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Masquerade for Privilege: Deregulation Undermining Environmental Protection

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MASQUERADE FOR PRIVILEGE: DEREGULATION UNDERMINING ENVIRONMENTAL PROTECTION

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1. INTRODUCTION

The enactment of the major environmental legislation of the 1970s, commencing with the Clean Air Act[1] and National Environmental Policy Act,[2] was very much a nonpartisan reform. Presidents Nixon, Ford and Carter supported the bills which became the phalanx of environmental protection in the United States,[3] and supported the appropriations needed for effective implementation of these laws.[4] Their leadership was accompanied by bipartisan support in Congress for environmental legislation.

In 1980, for the first time since environmental protection emerged as a prime public concern in the 1960s, the two chief presidential candidates divided over the issue. Deregulation of the environment became a dominant theme in the campaign of Ronald Reagan, and as President he reversed the machinery his predecessors, and preceding Congresses, had built.[5] President Reagan argued that the health effects of air and water pollution and exposure to hazardous chemicals had been grossly overrated,[6] and urged that the federal government relinquish to the states its long-standing control of lands in the West under federal statutes that had restricted mining, oil extraction, and the clear-cutting of timber.[7]

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1. 42 U.S.C. §§ 7401-7642 (1982 & Supp. IV 1986).

2. 42 U.S.C. §§ 4321-4370a (1982 & Supp. IV 1986).

3. These included, in addition to the Clean Air Act and National Environmental Policy Act of 1969, the Clean Water Act, 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901-6991i (1982 & Supp. IV 1986); the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (1982 & Supp. IV 1986); the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2629 (1982); as well as other legislation.

4. President Nixon's ill-fated attempt in 1972 to impound Congressionally authorized funds was declared unconstitutional in Train v. City of New York, 420 U.S. 35 (1975); *see also* Impoundment Control Act of 1974, 2 U.S.C. §§ 681-688 (1982 & Supp. IV 1986).

5. *See* Costle, *Environmental Regulation and Regulatory Reform,* 57 WASH. L. REV. 409 (1982).

6. *See, e.g.,* N.Y. Times, Oct. 28, 1980, at A25, col. 1 (responding to President Reagan's pronouncement that trees cause pollution, a state Public Interest Research Group spokesperson predicted that President Reagan doubtless "is going to put emission standards on trees").

7. *See* Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion,* 12 ENVTL. L. 847 (1982).

Deregulation of the environment was part of a larger antiregulatory agenda that antedated the 1980 election.[8] However, environmental deregulation sharply differs from the deregulation of transportation, broadcasting, and other traditionally regulated industries. First, the federal environmental statutes were enacted recently and in response to overwhelming public insistence. Surveys before and after 1980 show that the vast majority of Americans demand vigorous enforcement of environmental laws.[9] Second, the link between environmental protection and public health is firmly established. Third, the economic benefits to the public advanced for deregulating in other areas, such as cheaper air fares and greater variety in broadcasting through increased competition, have no real application to jettisoning environmental controls.

Nonetheless, the 1980 election resulted in a weakening of environmental protection at the federal level. President Reagan appointed Anne Gorsuch as administrator of the Environmental Protection Agency (EPA) and James Watt as Secretary of the Interior. Each were zealous myrmidons of deregulation. Administrator Gorsuch drastically reduced the EPA's budget and dismantled entire Agency programs, such as noise control.[10] Secretary Watt forthrightly proclaimed his intent to curb "excessive, burdensome and counter-productive" regulations.[11]

The Administration justified these measures as part of its broader antiregulation posture. President Reagan promulgated an Executive Order which provided that "regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society."[12] Of course, the benefits and costs of a regulation are largely judgmental. Measured subjectively, the costs of nearly any regulation may appear to outweigh its benefits. This is especially so in environmental protection, where the costs to industry of safeguards are far more readily

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8. As early as January 1980, yielding somewhat to this assault, President Carter had announced his intention to "get rid of those regulations which are unwarranted." Wash. Post, Jan. 12, 1980, at C7, col. 2.

9. A Harris Poll in May 1981 showed that 86% of those polled want the Clean Air Act, and 93% want the Clean Water Act, kept in place or strengthened. *Americans Do Not Want to Weaken Air, Water Acts, Harris Survey Finds,* 12 Env't Rep. (BNA) No. 9, at 280 (June 26, 1981).

10. *See* N.Y. Times, July 9, 1982, at A22, col. 1; Christian Sci. Mon., Oct. 19, 1981, at 13, col. 1; Wash. Post, Aug. 15, 1981, at D8, col. 2. President Reagan originally intended to pare the EPA fiscal year 1982 budget by more than 74% (from $5.3 billion to $1.39 billion), but was compelled to agree to a smaller reduction. *Reagan's Proposed Fiscal 1982 Budget Would Cut EPA Funding to $1.39 Billion,* 11 Env't Rep. (BNA) No. 46, at 2083 (Mar. 13, 1981) [hereinafter *Reagan's Proposed Budget].*

11. Wash. Post, Apr. 17, 1982, at A1, col. 4; Wash. Post, May 24, 1981, at A1, col. 3.

12. Exec. Order No. 12,291, 3 C.F.R. 127 (1982). This order was foreshadowed by a Heritage Foundation study of the EPA in 1980 that recommended revoking all regulations of the Agency that do not "reflect a balance in the pursuit of all society's goals." *See Heritage Foundation Recommendations Include Suspending Statutory Deadlines,* 11 Env't Rep. (BNA) No. 31, at 1103 (Nov. 28, 1980) [hereinafter *Heritage Foundation Recommendations].*

documented than the benefits to public health.[13] As Representative James Florio of New Jersey, who sponsored much of the significant solid and hazardous waste legislation in Congress, pointed out, during the early 1980s "the test at EPA was not whether a regulatory system met the statutory prescription to protect the environment, but rather whether it met the Administration's ideological regulatory standard"—a standard that "actually subverted the statutory goals."[14]

Another Reagan Administration innovation was review of EPA and other environmental regulations by the Office of Management and Budget, a policy that gives opponents of controls a second chance to argue against the controls, this time off the public record, and before a much friendlier forum.[15]

Neither Gorsuch nor Watt were able to withstand the barrage of criticism from Congress, environmental and public health groups, unions, the media, and citizens generally, culminating in over a million signatures on "Dump Watt" petitions.[16] Responding to the public outcry, President Reagan was obliged to replace Gorsuch with EPA administrators far more concerned with effective enforcement. At Interior, there was no dramatic turnaround, but under current Secretary Donald Hodel the decibel level of hostility to environmental regulation has decreased.

This Article will briefly examine the methods of deregulation employed by the Reagan Administration in some chief areas of environmental control: air, water, hazardous waste, toxic chemical regulation, strip-mining, and use of federal lands. The Article will evaluate the effectiveness of these programs under a deregulation regime and then offer some conclusions about the future of environmental regulation.

2. Air Quality

Congress enacted the Clean Air Act[17] in 1970[18] after expressly finding that air pollution "has resulted in mounting dangers to the public health

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13. *See* Costle, *supra* note 5, at 413-417. Douglas Costle, EPA administrator during the Carter years, notes that as "there are no statues to honor generals who kept the peace, so there are no dollar figures to measure harms that never happened." *Id.* at 417.

14. Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's,* 3 Yale J. on Reg. 351, 358-59 (1986).

15. *See* Costle, *supra* note 5, at 421.

16. Christian Sci. Mon., Oct. 19, 1981, at 13, col. 1. As early as December 1980 outgoing EPA Administrator Douglas M. Costle had argued that there was no basis for believing that "people voted against environmental regulation" in 1980, and that most industry chief executive officers sought "rationality and predictability," not the dismantling of environmental statutes. *See Costle Says New Administration Has No Mandate to Dismantle Laws,* 11 Env't Rep. (BNA) No. 37, at 1395 (Jan. 9, 1981).

17. 42 U.S.C. §§ 7401-7642 (1982 & Supp. IV 1986).

