TESTIMONY OF
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on

Public Health and Natural Resources:
A Review of Implementation of Our Environmental Laws

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Introduction.

My name is Tom McGarity. I hold the W. James Kronzer Chair in Law at the University of Texas School of Law, where I have for the last 21 years taught courses on Administrative Law and Environmental Law. As my attached Curriculum Vitae indicates, I have published many articles and two books in the area of Administrative Law and Regulatory Reform, and I have co-authored a casebook on Environmental Law. I am, therefore, pleased to testify today on the current implementation of the environmental laws in the United States, and I will attempt briefly to place the Bush Administration's implementation activities in historical perspective.

Summary of Major Themes.

The transition between the Clinton Administration and the George W. Bush Administration was not an easy one from an environmental perspective. Immediately upon assuming office, the White House Chief of Staff ordered Executive Branch Agencies to withdraw all unpublished proposed rules and postpone the effective date of all final rules to provide the new Administration an opportunity to modify those proposals and rules in accordance with the new Administration's less protective environmental policies. Although most of the final rules were ultimately allowed to go into effect, some have still not become effective, and many of those that did go into effect are currently under active reconsideration.

Although perhaps not as overtly aggressive as the Reagan Administration's attempts to allow private use of public resources, it seems clear that the George W. Bush Administration assigns a higher value to private development and a lower value to preservation than the previous two administrations. In the end, the Bush Administration's less abrasive approach may ultimately bring about a greater reduction in dwindling commonly held resources than any presidential administration since the late nineteenth century.

The George W. Bush Administration has by no means been a proactive protector of human health and the environment from private polluting activities. The new Administration has undertaken virtually no initiatives of its own to achieve environmental improvement, and it has taken affirmative steps to reverse or modify existing protective programs. Such new initiatives as have been undertaken during the first year of the Bush Administration have generally been required by statute, and older rulemaking actions that have gone forward have been only half-heartedly pursued. It appears that OIRA is beginning to assume a much more aggressive role reminiscent of the "regulatory relief" role that it played during the Reagan Administration. The Bush Administration does, however, appear willing to forge new ground in the dubious areas of "voluntary" pollution reduction programs and taxpayer-financed private cleanups. The Bush Administration's attitude toward environmental regulation might best be characterized as "quietly hostile."

At this juncture, it appears that the Administration is strongly committed to opening up public lands for private development and to reducing environmental restrictions on the private sector. The Administration does not appear strongly committed to protecting public resources from unnecessary exploitation or to protecting public health and the environment from private polluting activities. As a result, protections for public lands have grown less restrictive and the flow of environmentally protective regulations has slowed to a trickle. If the Administration does not act decisively very soon to reverse these trends, irreparable harm to human health and the environment is the predictable consequence.

Skeptical Reassessment of Late-Arriving Clinton Administration Environmental Initiatives.

As is typically the case during the transition between one Administration and the following Administration, the volume of proposed and final regulations issued by many Executive Branch agencies increased during the last few weeks of the Clinton Administration. Although many of those regulations were garden variety rules of the sort that agencies issue on a routine basis throughout the year, some were significant and controversial rules over which the relevant agencies had been deliberating for many years. It is, of course, not at all unusual for a decisionmaking institution to increase its output substantially at the end of its appointed term. The same thing happened at the end of the Carter and George H.W. Bush Administrations when a president from a different political party was elected.

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Postponement of Final Rules.

On January 20, 2001, White House Chief of Staff, Andrew Card, wrote a memorandum to the heads and acting heads of all Executive Branch agencies to communicate to them President George W. Bush's "plan for managing the Federal regulatory process at the outset of his Administration."[1] Subject to some limited exceptions for emergencies and urgent situations relating to public health and safety, the memorandum asked the agency heads to "withdraw" any regulation that had been sent to the Office of the Federal Register, but had not been published in the *Federal Register*. The regulation was not to be published in the *Federal Register* "unless and until a department or agency head appointed by the President after noon on January 20, 2001, reviews and approves the regulatory action."[2] With respect to final regulations that had been published in the *Federal Register* but had not taken effect, the agency heads were asked to "temporarily postpone the effective date of the regulations for 60 days."[3] Many executive branch agencies complied with the Card Memorandum by publishing Notices in the *Federal Register* delaying for 60 days the effective date of previously published regulations "in accordance with" the Card memorandum.[4]

The Bush Administration allowed many environmental regulations for which notices of final rulemaking had been sent to the Federal Register prior to January 20, 2001 to become effective with only a delay in the effective date.[5] For example, EPA allowed the final rule to lower the threshold for reporting of industrial use of lead to go into effect without further ado.[6] The Administration also released a Clean Water Act regulation designed to narrow a loophole in previous regulations that allowed for greater than necessary loss of wetlands.[7] And the Administration allowed three sets of final regulations setting out EPA's approach to regulating pest-killing genetically modified plants to go forward.[8] These results were probably compelled by the Administrative Procedure Act, under which the withdrawal of a final rule and the suspension of the effective date of a final rule are both actions constituting rulemaking and therefore subject to notice and comment informal rulemaking procedures.[9]

The Administration allowed some of the final regulations to go into effect only very reluctantly after being subjected to a great deal of public pressure. For example, the Bush Administration in March, 2001, proposed to "withdraw" the Clinton Administration's drinking water standard for arsenic on the ground that it may have been the result of "a rushed decision."[10] After receiving a great deal of public criticism and an updated report from a committee of the National Research Council of the National Academy of Sciences, EPA ultimately allowed the Clinton Administration version of the arsenic rule to remain in effect.[11] The standard does, however, remain on a so-called "hit-list" recently assembled by the Office of Information and Regulatory Affairs in the Office of Management and Budget of "high priority regulatory review issues" that warrant further attention.[12]

The Bush Administration did not allow all of the final rules promulgated at the end of the Clinton Administration to go into effect. For example, on April 20, 2001, the Department of Energy indefinitely postponed the effective date of the final rule imposing new efficiency standards for central air conditioners and heat pumps.[13] That action has been challenged by environmental groups.[14]

Some of the suspended rules that the Bush Administration allowed to go into effect may never become effective because of legal challenges. A federal district court in Idaho enjoined the Forest Service from implementing the Clinton

Administration regulations protecting roadless areas in national forests, and the Justice Department under the Bush Administration has declined to defend the rules in court.[15] In the case of the Department of Interior's regulations governing the use of snowmobiles in national parks, the rules were allowed to go into effect, but the Justice Department entered into a settlement in which it agreed to stay the rule pending the preparation of a new environmental impact statement.[16]

Still other final rules that were allowed to go into effect are under active consideration by the Bush Administration for possible amendments to reduce their stringency. For example, EPA allowed clean air standards for diesel engines to become effective in February, 2001.[17] The regulations require steep reductions in diesel emissions from new diesel powered vehicles and large reductions in the sulfur content of diesel fuel. The agency announced in August, however, that it would convene a panel of stakeholders to review the restrictions on sulfur in diesel fuel with an eye toward re-evaluating the stringency of the requirements and the tightness of the implementation schedule.[18]

Postponement and Withdrawal of Proposed Rules.

