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## Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof

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## Environmental Policy Law in the 1980's: Shifting Back the Burden of Proof

*Martin H. Belsky\**

### INTRODUCTION

The Reagan Administration has been under attack by conservation groups and former government officials<sup>1</sup> for attempting to destroy "the entire legal and institutional framework for environmental protection."<sup>2</sup> Defenders of the Administration urge that it is merely moving "the environmental pendulum . . . back to the center."<sup>3</sup> The debate is expressed in symbols and myths as a struggle between the so-called "environmental elite" and the "mortgagors of the future."<sup>4</sup> This article

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1. See, e.g., Interview with Russell Peterson, President of the National Audubon Society (and Chairman of the Council on Environmental Quality from 1973 to 1976) in BURSON-MARSTELLER, ENVIRONMENTAL POLICY . . . THE NEXT STEPS 45-46 (1982); Marcus, *Reagan as Environmentalist: A Hen in Fox's Clothing?*, 83 TECHNOLOGY REVIEW May-June, 1981, at 85 (quoting Robert H. Harris, a former Member of the Council on Environmental Quality); N.Y. Times, June 3, 1983 at 7, cols. 1 and 2 (quoting President Carter).

2. R. BROWNSTEIN & N. EASTON, REAGAN'S RULING CLASS 214 (1983) (quoting Jonathan Lash, an attorney with the Natural Resources Defense Council, an environmental public interest organization).

3. Interview with James Watt, Secretary of the Interior, in BURSON-MARSTELLER, *supra* note 1, at 18. See also interview with William R. Gianelli, Assistant Secretary for Public Works, Department of the Army, *id.* at 13.

4. See Andrews, *Class Politics or Democratic Reform: Environmentalism and American Political Institutions*, 20 NAT. RESOURCES J. 221 (1980); CONGRESSIONAL QUARTERLY, INC., EDITORIAL RESEARCH REPORTS, ENVIRONMENTAL ISSUES: PROSPECTS AND PROBLEMS 146-

hopes to demythologize this dispute by analogizing the recent changes in federal environmental law and policy to the traditional concept of allocation of the burden of proof.<sup>5</sup>

The premise of this article is that allocation of the burden of proof can determine the results of decision-making, whether decisions are made by administrative agency officials, judges, or even citizens in their day-to-day practical affairs.<sup>6</sup> Some person or entity must be given the responsibility to provide sufficient information to force a decision-maker to consider a particular solution. That party must also frame the evidence to convince the fact-finder to adopt the proffered solution.<sup>7</sup> Ultimately, an arbiter must weigh the evidence and resolve the dispute.<sup>8</sup>

In deciding on public policy issues, such as the degree and scope of environmental protection, this process of decision-making is a mixture of law and policy. The legislature responds to the public's concerns, makes political decisions as to whether new policies are necessary, and establishes priorities among old and new policies. If the legislature determines that new mandates are required, it provides standards and guidelines for the application of these mandates. The executive simi-

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56 (1982) [hereinafter cited as CONG. Q. 1982 ENVIRONMENT REPORT]. For example, former Secretary of the Interior James Watt told the Albuquerque Journal that the fight with environmentalists is just a "difference of opinion over our form of government"; that is, "a choice between the free market and leftist centralized-policy planners". Scott, *Reagan's First Year: We Know Watt's Wrong*, 67 SIERRA, Jan.-Feb. 1982, at 30. Similarly, environmentalists often adopt an "us versus them" mentality. S. TOLCHIN & M. TOLCHIN, *DISMANTLING AMERICA: THE RUSH TO DEREGULATE* 18 (1983). See also Ford, *The Election and the Environment — 1980*, 22 ENVIRONMENT, Nov. 1980, at 25 (Reagan energy advisor Michael T. Halbouty called environmentalists "rabid" and "fanatic").

5. For a discussion, in a different context, of the utility of "refocusing conflict away from the highly intense ideological plane to the less impassioned levels of procedure," see Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U.L. REV. 266, 268 (1976). See also Weyrauch, *Law as Mask—Legal Rituals and Relevance*, 66 CALIF. L. REV. 699 (1978).

6. 9 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW*, § 2485, at 272 (3d ed. 1940). The only difference is the "mode" of determining satisfaction of the burden. *Id.*

7. In the context of litigation, burden of proof means both the burden of production and the burden of persuasion. The requirement to provide sufficient information is often called the duty of producing evidence or the burden of going forward with the evidence. 9 J. WIGMORE, *supra* note 6, § 2487, at 292-93; C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE*, § 306, at 636 (1954); Best and Collins, *Legal Issues In Pollution—Engendered Torts*, 2 CATO J. 101, 123 (1982). In administrative law, however, the burden of proof placed on a proponent of a rule means only that the proponent has the burden of coming forward with proof, and not necessarily the ultimate burden of persuasion. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.15, at 519-521 (2d ed. 1978); 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 16.9, at 256-58 (2d ed. 1980). See also *Environmental Defense Fund Inc. v. EPA*, 548 F.2d 998, 1013 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977).

8. In the context of litigation, the requirement on one party to convince the judge or jury is often called the "risk of non-persuasion." 9 J. WIGMORE, *supra* note 6, § 2488, at 286. See also *id.* § 2485, at 272; C. MCCORMICK, *supra* note 7, § 307, at 638.

larly responds to the political process. Some constraints may be placed on executive action by statute but more often limitations are self-imposed and policy based. By delegation from the legislature or by inherent power, the executive has broad discretion to interpret legal standards and incorporate its policy preferences in rules and regulations. The executive also has the authority to apply its rules to particular factual situations. Finally, the judiciary reviews the policy priorities, whether expressed in traditional doctrines, or in legislative and administrative actions, and determines whether the standards and applications are enforceable. In doing so, it interprets the law and analyzes the policy choices made by the legislature and executive, and determines whether the procedures followed were fair and the choices made were legitimate.<sup>9</sup>

When applied to environmental policy law,<sup>10</sup> the branches of government make choices among alternative methods of using or preserving natural resources. To make decisions or to determine whether the decisions made are valid, government entities weigh the benefits of control and the evidence of those benefits, against the risks of inaction, and the evidence of those risks.<sup>11</sup> Depending on where the balance is set, the results will create more, less, or no pressure to force protection of the environment.<sup>12</sup>

This weighing process is, in turn, a function of the political and legal burdens of proof established by each decision-maker. Policy decisions are made by the legislature and the executive in terms of the amount of information each believes to be necessary to support a choice between protection and development alternatives. The more environmentally sensitive the decision-maker, the lower the political burden of proof on those who seek protective standards or preservationist actions. The judiciary reviews these decisions and determines whether the choice made is reasonable. The judiciary makes that determination by looking at the purposes and language of the legislation or common law rule, at the discretion granted to the executive to make policy choices, and at the propriety of the procedures followed in making such

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9. See L. FRIEDMAN & S. MACAULEY, *LAW AND THE BEHAVIORAL SCIENCES* 32-70 (2d ed. 1977).

10. See generally T. SCHOENBAUM, *ENVIRONMENTAL POLICY LAW* xx (1982) (the term "environmental policy law" is used to emphasize the interdisciplinary nature and politicization of environmental law).

11. Hoffman and Schwartz, *Environmental Law 1974/75*, ANN. SURV. OF AM. L. 641, 672 (1975) (citing a 1971 statement by then—and present—EPA Administrator William D. Ruckelshaus); Williams, *Environmental Law—Some Recurring Issues*, 3 OTAGO L. REV. 372, 383 (1975). See Chief Justice Burger's opinion for the Court in *Aberdeen and Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207, 1218 (1972).

12. See Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1247-48 (1968). Compare Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J. 55, 89 (1982).

choices.<sup>13</sup> The scope of judicial review depends on the established legal burdens of proof.<sup>14</sup>

This article will describe the legal and policy burdens of proof applicable to environmental decision-making and the shifts that have occurred in allocating those burdens. The initial change occurred when common-law principles gave way to a pro-protection legal framework established during an "environmental era." The second change occurred more recently when a new environmental policy law agenda was set. Through regulatory reforms, policy alterations, statutory proposals and budgetary and personnel actions, the federal executive is now seeking to develop a more pro-development structure and again place the burden of proof on those seeking to secure government action to protect the environment. The result is that those seeking protective action must present a greater amount of evidence than previously necessary to justify federal government intervention.<sup>15</sup>

Parts I and II of this article review the state of environmental law prior to the Reagan Administration. Until the "environmental era," commencing in the mid-1960's, environmental protection law was limited. Under traditional common law rules, the burden was on those opposing development to show how an identifiable entity had unreasonably and specially harmed or damaged them. That burden was difficult to meet.<sup>16</sup> In the late 1960's and early 1970's, increasing public awareness of environmental dangers, and the inability of traditional legal doctrines to deal with those dangers, led to the passage of numerous laws seeking to assure protection of the environment, and the creation of institutions to implement those laws. Mechanisms were adopted to force environmental values to be considered in all actions, to prescribe protective national environmental standards, to force technology to meet those standards, and to increase the number and size of areas to be protected from improper use. In burden of proof terms, in choosing between protection and development, the government was to "err on the side of caution."<sup>17</sup>

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13. 9 J. WIGMORE, *supra* note 6, § 2488, at 2284. *See also* McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 246-47 (1944).

14. *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE 520 (rule of reasonableness and scope of review), 537-40 (scope of review and questions of procedure, interpretation of the statute and exercise of agency discretion) (Supp. 1982).

15. For a limited discussion of the thesis that there has been an attempt to shift the burden of proof away from protection of the environment, *see* Belsky, Book Review, 11 COASTAL ZONE MGMT. J. 249 (1983) (reviewing R. HILDRETH & R. JOHNSON, OCEAN AND COASTAL LAW (1983)) [hereinafter cited as *Ocean Law Book Review*]. *See also* Futrell, *Environmental Law and Policy Developments in the Reagan Administration*, 1 ENVTL F., Dec. 1982, at 40.

16. *See infra* notes 20-55 and accompanying text.

17. *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1042 (1980). *See infra* notes 56-131 and accompanying text.

Part III of this article discusses the changes adopted by the Reagan Administration. Based on careful planning and research, the new political leaders fixed and then implemented a fully developed agenda. The philosophy of "limited government" was carried out under the doctrines of "regulatory reform" and "balancing the budget." The ideology of "state's rights" was pursued through "new federalism." Finally, the belief in "self-government" was promoted through "privatization." In the area of environmental protection, each of these policies was used to justify fundamental institutional and legal changes. The burden of proof was placed on those seeking to have controls adopted or enforced or seeking to restrict development. These persons would now have to overcome the presumption against such controls or limitations, especially if action was to be taken by the federal government.<sup>18</sup>

Part IV of this article considers the results of this shift in the burden of proof and what it suggests for the future of environmental law and policy. Early in the Reagan Administration, environmental policies became a major political issue. In response to concerns expressed by the public, Congress and even members of the business community, the Administration made some fine tuning and better articulation of policies. Controversial proposals and personalities were dropped; however, the goal has not changed. The presumption remains against imposing additional controls or restricting development and those seeking to overcome this presumption must come forward with sufficient evidence to justify intervention.<sup>19</sup>

## I

### THE BURDEN OF PROOF PRIOR TO THE ENVIRONMENTAL ERA

Until recently, the American political system rejected the concept that the ownership of property was a social function and that a property owner's right to use his or her property should be limited to the extent that such use was inconsistent with the needs of society.<sup>20</sup> Similarly, it rejected the idea that preserving land for conservation purposes was a legitimate governmental function.<sup>21</sup> These public policies were

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18. Introductory Remarks by President Ronald Reagan in COUNCIL ON ENVIRONMENTAL QUALITY, TWELFTH ANNUAL REPORT iii-iv (1981) [hereinafter cited as 1981 CEQ REPORT]. See *infra* notes 197-404 and accompanying text.

19. N.Y. Times, June 19, 1983 at E7, col. 1: "If the Reagan Administration [has] baked a new pudding of environmental policies after the shakeup at the EPA, it has yet to provide the proof."

20. See Juergensmeyer, *The American Legal System and Environmental Pollution*, 23 U. FLA. L. REV. 439, 447 (1971).

21. See CONG. Q., THE BATTLE FOR NATURAL RESOURCES 15-25 (1983) [hereinafter cited as BATTLE FOR NATURAL RESOURCES].

the basis for the common law doctrines that placed the burden of proof onto those seeking controls over the unfettered use of private property. These policies were also the basis for doctrines which placed political and legal constraints on those seeking uniform controls on destructive activities and increased conservation and public ownership of land and natural resources.

### *A. Setting and Applying the Standards*

At common law, the owner, and in most cases even the mere possessor, of property had an almost unrestricted right to use that property.<sup>22</sup> He or she had only to avoid injuries to individuals on or near the property and to protect interests held by other parties in that property.<sup>23</sup> Thus, the law provided little incentive to property owners or users to restrict the manner in which they conducted their activities. This political and legal philosophy severely restricted the ability of individuals to stop harmful activities under either the traditional tort remedies of nuisance, trespass and negligence or the special common law remedies for unusually or abnormally dangerous activities.

#### *1. Traditional Tort Rules*

Under the common law, an individual could seek relief for environmental damage through causes of action for nuisance, trespass, and negligence.<sup>24</sup> To succeed in such an action, however, the plaintiff had to overcome an almost insurmountable burden of proof.<sup>25</sup> Initially, the plaintiff had to select the proper cause of action and show his or her right to bring that action.<sup>26</sup> For example, discharge of a pollutant may injure not merely the plaintiff but a larger segment of the public. The

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22. "The possessor is allowed to exclude all but one [the owner], and is accountable to no one but [the owner]." O. HOLMES, *THE COMMON LAW* 246 (1881) (Legal Classics Edition, 1982).

23. The responsibility to avoid injury to individuals on one's own property depended on whether the person affected was a trespasser, licensee, or invitee. The responsibility to avoid injury to those near the property depended on whether a trespass or nuisance had occurred from actions on one's own property which directly affected a person or property interests on adjacent property. See W. RODGERS, *ENVIRONMENTAL LAW* 155 (1977).

24. See W. RODGERS, *supra* note 23, at 105 (public nuisance), 107 (private nuisance), 154-55 (trespass); Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126, 1145 (negligence).

Another possible source of common law relief might be admiralty law. However, application of that law to pollution suffers from complex legal issues such as jurisdiction, the need for a maritime wrong (involving shipping or commerce), and proof of causation. See McCoy, *Oil Spill and Pollution Control: The Conflict Between State and Maritime Law*, 40 GEO. WASH. L. REV. 97, 98-102 (1971).

25. See Krier, *Environmental Litigation and the Burden of Proof*, LAW AND THE ENVIRONMENT 105, 107 (M. Baldwin & J. Page eds. 1970).

26. See generally Rothstein, *Private Actions for Public Nuisance: The Standing Problem*, 76 W. VA. L. REV. 453 (1976).

complainant would ordinarily be barred from challenging this "public nuisance." An action would be allowed only if the plaintiff could plead and prove some individual injury different in kind and not merely in degree from the impact on the community. Absent proof of special damage, an individual's only hope of relief would be to convince a local public official to bring a lawsuit.<sup>27</sup> However, most public officials were reluctant to bring a complaint against a company or individual that, although polluting, was also supplying jobs and tax revenues.<sup>28</sup>

The plaintiff also had to select the defendant and prove that this person or entity was responsible for the alleged environmental damage. This burden was "often insurmountable."<sup>29</sup> If, for example, the plaintiff sought to recover damages for, or enjoin, air or water pollution, he or she would have to show which source, among several, was responsible for the pollution. Moreover, the plaintiff would have to demonstrate that the particular injury alleged was caused by the polluting activities of the named defendant.<sup>30</sup> No administrative or technical agency was available to supply evidence of such causation. The plaintiff had to gather scientific evidence alone. The expense of meeting this "burden of coming forth with the evidence" could be considerable. The defendant could more easily afford the legal expenses as a cost of doing business and the complaining party often could not justify his or her expenses when compared to the possible relief to be obtained. Even if the expenses could be justified, the necessary funds were often not available before trial.<sup>31</sup>

If the plaintiff selected the right action and the right defendant and proved that the defendant caused the harm, he or she still faced serious obstacles in meeting the burden of persuasion. Whether under a nuisance, trespass, or negligence claim, the plaintiff had to persuade the tribunal that the polluting activity was unreasonable or unnecessary.<sup>32</sup> To decide this question, the court was to "balance the equities." The economic utility of the activity was weighed against the special damage

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27. See W. RODGERS, *supra* note 23, at 104-06; R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY 211 (2d ed. 1978).

28. This is, of course, still a problem today. See Statement of Hon. Jos. E. Bradway, Mayor of Atlantic City, N.J., in *Hearings before the Ad Hoc Select Comm. on the Outer Continental Shelf on H.R. 6218*, 94th Cong., 1st Sess. 896 (1975) (calling for increased offshore drilling near Atlantic City to help resolve its then high unemployment problem).

29. R. STEWART & J. KRIER, *supra* note 27, at 259.

30. *Id.* at 261; Note, *State Air Pollution Control Legislation*, 9 B.C. INDUS. & COM. L. REV. 712, 716-17 (1968).

31. See Juergensmeyer, *supra* note 24, at 1155 ("Any control through assertion of private rights depends on the willingness and financial ability of individuals to go to court.")

32. See R. STEWART & J. KRIER, *supra* note 27, at 225. In order to persuade the tribunal, the plaintiff had to present scientific evidence and expert opinion which in turn increased the cost of bringing suit. See Note, *Acid Precipitation: Limits of the Clean Air Act and the Necessary Role of the Federal Common Law*, 34 SYRACUSE L. REV. 619, 653 (1983).

to the particular plaintiff.<sup>33</sup> For example, the contribution to the economy of a coal mine or cement factory would be balanced against the particular financial loss to the complainant.<sup>34</sup> Given prevailing values, the result of such balancing was inevitable. The economic contribution of the enterprise would be found to be more substantial than the individual harm and the plaintiff would ordinarily lose.<sup>35</sup>

Even a successful showing of inequitable harm would not guarantee victory in court. Other doctrines added to the high risk of nonpersuasion. Community acceptance, custom and prescriptive rights, or adverse possession rules could preclude relief.<sup>36</sup> If the defendant business had been in operation prior to arrival of the plaintiff, relief could also be barred because of the doctrines of assumption of the risk, contributory negligence or "coming to the nuisance."<sup>37</sup>

Even if the plaintiff was successful in a tort action for environmental injury, the victory might not eliminate the harmful activity. Money damages could be awarded and the pollution allowed to continue. The company would simply pay the costs involved and continue about its business. A court would seldom mandate changes in operations and even more rarely would a court temporarily or permanently enjoin such operations.<sup>38</sup>

## 2. *Unusually or Abnormally Dangerous Activities*

The traditional tort doctrines described above were originally applied to all conditions and activities, no matter how potentially harmful. Eventually, however, the common law carved out an exception to

33. R. STEWART & J. KRIER, *supra* note 27, at 225; Juergensmeyer, *supra* note 24, at 1131, 1154; Comment, *Government Defendants in Nuisance Injunction Suits*, 6 COLUM. J. ENVTL. L. 63, 72 (1979).

34. See *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pitts. L.J. 379 (Alleg. Co. 1935); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219 (1970).

35. See R. STEWART & J. KRIER, *supra* note 27, at 269. See also Juergensmeyer, *supra* note 24, at 1130-37 ("Only when this additional consideration [of the harm to all citizens] is added to the scale can there be a true balancing of the equities.")

36. See Juergensmeyer, *supra* note 24, at 1136, 1142 (adverse possession; prescriptive rights); *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pitts. L. J. 379, 391 (Alleg. Co. 1935) (custom and community acceptance).

37. See Juergensmeyer, *supra* note 24, at 1137; *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pitts. L.J. 379, 384-85 (Alleg. Co. 1935). The defenses of risk and contributory negligence were especially troublesome in dealing with environmental risks to workers. The obligations of an employer to his employee were minimal. The worker was "expected . . . to accept and take upon himself all of the usual risks of his trade, together with any unusual risks of which he had knowledge, and to relieve his employer of any duty to protect him . . . [Generally] there was no recovery, either because no lack of proper care could be charged against the employer, or because the worker was taken to have assumed the risk." W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 526 (4th Ed. 1971).

38. See, e.g., *Versailles Borough v. McKeesport Coal & Coke Co.*, 83 Pitts. L.J. 379 (Alleg. Co. 1935); *Boomer v. Atlantic Cement Co.* 26 N.Y.2d 219 (1970). See generally, W. RODGERS, *supra* note 23, at 117-18. Juergensmeyer, *supra* note 24, at 1131, 1148.

provide for strict liability for certain dangers. If the court, as a matter of law, defined conduct as not only dangerous but also abnormally or unusually risky, a victim could secure relief by merely showing that the actions caused the damage; the plaintiff did not have to prove that the defendant acted unreasonably.<sup>39</sup>

The doctrine of strict liability was of limited value to those seeking environmental protection. As with other torts, relief was on a one-to-one basis, was usually limited to monetary damages, and involved difficult problems of proving causation.<sup>40</sup> More important, the doctrine still involved balancing as to the utility of the activity. Unlike negligence rules, the balance was not made by the fact-finder in deciding whether the defendant acted unreasonably, but rather by the judge in deciding whether the activity or condition was abnormally or unusually risky. In developing the standards for abnormality, the court looked to prevailing land use patterns and common usage. The degree of risk, the gravity of the harm, and the appropriateness and value of the activity were all to be weighed.<sup>41</sup>

### *B. The State-Federal Relationship*

In addition to overcoming the historical and legal bias against controls over private action, those seeking protective rules had to overcome a similar bias against uniform national standards. Until the environmental era, it was assumed that the states, not the federal government, had the responsibility to determine the controls to be imposed on the use of private property.<sup>42</sup> Thus, the state courts interpreted and applied the traditional common law rules applicable to polluting or ultrahazardous activities. The federal courts were seldom involved in resolving environmental disputes, and when called into a controversy, federal courts generally applied the relevant state rules.<sup>43</sup>

Reliance on state action was evident in the laws enacted during this period. Both state and federal legislators were relatively inactive in the environmental arena.<sup>44</sup> The earliest statutory controls were state

39. W. PROSSER, *supra* note 37, at 505; W. RODGERS, *supra* note 23, at 158; Juergensmeyer, *supra* note 24, at 1148.

40. The problems of proving causation and securing total relief were especially troublesome when there were multiple causes of a single harm. Liability was limited to that portion of the total harm that each individual or entity caused. The burden was on the plaintiff to show apportionment. Only if the plaintiff could show that there was a single, indivisible harm would the burden switch to the defendant. W. PROSSER, *supra* note 37, at 526.

41. See W. RODGERS, *supra* note 23, at 158-60; W. PROSSER, *supra* note 37, at 505-12; RESTATEMENT (SECOND) OF TORTS § 520 (1980).

42. Juergensmeyer, *supra* note 20, at 441-42.

43. Federal courts usually only became involved when they had jurisdiction due to diversity of citizenship between the parties. In such cases, they applied the substantive law of the state in which they were located. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

44. F. SKILLERN, ENVIRONMENTAL PROTECTION—THE LEGAL FRAMEWORK 17 (1981).

laws, enacted pursuant to the accepted concept of an inherent police power in local governments.<sup>45</sup> The federal government deferred to the states and federal legislation was generally limited to the funding of state efforts and the offering of technical advice.<sup>46</sup>

The lack of federal uniform standards for pollution control placed a heavy political and legal burden on those seeking environmental protection. The reliance on state controls failed to recognize that environmental problems are not defined by arbitrary geographical boundaries. Those seeking regional or national standards faced the almost insurmountable problem of convincing legislators and executive officials in each state to adopt uniform rules.<sup>47</sup> Moreover, state governments were reluctant to impose any new controls on their own companies. Officials were concerned about the possible loss of industries to other states with less stringent laws or less effective control programs. As a result, state laws were generally weak and incompatible with those of other states. Even when state statutes did impose restrictions on activities, enforcement of those laws was lax.<sup>48</sup>

State autonomy and independence also complicated the problems of those seeking to use traditional common law tort doctrines to stop environmental damage. Even when successful in one jurisdiction, environmental activists almost had to start anew when they attempted to apply a particular approach to analogous problems in other jurisdictions. Without national standards to apply, state courts were free to reject precedents from other states. Moreover, state judges shared the concern of executives and legislators that strict application of protective rules would result in unacceptable economic consequences for their state.<sup>49</sup>

### C. *Protection and Conservation of Natural Resources*

The common law right to freely use property and the federalist principle against national ownership created enormous political and le-

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45. *Id.* at 268.

46. *See, e.g.* Gaba, *Federal Supervision of State Water Quality Standards Under the Clean Water Act*, 36 VAND. L. REV. 1167, 1177 (1983).

47. Even after the enactment of numerous federal environmental laws, it was difficult to convince state legislators to enact similar laws to complement these federal statutes. *See, e.g.*, W. RODGERS, *supra* note 23, at 809-22 (describing the differences between the various state statutes patterned after the National Environmental Policy Act).

48. *See* Juergensmeyer, *supra* note 20, at 443, 446.

49. *See, e.g.*, Versailles Borough v. McKeesport Coal & Coke Co., 83 Pitts. L.J. 379, 384 (Alleg. Co. 1935):

Pennsylvania is the great industrial state of the Union. Its prosperity and leadership are entirely dependent upon its smoke producing industries. If the necessary and unavoidable smoke produced by these industries were to be enjoined, the plants could not operate, many millions of dollars in invested capital would be destroyed and many thousands of persons thrown out of gainful employment.

gal problems for those seeking to preserve natural areas and conserve resources. The property owner had no incentive to protect conservation interests. The owner could use his or her property for its most productive purpose as determined by personal, rather than community, needs.

Conservationists could preclude activities only by paying for a use limitation, purchasing the property, or convincing the government to obtain the property.<sup>50</sup> With private purchase, the burden was clearly placed on conservationists to secure the financial resources to "buy up" the freedoms of the user. The burden could be difficult, if not impossible, to meet because the economic value of non-use seldom equalled the value of use.<sup>51</sup> The other option of collective or public ownership also placed a heavy burden on preservationists, who had to convince the government to pay for the property and to limit or ban activities on public lands. The free-market approach, inherent in our common law heritage, opposed public control and rather stressed return of public property to private interests. In addition, traditional values urged exploitation and maximum or "best use" of property.<sup>52</sup>

Until the late 19th century, little attention was paid to preserving the heritage of nature in the United States. As with controls over environmentally damaging activity, the decision to purchase property was a state decision. Federal law functioned primarily to transfer the public lands from the United States to the states or, with the state's concurrence, to citizens and corporations. States, in turn, similarly reduced their public holdings by transferring property to citizens. Retention of property by the government for aesthetics, recreation, or resources protection was inconsistent with the American notion of private ownership and use. Land was to be owned and used, not preserved.<sup>53</sup> It was not until the 1870's that the federal and state governments commenced a

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50. The government could obtain a property right by purchasing it on the open market or condemning the property under its eminent domain power and paying fair market value. See, e.g., *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668 (1896).

51. See Portney, *Introduction*, in *CURRENT ISSUES IN NATURAL RESOURCE POLICY* 1, 5 (P. Portney ed. 1982); Krier, *supra* note 25, at 107 (the common law has a "general preference for the initiator of economically productive action").

52. See Nelson, *The Public Lands*, in *CURRENT ISSUES IN NATURAL RESOURCE POLICY*, 14, 28 (P. Portney ed. 1982) (best use); Arrondale, *Access to Federal Lands* in *CONG. Q. 1982 ENVIRONMENT REPORT*, *supra* note 4, at 1, 11 (return to private interests); *REPORT FROM THE CONSERVATION FOUNDATION: STATE OF THE ENVIRONMENT—1982* 303 (1982) (lack of financial resources) [hereinafter cited as 1982 CONSERVATION FOUNDATION REPORT].

53. As one journalist noted:

The early settlers of North America had at their disposal a vast continent brimming over with seemingly inexhaustible riches. Even in the middle of the last century, those who pointed to wilderness as a resource worth preserving were regarded as eccentric by all but a few.

Shabecoff, *Environmental Groups Mark a Watershed with Watt*, N.Y. Times, Oct. 16, 1983, at E5, col. 2.

policy of obtaining areas for preservation and then barred or limited development in those areas.<sup>54</sup> Even then, only limited restrictions were placed on public lands. The balance, with certain exceptions, favored development of such lands.<sup>55</sup>

## II

### SHIFT OF THE BURDEN OF PROOF IN THE ENVIRONMENTAL ERA

The period from the mid-1960's to the end of the 1970's can be described as the "environmental era." Starting with the Wilderness Act of 1964 and ending with the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("Superfund"), over twenty federal laws were enacted to protect the environment.<sup>56</sup> These laws were designed to protect the air, water, oceans and public lands of America. Damage from industrial development and operations was to be monitored and controlled with an eventual goal of a clean environ-

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54. See Nelson, *supra* note 52, at 20; BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 25-28. See, e.g., Act of Mar. 1, 1872, § 1, 17 Stat. 32 (codified at 16 U.S.C. § 21 (1982)) (Yellowstone National Park); Act of Mar. 3, 1875, ch. 191, 18 Stat. 517 (Mackinac Island, Michigan); Act of Sept. 25, 1890, ch. 191, 26 Stat. 651 (codified at 16 U.S.C. § 41 (1982)) (Sequoia National Park).

55. For example, forest reserves, which became National Forests, were established and maintained "to furnish a continuous supply of timber." Organic Administration Act of 1897, 30 Stat. 35 (codified at 16 U.S.C. § 475 (1982)). See also *United States v. New Mexico*, 438 U.S. 696, 708 (1978). Withdrawn or reserved areas were often still open to certain types of resource exploitation. For example, under the Mining Law of 1872, 41 Stat. 437 (codified as amended in scattered sections of 30 U.S.C.), mining was permitted on all lands belonging to the United States, 30 U.S.C. § 22 (1982). However, certain limitations on exploitation were enacted, including use of national parks and national monuments. National Park Service Act of 1916 (codified as amended in scattered sections of 16 U.S.C.); Antiquities Act of 1906, 16 U.S.C. §§ 431-433 (1982). See also *Cameron v. United States*, 252 U.S. 450 (1920).

56. Among these laws are: Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-1136 (1982)); National Environmental Policy Act of 1969, Pub. L. No. 91-90, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4370 (1982)); Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 833 (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)); Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234 (codified at 42 U.S.C. §§ 4901-4918 (1982)); Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2812 (codified at 42 U.S.C. §§ 6901-6987 (1982)); Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280 (codified as amended at 16 U.S.C. §§ 1451-1464 (1982)); Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 632 (codified as amended at 43 U.S.C. §§ 1331-1356 (1982)); Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744 (codified at 43 U.S.C. §§ 1701-1784 (1982)); Federal Insecticide, Fungicide and Rodenticide Act of 1972, Pub. L. No. 92-516, § 2, 86 Stat. 975 (codified as amended at 7 U.S.C. §§ 136-136y (1982)); Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 (codified at 15 U.S.C. §§ 2601-2629 (1982)); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657 (1982)).

ment by the mid-1980's.<sup>57</sup>

The premises underlying these statutes were that the traditional common law remedies were insufficient; that private litigation would not solve pollution problems; that state efforts were inadequate; that the marketplace would not satisfactorily resolve environmental disputes; that the issues involved were broader than the narrow economic interests of the parties; and that national uniform standards were required.<sup>58</sup> Policy decisions about the future of the environment had to be made legislatively,<sup>59</sup> and institutions had to be created to effectuate those policies administratively.<sup>60</sup> The legal framework for environmental protection thus changed from a basically property and tort oriented system, with an occasional state statutory addendum, to a specialized branch of federal, statutory and administrative law. The Congress, and then by delegation federal regulatory agencies, balanced the interests of protection against development and decided the appropriate standards. These federal agencies had the responsibility to enforce the standards.<sup>61</sup>

57. None of the federal statutes set an actual target date; however, the Clean Air Act and the Federal Water Pollution Control Act assumed that the goal of a clean environment would be achieved by the mid-1980's. For example, section 172 of the Clean Air Act, 42 U.S.C. § 7502(a) (1982), provides that State Implementation Plans for a "non-attainment" area (a region which has a concentration of pollutants above National Ambient Air Quality Standards) shall provide for attainment of such standards by Dec. 31, 1982. The maximum extension for attainment of the national primary ambient air quality standards for photochemical oxidants or carbon monoxide was Dec. 31, 1987. 42 U.S.C. § 7502(c) (1982). The Federal Water Pollution Control Act is more specific; section 101 states "the national goal that the discharge of pollutants into navigable waters be eliminated by 1985," and provides an interim standard for protection of fish, wildlife, and recreational amenities to be achieved by 1983. 33 U.S.C. § 1251 (1982).

58. See Comment, *The Burden of Proof in Environmental and Public Health Litigation*, 49 UMKC L. REV. 207, 208 (1981) (insufficient common law remedies) [hereinafter cited as *Burden of Proof in Litigation*]; Hoffman and Schwartz, *supra* note 11, at 672 (difficulties of proof and enforcement through private litigation); Train v. Natural Resources Defense Council, 421 U.S. 60, 64, (1975) (dissatisfaction with state efforts); Krier, *supra* note 25, at 105 (economic interests narrow); Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1042 (D.C. Cir. 1978) (need for national uniform standards).

59. Justice Marshall described the process in *Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 404 (1971):

The growing public concern about the quality of our natural environment has prompted Congress in recent years to enact legislation to curb the accelerating destruction of our country's natural beauty.