18. The Act was based on several earlier statutes that increasingly recognized the interstate nature of air pollution and the resultant dangers to public health. *See* The Air Pollution Control Act of 1955, Pub. L. No. 84-145, 69 Stat. 322 (1955); Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (1967).

and welfare. . . ."[19] Except for the three federally preempted areas of motor vehicle emissions, aircraft, and motor vehicle fuels,[20] the Act is predicated on cooperative enforcement between the EPA and the states. The fulcrum for this enforcement is the State Implementation Plan (SIP) that each state is required to prepare for EPA approval, which sets forth in detail how that state is to meet the primary and secondary national ambient air quality standards for significant pollutants prescribed in the Act.[21] Without the SIP's, which the states may revise subject to EPA approval, the national air quality standards are essentially unenforceable. For this reason much litigation accompanied the adoption of the SIP's, their approval by the EPA, and attempts by the states to revise them.[22]

In 1980 the Heritage Foundation, a politically conservative group of economic analysts, recommended that the Reagan Administration abandon the requirement of SIP's and replace them with "case-by-case" decisions.[23] Shortly thereafter the Foundation's pundits advised the President to replace all environmental standards and discharge limitations with effluent taxes, dispensing with the "outmoded and inefficient technique of absolute standards."[24] The concept of taxing pollution through effluent charges was not new,[25] but was now being advanced as part of a concerted assault on environmental regulation, along with recommendations to repeal all environmental controls that were not "cost-effective."[26]

These suggestions were followed by proposals to slash the EPA's budget,[27] directed with particular force at the clean air program. The Reagan Administration sought severe reductions in air-quality enforcement staff, and the outright abolition of the Office of Transportation and Land Use Policy, which deals with the states' programs to regulate air pollution stemming from motor vehicle traffic in and around major cities.[28] Senator

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19. 42 U.S.C. § 7401(a)(2) (1982).

20. *Id.* at §§ 7521-7574 (1982).

21. *Id.* at § 7410. The standards are in section 7409. The importance of the SIP's is highlighted in Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975), and Union Elec. Co. v. EPA, 427 U.S. 246 (1976).

22. *See, e.g., Union Elec.,* 427 U.S. 246 (EPA may not weaken SIP as condition of its approval); *Train,* 421 U.S. 60 (state may allow variances for industry in SIP); Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976) (state is responsible for enforcing SIP), *cert. denied,* 434 U.S. 902 (1977).

23. *See Heritage Foundation Recommendations, supra* note 12, at 1103, 1104. This recommendation was part of the Heritage Foundation's broader proposal to rescind all environmental regulations not reflective of "a balance in the pursuit of all society's goals." *See id.*

24. *General Policy,* 11 Env't Rep. (BNA) No. 38, at 1616 (Nov. 28, 1980).

25. *See, e.g.,* Lahey, *Economic Charges for Environmental Protection: Ocean Dumping Fees,* 11 ECOLOGY L. Q. 305, 315 (1984) (tracing history of pollution tax back to recommendation of Council of Economic Advisors in Johnson Administration).

26. *See Heritage Foundation Recommendations, supra* note 12.

27. *Reagan's Proposed Budget, supra* note 10.

28. *Fiscal 1983 Air Program Budget Indicates Diminished EPA Role in Enforcement, SIPs,* 12 Env't Rep. (BNA) No. 24, at 710 (Oct. 9, 1981). The transportation-control program is dealt with at *infra* note 94.

Robert Stafford (R-Vt.), the Chairman of the Senate Environment and Public Works Committee, described these budget cuts as capable of rendering the Clean Air Act and other environmental statutes "just as harmless as removing the cartridges from a pistol." He noted that "laws need not be repealed to be ineffectual."[29]

The axe fell heavily on the EPA's emerging attempts to control acid rain. Acid rain is the depositing of vast amounts of sulfur dioxide and nitrogen dioxide, mainly from coal burning power plants, on lakes, streams and forests. Scientists have thoroughly documented the prodigious damage that acid rain has caused to fishing, drinking water supply, and forests.[30] The sulfur dioxide emissions from midwestern power plants burning high-sulfur coal travel eastward on the prevailing westerly winds, where the emissions damage the land and water resources of the northeastern states and eastern Canada.[31] Because of the international implications of acid rain, Clean Air Act section 115 was amended in 1977 to authorize the EPA Administrator to direct a state to revise its SIP if the Administrator finds that state's emissions "may reasonably be anticipated to endanger public health or welfare in a foreign country."[32] Carter EPA Administrator Douglas Costle made that finding in January 1981, based on a report by the International Joint Commission.[33] But before he could direct the midwestern states to revise their SIP's to curtail sulfur dioxide emissions, Costle left office.

Costle's successors reflected the Reagan Administration's deregulation viewpoint thoroughly on this issue. Despite the urging of the northeastern

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29. *General Policy,* Current Developments, 12 Env't Rep. (BNA) No. 26, at 792 (Oct. 23, 1981) [hereinafter *General Policy,* Oct. 1981].

This problem has abated only slightly. In the past two years appropriations for air quality have become caught up in the larger dilemma of the budget deficit. As recently as May 1988 state environmental officials criticized the Administration's failure to increase the EPA's budget for air quality. Wisconsin's Director of Air Management, Donald Theiler, told the Senate Appropriations Committee of "a rapid deterioration of the very foundation of the air pollution control program—the base or core program—designed to control criteria pollutants such as ozone, carbon monoxide, and particulates." *More Money Should Go to Water, Air Programs Cut by Reagan Administration, Officials Testify,* 19 Env't Rep. (BNA) No. 2, at 35 (May 13, 1988).

30. *See* Rosencranz & Wetstone, *Acid Precipitation: National and International Responses,* 22 ENV'T 6 (1980); Lyndon, *Acid Rain and the Clean Air Act: A New York State Perspective on Acid Rain,* 4 N.Y. L. SCH. J. OF INT'L AND COMP. L. 503 (1983). Acid rain has become the term of art for what scientists call acid precipitation, encompassing snow, fog, and mist as well as rain.

31. Scientists also have recognized that acid rain contributes to the "greenhouse effect" in which emissions from coal burning eat away the ozone layer of the earth's upper atmosphere. Many scientists believe the greenhouse effect likely will result in the heating of the planet, melting portions of the polar icecaps and leading to flooding and lasting changes in climate, agriculture, and animal habitat. *See EPA Report Says 'Greenhouse' Effect Will Heat Earth Significantly by 2040,* 14 Env't Rep. (BNA) No. 25, at 1048 (October 21, 1983).

32. 42 U.S.C. § 7415 (1982).

33. *See* Thomas v. New York, 802 F.2d 1443 (D.C. Cir.), *cert. denied,* 107 S. Ct. 3196 (1986).

states, three Canadian prime ministers, and many in Congress, the EPA has consistently temporized and insisted that the acid rain phenomenon requires further studies.[34] These dilatory strategies stem directly from the philosophy of deregulation and its corollary view that government controls are justified only when proven necessary beyond a reasonable doubt and when their benefits outweigh their costs. But the proof of causation required by the Reagan Administration on the acid rain issue seems far more stringent than a court would require. Those in the scientific community who deny the corrosive effects of acid rain are probably outnumbered by those who deny evolution or believe the earth to be flat. In addition, as discussed earlier,[35] insistence on rigid cost-benefit analysis before taking steps to protect the environment enables officials to compare apples and oranges. The costs to industry are far easier to quantify than the benefits of safeguarding a fishery, a forest, or a water supply system.

The northeastern states, which suffer the onslaught of acid rain most directly, have mounted a variety of legal challenges to the Administration's *laissez-pluvoir* approach. These states have sued to overturn the EPA's approval of the SIP's of those midwestern states that allow high sulfur dioxide emissions from coal burning power plants. These suits have failed, with the courts sustaining the EPA's exercise of administrative discretion and the Reagan EPA's view that a SIP need not take into account the adverse effects of pollution on another state.[36] Although section 126 of the Act [37] expressly authorizes states to petition the EPA for a finding that a major source of air pollution in another state prevents them from attaining the air quality standards mandated by the Act, the EPA has argued successfully that this section requires proof that a particular power plant prevented the state from meeting its standard[38]—an almost impossible burden of proof, since sulfur dioxide particles leave no fingerprints.

Most recently, attempts to invoke the 1981 Costle finding of international pollution[39] have also misfired. The EPA under President Reagan adamantly refused to follow the Costle finding, and the United States Court of Appeals for the District of Columbia Circuit recently adopted the agency's view that the Costle finding does not bind his successors since it was not adopted pursuant to the Administrative Procedure Act's rulemaking procedures.[40]

Congress likewise has failed to resolve the acid rain issue, although bills repeatedly have been filed to require the curbing of sulfur dioxide emis-

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34. *See* Lyndon, *supra* note 30, at 505.

35. *See* text accompanying *supra* notes 12-14.

36. *See* New York v. EPA, 716 F.2d 440 (7th Cir. 1983); New York v. EPA, 710 F.2d 1200 (6th Cir. 1983).

37. 42 U.S.C. § 7426 (1982).

38. Jefferson County v. EPA, 739 F.2d 1071 (6th Cir. 1984).

39. *See supra* notes 32-33.