The Bush Administration was free under the Administrative Procedure Act to withdraw any proposed regulations that had not been published in the *Federal Register* and to reconsider any proposals that were published in the *Federal Register* prior to promulgating final rules. In fact, EPA published very few notices of proposed rulemaking for significant regulations during the last two months of the Clinton Administration.

The Bush Administration EPA's proposed regulation to prevent regional haze in national parks through the installation of "best available retrofit technology" (BART) does not vary in any serious way from the Clinton Administration proposal that was sent to OMB, but never published in the *Federal Register*.[19] Yet EPA Administrator Whitman a month later told Congress that the emissions trading program for power plants that the agency was considering in connection with its response to Vice-President Cheney's "National Energy Policy" could very well replace the regional haze and other programs aimed at preventing significant deterioration of air quality in national parks.[20] Thus, if the Administration's "Clear Skies" initiative (discussed below) goes into effect, the concrete technological requirements for pollution reduction near national parks of the proposed regional haze rule will be replaced with a trading regime that may or may not reach proposed national emissions caps by 2012.

The fate of the other Clinton Administration environmental proposals remains to be seen. For example, EPA extended the comment period for its controversial proposals to establish effluent limitations under the Clean Water Act for concentrated animal feeding operations.[21] Administrator Whitman explained that the extension of the comment period was part of the Administration's efforts to "work on our outreach on imposed and impending regulatory matters."[22] The agency reported in November, 2001 that it was actively considering "[m]ore flexible approaches to water pollution from livestock operations" as a result of refinements to its cost and economics model.[23] The agency also extended the comment period for its proposed standards for metal products and machinery.[24] The agency wanted to ensure that the proposed limitations were achievable, given the economic downturn at the end of 2001.[25] The agency has yet to issue final rules for either of the two categories.

Ambivalent Stewardship of Common Resources.

During the Nixon/Ford and Carter Administrations, the President and Congress worked together to expand greatly the protections afforded to commonly held resources like the national forests, national parks and national monuments. The National Environmental Policy Act (NEPA) and the Endangered Species Act were enacted during the Nixon Administration. The Ford Administration witnessed the enactment of the Federal Land Policy and Management Act and a great expansion of the public lands devoted to the national park system. The Carter Administration launched a major initiative to protect Alaska's wilderness areas, and President Carter's Council on Environmental Quality drafted strong NEPA implementing regulations.

That all came to an abrupt end during the Reagan Administration when James Watt's Department of Interior launched an aggressive campaign to allow agricultural and industrial development of public lands. The Park Service immediately suspended purchases of land for inclusion in the National Park System, and it opened up national park lands to expanded coal mining activities. The Bureau of Land Management assigned a high priority to opening up wilderness ares to oil and gas leasing and to constrict the designation of additional lands for wilderness protection. Additional public

lands were opened to private grazing rights, and the Forest Service dramatically increased timber sales, sometimes at fire sale prices.[26]

President George H.W. Bush signed the Rio Principles that ultimately resulted in the Kyoto Treaty on Global Warming, and he slowed down somewhat the rapid development of public lands. The Clinton Administration launched a major initiative to protect the remaining roadless areas on public lands from excessive development, and toward the very end of the Administration, President Clinton designated many new national monuments and banned noisy and polluting snowmobiles from Yellowstone and Grand Teton National Parks.

During its first year in office the George W. Bush administration has adopted a much less protective approach toward public lands and other commonly held resources than the previous two administrations. Examples of retreats from the positions of previous administrations abound.

As noted above, the Bush Administration ultimately allowed the Clinton Administration's Roadless Area Conservation Rule to go into effect, but it made no effort to defend those regulations in court, a fact that was noted by all three judges on the Ninth Circuit panel that heard the appeal of the district court's order enjoining the Administration from implementing the rules.[27] By the end of 2001, the Bush Administration was already weakening the implementation of those rules by eliminating mandatory environmental reviews, abandoning the requirement that a "compelling need" be shown before building new roads, broadening "categorical exclusions," and eliminating special protections for remote roadless areas.[28]

On November 21, 2000, the Bureau of Land Management (BLM) of the Clinton Administration's Department of Interior revised the regulations governing hard rock mining on public lands (the "3809 rules") to replace poorly aging rules that had been promulgated prior to the advent of many environmentally destructive mining technologies.[29] The rules established environmental performance standards to protect rivers and groundwater, required mining companies to post bonds to ensure that any spills or other environmental contamination would be remediated, and empowered BLM to deny permits for mines that would pose too high a risk of causing environmental damage. On March 23, 2001, BLM proposed to replace the recently promulgated rules, and on October, 25, 2001, BLM promulgated final hard rock mining regulations that greatly reduced environmental protections of the previous regulations.[30] In particular, the Bush Administration's regulations replaced the Clinton Administration's environmental performance standards with the pre-existing 1980 standards, and they abrogated BLM's power to deny permits in order to avoid "substantial irreparable harm to significant scientific, cultural, or environmental resource values of the public lands that cannot be mitigated."[31]

