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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 officials1 for attempting to destroy "the entire legal and institutional framework for environmental protection."2 Defenders of the Administration urge that it is merely moving "the environmental pendulum . . . back to the center."3 The debate is expressed in symbols and myths as a struggle between the so-called "environmental elite" and the "mortgagors of the future."4 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).


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.\textsuperscript{5}

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.\textsuperscript{6} 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 preferred solution.\textsuperscript{7} Ultimately, an arbiter must weigh the evidence and resolve the dispute.\textsuperscript{8}

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-

\textsuperscript{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).

\textsuperscript{6} 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, § 2485, at 272 (3d ed. 1946). The only difference is the "mode" of determining satisfaction of the burden. \textit{id.}

\textsuperscript{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. I. 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).

\textsuperscript{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.  

When applied to environmental policy law, 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. Depending on where the balance is set, the results will create more, less, or no pressure to force protection of the environment.

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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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).


choices. The scope of judicial review depends on the established legal burdens of proof.

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.

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. 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.”

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).
16. See infra notes 20-55 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.  

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.

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. Similarly, it rejected the idea that preserving land for conservation purposes was a legitimate governmental function. These public policies were

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."
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. 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. 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.

I. Traditional Tort Rules

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

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).
25. 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).
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.\(^{27}\) 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.\(^{28}\)

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.”\(^ {29}\) If, for example, the plain-
tiff sought to recover damages for, or enjoin, air or water pollution, he
or she would have to show which source, among several, was respon-
sible for the pollution. Moreover, the plaintiff would have to demon-
strate that the particular injury alleged was caused by the polluting
activities of the named defendant.\(^ {30}\) No administrative or technical
agency was available to supply evidence of such causation. The plain-
tiff 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.\(^ {31}\)

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 nui-
sance, trespass, or negligence claim, the plaintiff had to persuade the
tribunal that the polluting activity was unreasonable or unnecessary.\(^ {32}\)
To decide this question, the court was to “balance the equities.” The
economic utility of the activity was weighed against the special damage

\(^{27}\) See W. Rodgers, supra note 23, at 104-06; R. Stewart & J. Krier, Environmen-

\(^{28}\) 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 off-
shore 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 pri-
vate 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 tribu-
nal, the plaintiff had to present scientific evidence and expert opinion which in turn in-
creased the cost of bringing suit. See Note, Acid Precipitation: Limits of the Clean Air Act
to the particular plaintiff.\textsuperscript{33} 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.\textsuperscript{34} 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.\textsuperscript{35}

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.\textsuperscript{36} 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."\textsuperscript{37}

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.\textsuperscript{38}

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

\begin{enumerate}
\item \textsuperscript{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).
\item \textsuperscript{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.")
\item \textsuperscript{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).
\item \textsuperscript{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 assumption 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).
\end{enumerate}
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.\(^{39}\)

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.\(^{40}\) 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.\(^{41}\)

\textit{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.\(^{42}\) 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.\(^{43}\)

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.\(^{44}\) The earliest statutory controls were state

\begin{itemize}
\item \(^{39}\) W. Prosser, \textit{supra} note 37, at 505; W. Rodgers, \textit{supra} note 23, at 158; Juergensmeyer, \textit{supra} note 24, at 1148.
\item \(^{40}\) 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, \textit{supra} note 37, at 526.
\item \(^{41}\) See W. Rodgers, \textit{supra} note 23, at 158-60; W. Prosser, \textit{supra} note 37, at 505-12; \textit{Restatement (Second) of Torts} § 520 (1980).
\item \(^{42}\) Juergensmeyer, \textit{supra} note 20, at 441-42.
\item \(^{43}\) 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).
\item \(^{44}\) F. Skillern, \textit{Environmental Protection—The Legal Framework} 17 (1981).
\end{itemize}
laws, enacted pursuant to the accepted concept of an inherent police power in local governments.\footnote{Id. at 268.} 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.\footnote{See, e.g., Federal Supervision of State Water Quality Standards Under the Clean Water Act, 36 VAND. L. REV. 1167, 1177 (1983).}

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.\footnote{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).} 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.\footnote{See Juergensmeyer, supra note 20, at 443, 446.}

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.\footnote{See, e.g., Versailles Borough v. McKeesport Coal & Coke Co., 83 Pitts. L.J. 379, 384 (Allegh. 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.}

\section*{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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legal 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. 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. 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.