40. *See* Thomas v. New York, 802 F.2d 1443 (D.C. Cir.), *cert. denied,* 107 S. Ct. 3196 (1986); *see also* 5 U.S.C. §§ 551-553 (1982).

sions.[41] These bills have in recent years provided for a nationwide fee to offset the increased cost of electricity which would otherwise be borne by midwestern ratepayers.[42] The deregulation view has benefited the midwestern producers of high-sulfur coal and the utilities which burn it, while causing continuing damage to fisheries, natural resources, and forests in the east and in Canada. One of the reasons for the enactment of the Clean Air Act was to provide enforcement at the federal level to deal with interstate and international air pollution, where the offending state was exporting its pollutants and therefore unlikely to act.[43] But, as Senator Stafford had predicted, [44] budget cuts and loss of morale at the EPA had rendered the Act ineffectual in curtailing acid rain, despite the provisions of the Act requiring the EPA to disapprove the SIP of a state whose emissions are damaging to the environment of a sister state or neighboring country.[45]

The 1977 amendments to the Act furnished a potential solution that also has been undercut by the Administration's attitude. Section 123[46] provides that the emission limitations adopted in a SIP may not be affected by stack heights in excess of "good engineering practice (as determined under regulations promulgated by the Administrator)," or any other dispersion technique.[47] This provision was aimed at the practice of building tall stacks to export air pollution—a major cause of acid rain from midwestern sources damaging eastern natural resources.[48] But the EPA's regulations implementing this section were too little and too late. Although the statute required the EPA to adopt the regulations by February 7, 1978, the Agency did not issue proposed regulations until January 1979,[49] and, in a process exacerbated by the change in Administration, did not issue its final rules until February 1982.[50] In *Sierra Club v. EPA*[51] the United States Court of Appeals for the District of Columbia Circuit overturned several key provisions of those rules as arbitrary and capricious and as contrary to the

41. *See, e.g.*, S. 1706, 97th Cong., 1st Sess. § 181 (1981); H.R. 4816, 97th Cong., 1st Sess. (1981); H.R. 3400, 98th Cong., 1st Sess. (1983).

42. *See* H.R. 3400, 98th Cong., 1st Sess. (1983).

43. *See* 42 U.S.C. § 7401 (1982).

44. *See General Policy*, Oct. 1981, *supra* note 29.

45. 42 U.S.C. §§ 7415, 7426 (1982); *see also supra* notes 32-40 and accompanying text. EPA Administrator Anne Gorsuch at one point actually recommended amending the Act to end its requirements that power plants reduce their sulfur dioxide emissions. *Sulfur Dioxide Percent Removal Rate Should Be Eliminated, Gorsuch Testifies*, 12 Env't Rep. (BNA) No. 43, at 1328 (Feb. 19, 1982). Congress did not accept Ms. Gorsuch's invitation.

46. 42 U.S.C. § 7423 (1982).

47. *Id.* at § 7423(a)(1)-(2). The statute exempts stack heights in existence before December 31, 1970.

48. *See* Connecticut v. EPA, 696 F.2d 147, 161 (2d Cir. 1982); Sierra Club v. EPA, 719 F.2d 436, 441 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984). The section was adopted in response to EPA regulations authorizing tall stacks where using better technology to reduce emissions was, *inter alia*, "economically unreasonable." *See Sierra Club*, 719 F.2d at 440.

49. 44 Fed. Reg. 2608 (1979).

50. 40 C.F.R. §§ 51.1, 51.12, 51.18 (1982).

51. 719 F.2d 436 (D.C. Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984).

Act. The *Sierra Club* court noted that, between the 1979 draft and the 1982 final regulations, the Agency significantly weakened the rules in several important respects.[52] Thereafter the EPA adopted revised rules, which also are under challenge.[53]

Most recently northeastern states and environmental groups have urged the EPA to list the sulfate that causes acid rain as a criteria pollutant.[54] This listing would require states with sulfur dioxide emissions, which turn into sulfates and inflict damage on other states, to control those emissions as part of their SIP's. If the EPA took acid rain seriously, this step would not be necessary.

Similarly, bills have been introduced to compel the EPA to control acid rain, usually through a nationwide fee imposed on all electric ratepayers to meet the cost to midwestern utilities of installing pollution-control equipment or converting to low-sulfur coal.[55] Again, this legislation would not be needed if not for the insistence of the EPA Administrator, at times overruling dissenting voices at his own agency,[56] that acid rain requires only further study—not a solution.

The long-standing attempt to obtain effective EPA standards for hazardous air pollutants likewise has run afoul of the current deregulation philosophy, a thinly disguised device for relieving industry of the burden of complying with the Clean Air Act. The Act treats hazardous pollutants far more stringently than the ordinary "criteria pollutants" controlled by the SIP's.[57] The EPA itself sets and enforces emission standards for sources of hazardous air pollution, although the EPA may delegate implementation and enforcement to a state whose procedure is approved by the EPA Administrator.[58]

Commentators have aptly described the draconian requirements of section 112 of the Clean Air Act as a rejection of the New Deal legislation model of delegating to the agency the discretion to impose regulatory

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52. Sierra Club v. EPA, 719 F.2d 436, 448, 456, 464, 470 (D.C. Cir. 1983), *cert. denied,* 468 U.S. 1204 (1984).

53. *President Reagan Signs RCRA; Amendments; EPA to Adopt Statutory Deadlines as Rules,* 15 Env't Rep. (BNA) No. 29, at 1243 (Nov. 16, 1984); *Northeastern States, Two Groups Sue EPA Asking Court to Reject Tall Stack Rules,* 16 Env't Rep. (BNA) No. 15, at 593 (Aug. 9, 1985).

54. *States Accuse EPA of Arbitrary Action in Denying Interstate Pollution Petitions,* 16 Env't Rep. (BNA) No. 34, at 1625 (Dec. 20, 1985); *EPA Proposes Denial of States' Requests for Agency Action on Acid Rain Controls,* 15 Env't Rep. (BNA) No. 19, at 716 (Sept. 7, 1984); *see generally* Lyndon, *supra* note 30, at 512-15.

55. *See* H.R. 3400, 4404, 98th Cong., 1st Sess. (1983).

56. *Ruckelshaus, Cabinet Council Work Group Weigh Range of Options on Acid Rain Control,* 14 Env't Rep. (BNA) No. 15, at 611 (Aug. 12, 1983).

57. Hazardous air pollutants are defined in § 112 of the Act as those noncriteria pollutants which the EPA finds "may reasonably be anticipated to result in an increase in mortality or . . . serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412(a)(1) (1983). The criteria pollutants dealt with in the SIP's are governed by § 110 of the Act, 42 U.S.C. § 7410 (1983); *see also supra* note 21.

58. 42 U.S.C. § 7412(b)-(e) (1983).

measures. Instead, Congress directly ordered the EPA to act with regard to those pollutants dangerous to human health.[59] But the EPA lagged right from the starting gate. While section 112 required the Administrator to list each hazardous air pollutant that the Agency intends to regulate within ninety days after December 31, 1970,[60] it took six years for the EPA to list four pollutants—asbestos, beryllium, mercury, and vinyl chloride—and in the case of vinyl chloride, the Environmental Defense Fund had to sue the EPA to compel the Agency to list the substance.[61] As a result, in 1977 Congress added section 122, requiring the EPA to decide within one year whether to list cadmium, arsenic, or polycyclic organic matter, and to decide within two years whether to list radioactive pollutants (radionuclides), as hazardous air pollutants.[62]

The EPA's response to this mandate was less than inspiring. The deregulation approach had already taken hold, and from 1977 through 1981 the Agency listed only arsenic and radionuclides, as well as benzene, under section 112.[63] But the EPA failed to adopt standards for these listed hazardous pollutants, even though section 112 requires the Agency to adopt emission standards for each listed pollutant within 180 days.[64] In the first eleven years of the Act's existence, the EPA adopted an emission standard for only one of these hazardous air pollutants, vinyl chloride.

In 1981 an Administration fervently committed to deregulation took over the EPA.[65] Under Administrator Anne Gorsuch, the EPA "issued no listings, no proposed emission standards, and no final rules under Section 112."[66] Federal district courts issued injunctions ordering the Agency to adopt standards for arsenic and radionuclides, which had been listed by the prior Administrator.[67] The arsenic standard, criticized as being far too lenient, presented a risk as great as two deaths per hundred for people exposed to the maximum level for the most prolonged period of time allowed.[68] In contrast, the usual standard for toxic substances involves a risk to human life of between one in one million and one in one hundred thousand.[69] Critics of the arsenic standard included career EPA officials.[70]

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59. Graham, *The Failure of Agency Forcing: The Regulation of Airborne Carcinogens Under Section 112 of the Clean Air Act,* 1985 DUKE L. J. 100, 101.