In addition to reducing the stringency of its regulations, the BLM has taken several affirmative steps during the Bush Administration to allow greater private use of commonly held resources that may have significant adverse environmental impacts. Last fall, BLM approved 12 leases for oil and gas exploration and development in the Redrock Canyonlands of southern Utah, and it proposed to grant additional oil and gas leases in the Vermillion Basin of northwestern Colorado.[32] In addition to the direct adverse environmental effects of such actions, the development of these fragile lands could render them ineligible for further protection under the wilderness preservation laws. In October, the Department of Interior reversed a decision by the Clinton Administration to disapprove the construction of a huge open-pit gold mine in southern California, despite the conclusions of an environmental impact statement that the project would cause "significant damage to air quality and visual, cultural, religious and archeological resources."[33]

The Bush Administration told a congressional subcommittee in May, 2001 that it wanted to impose a two year moratorium on studies of additional public lands for inclusion in the National Park system,[34] and the Park Service testified in December that it opposed any additions to the National Park system for the foreseeable future.[35] At the same time, the Bush Administration, in response to a lawsuit filed by the Snowmobile Manufacturers Association, has issued a Draft Supplemental Environmental Impact Statement indicating that the Park Service is likely to replace the Clinton Administration's total ban on snowmobiles in Yellowstone and Grand Teton National Parks with a partial ban that allows restricted use of quieter and somewhat less polluting snowmobiles.[36]

On January 9, 2002, President Bush signed a congressionally mandated agreement with Florida to prevent diversion of water from the recently enacted Everglades restoration project.[37] It is not at all clear, however, that the actual restoration plan proposed by the Administration complies with the statutory requirements. Among other things, the plan does not specify the actual amount of water that is to be dedicated to Everglades restoration.[38]

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a lower value to preservation than the previous two administrations. In the end, the Bush Administration's less abrasive approach may ultimately bring about a greater reduction in dwindling commonly held resources than any presidential administration since the late nineteenth century.

Reluctant Regulation of Private Polluting Activities.

The Nixon and Ford Administrations witnessed an extraordinary outpouring of landmark legislation aimed at protecting public health and the environment from private polluting activities. The modern Clean Air Act, Clean Water Act, Safe Drinking Water Act, Toxic Substances Control Act, Ocean Dumping Act, and Resources Conservation and Recovery Act were all enacted during an extraordinary six-year period during which Congress and the Administration basically agreed that the federal government had a critical role to play in protecting the environment.

The Carter Administration faced the daunting challenge of implementing those newly enacted statutes and of suggesting "mid-course corrections" to some of them in light of actual experience in the real world. At the very end of the Carter Administration, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act that created a large "superfund" to clean up abandoned hazardous waste sites and made responsible parties liable for the expenses incurred in public and private response actions. Since the end of the Carter Administrations, no administration has so aggressively promoted a pro-environmental regulatory agenda to protect citizens from private activities that threaten health, safety and the environment.

The Reagan Administration, in sharp contrast, launched major initiatives to reduce the stringency of EPA regulations while at the same time bring enforcement activities to a virtual standstill. Of more lasting significance, the Reagan Administration, through various executive orders, imposed burdensome (and often extra-statutory) analytical requirements on agencies writing health, safety and environmental regulations. In addition, the Reagan Administration witnessed a more aggressive use of an already existing centralized White House review process for major regulations in which the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) became a "black hole" from which many protective regulations never reemerged. Congress reined in the Reagan Administration's radical deregulatory initiatives with a series of widely publicized hearings and ultimately with highly prescriptive legislation like the 1984 amendments to the Resource Conservation and Recovery Act. The analytical requirements and centralized review requirements, however, remained in place and retained their very great potential to "ossify" the rulemaking process.[39] In the final analysis, little direct damage was done to the overall regulatory structure during the Reagan Administration, but the flow of new protective regulations slowed to a trickle as the agencies struggled to meet a much higher burden of justification.

The George H.W. Bush Administration took steps to avoid the stigma associated with the early years of the Reagan Administration, and it broke the log jam that stood in the way of enacting necessary new amendments to the Clean Air Act with innovative proposals that Congress for the most part adopted. President Bush also signed the Oil Pollution Act of 1990, a statute enacted in the wake of the Exxon Valdez disaster. For a time the flow of protective regulations picked up, especially in response to the mandatory rulemaking requirements of the new Clean Air Act amendments. Toward the end of that Administration, however, the President imposed a "moratorium" on new regulations, and the Council on Competitiveness, chaired by Vice-President Dan Quayle, launched a major deregulatory initiative.

The Clinton Administration undertook many proactive environmental initiatives, especially toward the end of that Administration, but it also went to great lengths to "reinvent" existing environmental programs to provide greater "flexibility" for regulatees. The Clinton Administration also undertook a major effort to re-examine existing regulations and eliminate those that were obsolete or ineffective. At the same time, the centralized review process in OIRA became more efficient and ceased to function as a major roadblock hindering the progress of major regulations. One very positive development during the Clinton Administration was the institutionalization of previously vague and unimplemented concerns about "environmental justice." The permanent environmental legacy of the Clinton Administration, however, is its successful defense of the statutory underpinnings of modern pollution control law against very serious attempts during the 104th Congress to replace existing statutory protections with much less protective environmental laws.[40]

The George W. Bush Administration has by no means been a proactive protector of human health and the environment from private polluting activities. The new Administration has undertaken virtually no initiatives of its own to achieve environmental improvement, and it has taken affirmative steps to reverse or modify existing protective programs. Such new initiatives as have been undertaken during the first year of the Bush Administration have generally been required by statute, and older rulemaking actions that have gone forward have been only half-heartedly pursued. It

appears that OIRA is beginning to assume a much more aggressive role reminiscent of the "regulatory relief" role that it played during the Reagan Administration. The Bush Administration does, however, appear willing to forge new ground in the dubious areas of "voluntary" pollution reduction programs and taxpayer-financed private cleanups.

The Clear Skies Initiative.

Perhaps the clearest example of the Bush Administration's approach to pollution control is its recently unveiled "Clear Skies" proposal. In 1999, the Clinton Administration launched a major enforcement initiative to force old polluting facilities that had increased emissions through projects requiring large capital expenditures to undergo "new source review" (NSR) as required by the Clean Air Act. The NSR process requires new and modified plants to comply with new source performance standards that are generally more stringent than the applicable requirements in state implementation plans. Although many companies resisted this initiative, others agreed to install better technology. When the Bush Administration came into office several major consent decrees were in the works, but not yet signed by the power plant operators. Although the Bush Administration has thus far not abandoned the new source review initiative, it is considering far-reaching changes to the new source review process, and it has proposed to do away with the new source review process altogether for power plants.