60. As Judge Wright noted in *Ethyl Corporation v. EPA*, 541 F.2d 1, 6 (D.C. Cir. 1976), *cert. denied*, 426 U.S. 941 (1976):

Man's ability to alter his environment has developed far more rapidly than his ability to foresee . . . the effects of his alterations. It is only recently that we have begun to appreciate the danger posed . . . and have created watchdog agencies whose task it is to warn us, and protect us . . . .

61. Hardin, *supra* note 12, at 1245: "The laws of our society follow the pattern of ancient ethics, and therefore are poorly suited to governing a complex, crowded, changeable world . . . . The result is administrative law . . . ." See Krier, *supra* note 25, at 121 (enforcing standards).

*A. The New Environmental Agenda*

Until the 1960's, there was little public awareness of the inability of the common law and some minimal state statutory supplements to protect and conserve the environment. As a result, there was almost no federal legislative response to these legal deficiencies. Only after a series of reports about environmental damage, increasing pollution of the air and water, and the need for increased wilderness and park areas did the public begin to express concern about environmental quality and the lack of sufficient legal safeguards to protect the environment.<sup>62</sup> Congress, in due course, took note of this aroused environmental sensitivity and responded with a broad set of federal statutes "to curb the accelerating destruction of our country's natural beauty."<sup>63</sup> Administrators similarly responded to the public's concerns and applied these new legislative mandates.<sup>64</sup>

The effect of these new laws and their implementation by sensitive regulators was to shift the legal balance in favor of environmental protection. Those seeking to develop or pollute had to justify deviations from strict uniform rules established to implement the national interest in preservation of public health, air, water, and natural resources.<sup>65</sup>

*1. Setting and Applying the Standards*

Dissatisfaction with common law doctrines and remedies led to the passage of the comprehensive set of federal laws that established a new national policy in favor of environmental protection. Two of the most significant of these statutes were the Clean Air Act of 1970<sup>66</sup> and the Federal Water Pollution Control Act of 1972.<sup>67</sup> These statutes required the establishment of strict pollution controls, often with deadlines to achieve established levels of protection.<sup>68</sup> In certain cases,

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62. See, e.g., BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 110 (Santa Barbara oil spill), at 53-54 (parks and wilderness); R. CARSON, SILENT SPRING (1962) (the use and abuse of pesticides).

63. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 404 (1971).

64. See R. MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 39 (1983).

65. See White, *Environment*, 209 SCIENCE 183, 187 (1980); *Burden of Proof in Litigation*, *supra* note 58, at 216.

66. Pub. L. No. 91-604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7642 (1982)).

67. Pub. L. No. 92-500, 86 Stat. 833 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376 (1982)).

68. For example, the discharge of all pollutants into navigable waters was to be terminated by 1985. Federal Water Pollution Control Act, § 101, 33 U.S.C. § 1251 (1982). Similarly, states were to attain the nationally set ambient air quality standards for most pollutants no later than the end of 1982. Clean Air Act, §§ 110(a) 110(e), 172(a)(1), 42 U.S.C. §§ 7410(a), 7410(e), 7502(a)(1) (1982). See *Train v. Natural Resources Defense Council*, 421 U.S. 60, 66-67 (1975).

"margins of safety" were required in setting such controls.<sup>69</sup> Variances and exemptions for particular hardship cases might be allowed,<sup>70</sup> but the burden would be on those seeking these exceptions to show their particular hardship and to demonstrate that granting relief would not generally adversely affect health or safety.<sup>71</sup>

Implicit in the establishment of this new legal framework were assumptions that these laws would be implemented by sympathetic regulators, that the cost of controls were at most only one factor in determining the appropriateness of an environmental safeguard, and that all efforts should be made to avoid even potential risks.

*a. The Exercise of Discretion*

One premise of the environmental era was that sensitive regulators would implement protectionist goals. In the National Environmental Policy Act (NEPA),<sup>72</sup> Congress gave a clear directive to these regulators: the new federal policy was to be maximum mitigation of environmental harm.<sup>73</sup> This policy was then detailed in a series of explicit statutory mandates designed to protect the air and water, establish uniform national environmental standards, and preserve natural resources. These laws granted broad discretion to the executive branch which was to exercise that discretionary power so as to avoid or mitigate environmental damage.<sup>74</sup>

69. See Federal Water Pollution Control Act, § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C) (1982) (pollution loads to include margin of safety), § 307(a)(5), 33 U.S.C. § 1317(a)(4) (1982) (ample margin of safety for toxic pollutants); Clean Air Act, § 109(b), 42 U.S.C. § 7409(b) (1982) (adequate margin of safety for national primary ambient air quality standards), § 112(b)(1)(B), 42 U.S.C. § 7412 (b)(1)(B) (emission standards for hazardous air pollutants to provide an ample margin of safety). Similar "margins of safety" provisions were included in the Safe Drinking Water Act, 42 U.S.C. §§ 201, 300(f)-(l) (1982). See generally Thompson, *Margin of Safety as a Risk-Management Concept in Environmental Legislation*, 6 COLUM. J. ENVTL. L. 1 (1979).

70. See, e.g., Federal Water Pollution Control Act, § 301(c), 33 U.S.C. § 1311(c) (1982) (point sources for water pollutants); *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975) (EPA allowance of Georgia State Implementation Plan variance procedure under Clean Air Act); Safe Drinking Water Act, § 1415, 42 U.S.C. § 300g-4 (1982). Compare *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) (no variance for water pollution control technology requirements).

71. See, e.g., Federal Water Pollution Control Act, § 301(c), 33 U.S.C. § 1311(c) (1982). See also *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 67 (1980); Note, *EPA v. National Crushed Stone Ass'n*, 7 COLUM. J. ENVTL. L. 165 (1982).

72. Pub. L. No. 91-90, 83 Stat. 852 (1969) (codified at 42 U.S.C. §§ 4321-4370 (1982)).

73. NEPA is considered primarily procedural. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978). Nevertheless, it clearly expressed the policy that all federal agencies were to use their best efforts to avoid damage and to mitigate any damage that might occur. See NEPA, §§ 101(a), (b)(3), 42 U.S.C. §§ 4331(a), (b)(3). See also Council on Environmental Quality, *Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 40 C.F.R. § 1502.1 (1983) (purpose).

74. See R. MELNICK, *supra* note 64, at 7-8.

To ensure that administrative officials properly exercised their discretion, NEPA and other statutes<sup>75</sup> established institutional mechanisms to require that environmental concerns be "interwoven into the fabric of agency planning."<sup>76</sup> First, administrative agencies were forced to take environmental considerations into account in all their activities.<sup>77</sup> Through either an environmental review or a more formal environmental impact statement, proposals for most federal activities had to describe the environmental consequences of the actions, any alternatives which might have different environmental consequences, and the reasons why a particular option was selected.<sup>78</sup> Second, NEPA sought to use the political process to insure environmental sensitivity by regulators.<sup>79</sup> Public hearings and draft and final impact analyses were to allow the public and the Congress to review agency actions for possible adverse environmental effects.<sup>80</sup> The hope was that by requiring agencies to articulate the options, less prudent alternatives would be discarded or actions modified to mitigate environmental damage.<sup>81</sup> Third, NEPA established the Council on Environmental Quality (CEQ) to be the institutional watchdog over actions by other agencies.

75. For example, the Fish and Wildlife Coordination Act of 1965, 16 U.S.C. §§ 661-668jj (1982), requires agency consultation to ensure that protection of fish and wildlife is given adequate consideration in any project. Similarly, construction of highways can occur on publicly owned land only if other alternatives are considered and rejected; even then, the highway must be constructed to "minimize harm" to public lands. Department of Transportation Act, 49 U.S.C. §§ 1651-1659; Federal-Aid Highway Act, 23 U.S.C. §§ 101-157. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Two statutes were enacted to require consideration of the effects on, and protection of, endangered species and marine mammals. Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531-1543 (1982), and Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361-1407 (1982). The ESA prohibited any activity that jeopardized a threatened species or its habitat.

76. *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979).

77. *Calvert Cliffs Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112-13 (D.C. Cir. 1971). All federal agencies must comply with the requirements of NEPA "to the fullest extent possible." NEPA, § 102, 42 U.S.C. § 4332 (1982).

78. Section 102 of NEPA, 42 U.S.C. § 4332 (1982), directs that a detailed environmental impact statement (EIS) must be prepared in connection with all major federal actions significantly affecting the quality of the environment. Implementing regulations by the Council on Environmental Quality require preparation of an "environmental assessment" for any proposed project to determine whether a full EIS must be prepared. 40 C.F.R. §§ 1501.3, 1501.4 (1983). See Rosenberg and Olson, *Federal Environmental Review Requirements Other than NEPA: The Emerging Challenge*, 27 CLEV. STATE L. REV. 195, 196 (1978).

79. NEPA's EIS requirement was viewed as an "action forcing" device that would provide for "full and fair discussion of significant environmental impacts and . . . inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1 (1983).

80. NEPA, § 102(2)(C), 42 U.S.C. § 4332(2)(C) (1982); 40 C.F.R. §§ 1502.9, 1503.1 (1983).

81. One court described the process required by NEPA as a "reordering of priorities". *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971).

CEQ was to establish processes by which key environmental issues were to be analyzed, to report yearly on the environmental activities of all the federal agencies, and to detail what should be included in each agency's analysis of options, how agencies were to consult with each other, and how they were to justify their activities.<sup>82</sup>

In burden of proof terms, this new express policy in favor of protection, the establishment of political mechanisms to oversee implementation of that policy, and the passage of numerous laws designed to protect the environment, led executive officials to recognize and accept a positive duty to conserve natural resources and minimize environmental risks. In deciding on new regulations or in approving activities, regulators were to exercise discretion to promote the policy of protection.<sup>83</sup>

The courts enforced this shift in environmental law by applying administrative law doctrines to statutory mandates.<sup>84</sup> Government authorization or approval of development was scrutinized. NEPA set a "high burden of production" on an agency seeking to support its own activity or justify approval of a private activity,<sup>85</sup> and the courts required strict compliance with NEPA's mandates. Courts took a "hard look" at governmental actions to ensure adequate consideration of environmental values.<sup>86</sup> Failure to comply with statutory mandates could

82. NEPA, §§ 201-04, 42 U.S.C. §§ 4341-4344 (1982). Until 1978, CEQ only issued guidelines to be followed by federal agencies in implementing NEPA's procedural requirements. CEQ later issued binding regulations applicable to all federal agencies. 40 C.F.R. §§ 1500.1-1508.28 (1983). See Shanley, *Presidential Executive Orders and Environmental Policy*, 13 PRES. STUDIES Q. 403, 406 (1983); Note, *Psychological Effects at NEPA's Threshold*, 83 COLUM. L. REV. 336, 337-38 (1983). "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

83. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1025 (D.C. Cir. 1978) (In enacting the Federal Water Pollution Control Act, Congress relied on "EPA's ingenuity . . . to force each industry on its own to develop the technology necessary to achieve the Act's aspiring goal."); *Environmental Defense Fund v. EPA*, 598 F.2d 62, 80, 83 (D.C. Cir. 1978) (EPA was to "err" on the side of overprotection "with respect to a known risk"; "Congress authorized and indeed required EPA to protect against dangers before their extent is conclusively ascertained").

84. One critic of judicial "intrusion" into the executive implementation of legislative mandates in the 1970's described the process as the establishment of a "new administrative law." See R. MELNICK, *supra* note 64, at 9-18.

85. Rodgers, *Benefits, Costs and Risks: Oversight of Health and Environmental Decision-making*, 4 HARV. ENVTL L. REV. 191, 219-221 (1980) [hereinafter cited as Rodgers, *Benefits, Costs and Risks*]. NEPA merely requires an EIS for "major federal actions." The case law, however, has made it clear that "federal actions" include not only actions federally conceived, constructed, and managed, but also federal sanctioning of a private, state or local activity through licenses, permits, leases, contracts, approvals, etc.

86. Leventhal, *Environmental Decision Making and the Courts*, 122 U. PA. L. REV. 509, 512 (1974). See W. RODGERS, *supra* note 23, at 716-17. See, e.g., *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), *cert. denied*, 409 U.S. 990 (1972). Compare *Baltimore Gas and Elec. Co. v. Natural Resources Defense Council*, 103 S.Ct. 2246, 2254 (1983).

lead to injunctions delaying or blocking a project.<sup>87</sup>

Review of governmental actions to protect the environment was not as rigid. The new set of federal statutes granted regulators broad discretion to design rules to avoid environmental harm. And while the courts required administrators to give "a reasoned presentation" of the basis for their decisions, policy judgments to impose protective controls were supported.<sup>88</sup> In short, where the issue was risk of harm, judges took a "soft glance" at administrative decisions that used the best available evidence to establish protective standards.<sup>89</sup> The burden of proof was on those who sought to reduce the level of controls or to exclude themselves from certain controls.<sup>90</sup> Support for the appropriate exercise of discretion in favor of pollution controls was furthered by a new legislative and judicial attitude toward the value of these controls as compared to their costs.

*b. Cost-Benefit Analysis and Risk Assessment*

The common law balanced the economic utility and reasonableness of an activity against the risks and magnitude of environmental damage. It also looked at the availability of technology and the economic feasibility of requiring more environmental safeguards. The ef-

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87. For example, in *County of Suffolk v. Secretary of the Interior*, 482 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), the trial court granted a preliminary injunction which was stayed and then a permanent injunction which was reversed. Nevertheless, the offshore oil and gas Baltimore Canyon lease sale and then lease awards were delayed. See Murphy and Belsky, *OCS Development: A New Law and a New Beginning*, 7 COASTAL ZONE MGMT. J. 297, 309, 328 n. 67-69 (1980).

88. See *American Meat Inst. v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 643, 648 (D.C. Cir. 1973). See also Leventhal, *supra* note 86, at 535-36; W. RODGERS, *supra* note 23, at 21. Agency decisions would not be accepted automatically, without an evidentiary basis. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 652 (1980). Still, as a plurality held in *Industrial Union*, even when the agency has the burden, it need only show that it was "more likely than not" that there was a "significant risk." *Id.* at 652.

89. See Rodgers, *Benefits, Costs and Risks*, *supra* note 85, at 216, 224. Professor Rodgers gives Judge Wright's majority opinion in *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976), as an example of the "soft glance." W. RODGERS, *supra* note 23, at 333-34. In that case, Judge Wright said:

When a statute is precautionary in nature, the evidence difficult to come by, uncertain or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect. Such proof may be impossible to obtain if the precautionary purpose of the statute is to be served.

541 F.2d at 26.

90. Generally, the Administrative Procedure Act places the burden of proof on the proponent of a rule. 5 U.S.C. § 556(d) (1982). Statutory exceptions and court interpretations have frequently shifted that burden, when reviewing environmental regulations, to the opponent of the rule. See *Environmental Defense Fund v. EPA*, 548 F.2d 998, 1012-15 (D.C. Cir. 1976). But see *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 652 (1980).

fect of such weighing was to support development over claims of existing or potential harm.

The new environmental law philosophy rejected application of a strict cost-benefit test. It assumed that such a test was unfair since the benefits of avoiding or reducing future damage were often difficult to ascertain.<sup>91</sup> The new legal framework also assumed that new techniques would be required to protect the environment and that old-fashioned balancing would not lead to the development of necessary technology.<sup>92</sup>

To implement this new environmental policy, Congress and the courts established differing rules depending on the risk of harm.<sup>93</sup> Where an activity posed a high risk, economic feasibility was not considered as a basis for setting standards or allowing exemptions to those standards.<sup>94</sup> The goal in such cases was to eliminate the risk entirely. Deadlines on maximum levels of emissions or pollutants were legislatively established and individuals or businesses had to meet those deadlines or stop their activities.<sup>95</sup> In some cases, government testing led to automatic prohibitions on activities or the use of certain chemicals and manufacturers had to find substitutes or stop making a product.<sup>96</sup>

Where the risks were not as high, economic feasibility could be taken into account.<sup>97</sup> The laws gave discretion to the regulator to

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91. Costle, *Environmental Regulations and Regulatory Reform*, 57 WASH. L. REV. 409, 420 (1982).

92. See *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 623 (D.C. Cir. 1973).

93. Congress, of course, has the power to require a cost-benefit analysis prior to the application of any environmental standard, but such a requirement is ordinarily clearly indicated on the face of the statute and if not so indicated, cannot be applied. See *American Textile Mfg. Inst. v. Donovan*, 452 U.S. 490, 510-12 (1981). See C. LUDLUM, *UNDERMINING PUBLIC PROTECTIONS: THE REAGAN ADMINISTRATION'S REGULATORY PROGRAM* 58 (Alliance for Justice Report, 1981).

According to Rodgers, *Benefits, Costs and Risks*, *supra* note 85, the most restrictive rules applied to dangerous substances. Specifically, in the drug and pesticide laws, those seeking to market a product had to prove its safety before it would be allowed on the market. Cost was not a consideration. See also Note, *Pesticide Regulation: Risk Assessment and Burden of Proof*, 45 GEO. WASH. L. REV. 1066, 1078-81 (1977) (pesticides). See, e.g., Food, Drug and Cosmetic Act, 21 U.S.C. 348(c)(3)(A) (1982) (carcinogens—the Delaney Clause).

94. See *American Textile Mfg. Inst. v. Donovan*, 452 U.S. 490 (1981).

95. It was assumed that the public interest would be served by achieving a specific standard by a specific time, with little explicit analysis leading to the setting of the limits. White, *supra* note 65, at 187. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1036 (D.C. Cir. 1977) (best available water pollution control technology standard might force some plants to go out of business); *Union Elec. Co. v. EPA*, 427 U.S. 246, 256, 257, 259 (1976), *reh'g denied*, 429 U.S. 873 (ambient air quality standards do not include feasibility; standards must be met or facility must close down).

96. See, e.g., *Environmental Defense Fund, Inc. v. EPA*, 465 F.2d 528 (D.C. Cir. 1972) (pesticides); *Hercules, Inc. v. EPA*, 496 F.2d 91, 110 (D.C. Cir. 1978) (toxic pollutant standards).

97. "Feasibility" means capable of being done. Economic feasibility means only that costs are one, but only one, factor in determining whether imposition of a specific control standard is economically possible. See *American Textile Mfg. Inst. v. Donovan*, 452 U.S.

weigh risks against general considerations of control costs.<sup>98</sup> The economic value of particular rules did not have to be justified for particular applications. Rather, the overall benefits of the regulatory scheme could be weighed against the economic impact on the whole industry.<sup>99</sup>

Through stringent rules and the exercise of discretion to implement these rules, the environmental balance had been reset. To ensure that the new standards would not be avoided by economic rivalries between geographic regions, the state-federal balance was also modified.

## 2. *The State-Federal Relationship*

Congress recognized that prior reliance on states to protect the environment had been unsuccessful. Therefore, the new set of federal environmental statutes established national programs and minimum national standards.<sup>100</sup> In certain cases, Congress created a national program under a federal agency, with federal controls and enforcement.<sup>101</sup> In others, states could implement federal laws or federal programs.<sup>102</sup> But even where this joint federal-state "coopera-

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490, 508-09 (1981). In some circumstances, feasibility was not a question of "if" a standard should be met, but only "when." See Schoenbrod, *Goals Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 742, 759 (1983). The "cost-sensitive" and "cost-effective" alternatives are the most common congressional models for use of cost-benefit analysis in environmental decision-making. Under both, costs are pertinent, but the decision-maker is given broad discretion. Rodgers, *Benefits, Costs and Risks*, *supra* note 85, at 210-11. See also Carpenter, *Ecology in Court and other Disappointments of Environmental Science and Environmental Law*, 15 NAT. RESOURCES LAW. 573, 584-85 (1983).

98. Clean Air Act, § 111(a)(1)(C), 42 U.S.C. § 7411(a)(1)(C) (1982); Federal Water Pollution Control Act, § 304(b)(1)(B), 33 U.S.C. § 1314(b)(1)(B) (1982). See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 387 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1036 (D.C. Cir. 1978). See also *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 130 (1977) (costs must be "wholly out of proportion" to be a limit on technology forcing standards).

99. Feasibility did not depend on an individual plant's ability to comply but on the capacity of the whole industry to handle additional costs. See *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 115 (1977) (chemical plants); *American Meat Inst. v. EPA*, 526 F.2d 442, 445-45 (7th Cir. 1975) (meatpackers and slaughterhouses); *National Crushed Stone Ass'n v. EPA*, 444 U.S. 67, 76 (1980) (crushed stone industry); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1036 (D.C. Cir. 1978) (paper industry). Cf. *Environmental Defense Fund, Inc. v. EPA*, 548 F.2d 998, 1005 (D.C. Cir. 1976) (pesticide—only need to show that use in general is hazardous).

100. The states would thus be freed "from the temptation of relaxing local limitations in order to woo or keep industrial facilities . . . [N]ational uniformity [avoids] favoring some regions of the country over others." *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1042 (D.C. Cir. 1978). See also 129 CONG. REC. H3479 (daily ed., June 2, 1983) (statement of Congressman Bruce Morrison).

101. See Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982); Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982); Noise Control Act, 43 U.S.C. §§ 4901-4918 (1982).

102. For example, under the Clean Air Act, section 107, states implement national ambient air quality standards through state implementation plans. 42 U.S.C. § 7407 (1982). Similarly under the Federal Water Pollution Control Act, section 402(b), states with an approved state program issue the necessary discharge permits. 33 U.S.C. § 1342(b) (1982). See

tive"<sup>103</sup> approach was the model, the opportunities for state inaction were minimized. Federal rules were applied to local areas unless and until adequate state rules were in place.<sup>104</sup> Similarly, insufficient state controls and enforcement were impermissible. National standards had to be obeyed and federal agencies had to approve state plans to carry out these standards before they could be implemented.<sup>105</sup> Moreover, compliance with state plans and federal standards could be enforced in the federal courts.<sup>106</sup>

Federal statutes and rules could preempt state laws. But unless a strong national interest was involved,<sup>107</sup> state laws that went beyond the maximums and which were intended to increase protections for the environment not only were allowed,<sup>108</sup> they were encouraged.<sup>109</sup>

The third aspect of the environmental agenda was to increase the nature and scope of the nation's efforts to protect and conserve resources. Saving the wilderness, developing national parks, and preserving selected natural areas became legislative and executive priorities.

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also Federal Insecticide, Fungicide and Rodenticide Act § 26, 7 U.S.C. § 136(b) (1982). The Coastal Zone Management Act of 1972, 16 U.S.C. § 1451-1464 (1982), established a voluntary program under which states receive federal funding and have the responsibility for developing and implementing plans for managing their coastal zones. Such plans were to be submitted to the Secretary of Commerce for approval. Clear guidelines were set up as to what exactly the plan should include, and federal activities had to be consistent, to the "maximum extent practicable," with approved stated programs. *See California v. Watt*, 683 F.2d 1253 (9th Cir. 1982), *rev'd sub nom.*, *Secretary of the Interior v. California*, 104 S. Ct. 656 (1984).

103. *See* Federal Insecticide, Fungicide and Rodenticide Act, § 26(b), 7 U.S.C. § 136w-1(b) (1982).

104. *See* Clean Air Act, § 110(c), 42 U.S.C. § 7410(c) (1982); Federal Water Pollution Control Act, § 402(c), 33 U.S.C. § 1342(C) (1982); Safe Drinking Water Act, § 1412, 42 U.S.C. § 300g-1 (1982).

105. *See* 7 U.S.C. § 136w-1 (1982) (pesticides); 42 U.S.C. § 300 3-2(b) (1982) (safe drinking water); 42 U.S.C. § 7410 (1982) (clean air); 33 U.S.C. § 1342(b) (1982) (clean water). *See also* Comment, *Waste Disposal: The Commerce Clause and the Resource Conservation and Recovery Act of 1976*, 1983 B.Y.U. L. REV. 147, 154-55 (RCRA—comply or lose technical and financial assistance from federal government).

106. *See, e.g.*, Clean Air Act, § 113(b), 304, 42 U.S.C. §§ 7413(b), 7604 (1982); Federal Water Pollution Control Act, §§ 309(b), 505, 33 U.S.C. §§ 1319(b), 1365 (1982).

107. *See, e.g.*, Noise Control Act, § 2(a)(3), 42 U.S.C. § 4901(a)(3) (1982); Resource Conservation and Recovery Act, § 6001, 42 U.S.C. § 6961 (1982) (exemption of federal facilities upon finding by President that it is necessary in the "paramount interest of the United States").

108. *See, e.g.*, Clean Air Act, § 116, 42 U.S.C. § 7416 (1982); Federal Water Pollution Control Act, § 510, 33 U.S.C. § 1370 (1982).

109. *See* Toxic Substances Control Act, § 28, 15 U.S.C. § 2627 (1982) (funding for complementing "but not reducing" federal controls); Clean Air Act, § 105, 42 U.S.C. § 7405 (1982) (grant to support state air pollution planning and control programs); Federal Water Pollution Control Act, § 106, 33 U.S.C. § 1256 (1982) (grants to states for state pollution control programs).

### 3. *Protection and Conservation of Natural Resources*

The earliest efforts to protect the environment sought to preserve natural areas through government ownership.<sup>110</sup> As early as the late nineteenth century, conservationists urged increases in federal holdings, prohibition of development on some holdings and restricted use in others. Finally, they sought protection for the habitats of living resources, both on public and private property.

Prior to the 1960's, however, such protection efforts were limited primarily to dedication of federal public lands to park or other conservation purposes. The authority for such action came from the Constitution itself. Congress had the general authority to "dispose of and make all needful rules and regulations respecting the . . . property belonging to the United States."<sup>111</sup> This authority could be exercised by specific legislation but, in fact, was most often effected by legislative "tacit consent" to executive withdrawals of federal land from sale or use.<sup>112</sup> Dedication of public land to conservation purposes was done, however, only on an "ad hoc" or "special use" basis. In some cases, Congress authorized or allowed the President to withdraw specific lands for special purposes.<sup>113</sup> In other cases, Congress established classes of lands to promote use of those lands in certain ways.<sup>114</sup>

No general system existed to preserve public lands for non-development purposes such as recreation, wildlife and wilderness. No management scheme existed to force aesthetic, wildlife and preservation values to be accommodated in decisions on the use of resources on federal lands.<sup>115</sup> At the very beginning of the environmental era, Congress recognized the deficiencies of this ad hoc approach. In response Congress passed a number of laws to increase the amount of federal lands

110. See COUNCIL ON ENVIRONMENTAL QUALITY, THIRTEENTH ANNUAL REPORT 71, 143 (1982) (hereinafter cited as 1982 CEQ REPORT); Shabecoff, *supra* note 53, at E5, col. 3; Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Land*, 22 NAT. RES. J. 279, 283-84 (1982).

111. U.S. CONST., art. IV, § 3, cl. 2.

112. For examples of specific legislative designations, see *supra* note 54. For a discussion of the "executive withdrawal" issue, see Getches, *supra* note 110.

113. See Note, *California v. Bergland: A Precarious Victory for Wilderness Preservation*, 7 COLUM. J. ENVTL. L. 179, 181-82 (1982). See, e.g., American Antiquities Preservation Act of 1906, 34 Stat. 225, (codified at 16 U.S.C. §§ 431-433 (1982) (national monuments)). See Federal Land Policy and Management Act, 43 U.S.C. §§ 1701, 1714 (1982). See also *Cappaert v. United States*, 426 U.S. 128 (1970) (scope of Antiquities Act).

114. A classification system for public lands had existed almost from the creation of the United States. Certain lands, for example, were to be set aside for military purposes or Indian reservations. See G. COGGINS & C. WILKERSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 123 (1981). Later, Congress established national forest and park systems. Forest Service Organic Act of 1897, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473-481 (1982)); National Park Organic Act of 1916, 39 Stat. 535 (codified as amended at 16 U.S.C. § 1-18 (1982)).

115. See Getches, *supra* note 110, at 309-310.

held for preservationist purposes and require a more protectionist approach to management of public and private lands and resources.

*a. Preservation of Natural Areas*

In 1964, Congress enacted comprehensive legislation to promote the purchase of additional park lands and to assure protection of wilderness areas.<sup>116</sup> A special fund was established for an aggressive program of park acquisition without the need for appropriations from general revenues.<sup>117</sup> In addition, a system was established to protect wilderness areas. Undeveloped federal land, "where the earth and the community of life are untrammelled by man [and] where man is a visitor who does not remain" would be set aside in a National Wilderness Preservation System,<sup>118</sup> and exploitation activities in these places would be prohibited.<sup>119</sup> Congress required federal agencies to make an inventory of federal lands, determine which ones should be designated "primitive" and "roadless" areas, and then recommend what parts of the inventory should be included in the wilderness system.<sup>120</sup> Except for existing mineral rights which would terminate in 1983, no activities would be permitted in any area being considered for possible wilderness designation until Congress determined otherwise.<sup>121</sup>

By the end of 1980, the wilderness system grew from nine million acres in 1964 to 79 million acres,<sup>122</sup> and 50 million additional acres of

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116. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-1136 (1982)). An earlier statute, the Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1982), was not really an environmentally sensitive law. Its purpose was to broaden the uses of the national forests. *See United States v. New Mexico*, 438 U.S. 696, 713-14 (1978). It could be and has been used, however, to promote conservation values. The government has almost total discretion in weighing the various goals of the statute. *See Sierra Club v. Hardin*, 325 F. Supp. 99, 122-24 (D. Alaska, 1971).

117. Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460(l)(4)-(l)(11) (1982). The fund used tax revenues and a percentage of receipts from the sale of offshore oil and gas leases for the purchase of recreational areas, parks, and refuges. *See Futrell, Parks to the People: New Directions for the National Park System*, 25 EMORY L. J. 255, 262-63 (1976).

118. Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1982).

119. *Isaak Walton League v. St. Clair*, 353 F. Supp. 698, 713-16 (D. Minn. 1973), *rev'd on other grounds*, 497 F.2d 849 (8th Cir. 1974) (wilderness is inconsistent with and antagonistic to mining). Some existing compatible private rights would be maintained, however, Wilderness Act, 16 U.S.C. § 1133(c) (1982). *See Minnesota Public Interest Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976), *cert. denied*, 430 U.S. 922 (1977) (discussing § 1133(c) of the Wilderness Act).

120. Wilderness Act of 1964, 16 U.S.C. §§ 1132(b)-(c) (1982). *See also* 16 U.S.C. § 1133(d)(3) (1982). *Compare* Federal Land Policy Management Act, 43 U.S.C. § 1782(c) (1982); *Rocky Mountain Oil and Gas Ass'n v. Watt*, 696 F.2d 734 (10th Cir. 1982). *See also* Note, *California v. Bergland: A Precarious Victory for Wilderness Preservation* 7 COLUM. J. ENVTL. L. 179, 181-87 (1982) for a discussion of roadless area reviews.

121. *Parker v. United States*, 448 F.2d 793 (10th Cir.), *cert. denied*, 405 U.S. 989 (1972). *See California v. Block*, 690 F.2d 753 (9th Cir. 1982).

122. McCloskey and Desautell, *A Primer on Wilderness Law and Policy*, 13 ENVTL. L.

federal land were being reviewed for possible inclusion in the system.<sup>123</sup> A similar policy of protection through purchase and dedication was adopted for federal offshore lands.<sup>124</sup>

Congress soon recognized that dedication of public lands to preservation use was only the first step in the protection of natural resources. It had to be followed by actions to assure that all resources would be managed to enhance conservation values.

*b. Management of Resources*

The shift in the environmental balance to favor protection was inconsistent with the common law philosophy to promote unrestricted resources development. The previous policy of giving public lands to private individuals, of mandating only selected areas for protection, and encouraging private development in all other areas, had to be reversed. Congress sought to limit exploitation and provide authority for balanced management of all federal lands. Thus, in 1976, Congress established comprehensive schemes to carry out those goals — the Federal Lands Policy and Management Act and the National Forest Management Act.<sup>125</sup> Under these laws, the manager of public lands had to develop criteria that indicated an “overriding concern” for protection.<sup>126</sup> Exploitation would be permitted but, unlike prior practice, environmental values had to be protected, even if they conflicted with resource development.<sup>127</sup> Later in the decade, special rules were established to further this protectionist policy through new requirements for exploitation of coal and offshore oil and gas resources.<sup>128</sup>

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REP. (ENVTL. L. INST.) 10,278, 10,279 (1983). This acreage includes Alaska lands. It would be nineteen million acres without those lands. See G. COGGINS & C. WILKERSON, *supra* note 114, at 791-92.

123. See McCloskey and Desautell, *supra* note 122, at 10,279. See, e.g., National Park and Recreation Act of 1978, Pub. L. No. 95-625, §§ 401-03, 92 Stat. 3467. See generally Nelson, *supra* note 52, at 27 (chart listing preservation legislation enacted by Congress).

124. Under the Marine Protection, Research and Sanctuaries Act of 1972, the federal government was to review offshore areas and establish marine sanctuaries “for the purpose of preserving or restoring such [offshore areas] for their conservation, recreation, ecological or aesthetic values.” 16 U.S.C. § 1432(a) (1982). Such sanctuaries were to be used to protect significant offshore areas from the “ill effects of development.” President’s Message to Congress, 13 WEEKLY COMP. PRES. DOC., 789 (May 28, 1977).

125. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1784 (1982)); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 1949, (codified at 16 U.S.C. §§ 1600-1687 (1982)).

126. Getches, *supra* note 110, at 314; See, e.g., Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(3), (c)(6) (1982). Under The Federal Land Policy and Management Act, the manager was the Secretary of the Interior or his designate.