60. 42 U.S.C. § 7412(b)(1)(A) (1983).

61. *See* Graham, *supra* note 59, at 109-10.

62. 42 U.S.C. § 7422 (1983). The statute requires the EPA to consult with the Nuclear Regulatory Commission with regard to radioactive pollutants. *Id.* at § 7422(c).

63. *See* Graham, *supra* note 59, at 112.

64. 42 U.S.C. § 7412(b)(1)(B) (1983).

65. *See supra* note 10 and accompanying text.

66. *See* Graham, *supra* note 59, at 113.

67. *See* New York v. Gorsuch, 554 F. Supp. 1060 (S.D.N.Y. 1983) (ordering EPA to adopt arsenic emission standards); Sierra Club v. Gorsuch, 551 F. Supp. 785 (N.D. Cal. 1982) (ordering EPA to adopt radionuclide emission standards).

68. N.Y. Times, Sept. 19, 1983, at A1, col. 1.

69. *Id.* (quoting spokesman for Environmental Defense Fund, Robert E. Yuhnke). Environmental Defense Fund spokesman Yuhnke described the arsenic standard as part of a

Following criticism of the arsenic standard, EPA Administrator William D. Ruckelshaus took the Pilate-like step of requesting the residents of Tacoma, where a major copper smelter discharged arsenic emissions, to indicate, at an EPA public hearing, whether they preferred to undergo the risk or have the smelter close.[71] No one, however, made a showing that the plant would have to close down if a stricter standard were adopted. The Agency finally adopted stricter standards, after it decided emissions from the smelter would be far lower than the EPA's risk modeling had indicated.[72]

Section 112 does not seem to allow a weighing of costs and benefits. The statute requires emission standards to be set "at the level which in [the EPA Administrator's] judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant."[73] However, that clear language has not inhibited the Agency in recent years from balancing costs and benefits in setting emission standards under section 112.

The radionuclide emission standard was only adopted after a protracted court battle, in the course of which the EPA was adjudged in contempt for failure to obey previous injunctions.[74] The standard finally adopted in January 1985, six years after radionuclides were listed as a hazardous pollutant, was a standard which the Agency admitted "will not require that sources do anything."[75]

Emission standards for two other hazardous air pollutants, benzene and vinyl chloride, were withdrawn by the EPA during the early 1980s as too stringent.[76] Although other toxic substances have been suggested as hazardous air pollutants, notably methyl isocyanate, the substance that was discharged into the air at the Bhopal, India disaster in December 1984, the

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post-1980 EPA "pattern of sacrificing human health for the economic well-being of industry." *Id.*

70. *Id.*

71. *Id.; see also Arsenic Standards for Tacoma Smelter Said to Be Tighter Than Those Proposed,* 15 Env't Rep. (BNA) No. 8, at 297 (June 22, 1984) [hereinafter *Arsenic Standards].*

72. *See Arsenic Standards, supra* note 71, at 297. The State of Washington meanwhile had adopted arsenic standards far more stringent than the EPA's. *Tacoma Asarco Copper Smelter to Close in June 1985, Company Board Announces,* 15 Env't Rep. (BNA) No. 9, at 389 (July 6, 1984).

73. 42 U.S.C. § 7412(b)(1)(B) (1983). The Supreme Court has held that the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1985), which mandates standards that "most adequately [assure], to the extent feasible, . . . no . . . material impairment of health," does not permit the Secretary of Labor to consider cost in setting standards. American Textile Mfrs.' Inst. v. Donovan, 452 U.S. 490 (1981); *see also* Graham, *supra* note 59, at 128. *See generally* Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking,* 4 HARV. ENVTL. L. REV. 191 (1980).

74. *See* Sierra Club v. Ruckelshaus, 602 F. Supp. 892, 900 (N.D. Cal. 1984).

75. *See EPA Says No Action Required of Sources to Comply with Radionuclide Regulations,* 15 Env't Rep. (BNA) No. 39, at 1531 (Jan. 25, 1985).

76. *See Benzene Decision Viewed as Indicator of Ruckelshaus Approach to Air Regulation,* 14 Env't Rep. (BNA) No. 34, at 1465 (Dec. 23, 1983) (reporting EPA's withdrawal of benzene standard); Natural Resources Defense Council, Inc. v. EPA, 824 F.2d 1146 (D.C. Cir. 1987) (en banc) (vacating withdrawal of vinyl chloride standard because EPA failed to determine safe level).

EPA has not acted to list them, let alone set emission standards.[77] For these reasons, legislation has been introduced to designate potentially toxic substances automatically as hazardous air pollutants if the EPA fails to act on schedule.[78] Another bill would finesse the EPA's exercise of discretion by automatically treating eighty-five specific substances as hazardous pollutants.[79] These approaches, thus far unsuccessful, would further extend the mandatory, "agency-forcing" nature of section 112.[80] Deregulation, as practiced by the previous and, especially, the present Administration, has rendered largely ineffectual a statute designed to compel agency action. Congress has now become obliged to again amend the Act to place even greater restraints on the EPA's discretion. The alternative would be to repeat the Agency's failures and delays of the past decade in this area.

Deregulation also interfered with attaining the Clean Air Act's goal of reducing pollution from motor vehicles, a major cause of smog. This interference is ironic, since the inability of the states to control automotive smog was a main reason for the enactment of the Clean Air Act. Regulation of emissions through the design of motor vehicles is preempted by the Act.[81] Here, as with hazardous air pollutants,[82] section 202 of the Act specifies the measures the EPA is to take to reduce hydrocarbons, carbon monoxide, and other air pollutants by adopting emission standards for vehicles.[83] From 1980 on, the EPA imposed standards reducing hydrocarbons, carbon monoxide, and nitrogen oxides from automobiles and other light-duty vehicles by ninety percent by 1975.[84] In 1980 emission standards for heavy-duty gasoline-powered vehicles, such as large trucks and buses, were adopted, again mandating substantial reductions in hydrocarbons and carbon monoxide.[85]

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77. *See Waxman Criticizes EPA for Not Regulating Methyl Isocyanate, Promises Push for Controls,* 15 Env't Rep. (BNA) No. 34, at 1397 (Dec. 21, 1984).

78. *See Plan to Provide for Automatic Listing of Hazardous Pollutants Introduced in House,* 14 Env't Rep. (BNA) No. 47, at 2084 (Mar. 23, 1984); *see also* H.R. 5084, 98th Cong., 2d Sess. (1984).

79. H.R. 2576, 99th Cong., 1st Sess. (1985); *see also* Nat'l Journal, June 29, 1985, at 1516.

80. *See supra* note 59 and accompanying text.

81. 42 U.S.C. § 7543 (1983) (stating that "[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles. . . . No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle"); *see* City of Chicago v. General Motors Corp., 467 F.2d 1262 (7th Cir. 1972). However, the states may impose emission controls on in-use commercial vehicles, and on the resale and reregistration of in-use vehicles. *See* Allway Taxi v. City of New York, 340 F. Supp. 1120 (S.D.N.Y.), *aff'd,* 468 F.2d 624 (2d Cir. 1972). The Act effectively exempts California from the otherwise total federal preemption since that state had emission standards in place prior to March 30, 1966. 42 U.S.C. § 7543(b) (1983).

82. *See* text accompanying *supra* note 59.

83. 42 U.S.C. § 7521 (1983).

84. 40 C.F.R. §§ 85.073-1, 85.074-1 (1987).

85. 40 C.F.R. §§ 86.301-79 to 86.348-79 (1987).

As with acid rain and hazardous air pollutants, the new Administration veered sharply from these goals. The White House proclaimed early in 1981 that "government must not unnecessarily hamper [the auto industry's] efforts through excessive regulation and interference," and simultaneously announced it was repealing or weakening thirty-five auto emission standards already adopted.[86] A paper by Budget Director David Stockman and Representative Jack Kemp (R-N.Y.), two influential Administration advisers, entitled "Avoiding an Economic Dunkirk," recommended relaxing emission standards for both light and heavy-duty vehicles.[87] Whether or not these policies averted an economic Dunkirk, they approached an environmental Waterloo.

Since the Clean Air Act mandated many of the goals of the emission standards adopted prior to 1981, such as the ninety percent decrease in levels in section 202,[88] the Act had to be amended to erase those gains. In September 1981 EPA Administrator Gorsuch recommended that Congress roll back emission standards for current and future vehicles to the more lenient levels required of 1980 models.[89] The National Clean Air Coalition warned that sixteen major metropolitan areas would fail to attain the carbon monoxide primary standard if those emission levels were relaxed.[90] The Administration introduced legislation to that effect,[91] but it failed to pass.