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. It was not until the 1870's that the federal and state governments commenced a

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").


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.

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

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. 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-


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).

ment by the mid-1980's.57

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.58 Policy decisions about the future of the environment had to be made legislatively,59 and institutions had to be created to effectuate those policies administratively.60 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.61

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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).


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. 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." Administrators similarly responded to the public's concerns and applied these new legislative mandates.

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.

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 and the Federal Water Pollution Control Act of 1972. These statutes required the establishment of strict pollution controls, often with deadlines to achieve established levels of protection. In certain cases,
"margins of safety" were required in setting such controls. Variances and exemptions for particular hardship cases might be allowed, 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.

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), Congress gave a clear directive to these regulators: the new federal policy was to be maximum mitigation of environmental harm. 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.
To ensure that administrative officials properly exercised their discretion, NEPA and other statutes established institutional mechanisms to require that environmental concerns be "interwoven into the fabric of agency planning." First, administrative agencies were forced to take environmental considerations into account in all their activities. 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. Second, NEPA sought to use the political process to insure environmental sensitivity by regulators. 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. The hope was that by requiring agencies to articulate the options, less prudent alternatives would be discarded or actions modified to mitigate environmental damage. 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.


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).


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.82

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.83

The courts enforced this shift in environmental law by applying administrative law doctrines to statutory mandates.84 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,85 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.86 Failure to comply with statutory mandates could


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.

lead to injunctions delaying or blocking a project.87

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.88 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.89 The burden of proof was on those who sought to reduce the level of controls or to exclude themselves from certain controls.90 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-

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.

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.91 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.92

To implement this new environmental policy, Congress and the courts established differing rules depending on the risk of harm.93 Where an activity posed a high risk, economic feasibility was not considered as a basis for setting standards or allowing exemptions to those standards.94 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.95 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.96

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

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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 PROTECTION: THE REAGAN ADMINISTRATION'S REGULATORY PROGRAM 58 (Alliance for Justice Report, 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. 1987) (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).
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.\textsuperscript{98} 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.\textsuperscript{99}

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.\textsuperscript{100} In certain cases, Congress created a national program under a federal agency, with federal controls and enforcement.\textsuperscript{101} In others, states could implement federal laws or federal programs.\textsuperscript{102} But even where this joint federal-state "cooper-
tive"103 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.104 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.105 Moreover, compliance with state plans and federal standards could be enforced in the federal courts.106

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

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.

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).


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).


3. Protection and Conservation of Natural Resources

The earliest efforts to protect the environment sought to preserve natural areas through government ownership.110 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."111 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.112 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.113 In other cases, Congress established classes of lands to promote use of those lands in certain ways.114

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.115 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

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.
115. See Getches, supra note 110, at 309-310.
BURDEN OF PROOF

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. A special fund was established for an aggressive program of park acquisition without the need for appropriations from general revenues. In addition, a system was established to protect wilderness areas. Undeveloped federal land, "where the earth and the community of life are untrammeled by man [and] where man is a visitor who does not remain" would be set aside in a National Wilderness Preservation System, and exploitation activities in these places would be prohibited. 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. 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.

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


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.\textsuperscript{123} A similar policy of protection through purchase and dedication was adopted for federal offshore lands.\textsuperscript{124}

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.