On February 14, 2002, President Bush presented the Administration's "Clear Skies Initiative" to address emissions of sulfur dioxide, oxides of nitrogen (NOx) and mercury from new and existing power plants.[41] Although it is clear that the initiative will require amendments to the Clean Air Act (in the words of the Administration "a new Clean Air Act for the 21st century"), the Administration has not yet drafted specific legislative proposals.[42] The exact means for accomplishing the promised emissions reductions remains vague and therefore difficult to evaluate.

The heart of the initiative is a "cap-and-trade" regime for power plants that could reduce the current cap for East Coast sulfur dioxide emissions from 11 million tons per year (tpy) to 4.5 million tpy in 2010 and 3 million tpy in 2018. A new trading regime will be established for NOx and mercury emissions with similar reductions targets by the same deadlines. Different caps would apply elsewhere in the country.[43] Only the emissions caps for the 2010 targets would be established at the outset by Congress. EPA would establish the 2018 caps after reviewing "new scientific, technology and cost information and, if necessary, adjust[ing] the phase two targets."[44] Since the initiative would apply to new and existing power plants alike, it would apparently replace the existing new source review process for power plants.[45]

The background documents for the "Clear Skies" initiative do not suggest how power plants will go about achieving the emissions reductions that will be required to meet the ambitious caps that the plan proposes. Power plants achieved the less ambitious sulfur dioxide caps established in the acid rain cap-and-trade program required by the 1990 Clean Air Act amendments largely by switching from high sulfur coal to lower sulfur coal and natural gas, rather than by retrofitting expensive pollution reduction technologies. The NOx and mercury reductions needed to meet the caps set out in the "Clear Skies" initiative will not be nearly so easily achieved. Companies will have to install new equipment at great capital expense and maintain that equipment over the years. The background documents do not attempt to predict how a company that has not installed pollution reduction technologies will acquire the necessary credits if most other companies likewise forego pollution controls on the assumption that credits will be available for purchase. According to one report, an EPA analysis prepared for the Vice-President's task force concluded that the existing Clean Air Act programs would reduce power plant emissions nearly twice as fast as the "Clear Skies" initiative.[46]

Whether or not Congress enacts power plant legislation along the lines of the proposed "Clear Skies" initiative, the Administration is apparently planning to proceed ahead with administrative changes to the new source review program that would severely limit its scope.[47] Vice-President Cheney's National Energy Policy Development Group recommended that EPA, in consultation with DOE and other federal agencies, examine the New Source Review regulations and report to the President on their impact on investment in new utility and refinery generation capacity, energy efficiency, and environmental protection.[48] As a first step in that review, EPA prepared a background paper in June, 2001 that simply summarized existing studies and other available information (most of which came from the regulated industries) without drawing any strong conclusions.[49] Thus far, negotiations over how to change the new source review program among EPA, DOE and other agencies have been carried out behind closed doors with substantial input from industry lobbyists, but no opportunity has been provided for environmental groups or state and local officials to participate in the deliberations.[50]

Both the Clear Skies initiative and the strong likelihood that the Administration will modify the new source

review program to reduce its scope and stringency have had a powerful adverse effect on the agency's efforts to take effective enforcement action against companies that have unlawfully avoided new source review in the past. In his letter resigning from EPA, the Director of the agency's Office of Regulatory Enforcement complained that the agency was about to "snatch defeat from the jaws of victory" in its ongoing enforcement efforts as reports of the agency's largely unsuccessful battles with "a White House that seems determined to weaken the rules we are trying to enforce" caused defendants in existing enforcement actions to walk away from settlement negotiations.[51] According to one report, a major oil company may avoid a multi-million dollar fine for violations of the new source review requirements by its refineries in Baytown and Beaumont, Texas if the changes that the Administration is considering go into effect.[52]

In drafting its comprehensive "Clear Skies" proposal for power plants, the Bush Administration specifically declined to include within the proposed reforms specific requirements to ensure the reduction of carbon dioxide, an important contributor to global warming. This failure to act follows the Administration's announcement on March 13, 2001 that it would not attempt to achieve reductions in carbon dioxide emissions from power plants, thus effectively repudiating repeated assurances by EPA Administrator Whitman that the Administration would keep candidate George W. Bush's campaign promise that his administration would regulate carbon dioxide emissions from power plants.[53] The dubious rationale for the policy reversal was that the country faced an "energy crisis" that had apparently come about during the previous six months.[54]

Instead of proposing mandatory emissions reductions or a cap-and-trade regime, the Administration has proposed a plan for achieving "voluntary" reductions in greenhouse gas emissions sufficient to achieve a goal of an 18 percent reduction in "greenhouse gas intensity" by 2012.[55] Voluntary emissions reductions would be accomplished through unspecified improvements in the existing voluntary emission reduction registration program.[56] The Administration was unwilling to impose mandatory regulatory requirements because "scientific uncertainties" limited our knowledge of global warming and because "sustained economic growth is an essential part of the solution."[57] But it was willing to commit a future Administration to review progress toward the 18 percent goal in 2012 and propose "additional measures" if "sound science" justified "further policy action."

By tying emissions reductions to the novel concept of "greenhouse gas intensity" (the ratio of emissions to gross domestic product) the Administration's goal could be met without any reductions in the actual emissions of greenhouse gasses, and such emissions could actually increase substantially if the economy does not improve at a steady rate.[58] In fact, greenhouse intensity has fallen in the U.S. over the last two decades, even though actual greenhouse gas emissions have increased substantially.[59] The voluntary aspect of the program is, however, its most troubling aspect from an environmental perspective, because it leaves improvement up to the companies that have no direct incentive to reduce emissions.[60] The primary incentives in the plan stem from tax credits for various energy conservation and alternative energy measures that companies can undertake. A similarly optimistic Voluntary Emissions Reduction Permit program for "grandfathered" facilities enacted in Texas when George W. Bush was governor has thus far induced only 10 plants to acquire voluntary permits and has achieved reductions in total emissions of about 0.01 percent from those grandfathered facilities.[61] This is not a history from which one may draw optimistic conclusions about the efficacy of voluntary programs.

