

# ANYTHING INDUSTRY WANTS: ENVIRONMENTAL POLICY UNDER BUSH II

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## I. PREFACE

I would like to begin with two caveats. First, this critique is not intended to be an exhaustive analysis of the Bush Administration's entire environmental record. Rather, the purpose is to illustrate, through selected examples, how this administration abuses science, law, and democratic processes to make bad public policy. Second, I make no claim to objectivity here. My view is that this administration has compiled the worst environmental record of any administration in history. To the extent others see it differently, so be it.

## II. INTRODUCTION

From day one, the Bush Administration has set about the task of systematically and unilaterally dismantling over thirty years of environmental and natural resources law. It started with the "Card Memo"<sup>1</sup> and the Anything But Clinton ("ABC") rule, which first quarantined and then quietly put to sleep, scores of regulations issued by the previous administration—everything from arsenic in drinking water, to fuel efficiency standards, to snowmobiles in Yellowstone National Park.<sup>2</sup> Since then, the anti-Clinton reaction has grown into a full-fledged ideological crusade to deregulate polluters, privatize public resources, limit public participation, manipulate science, and abdicate federal responsibility for tackling national and global environmental problems.

In over thirty years of practicing environmental law, I have not seen anything like this. Not even the historic battles with the likes of

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1. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 20, 2001) (freezing all pending rules and regulations from the Clinton Administration).

2. Danielle Nierenberg, *U.S. Environmental Policy: Where is it Headed?*, WORLD WATCH, July 1, 2001, at 12.

Interior Secretary James Watt and EPA Administrator Anne Burford Gorsuch in the Reagan Administration can compare. The current administration is far more clever, disciplined, and deceptive in what it says and does than its predecessors. It has also been more effective, due to a Republican-controlled Congress, an enfeebled Democratic Party, a distracted public, and an ambivalent media. Because of this environment, there has not been an open debate on the future of environmental policy. Rather, the Bush Administration has been able to make sweeping environmental changes through a stealth campaign, masquerading under sly euphemisms like "Healthy Forests," "Clear Skies," "No Net Loss," "Stewardship Contracts," and "Sound Science."

While the American public has been preoccupied with the issues of jobs, health care, and the "War on Terrorism," the Bush Administration has enjoyed a rare window of opportunity to roll back environmental policies and regulations. These changes were made possible because there was no coherent opposition party in Congress and little public knowledge about what these changes actually meant for the protection of public health and the environment. Some of the more egregious actions have been blocked in federal court, but litigation takes time, and there is a limit to the number of cases environmentalists and concerned states can handle. Meanwhile, the administration seeks to imprint its conservative ideology on the courts through its controversial judicial nominations and "recess appointments" to put people on the bench who have been rejected in the Judiciary Committee and Senate confirmation process.<sup>3</sup>

Admittedly, there have been some positive steps taken. For instance, there has been support for the environmental provisions of the Farm Bill,<sup>4</sup> and there have been stiff fines in a few high profile enforcement cases.<sup>5</sup> There has also been partial funding for the Land

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3. See, e.g., Editorial, *More Provocation*, WASH. POST, Feb. 22, 2004, at B6 (discussing the recess appointment of former Alabama Attorney General William H. Pryor Jr. to the 11th Circuit); Richard B. Schmitt & Richard Simon, *In a Rare Move, Bush Installs Judge Pickering*, L.A. TIMES, Jan. 17, 2004, at 9 (discussing the recess appointment of Mississippi Judge Charles W. Pickering to the 5th Circuit).

4. UNITED STATES DEP'T. OF AGRIC., FOOD AND AGRICULTURAL POLICY: TAKING STICK FOR THE NEW CENTURY 80-85 (2001), available at <http://www.usda.gov/news/pubs/farmpolicy01/fpindex.htm> (last visited May 3, 2004); Dan Morgan, *House Rejects Conservation Shift in Farm Bill*, WASH. POST, Oct. 5, 2001, at A2 (showing Bush Administration opposition to attempts to strip the Farm Bill of conservation measures).