\textit{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.\textsuperscript{125} Under these laws, the manager of public lands had to develop criteria that indicated an “overriding concern” for protection.\textsuperscript{126} Exploitation would be permitted but, unlike prior practice, environmental values had to be protected, even if they conflicted with resource development.\textsuperscript{127} 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.\textsuperscript{128}


\textsuperscript{125} 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).

\textsuperscript{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.

\textsuperscript{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.129

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.130 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.”131

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

129. See supra note 75.
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.\textsuperscript{132} 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.\textsuperscript{133}

I. 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.\textsuperscript{134} Moreover, they felt that a whole new set of laws were required to deal with high risk substances and practices.\textsuperscript{135}

In 1977, Congress responded by passing "corrective" amendments to the Federal Water Pollution Control Act and the Clean Air Act.\textsuperscript{136} 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.\textsuperscript{137} The intent was to "aid, not to impede," regulatory protection.\textsuperscript{138} Thus, at

\begin{itemize}
  \item \textsuperscript{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); \textit{id.}, at 792-93 (administrative overload on EPA). \textit{See generally R. MELNICK, supra note 64} (discussion of various lawsuits by environmental organizations and industry on Clean Air Act).
  \item \textsuperscript{133} Hercules, Inc. v. EPA, 598 F.2d 91, 102 (D.C. Cir. 1978).
  \item \textsuperscript{134} \textit{See R. MELNICK, supra note 64}, at 50-51.
  \item \textsuperscript{135} \textit{See State of the Union Address, Jan. 19, 1978, PUB. PAPERS-JIMMY CARTER 114.}
  \item \textsuperscript{137} \textit{See Hercules, Inc. v. EPA, 598 F.2d 91, 102 (D.C. Cir. 1978). \textit{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).
  \item \textsuperscript{138} Hercules, Inc. v. EPA, 598 F.2d at 102. \textit{See Hays, supra note 136, at 59; Wyche, supra note 136, at 519.}

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.\textsuperscript{147} Congress and the President believed that even with these changes, a regulatory gap existed for hazardous wastes and toxic substances.\textsuperscript{148} Thus, while considering changes to the clean air and clean water laws, Congress also passed the Resource Conservation and Recovery Act of 1976 (RCRA),\textsuperscript{149} which mandated a "cradle to grave" regulatory system for the transportation, storage, treatment and disposal of hazardous wastes.\textsuperscript{150} Congress next enacted the Toxic Substances Control Act,\textsuperscript{151} 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.\textsuperscript{152} 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.\textsuperscript{153} Finally, in 1980,
Congress passed, and the President signed, the Comprehensive Environmental Response Compensation and Liability Act of 1980 ("Superfund") (CERCLA),\textsuperscript{154} 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."\textsuperscript{155} 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\textsuperscript{156} and that the federal government could override state issuance of a permit when it believed that state provisions were inadequate.\textsuperscript{157} In hopes of encouraging aggressive state efforts, Congress also expanded the scope of state permit authority to cover federal facilities.\textsuperscript{158} Congress applied this regulatory model to its new programs as well. Accordingly, Congress authorized state hazardous waste


\textsuperscript{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. \textit{Id.} at § 111(c), 42 U.S.C. § 9611(c) (1982).

\textsuperscript{156} See \textit{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.

\textsuperscript{157} See \textit{Federal Water Pollution Control Act}, § 402(d), 35 U.S.C. § 1342(d) (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.\textsuperscript{159}

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.\textsuperscript{160} Thus, despite state objections to federal interference in areas of traditional state power,\textsuperscript{161} the President supported, and Congress enacted, a comprehensive strip-mining statute. The essential premise of this Surface Mining Control and Reclamation Act of 1977\textsuperscript{162} 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.\textsuperscript{163}

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\textsuperscript{164} and sympathetic regulators applied

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

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

\textsuperscript{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.


existing statutes to promote protection over development.\textsuperscript{165} 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.\textsuperscript{166} Similarly, there were few, if any, standards for the management of coal or offshore oil and gas resources despite concerns about environmental protection.\textsuperscript{167}