Reversing or Abandoning Clinton Administration Initiatives.

The Bush Administration has either repealed or proposed significant changes to several ongoing initiatives of the Clinton Administration to protect the environment from private polluting activities. The Department of Energy's indefinite postponement of the effective date of the final rule imposing new efficiency standards for central air conditioners and heat pumps was discussed above.[62] In formal comments on DOE's action, EPA accused DOE of using "misinformation" to justify its retreat from the Clinton Administration standard.[63]

On December 20, 2000, the Clinton Administration published a final rule that prohibited federal agencies from awarding large government contracts to companies that perpetually violated federal laws.[64] The Bush Administration "stayed" the final rule on April 3, 2001, and it revoked the rule entirely on December 27, 2001.[65] Although the extent to which the repealed rule actually deterred perennial environmental lawbreakers remains uncertain, the Bush Administration is apparently not opposed to rewarding such scofflaws with lucrative governmental contracts.

In July, 2001, EPA proposed to postpone further a congressionally delayed rule implementing the Clean Water

Act's "total maximum daily load" (TMDL) program for segments of rivers that do not meet state water quality stanards.[66] The agency issued a final rule postponing the implementation date until April 30, 2003. At the same time, the agency announced that it would use the moratorium "to re-consider some of the choices made in the July 2000 rule" in light of a recent report by the National Research Council of the National Academy of Sciences.[67]

New Initiatives to Roll Back Environmental Protections.

The Bush Administration has undertaken a number of new initiatives aimed at easing regulatory restrictions or otherwise reducing health and environmental protections. For example, on December 21, 2001, EPA published a proposed "Burden Reduction Initiative" rule aimed at reducing hazardous waste information collection and reporting requirements.[68] Similarly, in October, 2001, the agency transmitted to President Bush a report in which it promised to take several actions to give refineries greater flexibility in transitioning from winter gasoline to the "boutique fuels" that EPA and many states require to be used in the summertime.[69]

On January 14, 2002, the Bush Administration approved a plan to expedite wetlands destruction under the Corps of Engineers' "nationwide" permit program.[70] The staff of the Department of Interior's Fish and Wildlife Service drafted comments on the change predicting that it would result in "tremendous destruction of aquatic and terrestrial habitat," but upper level decisionmakers in the Department prevented the Service from delivering the critical comments.[71] After a committee appointed by the National Research Council of the National Academy of Sciences concluded that the mitigation measures called for in dredge and fill permits issued by the Corps of Engineers were not meeting the "no net loss" of wetlands policy that the Corps had attempted to follow since the first Bush Administration, the Corps on October 31, 2001, issued guidelines that, in the view of many observers will weaken, rather than enhance wetlands mitigation standards and ensure that the "no net loss" goal will not be achieved.[72]

In the area of pesticides regulation, the Bush Administration hesitantly declined to undo a settlement with environmental groups under which EPA agreed to reexamine pesticide tolerances under the more stringent requirements of the 1996 Food Quality Protection Act. An EPA press release reported that Administrator Whitman issued a directive to the pesticide program to make its procedures "more participatory and transparent" after being advised by the agency's general counsel that "the Agency had limited flexibility to change or withdraw from the consent decree" signed by the Clinton Administration.[73] In November, 2001, however, the press reported that EPA had quietly changed its policies to make it easier for companies to retain existing tolerances during the review process by relying upon human testing to avoid the additional safety factor that the agency employs when it extrapolates from animal studies.[74] The public outcry that resulted from this announcement caused EPA to reconsider its position, and it decided to decline to rely upon data from human studies pending a report that it quickly commissioned from the National Academy of Sciences.[75]

Missed Opportunities to Take Environmentally Protective Action.

The Bush Administration has also foregone opportunities to protect the environment. For example, after concluding that existing protections were sufficient, EPA on December 21, 2001, declined to establish numeric standards for dioxins in sewage sludge that is to be incinerated or placed in surface disposal units.[76] EPA officials recently acknowledged that the agency has achieved only about half the number of completed response actions under the federal "superfund" hazardous waste cleanup program during the first year of the Bush Administration as it accomplished during the last year of the Clinton Administration, and they blame a shortage of funding in part for that change. The Administration's FY 2003 budget envisions even fewer completed cleanups in 2002-03.[77]

More importantly, the Bush Administration has elected not to ask Congress to reauthorize the tax on the oil and chemical industries to replenish the "superfund" that EPA draws on in cleaning up abandoned hazardous waste disposal sites.[78] As recently noted by former EPA Administrator Carol Browner, this will result in taxpayers shouldering a larger part of the burden of cleanups or in a reduced number of cleanup actions.[79] Given the Bush Administration's apparent antipathy to taxation, this quiet failure to adhere to the "polluter pays" principle may properly be viewed as a subtle abandonment of the existing hazardous waste cleanup program. In either case, it represents a rather "enormous windfall for the oil and chemical industries."[80]

Positive Bush Administration Initiatives.

Most of the positive regulatory actions to protect the environment that EPA has undertaken during the Bush Administration have resulted from the agency's failure to halt actions initiated during the Clinton Administration. For example, EPA was praised by environmental groups for adhering to a plan promulgated during the Clinton Administration to dredge toxic PCBs from the Hudson River.[81] As discussed above, the Bush Administration after much soul-searching also allowed the Clinton Administration's drinking water regulations for arsenic go into effect.[82] The Bush Administration also went forward with a proposal to prevent regional haze in national parks.[83]

EPA has issued a few new proposals in response to court orders requiring the agency to take action. For example, in response to court orders, EPA on September 14, 2001, proposed regulations to address the vexing problem of air emissions from "off-road" vehicles, like diesel marine engines and snowmobiles, that would require manufacturers of such vehicles to employ easily available pollution reduction technologies by the 2006 model year.[84] Several environmental and recreational organizations criticized the proposal as falling "far short of the legal requirements in the Clean Air Act."[85]