127. See, e.g., Federal Land Policy and Management Act, 43 U.S.C. § 1732(b) (the Secretary of Interior in managing public lands shall “by regulation or otherwise take any action necessary to prevent unnecessary or undue degradation of the lands.”) See also Getches, *supra* note 110, at 315.

128. See *infra* notes 174-184 and accompanying text.

Even private property was not to be immunized from federal controls to enhance conservation values. For example, protection was provided for fish and wildlife habitat whether or not the habitat areas were owned by the federal government. Possible adverse effects of activities on fish and wildlife were to be assessed, and mitigated where possible, before required federal approval for a proposed project would be considered. In addition, actions that jeopardized threatened or endangered species could be totally prohibited.<sup>129</sup>

The special attention directed to the protection of wetlands is an excellent example of the shift in the balance from development to protection. At one time, many people considered wetlands worthless. Wetlands were to be developed into valuable real estate, agricultural land or industrial sites. Only recently has society recognized the value of wetlands as a habitat for countless organisms and as a means to cleanse water. The severe adverse effects from developing wetlands have also been noted.<sup>130</sup> The legal response to this change in political attitude was a shift in the burden of proof in new statutes and implementing regulations. Permits for dredge and fill activities in wetlands were now only to be issued if it could be shown that significant adverse effects on fish and wildlife would not result. Similarly, activities in wetlands that could significantly and adversely affect recreational or even aesthetic values had to be modified or they would be prohibited. Later in the environmental era, the burden was explicitly established. Pursuant to regulations and interpretations issued in 1977, the dredge and fill permit program was applied to all waters of the United States. Moreover, permits were to be denied unless it could be shown "that the benefits of the proposed alteration outweigh the damage to the wetlands resource."<sup>131</sup>

By the mid-1970's, the balance had shifted from development to protection of natural areas. Efforts to purchase, preserve and conserve public lands were accelerated, and more and more lands were withdrawn from possible exploitation. Where exploitation was allowed, careful management was required to promote environmental values. These successes complemented other successes in forcing environmental values to be considered in all public decision-making, in requiring protective standards for land, air and water, and in forcing industry to develop the necessary techniques to meet those standards. The next

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129. See *supra* note 75.

130. See Note, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1, 18 (1972); Davis, *Congress Weighing Proposals for New Wetlands Protection*, 41 CONG. Q. WEEKLY REP. 1163 (1983); COUNCIL ON ENVIRONMENTAL QUALITY, NINTH ANNUAL REPORT at 318 (1978).

131. 33 C.F.R. § 320.4(b)(4) (1983). See Federal Water Pollution Control Act, § 404, 33 U.S.C. § 1344 (1982). See also *Natural Resources Defense Council v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Claims 1981).

step was to make mid-course corrections in these policies to broaden their scope and ensure their continued utility.

### B. *The "Mid-Course Correction"*

While the environmental agenda had been adopted by the mid-1970's, environmental organizations and Congress were dissatisfied with the pace of implementation of newly enacted statutes and with the absence of legislative standards in some areas. At the same time, administrators were frustrated by what they perceived to be the impossible task of simultaneously putting into effect hundreds of new regulatory standards and by the legal challenges to their regulatory actions by both environmentalists and industry.<sup>132</sup> The result was a "mid-course correction" where Congress and a sympathetic President acted to complete the legislative framework for environmental protection and to facilitate the implementation of that framework.<sup>133</sup>

#### 1. *Setting and Applying the Standards*

Both Congress and the Executive believed that modifications to recently enacted statutes were necessary to secure cleaner air and water.<sup>134</sup> Moreover, they felt that a whole new set of laws were required to deal with high risk substances and practices.<sup>135</sup>

In 1977, Congress responded by passing "corrective" amendments to the Federal Water Pollution Control Act and the Clean Air Act.<sup>136</sup> The premise of these adjustments was that development could occur within established strict environmental standards, but that it must be made easier for administrators to implement statutory goals.<sup>137</sup> The intent was to "aid, not to impede," regulatory protection.<sup>138</sup> Thus, at

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132. See *Natural Resources Defense Council v. Train*, 411 F. Supp. 864 (S.D.N.Y. 1976), *aff'd*, 545 F.2d 320 (2d Cir. 1976) (environmental lawsuit to force EPA to list lead as a toxic pollutant); Schoenbrod, *supra* note 97, at 792, n.300 (quoting Congressional report); *id.*, at 792-93 (administrative overload on EPA). See generally R. MELNICK, *supra* note 64 (discussion of various lawsuits by environmental organizations and industry on Clean Air Act).

133. *Hercules, Inc. v. EPA*, 598 F.2d 91, 102 (D.C. Cir. 1978).

134. See R. MELNICK, *supra* note 64, at 50-51.

135. See State of the Union Address, Jan. 19, 1978, PUB. PAPERS-JIMMY CARTER 114.

136. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566; Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. See Wyche, *The Regulation of Toxic Pollutants Under the Clean Water Act: EPA's Ten Year Rulemaking Nears Completion*, 15 NAT. RESOURCES LAW. 511, 519 (1983); Hays, *Clean Air: From the 1970 Act to the 1977 Amendments*, 17 DUQ. L. REV. 33, 36-37 (1978); Hall, *The Clean Water Act of 1977*, 11 NAT. RESOURCES LAW. 343 (1978).

137. See *Hercules, Inc. v. EPA*, 598 F.2d 91, 102 (D.C. Cir. 1978). See also *Republic Steel Corp. v. Train*, 557 F.2d 91 (6th Cir. 1977) (the failure of EPA to define interim effluent limitations technology, despite the FWPCA's requirement, meant that Ohio was not bound to apply the July 1, 1977 deadline for pollution clean-up to the Republic Steel Corporation).

138. *Hercules, Inc. v. EPA*, 598 F.2d at 102. See Hays, *supra* note 136, at 59; Wyche, *supra* note 136, at 519.

the request of agency officials,<sup>139</sup> Congress extended protection deadlines for monitoring clean air and clear water goals.<sup>140</sup> Congress also required that standards be set for previously unregulated pollutants<sup>141</sup> and regions.<sup>142</sup> Finally, Congress gave regulators new and more flexible enforcement mechanisms to avoid stalling by polluters.<sup>143</sup>

The 1977 Clean Air and Clean Water Act Amendments also responded to the public's concern for environmental protection<sup>144</sup> by taking steps to strengthen controls over hazardous pollutants.<sup>145</sup> The new clean air law broadened the discretion of the EPA Administrator to regulate hazardous air pollutants and authorized the Administrator to set "design, equipment, work practice or operational standards" if ordinary emission standards would not provide an "ample margin of safety."<sup>146</sup> Similarly, the amended clean water law required EPA to

139. See R. MELNICK, *supra* note 64, at 50-51.

140. See, e.g., Clean Air Act, § 172, 42 U.S.C. § 7502 (1982) (National Ambient Air Quality Standards); § 202, 42 U.S.C. § 7521 (1982) (automobile emissions); § 173, 42 U.S.C. § 7503 (1982) (progress toward attainment of clean air); Federal Water Pollution Control Act, § 301(i), 33 U.S.C. § 1311(i) (1982) (extensions).

141. See Clean Air Act, § 122, 42 U.S.C. § 742 (1982) (standards for hazardous pollutants); Federal Water Pollution Control Act, §§ 301(b)(2), 307(a), 33 U.S.C. §§ 1311(b)(2), 1317(a) (1982) (toxics); *id.*, § 301(b)(2)(F), 33 U.S.C. § 1311(b)(2)(F) (1982) (non-conventional pollutants).

142. See Clean Air Act, § 110, 42 U.S.C. § 7410 (1982) (scope of coverage); § 160-69, 42 U.S.C. §§ 7470-7479 (1982) (attainment areas and PSD).

143. For example, new non-compliance penalties for clean air violations were introduced, based on a market concept. Clean Air Act, § 120, 42 U.S.C. § 7420 (1982). The theory was that if polluters did not clean up by the specified compliance date, they might be permitted to continue to operate but with a fine equal to the economic value of non-compliance. Hays, *supra* note 136, at 45. See also, Federal Water Pollution Control Act, § 309, 33 U.S.C. § 1319 (1982).

144. See *Environmental Defense Fund v. EPA*, 598 F.2d 62, 72-73 (D.C. Cir. 1978) (Clean Water Amendments of 1977); *Alabama Power Co. v. Costle*, 636 F.2d 323, 349 (D.C. Cir. 1979) (1977 Amendments provide additional controls for clean air).

145. Except for the control of pesticides and limited controls over toxic air and water pollutants, little federal legislation existed prior to the late 1970's addressing the problem of waste management and control of toxic substances. W. RODGERS, *supra* note 23, at 627, 898-99. See Clean Air Act, § 112, *as amended* 42 U.S.C. § 7412 (1982); Federal Water Pollution Control Act, § 307, *as amended* 33 U.S.C. § 1317 (1982). The Federal Insecticide, Fungicide and Rodenticide Act of 1972, 7 U.S.C. §§ 136-136y (1982), put strict limitations on the registration and marketing of pesticides and placed the burden of proving safety on the applicant seeking to register a pesticide. *Environmental Defense Fund v. EPA*, 465 F.2d 528, 532 (D.C. Cir. 1972).

The only other statutes designed to deal with wastes were the Solid Waste Disposal Act of 1965, 42 U.S.C. §§ 3251-3259 (1982) and the Resource Recovery Act of 1970, Pub. L. No. 91-512, 84 Stat. 1227 (amending the Solid Waste Disposal Act). Both statutes were "promotion type" laws that provided funding for pilot programs and studies.

146. Clean Air Act, § 112(e), 42 U.S.C. § 7412(e) (1982). The earlier § 112 defined hazardous air pollutants as including air pollutants which may "cause or contribute" to increases in mortality or serious illness. The 1977 Amendment allowed regulation of the newly-defined "hazardous air pollutant which may cause or contribute to air pollution" which, in turn, "may reasonably be anticipated to result in an increase in mortality" or serious illness. *Id.* § 223(a)(1), 42 U.S.C. § 7412(a)(1) (1982).

develop new guidelines and standards for toxic substances, detailed a list of toxic pollutants, and provided that the standards for such pollutants include an "ample margin of safety" and not be subject to individual waiver or modification.<sup>147</sup>

Congress and the President believed that even with these changes, a regulatory gap existed for hazardous wastes and toxic substances.<sup>148</sup> Thus, while considering changes to the clean air and clean water laws, Congress also passed the Resource Conservation and Recovery Act of 1976 (RCRA),<sup>149</sup> which mandated a "cradle to grave" regulatory system for the transportation, storage, treatment and disposal of hazardous wastes.<sup>150</sup> Congress next enacted the Toxic Substances Control Act,<sup>151</sup> which required the EPA Administrator to set up systems for testing and identifying potentially noxious chemical substances or mixtures, and to prohibit the manufacture, processing or distribution of such substances or mixtures if EPA concluded that they presented a severe risk to health or the environment.<sup>152</sup> Third, in 1978 Congress amended the federal pesticide law; this simplified the regulation of pesticides, gave EPA more explicit authority to ban pesticide ingredients and to suspend and cancel potentially harmful chemicals, and granted the public greater access to the basic environmental data upon which registration and cancellation decisions were made.<sup>153</sup> Finally, in 1980,

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147. Federal Water Pollution Control Act, § 307(a), 33 U.S.C. § 1317(a) (1982). *See* *Environmental Defense Fund v. EPA*, 598 F.2d 62, 73 (D.C. Cir. 1978).

148. *See* Message to Congress, May 23, 1977, PUB. PAPERS-JIMMY CARTER 967 (1977) [hereinafter cited as Carter's 1977 Environmental Message]; Message to Congress on "Environmental Priorities and Programs," Aug. 2, 1979, PUB. PAPERS-JIMMY CARTER, 1353, 1357 (1979), *reprinted in* 37 CONG. Q. WEEKLY REP. 1669 (August 11, 1979) [hereinafter cited as Carter's 1979 Environmental Message].

149. Pub. L. No. 94-580, 90 Stat. 2812 (1976) (codified at 42 U.S.C. §§ 6901-6987 (1982)).

150. Resource Conservation and Recovery Act, §§ 3001-3011, 42 U.S.C. §§ 6921-6931 (1982). *See also* S. EPSTEIN, L. BROWN & C. POPE, *HAZARDOUS WASTE IN AMERICA* 193 (1982) [hereinafter cited as *HAZARDOUS WASTE IN AMERICA*].

Another attempt to limit dumping of wastes was the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1444 (1982). The Act was intended to regulate ocean dumping of all wastes and "to prevent or strictly limit the dumping . . . of any materials which would adversely affect human health . . . or the marine environment." *Id.* at § 1401. Dissatisfied with efforts to implement this policy, Congress passed an amendment in 1977 which required the EPA to end ocean dumping of sewage sludge that "may unreasonably degrade or endanger human health . . . or the marine environment" as soon as possible, but no later than Dec. 31, 1983. *Id.* at § 1412(a).

151. Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601-2629 (1982)).

152. Toxic Substances Control Act, § 4, 15 U.S.C. § 2603 (1982) (testing and identifying); *id.* §§ 4, 5, 15 U.S.C. § 2603-2604 (1982) (prohibition). In the case of polychlorinated biphenyls (PCB's), Congress in effect made the judgment regarding risk and directed the EPA to take action. § 6(e), 15 U.S.C. § 2605(e) (1982). *See* *Environmental Defense Fund v. EPA*, 598 F.2d 62, 76-77 (D.C. Cir. 1978).

153. Pub. L. No. 95-396, §§ 2(a), 3-8, 92 Stat. 819, 820-27 (1978) (codified at 7 U.S.C. § 136a (1982)).

Congress passed, and the President signed, the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("Superfund") (CERCLA),<sup>154</sup> which established a \$1.6 billion fund to pay for emergency cleanup of sudden dangerous releases of hazardous wastes, and to commence cleanup of hazardous waste sites which "may present an imminent and substantial danger to the public health or welfare."<sup>155</sup> These new statutes were the first leg of the "mid-course correction." Congress and the President also acted to reaffirm the new "cooperative federalism" between the state and federal governments. Finally, both Congress and the President accelerated efforts to protect and conserve national resources.

## 2. *The State-Federal Relationship*

Throughout the last half of the 1970's, Congress sought to reinforce the federal-state relationship established at the beginning of the environmental era. Federal statutes were enacted to ensure that the national goals of environmental protection and preservation would not be thwarted by state inaction or insensitivity. In most cases, this meant federal standards would be implemented by state agencies. States could not avoid federal mandates under such laws, but instead were encouraged to build on the minimum federal requirements by adopting and applying more stringent rules. The 1977 amendments to the Federal Water Pollution Control Act and the Clean Air Act made it explicit that states could establish controls that were more restrictive than federal requirements<sup>156</sup> and that the federal government could override state issuance of a permit when it believed that state provisions were inadequate.<sup>157</sup> In hopes of encouraging aggressive state efforts, Congress also expanded the scope of state permit authority to cover federal facilities.<sup>158</sup> Congress applied this regulatory model to its new programs as well. Accordingly, Congress authorized state hazardous waste

154. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified at 42 U.S.C. §§ 9601-9657 (1982)).

155. Comprehensive Environmental Response, Compensation, and Liability Act, § 104, 42 U.S.C. § 9604 (1982). Costs of restoration, rehabilitation or replacement of natural resources, damage assessment, and necessary studies were also to be paid out of the fund. *Id.* at § 111(c), 42 U.S.C. § 9611(c) (1982).

For background on the Love Canal and other incidents that aroused public concern and which lead to a two-year legislative struggle to enact the Superfund, see HAZARDOUS WASTE IN AMERICA, *supra* note 150, at 199-221.

156. See Clean Air Act, § 111(c)(1), 42 U.S.C. § 7411(c)(1) (1982). This provision arose from a controversy where California sought to require automobile emissions lower than the federal standards in its state implementation plan.

157. See Federal Water Pollution Control Act, § 402(d), 35 U.S.C. § 1342(d) (1982).

158. See *id.* § 313, 33 U.S.C. § 1323 (1982) overruling EPA v. California *ex rel.* State Water Resources Control Board, 426 U.S. 200 (1976). Similarly, the phrase "(except with respect to stationary sources owned or operated by the United States)" in the earlier Clean Air Act was deleted. Clean Air Act, § 112(a)(1), 42 U.S.C. § 7412(a)(1) (1982).

programs to implement federal standards, and encouraged complementary state programs to protect the public from toxic substances and to prevent or cleanup the release of hazardous substances.<sup>159</sup>

The Executive Branch supported the "cooperative federalism" model. In fact, President Carter encouraged Congress to apply the model in previously untouched areas, such as land management.<sup>160</sup> Thus, despite state objections to federal interference in areas of traditional state power,<sup>161</sup> the President supported, and Congress enacted, a comprehensive strip-mining statute. The essential premise of this Surface Mining Control and Reclamation Act of 1977<sup>162</sup> was that prior state regulatory efforts had been insufficient, so that a new two-phase system was necessary to compel the states to act. First, in an interim phase, the federal government was to promulgate limited controls and enforce them. Then, in the second phase, the states could establish their own programs, but only if they were approved by the federal government as meeting federal standards. Even then, the federal government could take over the state program if state enforcement efforts were insufficient. Under the statute, the federal administrators were to issue environmentally protective design and performance standards for surface mining. These federal standards were minimums which states could exceed.<sup>163</sup>

### 3. *Protection and Conservation of Natural Resources*

Congressional action in the early years of the environmental era established policies and programs to purchase, conserve, and manage both public and private lands to promote environmental values. In the late 1970's, these policies and programs were aggressively implemented by the Executive. More and more property was purchased for or dedicated to conservation purposes<sup>164</sup> and sympathetic regulators applied

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159. Resource Conservation and Recovery Act, § 3006, 42 U.S.C. § 6926 (1982); Toxic Substances Control Act, § 28, 15 U.S.C. § 2627 (1982); Comprehensive Environmental Response, Compensation, and Liability Act, §§ 104(d), 114(a), 42 U.S.C. §§ 9604(d), 9614(a) (1982).

160. See Carter's 1977 Environmental Message, *supra* note 148 (outer continental shelf and strip mining legislation).

161. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 279 (1981); *Hodel v. Indiana*, 452 U.S. 314 (1981). Both cases upheld the strip mining statute against state claims that it violated states' rights under the Tenth Amendment.

162. Pub. L. No. 95-87, 91 Stat. 447 (codified at 30 U.S.C. § 1202 (1982)).

163. *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 269, 288 (1981).

164. CONSERVATION FOUNDATION LETTER, Feb. 1983, at 1 [hereinafter cited as CONSERVATION LETTER]. One critic complained that the Federal government in the late 1970's went so far as to systematically curtail the availability of public lands for exploitation. See Terrell, *The Department of the Interior*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 333, 350 (C. Heatherly, ed. 1981).

existing statutes to promote protection over development.<sup>165</sup> Still, there were gaps. Although substantial additions were made to America's wilderness and other protected areas, the status of the federally owned Alaskan lands—the largest potential area for protective treatment—was still unresolved.<sup>166</sup> Similarly, there were few, if any, standards for the management of coal or offshore oil and gas resources despite concerns about environmental protection.<sup>167</sup>

*a. Preservation of Natural Areas*

Almost since the beginning of his Administration, President Carter sought to convince Congress that it should act to preserve the "country's crown jewels—Alaska's wilderness areas."<sup>168</sup> Congress failed to take action until the President "executively withdrew" lands under existing statutory authority and forced Congress to respond.<sup>169</sup> Then, Congress enacted the Alaskan National Interest Lands Conservation Act of 1980<sup>170</sup> adding over thirty million acres to the nation's wildlife and parks systems. The basis for this statute, enacted at the end of the environmental era, was almost the same as the Wilderness Act that ushered in that era. The Alaska Lands Bill was needed to "preserve for the benefit, use, education and inspiration of present and future generations certain lands and waters in the State of Alaska that contain nationally significant natural, scenic, historic, archaeological, geological,

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165. BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 72-73.

166. In 1971, Congress authorized the temporary withdrawal of 84 million acres of public lands in Alaska for later legislative consideration as national parks, forests, wildlife refuges or parts of the wild and scenic river systems. *See* Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 U.S.C., 43 U.S.C.); Getches, *supra* note 110, at 299.

167. *See* Ferguson, *Impact of New Legislation Relating to Federal Coal Resources*, 4 J. CONTEMPORARY L. 255 (1978); H.R. REP. NO. 590, 95th Cong., 1st Sess. 54-55, 95-100 (1977) (Outer Continental Shelf Land Act Amendments of 1977) [hereinafter cited as 1977 House OCS Report].

168. Statement by President Carter at the signing of The Alaska National Interest Lands Conservation Act, PUB. PAPERS-JIMMY CARTER 2756 (1980).

169. *See* State of Alaska v. Carter, 462 F. Supp. 1155, 1157-58 (D. Alaska 1978); Getches, *supra* note 110, at 299, 323-24. *See generally* Congressional Stall Prompts Administrative Actions to Protect the Alaska National Interest Lands, 8 ENVTL. L. REP. (ENVTL. L. INST.) 10,245 (1978). *See also* President Carter's State of The Union Address (Jan. 19, 1978), PUB. PAPERS-JIMMY CARTER 116 (1978); President Carter's State of The Union Address (Jan. 21, 1980) PUB. PAPERS-JIMMY CARTER 114 (1980).

170. Pub. L. No. 96-487, 94 Stat. 2371 (1980) (codified in scattered sections of 16 U.S.C., 43 U.S.C.). Title II of The Alaska National Interest Lands Conservation Act added and expanded units of the National Park System. Title III added to the National Wildlife Refuge System. Title IV established a new Recreation Area. Title V added to the National Forest System and National Monument System. Title VI added units to the National Wild and Scenic Rivers System and Title VII established new units of the National Wilderness Preservation System. In addition, over 20 million acres were designated as units of the National Wildlife Refuge System.

scientific, wilderness, cultural and wildlife values."<sup>171</sup> The setting aside of more land for preservationist purposes was only one form of protection, however. New laws also were needed to eliminate regulatory gaps in the management of resources.

*b. Management of Resources*

Congress had begun the process of reorienting federal land practices in 1976 by mandating new management regimes for forest and other lands.<sup>172</sup> Congress then turned to the development of a new environmental framework for management of the nation's coal and offshore oil and gas resources. In doing so, Congress reconfirmed all of the policies articulated throughout the first years of the environmental era. A shift had occurred in the political balance in favor of protection. During the "mid-course correction," new laws implemented that shift. Previous uncontrolled actions by resource developers were stopped. The burden was put on developers to demonstrate that resources could be exploited "consistent with essential environmental protection."<sup>173</sup>

A new system was adopted for leasing federal coal resources. Under The Federal Coal Leasing Amendments of 1975,<sup>174</sup> a planned and phased leasing system was to be established, new standards prepared, and a process designed to determine environmental risks and balance them against development benefits. Administrators were to provide more rigorous environmental controls over coal operators.<sup>175</sup> Thus, leasing of federal coal deposits was allowed only in accordance with a "comprehensive land-use plan," which included an assessment of leasing impacts on the environment. Exploration and development licenses had to include "reasonable conditions to insure the protection of the environment."<sup>176</sup> A later-enacted companion statute totally regulated strip mining, the most environmentally risky coal mining procedure, from site development prior to mining to reclamation after mining.<sup>177</sup>

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171. 16 U.S.C. § 3101 (1982).

172. See *supra* notes 125-28 and accompanying text (Federal Land Policy and Management Act of 1976 and National Forest Management Act of 1976).

173. See Ferguson, *supra* note 167, at 264.

174. Pub. L. No. 94-377, 90 Stat. 1083 (1975) (codified at 30 U.S.C. § 201 (1982)).

175. Comment, *Federal Coal Leasing Amendments Act Should Increase Production and Public Benefits from Coal Leasing on Federal Land*, 16 NAT. RESOURCES J. 1033, 1035 (1976). Congress was concerned that coal leasing had previously existed with few controls over environmental effects. C. COGGINS & C. WILKERSON, *supra* note 114, at 420 (citing a House Committee report on the statute).

176. Federal Coal Leasing Amendments Act, 30 U.S.C. § 201(a)(3)(A) (1982) (land-use plans); 30 U.S.C. § 201(b)(1) (1982) (conditions).

177. See Comment, *Regulatory Revisions to the Surface Mining Control and Reclamation Act: An Exercise in Administrative Legislation*, 31 U. KAN. L. REV. 279, 282-83 (1983) [hereinafter cited as *Strip Mining Comment*].

Similar action was taken to address the management and environmental problems related to federal offshore oil and gas leasing.<sup>178</sup> Under the Outer Continental Shelf Lands Act Amendments of 1978,<sup>179</sup> the previous pro-development policy was to be tempered by a new emphasis on environmental needs.<sup>180</sup> Congress gave federal regulators the authority to develop strict safety regulations and mandated that lessees prepare exploration and development plans to provide for exploitation in the most environmentally safe manner.<sup>181</sup> The environmental consequences of all activities were to be adequately considered and acted upon.<sup>182</sup> Cancellation of leases for environmental reasons, previously not allowed under the law, was now possible.<sup>183</sup>

Passage of these new management statutes and the Alaskan Lands Bill was a "reaffirmation of our commitment to the environment." The assumption was that the government and the people have a "responsibility" as "stewards of an irreplaceable environment." Many battles had been won, but the "fight for . . . environmental concerns" had to continue.<sup>184</sup>

### C. *The Premise For the 1980's*

By the end of 1980, the environmental law framework had been established. New agencies had been created and given responsibility to protect the air, water, and public health. Older agencies had been given increased duties to balance resource development against conservation and protection. Agency officials had begun the process of implementation through the development of complex regulatory programs and had sought and obtained legislative assistance in making mid-course corrections in these programs. Finally, policies to promote wilderness, parks and wildlife had been legislatively strengthened and applied.

178. See generally Murphy and Belsky, *supra* note 87; Jones, *The Legal Framework for Energy Development on the Outer Continental Shelf*, 10 U.C.L.A. [UCLA]-ALASKA L. REV. 143, 155-64 (1981).

179. Pub. L. No. 95-372, 92 Stat. 632 (1978) (codified at, 43 U.S.C. § 1331-1356 (1982)).

180. 43 U.S.C. § 1344 (1982); 1977 *House OCS Report*, *supra* note 167, at 149-52; Murphy and Belsky, *supra* note 87, at 308, 311.

181. Outer Continental Shelf Lands Act Amendments, §§ 5(a), 21, 43 U.S.C. §§ 1334(a), 1347 (1982) (safety regulations); §§ 11(c), 25, 43 U.S.C. §§ 1340(c), 1351 (1983) (plans). See Murphy and Belsky, *supra* note 87, at 313, 315-16.

182. 1977 *House OCS Report*, *supra* note 167, at 52, 54-55; Murphy and Belsky, *supra* note 87, at 316, 319-20. See also Note, *Environmental Considerations in Federal Oil and Gas Leasing on the Outer Continental Shelf*, 19 NAT. RESOURCES J. 399, 409 (1978).

183. Outer Continental Shelf Lands Act, §§ 5(a)(2), 25(h)(1)(D), 43 U.S.C. §§ 1334(a)(2), 1351(h)(1)(D) (1982). See *Gulf Oil Corp. v. Morton*, 493 F.2d 141 (9th Cir. 1973), *reh'g denied*, 493 F.2d 149 (9th Cir. 1974); *Union Oil Co. v. Morton*, 512 F.2d 743 (9th Cir. 1975) (cancellation of leases precluded under prior law).

184. See Statement by President Carter at the signing of the Alaska National Interest Lands Act, PUB. PAPERS-JIMMY CARTER 2756-58 (1980).

In the 1980's, environmental law now could move from policy development and drafting of regulations to policy implementation and law enforcement.<sup>185</sup> A small number of critical issues would have to be resolved,<sup>186</sup> but in most cases no new laws would be needed. Rather, existing laws would be applied, perhaps with the addition of a few formal legislative modifications.<sup>187</sup>

Thus, the focus could move from Congress to the Executive. Administrators had been given the authority and discretion needed to assure adequate consideration of environmental protection in all activities and to limit projects or products that threatened ecological values or human health and safety.<sup>188</sup> Congress' role now could become one of oversight. Legislators would assure adequate funding for environmental programs, check on the progress of implementation, and respond to any requests for technical corrections that would promote the policy of protection.<sup>189</sup>

The numerous laws passed during the environmental era gave states and citizens a large role in the implementation process. States could assume responsibility for national programs if they were willing to abide by the national policies. States could set up their own machinery to enforce federal laws and enact complementary laws for unique local problems. Funding was available from the federal government to assist the states.<sup>190</sup> Citizens could participate in hearings to review the environmental effects of proposed projects, could get information on product safety concerns, and thus were able to aid or push local and

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185. See, e.g., *Environment in the 1980's — The Carter CEQ Says Farewell*, 66 SIERRA, Sept.-Oct. 1981, at 34 [hereinafter cited as *Carter CEQ Farewell*].

186. BURSON-MARSTELLER, *supra* note 1, at 41 (Michael M. McClosky, Executive Director, Sierra Club), 36 (Frank Potter, Chief Counsel, House Comm. on Energy and Commerce). A key exception, where new laws were felt to be needed, was the "acid rain" problem. Legislation had been passed in 1980 requiring that an interagency task force study the issue. 1982 CEQ REPORT, *supra* note 110, at 216. Many, including the incumbent President, believed that legislation would soon be required to regulate emissions in response to the acid rain issue. See 41 CONG. Q. WEEKLY REP. 1063 (1983); PUB. PAPERS-JIMMY CARTER 448, 449 (Letter to the Speaker of House and the President of the Senate, Mar. 6, 1980). Another area of concern was protection of the global environment, which might require treaties, executive agreements, and implementing laws and regulations. See generally COUNCIL ON ENVIRONMENTAL QUALITY, GLOBAL FUTURE: TIME TO ACT (1981); DEMOCRATIC NATIONAL COMMITTEE, THE 1980 DEMOCRATIC NATIONAL PLATFORM 15, 16 (1980) [hereinafter cited as 1980 DEMOCRATIC PLATFORM].

187. Frank, *Oceans Policy in an Era of Scarcity*, 10 NOAA, Sept.-Oct. 1980, at 8.

188. See Costle, *supra* note 91, at 411. See also *Lead Industries Ass'n v. EPA*, 647 F.2d 1130, 1146 (D.C. Cir. 1980).

189. See GENERAL ACCOUNTING OFFICE, POTENTIAL IMPACTS OF REDUCING THE ENVIRONMENTAL PROTECTION AGENCY'S BUDGET 1 (1982) [hereinafter cited as 1982 GAO EPA REPORT]. See also 1980 DEMOCRATIC PLATFORM, *supra* note 186, at 13.

190. BURSON-MARSTELLER, *supra* note 1, at 10 (John V. Byrne, Administrator of National Oceanic and Atmospheric Administration), 58 (Richard D. Lamm, Governor of Colorado), 34 (Rep. Henry Waxman, D-Calif.).

national leaders in implementation efforts.<sup>191</sup>

Some environmentalists had idealistic notions about this new era of implementation. They believed that the environmental law and policy agenda had been set and could not be reversed easily. Business and industry, they felt, would adjust to the new balance of protection over development. Technology would be developed to make environmental safeguards just another cost of doing business. Future planning would be aided by having the environmental framework set and not subject to case-by-case adjudication. Companies would recognize that the advantages of certainty would outweigh the costs of environmental protection.<sup>192</sup>

By the late 1970's, however, the optimism of environmentalists had been tempered by the realities of the implementation process. Developing laws and regulations had been difficult but exciting. The public, and then, in response, Congress and the Executive, could make clear statements of a preference for protection. Implementing and applying such rules was just as difficult, but less exciting. Broad statements of policy would not resolve case-by-case applications; such applications put severe strains on the legal and policy consensus in favor of protection. Administrators had to resolve actual conflicts between jobs and protection and growth and conservation.<sup>193</sup>

The difficulties of the implementation process were compounded by changes in American society from the late 1960's to the 1980's. At the beginning of the environmental era, there was a widespread feeling that America was an abundant society with a strong economy. The nation could afford environmental protection. By the end of the 1970's, the feeling of perceived abundance gave way to a feeling of perceived scarcity and economic insecurity. Similarly, passage of most new environmental laws occurred during a period when there was public confidence in government. The public believed that government, and particularly the federal government, could efficiently and competently conduct a wide range of programs. By the end of the environmental era, increasing public doubts about the competence of the bureaucracy led to pressures to cut the size and power of the federal government.<sup>194</sup>

These practical problems of implementation and changes in public attitude affected environmental policy law. Modifications might be

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191. *Id.* at 40 (Jay D. Hair, Executive Vice President, National Wildlife Federation); Belmont, *Public Interest Access to Agencies: The Environmental Problem for the 1980's*, 11 STETSON L. REV. 454, 457-58 (1982); Futrell, *supra* note 15, at 40-41; Comment, *Public Participation in State NPDES Enforcement: Questionable Basis, Good Policy*, 6 COLUM. J. ENVTL. L. 185, 214-15 (1980) [hereinafter cited as *Public Participation Comment*].