\textbf{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.”\textsuperscript{168} Congress failed to take action until the President “executively withdrew” lands under existing statutory authority and forced Congress to respond.\textsuperscript{169} Then, Congress enacted the Alaskan National Interest Lands Conservation Act of 1980\textsuperscript{170} 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, natural areas to promote protection over development.\textsuperscript{165} 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.\textsuperscript{166} Similarly, there were few, if any, standards for the management of coal or offshore oil and gas resources despite concerns about environmental protection.\textsuperscript{167}

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scientific, wilderness, cultural and wildlife values." 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. 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." A new system was adopted for leasing federal coal resources. Under The Federal Coal Leasing Amendments of 1975, 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. 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." 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.  

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173. See Ferguson, supra note 167, at 264.
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. COGGS & C. WILKERSON, supra note 114, at 420 (citing a House Committee report on the statute).
Similar action was taken to address the management and environmental problems related to federal offshore oil and gas leasing. Under the Outer Continental Shelf Lands Act Amendments of 1978, the previous pro-development policy was to be tempered by a new emphasis on environmental needs. 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. The environmental consequences of all activities were to be adequately considered and acted upon. Cancellation of leases for environmental reasons, previously not allowed under the law, was now possible.

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.

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 midcourse corrections in these programs. Finally, policies to promote wilderness, parks and wildlife had been legislatively strengthened and applied.

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).
In the 1980's, environmental law now could move from policy development and drafting of regulations to policy implementation and law enforcement. A small number of critical issues would have to be resolved, 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.

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. 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.

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. 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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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].


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).


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. 191

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. 192

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.193

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.194

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

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.195

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.196 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.197 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.198 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

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).
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.
on the free market system and decreased dependence on government intervention. 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.

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.

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.


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).


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. In short, "government [had become] not the solution to our problem; government [had become] the problem."

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. 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. 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. 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. In short, the Reagan Administration believed that environmental agencies, budgets, and policies needed restructuring to overcome years of antigrowth bias.

2. Developing the "Game Plan"

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

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.
leaders and scholars began a systematic study of the federal government in the fall of 1979. 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. The result was a “game plan” for implementing a conservative philosophy.

The planning groups made specific recommendations to achieve the goal of reversing government policy; these recommendations were especially dramatic in environmental areas. 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. 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. 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. 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

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).
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.
216. Hinish, supra note 203, at 699, 702.
the states to spend federal dollars as they wished.217

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."218 In the context of environmental law and policy, the previous policy of "err[ing] on the side of caution" would be changed. The new Administration intended to "err[ing] on the side of... use as against preservation."219

3. Implementing the Reforms

The Reagan Administration hit the ground running.220 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.221 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.222 Finally, the new Administration reorganized government at the highest levels. All major agency decisions would be scrutinized through reviews by new Cabinet councils.223

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.224 Moreover, many regulatory programs

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217. Cordia, supra note 213, at 972 (EPA); Terrell, supra note 164, at 346 (Department of Interior); See Hinish, supra note 203, at 699.
219. Twomey, supra note 209, at 23 (quoting former Interior Secretary Watt).
221. See id. at 629-31 (budget cuts), 646 (lower personnel ceilings); Newland, supra note 198, at 3 (selection of officials based on ideology).
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. 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. Less money was made available to purchase park and wilderness lands and leasing of federal lands to private interests was increased.

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 were directed to develop new agency budgets.


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).


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. 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. 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. During the environmental era, these “regulatory reform” executive orders had little substantive impact on the increasingly pro-environment balance.


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\(^2\) 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.\(^2\)

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.\(^2\) 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.\(^2\) Environmental regulations were prominent on the list of those to be temporarily stopped, reviewed, and then changed or dropped.\(^2\)

President Reagan next issued a comprehensive and more effective regulatory reform in Executive Order No. 12,291. This executive order,\(^2\)

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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).
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. 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. 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.