The Bush Administration has been a strong proponent of "voluntary" initiatives that attempt to inspire individuals and companies to clean up the environment by appealing to their good citizenship. A good example is the "Smoke-Free Home Pledge Initiative," under which EPA is attempting to educate smoking parents to quit out of concern for the health of their children and others who are exposed to environmental tobacco smoke.[86] In October, 2001, EPA announced voluntary cancellations of some agricultural uses of two organophosphate pesticides,[87] and in February, 2002 the agency announced a voluntary agreement by manufacturers of treated wood to move away from wood treated with arsenic for residential and other consumer uses.[88]

Though not properly characterized as a Bush Administration "initiative," the Administration participated actively in the enactment of long-pending "Brownfields" legislation that will devote additional federal funds for the next four years to help clean up contaminated urban sites and thereby promote redevelopment of inner city areas.[89] The legislation, which was supported by environmental groups, civil rights groups and small business advocates, would also relieve from liability for cleanups so-called "de micromis" contributions of small businesses and residential households to superfund sites.[90]

In the final analysis, I have been unable to identify a single important new rulemaking initiative undertaken by the George W. Bush Administration to protect citizens from private polluting activities that was not already in the works prior to January 20, 2001. It is fair to say that the George W. Bush administration did not hit the ground running with an environmental improvement agenda. Indeed, it is does not appear that the Administration is even jogging.

Tighter Oversight of the Environmental Agencies at OMB.

Soon after the enactment of many of the modern environmental statutes in the early 1970s, regulated entities charged that EPA and other recently created agencies were so enthusiastically implementing their newly granted statutory powers that they had spun "out of control." Reacting to these criticisms, the Nixon Administration inaugurated a "Quality of Life" review process under which EPA and the Occupational Safety and Health Administration were obliged to send proposals for major regulations to OMB for review by other departments and agencies. President Ford left the review process in place but lodged it in the now-defunct Council on Wage and Price Stability, and it required the agencies to prepare an "inflation impact statement" for major regulations. The Carter Administration left the review function in place but later shifted its locus to an interagency Regulatory Analysis Review Group.[91]

President Reagan shifted the regulatory review function back to OMB and lodged it in the newly created Office of Information and Regulatory Affairs (OIRA). Intended by Congress to be the primary implementing agency for the Paperwork Reduction Act, it soon became the institutional home of the most ardent anti-regulators in the Administration. OIRA demanded that agencies prepare detailed and comprehensive cost-benefit analyses for major regulations, and it frequently held up regulations with which it had substantive objections for months and in some cases forever. Since OIRA's objections in many cases went to the substantive policies that Congress had enacted in the agencies' authorizing statutes, disputes between OIRA and congressional oversight committees were not uncommon.[92]

OIRA continued to play an aggressive oversight role during much of the George H.W. Bush Administration, but

its oversight role was shifted to Vice-President Quayle's Council on Competitiveness during the last part of that Administration after Congress demanded greater transparency of the OIRA review process. During the Clinton Administration, OIRA was again assigned the primary regulatory oversight function, and the process remained reasonably transparent. Although OIRA frequently found fault with agency regulatory analysis documents, it rarely held up agency initiatives on purely substantive grounds.

Although it is still very early in the process to draw significant conclusions, it appears that OIRA is asserting an aggressive oversight role in the George W. Bush Administration that is reminiscent of the role that it played during the late Reagan Administration and early George H.W. Bush Administration. The process remains transparent, and with the office's commendable expanded use of the internet, it has become more transparent than ever during the first year of the new Administration. OMB's closed-door meetings with industry groups and the agencies are documented and posted, although there is no evidence that people representing the beneficiaries of regulations have been invited to attend such meetings. Finally, since OIRA appears to be acting reasonably promptly on rules that are submitted for review, the "black hole" metaphor is thus far not appropriate.

OIRA has recently announced that it will implement a new regulatory review plan under which it will ask agencies to use cost-per-life-year-saved as the measure of the cost-effectiveness of life-saving rules and quality adjusted life years as the measure of the benefits of regulatory interventions that protect against nonfatal health effects.[93] The goals of this change are to facilitate comparisons across agencies and to foster greater uniformity in the level of costs imposed by federal regulations.[94] Although this is not the place to debate these measures of the societal value of regulatory interventions, it should be noted that they are quite controversial and by no means command a consensus among legal and policy scholars.[95] At best they belittle the societal value of the infirm and elderly, and at worst they force agencies to compare incommensurables and to dwarf "soft" variables like justice and fairness.

There are indications, moreover, that OIRA may see a substantive role for itself in the review process that goes beyond merely insisting that agencies prepare careful analyses of the costs and benefits of major regulations. For example, OIRA has begun to interject itself into the process of formulating rules much earlier in the process than has been the case in past administrations. Indeed, OIRA is even offering advice on how EPA should carry out its research into the health effects of pollutants. In a recent letter to EPA Adminstrator Whitman, OIRA Administrator Graham urged EPA to "retarget" its research on the health effects of fine particulate matter to address only those particulates determined to be harmful. A representative of the electric utility industry offered that "[t]his is exactly what we have been asking for."[96]

OIRA's 2001 report to Congress explains that "early involvement can be valuable if OMB's perspective helps agencies frame the problem in constructive ways, suggests creative regulatory alternatives, or offers insights into how particular types of costs and benefits may be quantified or weighed."[97] As the preceding quote suggests, early involvement also provides ample opportunity for OIRA to guide the rulemaking process to particular substantive ends. The choice among regulatory alternatives and weighing costs and benefits of those alternatives is the essence of substantive decisionmaking. To the extent that OIRA is providing input on such issues early in the process, it is providing substantive input. Given the reality of OIRA review of the final product, it should not be surprising to find that agencies are swayed by OIRA's views at these early, largely invisible stages of the decisionmaking process.