192. See BURSON-MARSTELLER, *supra* note 1, at 53 (David Roderick, United States Steel).

193. See Belmont, *supra* note 191, at 456-57.

194. See Frank, *supra* note 187, at 8-9.

necessary to make existing laws and programs more efficient and fair. Still, the premise for the 1980's was that there would not be a fundamental shift in the balance between protection and development.<sup>195</sup>

This premise was directly attacked in the presidential election campaign of 1980. The incumbent sought support because of his environmental sensitivity and his efforts to promote protection by legislative and administrative actions. The challenger argued that the balance had to be reset. He advocated a shift in the environmental balance back towards development. The challenger insisted that the country was hindering needed growth through overregulation and was improperly interfering with business and industry efforts to strengthen the economy through maximization of profit.<sup>196</sup> The next part of this article discusses how a new President interpreted the results of his election as public support for a shift in the burden of proof onto those seeking environmental protection and how he implemented policies and programs in an attempt to ensure that shift.

### III

#### SHIFTING BACK THE BURDEN OF PROOF

Commentators on the American political process have argued that a new president can make only limited changes in public policy. During the first two years of his administration, President Reagan refuted that contention, especially with respect to changes in environmental policy law.<sup>197</sup> These changes carried out the new president's philosophy, which was well-developed at the time of his inauguration. The President believed that government, especially the national government, had grown too large and too intrusive, and had to be reduced in both size and power.<sup>198</sup> The Reagan Administration viewed environmental law as an excellent example of the excesses of the past that provided an opportunity to implement the shift back to increased reliance

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195. Some measures to expedite environmental reviews were suggested, but not if they involved waiver of substantive standards or procedures that might amount to waivers. See Carter's 1979 Environmental Message, *supra* note 148, at 1669-79; Remarks on Second Environmental Decade, Feb. 23, 1980, PUB. PAPERS-JIMMY CARTER 414, 417 (1980) (energy mobilization board). See also PUB. PAPERS-JIMMY CARTER 2085-86 (1980) (steel enhancement legislation to give more time for compliance, but based on premise of improvement and eventual elimination of pollution).

196. See Carter, *Carter and the Environment*, 207 SCIENCE 1190 (1980); Koch, *Philosophic Split Divides Candidates on Environment*, 38 CONG. Q.WEEKLY REP. 3161 (1980); L. CANNON, REAGAN 289-90 (1982).

197. Political scientists have noted that "Reagan's changes in environmental policy, whether good or bad, had discredited those who believed that the American Presidency had become a powerless relic." TIME, Oct. 3, 1983, at 17.

198. See Newland, *A Mid-Term Appraisal—The Reagan Presidency: Limited Government and Political Administration*, 43 PUB. AD. REV. 1 (1983) (quoting President Reagan's Inaugural Address of Jan. 23, 1981).

on the free market system and decreased dependence on government intervention.<sup>199</sup> The Administration used three cardinal principles—regulatory reform, new federalism, and privatization—to return the burden of proof in environmental policy law to the earlier standard which favored growth and development.<sup>200</sup>

### A. *Development of the Reform Agenda*

The Reagan Administration achieved early successes in reforming environmental law and policy by implementing a comprehensive strategy. The strategy was composed of several elements. First, to effect a fundamental change in government policy, a leader with the right philosophic tenets must acquire the necessary position, and its attendant power. Second, the leader must have a plan, designed in advance of the assumption of power, to carry out the required changes. Finally, the leader must implement the changes and persuade the public to accept them.<sup>201</sup>

#### 1. *The Reagan Philosophy*

The Reagan Administration's philosophy of governance is premised on tenacious optimism and traditional conservative values. This philosophy presumes that the private sector, if left alone, will secure national prosperity through individual and corporate initiative. Moreover, when governmental action is required, it should ordinarily be taken at the level of government closest to the people—the states, counties, cities and towns. Federal spending should be limited to essential services, particularly national security and defense.<sup>202</sup>

199. See Buchanan, *Reagan: Working to Protect His GOP Lead*, 37 CONG. Q. WEEKLY REP. 2823, 2826 (1979).

200. While the analysis in this part of the article separates regulatory reform, new federalism, and privatization as three distinct philosophic principles, they are closely related. Some analysts include new federalism and privatization in the definition of regulatory reform as a "cluster of ideas to reduce the size and impact of government and promote development and growth." See McGrew, *Regulatory Reform Revivalists Have Impractical Agenda*, Legal Times, Oct. 10, 1983, at 10.

Thus, regulatory reform can be defined to include changing the level of government in charge of regulation. See *Staff Report, Regulatory Procedures and Public Health Issues in the EPA's Office of Pesticide Programs in Hearings Before the Subcomm. on Dep't Operations, Research and Foreign Agriculture, House Comm. on Agriculture*, 97th Cong., 2d Sess. 77, 82-83 (1983) [hereinafter cited as *House Pesticide Report*]. Similarly, regulatory reform is an integral part of the doctrine of privatization. Growth will be promoted by reductions in rules that restrict development of public lands, by turning over public lands to private parties and by limiting governmental controls of private activities on non-public lands. See Boggs, *Epilogue: What the President Can Do by Executive Order*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 1077, 1087-88 (C. Heatherly, ed. 1981).

201. See THE HERITAGE FOUNDATION, A MANDATE FOR LEADERSHIP REPORT: AGENDA '83 xiii-xvi (1983) [hereinafter cited as 1983 HERITAGE FOUNDATION REPORT].

202. Newland, *supra* note 198, at 1.

The Administration believed that the previous four decades of reliance on federal government action had been a mistake. The federal government had grown too large and too coercive. Overregulation had thwarted growth and initiative. Money had been taken away from the producers to be spent on implementation of social theories.<sup>203</sup> In short, "government [had become] not the solution to our problem; government [had become] the problem."<sup>204</sup>

While environmental protection was not initially a major concern of the President and his Administration, it was a good example of the problems of government in general.<sup>205</sup> The Administration believed that federal agencies had become the captives of an anti-growth minority, and were run by individuals selected because of their desire to regulate and who were, by their nature, opposed to private enterprise.<sup>206</sup> The Administration believed that environmental laws and regulations were cumbersome and overly stringent and illustrated that unnecessary government regulations were the chief cause of America's economic problems.<sup>207</sup> Moreover, Federal spending on environmental protection and conservation was misdirected; enforcement of environmental laws should be the responsibility of the states. The balance between development and protection should be set by the marketplace and cooperation with private enterprise, not by government control, enforcement and purchase.<sup>208</sup> In short, the Reagan Administration believed that environmental agencies, budgets, and policies needed restructuring to overcome years of antigrowth bias.<sup>209</sup>

## 2. *Developing the "Game Plan"*

With this philosophy as a base, a group of conservative political

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203. Newland, *supra* note 198, at 1; see also Hinish, *Regulatory Reform: An Overview*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 697, 698 (C. Heatherly, ed. 1981).

204. Inaugural address of President Ronald Reagan, 17 WEEKLY COMP. PRES. DOC. 2 (Jan. 26, 1981).

205. See Holder, *The Reagan Years; Environmentalists Tremble*, 210 SCIENCE 988, (1980) (environmental issues discussed in the campaign not for their own sake but in the context of the need to cut back federal regulations); Hinish, *supra* note 203, at 702-03 (EPA as "target of opportunity"). See also L. CANNON, *supra* note 196, at 351.

206. REPUBLICAN NATIONAL COMMITTEE, 1980 REPUBLICAN NATIONAL CONVENTION PLATFORM 17 (1980) [hereinafter cited as 1980 REPUBLICAN PLATFORM]. See S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 85. The belief was that President Carter gave "plum jobs" to leaders of the environmental movement who were really "environmental extremists." Holder, *supra* note 205, at 988.

207. Koch, *supra* note 196, at 3162.

208. See 1980 REPUBLICAN PLATFORM, *supra* note 206, at 25-27. See also REPUBLICAN NATIONAL COMMITTEE, TALKING POINTS: TAKING CARE OF THE ENVIRONMENT 1, 3 (1983).

209. See, e.g., Twomey, *The Rape of the West*, INQUIRER MAGAZINE, Oct. 9, 1983, at 21, 23 (former Secretary Watt on the Department of the Interior). See also S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 39.

leaders and scholars began a systematic study of the federal government in the fall of 1979.<sup>210</sup> The analysis was to be ready when President Reagan took office and used quickly to set the "conservative agenda" for the new government. Task forces were established to discuss the personnel, budget and policies of each department and agency. Other groups were to look at government-wide issues.<sup>211</sup> The result was a "game plan" for implementing a conservative philosophy.<sup>212</sup>

The planning groups made specific recommendations to achieve the goal of reversing government policy; these recommendations were especially dramatic in environmental areas.<sup>213</sup> First, the key to success was the selection of personnel who supported limited government and a shift in the balance to favor use, instead of protection or control.<sup>214</sup> Second, the budgets of the environmental agencies had to be sharply reduced. Less money would be made available to draft and enforce controls and fewer funds would be available to take land use decisions away from private interests.<sup>215</sup> Third, an immediate halt to new regulatory controls was required. This moratorium would allow newly devised machinery to be established to formally shift the burden or balance.<sup>216</sup> Finally, the power of the federal government would be reduced by relinquishing responsibility for environmental policy and decision-making to the states, and by reducing the restrictions on how states could spend federal grants. The delegation of authority to the states would also help secure the policy goals of reducing the number of federal personnel and their budgetary expense. Unrestricted block grants would similarly aid in reducing federal personnel and agency budgets. There would be less need for monitoring state activities to ensure compliance with federal guidelines, and the overall amount of funding to states could be reduced in return for the freedom given to

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210. MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION vii, ix (C. Heatherly, ed. 1981). See also *id.* at v-vi.

211. See, e.g., Hinish, *supra* note 203, at 697; *Roundtable Discussion of the Role of the White House in Regulatory Policy-making*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 829 (C. Heatherly, ed. 1981).

212. HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP, SUMMARY REPORT 1 (1980) [hereinafter cited at 1980 HERITAGE FOUNDATION SUMMARY REPORT].

213. The Environmental Protection Agency "was pulled out of [a more general] planning group in mid-stream and established as an independent team with over fifty participants . . ." Cordia, *The Environmental Protection Agency*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 970 (C. Heatherly, ed. 1981). Hinish, *supra* note 203, at 701.

214. Cordia, *supra* note 213, at 970; Hinish, *supra* note 203, at 701.

215. See 1980 HERITAGE FOUNDATION SUMMARY REPORT, *supra* note 212, at 1 and Rogers, *Office of Management and Budget*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 955, 960 (C. Heatherly, ed. 1981) (personnel); Terrell, *supra* note 164, at 373, 386 and 1980 HERITAGE FOUNDATION SUMMARY REPORT, *supra* at 2, 6, 7 (land use).

216. Hinish, *supra* note 203, at 699, 702.

the states to spend federal dollars as they wished.<sup>217</sup>

The goal of these detailed proposals was to prevent any reinterpretation of the election results as a victory for pragmatism over ideology. Ideology would be important in the new government in order to effect "substantive changes in the direction of government."<sup>218</sup> In the context of environmental law and policy, the previous policy of "erring on the side of caution" would be changed. The new Administration intended to "err on the side of . . . use as against preservation."<sup>219</sup>

### 3. *Implementing the Reforms*

The Reagan Administration hit the ground running.<sup>220</sup> New reduced budgets and personnel levels were proposed and to a large extent enacted by Congress, and officials sympathetic to the Administration's philosophy were selected to implement the new policies.<sup>221</sup> An executive order was issued to impose regulatory reform on all agencies. In this executive order, the President gave the Office of Management and Budget increased power to control and limit new regulatory proposals and placed an immediate moratorium on all new regulations.<sup>222</sup> Finally, the new Administration reorganized government at the highest levels. All major agency decisions would be scrutinized through reviews by new Cabinet councils.<sup>223</sup>

These reforms and their initial success had a direct impact on environmental policy law. The budget cuts to all environmental agencies were severe. The bureaucracy's ability to promulgate and enforce regulations was sharply reduced.<sup>224</sup> Moreover, many regulatory programs

217. Cordia, *supra* note 213, at 972 (EPA); Terrell, *supra* note 164, at 346 (Department of Interior); See Hinish, *supra* note 203, at 699.

218. MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION at vii (C. Heatherly, ed. 1981).

219. Twomey, *supra* note 209, at 23 (quoting former Interior Secretary Watt).

220. See Pfiffner, *The Carter-Reagan Transition: Hitting the Ground Running*, 13 PRESIDENTIAL STUDIES Q. 623, 626 (1983).

221. See *id.* at 629-31 (budget cuts), 646 (lower personnel ceilings); Newland, *supra* note 198, at 3 (selection of officials based on ideology).

222. See Exec. Order No. 12,291, 3 C.F.R. 127 (1982). See Raven-Hansen, *Making Agencies Follow Orders: Judicial Review of Agency Violations of Order 12,291*, 1983 DUKE L.J. 285.

223. Newland, *supra* note 198, at 6-8. One such Cabinet council was on National Resources and the Environment and was chaired by Secretary of the Interior Watt. *Id.* at 6. (1982).

224. The Administration sought both to balance the budget and to increase spending for defense and national security purposes. Thus, increased military spending was to be balanced by massive cuts in all domestic programs, especially social welfare and environmental protection. Granat, *Defense Leads Rise in U.S. Research Budget*, 41 CONG. Q. WEEKLY REP. 300 (1983); cf. *Environmental Budget is Down Almost One-Fourth from Carter's Last Year*, 40 CONG. Q. WEEKLY REP. 269 (1982).

The President proposed two 12 percent reductions in EPA's fiscal year 1982 budget. Congress approved a total 15 percent cut. For fiscal year 1983, the President recommended

were increasingly turned over to the states, but without increased federal funding to support those programs.<sup>225</sup> Funding also was reduced for research, monitoring, and assessment, while the private sector was given authority to analyze environmental problems and develop their own remedies.<sup>226</sup> Less money was made available to purchase park and wilderness lands and leasing of federal lands to private interests was increased.<sup>227</sup>

Despite these deep budget and personnel cuts, the Administration had yet to achieve its ideological goals for environmental law and policy. In order to effect longer term policy changes, administrators sharing the reform philosophy<sup>228</sup> were directed to develop new agency budgets.<sup>229</sup>

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an additional 17 percent cut. Congress did not approve this cut and in fact increased EPA's budget. See 1982 GAO EPA REPORT, *supra* note 189, at 1; GENERAL ACCOUNTING OFFICE, WASTEWATER DISCHARGERS ARE NOT COMPLYING WITH EPA POLLUTION CONTROL PERMITS 3 (1984) [hereinafter cited as GAO WASTEWATER]. For charts comparing proposed and appropriated budgets for fiscal year 1981, 1982 and 1983, see 1982 GAO EPA REPORT, *supra* at 52 and 129 CONG. REC. S7306-7307 (daily ed. May 24, 1983). EPA reduced its full-time personnel ceiling from 11,063 in 1981 to 8645 for fiscal year 1983. 1982 GAO EPA REPORT, *supra* at 4. For a chart showing the steady decrease in EPA's personnel, see *id.* at 34.

Other federal departments and agencies concerned with conservation have also fallen victim to budget and personnel slashes. See, e.g. OFFICE OF MANAGEMENT AND BUDGET, APPENDIX TO THE BUDGET FOR FISCAL YEAR 1983 at I-M1 to M-88 (Department of Interior); H.R. REP. NO. 135, 98th Cong., 1st Sess. 3 (1983) (NOAA Authorization), CONSERVATION LETTER, *supra* note 164, at 2 (CEQ).

225. See Futrell, *supra* note 15, at 41. According to the National Governors' Association, the \$233.1 billion which the federal government granted to the states to help them run their environmental programs in fiscal year 1983 covered only one-half of the cost of these programs. See Davis, *EPA, States Differ in Views on Environmental Federalism*, 40 CONG. Q. WEEKLY REP. 2915 (1983).

226. See 129 CONG. REC. S7128 (daily ed. May 19, 1983) (Sen. Robert Stafford, R-Vt.); 129 CONG. REC. S6807 (daily ed. May 17, 1983) (Senator Patrick Moynihan, D-N.Y.); Costle, *supra* note 91, at 422 (EPA's research budget); N.Y. Times, June 24, 1983, at 8, cols. 1-2 (enforcement budget).

227. See Pomerance and Turner, *The Reagan Administration and the Environment*, 111 USA Today, July 1982, at 41, 42 (purchase); Mosher, *Despite Setbacks, Watt is Succeeding in Opening Up Public Lands For Energy*, 15 NAT'L J. 1230, 1231-32 (weekly ed. 1983) (leasing).

228. Many top positions in the environmental agencies went to individuals who had worked for, or with, businesses which they would be regulating. Pomerance and Turner, *supra* note 227, at 42; 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 413; L. CANNON, *supra* note 196, at 361. New agency heads accepted budget reductions and in many cases proposed reductions beyond those required by the White House. See Dedera, *Let's Visit Anne Gorsuch of the EPA*, EXXON USA, Third Quarter 1982, at 14. 1982 GAO EPA REPORT *supra* note 189, at 1.

229. For example, in a speech to National Park concessionaires on March 28, 1981, then Secretary of the Interior James Watt stated the Administration's goal: "We will use the budget system to be the excuse to make major policy decisions." 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 33; see Costle, *supra* note 91, at 422.

*B. Setting and Applying the Standards—"Regulatory Reform"*

Regulatory reform has been a consistent theme of presidential public policy since the late 1960's. However, this theme was not effectively implemented to secure significant changes in federal government decision-making and environmental policy law until 1981. Presidents Nixon, Ford and Carter all sought to eliminate overregulation, lessen the inflationary impact of regulations, and assert some centralized control over agency promulgation of regulations.<sup>230</sup> Of course, each President appointed officials who shared his view on regulatory matters. In addition, each President adopted mechanisms to guide such officials, to coordinate their activities, and to force them to increase their consideration of the economic consequences of regulatory actions. These mechanisms were established by presidential policy directives to the federal bureaucracy — executive orders.<sup>231</sup> However, until the Reagan Administration, executive orders were carefully circumscribed to avoid claims of undue White House interference with the regulatory process and to secure Congressional support for the exercise of White House control over the implementation of legislative directives and policies.<sup>232</sup> During the environmental era, these "regulatory reform" executive orders had little substantive impact on the increasingly pro-environment balance.<sup>233</sup>

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230. See Raven-Hansen, *supra* note 222, at 291-92. See, e.g., Carter's 1979 Environmental Message, *supra* note 148, at 1672.

231. See Raven-Hansen, *supra* note 222, at 286, 292. President Nixon established a "Quality of Life" review program in 1971, which provided for interagency review, under the auspices of the Office of Management and Budget, of regulations, standards, and guidelines concerning environmental quality, consumer protection, and occupational and public health and safety. See C. LUDLUM, THE REAGAN REGULATORY PROGRAM IN CONTEXT 5-17 (Alliance for Justice Report 1981). In 1974, President Ford issued Exec. Order No. 11,821, 39 Fed. Reg. 41,501, to require analysis of the inflationary impact of all major legislative proposals, regulations, and rules. In 1976, this was revised, via Exec. Order No. 11,949, 42 Fed. Reg. 1017, to require the filing of an "economic impact statement." See C. LUDLUM, *supra* at 17-24; Shanley, *supra* note 82, at 411. On March 23, 1978, President Carter issued Exec. Order No. 12,044, 45 Fed. Reg. 44,249, which provided for publication of a semi-annual agenda of regulations, preparation of a regulatory impact analysis and for agency review of issues and alternatives. See C. LUDLUM, *supra* at 24-26, 42-44; Shanley, *supra* at 412.

232. See C. LUDLUM, *supra* note 231, at 9 (citing a National Academy of Science study on "Decision Making in the Environmental Protection Agency" during the Nixon and Ford Administrations), 25 (Carter Administration), 33 (need for Congressional support). Congress was particularly wary of the application of regulatory review mechanisms to environmental law and executive officials were careful to deny any intent to reduce environmental protection through such reviews. For example, in February of 1972, the Senate Public Works Committee held hearings about contentions that OMB had significantly delayed EPA implementation of the Clean Air Act. EPA Administrator Ruckelshaus vehemently denied any OMB interference. See *id.* at 12-14 (Nixon Administration). See also *id.* at 20-22 (Ford Administration), 33-35, 37, 42-44 (Carter Administration).

233. Regulatory reform was to be conducted in a way that was not to "weaken our commitment to environmental quality." Carter's 1979 Environmental Message, *supra* note 148, at 1672.

Like previous Presidents, President Reagan adopted the regulatory reform theme as part of his public policy. In fact, regulatory reform became a battle cry for his Administration: America faced a crisis of overregulation<sup>234</sup> and action had to be taken quickly to deregulate the American economy. Acting on recommendations made prior to his inauguration, the President selected agency officials sympathetic to his policies for reducing government interference in private enterprise.<sup>235</sup> Next, the President accepted a recommendation to tailor the process used by previous Administrations — executive orders — to secure not just reform but also immediate regulatory relief.<sup>236</sup> President Reagan placed a moratorium on the implementation of pending regulations and on the promulgation of any new ones. This moratorium allowed a newly established Task Force on Regulatory Relief to review and assess affected regulations and then modify or eliminate any that were inconsistent with the goal of reducing overregulation.<sup>237</sup> Environmental regulations were prominent on the list of those to be temporarily stopped, reviewed, and then changed or dropped.<sup>238</sup>

President Reagan next issued a comprehensive and more effective regulatory reform in Executive Order No. 12,291. This executive order,

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234. Hinish, *supra* note 203, at 697; 1980 REPUBLICAN PLATFORM, *supra* note 206, at 19; See also 38 CONG. Q. WEEKLY REP. 2030, 2041 (July 19, 1980).

235. See England, *Regulatory Reform*, in 1983 HERITAGE FOUNDATION REPORT, *supra* note 201, at 307-08.

236. The recommendation for an immediate executive order for regulatory reform came from the Heritage Foundation and the Republican Platform. See Hinish, *supra* note 203, at 702; Cordia, *supra* note 213, at 1027-29; Boggs, *supra* note 200, at 1077; 1980 REPUBLICAN PLATFORM, *supra* note 206, at 19. The changes made by Exec. Order No. 12,291 have been termed just short of being unprecedented, C. LUDLUM, *supra* note 231, at 58, and "the most comprehensive overhaul of the regulatory process in the history of the republic." Tolchin and Tolchin, *The Rush to Deregulate*, N.Y. TIMES MAGAZINE, Aug. 21, 1983, at 34. One critic distinguishes President Reagan's order from previous ones by stating that previous Administrations sought regulatory reform while the Reagan Administration really only sought regulatory relief. "It does not seek to make regulations better but only to make regulations fewer." Costle, *supra* note 91, at 410-11, 417. Even those who argue that the new initiative is not a fundamental attack on regulation but rather only a change of direction and degree concede that it has caused a major shift in environmental policy. Epstein, *The Principles of Environmental Protection: The Case Study of Superfund*, 2 CATO. J. 9 (1982).

237. Newland, *supra* note 198, at 12; Tolchin and Tolchin, *supra* note 236, at 36; 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 36, 406. The Task Force stressed four principles to guide its review: (1) use of market incentives; (2) reduction of burden on state and local government; (3) modification of regulations where social costs exceeded benefits; and (4) streamlining of regulatory procedures. See Newland, *supra* at 12.

238. One hundred and seventy-two pending regulations were postponed. After two months of review, thirty were further postponed for reconsideration. Environmental regulations were prominent on the list, including rules on hazardous waste, pre-treatment of wastewater discharges, and surface mining. Similarly, proposed environmental regulations were the subject of special task force consideration. By November of 1981, most of the regulations listed in EPA's 1981 regulatory agenda were delayed and reconsidered or stopped. 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 407.

like its predecessors, contains reporting and managerial provisions.<sup>239</sup> However, unlike its predecessors, it makes substantive changes. The executive order authorizes the Office of Management and Budget to review rules and mandate changes in the event that discretion is not properly exercised at the agency level.<sup>240</sup> Before promulgating a rule, each agency must consider not merely the economic consequences of its action, but must also make cost-benefit and risk analyses. A regulation or regulatory alternative may be adopted only if it is cost-effective and responds to a demonstrated need.<sup>241</sup>

The new regulatory policy and executive order have had a substantial impact on the environmental burden of proof. First, discretion is exercised against protective regulation. Second, any environmental regulation must be based on demonstrated benefits that outweigh costs. Finally, where the issue is one of only potential harm, regulatory action is allowed only where the probability of the risk outweighs the benefits of government non-interference in private activities.

### 1. *The Exercise of Discretion*

An assumption of the environmental era was that sensitive regulators would implement protection goals set out in statutes and the courts would uphold grants of discretion to the executive. As long as administrators took a hard look at the alternatives and consequences, the courts would take a soft glance at their policy judgments. Judges would not substitute their judgment for that of the agency decision-maker.<sup>242</sup>

During the late 1960's and the 1970's, government officials were sympathetic to the policy of environmental protection. This placed the burden of proof on those opposing controls or promoting development; they had to convince regulators not to restrict development or protect a resource. Once the regulator chose the more environmentally sensitive alternative, those promoting development or opposing regulation had an even higher burden to secure reversal of the decision in court.<sup>243</sup>

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239. Exec. Order No. 12,291, *supra* note 222. The procedural framework for the order was the requirement that every federal agency prepare a "Regulatory Impact Analysis" (RIA) of "major rules" to be submitted to the Office of Management and Budget, which would then evaluate the value of the proposals using a cost-benefit analysis system. Other provisions called for an agenda of proposed regulations, *Id.* (§ 5); an agency finding that the proposed rule is within its delegated authority. *Id.* (§ 4); and OMB monitoring of compliance *Id.* (§ 6(a)(8)). See Raven-Hansen, *supra* note 222, at 292-93.

240. See C. LUDLUM, *supra* note 93, at 8, 11. Under previous Administrations, the power of the White House under its regulatory reform executive orders was limited. While there was a centralized review, usually by the Office of Management and Budget, the power over agencies was essentially hortatory. See Raven-Hansen, *supra* note 222, at 344.

241. Cost-consciousness was the standard established under prior regulatory reform executive orders. Raven-Hansen, *supra* note 222, at 293. See Costle, *supra* note 91, at 418.

242. See *supra* notes 72-90, and accompanying text.

243. See, e.g., NEWSWEEK, Sept. 12, 1983, at 11 (former Secretary of Interior Andrus

However, the need for discretionary authority meant that less environmentally sensitive regulators could choose weaker controls or fewer restrictions.<sup>244</sup>

The Reagan Administration was aware of this power to shift the burden of proof by changes in regulatory decision-making. Prior governments, it stressed, had presumed that development and growth were hazardous "unless proved otherwise in advance."<sup>245</sup> The Administration believed that "elitists" had shifted the balance too far in favor of protection.<sup>246</sup> The exercise of discretionary decision-making had to change in order to "move [the environmental pendulum] back."<sup>247</sup> To achieve this goal the President first selected agency officials who shared his ideology. As an added safeguard, the Office of Management and Budget was to review the exercise of discretion by agency officials and, if necessary, reverse it. Finally, in establishing and enforcing standards for government action, the decision-maker was to select the alternative least burdensome to those regulated.

*a. Selection of the Regulators*

The two most significant environmental officials in the federal bureaucracy are the EPA Administrator and the Secretary of the Interior. The EPA Administrator is responsible for the implementation of laws pertaining to clean air, clean water, toxic substances and hazardous wastes. The Interior Secretary is responsible for implementation of most laws and policies dealing with the management of public lands, leasing of mineral resources, and conservation of park, wilderness, and fish and wildlife resources. The exercise of discretion by these officials in favor of the new ideology was essential. So, to fill these posts the President carefully selected individuals committed to his philosophic doctrines.

EPA Administrator Gorsuch,<sup>248</sup> had revealed her philosophy against government regulatory interference in private sector activities as a legislator in Colorado. She saw her responsibility at EPA as play-

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states he took job to implement policy of protection). *See also* Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 656 (1980) (the Occupational Safety and Health Administration free to interpret data on the side of overprotection, rather than underprotection).

244. *See* Costle, *supra* note 91, at 419.

245. *See* Book Review, REGULATION, March-April 1983, at 9 (quoting W. TUCKER, PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM (1983)).

246. *See* R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 119 (quoting President Reagan in a 1981 speech); L. CANNON, *supra* note 196, at 287-90 (statements by candidate Reagan).

247. BURSON-MARSTELLER, *supra* note 1, at 18 (Secretary Watt).

248. Ms. Gorsuch became Mrs. Burford near the end of her term as Administrator. This article will refer to her as Ms. Gorsuch. EPA Administrator Gorsuch was replaced in May of 1983 by William D. Ruckelshaus. 41 CONG. Q. WEEKLY REP. 1005 (1983).

ing a "key role . . . in regulatory reform" and "delegating the implementation of [EPA's] programs and rules to the states, then stepping back and letting them do the job."<sup>249</sup> To ensure that these policies were carried out, she selected assistants sharing her anti-regulation ideology, often from the companies to be regulated or from their law firms.<sup>250</sup>

These EPA officials exercised their discretion by placing a higher burden of proof on those desiring regulatory controls and seeking action against polluters. For example, they interpreted statutes as granting discretion not to regulate pollutants, and established new procedures to permit exceptions to or variances from regulatory standards.<sup>251</sup> These EPA officials delayed implementation of new programs,<sup>252</sup> lessened requirements for permit applications,<sup>253</sup> and proposed statutory amendments to reduce environmental safeguards.<sup>254</sup> The justifications were economic growth, efficiency, cost-

249. BURSON-MARSTELLER, *supra* note 1, at 16.

250. See C. REESE, DEREGULATION AND ENVIRONMENTAL QUALITY 299 (1983); Wall St. J., Apr. 21, 1983, at 1, col. 1. For example, Ms. Gorsuch's chief of staff had been the lobbyist for the American Paper Institute and then Johns-Mansville. Her general counsel and assistant administrators had also worked for, lobbied for, or been attorneys for companies regulated by EPA. See R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 211-12.

251. *Natural Resources Defense Council v. EPA*, 683 F.2d 752 (3d Cir. 1982) (deferral of regulations to implement portions of Clean Water Act). See also 46 Fed. Reg. 56,582 (1981) (definition of hazardous waste not to include mixtures of hazardous and non-hazardous substances until whole mixture fits into set categories); *Illinois v. Gorsuch*, 530 F. Supp. 340 (D.D.C. 1981) (landfills); 15 NAT'L J. at 1498-99 (weekly ed. 1983) (waiver of best available technology standard for clean water); 46 Fed. Reg. 31,411 (1981) (waiver of carbon monoxide standard for light duty vehicles).

In addition to granting individual variances and exceptions, EPA promoted increased use of the "bubble concept" in regulations implementing the Clean Air Act. The "bubble" would allow a plant to emit more pollutants in one operation if offset by a reduction in another part of the plant or elsewhere in the same facilities. 15 NAT'L J. 1995 (weekly ed. 1983). Previous Administrations had also sought to apply the bubble concept. See *ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978); *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The Carter Administration, however, had rejected application of the bubble to any area which had not attained clean air. R. STEWART AND J. KRIER, ENVIRONMENTAL LAW AND POLICY 92 (1982 Supp.). The Reagan Administration rescinded the previous regulations and adopted new regulations to allow the bubble in "non-attainment areas." *Id.*; 16 NAT. RESOURCES LAW. 2-3 (1983). This rule change was declared invalid in *Natural Resources Defense Council v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982). However, the Supreme Court reversed the Court of Appeals and upheld the new rule as a proper exercise of discretion. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778 (1984).

252. *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) (EPA sought to defer setting standards for information to be contained in permits for hazardous waste incineration and storage); 15 NAT'L J. 1532 (weekly ed. 1983) (delays in air emission standards); 129 CONG. REC. S7599-600 (daily ed. May 26, 1983) (toxic chemicals and Superfund).

253. See, e.g., 1982 CEQ REPORT, *supra* note 110, at 127, and *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802, 809 n.15 (D.C. Cir. 1983) (EPA rules on hazardous waste "more flexible" than earlier proposals). See also 15 NAT'L J. 1058 (weekly ed. 1982) (sewage treatment pollution controls).

254. See 1982 CEQ REPORT, *supra* note 110, at 74; Ward, *Clean Air Amendments: Why*

savings, and a more balanced regulatory policy.<sup>255</sup>

Secretary of the Interior James Watt was an even more committed representative of the new ideology.<sup>256</sup> After prior government service, he had established a public interest legal foundation as a "counter force" to the environmentalists. He intended to continue that fight as Secretary of the Interior.<sup>257</sup> In Secretary Watt's view, the Interior Department's mandate to manage public lands was to be used to promote growth. The government had moved too far away from growth policies and into a drift toward socialism. Natural resources should be exploited and the new Interior Secretary's responsibility was to allow development to occur.<sup>258</sup>

Like Administrator Gorsuch, Secretary Watt chose assistants who shared his pro-growth, anti-preservation philosophy. They came from businesses and trade groups or from other positions indicating a commitment to deregulation and growth.<sup>259</sup> They exercised discretion to block environmental extremists who sought to seal off public lands from development or restrict private enterprise.<sup>260</sup>

#### *b. Overseeing the Regulators*

Even with the proper regulators in place, the Administration was

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*They Bombed*, 1 ENVTL. F., Feb. 1983 at 14-16 (clean air); 15 NAT'L J. 1497, 1499 (weekly ed. 1982) (clean water); Wall St. J., June 29, 1983 at 2, col. 3 (toxic wastes). See also 7 EPA J. Sept./Oct. 1981, at 2 (proposed extensive amendment of the Clean Air Act).

255. 1982 CEQ REPORT, *supra* note 110, at 74-76. These changes were called a "market approach to pollution control." *Id.* at 7, 74-75.