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.

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.

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.\textsuperscript{244}

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."\textsuperscript{245} The Administration believed that "elitists" had shifted the balance too far in favor of protection.\textsuperscript{246} The exercise of discretionary decision-making had to change in order to "move [the environmental pendulum] back."\textsuperscript{247} 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.

\textit{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,\textsuperscript{248} 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-

\begin{itemize}
\item \textsuperscript{244} See Costle, \textit{supra} note 91, at 419.
\item \textsuperscript{246} See R. BROWNSTEIN AND N. EASTON, \textit{supra} note 2, at 119 (quoting President Reagan in a 1981 speech); L. CANNON, \textit{supra} note 196, at 287-90 (statements by candidate Reagan).
\item \textsuperscript{247} BURSON-MARSTELLER, \textit{supra} note 1, at 18 (Secretary Watt).
\item \textsuperscript{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).\end{itemize}
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." 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.

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. These EPA officials delayed implementation of new programs, lessened requirements for permit applications, and proposed statutory amendments to reduce environmental safeguards. The justifications were economic growth, efficiency, cost-


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.


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).


254. See 1982 CEQ Report, supra note 110, at 74; Ward, Clean Air Amendments: Why
savings, and a more balanced regulatory policy.255

Secretary of the Interior James Watt was an even more committed representative of the new ideology.256 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.257 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.258

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.259 They exercised discretion to block environmental extremists who sought to seal off public lands from development or restrict private enterprise.260

b. Overseeing the Regulators

Even with the proper regulators in place, the Administration was

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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.


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. 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. Only the OMB Director could waive the procedural requirements of the executive order.

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. 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 regulations.

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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.
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.

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. 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.\textsuperscript{268} If government failed to act, citizens could sue as "private attorneys general" to force appropriate action.\textsuperscript{269}

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.\textsuperscript{270}

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.\textsuperscript{271} 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.\textsuperscript{272}

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

\footnotesize{\textsuperscript{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).}

\footnotesize{\textsuperscript{269} See Miller, supra note 266, at 10309-10; Macbeth, \textit{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.}

\footnotesize{\textsuperscript{270} \textit{Overregulation: 1980 Republican Platform}, supra note 206, at 19, 23, 27.}

\footnotesize{\textsuperscript{271} 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.\textsuperscript{272}}
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. Similarly, environmentalist participation was limited in agency rule-making and in advisory groups.

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


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).

citizen suits, the Administration opposed the awarding of attorney’s
fees to environmental litigants.\textsuperscript{279}

The Reagan Administration’s support for cooperative regulation
meant that discretion was to be exercised in favor of those being regu-
lated. 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 fur-
ther restricted the application of existing statutory mandates. Specifi-
cally, 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.\textsuperscript{280} 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.\textsuperscript{281} Similarly, executive orders promul-
gated during the 1970’s sought to have agencies consider the inflation-
ary 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 environ-
mental 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-

\textsuperscript{102} (issue of pesticide use resolved through “effective negotiations” with the registrants in-
volved); \textit{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).

\textsuperscript{279} See \textit{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
Before this case, many courts had awarded attorneys fees even if the environmental organi-
zation had not prevailed, so long as the suit furthered the policies of the statute. \textit{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}, \textit{Legal Times}, Aug. 22, 1983, at 11,
col. 3.

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

\textsuperscript{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. \textit{Baum, Legislating Cost-Benefit Analysis: The Federal Water
effective and that it could be modified.282

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.283 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.284 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.285

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.286

Executive Order No. 12,291 also requires that each major rule287 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


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.\footnote{288}

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.\footnote{289}

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.\footnote{290} 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.\footnote{291} Thus, the agency must usually rely on its own calculations or perhaps the calculations of interested citizens.\footnote{292} In times of budget reductions, agencies have been reluctant to make such expenditures.\footnote{293} 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.\footnote{294} Finally, as described earlier, many benefits are not quantifiable, are col-

\footnote{288. Exec. Order No. 12,291, supra note 222, § 3(d).}
\footnote{289. Id. at § 2.}
\footnote{290. See Carter CEQ Farewell, supra note 185, at 41; Rodgers, Benefits, Costs, and Risks, supra note 85, at 196.}
\footnote{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).}
\footnote{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).}
\footnote{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. 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.