5. See, e.g., *News in Brief*, ENVTL. COMPLIANCE & LITIG., Apr. 2003, at 7 (reporting on a multi-billion dollar Clean Air Act ("CAA") enforcement settlement with a Virginia-based utility).

and Water Conservation Fund, opposition to “regulatory takings” claims in the Supreme Court (most notably *Tahoe Sierra*<sup>6</sup>), and the adoption of rules cracking down on non-highway, diesel emissions.<sup>7</sup> Some of these accomplishments are no doubt due to political realities; environmental issues still matter to many voters. Nevertheless, some credit is due to the Bush Administration, regardless of the suspected motivation.

Unfortunately, Bush’s few trees of environmental redemption are covered by a forest of bad policy. Even a cursory review of the record reveals the pattern of an administration looking to change environmental law by fiat, collusion, and deception. These changes have little regard for environmental consequences and even less regard for the foundational democratic principles of transparency and open debate.

### III. THE EVIDENCE

#### A. *Hot Air on Climate Change*

Global warming is clearly the most pressing environmental issue of the Twenty-first Century. The leadership of the United States is crucial to reducing our greenhouse gas emissions, the heaviest in the world, and to cooperating with the other nations transitioning from today’s fossil fuel economy to one built on efficient, renewable, cleaner energy systems. The President got off to a bad a start by renegeing on a campaign promise to address CO<sub>2</sub> emissions as part of a “four pollutants bill.”<sup>8</sup> He then made matters worse by repudiating the Kyoto Protocol, notwithstanding the fact that the U.S. got exactly what it had demanded in the negotiations—namely, a cap and trade program to reduce greenhouse gases (“GHGs”) and the use of “carbon sinks” to generate credits for emission offsets.<sup>9</sup> The President said

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6. *Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

7. *Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel*, 68 Fed. Reg. 28,238 (proposed May 23, 2003) (to be codified at 40 C.F.R. pts. 69, 80, 89, 1039, 1065, & 1068).

8. Cat Lazaroff, *Bipartisan Emissions Bill Counters Bush's Broken Promise*, ENVTL. NEWS SERV., March 15, 2001; News Hour with Jim Lehrer, *Environmental Reversal* (PBS television broadcast, Mar. 14, 2001), available at [www.pbs.org/newshour/newshour\\_index.html](http://www.pbs.org/newshour/newshour_index.html).

9. Alexander Gillespie, *Sinks and the Climate Change Regime: The State of Play*, 13 DUKE ENVTL. L. & POL'Y F. 279, 279 (2003); Richard A. Kerr, *Major Challenges for Bush's Climate Initiative*, SCI. MAG., July 13, 2001, at 199.

that Kyoto was based on the “unproven science” of global warming.<sup>10</sup> Subsequently, in the spring of 2001, the United Nation’s Intergovernmental Panel on Climate Change (“IPCC”), a body representing 40,000 of the world’s leading climatologists, released its Third Assessment Report which concluded that “[t]he Earth’s climate system has demonstrably changed on both global and regional scales since the pre-industrial era, with some of these changes attributable to human activities.”<sup>11</sup>

Unconvinced, the White House requested the National Academy of Sciences (“NAS”) to review the IPCC Report. In June, 2001, NAS issued its report endorsing the IPCC conclusions, stating: “Greenhouse gases are accumulating in the earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise.”<sup>12</sup> But, undeterred, the White House denounced the Kyoto Protocol as fundamentally flawed and continued to insist that there still was “considerable uncertainty about the scientific causes of global warming.”<sup>13</sup> Simultaneously, the White House announced it would not support the reappointment of Dr. Robert Watson as Chair of the IPCC.<sup>14</sup> Because Dr. Watson is one of the world’s leading climate scientists, Director of the Environment Program at the World Bank, and a former official at the National Aeronautics and Space Administration, this decision was roundly criticized throughout the world.<sup>15</sup>

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10. See President Bush Discusses Global Climate Change, 37 WEEKLY COMP. PRES. DOC. 876 (June 11, 2001) (“The targets [of Kyoto] were arbitrary and not based upon science”).

11. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 4 (2001), available at <http://www.ipcc.ch/pub/un/syrenq/spm.pdf> (last visited May 4, 2004).

12. COMMITTEE ON THE SCIENCE OF CLIMATE CHANGE, NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS 1 (2001), available at <http://books.nap.edu/html/climatechange/climatechange.pdf> (last visited May 4, 2004). As Climatologist Steven Schneider said regarding the argument that there is still some uncertainty about global warming: “I’m not 99 percent sure, but I am 90 percent sure [that the climate is changing]. Why do we need 99 percent certainty when nothing else is that certain? If there were only a 5 percent chance the chef slipped some poison in your dessert, would you eat it?” Union of Concerned Scientists, *Science of Global Warming: Sound Science for Public Policy and Decision-Making*, at [http://www.ucsusa.org/global\\_environment/global\\_warming/page.cfm?pageID=971](http://www.ucsusa.org/global_environment/global_warming/page.cfm?pageID=971) (last modified June 9, 2003).

13. *Bush Withholds Backing of EPA Report on Warming*, WASH. POST, June 5, 2002, at A2.

14. John Mason, *U.S. Pressure Forces Removal of Climate Change Chief*, FIN. TIMES (London), Apr. 20, 2002, at 8.

15. *Id.*; John Mason, *U.S. Defends Strategy on Fighting Global Warming*, FIN. TIMES (London), May 14, 2002, at 14.

On December 16, 2003, the American Geophysical Union, one of the nation's most influential scientific organizations dealing with the Earth's atmosphere, issued a new position statement on global warming.<sup>16</sup> After a year of debate, the organization made several specific findings. First, scientific evidence strongly indicates that natural influences cannot explain the rapid increase in global near surface temperatures observed during the second half of the Twentieth Century.<sup>17</sup> Second, the union found that it is virtually certain that increasing concentrations of CO<sub>2</sub> and other greenhouse gases will cause global surface climate to become warmer.<sup>18</sup> Now, scientists are warning of even graver dangers from "abrupt climate change." According to a recent report by the National Research Council (NRC), an arm of NAS, there is convincing geological evidence of dramatic changes in temperature occurring within relatively short time frames.<sup>19</sup> For example, roughly half of the North Atlantic warming since the last Ice Age was achieved in only a decade and has been accompanied by significant global climatic changes. Other scientists have published peer-reviewed studies proposing immediate action to keep atmospheric CO<sub>2</sub> levels below thresholds likely to cause "dangerous anthropogenic interference" with the climate.<sup>20</sup>

What is the administration's response to the growing scientific consensus that urgent action is needed to address climate change? Here is a quick rundown of the state of affairs. Under the 1992 Framework Convention on Climate Change,<sup>21</sup> signed by George H. W. Bush and ratified by the Senate,<sup>22</sup> the U.S. pledged to stabilize atmospheric gas concentrations at a level that will prevent "dangerous human interference" with the climate.<sup>23</sup> As a first step, the U.S. committed to reduce "anthropogenic emissions of carbon dioxide and other greenhouse gases to 1990 levels."<sup>24</sup> Instead, U.S. emissions have

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16. American Geophysical Union, *AGU Adopts New Statement on Human Impacts on Climate*, at [http://www.agu.org/sci\\_soc/prrl/prrl0335.html](http://www.agu.org/sci_soc/prrl/prrl0335.html) (Dec. 16, 2003).

17. *Id.*

18. *Id.*

19. Tom Clarke, *Abrupt Climate Change Likely*, NATURE SCI. UPDATE, at <http://www.nature.com/nsu/011220/011220-3> (December 13, 2001).

20. Brian C. O'Neill, & Michael Oppenheimer, *Dangerous Climate Impacts and the Kyoto Protocol*, SCI. MAG., June 14, 2002, at 1971.

21. U.N. Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (entered into force Mar. 21, 1994) [hereinafter 1992 Framework Convention].

22. U.N. Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992).

23. 1992 Framework Convention, *supra* note 21, art. 4.