256. To many, Watt became the "embodiment of the Administration's anti-environmental policies." N.Y. Times, Oct. 16, 1983, at E-5, col. 1. Secretary Watt was replaced in October, 1983 by William P. Clark. N.Y. Times, Oct. 14, 1983, at 5, col. 1; 41 CONG. Q. WEEKLY REP. 2120 (1983).

257. R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 107-09. See, e.g. BURSON-MARSTELLER, *supra* note 1, at 18 (interview with Secretary Watt).

258. See BURSON-MARSTELLER, *supra* note 1, at 18; L. CANNON, *supra* note 196, at 357-59.

259. 41 CONG. Q. WEEKLY REP. 2122 (1983). The Undersecretary of the Department of Interior had been a member of the President's campaign team and president of an electric utilities lobbying group. He stated publicly that he believed that environmentalists sought to bring society to a halt. The Director of the Bureau of Land Management, as Speaker of the Colorado House of Representatives, opposed federal ownership of resource lands and controls over business. The new Director of the Office of Surface Mining was a former coal company executive who had condemned the Strip Mining Law he was to implement. R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 115-17, 130-33, 136-37. See also 15 NAT'L J. 2309 (weekly ed. 1983) (listing other Interior officials and their backgrounds).

260. See Coggins, *The Public Interest in Public Land Law: A Commentary on the Policies of Secretary Watt*, 4 PUB. LAND L. REV. 3, 17 (1983). The careful selection of regulators to implement the Administration's policies was, of course, not limited to EPA and Interior. For example, the new Assistant Secretary of the Department of Agriculture, responsible for the Forest Service, was a former timber company lawyer. He had long stated his opposition to Forest Service regulations and policies and believed that environmental organizations had been infiltrated by Communists and Socialists. See Pomerance and Turner, *supra* note 227, at 42; R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 185-87.

still concerned that agency officials would become co-opted by the bureaucracy.<sup>261</sup> To limit the possibility of such an occurrence, Executive Order No. 12,291 allocated extensive review powers to a regulatory task force in the Office of Management and Budget (OMB). Pursuant to this executive order, almost all pending regulations were suspended or postponed. These pending regulations and all future regulations were to be reviewed by OMB prior to their effective date. Major rules had to be accompanied by a regulatory impact analysis demonstrating that the regulation was the most cost-effective alternative, and OMB was given the power to decide what constituted a major rule. OMB had to approve the regulatory impact analysis both at the preliminary draft and final draft stages. OMB could delay the rule-making process by requesting that the agency justify its analysis. Moreover, OMB could even modify the analysis or withhold its release, thus exercising a "pocket veto" over the proposal.<sup>262</sup> Only the OMB Director could waive the procedural requirements of the executive order.<sup>263</sup>

In the environmental area, OMB forcefully exercised its power both directly and indirectly. Some regulations were suspended or postponed because of direct requests by OMB. In other cases, fear of possible OMB action led agencies to modify rules they had previously adopted.<sup>264</sup> OMB could, and did, both postpone and actively block regulations. Such regulations were placed in the "black hole" of regulatory limbo as OMB, through its review power, indefinitely postponed

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261. See Raven-Hansen, *supra* note 222, at 341. The Reagan Administration had learned from the mistakes of prior Administrations. Regulatory reform advisory groups were not sufficient. Centralized power to modify or stop regulations was essential. S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 57; Newland, *supra* note 198, at 12.

262. See S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 83-84; see also Belsky, *The Regulatory Review Process*, in CENTER FOR OCEAN MANAGEMENT STUDIES, THE UNITED STATES FISHING INDUSTRY AND REGULATORY REFORM 7-18 (1982). A key problem in OMB's power over regulatory decisions is that it often precludes adequate congressional oversight or judicial review of agency actions. Regulatory officials will often not be able to explain the rationale for decisions because OMB and not the agency made the final determination. They cannot, therefore, be held accountable for the decisions. Questioning of OMB officials, in turn, may be impossible since they can, and did, claim "executive privilege." C. LUDLUM, *supra* note 93, at 17-18.

263. Exec. Order No. 12,291, *supra* note 222, §§ 3,6,7.

264. See Raven-Hansen, *supra* note 222, at 295 n.48 (postponement), 295 (agency modifications). OMB sent back thirty-one rules to EPA for further consideration. Twenty-two of these were later withdrawn. Wash. Post, Oct. 9, 1983, at A-8, col. 3. One example of OMB control shifting the environmental balance occurred with proposed EPA regulations to implement Clean Water Act prohibitions on the dumping of toxic substances into municipal treatment plants. OMB ordered a suspension of these proposed rules. Eventually, the Third Circuit ordered a reinstatement of the regulations. See *Natural Resources Defense Council v. EPA*, 683 F.2d 752 (3d Cir. 1982). OMB power over regulatory agencies was, of course, enhanced by the fact that agencies needed OMB approval of budget requests. Agency officials feared retaliation by OMB budget officials if they failed to comply with demands of OMB's regulatory reviewers. See C. REESE, *supra* note 250, at 301; C. LUDLUM, *supra* note 93, at 11, 19.

promulgation.<sup>265</sup>

The selection of pro-growth agency heads had effectively shifted the burden of proof onto those seeking new protective regulations. The grant of supervisory authority to OMB confirmed that shift. A third aspect of the Reagan Administration's efforts to ensure that discretion was exercised in favor of development was the promotion of a new and closer relationship with those being regulated.

*c. Cooperative Regulation*

The Reagan Administration sought generally to change the nature of the federal government's relationship to those being regulated. There was a perceived need for closer ties with business and industry and for an end to the cozy relationship with anti-growth organizations. The Administration believed it was necessary to adjust the mechanisms adopted by Congress, and the policies implemented by previous Administrations, that limited government-industry cooperation and promoted citizen involvement in decision-making.

During the environmental era, Congress established various mechanisms to force federal officials to take environmental considerations into account in their decisions. For example, consultation with other federal agencies and outside groups, public hearings, and publication of comprehensive assessments of alternatives and their environmental consequences, encouraged agencies to select the most protective alternative. A special office in the White House represented environmental interests. Citizens suits were authorized to ensure that government and private parties complied with procedural and substantive mandates.<sup>266</sup>

In addition, during the environmental era the choice of administrative action was not determined just by negotiation between the regulator and the regulated. Information and advice came from environmental organizations and advisory groups, as well as industry. An agency received all views before acting. The public visibility of the entire consultation process ensured representation of the public interest.<sup>267</sup> Finally, environmental protection was assured by giving agencies increased prosecutorial powers to enforce statutory and regulatory

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265. S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 80. See also C. LUDLUM, *supra* note 93, at 8. By demands for more information, followed by technical or substantive objections, OMB can cause an agency to drop a proposal. Tolchin and Tolchin, *supra* note 236, at 38. A Congressional Research Service study of 183 rules listed in EPA's January 1981 regulatory agenda showed that in 1982 most of these were in various states of review, reconsideration or delay over a year later. See Futrell, *supra* note 15, at 40.

266. See *supra* notes 72-90 and accompanying text. Virtually identical citizen suits provisions were included in all environmental and land use statutes except the Federal Insecticide, Fungicide and Rodenticide Act. See Miller, *Private Enforcement of Federal Pollution Control Laws*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,309, 10,311 (1983).

267. *Public Participation Comment*, *supra* note 191, at 185, 188.

mandates. Administrative, injunctive, and criminal remedies were authorized.<sup>268</sup> If government failed to act, citizens could sue as "private attorneys general" to force appropriate action.<sup>269</sup>

The Reagan Administration rejected the philosophy behind these pro-protection mechanisms. The Administration believed that private industry had been harassed by overzealous regulators being pushed by environmental activists. The activists were aided by knowing in advance every action government officials contemplated. Requirements for making public disclosure of documents were a needless paperwork expense both to government and to industry. In any event, enforcement of environmental regulations had become too adversarial and technical. Industry could be relied upon to comply with reasonable requirements. Citizen opportunities to affect decisions and force sanctions could effectively hamstring efforts to secure "cooperative" regulation and enforcement.<sup>270</sup>

Changes in policies and procedures were adopted to implement this major shift in philosophy. Industry was invited to discuss specific regulations with the agencies and, if dissatisfied with the agency response, to discuss their concerns with OMB and other White House officials. Discussions would not be open to outside parties nor be publicly reported.<sup>271</sup> The increased power of OMB as a reviewing body with veto power thus gave businesses and developers a "second shot" to stop or modify a rule.<sup>272</sup>

At the same time, participation by environmentalists in agency ac-

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268. See, e.g., Statement of President Carter on signing S.1156, the Solid Waste Disposal Act of 1980, PUB. PAPERS-JIMMY CARTER 2381 (1980).

269. See Miller, *supra* note 266, at 10309-10; Macbeth, *Fees to Non-prevailing Parties Nixed Under Clean Air Act*, Legal Times, Aug. 22, 1983, at 11, col. 1. For a discussion of the general outline of these citizen suit provisions, see Miller, *supra* at 10311.

270. *Overregulation*: 1980 REPUBLICAN PLATFORM, *supra* note 206, at 19, 23, 27.

*Availability of Information and Paperwork*: 1982 CEQ REPORT, *supra* note 110, at 109; 1980 REPUBLICAN PLATFORM, *supra* at 19.

*Enforcement*. See Terrell, *supra* note 164, at 398; Cordia, *supra* note 213, at 1019-1020, 1023. See also 1980 REPUBLICAN PLATFORM, *supra* at 23, 24; T. SMITH, FEDERAL ENVIRONMENTAL STATUTES—SOME DILEMMAS FOR THE REGULATED 11-12, 19-20 (1978); Dederer, *supra* note 228, at 14.

*Citizen Participation*: Hammond, *The Department of Justice*, in MANDATE FOR LEADERSHIP: POLICY MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 440-41 (C. Heatherly, ed. 1981) (previous Administration did not raise standing question and entered into stipulated judgments and sweetheart litigation).

271. See C. REESE, *supra* note 250, at 300; C. LUDLUM, *supra* note 93, at 31-33 (OMB pre-clearance process precludes public review of agency decision), 40-41 (OMB's negotiations with lobbyist out of public view). See, e.g., 15 NAT'L J. 1155 (weekly ed. 1983) (toxic substances—advance notice of regulations given to industry); N.Y. Times, Jan. 31, 1984, at A-19, cols. 1-5 (private meetings with industry on proposed ban of pesticide ethylene dibromide; decision made not to go forward with proposal); HAZARDOUS WASTE IN AMERICA, *supra* note 150, at 252. The Administration's philosophy was that informal contacts "helped make deregulation work." Wall St. J., June 6, 1983, at 24, col. 7.

272. Costle *supra*, note 91, at 422. See also C. LUDLUM, *supra* note 93, at 51.

tivities was curtailed. The size and influence of the Council on Environmental Quality was reduced and its purpose actually changed from representation of environmental interests in administrative decision-making, to defense of that decision-making against attack by environmentalists.<sup>273</sup> Similarly, environmentalist participation was limited in agency rule-making<sup>274</sup> and in advisory groups.<sup>275</sup>

Finally, enforcement activities were reduced drastically. Budgets and personnel for enforcement were cut.<sup>276</sup> Enforcement actions were fewer in number and scope.<sup>277</sup> Sanctions or orders were based on informal settlement and "cooperative consultation."<sup>278</sup> To discourage

273. See R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 193. Compare 1982 CEQ REPORT, *supra* note 110, with COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT (1980). See also *Carter CEQ Farewell*, *supra* note 185.

274. One example of the procedure adopted to reduce environmentalist involvement in agency actions is the changes made to exclude or narrow environmental reviews of agency activity through the NEPA process. See "Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34,263 (July 28, 1983), 36,486 (Aug. 11, 1983). Compare 40 C.F.R. § 1508.4 (1983) with 48 Fed. Reg. 34,264-65 (1983) (categorical exclusions); 40 C.F.R. § 1502.14 (1983) with 48 Fed. Reg. 34,267-68 (1983) (narrowing of alternatives); 40 C.F.R. § 1508.23 (1983) with 48 Fed. Reg. 34,267-68 (1983) (definition of "proposal"). Another example is the elimination of payment to public interest groups to participate in agency procedures. 129 CONG. REC. E2358 (daily ed. May 18, 1983) (Congressman Larry McDonald, quoting article in *Conservative Digest*). See, e.g., *House Pesticide Report*, *supra* note 200, at 282.

275. See Futrell, *supra* note 15, at 41; 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 404-05; FRIENDS OF THE EARTH, RONALD REAGAN AND THE AMERICAN ENVIRONMENT 33 (1982). See, e.g., 41 CONG. Q. WEEKLY REP. 670 (1983) (selection of representatives to Interior Department's Scientific Advisory Committee; Secretary Watt dissatisfied with advice of previous group and wanted new members who would be approved by Republican National Committee); 15 NAT'L J. 2308-09 (weekly ed. 1983) (another Interior Department Advisory Board); H.R. REP. NO. 212, 98 Cong., 1st Sess. 27 (1983) (EPA Science Advisory Board; Committee concerned that terms of members reduced because of environmental views and prospective appointments examined for political ideology); GENERAL ACCOUNTING OFFICE, DELAYS IN EPA'S REGULATIONS OF HAZARDOUS AIR POLLUTANTS 30-31 (1984) (EPA Advisory Committee on Hazardous Air Pollutants) [hereinafter cited as GAO HAZARDOUS AIR POLLUTANTS].

276. See *House Pesticide Report*, *supra* note 200, at 91, 270; Tolchin and Tolchin, *supra* note 236, at 72 (strip mining); 41 CONG. Q. WEEKLY REP. 1204 (1983) (quoting Senator Patrick Leahy, D-Vt. on EPA generally). Congress, concerned with these cuts, has specifically directed that more money be spent for enforcement. See H.R. REP. NO. 264, 98th Cong., 1st Sess. (1983), reprinted in 129 CONG. REC. H3472-76 (daily ed. June 2, 1983); 129 CONG. REC. S8822 (daily ed. June 21, 1983).

277. See Tolchin and Tolchin, *supra* note 236, at 72; 129 CONG. REC. S8822 (daily ed. June 21, 1983); *Legal Times*, Aug. 15, 1983, at 2, cols. 1-4; Futrell, *supra* note 15, at 41. See, e.g., 15 NAT'L J. 2306, 2309 (weekly ed. 1983) (reporting a case where a court criticized the Interior Department for not carrying out an earlier court enforcement order); HAZARDOUS WASTE IN AMERICA, *supra* note 150, at xi-xii (Preface by Senator Albert Gore, Jr., D-Tenn.); GAO WASTEWATER, *supra* note 224, at 24-25.

Concerned with agency enforcement activities, Congress is not only ordering more money to be spent, but also is making a review of enforcement in selected programs. H.R. REP. NO. 223, 98th Cong., 1st Sess. 8-9 (1983) (Appropriations Committee Report — study of Superfund enforcement).

278. See, e.g., *Wall St. J.*, Nov. 10, 1983, at 12, col. 4 (toxic substances labelling). See also *House Pesticide Report*, *supra* note 200, at 280-81; 1982 CEQ REPORT, *supra* note 110, at

citizen suits, the Administration opposed the awarding of attorney's fees to environmental litigants.<sup>279</sup>

The Reagan Administration's support for cooperative regulation meant that discretion was to be exercised in favor of those being regulated. New laws were sought and older laws interpreted to require a high level of proof before environmentally protective rules and orders would be adopted. At the same time, two other new requirements further restricted the application of existing statutory mandates. Specifically, each proposed control had to survive a strict cost-benefit test and had to be justified by substantial evidence of necessity.

## 2. *Cost-Benefit Analysis*

During the environmental era, Congress passed some statutes that explicitly precluded consideration of costs in setting regulatory controls and enacted others that were silent on whether a cost-benefit weighing was permitted or required. In both situations, a strict cost-benefit test was interpreted as being legislatively precluded.<sup>280</sup> Most statutes, however, did allow costs to be "taken into account" in regulatory decision-making. Under such a "cost-conscious" standard, an agency could give a general overview of costs and then explain why, despite these costs, the regulation was necessary.<sup>281</sup> Similarly, executive orders promulgated during the 1970's sought to have agencies consider the inflationary or economic impact of new rules, but required only a generalized statement of cost-effectiveness. Agencies interpreted the statutes and executive orders to allow the exercise of discretion in favor of environmental controls. This balance in favor of protection was also used in any higher review by the executive branch. The burden was on OMB or other White House officials to show that any regulation was not cost-

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102 (issue of pesticide use resolved through "effective negotiations" with the registrants involved); GAO WASTEWATER, *supra* note 224, at 25 (policy memorandum telling EPA enforcement officers to avoid confrontational attitude, and to deal with the regulated community on a presumption of good faith and an assumption of voluntary compliance).

279. See *Environmental Defense Fund v. EPA*, 716 F.2d 915 (D.C. Cir. 1983) (EPA claim that attorney's fees not be granted was rejected). Recently the United States Supreme Court upheld the Administration position that attorneys fees should only be given if "some success on the merits" is achieved. *Ruckelshaus v. Sierra Club*, 103 S.Ct. 3274, 3276 (1983). Before this case, many courts had awarded attorneys fees even if the environmental organization had not prevailed, so long as the suit furthered the policies of the statute. *Ruckelshaus* set limits so that the organization would have to prevail on at least some issue. Macbeth, *Fees to Non-Prevailing Parties Nixed Under Clean Air Act*, Legal Times, Aug. 22, 1983, at 11, col. 3.

280. See *American Textile Mfg. Inst. v. Donovan*, 452 U.S. 490, 508-12 (1981). See also C. LUDLUM, *supra* note 93, at 58.

281. See *supra* notes 91-99 and accompanying text. Congress was reluctant to allow agencies to use a strict cost-benefit test to negate the balancing that Congress performed when it enacted the statutes. Baum, *Legislating Cost-Benefit Analysis: The Federal Water Pollution Control Act Experience*, 9 COLUM. J. ENVTL. L. 75, 110-11 (1983).

effective and that it could be modified.<sup>282</sup>

The assumption behind this legislative and administrative rejection of a strict cost-benefit test was that flexibility in an analysis is required because of the inherent bias in favor of overestimating costs and underestimating benefits. Costs are easily determined from the information of an affected party, but benefits from environmental controls are generally collective to society as a whole. Therefore, there is usually no identifiable party to calculate the specific benefits to himself or herself.<sup>283</sup> In addition, cost-conscious regulation involves consideration of factors which are extremely difficult to quantify, such as non-economic aesthetic values and the benefits of avoiding future harm.<sup>284</sup> Finally, a cost-conscious policy may, in fact, seek to have society pay for future environmental damage by forcing the costs of pollution to be "internalized" in the market price today.<sup>285</sup>

The Reagan Administration rejected a cost-conscious regulatory policy, and in Executive Order No. 12,291 established a strict requirement that all regulations be cost-effective. As a general rule, no significant regulatory action may be taken unless "the potential benefits to society for the regulation outweigh the potential costs to society." If a regulation is to be promulgated, the alternative which involves the "least net cost" to society must be selected. In addition, the agency must maximize "the net aggregate benefits to society" in establishing overall regulatory objectives and priorities.<sup>286</sup>

Executive Order No. 12,291 also requires that each major rule<sup>287</sup> be accompanied by a Regulatory Impact Analysis (RIA), describing in as much detail as possible a rule's potential benefits and costs, and identifying those who would receive the benefits or bear the costs. All alternative approaches that would achieve the regulatory goal at a lower cost must be described, and the legal reasons given for rejection

282. See S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 44-55; Liroff, *Federal Experience: Cost-Benefit Analysis in Federal Environmental Programs*, in COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATIONS 35, 36-38 (1982). See also Baum, *supra* note 281, at 90-98 (EPA interpretation and implementation of Federal Water Pollution Control Act).

283. C. REESE, *supra* note 250, at 31-34. Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1410-14 (1981) (consideration of collective benefits and cost-benefit analysis).

284. See Swartzman, *Cost-Benefit Analysis in Environmental Regulation: Sources of the Controversy in Environmental Cost-Benefit Analysis*, in COST BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATIONS 53, 72 (1982) (aesthetics); Carter *CEQ Farewell*, *supra* note 185, at 39-40 (avoidance of future harm as "costs" of non-regulation).

285. Carter *CEQ Farewell*, *supra* note 185, at 40; Costle, *supra* note 91, at 412.

286. Executive Order No. 12,291, *supra* note 222, § 2.

287. Certain categories of rules were declared "major" by the executive order. In other cases, OMB can declare any rule, even of marginal economic impact, but of significant social or political effect, to be major. Finally, even if a rule is not designated major, a preliminary analysis, involving cost-benefit review, is required. See C. LUDLUM, *supra* note 93, at 8, 10, 63.

of any alternative. If any costs or benefits cannot be quantified in monetary terms, an evaluative description is required.<sup>288</sup>

Thus, Executive Order No. 12,291 mandates not merely a general assessment of costs as against benefits, but a specific and detailed evaluation. Where statutes allow costs to be taken into account in regulatory decision-making, the executive order converts this cost-conscious standard into a strict cost benefit test. Except where there are explicit statutory restrictions, no significant regulation can be promulgated unless the costs outweigh the benefits. If a regulation is to be adopted, the least costly alternative is to be selected.<sup>289</sup>

Executive Order No. 12,291 requires the agency to balance all regulatory alternatives, and therefore makes the final result dependent on the information and financial resources available to those opposing and those proposing regulatory controls. As such, the executive order shifts the balance of regulatory decision-making against controls.<sup>290</sup> Information on costs will always be available. A company describes the new equipment, new personnel, or time required to meet the regulatory standard, and suggests alternatives that would be more favorable to it and cheaper. The expense of such an analysis is merely a cost of doing business and usually cheaper than selection of a more stringent rule.

Information on benefits, however, will not always be available. Obviously, the regulated company will not be the most trustworthy source of such evidence.<sup>291</sup> Thus, the agency must usually rely on its own calculations or perhaps the calculations of interested citizens.<sup>292</sup> In times of budget reductions, agencies have been reluctant to make such expenditures.<sup>293</sup> Moreover, with the decreased financing of citizen participation and more secret cooperation with regulated companies, the ability of citizen group's to provide information is reduced.<sup>294</sup> Finally, as described earlier, many benefits are not quantifiable, are col-

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288. Exec. Order No. 12,291, *supra* note 222, § 3(d).

289. *Id.* at § 2.

290. See *Carter CEQ Farewell*, *supra* note 185, at 41; Rodgers, *Benefits, Costs, and Risks*, *supra* note 85, at 196.

291. W. RODGERS, *supra* note 23, at 746; Rodgers, *Benefits, Costs and Risks*, *supra* note 85, at 194-95; White, *supra* note 65, at 185. See also Roberts, *Benefit-Cost Analysis: Its Use (Misuse) in Evaluating Water Resources Projects*, 14 AM. BUS. L. J. 73, 74-83 (1976). S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 140.

292. See Costle, *supra* note 91, at 415. But see 1982 CEQ REPORT, *supra* note 110, at 127 (EPA uses questionnaires mailed to those being regulated, here hazardous waste generators, transporters, and facilities to estimate costs).

293. See C. LUDLUM, *supra* note 93, at 8-9 (additional agency resources needed to comply with cost-benefit regulatory impact analysis requirements). See also *supra* note 224, and accompanying text (budget cuts at environmental agencies).

294. See *supra* notes 274-75, 278-79 and accompanying text (reduction in payments for citizen participation); S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 138 (resources of private environmental groups).

lective in nature, or are non-economic.<sup>295</sup> Thus a statement of benefits often means generalized assertions about the need for protection or the risks to present and future health, which are viewed as ivory-tower elitism and discounted.<sup>296</sup>

Balancing evidence of explicit costs against undocumented or unquantifiable benefits leads to the inevitable selection of no new regulation or the least restrictive regulatory alternative.<sup>297</sup> Using such a balancing process, even an environmentally sensitive public official would be faced with these choices; where officials are already biased against more controls, the burden of securing protections tends to be almost insurmountable.<sup>298</sup>

The Reagan Administration even applies a cost-benefit philosophy when statutory provisions appear to ban such a review.<sup>299</sup> In such cases, Executive Order No. 12,291 still requires a regulatory analysis and a statement justifying why the lowest cost alternative cannot be applied. This requirement can result in agency officials unofficially applying a cost-benefit test as part of their discretionary decisions on regulatory options, even when the test is statutorily proscribed.<sup>300</sup>

295. See C. LUDLUM, *supra* note 93, at 60; *Carter CEQ Farewell*, *supra* note 185, at 40; Costle, *supra* note 91, at 412. Attempts have been made to quantify some environmental values, especially wilderness and wildlife values. Thus, the number of people hiking, watching wildlife, or hunting and fishing can give some measure of the "economic worth" of non-development. See, e.g., Allen, *The Enjoyment of Wildlife*, in *WILDLIFE AND AMERICA* 28 (H. Brokaw ed. 1978). Still, only a loose correlation exists between economic expressions of environmental values and society's perception of the need for preservation of natural areas. Quantification of pollution control benefits is almost impossible to measure; for example, we are just beginning to learn how to measure air and water quality. See Costle, *supra* note 91, at 413.

296. See S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 133-37; C. LUDLUM, *supra* note 93, at 60-61. For example, the *Wall Street Journal* criticized a recent proposal by the new EPA Administrator to control acid deposition as setting a value (or cost) of \$6,000 a fish and termed the proposal "Gold(Plated) Fish". Editorial, *Wall St. J.*, Oct. 9, 1983, at A-8, col. 1.

297. Costle, *supra* note 91, at 423; C. LUDLUM, *supra* note 93, at 56-57. This is especially true because both industry and government have tried to overestimate the costs of regulation. See Costle, *supra* note 91, at 415 (describing the debate over the costs to the utility and steel industries of regulations to control pollution). Decision-makers find it easier to focus on considerations that have been quantified. *Id.* at 419.

298. See Costle, *supra* note 91, at 419. See, e.g., *California v. Watt*, 712 F.2d 584, 599-600 (9th Cir. 1983) (outer continental shelf leasing — broad discretion given to the Secretary of the Interior in making cost-benefit analysis). In addition, a cost-benefit investigation can be used as a device to disguise policy judgments. W. RODGERS, *supra* note 23, at 746.

299. See GAO HAZARDOUS AIR POLLUTANTS, *supra* note 275, at 43-44, 48-52. *American Textile Mfg. Inst. v. Donovan*, 452 U.S. 490, 505 n.25 (1981) (Administration request for remand of case deciding that OSHA "feasibility" requirements are not to be based on strict cost-benefit analysis). See also 40 CONG. Q. WEEKLY REP. 2474 (1982) (House passage of Endangered Species Act reauthorization; request by Administration that Congress explicitly confirm agency interpretation of Act and make economic costs a factor in listing of endangered species is rejected).

300. Exec. Order No. 12,291, *supra* note 222, § 3(d)(4) and 3(a)(5). See C. LUDLUM, *supra* note 93, at 56, 59-60. This requirement is especially troublesome since even if the

The Reagan Administration has thus been using cost-benefit analysis as an analytical tool to reduce the scope and strictness of the environmental regulatory program.<sup>301</sup> Because the new executive order requires agencies to choose the most cost-effective alternative and justify any non-quantifiable benefits, agencies are demanding increased evidence of benefits before adopting a rule and then are selecting the least restrictive regulatory option.<sup>302</sup> When a protective rule is adopted, OMB uses the cost-benefit analysis to put the burden of proof on the agency to defend the benefits as compared to costs.<sup>303</sup>

### 3. Risk Assessment

By moving from a cost-conscious to a strict cost-benefit standard, the Reagan Administration seeks to use economic theory as a basis to avoid or reduce environmental controls. Similarly, the Administration seeks to use the risk assessment scientific technique to delay or permanently evade regulatory action.

During the environmental era, risks were to be assessed, but government action did not have to wait until all the evidence was presented. In many cases, in fact, environmental laws mandated that the government act unless zero or minimal risk had been proven.<sup>304</sup> Executive Order No. 12,291 seeks to change that policy. Administrative decisions now are to "be based on adequate information concerning the need for and consequences of proposed government action."<sup>305</sup>

This need for a "hard look" at the information necessary to justify a rule or select a regulatory alternative<sup>306</sup> is closely tied to the requirement of a cost-benefit analysis, and like that test shifts the balance away from controls intended to minimize present and future risks.<sup>307</sup>

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agency claims it is not relying on cost-benefit criteria, it is possible that, through preparation of analysis, it did so. *Id.* at 59-60.

301. Carpenter, *supra* note 97, at 585; see 1982 CEQ REPORT, *supra* note 110, at 177.

302. See Whittington and Grubb, *Economic Analysis in Regulatory Decisions: The Implications of Executive Order No. 12291* 9 SCI., TECH., AND HUM. VALUES, Winter 1984, at 64 (reviewing a series of cost-benefit analyses of EPA proposed rules). Costle, *supra* note 91, at 417-418.

303. Shanley, *supra* note 82, at 420.

304. See Hoerger, Beamer and Hanson, *The Cumulative Impact of Health, Environmental, and Safety Concerns on the Chemical Industry During the 1970's*, 46 LAW & CONT. PROBS. 95, 102-04 (1983); Brooks, *The Resolution of Technically Intensive Public Policy Disputes*, 9 SCI., TECH., AND HUM. VALUES, Winter 1984 at 39, 41-44.

305. Exec. Order No. 12,291, *supra* note 222, § 2(a). Congressman Dan Ritter of Pennsylvania introduced a bill for improving knowledge and the use of risk assessment by agencies having regulatory responsibility for health, safety and the environment. The bill defines risk assessment, § 4(b), as "that process of quantification . . . of the proof of an identified risk." Risk is defined, § 4(a), as the "potential of a given action to cause unwanted or negative consequences to human life, health, or the environment." 129 CONG. REC. E4432-33 (daily ed. Sept. 21, 1983).

306. Raven-Hansen, *supra* note 222, at 337.

307. See *Ethyl Corp. v. EPA*, 541 F.2d. 1, 25 (D.C. Cir. 1976) ("Awaiting certainty will

The more speculative the risk of harm, the less quantifiable the benefit of controls. Similarly, information on the cost consequences of a regulation is more easily obtainable than information on need or risks.<sup>308</sup> Need must be premised on adequate information; yet, environmental regulations are often based on information at the "frontiers of scientific knowledge."<sup>309</sup>

Risk assessment has long been an accepted analytical technique that mixes science and policy.<sup>310</sup> First, information must be obtained to state the risks of an activity.<sup>311</sup> This involves large expenditures to pay people to develop and use technical instruments. The tasks required for risk assessment include basic research to create the theoretical models that allow later analysis, measurement of environmental quality and changes caused by activities, and the testing of how alternative approaches to a problem affect the environment.<sup>312</sup> As with cost-benefit analysis, those being regulated cannot impartially assess risks; they have an inherent conflict of interest and will seek to develop information to minimize risks. To avoid this conflict of interest the necessary analyses should be done by government or by impartial scientists.<sup>313</sup>

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often allow for only reactive, not preventive regulation"). This new "hard look" policy is a true shift back. Under traditional tort rules, a cause in fact is needed before a remedy will be given and the burden is on those seeking relief to show that a substance or activity is responsible for a specific harmful activity. Note, *Environmental Law*, 25 CATH. U. L. REV. 178, 180-81 (1975).

308. For example, as with cost-benefit analysis, it is difficult to quantify possible effects on the "quality of life." *Burden of Proof in Litigation*, *supra* note 58, at 212-13. Similarly, in assessing the benefits and risks of a new pesticide, the benefits of a chemical's use are easily quantifiable and available from industry. The risk of cancer is less quantifiable. Combined application of adequate information requirements and cost-benefit tests means that more weight is given to the benefits. *House Pesticide Report*, *supra* note 200, at 246-47.

309. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 656 (1980). One commentator has described the problem of regulating in areas of scientific uncertainty in terms of "false positives" and "false negatives." A legislative or regulatory policy that seeks to minimize the false identification of a risk is concerned about "false positives." A more precautionary policy that seeks to minimize the risks is more concerned about "false negatives." Page, *A Generic View of Toxic Chemicals and Similar Risks*, 7 *ECOLOGY L.Q.* 207, 220 (1978). The Reagan Administration is obviously more concerned about "false positives" than "false negatives" when it requires, by Exec. Order No. 12,291, "adequate information" before regulatory action is taken.

310. *Environmental Defense Fund v. EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978). See *Examining the Role of Science in the Regulatory Process*, 25 *ENVIRONMENT*, June 1983 at 9, 11 [hereinafter cited as *Science Roundtable Discussion*]; Baram, Book Review, 25 *ENVIRONMENT* 21, 26 (1983) (quoting a National Academy of Science study, "Risk Assessment in the Federal Government: Managing the Process" at 37 (1983)).

311. 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 8.