Although Congress refused to weaken the Clean Air Act, the EPA did what it could, delaying "indefinitely" the proposed standards for heavy-duty vehicles,[92] until ordered by the United States District Court for the District of Columbia to adopt standards for nitrogen oxides and particulate matter as required by the Act.[93] The EPA finally adopted the standards as the tide of environmental deregulation ebbed in the mid-80s, and the standards were sustained by the courts.[94]

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86. N.Y. Times, Apr. 7, 1981, at A1, col. 2. Standards governing particulate matter emitted from diesel-powered vehicles that were adopted under Costle were upheld by the United States Court of Appeals for the District of Columbia Circuit. Natural Resources Defense Council, Inc. v. EPA, 655 F.2d 318 (D.C. Cir. 1981).

87. *See Stockman Designated to Head OMB, Proposes Major Agency Rule Changes,* 11 Env't Rep. (BNA) No. 34, at 1257, Dec. 19, 1980.

88. *See supra* note 84.

89. *See U.S. Automakers, EPA Call on Congress to Roll Back Current Emissions Standards,* 12 Env't Rep. (BNA) No. 22, at 636 (Sept. 25, 1981); *see also Court Denies EPA Request to Reconsider February Deadline for Land Disposal Rules,* 12 Env't Rep. (BNA) No. 33, at 972 (Dec. 11, 1981) (EPA urges up to 50% relaxation of carbon monoxide standard for light-duty vehicles).

90. *Id.; see also Senate Panel Delays Auto Standard Vote to Consider New, Controversial Analysis,* 12 Env't Rep. (BNA) No. 34, at 1004 (Dec. 18, 1981).

91. H.R. 5252, 97th Cong., 2d Sess. (1982). *See Waxman Says H.R. 5252 Would Slow Progress in Clean Air, Weaken Important Sections,* 12 Env't Rep. (BNA) No. 41, at 1287 (Feb. 5, 1982).

92. *See Two-Year Delay For Catalyst Truck Controls, Indefinite Easement for Heaviest Trucks Set,* 14 Env't Rep. (BNA) No. 26, at 1139 (Oct. 28, 1983).

93. Natural Resources Defense Council, Inc. v. Ruckelshaus, 21 Env't Rep. Cas. (BNA) 1953 (D.D.C. 1984).

94. Natural Resources Defense Council, Inc. v. Thomas, 805 F.2d 410 (D.C. Cir. 1986).

3. Water Quality

Federal regulation of water was far more deeply entrenched than was its jurisdiction over air quality when deregulation arrived. National control over the obstruction of, or discharge of refuse into, the navigable waters of the United States stemmed from the Rivers and Harbors Act of 1899.[95] That statute, which requires a permit from the United States Army Corps of Engineers, was enacted to safeguard the navigability of those waterways, but has been used since the 1960s to regulate the discharge of pollutants as well.[96] In 1972 the Congress, building on earlier statutes,[97] enacted the law that later became known as the Clean Water Act,[98] establishing a comprehensive scheme to control water pollution through a permit program and water quality standards.[99] Other federal statutes regulate ocean dumping[100] and groundwater,[101] areas not covered by the Clean Water Act.[102]

Controlling discharges through graduated fees instead of permits had been proposed for water pollution as early as the 1960s.[103] The idea dovetails with the concept of deregulation in many ways, since the fee is designed to have market forces, rather than government controls, provide the incentive for reducing effluent discharges.[104] But the idea of taxing pollution never caught on, partly because, as even its proponents conceded, it is effective

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Beyond the scope of this paper are the related struggles over the transportation control plans to improve air quality in major metropolitan areas through techniques such as state inspection of catalytic converters and exhaust systems, limits on parking, and the like. These battles hinged on federal versus state power, rather than on deregulation. *See, e.g.*, Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976), *cert. denied*, 434 U.S. 902 (1977); Friends of the Earth v. Carey, 552 F.2d 25 (2d Cir. 1977); Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *vacated as moot*, 431 U.S. 99 (1977); Council of Commuter Orgs. v. Gorsuch, 683 F.2d 648 (2d Cir. 1982); Council of Commuter Orgs. v. Thomas, 799 F.2d 879 (2d Cir. 1986).

95. 33 U.S.C. §§ 401-687 (1986 & 1988 Supp.).

96. *See* United States v. Standard Oil Co., 384 U.S. 224 (1966) (criminal prosecution for discharge of aviation fuel); United States v. Republic Steel Corp., 362 U.S. 482 (1960) (enjoining discharge of effluent from steel mill).

97. Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965); Clean Water Restoration Act of 1966, Pub. L. No. 89-753, 80 Stat. 1246 (1966); Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970).

98. 33 U.S.C. §§ 1251-1376 (1982 & Supp. IV 1986). The 1972 statute, originally entitled the Federal Water Pollution Control Act, is universally referred to as the Clean Water Act.

99. The permit program is mandated by 33 U.S.C. § 1311 (1982 & Supp. IV 1986). The water quality standards are mandated by 33 U.S.C. § 1313 (1982 & Supp. IV 1986).

100. The Marine Protection, Research and Sanctuaries Act, 33 U.S.C. §§ 1401-1445 (1982 & Supp. IV 1986).

101. The Safe Drinking Water Act, 42 U.S.C. § 300f to 300j-11 (1982).

102. The Clean Water Act is limited to surface waters and defines the "waters of the United States," to which it applies, to include the territorial seas offshore as far as three miles. *See* 33 U.S.C. § 1362 (7), (8) (1982). Discharges from land-based point sources such as pipes are covered by the Clean Water Act both within and beyond the three-mile limit. *Id.* § 1362 (12). Discharges from vessels and barges into the oceans more than three miles offshore are not regulated under the Act.

103. Lahey, *supra* note 25, at 315.

104. *Id.* at 318.

only if closely monitored,[105] and partly because of the strong public support for imposing penalties on those who pollute.

The Reagan Administration's deregulation rhetoric was directed more at air quality,[106] but was broad enough to apply to the EPA's water-quality programs as well. Under Administrator Gorsuch, the EPA proclaimed its intent to abandon effluent discharge permits and retreat to water quality standards alone.[107] This plan would have been extremely detrimental to water quality since it would have deprived the Agency, and those states which followed its lead, of the ability to penalize dischargers for violation of the limits on particular pollutants set forth in their permits. Water quality standards, while equally important, are keyed to the purity of the particular body of water, not the amount and nature of the discharge by a given source. The EPA then urged a cost-benefit test[108] for water quality standards,[109] which would weaken the standards while abandoning the permit program established by the Act. Fortunately, nothing came of these proposals.

The treatment of toxic chemicals under the Clean Water Act has had nearly as frustrating a history as that of hazardous air pollutants.[110] Section 307 of the Clean Water Act originally mandated an EPA list of toxic pollutants and effluent standards for each pollutant, to be adopted by the Agency based on health, not economics.[111] The EPA was to take into account the toxicity and hazard to human health of each such pollutant, as well as the ability of the substance to persist in the environment.[112] However, after several years the Agency listed and proposed standards for only nine toxic water pollutants, [113] and even as to these pollutants, the EPA failed to adopt enforceable standards.[114] A suit by the Natural Resources Defense Council, an environmental public-interest law firm, to compel the EPA to adopt standards for the nine, and to list other toxic pollutants, ended in the "Flannery Decree," a court approved consent agreement.[115] The settle-

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105. *Id.* at 334.

106. *See supra* note 10 and accompanying text.

107. *See Opposition to Major Water Act Changes Hinted By Chafee; Quick Action Expected,* 12 Env't Rep. (BNA) No. 42, at 1307 (Feb. 12, 1982).

108. *See supra* note 12 and accompanying text (discussing Reagan Administration adoption of cost-benefit analysis of environmental regulations).

109. *See Revisions to Water Quality Rule Moving Through EPA Review Process,* 12 Env't Rep. (BNA) No. 45, at 1391 (March 5, 1982).

110. *See supra* note 57 and accompanying text (discussing hazardous air pollutants).

111. 33 U.S.C. § 1317 (1982).

112. *Id.*

113. 40 C.F.R. § 129.1-129.105 (1987). In 1973 the EPA listed as toxic water pollutants aldrin/dieldrin, benzidine, cadmium, cyanide, DDT, endrin, polychlorinated biphenyls (PCB's), mercury, and toxaphene. Cadmium, cyanide, and mercury are no longer listed as toxic pollutants. *Id.*

114. *See* Natural Resources Defense Council, Inc. v. Train, 8 Env't Rep. Cas. (BNA) 2120, 2123 (D.D.C. 1976).