Another indication of OIRA's desire to play a much more active role in day-to-day agency affairs is the invitation that it offered in May, 2001 to the public to "nominate specific regulations that we should propose for reform."[98] On the basis of the 71 submissions, OIRA identified a list of 23 "high priority regulatory review issues" that warranted further attention and could potentially result in a "prompt" letter to an agency demanding additional "deliberation and response."[99] Thirteen of the 23 rules on the so-called "hit list" are environmental regulations.[100] Included on the list are such recently completed actions as the Forest Service's roadless area conservation rule and EPA's arsenic in drinking water rule. All of the accepted recommendations came from either industry groups or the industry-supported Mercatus Center of George Mason University.[101]

OMB has issued guidelines to agencies on the quality of information that agencies use when they regulate or otherwise communicate risk-related information to the public.[102] The guidelines, which were drafted pursuant to an obscure rider in the Treasury and General Government Appropriations Act for Fiscal Year 2001,[103] require agencies to develop procedures to ensure the quality of information that the agencies disseminate and to allow companies and other affected entities an opportunity to challenge information that does not come up to the OMB's standards of information quality. The OMB Information Guidelines require agencies to "develop information resource management procedures for reviewing and substantiating . . . the quality (including the objectivity, utility, and integrity) of information before it is

disseminated."[104] In addition, the Guidelines require agencies to develop procedures for allowing affected persons to "seek and obtain, where appropriate, timely correction of information . . . that does not comply with OMB and agency guidelines."[105]

At this early stage in the implementation of the guidelines the extent to which OIRA plans to screen agency rulemaking documents for consistency with OIRA's interpretation of the OMB guidelines remains unclear. It is, however, quite clear that the advocates of the Guidelines who lobbied for the appropriations rider assume that OMB will be actively involved in reviewing agency background documents for consistency with its guidelines.[106] Thus, the guidelines could serve as a vehicle for increasing the stringency of OIRA scrutiny of rulemaking documents and thereby facilitate greater substantive control. At the very least the opportunity that the guidelines afford regulatees to challenge the quality of the scientific information underlying health and environmental regulations before they are promulgated will serve further to ossify the rulemaking process.[107]

Diminished Accountability for Delegated Programs.

Most federal environmental laws provide for substantial delegation of federal powers and responsibilities to the states upon a proper demonstration that the state programs are sufficient to meet the requirements of the federal programs. Pursuant to these delegations, state regulatory agencies regulate private polluting activities within broad contours specified by federal statutes and regulations. During the first year of the Bush Administration, EPA has signaled that the states have a great deal of flexibility to administer federally delegated programs, even to the point of violating the specific requirements of environmental statutes. A good example is EPA's approval, on November 14, 2001, of wholly inadequate amendments to the Texas state implementation plan (SIP) for the Houston/Galveston ozone nonattainment area.[108]

EPA was bound by statute and a consent decree either to approve a state-submitted plan demonstrating that the Houston/Galveston area would come into attainment with EPA's one-hour standard for photochemical oxidants by 2007 or to promulgate such a plan on its own. EPA approved a state-submitted plan that did not demonstrate how the area would come into attainment by the deadline. In fact, the Texas plan came up short by 56 tons per day (tpd) of NOx emissions, an amount that represents more than one third of the emissions assigned to all automobile emissions in the attainment year.[109] Instead of making the required demonstration that the plan would attain the one-hour ozone standard by the 2007 deadline, the plan that EPA approved contained several promises for actions that Texas would take in the future.[110] In particular, the Texas plan merely promised to adopt rules sometime in the next two-and-one-half years capable of making up the 56 tpd shortfall "without requiring additional limits on highway construction."[111] The Clean Air Act permits EPA to approve a plan revision "based upon a commitment of the State to adopt specific enforceable measures by a date certain," but in order to prevent just the sort of highly speculative attainment demonstrations that the Houston plan attempts, the measures must be adopted "not later than one year after the date of approval of the plan revision."[112] EPA's action is thus patently unlawful, and it has (not surprisingly) been challenged in court.[113]

One of the reasons that no area that was designated "serious" or "extreme" is likely to come into actual attainment with the 1-hour ozone national primary ambient air quality standard is the failure of EPA to promulgate regulations implementing the requirement of section 181(g) that states retrospectively demonstrate that sources in such nonattainment areas did in fact achieve a 15 percent reduction in volatile organic compounds (VOCs) (or the equivalent in VOC and NOx reductions) as of August 15, 1996 and reductions of 3 percent per year thereafter. Although the SIPs for such areas provide for such reductions, no state has ever demonstrated that the reductions were actually achieved, despite a statutory requirement that they do so. The states are waiting for EPA to promulgate regulations prescribing the "form and manner" of such demonstrations. EPA has taken no action during the Bush Administration to write such regulations, even though the 2002 demonstration year is now upon us.

Less Transparency.

In the age of the internet, federal agencies have many opportunities to make the decisionmaking process available for public viewing. Agencies can provide important (and even relatively unimportant) documents, announcements of meetings, and minutes of advisory committee meetings to the public on the world-wide web. Indeed, they can even broadcast live meetings online. The Electronic Freedom of Information Act Amendments of 1996 accelerated the overall trend since the enactment of the original Freedom of Information Act in the mid-1970s toward

openness in government decisionmaking. The trend during the first year of the Bush Administration, however, appears to be away from this general trend toward increased transparency of the decisionmaking process in Executive Branch agencies.

The refusal by the White House to disclose documents related to the meetings of Vice-President Cheney's Energy Task Force with representatives of energy companies including Enron Corporation, Southern Company, the Exelon Corporation, BP, the TXU Corporation, FirstEnergy and TXU Corporation, is no doubt the most heavily publicized action in this regard, but it is by no means the only sign of a trend away from transparency.[114] A federal district court recently employed unusually harsh language in criticizing the Department of Energy's hesitance to disclose documents relating to that Department's participation in the Energy Task Force. The court found that the agency had been "woefully tardy" in responding to the Natural Resource Defense Council's FOIA request for documents that were of "extraordinary public interest."[115] According to the court, the government had "no legal or practical excuse for its excessive delay in responding" to the request.[116]

In October, 2001, the Justice Department issued a new memorandum describing how agencies in the Bush Administration should respond to requests for information under the Freedom of Information Act (FOIA).[117] Although the Administration was "committed to full compliance with" FOIA, the memorandum stressed that it was "equally committed to protecting other fundamental values that are held by our society." Noting that "certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public," the memorandum warned agencies that they should release voluntarily information that might otherwise be withheld "only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information." The Justice Department promised to defend all agency decisions to withhold documents "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." The presumption erected by the memorandum is apparently in favor of nondisclosure of information that can be protected, rather than in favor of voluntary disclosure of information that could be protected but would not cause harm if disclosed. This represented a reversal of the presumption in favor of voluntary disclosure that applied during the Clinton Administration.[118]