312. See *id.* at 6-7; Dowd, *Needed: EPA Research Leadership*, 2 *ENVTL. F.*, Oct. 1983, at 23-24.

313. See *TIME*, May 23, 1983, at 20 (reporting on a probe criticizing the work of a testing firm which was responsible for evaluating health and safety hazards of 212 chemicals). Even research by government scientists, of course, can be affected by the reform ideology. In June 1983, the head of research for EPA told an American Academy for the Advancement of Science meeting that his scientists do projects at the dictation of other EPA divisions and not

The threshold decisions as to what risks require regulation or which regulatory alternative should be chosen are essentially political ones.<sup>314</sup> The process is straightforward if the scientific evidence is clear.<sup>315</sup> The legislature or regulator establishes what level of risk is acceptable.<sup>316</sup> In some cases, no risk is acceptable because of the magnitude or likelihood of potential harm. In other cases, regulations are developed to minimize risk. Finally, in some cases, regulations are based on a weighing of the potential harm against the costs of regulation.<sup>317</sup>

The process becomes much more difficult when the evidence is less clear. Again, the level of acceptable risk is set by the legislature or regulator. But now, even if the level of acceptable risk is established, the available evidence of potential harm has to be weighed against the magnitude of the risk. The degree of evidence required determines the regulatory course of action.<sup>318</sup>

Under the philosophy of deregulation and regulatory reform, risk assessment has been converted into a basis to delay or avoid controls in areas where there is no absolute proof of present and immediate substantial harm.<sup>319</sup> The Reagan Administration believes that the prior precautionary policy was improper. Under that policy, government regulated first and then did the scientific analyses. However, Executive Order No. 12,291 now precludes regulatory action until there is credi-

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according to their own evaluation of need. "Our job is to do what the client wants." 15 NAT'L J. 1108 (weekly ed. 1983).

314. The real question is whether or not to regulate. *Science Roundtable Discussion*, *supra* note 310, at 7, 10-11.

315. On June 22, 1983, the new EPA Administrator, William D. Ruckelshaus, gave a speech to the National Academy of Science on "Science, Risk and Public Policy." He noted that in certain areas, and with certain pollutants, "the scientific community can set safe levels and margins of safety. . . ." In those cases, effective controls are possible. 129 CONG. REC. S9356 (daily ed. June 28, 1983).

316. The legislature makes an unacceptable risk equal to causation. *Burden of Proof in Litigation*, *supra* note 58, at 212.

317. For example, a risk may be minimized by providing for "margins of safety" in regulatory action. Note, *Environmental Law*, 25 CATH. U. L. REV. 186-187 (1975).

318. In 1971, then EPA Administrator Ruckelshaus described the process as follows:

[T]wo extremes must . . . be avoided: insistence on final hard scientific evidence of occurrence . . . which may only occur when the process leading to this result is irreversible; and action based only on anxiety, which may deprive mankind of a badly needed control mechanism.

*Reasons Underlying the Registration Decisions Concerning Products Containing DDT*, 2, 4, 5-T, Aldrin and Dieldrin, 1 ENVTL. L. REP. (ENVTL. L. INST.) 30,028, 30,031 (1971).

319. Risk assessment can be used as a policy-making device to protect against the possibility of future harm. Such a policy implies that probability or even possibility can be a basis for a protective rule. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 593-94 (D.C. Cir. 1971) (pesticides — cancellation when substantial question about safety). The new "hard look" policy focuses only on past proven dangers. It therefore is the opposite of risk assessment environmental reviews that seek to minimize risk of future harm. See *Science Roundtable Discussion*, *supra* note 310, at 41 (comments of Richard Dowd).

ble scientific information. Only when such information becomes available will the question of alternatives be raised. Thus, scientific uncertainty serves as an excuse for inaction.<sup>320</sup> At the same time, the federal government has substantially reduced expenditures for the basic and applied science to determine and estimate risks.<sup>321</sup> Increasingly, government relies on the regulated industries for assessment and monitoring.<sup>322</sup> Even when information on risk is presented, the Administration responds by marshalling contrary evidence as a basis for arguing that more research is necessary before taking action, or for arguing against any action at all.<sup>323</sup>

320. See R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 209 (former EPA Administrator Gorsuch stated "I think there's an awful lot that needs to be known about the problems before responsible regulatory action can be taken"); Otten, *Can EPA Be Made Rational*, Wall St. J., Oct. 19, 1983, at 30, col. 4. Ms. Gorsuch urged that all the Administration was doing was to apply traditional risk assessment methodology to environmental decisions. *Id.* cols. 4-5. See, e.g., GAO HAZARDOUS AIR POLLUTANTS, *supra* note 275, at 5, 10, 21-22. One scientist has noted that if an attack on an environmental regulatory policy fails, the "next best position" is to insist that the science is "not good enough" to justify regulations. *Science Roundtable Discussion*, *supra* note 310, at 8 (Ashford).

321. H.R. REP. NO. 212, 98th Cong., 1st Sess. 15-16, 26 (1983) (authorizing increased funding for EPA research because of disappointment in Administration's level of funding). See *Science Roundtable Discussion*, *supra* note 310, at 40; 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52 at 404-05; 129 CONG. REC. S6804-05 (daily ed. May 17, 1983); Dowd, *supra* note 312, at 52.

One Congressman calls this policy of requiring hard information and simultaneously reducing federal research funds a "Catch-22" situation. "When . . . the various Committees of Congress wish to establish some cost-effective environmental regulations and laws, we are told by industry and administration spokesmen that we do not know enough. But yet when we come to set realistic research budget and funding levels we are told that that is too much. We are told: Do not set a level of adequate research funding that would give us the knowledge to impose realistic cost-effective, sensible environmental constraints. . . ." 129 CONG. REC. H3471-72 (daily ed. June 2, 1983) (Rep. James Scheuer, D-N.Y.).

322. See *House Pesticide Report*, *supra* note 200, at 211. See also *Hearing on the FY 1984 EPA Research Program and Budget Request Before the Subcomm. on Natural Resources, Agriculture Research and Environment of the House Comm. on Science and Technology*, 98th Cong., 1st Sess., at 24-25 (Staff Summary). For example, the federal government is relied on a chemical industry study on formaldehyde in determining whether regulation was appropriate. 1982 CEQ REPORT, *supra* note 110, at 14.

323. For example, EPA decided not to regulate formaldehyde, despite evidence of carcinogenicity in animals. Actual "human effects" data was required before regulation would be appropriate. HAZARDOUS WASTE IN AMERICA, *supra* note 150, at 344-48. See also *House Pesticide Report*, *supra* note 200, at 85 (pesticides studies contain "substantial scientific arguments . . . intended to minimize the significance of adverse effects found in experiments"), 247 (stricter standards for data that chemicals may be hazardous before action taken).

The controversy over acid rain also illustrates the Reagan Administration's attitude towards uncertainty and regulatory action. In 1980, Congress mandated a ten-year study of the acid deposition problem. At the same time, the Carter Administration had decided to commence immediate regulatory action. However, the Reagan Administration changed this policy. It argued that the causes and effects of acid deposition were not fully known. Specifically, it urged that a regulatory control program had to wait "until there is enough evidence to recommend that our actions can produce the desired results." Siegal, *Study Criticizes U.S. Acid Rain Policies*, 19 TRIAL, June 1983, at 8, 10, 12; N.Y. Times, Jan. 25, 1984 at 1, col. 5.

The Reagan Administration also rejects the legislative determination, contained in certain statutes involving hazardous activities or products, that in some cases no risk, or at best only minimal risk, is acceptable.<sup>324</sup> The Administration seeks, by rule-making or proposed statutory changes, to eliminate these "absolutist" mandates.<sup>325</sup> Similarly, where the level of acceptable risk has been set by prior rules or cases, the Administration has attempted to raise the level of acceptable risk required before action is taken. As with the debate on uncertainty, debate about which alternative is to be taken becomes a basis for delay or inaction.<sup>326</sup>

The effect of this new use of risk assessment is similar to other aspects of the regulatory reform agenda. The burden of proof is shifted onto those who wish to secure new protections against environmental harm. Explicit and detailed information of alleged harm must be provided. Otherwise, agency officials will exercise discretion to avoid regulatory action.<sup>327</sup> Even when some action must be taken, these officials

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324. The Heritage Foundation attacked EPA's administration of the toxic substances and other laws because of the agency's "zero risk policy". It urged "real world" analysis of risks, not mere laboratory testing. Cordia, *supra* note 213, at 993-94. See also Koch, *supra* note 196, at 3163 (reporting on the Republican platform's criticism of the "zero risk policy" of EPA). For pesticides, the Foundation urged elimination of the "Delaney clause" which bans uses of a chemical if tests show cancer in animals. It urged a benefit-risk analysis. See Cordia, *supra* at 1001-02. See also 1982 CEQ REPORT, *supra* note 110, at 91 (EPA studying whether "wide margins of safety" built into criteria to regulate toxic substances in water "should be changed because they are unnecessarily conservative").

325. Recently, for example, OMB's regulatory reform officer wrote to EPA about certain EPA decisions regarding toxic chemicals. He criticized EPA's decision to regulate exposure "down to a 'no effects' level of risk." The agency, he argued "can and should become willing to tolerate some risk in new chemicals before controls or tests are set." (The text of the letter by Christopher DeMuth, OMB Administrator of Information and Regulatory Affairs, can be found in the "Memo of the Month" inside the back cover of 2 ENVTL. F., Jan. 1984.) Some Representatives objected to the letter because, in their opinion, the Toxic Substances Control Act of 1976 required a "no risk" policy. *OMB Extends Its Mandate*, Wash. Post Nat'l Weekly Ed., Dec. 5, 1983, at 34, col. 1. See Toxic Substances Control Act, § 6, 15 U.S.C. § 2605 (1982) (regulation is in order if there is a reasonable basis to conclude a chemical will present an unreasonable risk).

326. For example, Congress required EPA to establish national emission standards for radio-nuclides as a hazardous air pollutant. After listing radio-nuclides as a hazard, EPA said it wanted to wait until 1989 to set the standards, ten years after the congressional deadline. The reason given was that more time was needed to study the issue. The Sierra Club filed suit to force EPA to issue standards and the court ordered the agency to do so. *Sierra Club v. Gorsuch*, 551 F. Supp. 785 (N.D. Cal. 1982). EPA's request for more time to study "envisioned a level of thoroughness and scientific certainty not within the contemplation of Congress at the time it mandated the regulation of hazardous air pollutants." *Id.* at 788-89.

A congressional committee staff recently conducted a study of EPA's pesticide program, which "followed the basic blueprint for a regulatory reform laid out by President Reagan." *House Pesticide Report*, *supra* note 200, at 82. It found that, "when balancing risks and benefits," EPA has decided to accept as tolerable a level of risk 10 to 100 times higher than in the past. *Id.* at 85, 238, 247.

327. Recently, former EPA Administrator Gorsuch dismissed a group of scientific advisors to EPA. One critical scientist described this as an example of the use of discretion in

will weigh only substantive risks against costs and choose the least coercive alternative.<sup>328</sup> Regulatory reform, moreover, was only one part of the Administration's environmental policy agenda. The second agenda item was to reduce the federal role in environmental decision-making.

### C. *The State-Federal Relationship—"New Federalism"*

Regulatory reform was assisted and complemented by a "new federalism." The Administration believed that the "crises of over-regulation" could be resolved only by tying deregulation to this new federalism. When regulatory action was required, the presumption was that any action should be undertaken by the states, not the distant federal bureaucrats.<sup>329</sup>

The idea of cooperative federalism is not new.<sup>330</sup> Many of the statutes enacted during the environmental era, including both the Clean Air Act and the Federal Water Pollution Control Act, established a mixed federal-state regulatory regime. Federal standards were established and states assumed responsibility to implement these standards. To protect their own environment, states were often permitted to establish requirements beyond the federal minimums. More stringent local rules were pre-empted only where a national need for uniformity was clearly found.

States, as part of this cooperative effort, increasingly were to as-

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risk assessment; that is, she wanted "our scientists" rather than "their scientists." *Science Roundtable Discussion*, *supra* note 310, at 12 (Ashford).

328. Otten, *supra* note 320, at 30, col. 4. One example of the use of risk assessment to secure less restrictive regulatory controls is recent changes in the implementation of the Ocean Dumping Act, Title I of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-1444 (1982). This statute was intended to set up strict standards for the control of dumping of wastes into the ocean. When read together with the goal of eliminating discharges of pollutants into navigable waters, Federal Water Pollution Control Act of 1972, § 101(a)(1), 33 U.S.C. § 1251(a)(1) (1982), it was intended to prevent municipalities from dumping wastes if sufficient information was not available on the adverse effects of the dumping. The burden was on those seeking to dump to show no adverse effects. Cost effects on the dumper were not to be a significant factor in the decision to allow a permit. W. RODGERS, *supra* note 23, at 492, 496.

In 1973, EPA adopted a policy to phase out all ocean dumping by 1981. However, New York City sued EPA to allow it to continue dumping after this date. In *City of New York v. EPA*, 543 F. Supp. 1084 (S.D.N.Y. 1981), the court found that the Act requires a weighing to determine if sludge disposal would unreasonably degrade the ocean. EPA, under the new Administration, did not appeal the decision, but rather seized the opportunity to mesh its philosophy of risk assessment and cost-benefit analysis in application of the Ocean Dumping Act. See Swanson & Devine, *The Pendulum Swings Again: Ocean Dumping Policy*, 24 ENVIRONMENT June 1982 at 14-15.

329. See 1 ENVTL. F., Jan. 1983, at 10. See, e.g., 1982 CEQ REPORT, *supra* note 110, at 91 (reorientation of wastewater management from federal to state decision-making).

330. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 289 (1981).

sume more of the enforcement responsibility established by federal statutes and regulations. Thus, in addition to enforcement of federal laws through federal administrative and court proceedings, states could enforce these laws, and their local adaptations, through state agencies and courts. Finally, states were encouraged to establish their own mechanisms to balance protection against development. The federal government, in turn, would supply funding and also give states an increased role in approving federal activities. States could comment on such activities and federal agencies had to justify their actions in light of state concerns.<sup>331</sup>

The change from cooperative federalism to new federalism was more than an acceleration of previous legal and policy trends. In burden of proof terms, this change was a tactic to further the shift away from regulatory controls that purportedly limited growth. Under previous Administrations, a Federal program was not delegated unless a state had the capability to meet the federal standards. The Reagan Administration believed that a program should be delegated unless the state is clearly shown to lack the authority or ability to carry out its responsibilities.<sup>332</sup>

Under cooperative federalism the national government monitored state actions to provide at least a minimum level of national and uniform protective controls. Opportunities for states to compete for business by weakening environmental standards were limited. However, under new federalism the idea that the federal government had an obligation to set national standards was considered outmoded and condescending. Perhaps at one time states had been unable to implement environmental laws; now, however, trained and diligent local officials in all states were prepared to accept new responsibilities. Arguments that federal bureaucrats had special expertise and objectivity were considered chauvinistic.<sup>333</sup>

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331. See *supra* notes 100-109 and accompanying text.

332. 1 ENVTL. F., Jan. 1983, at 10. For a description of the shifts in delegation, see *id.* at 9.

333. In his 1982 State of the Union Address, President Reagan stated that his new federalism policy would "accomplish a realignment that would end cumbersome administration and spiralling costs at the federal level while we ensure these programs will be more responsive to both the people they are meant to help and the people who pay for them." See State of the Union Address, January 23, 1981, 128 CONG. REC. H5155 (daily ed. Jan. 23, 1981). Similar statements have been more specifically directed towards environmental protection. See Dederer, *supra* note 228, at 15; Cordia, *supra* note 213, at 974-75, 977; Becker, *Air Quality and Federalism—"True Partner" and Fair Share*, 1 ENVTL. F., Jan. 1983, at 16.

The transfer of responsibility to the states by EPA, for example, would allow "more room for state experimentation." Norton, *Decentralizing Environmental Decision Making*, in 1983 HERITAGE FOUNDATION REPORT, *supra* note 201, at 339-40. See also Cannon, *Delegation to the States: Realizing a Long Delayed Mandate*, 1 ENVTL. F., Jan. 1983, at 39. For a description of EPA's reduction in its oversight of state programs, see 1982 GAO EPA REPORT, *supra* note 189, at 20-22 (EPA review role limited to "quantitative audit").

Another premise of cooperative federalism was that states would implement national programs at the local level. Thus, to assure uniformity and reduce the possibility of industry forum shopping, federal revenues were given to the states to carry out their responsibilities under federal laws. Under the new federalism, however, increases in state responsibility were tied to decreases in state funding. Reductions in the federal budget were achieved by decreasing payments to the states for environmental activities.<sup>334</sup> In addition, this reduced funding was generally given as part of "block grants" that could be spent as the state wished. The state was under no obligation to spend any of the funds for new environmental responsibilities.<sup>335</sup>

New federalism resulted in reduced environmental protection. In a depressed economy, businesses appealed to local leaders to reduce safeguards so as to secure more jobs.<sup>336</sup> At the same time, states faced increased costs due to the transfer of obligations under other new federalism programs for care of the elderly, support for the poor, transportation and housing.<sup>337</sup> In addition, states were under increasing pressure to follow the federal example and reduce their own budgets and personnel.<sup>338</sup> The result was that environmental protection had a low priority in any allocation of state revenues or federal block grants.<sup>339</sup> Regulatory activity, but especially enforcement of laws and regulations, was therefore reduced.<sup>340</sup>

In practice, new federalism was a strategy to reduce government

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334. President Reagan's State of the Union Address, *supra* note 333. See C. REESE, *supra* note 250, at 303; Futrell, *supra* note 15, at 41; Ottinger, *The New Federalism*, in 129 CONG. REC. E4389, E4390 (daily ed. Sept. 20, 1983). For a chart describing reductions in EPA's grant assistance to the states, see 1982 GAO EPA REPORT, *supra* note 189, at 53.

335. 1980 REPUBLICAN PLATFORM, *supra* note 206, at 23; Newland, *supra* note 198, at 12-13. See also BURSON-MARSTELLER, *supra* note 1, at 46 (concern about the effect of block grants on environmental spending raised by Russell Peterson, Chairman of Council on Environmental Quality for three years in the 1970's and now President of the National Audubon Society).

336. See S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 254; BURSON-MARSTELLER, *supra* note 1, at 40 (Jay Hair, Vice President of the National Wildlife Federation). See, e.g., *id.* at 52 (President of National Coal Association, Carl Bagge, supports the new federalism since state control will promote "cooperation" and "flexibility").

337. See 40 CONG. Q. WEEKLY REP. 151 (Jan. 30, 1982) (list of programs which might be transferred to the states).

338. See 1982 GAO EPA REPORT, *supra* note 189, at 18.

339. *Id.* at 11, 14; 1 ENVTL. F., Jan. 1983, at 11 (quoting a Maryland official); Becker, *supra* note 333, at 16. For a chart describing what states believed the budget cuts would do to their state programs, see 1982 GAO EPA REPORT, *supra* note 189, at 9.

For a discussion of the possibility of states financing environmental activities through user fees or service charges, see Belsky and Harvey, *Users Fees and Coastal Zone Management*, 1 ENVTL. F., Feb. 1983, at 17. But *c.f.* 1982 GAO EPA REPORT, *supra* note 189, at 30-31 (states fear loss of industry and jobs if they set higher fees than neighbors).

340. C. REESE, *supra* note 250, at 304. A national Governor's Association survey stressed that the total amount of grants for FY 1983 would provide only one-half of what the states needed to implement and enforce delegated programs. 129 CONG. REC. H3479 (daily ed.

interference and not a goal unto itself. Thus, it was used to justify regulatory reforms,<sup>341</sup> but was not allowed to thwart the Administration's pro-development ideology. When states proposed stringent safeguards, the federal government stepped in and set a lower national standard.<sup>342</sup> When federal enforcement against states appeared to help the reform agenda, the federal government took the hard line.<sup>343</sup>

Cooperative federalism had encouraged the development of strong state programs to manage growth.<sup>344</sup> This was inconsistent with the

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June 2, 1983) (quoting the National Governors' Association Study: THE STATE OF THE STATES; MANAGEMENT OF ENVIRONMENTAL PROGRAMS IN THE 1980's).

Enforcement activities would be specifically affected. Less money was to be given to the states for training and other technical assistance. At the same time there would be fewer federal inspections and fewer federal enforcement counsel. 1982 GAO EPA REPORT, *supra* note 189, at 20-27. The General Accounting Office summed up state officials' concerns: "State officials have predicted that reduced Federal assistance will result in negative impacts on the environment." *Id.* at 8.

341. For example, as part of its regulatory reform proposal to reduce the strictness of federal Clean Air regulations, the Administration proposed that states were to be given a "full partnership in carrying out the Clean Air principles." See 39 CONG. Q. WEEKLY REP. 1458 (1981); 7 EPA J., Sept./Oct. 1981 at 2.

342. One example of how the Administration rejects the new federalism philosophy when it fears that states will adopt more stringent rules occurred in the setting of standards for labelling toxic substances used in the workplace. In January of 1981, President Carter proposed standards that required companies to tell workers what chemical ingredient they were working with and what the chemical's use meant to their health. As part of President Reagan's regulatory relief program, these OSHA rules were withdrawn. However, by 1983 over a dozen states had passed their own "right to know" laws. At the insistent request of industry, concerned about these state laws, OSHA promulgated in November of 1983 a federal toxic labeling rule, narrower than the previous Carter proposal and the state laws. The chemical industry hopes and believes that the new regulation will have a "chilling effect" on other states passing laws. Moreover, industry and OSHA will urge that the federal rule preempts all existing and future state laws. See Wall St. J., Nov. 23, 1983, at 7, cols. 1-3; Letter to the Editor by Thorne Auchter, Assistant Secretary of Labor for Occupational Safety and Health; N.Y. Times, Dec. 7, 1983, at A-30, cols. 1-3; Legal Times, Dec. 12, 1983, at 12. A number of states have filed suit to prevent preemption of stricter state laws. See NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ENVIRONMENTAL PROTECTION REP. 7-8 (Jan. 1984). For an analysis of the state laws involved, see Skinner, *States Act to Protect Citizens from Toxics*, WAYS AND MEANS, July-Aug. 1983, at 1, col. 6. See also *Silkwood v. Kerr McGee Corporation*, 104 S. Ct. 615, 626 (1984) (United States opposes awarding punitive damages in state tort action based on exposure to contamination in nuclear plant since such action is preempted by federal scheme to control nuclear power licenses).

343. The Administration sought to impose sanctions against all those states that had not attained clean air by the statutory deadlines. The belief of many members of Congress and environmentalists was that the purpose of this tactic was to force Congress to adopt the Administration's proposals to amend the Clean Air Act. See 15 NAT'L J. 1243 (weekly ed. 1983); N.Y. Times, June 24, 1983, at A-10, col. 1. The drafters of the statute believed that the Clean Air Act required state implementation plans and compliance with those plans, and that if a state was showing reasonable progress towards attainment it was satisfying the statute. By specific amendment, Congress temporarily precluded the EPA from implementing its "misinterpretation" of the law. 129 CONG. REC. S8817-18 (daily ed. June 21, 1983); 129 CONG. REC. H3494, H3518 (daily ed. June 2, 1983). The new Administrator of EPA has indicated that he will not impose sanctions so long as states make "reasonable efforts." N.Y. Times, June 24, 1983, at A-10, col. 1.

344. See, e.g., Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464 (1982). In 1980,

Reagan Administration's pro-development ideology. Thus under the new federalism, the Administration sought to reduce federal funding for programs that promoted careful state management.<sup>345</sup> Attempts by the states to limit federal activities that adversely affected the environment were also opposed by the Administration. Procedures were adopted to reduce the ability of states to comment on,<sup>346</sup> or prohibit,<sup>347</sup> federal activities.

Thus, regulatory reform and new federalism became methods to increase the burden on those who sought to protect the environment and control growth. The third component of the new ideology had similar goals; the Administration applied the policy of "privatization" to reduce the amount of land set aside for conservation purposes, to increase development of federal resources, and to reduce restrictions on private activities.

#### *D. Protection and Management of Natural Resources— "Privatization"*

The Reagan Administration's most successful shift in environmental decision-making back to a pro-development policy was through application of the ideology of "privatization."<sup>348</sup> Until the early 20th

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President Carter signed a bill into law to provide at least five years of additional federal support for state coastal management programs and incentives to encourage the remaining states to develop such programs. See Carter's 1979 Environmental Message, *supra* note 148, at 1672; PUB. PAPERS-JIMMY CARTER 2335 (1980).

345. See H.R. REP. NO. 206, 98th Cong., 1st Sess., 44-45 (1983) (noting the Administration's proposal to terminate federal support for coastal zone management).

346. For a discussion of the changes adopted by the Council on Environmental Quality to limit public, including state, review of federal projects, see *supra* note 274. Offshore leasing is an example of the Administration's attempts to limit state input into decision-making. The intent of new policies is to move states affected by offshore oil and gas activity from a "partner" to a "consultative party." Belsky, *Perspectives on Intergovernmental and Environmental Issues*, in CENTER FOR OCEAN MANAGEMENT STUDIES, THE NEWEST FEDERALISM: A NEW FRAMEWORK FOR COASTAL ISSUES 88 (1982).

347. For example, the Administration pushed through regulatory changes to preclude states from having the right to make determinations of the "consistency" of offshore lease sales with their state coastal management programs. Until this change, regulations applied the consistency provision of the Coastal Zone Management Act to offshore leasing decisions. 46 Fed. Reg. 35,253 (July 8, 1981). See Holt, *Federal Consistency with State Programs*, COASTAL LAW MEMO, March 1983, at 2 (part of a series of "Coastal Law Memos" produced by the Ocean and Coastal Law Center, University of Oregon School of Law). The Administration's position was recently upheld by the Supreme Court in a five to four decision. *Secretary of Interior v. California*, 104 S. Ct. 656 (1984).

348. "Privatization" can be defined as "the action or process" of transferring public "control and ownership to a private person or private legal entity." Hanke, *The Privatization Debate: An Insider's View*, 2 CATO J. 653, 653 n.2 (1982).

Of all the Administration's pro-development policies, privatization is considered the most successful and long-lasting. See BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 10-11. N.Y. Times, June 26, 1983, at A-1, col. 4 (The Reagan Administration has accomplished its "most sweeping changes" in the management of public land and resources). The philosophy of the shift was expressed by Stroup and Baden, *Endowment Areas: A Clearing in*

century, the federal government had a policy of public lands divestiture and use. Public lands were transferred to private parties as quickly as possible. Where lands were kept in government hands, they were lent to the private sector to use. Similarly, governmental interference in the free use of private property and in the maximum exploitation of resource potential was minimal.<sup>349</sup>

The conservation movement of the early 20th century changed government attitudes. Selected areas were set aside or purchased by government to protect and preserve their scenic beauty and natural amenities. The environmental era confirmed this shift toward protection. More and more areas were purchased. A comprehensive review of all federal lands was undertaken to ensure continued protection of wild, scenic or roadless areas. Activities were strictly limited in these areas.<sup>350</sup> Later in the environmental era, the protectionist philosophy was applied to exploitation of federal resources. Where permitted, exploration and development were undertaken in a paced and carefully managed manner. Oil, coal or other resources could only be recovered if removed with environmental sensitivity. Finally, even exploitation on private lands was carefully overseen by government to reduce or prevent adverse effects on land or natural resources.<sup>351</sup>

The Reagan Administration rejected, almost totally, this natural resource management philosophy. The Administration believed that protectionist government policies were anti-American. The previous policies had relied on government bureaucrats to make economic decisions about the best use of lands and resources. These individuals had a vested interest in increased federal control and personal power.<sup>352</sup> As a result, too much land had been "locked up." The Administration believed that private market forces were better able to establish the best use of land and to efficiently exploit America's vast resources.<sup>353</sup>

Privatization was a priority of those planning for the new President. Detailed plans<sup>354</sup> and legal and public relations justifica-

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*the Policy Wilderness*, 2 CATO J. 691, 692-93 (1982): "Eastern patricians reacted to privatization through a 'counterrevolution' and established the National Park System, the Forest Service, BLM and the Wilderness System. The failure of those mechanisms suggests it is time for another revolution."

349. See *supra* notes 50-55 and accompanying text.

350. See *supra* notes 116-128 and accompanying text.

351. See *supra* notes 174-183 and accompanying text.

352. See Hanke, *supra* note 348, at 660, 662.

353. See BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 80 (quoting Secretary Watt); Terrell, *supra* note 164, at 191; Smith, *On Divestiture and the Creation of Property Rights in Public Lands*, 2 CATO J. 663, 698-700 (1982). One Administration "insider" stated the philosophy as follows: "The federal government's land holdings, which are six times larger than France, are a serious problem, symptomatic of a grave disease. The cure is privatization." Hanke, *supra* note 348, at 653.

354. Privatization, including increased sales, decreased purchases, and more leasing, was a consistent theme of the Heritage Foundation. See MANDATE FOR LEADERSHIP: POLICY

tions were prepared for the new policy.<sup>355</sup> New agency heads were selected who would exercise discretion in favor of privatization.<sup>356</sup> Budget and personnel proposals were prepared to shift government's role in resource management from preservation toward development.<sup>357</sup>

Privatization complemented the new Administration's other policy goals. First, privatization would reduce government size and power generally. Public lands would be sold to reduce federal power, personnel and influence. Land sales would provide money to reduce the federal budget deficit. Fewer land purchases would also reduce federal expenditures, not just at the time of purchase, but also later in avoided management costs.<sup>358</sup>

Privatization complemented regulatory reform. In balancing costs against benefits, resources exploitation clearly outweighed protection and conservation. Restrictions on development had to be justified and the least intrusive controls imposed. Thus, land use was to be established not by government through regulation, but by private enterprise through market forces.<sup>359</sup>

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MANAGEMENT IN A CONSERVATIVE ADMINISTRATION 191-97, 1087-88 (C. Heatherly, ed. 1981).

355. An example of a public relations justification was the position that less parkland should be purchased in order to improve the quality of existing parks. 15 NAT'L J. 1239 (weekly ed. 1983) (quoting G. Ray Arnett, Interior Assistant Secretary for Fish, Wildlife, and Parks). See also, Coggins, *supra* note 260, at 13 (increase in resource leasing justified as necessary for national security). Examples of legal justifications were the Interior Department Solicitor's opinions that leasing in certain wildlife refuges would now be allowed where leasing was previously thought to be prohibited and that appeals of BLM decisions would now only be made by property owners affected by their decision and not by outside conservationists. 15 NAT'L J. 2306, 2307-08 (weekly ed. 1983).

356. For example, the President's naming of James Watt to head the Interior Department "signaled that he viewed his victory as a mandate to rework [prior] policies on resource management." BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 74.

357. See 15 NAT'L J. 1239 (weekly ed. 1983) (quoting a remark by Secretary Watt to a Conference of National Park Concessionaires on March 3, 1981, that he would "use the budget system to be the excuse to make major policy decisions"). See also Terrell, *Minerals Policy and the Public Lands*, in 1983 HERITAGE FOUNDATION REPORT, *supra* note 201, at 191, 196 (organization and policy changes).

358. Hanke, *supra* note 348, at 656-57; Smith, *supra* note 353, at 671-72. The idea that selling public lands could be used to raise government revenue is not new. In fact, as early as the American Revolution much of the original stock of public land was privatized by land sales to raise government revenue, primarily to finance wars. Smith, *supra* at 671; Hanke, *supra* at 656 n.5; Ramsey, *Forest Socialism*, 15 REASON, Dec. 1983, at 33-34.

359. Private market forces, it was argued, could more accurately apply a "cost-benefit test." The "public decision-maker" does not lose anything by decreasing efficiency. It will often be politically advantageous for a politician to support the program even if the costs far exceed the benefits. The benefits will be concentrated on a special interest group, while the costs per taxpayer will be small and unnoticed. Smith, *supra* note 353, at 700. See also Sax, *Why We Will Not (Should Not) Sell the Public Lands: Changing Conceptions of Private Property*, 1983 UTAH L. REV. 313, 315. Valuation of federal lands should consider the "opportunity costs of non-development"; that is, the value of foregone economic opportunities. 1982 CEQ REPORT, *supra* note 110, at 145. As with cost-benefit analysis generally, this market

Privatization also was tied to new federalism. In fact, one basis for new federalism was to respond to complaints by some Western states that they should be able to determine the appropriate use of federal lands in their state.<sup>360</sup> Lands were to be given "back" to the states to be used for state purposes. There would be no more federal withdrawals or reservations of land for public uses. Federal lands were to be managed under the relevant state policies;<sup>361</sup> but, as with all new federalism policies, state control was to be used to ensure resource development. Increased state power over resources management was promoted when it would lead to exploitation, but not when it would lead to restrictions.<sup>362</sup>

### 1. *Preservation of Natural Areas*

The first element of the privatization program was to reduce the amount of land owned by the federal government and devoted primarily to aesthetic or preservation purposes. Most people agree that title to at least some property should be held by government, even the federal government. Examples include government buildings, military installations, national monuments and some parks.<sup>363</sup> However, the Reagan Administration believed that too much money was being spent to purchase land because of its amenity value. Thus, rejecting what it termed the previous Administration's "park-a-month" policy, the new Administration proposed eliminating appropriations for new parks. The Reagan Administration relied on the need to improve maintenance of existing parks to justify its opposition to new acquisitions. The Administration adopted a similar policy for national wildlife refuges and wetlands.<sup>364</sup> Even when land was donated to the government,

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evaluation fails to consider adequately the existence of non-development values such as scenic beauty and open space. See Sax, *supra* at 322-23.

360. These complaints about federal ownership of lands in the Western states were referred to as the "sagebrush rebellion." During the 1980 campaign, then candidate Reagan told a group of supporters that he supported the sagebrush rebellion. "Count me in as a rebel." See Miller, *What Really Happened at EPA*, READER'S DIGEST, July 1983, at 59-60; Hanke, *supra* note 348, at 655; Smith, *supra* note 353, at 663.

361. See 1982 CEQ REPORT, *supra* note 110, at 147 (conveying of federal lands to states).

362. For example, Secretary Watt wanted to turn over strip mining controls to the states. L. CANNON, *supra* note 196, at 367. See 15 NATL. J. 1232 (weekly ed. 1983); U. S. NEWS & WORLD REP., Aug. 30, 1982, at 58. However, he also wanted to decrease the states' role in coal and offshore oil and gas leasing. See L. CANNON, *supra* at 337, 376. See also 15 NATL. J. 1232 (weekly ed. 1983) (coal leasing); 41 CONG. Q. WEEKLY REP. 1305-06 (1983) (offshore oil and gas leasing).