115. *Id.*

ment, embodied in the 1977 amendment to section 307,[116] required the EPA to adopt health-related standards for certain toxic pollutants, but enabled the EPA to retreat to best available technology standards for the others.[117] Final standards for effluent from specific industries were to be adopted by July 1, 1980.[118] When the EPA missed that deadline, it moved to amend the decree, claiming changed circumstances and the need for administrative flexibility.[119] The Natural Resources Defense Council argued in response that the EPA "manufactured most of their 'changed circumstances' through proposed budget cuts [and] internal resource allocations. . . ."[120] The United States District Court for the District of Columbia eventually amended the decree, giving the Agency another two years.[121] By November 1982 the EPA released final standards for twelve industries, including iron and steel, aluminum, copper, petroleum, and inorganic chemicals.[122] Administrator Gorsuch announced that the EPA was preparing standards for the remaining eleven industries covered by the decree, and "intends to stay on schedule."[123] Eventually the toxic water pollutants program was restored to effectiveness, although mainly reduced to the best available technology level of ordinary pollutants as permitted under the Flannery decree.[124]

The EPA's deregulation philosophy also has pervaded its approach to the issue of "backsliding," or relaxing the limits of permits already issued. As noted, the Clean Water Act relies on both effluent limitations and water quality standards.[125] The Reagan Administration's view, however, was expressed by Frederick Eidsness, EPA Assistant Administrator for Water, who stated that controls greater than needed to meet water quality standards amount to "treatment for treatment's sake."[126] This facile description

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116. Pub. L. No. 95-217, §§ 53(a), (b), 54(a), 91 Stat. 1589-1591 (1977).

117. *See* 33 U.S.C. § 1317(a) (1982); Natural Resources Defense Council, Inc. v. Train, 8 Env't Cas. (BNA) 2120 (D.D.C. 1976). The consent decree was amended the following year. Natural Resources Defense Council, Inc. v. Train, 12 Env't Rep. Cas. 1833 (D.D.C. 1979), *aff'd in part* and *remanded in part sub nom.* Environmental Defense Fund, Inc. v. Costle, 636 F.2d 1229 (D.C. Cir. 1980), *upheld on remand sub nom.* Natural Resources Defense Council, Inc. v. Gorsuch, 16 Env't Rep. Cas. 2084 (D.D.C. 1982), *aff'd sub nom.* Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied sub nom.* Union Carbide Corp. v. Natural Resources Defense Council, Inc., 467 U.S. 1219 (1984); *see also* Wyche, *The Regulation of Toxic Pollutants Under the Clean Water Act: EPA's Ten Year Rulemaking Nears Completion,* 15 NAT. RESOURCES J. 511 (1983).

118. 33 U.S.C. § 1317(a)(2) (1982).

119. Wyche, *supra* note 117, at 524.

120. *Id.* at 525.

121. Natural Resources Defense Council, Inc. v. Gorsuch, 17 Env't Rep. Cas. (BNA) 2013 (D.D.C. 1982).

122. *See Effluent Guidelines Proposed By EPA for Six Industries; Set for Six Others,* 13 Env't Rep. (BNA) No. 28, at 1027 (Nov. 12, 1982).

123. *Id.*

124. *See* Van Putten & Jackson, *The Dilution of the Clean Water Act,* 19 U. MICH. J. L. REF. 863, 875 n.49 (1986).

125. *See* text accompanying *supra* note 99.

126. *See* Van Putten & Jackson, *supra* note 124, at 881 n.80 (quoting Frederick Eidsness).

overlooked the need for accountability of particular sources through a permit program to enable the regulating agency to know what pollutants are being discharged, as well as the need to attribute violations of water quality standards to particular sources, in order to have effective enforcement.

Concerned about possible backsliding by sources, the EPA in 1978 adopted a regulation authorizing the limits in a Clean Water Act permit to be relaxed only in the event of a material and substantial change in circumstances or a permit whose limits were stricter than the relevant effluent guidelines required.[127] A 1980 amendment to the Act also allowed relaxing permit limits "to correspond to subsequently-promulgated guideline limitations when increased production significantly reduces treatment efficiency."[128] In 1982 EPA Administrator Gorsuch proposed to allow permit backsliding up to the level of subsequently-adopted effluent guidelines permitting greater discharge of pollutants.[129] In effect, this proposal would have undermined the Clean Water Act's mandate of continued progress toward ending the discharge of pollutants completely.[130] Congressional outcry was immediate.[131] The EPA backed off, rescinding its proposed amendment.[132] The EPA ultimately adopted a regulation allowing increased discharges of pollutants only if "previous case-by-case limitations prove to be an incorrect assessment of the discharger's capabilities."[133] Locking the EPA firmly into this position, the 1987 amendments to the Clean Water Act now bar backsliding unless justified by material and substantial changes, new data, or similar evidence.[134] Congress, reluctant to rely on EPA discretion in an Administration hostile to environmental concern, explicitly narrowed the scope of that discretion.

EPA enforcement under the Clean Water Act likewise reflected the advent and decline of the deregulation approach. Statistics gathered by the General Accounting Office show a sharp decrease in water-quality enforcement actions, from 1523 in 1977 to 736 in 1979 and, even more dramatically, to 204 in 1982.[135] During this period the EPA acknowledged (or boasted) a 41.5% reduction in compliance inspections and a 25.5% decline in Clean Water Act enforcement personnel.[136] This lack of activity was not due to a lack of enforcement opportunities. The Agency conceded that 24% of Clean

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127. 40 C.F.R. § 125.31 (1978).

128. 40 C.F.R. § 122.62(l)(2)(v) (1981).

129. 47 Fed. Reg. 52,072, 52,084 (1982).

130. *See* 33 U.S.C.A. § 1251(a)(1) (West 1986) (declaring that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985").

131. *See* Van Putten & Jackson, *supra* note 124, at 885.

132. 49 Fed. Reg. 37,999, 38,021 (1984).

133. 49 C.F.R. § 122.44(l)(2)(i); 49 C.F.R. § 122.62 (a)(17) (1986).

134. 33 U.S.C.A. § 1342(o) (West Supp. 1988).

135. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act,* 55 GEO. WASH. L. REV. 202, 204 (1987).

136. *Id.* at 205.

Water Act permit holders were in significant violation of their permits.[137] With the replacement of Gorsuch by William Ruckelshaus as EPA Administrator, enforcement actions promptly veered upward, to 887 in 1983 and 1,828 in 1984.[138] Ruckelshaus announced early on: "Let me disabuse anyone who believes EPA, while I am there, will not have the will and the determination to enforce the laws as written by Congress."[139]

4. Hazardous Substances

The EPA's refusal to come to grips with the problems of hazardous waste furnishes a stark example of its deregulation approach on collision course with its mandate to protect public health. Unlike air and water quality, the improper disposal of hazardous waste was not a major environmental concern until hazardous waste from New York's Love Canal, Missouri's Times Beach, and other landfill sites began to leak into groundwater in the late 1970s. Public insistence on strict controls and redress led to enactment of the Resource Conservation and Recovery Act (RCRA)[140] in 1976 and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[141] in 1980. Like the Clean Air Act and Clean Water Act, these statutes initially delegated broad discretion to the EPA to wield regulatory controls in a highly complex area. But here too the EPA's repeated failure to act effectively led Congress to remove much of its discretion and expressly legislate detailed controls. This was the context in which Representative James J. Florio stated, as noted earlier, that "the test at EPA was not whether a regulatory system met the statutory prescription to protect the environment, but rather whether it met the Administration's ideological regulatory standard [which] actually subverted the statutory goals."[142]

RCRA required the EPA to adopt regulations controlling the land disposal of hazardous waste within eighteen months of its enactment.[143] It took six years and a legal action[144] before the EPA promulgated these regulations, and the rules imposed no immediate mandate at all on hazardous waste facilities.[145] The regulations required a facility to meet the standards contained therein only upon applying for a final permit under the Act.[146] In addition, the regulations continued to authorize the land disposal of hazardous waste in steel drums even though this disposal method had been

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137. *Id.*
138. *Id.* at 207.
139. *Id.*
140. 42 U.S.C. §§ 6901-6987 (1982).
141. 42 U.S.C. §§ 9601-9657 (1982).
142. *See* Florio, *Congress as Reluctant Regulator: Hazardous Waste Policy in the 1980's*, 3 YALE J. ON REG. 351, 358-59 (1986).
143. 42 U.S.C. § 6924 (1983 & 1988 Supp.).
144. Environmental Defense Fund v. Thomas, 627 F. Supp. 566 (D.D.C. 1986).
145. 40 C.F.R. Pts. 264, 265, 267 (1987).
146. 40 C.F.R. § 264.3 (1987).