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. 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.

The Reagan Administration even applies a cost-benefit philosophy when statutory provisions appear to ban such a review. 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.

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.


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.\textsuperscript{301} 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.\textsuperscript{302} 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.\textsuperscript{303}

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.\textsuperscript{304} 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.”\textsuperscript{305} This need for a “hard look” at the information necessary to justify a rule or select a regulatory alternative\textsuperscript{306} 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.\textsuperscript{307}

\textsuperscript{301} Carpenter, \textit{supra} note 97, at 585; see 1982 CEQ REPORT, \textit{supra} note 110, at 177.


\textsuperscript{303} Shanley, \textit{supra} note 82, at 420.


\textsuperscript{305} Exec. Order No. 12,291, \textit{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).

\textsuperscript{306} Raven-Hansen, \textit{supra} note 222, at 337.

\textsuperscript{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. Need must be premised on adequate information; yet, environmental regulations are often based on information at the "frontiers of scientific knowledge."309

Risk assessment has long been an accepted analytical technique that mixes science and policy.310 First, information must be obtained to state the risks of an activity.311 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.312 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.313

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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.


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.\textsuperscript{314} The process is straightforward if the scientific evidence is clear.\textsuperscript{315} The legislature or regulator establishes what level of risk is acceptable.\textsuperscript{316} 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.\textsuperscript{317}

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.\textsuperscript{318}

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.\textsuperscript{319} 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 credit-

\textsuperscript{314} The real question is whether or not to regulate. \textit{Science Roundtable Discussion, supra} note 310, at 7, 10-11.

\textsuperscript{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. \textsc{129 CONG. REC. S9356} (daily ed. June 28, 1983).

\textsuperscript{316} The legislature makes an unacceptable risk equal to causation. \textit{Burden of Proof in Litigation, supra} note 58, at 212.

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

\textsuperscript{318} In 1971, then EPA Administrator Ruckelshaus described the process as follows: "Two 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.


\textsuperscript{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 \textsc{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. \textit{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. At the same time, the federal government has substantially reduced expenditures for the basic and applied science to determine and estimate risks. Increasingly, government relies on the regulated industries for assessment and monitoring. 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.

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).


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.\textsuperscript{324} The Administration seeks, by rule-making or proposed statutory changes, to eliminate these "absolutist" mandates.\textsuperscript{325} 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.\textsuperscript{326}

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.\textsuperscript{327} Even when some action must be taken, these officials

\textsuperscript{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, \textit{supra} note 213, at 993-94. \textit{See also} Koch, \textit{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. \textit{See} Cordia, \textit{supra} at 1001-02. \textit{See also} 1982 CEQ REPORT, \textit{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").

\textsuperscript{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. \textit{OMB Extends Its Mandate}, Wash. Post Nat'l Weekly Ed., Dec. 5, 1983, at 34, col. 1. \textit{See} Toxic Substances Control Act, \textsection 6, 15 U.S.C. \textsection 2605 (1982) (regulation is in order if there is a reasonable basis to conclude a chemical will present an unreasonable risk).

\textsuperscript{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." \textit{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." \textit{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. \textit{Id.} at 85, 238, 247.