Other individual actions by individual agencies also suggest a trend away from transparency during the Bush Administration. In October, 2001, EPA hosted a closed door meeting with industry representatives to discuss the possibility of "building a new reinvention and regulatory reform agenda."[119] In that same month, the Forest Service issued a proposal to expand its use of "categorical exclusions" from the otherwise applicable environmental analysis and review process to certain "special use" applications and authorizations.[120] In the absence of these environmental assessments, any adverse environmental effects of such authorizations are effectively invisible to the general public. The Fish and Wildlife Service's harshly negative comments on the Corps of Engineers' changes to the nationwide permit program, discussed above, were quietly pretermitted by upper level officials in the Department of Interior and would never have seen the light of day but for a leak to a newspaper reporter.[121] In December, 2001, USDA announced a decision to approve a large sale of timber on nearly 41,000 acres in the Bitterroot National Forest and at the same time proclaimed that the sale would be exempt from administrative appeal. A federal judge in January, 2002 enjoined the sale because of the court's concern that the public had been shut out of the decisionmaking process.[122]

One gratifying exception to the general movement away from transparency is the previously discussed effort by the Office of Information and Regulatory Affairs in the Office of Management and Budget to increase the transparency of its interaction with the regulatory agencies by putting the content of such communications on its expanded website.[123]

Conclusions.

It does not appear that the George W. Bush Administration came to office with a radical deregulatory agenda of the sort that the White House and the major presidential appointees pursued in the early years of the Reagan Administration and the waning years of the George H. W. Bush Administration. At the same time, it is readily apparent that the White House does not have a progressive environmental protection agenda in mind. Indeed, I have been unable to identify a single important new rulemaking initiative undertaken by the George W. Bush Administration to protect citizens from private polluting activities. The Bush Administration's attitude toward environmental regulation might best be characterized as "quietly hostile."

To use an athletic metaphor, it is fair to say that the George W. Bush administration did not hit the ground

running with an agenda for improving the environment. Indeed, it is does not appear that the Administration is even jogging in the direction of environmental improvement. Viewed most charitably, the Bush Administration has been running in place on environmental issues while it focuses its attention on other matters. In recent weeks, however, its actions strongly suggest that the Administration is beginning to sprint off in the opposite direction. If so, irreparable harm to human health and the environment is the predictable consequence.

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[3] Id.

[4] See, e.g., Department of Health and Human Services, Health Care Financing Administration, Medicare Program; Use of Restraint and Seclusion in Residential Treatment Facilities Providing Inpatient Psychiatric Services to Individuals Under Age 21: Delay of Effective Date, 66 Fed. Reg. 15800 (2001).

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[8] U.S. Environmental Protection Agency, Plant-Incorporated Protectant Rules Affirmed by Administration; Comments Invited on Supplemental Notice and Report, July 19, 2001.

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[100] OMB 2001 Report to Congress, supra, at 63-64.

[101] Natural Resources Defense Council, Inc., Rewriting the Rules: The Bush Administration's Unseen Assault on the Environment 19-20 (2002). See Free Market Group Wields Strong Influence on Bush Rule Reforms, Inside EPA, Weekly Report, January 25, 2002, at 11.

[102] Office of Management and Budget, guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, September 24, 2001 [hereinafter cited as OMB Information Guidelines].

[103] Pub. L. 106-554, 106th Cong., 2d Sess (2000).

[104] OMB Information Guidelines, supra, at 5.

[105] OMB Information Guidelines, supra, at 15.

[106] See OMB Guidelines on Quality of information Seen as Having Profound Impact on Agencies, 33 BNA Environment Reporter (Current Developments) 146, 148 (2002) (lobbyist Jim Tozzi argues that "through the information-quality guidelines, OMB can control the information disseminated" by regulatory agencies).

[107] See, id., at 147-48 (reporting concerns from environmental group representatives and former OMB officials that the guidelines will be used by regulatees to slow down the rulemaking process).

[108] U.S. Environmental Protection Agency, Approval and Promulgation of Implementation Plans; Texas; Houston/Galveston Nonattainment Area; Ozone, 66 Fed. Reg. 57160 (2001).

[109] The motor vehicle emissions budget for NOx for the attainment year of 2007 in the Houston/Galveston nonattainment area is 156.6 tpd. 66 Fed. Reg. at 57161.

[110] For example, the Texas SIP promised to perform new mobile source modeling for the area, using new EPA models, within 24 months of a model's official release, and to perform a "mid-course review" and submit a "mid-course review SIP revision, with any recommended mid-course corrective actions," to the EPA by May 1, 2004. 66 Fed. Reg. at 57160-61.

[111] 66 Fed. Reg. at 57161.

[112] 42 U.S.C. § 7410(1)(4).

[113] Environmental Defense v. EPA, Petition for Review, United States Court of Appeals for the Fifth Circuit, January 11, 2002.

[114] See Don Van Natta, Jr. & Neela Banerjee, Top G.O.P. Donors in Energy Industry Met Cheney Panel, New York Times, March 1, 2002.

[115] Natural Resources Defense Council, Inc. v. Dept. of Energy, Civ. No. 01-2545 (GK), Memorandum-Order, Feb. 21, 2002, at 3, .

[116] Id., at 5.

[117] Memorandum for Heads of All Federal Departments and Agencies from John Ashcroft re: The Freedom of Information Act, dated October 12, 2001.

[118] See Ellen Nakashima, Bush View of Secrecy is Stirring Frustration, Washington Post, March 3, 2002, at A1; Critics Say New Rule Limits Access to Records, New York Times, February 27, 2002.

[119] White House Uses New Popularity to Move Environmental Agenda, Inside EPA Weekly Report, November 9, 2001, at 1, 13.

[120] Forest Service, National Environmental Policy Act Documentation Needed for Certain Special Use Authorizations, 66 Fed. Reg. 48412 (2001).

[121] See Michael Grunwald, Compromise, or Selling Out? Washington Post Weekly Edition, January 28, 2002, at 30.

[122] Bush is No Defender, Attorneys Charge, Environmental News Network, January 11, 2002, at 2.

[123] The OIRA website is located at <http://www.whitehouse.gov/omb/inforeg/regpol.html>.