shown to be highly dangerous.[147] The rules also failed to require double liners for drums, a leak-detection system, or the monitoring of groundwater for contamination.[148] Not until October 1986, after repeated exhortation from Congress, environmental organizations, and residents of areas adjacent to hazardous waste sites, did the EPA draft regulations banning the land disposal of untreated hazardous waste.[149] In its post-Gorsuch reformation, the EPA also enacted stringent financial responsibility requirements for hazardous waste landfills.[150]

Deregulation attitudes likewise inhibited the Agency's embrace of CERCLA, the statute creating the Superfund and authorizing the EPA cleanup of hazardous waste sites. Representative Florio suggested the EPA's hidden agenda was to avoid Congressional reauthorization of the tax on industry enacted by CERCLA, which was slated to expire September 30, 1985.[151] And indeed EPA Administrator Gorsuch candidly avowed to the Cabinet Council on Natural Resources and the Environment that "[w]e are trying to avoid 'son of Superfund.' "[152] To achieve that goal, the Agency under Gorsuch had little interest in cleaning up a prodigious number of sites, and in fact had only completed remedial action at eight sites—out of 850 on the National Priorities List for cleanup—by 1985.[153] Although the EPA had adopted maximum permitted contamination levels for groundwater in the Safe Drinking Water Act,[154] its plan for remediation of hazardous waste sites did not require adherence to those levels.[155] Instead of adopting objective nationwide standards for hazardous waste site remediation, the EPA varied its requirements from one location to another in the Gorsuch era, causing a Congressional Report to conclude that "the identity of the private parties responsible and the political affiliation of local officials were allowed to influence the cleanup requirements significantly."[156] The EPA

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147. *EPA Suspends Ban on Liquids in Landfills, Proposes Alternative Rule; Lawsuit Filed,* 12 Env't Rep. (BNA) No. 45, at 1387 (Mar. 5, 1982).

148. *See* Florio, *supra* note 142, at 362-63.

149. *RCRA Land Ban Among Most Significant Rules that Apply to Superfund Cleanups, EPA Says,* 17 Env't Rep. (BNA) No. 27, at 1015 (Oct. 31, 1986).

150. *Draft Land Disposal Rules Outline Framework, Would Delay Ban Two Years for Some Solvents,* 16 Env't Rep. (BNA) No. 34, at 1619 (Dec. 20, 1985).

151. Florio, *supra* note 142, at 363. The September 30, 1985 termination date is in 42 U.S.C.A. § 9653 (West 1983 & 1988 Supp.) (repealed effective January 1, 1987, per 1988 Supp.).

152. Florio, *supra* note 142, at 364.

153. *Id.* at 364-65.

154. 42 U.S.C. § 300f-300j (1982).

155. *See* The National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. § 300 (1985). The Agency rationalized its refusal to require adherence to Safe Drinking Water Act levels "by arguing that each site was unique and that [it] needed flexibility to respond to each individual site differently." *See* Florio, *supra* note 142, at 365.

156. Florio, *supra* note 142, at 365-66; *see also* SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON ENERGY AND COMMERCE, 98TH CONG., 2D SESS., INVESTIGATION OF THE ENVIRONMENTAL PROTECTION AGENCY, REPORT ON THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE OVER EPA DOCUMENTS, ABUSES IN THE SUPERFUND PROGRAM, AND OTHER MATTERS 121-57 (Comm. Print 1984).

enacted uniform nationwide standards only after legal action by the Environmental Defense fund.[157]

Both the 1984 amendments to RCRA[158] and the 1986 "SARA" reauthorization of CERCLA[159] embodied the powerful Congressional intent to restrict the Agency's discretion, which had been too often exercised to delay these statutes or render them ineffectual. For example, Congress now required landfills under interim permits to apply for final permits by November 8, 1985[160] and to use double liners and a leachate collection system, pending enactment of EPA standards.[161] Similarly, the amended statute imposed performance standards for new storage tanks pending adoption of EPA regulations.[162]

The Congressional enactment of detailed standards of the sort ordinarily delegated to administrative agencies has, predictably, raised some eyebrows. Senator Symms (R.-Idaho) objected to the level of detail in the RCRA amendments, asking, rhetorically, "[c]an any member of this body explain . . . why the lower liner of a hazardous waste disposal facility should have a permeability of $1x10^{-7}$ centimeter per second?"[163] The answer to Senator Symms' question lay in the determination of Congress not to have these vital statutes thwarted by a hostile, deregulation-bent EPA.[164]

The Toxic Substances Control Act (TSCA)[165] suffered similarly from application of the deregulation approach. This result was particularly ironic because TSCA was originally seen as an ounce-of-prevention statute, designed to allow the EPA to interdict dangerous chemical compounds before they entered the marketplace and the environment.[166] TSCA authorizes the EPA to order manufacturers to test new chemical substances, or old substances put to new uses, about which data are insufficient, if the EPA finds either that the product may present an unreasonable risk to health or

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157. Environmental Defense Fund v. United States Environmental Protection Agency, No. 82-2234 (D.C. Cir. 1984), settled in Jan. 1984. *See* Florio, *supra* note 142, at 366.

158. Pub. L. No. 98-616, 98 Stat. 3224-3293 (1984).

159. The Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1615-1782 (1986) (amending CERCLA, 42 U.S.C.A. §§ 9601-9657 (West 1983 & 1988 Supp.)).

160. 42 U.S.C.A. § 6925(e)(2)(A) (West Supp. 1988).

161. *Id.* at § 6924(o)(1)(A) (West Supp. 1988).

162. *Id.* at § 6991b(g).

163. 130 CONG. REC. S13812 (daily ed. Oct. 5, 1984); *see also* Florio, *supra* note 142, at 371.

164. "[B]etween 1980 and 1983, Congress came to perceive EPA as an agency unwilling or unable to fulfill its mandate of environmental protection. Almost every section of the RCRA Amendments might be read as expressing a sense of frustration over the pace and scope of EPA action. For these reasons Congress elected to act, in effect, as its own regulatory agency." Mugdan & Adler, *The 1984 Resource Conservation and Recovery Act Amendments: Congress as a Regulatory Agency,* 10 COLUM. J. ENVTL. L. 215, 217 (1985).

165. 15 U.S.C.A. §§ 2601-2629 (West 1982 & Supp. 1988).

166. *See* Kraus, *Environmental Carcinogenesis: Regulation on the Frontiers of Science,* 7 ENVTL. L. 83 (1976); Bronstein, *The New Toxic Substances Control Act,* 13 FORUM 371 (1978). *But see* Gaynor, *The Toxic Substances Control Act: A Regulatory Morass,* 30 VAND. L. REV. 1149 (1977).

the environment or that a substantial number of persons will be exposed to it.[167] The EPA then has the power to restrict or ban the chemical, either until data are available or after the data show it to create an unreasonable risk.[168] The EPA was to publish a list of chemicals by 1977 to be tested,[169] but failed to do so and was sued.[170] The change in administrations and severe budget cuts pushed TSCA further back on the EPA's list of priorities. In an attempt to finesse the litigation, the Gorsuch EPA promulgated a regulation allowing manufacturers to test their own chemicals on the EPA's priority list for testing.[171] In a second legal challenge, the United States District Court for the Southern District of New York held that voluntary testing by manufacturers violated TSCA's requirement that the EPA itself test the chemicals.[172] The court further directed the Agency to act within a reasonable time to adopt proper testing procedures.[173]

While illegally delegating authority to the industry to perform testing that TSCA requires the EPA to perform, the EPA under Gorsuch rigidly insisted on "good science"—"scientific evidence and not . . . rumor and soothsaying"[174]—as a basis for regulating toxic substances. This approach has been aptly described as "a subterfuge designed to accomplish de facto deregulation."[175] It demands proof beyond a reasonable doubt before the EPA will act to restrict a substance believed to be toxic. This stands scientific prudence on its head, because insisting on such certainty guarantees inaction as long as any doubt exists. No rational person would continue to drink water reasonably thought to be polluted while awaiting absolute proof. Yet the EPA during the Gorsuch regime adopted that view, in effect absolving industrial polluters in the absence of the elusive certain showing of risk. In the real world, risk assessment takes place based on reasonable probabilities, not on impossible-to-prove certainty.[176]

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167. 15 U.S.C. § 2603(a) & (b) (1982).

168. *Id.* at §§ 2604(e)-(f), 2605.

169. *Id.* at § 2603(e).

170. Natural Resources Defense Council, Inc. v. Costle, 15 Env't Rep. Cas. (BNA) 1858 (S.D.N.Y. 1980).

171. 46 Fed. Reg. 53,775 (1981); 47 Fed. Reg. 335 (1982).

172. Natural Resources Defense Council, Inc. v. EPA, 595 F. Supp. 1255 (S.D.N.Y. 1984).

173. *Id.* at 1261.