\textsuperscript{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.\textsuperscript{328} 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.\textsuperscript{329}

The idea of cooperative federalism is not new.\textsuperscript{330} 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-risk assessment; that is, she wanted “our scientists” rather than “their scientists.” \textit{Science Roundtable Discussion, supra} note 310, at 12 (Ashford).

\begin{quotation}
\textsuperscript{328} Otten, \textit{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. \textsc{W. Roddgers, supra} note 23, at 492, 496.
\end{quotation}

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 \textit{Swanson & Devine, The Pendulum Swings Again: Ocean Dumping Policy, 24 ENVIRONMENT} June 1982 at 14-15.

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\textsuperscript{329} \textit{See} I \textsc{ENVTL. F.}, Jan. 1983, at 10. \textit{See, e.g.}, 1982 CEQ \textsc{REPORT, supra} note 110, at 91 (reorientation of wastewater management from federal to state decision-making).
\end{quotation}

\begin{quotation}
\textsuperscript{330} \textit{See} \textsc{Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 289 (1981)}.
\end{quotation}
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.331

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.332

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.333

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 Dedera, 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. 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.

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. 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. In addition, states were under increasing pressure to follow the federal example and reduce their own budgets and personnel. The result was that environmental protection had a low priority in any allocation of state revenues or federal block grants. Regulatory activity, but especially enforcement of laws and regulations, was therefore reduced.

In practice, new federalism was a strategy to reduce government


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).


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 cf. 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,\textsuperscript{341} 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.\textsuperscript{342} When federal enforcement against states appeared to help the reform agenda, the federal government took the hard line.\textsuperscript{343}

Cooperative federalism had encouraged the development of strong state programs to manage growth.\textsuperscript{344} This was inconsistent with the

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June 2, 1983\end{flushright} (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, \textit{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." \textit{Id} at 8.

\textsuperscript{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." \textit{See} 39 CONG. Q. WEEKLY REP. 1458 (1981); 7 EPA J., Sept./Oct. 1981 at 2.

\textsuperscript{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. \textit{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. \textit{See} \textit{National Association of Attorneys General, Environmental Protection Rep.} 7-8 (Jan. 1984), for an analysis of the state laws involved, see Skinner, \textit{States Act to Protect Citizens from Toxics, WAYS AND MEANS}, July-Aug. 1983, at 1, col. 6. \textit{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).

\textsuperscript{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. \textit{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.

\textsuperscript{344} \textit{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. 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, or prohibit, 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.” Until the early 20th
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.\footnote{349}

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.\footnote{350} 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.\footnote{351}

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.\footnote{352} 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.\footnote{353}

Privatization was a priority of those planning for the new President. Detailed plans\footnote{354} and legal and public relations justifica-
tions were prepared for the new policy. New agency heads were selected who would exercise discretion in favor of privatization. Budget and personnel proposals were prepared to shift government's role in resource management from preservation toward development.

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.

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.
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.360 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;361 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.362

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.363 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.364 Even when land was donated to the government, 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.

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." 365

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. 366 The President expressed this philosophy directly: the time had come to "move systematically to reduce the vast holdings of surplus land and real property." 367 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. 368

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. 369 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.

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.

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

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 is 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. BAT’LE FOR NATURAL RESOURCES, supra note 21, at 49-50, 124-25.

375. See BAT’LE FOR NATURAL 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. The Reagan Administration applied this new policy to the leasing of all mineral and timber rights.


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.


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. Secretary Watt implemented this program through a significant increase in lease sales and through decreased controls over lease site selection and resource exploitation.

Prior federal resources management policy had promoted caution and case-by-case decision-making. Thus, under the 1978 Outer Continental Shelf Lands Act Amendments 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.

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.

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

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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.


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. 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.

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. Controls over drilling and production were also reduced. Safety monitoring became the responsibility of the leaseholder, with reduced federal oversight. 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).


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.  

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. 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. As a result of developer complaints, the dredge and fill program was targeted for reform. 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 destruct-

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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).

tive and contrary to the public interest. To implement this new policy, the Administration recommended new legislation. However, when Congress failed to enact such legislation, the Administration proposed regulations to achieve its goals without the need for statutory change. 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. Procedures were also proposed to minimize input and review by those state and federal agencies concerned with the protection of living resources.