363. Smith, *supra* note 353, at 691; Sax, *supra* note 359, at 317.

364. See Glicksman and Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVT'L. L. 125, 162-68, 172-75 (1984). Congress had established a Land and Water Conservation Fund, from revenues obtained by leasing offshore oil and gas rights, to purchase parks and to fund state purchases for habitat protection areas. See *supra* note 117. The Administration first requested rescis-

the Secretary of the Interior was reluctant to accept such property. The philosophy was that the park, refuge and wilderness systems were largely completed; expanding them was a waste of public money and an exercise in "creeping statism."<sup>365</sup>

In addition to a moratorium on new purchases, the Administration proposed extensive sales of existing public lands. The intent was to reduce the deficit and open up areas to resource exploitation.<sup>366</sup> The President expressed this philosophy directly: the time had come to "move systematically to reduce the vast holdings of surplus land and real property."<sup>367</sup> To pursue this goal, the President created a Property Review Board, which established policies for property sales and a target for each federal agency to meet in divesting itself of property.<sup>368</sup>

The Administration believed that the reduction in purchases and increase in sales would allow lands to be allocated to their most productive purposes without the interference of federal bureaucrats.<sup>369</sup> Similarly, retained public lands were to be managed to promote their most productive use. Restrictions that limited the use of some federal public lands to conservation purposes would be reduced. Thus, as part of a comprehensive plan to develop the oil, gas, and other mineral resources of the United States, the Administration adopted a new policy that shifted consideration away from preservation. Development was

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sion of authorizations for purchases and then lower appropriations for such purchases. Congress consistently appropriated substantially more than Administration requests. See Glicksman and Coggins, *supra* at 177-84; Mosher, *supra* note 227, at 1233; 41 CONG. Q. WEEKLY REP. 1305 (1983). See also *id.* at 2511-12 and 129 CONG. REC. H8882-8884, H10262-63 (daily ed. Oct 31, 1983 and Nov. 17, 1983) (funding for wetlands acquisition from duck stamp fees). Still, funding levels have been far below those of earlier years. League of Women Voters, THE NATIONAL VOTER, Summer 1983, at 5; 41 CONG. Q. WEEKLY REP. 1306 (1983). For a discussion and chart describing the decline in acquisitions for parks and other recreation or preservation areas, the amounts requested by the Administration, and the amounts actually appropriated by Congress, see CONSERVATION LETTER, *supra* note 164, at 1-4.

365. See 15 NAT'L J. 1239 (weekly ed. 1983) (donations); Terrell, *supra* note 164, at 386-88 (previous "purchase policy" should be reversed).

366. Hanke, *supra* note 348, at 655; Stroup and Baden, *supra* note 348, at 694.

367. Hanke, *supra* note 348, at 655 (quoting the President's Budget Message for FY 1983). See also Hanke, *Land Policy*, in 1983 HERITAGE FOUNDATION REPORT, *supra* note 201, at 181, 183 [hereinafter cited as Hanke, *Land Policy*].

368. Hanke, *supra* note 348, at 655-56; Hanke, *Land Policy*, *supra* note 367, at 184.

369. Hanke, *supra* note 348, at 656-57; Coggins, *supra* note 260, at 12. For a criticism of this policy of reducing purchases and increasing sales, see Sax, *supra* note 359. Opposition to this policy came from environmentalists and even developers. See 129 CONG. REC. S16800 (daily ed. Nov. 18, 1983) (Remarks of Senator Ernest Hollings, D-S.C.); 16 NAT. RESOURCES LAW. 192 (1983) (sales violate Federal Land Policy Management Act); Ramsey, *supra* note 358, at 35-37; McBee, *Reagan's Regulators—Their Fire is Flickering*, U.S. NEWS & WORLD REP., Sept. 26, 1983, at 53 (reluctance of forest companies to initiate new sales). As a result of this opposition, the sales policy was essentially dropped. See *Watt Sets Aside Land Sales*, TIME, Aug. 8, 1983, at 37; *Selling the Forests*, U.S. NEWS & WORLD REP., Sept. 26, 1983, at 53.

to be permitted unless very strong evidence could be presented to justify withdrawal of such lands from private exploitation. Public lands were assets, like any other, and were to be managed to promote their most economic use.<sup>370</sup>

An example of this shift in policy was the modification of restrictions on oil and gas drilling in wildlife refuges.<sup>371</sup> Similarly, the Administration sought to open up wilderness areas to development.<sup>372</sup> Proposals to set aside any new wilderness areas were opposed;<sup>373</sup> proposals were made to reduce the amount of land to be designated as wilderness;<sup>374</sup> and attempts were made to permit leasing in wilderness and wilderness study areas.<sup>375</sup>

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370. The new development philosophy, policy, and plan were laid out in a 1982 "National Material and Program Plan." Terrell, *supra* note 357, at 191, 194. As part of the national plan, private entities would identify "areas of critical mineral potential." The resource value of these areas was to be weighed against proposed new wilderness designations or other activity restrictions. All decisions on the imposition of restrictions would be in conformance with this new mineral policy and decided by the Minerals Section of the Department of the Interior, the Minerals Management Service. The intent was to subordinate other values to minerals development. *Id.* at 194-96.

371. 48 Fed. Reg. 33,648 (July, 22 1983). The policy change was the result of a new interpretation of the law by the Interior Department Solicitor. 15 NAT'L J. 2307-08 (weekly ed. 1983). The policy to open up refuges to commercial exploitation is shown by the method in which the Interior Department proposed to deal with Alaskan lands. In 1981, Secretary Watt transferred responsibility for activities in the Arctic National Wildlife Refuge from the Fish and Wildlife Service, which is responsible for the protection of the animals in the refuge and their habitats, to the United States Geological Survey, which is responsible for authorizing development activities on public lands. The attempted transfer was held to be in violation of the Alaska Lands Act and the National Wildlife Refuge Administration Act. *Trustees for Alaska v. Watt*, 524 F. Supp. 1303 (D. Alaska 1981).

372. In May of 1981, Secretary Watt sent a memo to top appointees outlining his objectives. One of the goals was to "open wilderness areas." L. CANNON, *supra* note 196, at 363; 41 CONG. Q. WEEKLY REP. 2123 (1983). See also Terrell, *supra* note 164, at 372-73 (Heritage Foundation recommends increased exploitation of wilderness system lands). The director of the Forest Service has a similar goal for forest roadless areas. Working with industry groups, he is proposing "hard release" language legislation. This language would limit consideration of forest lands as wilderness. See CONG. RESEARCH SERV. STUDY ON WILDERNESS RELEASE, 129 CONG. REC. S17170-72 (daily ed. Nov. 18, 1983).

373. President Reagan stated in a National Radio Broadcast that Secretary Watt was unfairly criticized for rejecting 800,000 acres proposed to be set aside as wilderness areas. Both Reagan and Watt said the lands did not meet wilderness qualifications. N.Y. Times, June 12, 1983, at A-1, col. 1, A-35, col. 1.

374. The Wilderness Act and Federal Land Policy and Management Act require studies to be made by the Interior and Agriculture Departments to see which federal lands should be made wilderness and which released for commercial activity. These are the "roadless area reviews" by BLM and the Forest Service. See *supra* notes 120-21 and accompanying text. Secretary Watt proposed dropping substantial acreage from the study of roadless areas. He also proposed allowing commercial exploitation while the study of areas continues. Finally, he sought to accelerate decisions on whether an area should qualify as a roadless area or wilderness area. BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 49-50, 124-25.

375. See BATTLE FOR NATIONAL RESOURCES, *supra* note 21, at 124-25; Zafferano, *Legal and Policy Implications of Pacific Legal Foundation v. James Watt*, 3 PUB. LAND L. REV. 51 (1982). Mining, for example, was to be authorized directly in study areas or indirectly through "slant drilling" onto wilderness areas from adjacent leaseholds. See U.S. NEWS &

The Administration's reversal of the policy to reserve federal lands for amenity purposes was closely tied to other privatization efforts to promote resource development on both private and public lands. Just as restrictions on the use of federal lands were to be reduced, so were the controls over resource development rights on all lands.

## 2. *Management of Resources*

An integral element of the privatization program is accelerated leasing of federal lands together with reduced limitations on the activities allowed pursuant to such leases.<sup>376</sup> The Reagan Administration applied this new policy to the leasing of all mineral and timber rights,<sup>377</sup>

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WORLD REP., June 6, 1983, at 52; 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 196; 41 CONG. Q. WEEKLY REP. 1306, 2123 (1983). See also *Mountain States Legal Foundation v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980); Secretary Watt's former firm sued to force the Interior Department and Forest Service to allow mineral development on forest lands; the decision, that allows such exploitation, was not appealed by the Reagan Administration. 11 ENVTL. L. REP. (ENVTL. L. INST.) 10,026 (1982).

Congress responded strongly to these proposals to "open up the wilderness." Special amendments were attached to Interior Department appropriations bills to prevent leasing of or drilling in wilderness or wilderness study areas. See Act of Oct. 2, 1982, Pub. L. No. 97-276, § 126, 96 Stat. 1196 (appropriation bill bans leasing in those forest lands considered in *Mountain States Legal Found. v. Andrus*, 499 F. Supp. 383 (D. Wyo. 1980)); 16 NAT. RESOURCES LAW. 184 (1983); 41 CONG. Q. WEEKLY REP. 1306 (1983).

376. See Coggins, *supra* note 260, at 13. As one privatization supporter noted: "An alternative to complete divestiture of the public lands is simply to extend, and perhaps strengthen the federal leasing program." Smith, *supra* note 353, at 667. In fact, more energy and mineral leases were processed from 1981 to 1983 than in the previous decade. Twomey, *supra* note 209, at 24-25.

377. The Forest Service proposed to double the timber harvest. Twomey, *supra* note 209, at 26. BLM leased 150 percent more onshore acreage in 1981 than in 1980, and in 1982 leased almost double its 1981 figure, "[t]hus equaling in 1982 alone the number of acres leased for the entire period of 1977-1980." 1982 CEQ REPORT, *supra* note 110, at 160.

Increased leasing of federal coal lands was, except for outer continental shelf leasing, the most controversial reversal in resource development policy, and it indirectly led to the resignation of Secretary of the Interior Watt. Secretary Watt believed that prior limits on coal leasing had made the country more dependent on foreign energy. Coal lands were to be opened up for leasing to meet future demands, even if the current market demand or market price was low. 15 NAT'L J. 2306-07 (weekly ed. 1983). Secretary Watt conducted some of the largest coal sales in history in Wyoming and Montana. 15 NAT'L J. 1230 (weekly ed. 1983). After a General Accounting Office analysis, a Congressional committee vetoed further sales until a Special Study Commission on Fair Market Value Policy for Federal Coal Leasing could issue a report. The concern was that Secretary Watt was selling coal rights at far below market value and without adequate environmental safeguards. Despite the Congressional action, Secretary Watt proposed to continue leasing, stating that a committee veto was no longer binding in light of the United States Supreme Court's decision in *Immigration and Naturalization Serv. v. Chadha*, 103 S.Ct. 2764 (1983), which declared the one-house legislative veto unconstitutional. Congress responded by imposing a six-month total moratorium on coal leasing in the Interior Department appropriations bill. The delay was to allow the Commission to issue its report. See *BATTLE FOR NATURAL RESOURCES*, *supra* note 21, at 93, 96-97; 129 CONG. REC. S12486 (daily ed. Sept. 20, 1983), S14166 (daily ed. Oct. 19, 1983), S14276 (daily ed. Oct. 20, 1983) (Senate debate and then concurrence in moratorium on coal leasing).

When the Commission issued its report, it supported increased leasing. However, it

but applied it most vigorously to the leasing of offshore oil and gas resources. The process used to implement this new leasing program illustrates the shift from protection to development in federal resources management.

Prior administrations had sought to increase offshore oil and gas leasing. However, Secretary of the Interior Watt proposed a program to offer the entire outer continental shelf of the United States for leasing by oil and gas companies within five years.<sup>378</sup> Secretary Watt implemented this program through a significant increase in lease sales<sup>379</sup> and through decreased controls over lease site selection and resource exploitation.<sup>380</sup>

Prior federal resources management policy had promoted caution and case-by-case decision-making. Thus, under the 1978 Outer Continental Shelf Lands Act Amendments<sup>381</sup> the breadth of a lease offer was to be narrowed at each step of the pre-lease review. Areas were recommended for inclusion or exclusion by the oil companies, the affected states, environmental groups, or competing interests such as commercial fishermen. As the process moved from establishment of a nationwide leasing program to the selection of particular tracts, the Secretary of the Interior would review suggestions and decide at each stage to exclude or include areas for consideration.<sup>382</sup>

Leasing was to be accompanied by stipulations, rules, orders, and other regulatory controls to insure safe exploitation. Only at the completion of the review process were specific tracts, with specifically tailored conditions, offered for leasing. Even after bids were accepted, they could be rejected if they did not give the federal government the fair market value of the leasehold interest.<sup>383</sup>

Secretary Watt rejected this narrowing process as placing too much emphasis on environmental, as opposed to market, considera-

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found that the Interior Department had offered coal leases at "rock bottom" prices, and had improperly disclosed property values and acceptable bids to industry representatives. Overall, the Commission recommended a "more balanced approach" to coal leasing to promote competitive bidding and increase federal revenues. *Wall St. J.*, Feb. 9, 1983, at 10, col. 1.

378. 15 NAT'L J. 1230 (weekly ed. 1983) (five year program). *Cf.* Koch, *supra* note 196, at 3163 (increases by President Carter.)

379. In 1982 and 1983, 7.7 million acres were leased. This is more than one-fourth of all federal offshore lands leased in the past thirty years. *Wash. Post Nat'l Wkly. Ed.*, Nov. 28, 1983, at 36, col. 2.

380. The effect of the pro-development outer continental shelf policy was an increase in successful lawsuits and successful congressional efforts to block lease sales. *See, e.g.*, *Conservation Foundation of New England v. Watt*, 560 F. Supp. 561 (D. Mass. 1983); *COASTAL ZONE MGMT.*, Sept. 22, 1983, at 1 (Appeals Court upholds injunction on leasing off Massachusetts coast); *Wall St. J.*, Dec. 15, 1983, at 60, col. 2 (Appeals Court upholds ban on sale of California oil leases).

381. Pub. L. No. 95-372, 92 Stat. 632 (1978) (codified at 43 U.S.C. §§ 1331-1356 (1982)).

382. *See California v. Watt*, 712 F.2d 584, 588 (D.C. Cir. 1983).

383. *See generally* Murphy and Belsky, *supra* note 87.

tions. He established a new leasing procedure in which whole blocks were offered to industry; no areas were excluded at any of the early stages because of environmental problems or complaints.<sup>384</sup> Industry's desires were paramount. The decisions of the bidders, that is, the market, determined which area would actually be leased. Similarly, the decisions of the bidders determined whether market value was obtained. If industry bid, the property had value and was to be leased.<sup>385</sup>

Secretary Watt accelerated the leasing schedule and reduced the planning and comment period. Less time was available for opponents of a particular lease to develop information and suggest possible exclusions of selected tracts or lease restrictions. States were given less opportunity to propose, let alone demand, lease deletions or protective stipulations. Regulations were adopted to eliminate mandates of consistency of lease sales with state coastal policies; previously withdrawn tracts were offered over state objections; and the role of state-federal policy groups was reduced.<sup>386</sup> Controls over drilling and production were also reduced. Safety monitoring became the responsibility of the leaseholder, with reduced federal oversight.<sup>387</sup> Similarly, protection of other resources was considered less important than oil and gas development. Thus, the new Interior Secretary opposed attempts to limit leasing even in marine sanctuaries and weakened special rules to protect fishery habitats or endangered species. Finally, less money was made available for research on the possible adverse environmental effects of oil and gas development. Instead, the Reagan Administration relied on

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384. See 129 CONG. REC. E4413 (daily ed. Sept. 20, 1983) (excerpts from an article by the Acting Director of the Mineral Management Service). This change in policy was a recommendation of the Heritage Foundation. See Terrell, *supra* note 164, at 357-58.

385. Belsky, *supra* note 346, at 88 (industry interest to be the key factor in tract selection). As with coal leasing, see *supra* discussion in note 377, the Secretary also challenged the requirement of the Outer Continental Shelf Lands Act that leasing should secure a fair return for the government. To the Secretary, this was an anti-development policy. The objective should not be to maximize return to the government, but rather to encourage offshore exploration. Wash. Post Nat'l Wkly. Ed., Nov. 28, 1983, at 36, col. 3. A Congressional staff report criticized the accelerated leasing policy because it was not receiving the fair market value of the leases. 129 CONG. REC. E3200 (daily ed. June 27, 1983) (text of staff report).

386. See Comment, *Cooperative Federalism for the Coastal Zone and the Outer Continental Shelf: A Legislative Proposal*, 1983 B.Y.U. L. REV. 123, 135 (California), 129 CONG. REC. S1252 (daily ed. Sept. 20, 1983) (Remarks of Sen. Paula Hawkins, R-Fla., on Florida); 129 CONG. REC. H4539 (daily ed. June 28, 1983) (Remarks of Rep. Gerry Studds, D-Mass., on Massachusetts). See also Belsky, *supra* note 346, at 88; 129 CONG. REC. E3200 (daily ed. June 27, 1983) (Congressional staff report).

For a discussion of the Interior Department's conflict with the states over outer continental shelf lease sales and the need for "consistency" with state plans, see *supra* note 347. For a discussion of the reduction of funding for state planning for offshore leasing activity, see H.R. REP. NO. 206, 98th Cong., 1st Sess. 44-45 (1983).

387. See Norse, *Marine Pollution and the Reagan Administration's OCS Oil and Gas Program*, ABA STANDING COMMITTEE ON ENVIRONMENTAL LAW, QUARTERLY NEWSLETTER, Spring 1983, at 1, 3.

industry to supply information on possible hazards and controls.<sup>388</sup>

The Reagan Administration's policy to promote resources development on federal lands was paralleled by efforts to foster resources exploitation on private lands. During the environmental era, the federal government expanded its authority to control development on private lands. Individuals and companies had to comply with regulations to protect air and water, and also had to comply with guidelines to protect the property they proposed to develop. This preference for protective controls over marketplace decision-making was inconsistent with the Reagan Administration's privatization philosophy. Thus, regulatory reforms were proposed to reduce restrictions imposed by air and water policy rules and, similarly, to loosen controls on development of private lands. This shift in government policy is shown by the elimination of restrictions which had been adopted to protect wetlands, endangered species habitats, and coal mining terrain.

During the environmental era, laws and regulations were adopted to prevent the issuance of a dredge and fill permit when it could lead to the unnecessary destruction of a wetland. The burden of proof was placed explicitly on those seeking to develop a wetland to show that the proposed benefits outweighed any danger.<sup>389</sup> The Reagan Administration believed that these rules unduly interfered with private activities. Restrictions on dredge and fill permits stopped developers from building homes, shopping centers, and factories, and hindered needed expansion of waterways and ports to facilitate transportation.<sup>390</sup> As a result of developer complaints, the dredge and fill program was targeted for reform.<sup>391</sup> The Reagan Administration shifted the burden of proof; a permit for development in a wetland now was to be granted unless it could be proven that the proposed activity would be destruc-

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388. See Norse, *supra* note 387, at 3, for a discussion of the prolonged but unsuccessful attempts of the Interior Department to force the National Oceanic and Atmospheric Administration to allow oil and gas drilling in two marine sanctuaries, through the use of the regulatory reform executive order. See also Hoagland, *Federal Ocean Resource Management: Interagency Conflict and the Need for a Balanced Approach to Resource Management*, 3 VA. J. NATL. RES. L. 1, 25-31 (1983).

For a discussion of attempts to limit review of endangered species information in outer continental shelf decision-making, see *Conservation Law Found. v. Watt*, 560 F. Supp. 561, 571-73 (D. Mass. 1983). The Department has also attempted to reduce independent scientific advice on environmental risks by firing all members of the Outer Continental Shelf Scientific Advisory Committee and replacing them with individuals more sympathetic to the Administration's goals. See Norse, *supra* note 387.

389. See *supra* notes 130-31 and accompanying text.

390. See Hookano and Currin, *Preserving the Wetlands: Public Interest Policy or Water Quality Panacea*, URBAN LAND, June 1983, at 36 (the authors are attorneys for the Pacific Legal Foundation, seeking to change the "404" permit program).

391. Comment, *Corps Recasts § 404 Permit Program, Braces for Political, Legal Skirmishes*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,128 (1983) [hereinafter cited as *Section 404 Comment*]; Hookano and Currin, *supra* note 390, at 37.

tive and contrary to the public interest.<sup>392</sup> To implement this new policy, the Administration recommended new legislation.<sup>393</sup> However, when Congress failed to enact such legislation, the Administration proposed regulations to achieve its goals without the need for statutory change.<sup>394</sup> These proposed rules required speedier response to permit requests, allowed general nationwide permits for certain activities, and promoted state takeover of the dredge and fill program.<sup>395</sup> Procedures were also proposed to minimize input and review by those state and federal agencies concerned with the protection of living resources.<sup>396</sup>

The Endangered Species Act<sup>397</sup> was another target of the privatization ideology. The Administration argued that the statute was being used as a tool to slow or stop development. Moreover, since threats to any endangered animal mandated disapproval of a project, the Act impeded "prudent balancing" of the utility of proposed projects with environmental concerns. The Administration sought to change the entire regulatory program.<sup>398</sup> First, as with park lands, the Administration urged that the existing program had been poorly managed. Instead of listing any new species, the Administration claimed it was necessary to improve the status of already listed species through better

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392. See Metz, *Coastal Conference Highlights Administration's Position on § 404*, NAT'L WETLANDS NEWSLETTER, July-Aug., 1983, at 4. See also Davis, *supra* note 130, at 116.

393. The Army Corps of Engineers proposed legislative reforms to restrict the scope of jurisdiction of the § 404 permit program and to explicitly shift the burden of proof onto those opposing a permit. The Administration decided not to formally endorse these requests but rather to simply allow the Corps to prepare a bill and submit it through a "friendly member." 41 CONG. Q. WEEKLY REP. 700 (1983). The proposals were not enacted and the regulation promulgated by the Corps of Engineers has led to legislative proposals to reverse the Corp's recent changes and to increase protection of the wetlands. See *Section 404 Comment*, *supra* note 391, at 10130-31, 10134.

394. *Section 404 Comment*, *supra* note 391, at 10131. In fact, the strategy was to see how many changes could be made so as to minimize the need for statutory changes. Mertz, *supra* note 392, at 6.

395. *Section 404 Comment*, *supra* note 391, at 10131-32; Metz, *supra* note 392, at 5 (paraphrasing the Deputy Assistant Secretary of the Army for Civil Works), and 6. See also 16 NAT. RESOURCES LAW. 109 (1983).

396. Where the Corps' District Engineer was required by statute to consider the views of wildlife agencies, new rules provided that he was no longer to give "great weight" to the views of wildlife agencies and could only require mitigation in very limited circumstances. Finally, new regulations restricted the ability of a wildlife agency to appeal the issuance of a permit. *Section 404 Comment*, *supra* note 391, at 10132-33.

After the proposed regulations were challenged in a lawsuit by twenty-five environmental groups, the Administration agreed to a court-approved settlement that required new proposed regulations to limit the scope of general permits, to provide for consultation with wildlife agencies, and to include mitigation requirements in any permit. Environmentalists believe that this is the first step in restoring "the integrity" of the dredge and fill permit program, but are still concerned about discretionary actions in granting the permits and by possible future efforts to remove two-thirds of the wetlands now covered by the program from federal regulation. See NAT'L WETLANDS NEWSLETTER, Mar.-Apr. 1984, at 4-5.

397. 16 U.S.C. §§ 1531-1543 (1982).

398. Terrell, *supra* note 164, at 384-85.

recovery programs. At the same time, some species were taken off the endangered list. Whether a species remained listed was determined by weighing the biological risk against the economic harm. Thus, there was a lower likelihood of a project being stopped with this static or reduced list of species.<sup>399</sup> In addition, the Administration secured statutory amendments to give the Secretary of the Interior more discretion in determining the threat posed to a species by a particular activity.<sup>400</sup> Finally, budget and personnel cuts limited the amount of information available about threats to existing endangered species or the possibility of a species becoming endangered.<sup>401</sup>

Perhaps the most extreme example of a change in policy with respect to private land was in the administration of strip mining rules by the Department of the Interior. The Surface Mining Control and Reclamation Act<sup>402</sup> was enacted in 1977 because of dissatisfaction with the effects of existing strip mining practices.<sup>403</sup> The Reagan Administration believed that the law was too stringent and that the Carter Administration regulators had been overzealous. The new Administration reduced the standards for state assumption of program authority and relaxed the regulatory requirements for mining. Further, personnel levels to enforce the regulations were cut and penalties for violations were reduced.<sup>404</sup> In short, as with all other aspects of the Administra-

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399. See Pomerance and Turner, *supra* note 227, at 42-43. At the time of President Reagan's inauguration, twenty-five species were proposed for listing. By June of 1982 only four had been listed and additions to the proposal list have been minimal. See Campbell, *The Endangered Species Act: Facing Extinction?*, ENVIRONMENT, June 1982, at 13. In reauthorizing the Endangered Species Program in 1982, Congress specifically rejected the Administration's policy of weighing economic factors against risk and required listing decisions to be based only on biological grounds. 40 CONG. Q. WEEKLY REP. 2474 (1982).

400. The Endangered Species Act Amendments of 1982, Pub. L. No. 97-304, 96 Stat. 1411, allow the Secretary of the Interior to revise the determination of the "critical habitat of a species" and authorize broader permits for the taking of endangered or threatened species incident to permissible activity. C. Wood, *Conflict in Resource Management and the Use of Threat: The Goldstream Controversy*, 16 NAT. RESOURCES LAW. 137, 148 (1982). Similarly, amendments to the Marine Mammal Protection Act replaced a requirement of zero mortality for porpoises affected by fishing to a standard of "best marine mammal safety techniques that are economically and technologically practicable." Act of Oct. 9, 1981, Pub. L. No. 97-58, 95 Stat. 979.

401. This lack of scientific information can provide a basis to argue that an activity should *not* occur because a finding cannot be made that the actions involved will not jeopardize the continued existence of any endangered species. See *Roosevelt Campbell Int'l Park v. EPA*, 684 F.2d 1041 (1st Cir. 1982).

402. Pub. L. No. 95-87, 91 Stat. 447 (1977) (codified at 30 U.S.C. § 1202 (1982)).

403. See *supra* notes 162-163 and accompanying text.

404. This change in policy was recommended by the Heritage Foundation. See Terrell, *supra* note 164, at 345 (zealots of Carter Administration). For a discussion on the implementation of the changes, see *Strip Mining Comment*, *supra* note 177, at 288-90 (reorganization of the Office of Surface Mining), 299-302 (state program regulation requirements), 290-299 (regulatory requirements and standards); R. BROWNSTEIN AND N. EASTON, *supra* note 2, at 139, 141; C. REESE, *supra* note 250, at 299 (reduction in enforcement).

tion's privatization policy, the balance between development and protection had been reset. Increased exploitation of resources was promoted and environmental controls on activities were relaxed.

Through privatization, as with regulatory reform and new federalism, the Administration had shifted back the burden of proof in environmental policy law. This article next discusses the response to this shift and the Reagan Administration's "mid-course correction."

#### IV

##### THE NEW "MID-COURSE CORRECTION"

Both the public and Congress initially supported the President's proposals for regulatory relief, new federalism, and privatization. They believed the Administration's arguments that the new policies would ensure that deficits would be trimmed, taxes cut, regulatory interference lessened, states' rights upheld, and private enterprise promoted. The expected result would be continued economic growth, decreased inflation, and eventual reductions in unemployment. As for environmental protection, some change was perhaps necessary as part of the comprehensive policy initiatives the President suggested.

This initial support soon diminished. Opposition by environmental organizations broadened to Congress and the public. The result was an attempt by the Administration to change the style and visibility of its proposals. Still, the substantive shift was not affected. The burden remains on those who desire protective controls, public ownership, or conservation of resources.

##### *A. Reaction to the Shift in the Burden*

Environmentalists opposed the President's policies almost from the beginning. The regulatory reform proposals, they urged, were a fundamental change in government policy that would not adequately consider the interests of all parties and would result in reduced environmental safeguards. The budget and personnel cuts would reduce government effectiveness. New federalism would not work because states would be unduly influenced by pro-development interests and would not have the financial resources or staff expertise to assume transferred responsibilities. Privatization, they stressed, would result in the most long-term injury to the environment. Land once sold or improperly developed could no longer be protected.<sup>405</sup>

Interspersed in all this criticism of the new Administration's poli-

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405. See 15 NAT'L J. 2306 (weekly ed. 1983). The opposition of environmentalists was not limited to activist groups but also included traditionally conservative organizations such as the National Wildlife Federation. C. REESE, *supra* note 250, at 298. See 129 CONG. REC. S8641 (daily ed. June 16, 1983) (insert of a letter by the National Wildlife Federation).

cies was the concern that environmental groups were being removed from the decision-making process. Discretion was being exercised by individuals unsympathetic to environmental values, and the access of environmental groups to agencies or advisory groups was being reduced. Finally, environmentalists were being portrayed as radicals or extremists, out of the mainstream of contemporary American political opinion.<sup>406</sup>

Fortunately for the environmentalists, the philosophy that led to the environmental era was still popular and the statutory mandates established during that period were still in force. The public and Congress were willing to allow the new Administration some leeway in implementing new policies, but they would not give it *carte blanche*.<sup>407</sup> Similarly, the courts were willing to allow administrators discretion in implementing laws, but would not permit legal requirements to be ignored.<sup>408</sup> In addition, the Administration's spokespersons for the changes in environmental law and policy soon were perceived as doctrinaire, abrasive, and confrontational.<sup>409</sup>

In 1982, environmental interest groups began a counterattack. Their ranks enlarged by increases in paid memberships and donations,<sup>410</sup> they initiated legal suits to overturn administrative actions and sought to convince the public and Congress that the Administration officials were the radicals and ideologues. Environmentalists prepared comprehensive reports which detailed the changes made and proposed by the Reagan Administration, described the "cozy relationship" that the new directors of federal agencies had with those to be regulated, and warned about the resulting environmental dangers. The reports also pointed to public opinion polls supporting protection of the environment as a national priority.<sup>411</sup>

Congress and the media soon joined in the challenge to the Administration's environmental policies. Since congressional committee

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406. See, e.g., 19 WEEKLY COMP. PRES. DOC. 393 (President Reagan in question and answer session with reporters, Mar. 11, 1983).

407. See C. REESE, *supra* note 250, at 312. See also Bloomgarden, *Managing the Environment: The Public's View*, PUBLIC OPINION, Feb.-Mar. 1983, at 47; 15 NAT'L J. 676 (weekly ed. 1983); Fielding, *The Environmental Interregnum—It's Over*, 2 ENVTL. F., June 1983, at 10, 11.

408. See *Natural Resources Defense Council v. EPA*, 683 F.2d 752 (3d Cir. 1982). See also *California v. Watt*, 683 F.2d 1253 (9th Cir. 1983), *rev'd sub nom. Secretary of the Interior v. California*, 104 S. Ct. 656 (1984).

409. See, e.g., L. CANNON, *supra* note 196, at 368 (discussing Secretary Watt).

410. Environmental organizations raised money by appealing to their members and other interested citizens to help them combat the "destructive" policies of the Reagan Administration. See 2 ENVTL. F., June 1983, at 9.

411. See FRIENDS OF THE EARTH, *supra* note 275; 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52. See also 15 NAT'L J. 2306-08 (weekly ed. 1983) (referring to a 66-page study by the Wilderness Society of Secretary Watt's management of the Bureau of Land Management).

members had drafted many of the environmental statutes, they would not automatically accept Administration proposals for fundamental changes in these laws.<sup>412</sup> Federal legislators also felt that they were being eliminated from the decision-making process. They wished to exercise more oversight and control over administrative actions and budget and personnel cuts.<sup>413</sup> The media also responded to the complaints about the Administration's policies. Environmental protection became an issue independent of other Administration changes and proposals. Press reports increased on changes in policy, attacks by environmental organizations, and congressional concern.<sup>414</sup> Both Congress and the press became skeptical of the Administration's justifications, and critical of the personnel and policies of the environmental and natural resources agencies.<sup>415</sup>

At the same time, an increasing number of court decisions indicated that the Administration was not merely establishing new policies, but was violating the law. Regulators were not adequately following procedural rules to ensure public and state involvement in environmental decision-making and were, in some cases, disregarding explicit statutory environmental protection mandates.<sup>416</sup>

By the end of 1982, public opinion focused increasingly on the Administration's environmental policies. The public's basic support for protection of the environment was converted into concern about a possible decrease in such protection. Publicity about environmental risks from toxic substances, hazardous wastes, and acid rain heightened

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412. The initial response by environmentally oriented federal legislators was defensive. They wanted to stop changes in recently enacted laws. See *HAZARDOUS WASTE IN AMERICA*, *supra* note 150, at 221. By 1983, these members were offering bills to statutorily mandate more protective regulations. See League of Women Voters, *Report from the Hill*, Nov.-Dec. 1983, at NR-1- NR-3 (reporting on Senate and House hearings on legislative proposals to amend the Clean Air and Clean Water Acts). See also 41 CONG. Q. WEEKLY REP. 2026 (1983) (ban on outer continental shelf leasing off the California, Florida and New England coasts).