174. N.Y. Times, Nov. 9, 1982, at A30, col. 4.

175. Latin, *Good Science, Bad Regulation, and Toxic Risk Assessment,* 5 YALE J. ON REG. 89, 94 (1988).

176. *See* American Textile Mfrs' Inst. v. Donovan, 452 U.S. 490 (1981) (upholding risk assessment for cotton dust standard in workplace); Ethyl Corp. v. EPA, 541 F.2d 1, 25 (D.C. Cir. 1976) (upholding assessment that lead in air endangers public health), *cert. denied,* 426 U.S. 941 (1977). The United States Court of Appeals for the District of Columbia Circuit there stated, "Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventive, albeit uncertain, decisions legitimately be so labeled?" *Id.* at 25. See generally as to risk assessment Rodgers, *Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking,* 4 HARV. ENVTL. L. REV. 191 (1980).

5. Land Management

In the Rocky Mountain States, deregulation on the part of the Reagan Administration took the form of joining the so-called sagebrush rebellion. This alliance was odd even for a deregulation-bent administration, because the rebellion was a movement to divest the federal government of ownership of one of its most valuable assets, the millions of acres administered by the Bureau of Land Management in the Department of the Interior.[177] The rebellion's proponents sought land reform in reverse. They sought to remove these lands from federal protection in order to make them available for development, strip mining, and clear-cutting of timber. This raid on the Treasury was thinly camouflaged as a proposal to turn these lands over to the states.[178] But the Mountain states traditionally encouraged private development of their own lands, often selling thousands of acres for far under market value, and bestowing preferential rights on ranchers, timber companies, and mineral developers.[179]

The myth that the state governments were "closer to the people" is belied by the contrasting history of federal and state stewardship of public lands. The federal record over the decades, while far from impeccable, shows significant resistance to incursions into public lands to extract minerals or timber.[180] The states, on the other hand, have tended to be far more responsive to developmental interests. Some states have statutes and even constitutional provisions requiring state-owned lands to be used at their maximum monetary value.[181] Traditionally, the Western states have leased public lands for ranching and mining for much lower fees then the United States imposes.[182]

Attempts to seize control over these vast national assets are not new. They were eloquently condemned by the eminent historian Bernard De Voto

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177. *See* Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion,* 12 Envtl. L. 847 (1982); Huffman, *Governing America's Resources: Federalism in the 1980's,* 12 Envtl. L. 863 (1982).

178. Babbitt, *supra* note 177, at 849.

179. *Id.*

180. *See, e.g.,* The Alaska National Interest Lands Conservation Act, 16 U.S.C.A. §§ 3101-3233 (West 1985 & Supp. 1988) (giving 45 million acres of prime wilderness to National Park System in 1980 and 54 million acres to Fish and Wildlife Service for wildlife refuges); *see also* Strickland v. Morton, 519 F.2d 467 (9th Cir. 1975) (upholding denial by Secretary of Interior of permit for homesteading); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397 (10th Cir. 1976) (sanctions by Secretary of Interior against violation of lease allowing limited grazing on Bureau of Land Management lands); Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976) (denial of coal prospecting permit in order to prepare environmentally protective program); Council on Environmental Quality, 1982 Annual Report, pp. 143-163 (stating that "hundreds of millions of acres of [federal] public land have been withdrawn from entry, restricting the mineral exploration efforts of the American mining industry"). *But see* Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management,* 53 U. Colo. L. Rev. 229 (1981).

181. *See, e.g.,* Colo. Const. art. IX, § 10; Wyo. Const. art. XVIII, § 3; Mont. Code Ann. § 77-1-601 (1981).

182. *See* Babbitt, *supra* note 177, at 851.

forty years ago.[183] But never before had the federal government announced its eager participation in the looting of its own patrimony.

In the event, attempts to amend the Federal Land Policy and Management Act[184] were repulsed in Congress. But the Reagan Administration urged deregulation and actual conveyance of federal lands at every step. A Heritage Foundation report as early as January 1981 urged the incoming Administration to transfer most public lands to the states, with the United States to retain access and recreational and mineral rights, and to sell the national parks outright to private owners such as conservation organizations.[185] The Heritage Foundation failed to explain how these groups were to purchase and maintain the parks. Perhaps it tacitly assumed these groups would resell the parks to developers. Thereafter Secretary of the Interior Watt expended much rhetoric on urging private development of federal lands, such as an unsuccessful attempt to overturn a decision of his predecessor, Cecil Andrus, disapproving surface mining adjacent to Bryce Canyon National Park.[186] Secretary Watt also delayed and weakened the federal surface mining regulations requiring operators to restore strip mined land to its original contours.[187] The United States District Court for the District of Columbia invalidated regulations that would have both authorized strip mining in many parks and wilderness areas[188] and unlawfully delegated authority to the states to regulate mining on federal lands.[189] The Department's attempt to return regulatory authority to the states was ironic since the very purpose of the Surface Mining Control and Reclamation Act[190] was to impose federal regulation because of the failure of the states effectively to control strip mining.[191]

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183. *Id.* at 852.

184. 43 U.S.C.A. §§ 1701-1784 (West 1986 & Supp. 1988).

185. *Report Urges Replacing Standards with Taxes, Dropping Sewer Program,* 11 ENVIR. REP. (BNA) No. 38, at 1616-17 (Jan. 16, 1981).

186. *Watt Asks Justice Department to Seek Remand of Andrus Decision on Bryce Canyon,* 12 ENVIR. REP. (BNA) No. 22, at 640 (Sept. 25, 1981); *Federal Court Denies Watt's Motion for Remand of Bryce Canyon Decision, id.* No. 39, at 1216 (Jan. 22, 1982).

187. *See* Wash. Post, May 24, 1981, at C7, col. 5 (Watt espouses ending "excessive and burdensome regulations" of surface mining); Christian Science Monitor, Apr. 19, 1982, p. 2 (Department announced plans to revise 46 surface-mining regulations, delayed when National Wildlife Federation sued to enjoin them); *OSM Proposes Mining Rules for Areas Lacking Enough Spoil to Backfill Highwall,* 12 ENVIR. REP. (BNA) No. 38, p. 1144 (Jan. 15, 1982) (Department proposed deleting requirement that operator restore lands to original contour if not enough spoil on hand to replace contour).

188. *In re* Permanent Surface Mining Regulation Litigation, 620 F. Supp. 1519 (D.D.C. 1985).

189. *In re* Permanent Surface Mining Regulation Litigation, 21 Env't Rep. Cas. (BNA) 1193 (D.C. Cir. 1984).

190. 30 U.S.C.A. §§ 1201-1328 (West 1986 & Supp. 1988).

191. Congress so found. *See* 30 U.S.C.A. § 1201(g) (West 1986); Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (upholding constitutionality of Act and discussing reasons for its enactment); *see also* Harris & Close, *Redefining the State Regulatory Role,* 12 ENVTL. L. 921 (1982) (justification of Reagan Administration approach, written by two Department officials.

CONCLUSION

The attempt to deregulate in the environmental area foundered when it became evident that weakening federal controls over air and water quality and hazardous waste would endanger public health. Similarly, turning public lands and strip mining regulation over to the states would in large measure put the fox in charge of the henhouse. Overwhelming public awareness of these concerns enabled Congress, together with dedicated civil servants within the Administration itself, to turn aside deregulation on most fronts.

With acid rain,[192] however, deregulation has prevented any meaningful steps to control a steadily worsening injury to our forests, lakes, and water supply. This is so because, in contrast to most other important environmental issues, region has been pitted against region and in the absence of federal recognition of the severity of the problem a national consensus has been slow to emerge.

Even in other areas of environmental protection, the damage inflicted by several years of budget cuts and lack of responsible leadership at the EPA and Department of the Interior was serious. When enforcement and rulemaking are hamstrung, law-abiding citizens suffer while those who cut corners go unpunished.

As aquifers become endangered, landfills near capacity, and waste appears on our beaches, it is unlikely that environmental protection will ever again be deregulated. The awareness is now close to universal that environmental laws can no more be ignored as a matter of government policy than can the criminal code. Moreover, the overwhelming public rejection of deregulation has enabled many to see through those who attempt to justify it, in the environmental area, as a dictate of economic philosophy. It was, after all, recognized more than half a century ago by Justice Cardozo that "[m]any an appeal to freedom [of contract] is the masquerade of privilege or inequality seeking to entrench itself behind the catchword of a principle."[193]

192. *See supra* notes 30-56 and accompanying text.

193. *See* Cardozo, *Mr. Justice Holmes,* 44 HARV. L. REV. 682, 687-88 (1931).