The Endangered Species Act 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. 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

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.
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.\textsuperscript{399} 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.\textsuperscript{400} 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.\textsuperscript{401}

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\textsuperscript{402} was enacted in 1977 because of dissatisfaction with the effects of existing strip mining practices.\textsuperscript{403} 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.\textsuperscript{404} In short, as with all other aspects of the Administr-

\textsuperscript{399} See Pomerance and Turner, \textit{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?, \textit{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. \textit{40 Cong. Q. Weekly Rep.} 2474 (1982).


\textsuperscript{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).


\textsuperscript{403} See \textit{supra} notes 162-163 and accompanying text.

\textsuperscript{404} This change in policy was recommended by the Heritage Foundation. See Terrell, \textit{supra} note 164, at 345 (zealots of Carter Administration). For a discussion on the implementation of the changes, see \textit{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, \textit{supra} note 2, at 139, 141; C. Reese, \textit{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.405

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

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.406

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.407 Similarly, the courts were willing to allow administrators discretion in implementing laws, but would not permit legal requirements to be ignored.408 In addition, the Administration’s spokespersons for the changes in environmental law and policy soon were perceived as doctrinaire, abrasive, and confrontational.409

In 1982, environmental interest groups began a counterattack. Their ranks enlarged by increases in paid memberships and donations,410 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.411

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

406. See, e.g., 19 WEEKLY COMP. PRES. DOC. 393 (President Reagan in question and answer session with reporters, Mar. 11, 1983).
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.\textsuperscript{412} 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.\textsuperscript{413} 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.\textsuperscript{414} 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.\textsuperscript{415}

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.\textsuperscript{416}

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

\textsuperscript{412} The initial response by environmentally oriented federal legislators was defensive. They wanted to stop changes in recently enacted laws. See \textit{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, \textit{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\textsuperscript{st} Cong. Q. \textit{Weekly Rep.} 2026 (1983) (ban on outer continental shelf leasing off the California, Florida and New England coasts).


this concern, and opposition to the Administration’s actions grew. In short, environmental law and policy had become a potentially major political issue.

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.” Agency officials projected a more moderate image and spent more time traveling around the country explaining their actions directly to the people. The rhetoric was tempered and controversial symbols abandoned. A major pro-environment initiative was promoted.

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


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. 423

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

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.


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).


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 “steadily 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.428

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.429

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.430 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.431

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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).

cretion was still exercised to select the least restrictive alternative. 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. Less money was available for scientific research, although regulatory decisions still depended on strong scientific evidence of the need for regulatory action. Cost-benefit analysis and risk assessment were still required and, in fact, promoted by the new leadership. Cooperation with industry and restrictions on public access to

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).


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
New federalism policies were promoted, except when they hindered private enterprise. Development of public lands remained a higher priority than purchase or restrictions. 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.

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't 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.


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. 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.

In the longer term, public interest in the shift in environmental policy may be diluted by other concerns. 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-

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.


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 Seis Ground Rules for Deregulation, 2 ENVTL. F., Sept. 1983, at 3 (applicability of the Motor Vehicle case to environmental law).

dance—, but legislative compromises may require intentionally vague language. Executive agencies have broad discretion to carry out legislative guidelines and interpret vague language.\footnote{445} 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.\footnote{446}

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.\footnote{447} 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.\footnote{448} 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.\footnote{449} Regulatory reform, cost-benefit and risk assessment analyses increasingly have been accepted and are almost institutionalized.\footnote{450}

Public lands and resources that have been

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).
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.451

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.452

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.

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); Moore, Private Suits Flood Companies Under Clean Water Provisions, Legal Times, May 7, 1984, at 1, col. 2; Keller, 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.453

At the federal level, agency officials will continue, even under a higher burden, to impose some regulatory controls.454 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.455 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.


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).