413. See, e.g., 129 CONG. REC. S7274-75 (daily ed. May 23, 1983) (insert of an article by Senator Robert Stafford, R-Vt., on administration of the Superfund). Congress responded to budget cut proposals, for example, by increasing rather than decreasing agency budgets. See, e.g., 41 CONG. Q. WEEKLY REP. 2026 (1983) (Interior Appropriation Bill); H.R. REP. NO. 223, 98th Cong., 1st Sess. 2-3 (1983) (EPA Appropriation); 15 NAT'L J. 1344 (weekly ed. 1983) (EPA budget and personnel). Congress also mandated increased personnel for environmental regulation and enforcement. See 129 CONG. REC. H4469 (daily ed. May 23, 1983) (EPA appropriation conference report); H.R. REP. NO. 212, 98th Cong., 1st Sess. 24 (1983) (EPA authorization; prohibition of reductions in personnel).

414. See, e.g., Editorial, *Boston Globe*, Apr. 10, 1983, at A-22, col. 1; Peterson, *Will the Crystal Ball Show a Dark Environmental Future*, *St. Petersburg Times*, October 31, 1982, at 1-A, col. 1; Wall St. J., March 29, 1983, at 1, col. 4; N.Y. Times, June 5, 1983, at E-7, cols. 4-5; NEWSWEEK, July 25, 1983, at 22.

415. See, e.g., Editorial, *Watt's 'Big Lie' Campaign*, *St. Petersburg Times*, May 20, 1983, at 24A, cols. 1-2; 15 NAT'L J. 1230-31 (weekly ed. 1983) (quoting Representatives).

416. See, e.g., *Trustees For Alaska v. Watt*, 524 F.2d 1303 (D. Alaska 1981); *Environmental Defense Fund v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983).

this concern, and opposition to the Administration's actions grew.<sup>417</sup> In short, environmental law and policy had become a potentially major political issue.<sup>418</sup>

### B. Maintaining the Shift in the Burden

The initial Administration reaction to increasing public and congressional concern about environmental policy was to develop a public relations strategy. A White House office issued a comprehensive report justifying the Administration's policies and espousing the Administration's pride in its "environmental achievements."<sup>419</sup> Agency officials projected a more moderate image and spent more time traveling around the country explaining their actions directly to the people.<sup>420</sup> The rhetoric was tempered and controversial symbols abandoned.<sup>421</sup> A major pro-environment initiative was promoted.<sup>422</sup>

Still, there was not a basic shift in environmental policy. The Administration's efforts to change laws and shift the balance away from protection were not abandoned. Agency officials continued to exercise their discretion to swing the pendulum back from an overemphasis on

417. See 15 NAT'L J. 676 (weekly ed. 1983). Wash. Post, Dec. 23, 1983, at A-6, cols. 4-5; N.Y. Times, Dec. 29, 1983, at 13, col. 1 (poll by White House pollster). See also Lake, *The Environmental Mandate: Activities and the Electorate*, 98 POL. SCI. Q., Summer 1983, at 215, 216-32. Bloomgarden, *supra* note 407, at 47-50.

418. See N.Y. Times, Dec. 29, 1983, at A-16, cols. 1-5. NEWSWEEK, July 25, 1983, at 22. See, e.g., BURSON-MARSTELLER, *supra* note 1, at 33 (statement by Henry Waxman, D-Calif.); Wash. Post, July 17, 1983, at A-1, cols. 1-4 (environment as issue in New Hampshire); N.Y. Times, June 3, 1983, at A-18, col. 1 (attack by former President Carter on Reagan environmental policies).

419. See Transmittal Message by President Ronald Reagan in 1982 CEQ REPORT, *supra* note 110, at iv. See generally, 1982 CEQ REPORT, *supra*. See also C. REESE, *supra* note 250, at 310.

420. See Watt's 'Truth' Crusade, NEWSWEEK, Apr. 11, 1983, at 35; Pasztor, *White House Acts to Change Image on Environment*, Wall St. J., Mar. 11, 1983, at 16, col. 3; Pasztor, *Watt Tries to Project New Moderate Image But Encounters Growing Number of Critics*, Wall St. J., Aug. 3, 1983, at 21, col. 6. As part of this image campaign, the President gave his first "environmental message" in one of his regular Saturday morning five-minute radio talks. N.Y. Times, June 12, 1983, at A-1, col. 1.

421. For example, in 1982, the Administration "began to shrink" its use of the term "privatization" to describe its land use policy. The new phrase would be "asset management." See Ramsey, *supra* note 358, at 34-35; Hanke, *supra* note 348, at 661.

422. In early 1982, the Administration sought suggestions from agency officials regarding an environmental initiative consistent with its announced deregulation and privatization philosophy. The National Oceanic and Atmospheric Administration proposed, and the Interior Department accepted, "Barrier Islands" legislation. This legislation would bar federal subsidies, including insurance, for development on barrier islands. Companies and individuals would still be able to build on such islands. They simply could not depend on federal support for such actions. The initiative, enacted into law with some modification, was consistent with the Administration's desire to reduce dependence on federal revenues. See U.S. NEWS & WORLD REP., June 6, 1983, at 54; Kuehn, *The Coastal Barrier Resources Act and the Expenditures Limitation Approach to Natural Resources Conservation: Wave of the Future or Island Unto Itself?*, 11 ECOLOGY L.Q. 583 (1984).

protection. And the President supported their actions directly and publicly.<sup>423</sup>

Concern by the public, Congress and even business leaders<sup>424</sup> was intensified, however, by allegations against EPA Administrator Gorsuch of unethical conduct by her and her staff. These allegations led to her resignation,<sup>425</sup> and later allegations of "insensitive remarks" by Interior Secretary Watt also led to his resignation.<sup>426</sup> Appointment of their successors provided an opportunity for a real mid-course correction in environmental law and policy.<sup>427</sup>

423. See 19 WEEKLY COMP. PRES. DOC. 475 (President Reagan's March 29, 1983 interview with six journalists). Secretary Watt explained his change of tone as a symbol of the success of his policies. He stated that he could begin taking "more environmentally oriented actions . . . because he had succeeded in swinging the pendulum back from what he saw as too much emphasis on protecting lands and resources and too little on the development of energy, minerals, timber and other (federal) resources." N.Y. Times, June 26, 1983, at A-20, col. 1.

424. Business leaders became concerned that "overzealous actions" by EPA and Interior officials had "given deregulation a bad name." See U.S. NEWS & WORLD REP., Dec. 12, 1983, at 81. Moreover, they were upset about the uncertainty of the regulatory regime covering their activities caused by an increase in lawsuits, often successful, challenging the Administration's reforms. See Wall St. J., Aug. 3, 1983, at 21, col. 5. See also AMICUS JOURNAL, Spring 1983, at 2 (quoting an editorial in Chemical Week); Wall St. J., Feb. 18, 1983, at col. 4 (quoting the Chairman of the Board of the Continental Group); Wall St. J., April 29, 1983, at 1, col. 1 (quoting an industry lobbyist). The executive vice-president of the National Association of Manufacturers described the problem:

In the environmental area, it is perhaps easier to understand why regulatory reform lost support. The political squabbling that surrounded Interior Secretary James Watt and the loss of confidence in the Environmental Protection Agency unfortunately shifted the emphasis from the need for reform to a fear that reform meant loss of important environmental protection.

Jasinowski, *The Decline of Regulatory Reform*, Wash. Post Nat'l Wkly. Ed., Jan. 23, 1984, at 26, col. 3.

425. See 41 CONG. Q. WEEKLY REP. 2475 (1983). See also N.Y. Times, June 9, 1983, at B-11, col. 1 (a dispute over toxic waste cleanup program led to the departure of Rita Lavelle and twenty-one other EPA appointees following Anne Gorsuch's resignation).

426. See 41 CONG. Q. WEEKLY REP. 2475 (1983). See also N.Y. Times, Oct. 10, 1983, at A-1, col. 5.

427. See N.Y. Times, Oct. 14, 1983, at A-1, col. 4 and A-5, col. 1.

At the announcement of the appointment of William Ruckelshaus as EPA Administrator, and later at his swearing in, President Reagan called for a new beginning as shown by the appointment of a man "staunchly committed to protecting the nation's air and water and land." The President gave Administrator Ruckelshaus a "broad, flexible mandate" and authorized him to conduct an agency-wide review to assure that EPA had the personnel and resources needed to "perform its vital function." The President stressed that his Administration had been doing a good job, but "I also believe that we can do better." 19 WEEKLY COMP. PRES. DOC. 428 (nomination of William D. Ruckelshaus, March 21, 1983). See 19 WEEKLY COMP. PRES. DOC. 741-42 (swearing in of William D. Ruckelshaus). See also Wall St. J., May 19, 1983, at 4, col. 3 (quoting Reagan as saying we must do "even more to protect and cleanse our environment . . . there must be nothing less than full compliance with the letter and spirit of the law").

After the resignation of Secretary Watt, Reagan authorized his new Interior Secretary, William Clark, to review the policies, personnel, and process at the Interior Department. Wash. Post, Nov. 27, 1983, at A-3, col. 2.

The new EPA Administrator, William D. Ruckelshaus, had been the first Administrator of the Agency and was respected by Congress, the environmental community, and the public. He quickly acted to regain congressional and public confidence in his agency. Administrator Ruckelshaus replaced controversial subordinate officials, admitted mistakes of the past, established better relations with environmental groups, Congress, and the press, and promised new initiatives to protect the environment.<sup>428</sup>

The new Interior Secretary, William P. Clark, was not so readily supported by opponents of the Administration's policies. He was a trusted friend of the President and had little experience in environmental management. Secretary Clark's record as a judge indicated support for development over conservation. Nevertheless, like Administrator Ruckelshaus, he changed the tone of the Interior Department. Secretary Clark replaced controversial officers, established more open relations with environmental groups, Congress and the press, and promised an investigation and change of previous policies.<sup>429</sup>

This mid-course correction was more of a fine-tuning than a shift in basic environmental policy. There was some response to public or congressional demands for regulations, new laws, more enforcement, and preservation of lands and other resources.<sup>430</sup> It soon became apparent, however that the burden was still on those seeking controls or requesting conservation to demonstrate the need for action. Reduction and reform of regulations remained an Administration priority.<sup>431</sup> Dis-

428. See *Ruckelshaus Team Moving Into Place at EPA*, 41 CONG. Q. WEEKLY REP. 2391 (1983). Wall St. J., Nov. 8, 1983, at 5, col. 3; 15 NAT'L J. 1344 (weekly ed. 1983) (support for congressional budget increases); TIME, Dec. 5, 1983, at 55 (press openness).

429. See N.Y. Times, Oct. 14, 1983, at A-1, col. 4 and A-5, col. 1 (concern of environmentalists about new Secretary of the Interior Clark); 41 CONG. Q. WEEKLY REP. 2412 (1983) (confirmation of Clark; concern of some Senators); Wash. Post, Oct. 14, 1983 at A-1, col. 4 (lack of credentials and experience); Wash. Post, Dec. 23, 1983 at A-1, col. 3 and A-6, cols. 1-6 (replacement of Watt's appointees); Wall St. J., Dec. 8, 1983, at 2, col. 2 (meeting with environmental leaders); 42 CONG. Q. WEEKLY REP. 164 (1984) (meeting with Congressional leaders); 129 CONG. REC. S16800 (daily ed. Nov. 18, 1983) (debate on Clark confirmation; Clark quoted as saying he will study the issues); Wall St. J., Jan. 13, 1984 at 8, cols. 2-3 (change in offshore leasing policies).

430. See Wall St. J., Nov. 8, 1983, at 5, col. 3 (cost of hazardous air pollutants); Wash. Post, Dec. 23, 1983, at A-6, col. 5 (EPA proposal on acid rain); Wall St. J., Feb. 14, 1984 at 14, cols. 3-4 (enforcement of strip mining rules); N.Y. Times, Dec. 29, 1983, at A-16, cols. 1-5 (Clark announces end to moratorium on acquisition of lands for parks and refuges; delays two outer continental shelf sales); Wall St. J., Jan. 6, 1984 at 2, cols. 3 & 4 (ban on leasing in wildlife refuges and proposed wilderness areas); Wall St. J., Mar. 2, 1984 at 6, cols. 2 & 3 (reduction in outer continental shelf acreage to be leased).

431. See 42 CONG. Q. WEEKLY REP. 212, 216 (1984) (President's Budget Message of Feb. 1, 1984). See also *id.* at 217, 218-19 (President's Economic Report of Feb. 2, 1984): "It is also apparent that substantial further deregulation and regulatory reform will require changes in the basic regulatory legislation." See, e.g., Wall St. J., Mar. 12, 1984, at 8, col. 1 (proposed standards on dust, soot and other particles in the air); Asbestos Information Ass'n v. OSHA, 52 U.S.L.W. 2533 (5th Cir. 1984) (standard for workplace asbestos exposure).

cretion was still exercised to select the least restrictive alternative.<sup>432</sup> Possible changes in direction by agency officials were still limited by OMB oversight and control.<sup>433</sup> Some environmental budgets were increased in response to political pressure, but funding and personnel levels remained substantially below levels existing prior to the new Administration.<sup>434</sup> Less money was available for scientific research,<sup>435</sup> although regulatory decisions still depended on strong scientific evidence of the need for regulatory action.<sup>436</sup> Cost-benefit analysis and risk assessment were still required and, in fact, promoted by the new leadership.<sup>437</sup> Cooperation with industry and restrictions on public access to

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432. See Wall St. J., Apr. 6, 1984 at 31, cols. 4-6 (criticism by environmentalists of EPA Administrator Ruckelshaus); AMICUS J., Spring 1984, at 14 (new Interior Secretary Clark and continuation of prior resource policies).

EPA Administrator Ruckelshaus indicated prior to his appointment that the nation's basic clean air and clean water laws were inflexible and sometimes counterproductive. Wall St. J., Apr. 29, 1983, at 1, col. 1. See also U.S. NEWS & WORLD REP., July 11, 1983, at 40. Ruckelshaus's regulatory decisions selected the least restrictive option. See, e.g., N.Y. Times, Sept. 18, 1983, at 1, col. 1 (new rules proposed by EPA to govern two environmental hazards would permit health risk levels higher than previous administrations considered acceptable, and equivalent to those recommended by former EPA Administrator Gorsuch); Wall St. J., Dec. 16, 1983, at 6, cols. 3-4 (less stringent regulation for benzene emissions seen as "barometer" of new Administrator's thinking); N.Y. Times, Feb. 4, 1984, at 1, cols. 4-7, (EPA Administrator sets suggested safe levels for pesticide EDB in grain and foods; states and environmental organizations criticize levels set as too risky).

433. See, e.g., 15 NAT'L J. 2511 (weekly ed. 1983) (letter from OMB regulation chief to Ruckelshaus on EPA regulation of new uses of toxic chemicals); *Inside the Administration*, PAPERWORK UPDATE, Dec. 2, 1983, 2 (1983) (OMB rejects EPA request for approval of regulation to require information from manufacturers on new chemicals); TIME, Dec. 5, 1983, at 55 (OMB opposition to acid rain proposals); Wall St. J., Jan. 6, 1984 at 30, cols. 3-4 (OMB pressure leads to Labor Department's lowerings of grain elevator dust standards).

434. In his proposed fiscal year 1985 budget, the President proposed a six percent increase in EPA's operating budget from that proposed for fiscal year 1984. That is still eight percent less than the Agency's fiscal year 1981 operating budget in the last year of the Carter Administration (without adjusting for inflation). The proposed 1985 budget for the Interior Department was five percent less than its fiscal year 1984 budget. More money was available for dam construction; funding for environmental studies of offshore areas was decreased, and no money was proposed for historic preservation or coastal zone management. 42 CONG. Q. WEEKLY REP. 198-99, 273 (1984); Wall St. J., Feb. 2, 1984, at 5, cols. 2-3; N.Y. Times, Feb. 2, 1984, at B-4, col. 5.

435. The proposed fiscal year 1985 budget includes substantial increases for research and development. However, the funds are directed to military and space projects. Civilian projects will receive only a 1.6 percent increase, and there will be an actual reduction in applied research and development. 42 CONG. Q. WEEKLY REP. 178, 273-74 (1984); N.Y. Times, Feb. 2, 1984, at B-4, col. 4.

436. In addition, Administrator Ruckelshaus believes that many problems are too quickly handled by regulations. He recommends that risk assessment studies be conducted before management actions are undertaken. See 15 NAT'L J. 1688-89 (weekly ed. 1983) and Wall St. J., Dec. 12, 1983, at 4, col. 2 (dioxin); N.Y. Times, Feb. 4, 1984, at 1, col. 6 (EDB in imported fruit). Administrator Ruckelshaus hopes to convince the public of the need to get the best scientific evidence first, before taking regulatory action. He believes that the previous policy of setting standards first and then modifying them or justifying them through research, needs to be changed. Wall St. J., Oct. 19, 1983, at 30, col. 4.

437. In addition to supporting risk assessment, see *supra* note 436, EPA Administrator

information were continued.<sup>438</sup> New federalism policies were promoted, except when they hindered private enterprise.<sup>439</sup> Development of public lands remained a higher priority than purchase or restrictions.<sup>440</sup> The initial shift in the balance from protection to development was a Presidential decision. The mid-course correction only served to justify and maintain that shift, not to terminate it.<sup>441</sup>

Ruckelshaus strongly supports cost-benefit analysis and believes it is unwise to not be able to consider costs in establishing regulations. He is proposing legislative changes to allow such analysis in cases where it is now statutorily prohibited. *See* 15 NAT'L J. 1689 (weekly ed. 1983); Wash. Post Nat'l Weekly Edition, Dec. 12, 1983, at 9, col. 3. He is proposing new legislative guidelines that will allow agencies to weigh the risks against benefits and the costs of reducing risks. Moreover, he urges that such assessment should be premised on finding some acceptable level of risk, rather than opposing an activity or product altogether. *See* 15 NAT'L J. 2529, 2531-32 (weekly ed. 1983) (interview with Administrator Ruckelshaus).

An example of cost-benefit and risk assessment analyses is the attempt to set regulatory controls over acid precipitation. *See supra* discussion in note 323. Despite his request for authority to propose legislation and to implement a program to control emissions causing such precipitation, Administrator Ruckelshaus justified, in terms of the costs and risks involved, the President's decision to merely provide for future research:

Mr. Ruckelshaus said the Administration did not call for a program to reduce sources of the pollution "because the President is not persuaded we know enough to launch a major control program." He said that more information was needed before undertaking "a very expensive and potentially socially disruptive program."

N.Y. Times, Jan. 27, 1984 at 6, col. 4.

438. *See* Wall St. J., Oct. 13, 1983, at 4, col. 1 and Wash. Post, Oct. 13, 1983, at A-21, col. 5 (EPA amends its procedure for enforcement of hazardous waste cleanup settlements. Past policy provided no standards for resolution of disputes between industry and EPA over payment of cleanup expenses. Full payment was the basis for bargaining. The new guideline presumptively accepts 80 percent as the basis); Wall St. J., Aug. 23, 1983, at 2, col. 3 (reduction in availability to public or unions of health complaints by employees of chemical plants). *See also* Wall St. J., Dec. 20, 1983, at 16, cols. 3-4 (EPA proposes changes in fuel economy procedures at automobile companies' request); Brown, *EPA Enforcement — Past, Present and Future*, ENVTL. F., May 1984, at 12, 18-22 (EPA enforcement policies not yet improved; 1984 will be determinative year).

439. *Compare* Wall St. J., Dec. 30, 1983, at 32, cols. 1-2 (EPA will let states decide on standards for groundwater protection), *with* N.Y. Times, Jan. 1, 1984, A-11, col. 6 (states challenging OSHA regulation preempting state laws on hazardous substance warnings).

440. *See* AMICUS J., Spring 1984, at 12-15. *See, e.g.*, Wash. Post, Dec. 24, 1983, at A-2, col. 4 (former director of coal leasing program given additional power over all mineral leasing and land conservation programs). Even the decision to resume purchases of land for national parks may not indicate a real change in policy. Secretary Clark had indicated that his request for \$150 million for purchases would not be to add new units to the park system, but rather was needed to "round out" existing parks. The request is less than one-sixth of the amount Congress has authorized for national park purchase. *See* N.Y. Times, Jan. 1, 1984, at 14E, cols. 3-4.

441. Some skeptics had urged that the President used Gorsuch and Watt as "political lightning rods" to draw attention away from his own conservative environmental views. *See* U.S. NEWS & WORLD REP., June 6, 1983, at 31. There was, in any event, little doubt that Watt was carrying out the President's reform agenda and not just his own. *See* N.Y. Times, Oct. 10, 1983, at D-10, col. 4.

The mid-course correction, termed the "next phase" of environmental policy, would have a less confrontational tone. It would be a "political damage control job" to neutralize environmental concerns by launching a few new initiatives and reducing the rhetoric. *See* Hoffman, *Environment Key in 1984 Strategy*, Wash. Post, Dec. 23, 1983, at A-1, cols. 4-5. *See also* 3 ENVTL. F., Sept. 1983 at 3-4; Wall St. J., Apr. 13, 1984, at 62, cols. 1-2. The

## CONCLUSION

It is not yet clear whether the shift in the burden of proof necessarily will result in long-term decreases in the legal protections available for the environment. In the short term, federal officials will exercise discretion to implement procedures in favor of development. However, public opposition to many of the Administration's policies has caused Congress and the courts to place substantial limits on implementation of the reform agenda. Environmental organizations, with growing membership and financial resources, are pressuring legislators and judges to enforce federal environmental mandates. Congress has responded by exercising more oversight, increasing budgets for environmental activities, and limiting the discretion of regulators. The courts have responded by requiring federal agencies to comply with statutory or administrative mandates.<sup>442</sup> Perhaps of even greater significance, the United States Supreme Court has indicated that an agency is not totally free to change its regulatory policy. The agency must be able to present "an adequate basis and explanation" for any such changes.<sup>443</sup>

In the longer term, public interest in the shift in environmental policy may be diluted by other concerns.<sup>444</sup> Even if pressured by the voters, Congress cannot detail all required decisions through legislation. The premise of environmental policy law, as part of administrative law, is that the legislature cannot and will not make complex determinations about implementation. Statutes provide policy gui-

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President has made it clear that his philosophy is still the same. 19 WEEKLY COMP. PRES. DOC. 429 (Mar. 21, 1983). Secretary Watt's policies were the Administration's and would be carried out by Secretary Clark. 129 CONG. REC. S16769 (daily ed. Nov. 18, 1983) (quoting Presidential Advisor Edward Meese). EPA Administrator Ruckelshaus shares the Administration's belief that environmental laws must be changed to make them "more reasonable and less burdensome." N.Y. Times, July 31, 1983, at E-1, col. 6. See also, Petersen, *Ruckelshaus Rocks No Boats at EPA*, Wash. Post Nat'l. Wkly. Ed., Dec. 12, 1983, at 9, cols. 1-3.

442. See Wall St. J., June 2, 1983, at 2, cols. 3-4 (comments of EPA Administrator Ruckelshaus on Reagan Administration changes and congressional reaction); 1982 CONSERVATION FOUNDATION REPORT, *supra* note 52, at 405 (suits by environmental organizations); 129 CONG. REC. H8248, E5823 (daily ed. Oct. 18 and Nov. 18, 1983) (scrutiny of Interior Department policies); 129 CONG. REC. H2867 (daily ed. Aug. 4, 1983) (solid waste bill; legislated standards required to close administrative loopholes); 15 NAT'L J. 1344 (weekly ed. 1983) (congressionally imposed increases to EPA budget). Natural Resources Defense Council v. Gorsuch, 683 F.2d 752 (3d Cir. 1982) (court upholds challenge by environmental group to changes in regulatory policy).

443. *Motor Vehicle Mfg. Ass'n v. State Farm Mutual*, 103 S. Ct. 2856, 2862 (1983). In the *Motor Vehicle* case, the Court reviewed the rescission of a passive restraint safety standard for new cars. It found that the revocation was improper and that "substantial uncertainty" was insufficient as a reason for the revocation. 103 S. Ct. at 2871. Merely saying that a rule is overly burdensome or that political concerns mandate a new rule is not a sufficient basis for a change. See Tunick and Penney, *Supreme Court Sets Ground Rules for Deregulation*, 2 ENVTL. F., Sept. 1983, at 3 (applicability of the *Motor Vehicle* case to environmental law).

444. See Stroup and Baden, *supra* note 348, at 704. But cf. Lake, *supra* note 417, at 232 (politicians confuse public's attitude toward protection of environment with issue support).

dance, but legislative compromises may require intentionally vague language. Executive agencies have broad discretion to carry out legislative guidelines and interpret vague language.<sup>445</sup> Finally, judicial involvement in administrative decision-making is limited. When a regulator acts within the broad discretion granted to him or her by Congress, the courts will not intervene. Even if the regulator acts beyond the statutory grant of authority, the courts can only respond to a specific case; parties challenging governmental action must assume a continuing and large financial commitment. Moreover, the same courts that can be used in the short-term to stop anti-environment changes can be used in the long-term to prevent a return to a pro-environment set of regulations. New leadership more sensitive to environmental protection may be required to specifically justify any changes in regulatory policy.<sup>446</sup>

There is, of course, the possibility that a change in political leadership might cause a change in philosophy of the federal government regulators. In such a case, officials may shift the burden back somewhat, through the exercise of discretion.<sup>447</sup> However, even if such a change occurs, the idealistic goals established by the environmental era will have to yield to a different balance for the future. Trust in sensitive environmental officials to implement strict controls has been lessened. Moreover, the ability of officials to change policy without new evidence and justifications has been judicially limited.<sup>448</sup> Dependence on a large federal budget and bureaucracy to acquire information, take decisive action, and enforce controls or protect resources is no longer as acceptable an approach as in the past. In addition, many of the most senior and skilled government employees are gone and it may take many years to re-build a core of expertise.<sup>449</sup> Regulatory reform, cost-benefit and risk assessment analyses increasingly have been accepted and are almost institutionalized.<sup>450</sup> Public lands and resources that have been

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445. See Costle, *supra* note 91, at 411. See also *American Textile Mfg. Co. v. Donovan*, 452 U.S. 490, 543 (1981) (dissent by Justice Rehnquist complains that Congress all too often and, in his opinion, unconstitutionally, delegates the "hard policy choices" to the Executive).

446. See Reed, McChesney, and Rosenblum, *The Supreme Court—1983-84*, 13 ENVTL. REP. 10298, 10301 (1983) (*Motor Vehicle Mfg. Ass'n v. State Farm Mutual* stands for the proposition that once a rule is on the books, "the rule has a sort of presumption of validity").

447. See Tolchin and Tolchin, *supra* note 236, at 74 (discretion dependent on politics of President); BURSON-MARSTELLER, *supra* note 1, at 32 (statement of Congressman Morris Udall, D-Ariz.; shift back if change in political leadership); 2 ENVTL. F., Aug. 1983, at 5 (Democratic Party seeks to position itself as the party of environmental protection).

448. *Motor Vehicle Mfg. Ass'n v. State Farm Mutual*, 103 S. Ct. 2856 (1983) (limits on ability to change regulatory rules).

449. H.R. REP. NO. 223, 98th Cong., 1st Sess. 19, 20 (1983) (EPA appropriation for FY 1984—erosion of EPA's technical and professional expertise through personnel reductions); S. TOLCHIN & M. TOLCHIN, *supra* note 4, at 253 (personnel reductions make it more difficult to act in the future).

450. See, e.g., 129 CONG. REC. E5742 (daily ed. Nov. 18, 1983) (lecture by Russell F.

sold or developed cannot be conserved in the future. And private property that has not been purchased by the government may be lost to preservation purposes through development.<sup>451</sup>

However, even with a reallocation of the burden of proof onto those seeking controls or conservation, the potential for enhanced legal protections still exists. The judicial remedies developed before and during the environmental era are easier to secure. Public sensitivity to environmental concerns has increased, and thus fact-finders are often more willing to accept the evidence of harm and conclude that such harm outweighs economic utility. The environmental era has produced a larger number of public interest environmental law organizations with increased resources to undertake complex and expensive litigation. Finally, there is the strong possibility that a new set of judicial remedies, for example "toxic torts," may be statutorily created.<sup>452</sup>

The shift from federal to state regulation and enforcement may not necessarily result in decreased environmental protection. State officials are increasingly interested in passing and enforcing environmental statutes. The environmental era has resulted in substantial state bureaucracies whose continued survival depends on the exercise of administrative control over development activities. Many states are setting aside land for preservation and establishing strict environmental standards because of their own economic interest in promoting a certain quality of life and securing new "soft" high technology businesses.

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Train, President of World Wildlife Fund; acceptance of tradeoffs based on cost-benefit and risk analysis); C. LUDLUM, *supra* note 93, at 1, 66 (reduction of unnecessary and burdensome government regulations a desirable objective).

451. Twomey, *supra* note 209, at 26 (once public lands are sold or developed, they cannot be taken back); BATTLE FOR NATURAL RESOURCES, *supra* note 21, at 11 (Watt's policies may limit successor's discretion to dedicate land to non-development purpose).

452. See 5 BURSON-MARSTELLER, *supra* note 1, at 44 (statement of Russell Train; increasing inclination of courts to impose tort liability); Phila. Inquirer, Nov. 20, 1983, at 3-D, col. 3 (jury verdict awarding damages for contaminated well; indicates heightened awareness by public of danger of toxins); Beshada v. Johns Mansville, 90 N.J. 191, 447 A.2d 539 (1983) ("state of the art" defense no longer available in strict liability case involving asbestos); Moore, *Private Suits Flood Companies Under Clean Water Provisions*, Legal Times, May 7, 1984, at 1, col. 2; Feller, *Private Enforcement of Federal Anti-Pollution Laws Through Citizen Suits: A Model*, 60 DENVER L. J. 553, 565-71 (1982/1983) (use of federal agency files to provide necessary information for citizen suits); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983) (Superfund statute; reimbursement for clean up; companies are jointly and severally liable if harm indivisible; if harm divisible, burden of proof of apportionment rests with defendants); United States v. Wade, 52 U.S.L.W. 2384 (E.D. Pa. 1983) (Superfund changes traditional tort concepts of causation; government only needs to show company had waste at site); Keller, *The Management Challenge*, TRIAL, Apr. 1983, at 51, and Bartlett, *The Legal Development of a Viable Remedy for Toxic Pollution Victims*, THE BARRISTER, Fall 1983, at 41 (toxic torts); Grad, *Remedies for Injuries Caused by Hazardous Waste: The Report and Recommendation of the Superfund, § 301 Study Group*, in ABA STANDING COMMITTEE ON ENVIRONMENTAL LAW QUARTERLY NEWSLETTER, Fall 1983, at 1 (proposed allowing damages for personal and property injury resulting from exposure to hazardous wastes).

Finally, many state prosecutors now see environmental law as an additional area where they are obligated to enforce the law, and have set up special "environmental units" to do so.<sup>453</sup>

At the federal level, agency officials will continue, even under a higher burden, to impose some regulatory controls.<sup>454</sup> Political pressure, industry concern about non-uniform state rules, congressional mandates, court decisions, and perhaps a change in philosophy, could lead to even more stringent standards in some areas.<sup>455</sup> Nevertheless, the balance has been reset. Whether the shift is described as a pendulum shift to the center or from the center, environmental policy law will never be the same.

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453. See Wash. Post, Dec. 24, 1983, at A-4, cols. 1-2 (action by Florida on EDB); Comment, *Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dump Sites*, 130 U. PA. L. REV. 1229, 1236 n.38 (1983) (state laws on hazardous waste); 2 ENVTL. F., Dec. 1983, at 5 (report on meeting of state and local air pollution control agencies); Ward, *High Interest in Hazardous Air Pollutants*, 2 ENVTL. F., Dec. 1983, at 7 (Michigan state official said even anemic economy and high unemployment will not lead to a decrease in state controls), at 12 (more and more states with own controls). But see Davis, *Toxic Materials*, 25 ENVIRONMENT, Apr. 1984, at 5, 41 (obstacles to state action).

454. See, e.g., Wall St. J., Dec. 21, 1983, at 8, col. 3 (EPA to regulate a chemical because there is "sufficient data" to conclude there is significant risk of serious harm); Wash. Post Nat'l Weekly Ed., June 18, 1984, at 33, col. 1 (regulation of carcinogens; policy changed because of new scientific evidence).

455. See BURSON-MARSTELLER, *supra* note 1, at 46 (quoting Russell Peterson that when citizens become dissatisfied that the "new system doesn't give them what they want, they will be back beating on the federal government for help"); Ward, *supra* note 453, at 12 (hazardous air pollution laws, "inconsistent with crazy quilt of non-uniform rules and regulations," may be felt by industry to be "particularly cumbersome and meddlesome"); *A Second Generation of National Parks*, 4 AM. LAND F., Fall 1983, at 18 (discussion of proposals to amend National Parks Act to include landscaped areas); 41 CONG. Q. WEEKLY REP. 2334 (1983) (House passes legislation to tighten laws to control hazardous waste); 129 CONG. REC. S11592 (daily ed. Aug. 4, 1983) (Senator William Proxmire introduces legislation to set stiffer standards for federal insecticide law); Belsky, *supra* note 346, at 90, 94 (increase in litigation to resolve environmental disputes).