24. *Id.*

increased by 14% over 1990 levels.<sup>25</sup> Under the 1997 Kyoto Protocol,<sup>26</sup> the U.S. was supposed to reduce GHG emissions to 7% below 1990 levels.<sup>27</sup> Instead, U.S. emissions are projected to increase by another 14% by 2012, which would mean that the U.S. will be 28% over the target levels it agreed to meet in the Framework Convention.<sup>28</sup> Under President Bush's proposed climate change (in)action plan, GHG intensity is projected to decrease by 18%.<sup>29</sup> However, this "intensity" metric is nothing more than a ratio of GHG emissions to economic output. It simply means that GHG intensity will automatically decrease, even if nothing is done to actually reduce emissions, as long as U.S. economic output increases over the next decade.<sup>30</sup> This is an accounting gimmick worthy of Enron. In fact, the administration's own figures show a projected *net* increase of 14% GHG emissions over the next decade.<sup>31</sup>

Electric Utilities account for 32% of GHG, making reductions in this sphere the highest priority in addressing Global Warming.<sup>32</sup> The administration, however, has opposed regulating CO<sub>2</sub> under existing Clean Air Act ("CAA") standards, and this has prompted twelve Northeastern states to file suit to force compliance.<sup>33</sup> Moreover, the administration opposes any legislation addressing CO<sub>2</sub> as part of the "four pollutants bill."<sup>34</sup> Instead, the White House supports voluntary

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25. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2002 (2004), available at <http://yosemite.epa.gov/oar/globalwarming.nsf/content/EmissionsNational.html> (last modified Apr. 22, 2004) [hereinafter GHG EMISSIONS 2004].

26. Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter 1997 Kyoto Protocol].

27. *Id.* Annex B.

28. Adlai Amor, World Resources Institute, *WRI Says Bush Plans will Increase Greenhouse Emissions by 14 Percent*, at [http://newsroom.wri.org/newsrelease\\_text.cfm?NewsReleaseID=23](http://newsroom.wri.org/newsrelease_text.cfm?NewsReleaseID=23) (Feb. 14, 2002).

29. The White House, *Global Climate Change Policy Book*, at <http://www.whitehouse.gov/news/releases/2002/02/climatechange.html> (Feb. 2002).

30. Environmental Defense, *Why The Bush Administration's Greenhouse Intensity Targets Would Make it Impossible to Avoid Dangerous Climate Change* (Oct. 23, 2002), available at [http://www.environmentaldefense.org/documents/2421\\_COP\\_bushintensity.pdf](http://www.environmentaldefense.org/documents/2421_COP_bushintensity.pdf).

31. World Res. Inst., *Analysis of Bush Administration Greenhouse Gas Target* (Feb. 14, 2002), available at [http://pdf.wri.org/wri\\_bush\\_climate\\_analysis.pdf](http://pdf.wri.org/wri_bush_climate_analysis.pdf).

32. GHG EMISSIONS 2004, *supra* note 25.

33. Office of N.Y. State Att'y Gen., *States, Cities, Environmental Groups Sue Bush Administration on Global Warming, Challenge EPA's Refusal to Reduce Greenhouse Gas Pollution*, at [http://www.oag.state.ny.us/press/2003/oct/oct23a\\_03.html](http://www.oag.state.ny.us/press/2003/oct/oct23a_03.html) (Oct. 23, 2003).

34. See Robin Toner, *Environmental Reversals Leave Moderate Republicans Hoping for Greener Times*, N.Y. TIMES, Apr. 4, 2001, at A16 (highlighting moderate Republican resistance to the White House's reversal on carbon dioxide reduction); see also Seth Borenstein, *Bush*

reductions from an industry notorious for stonewalling air quality regulation.

Transportation, which accounts for 27 percent of GHG, is an equally high priority. Due in part to the popularity of SUVs, the nation's overall fuel economy is the lowest it has been in over two decades. According to a 2001 NAS report, existing technology could substantially improve Corporate Average Fuel Economy ("CAFE") standards without compromising safety.<sup>35</sup> The Congressionally appointed blue ribbon committee states that "because of concerns about greenhouse gas emissions and the level of oil imports, it is appropriate for the federal government to ensure fuel economy levels beyond those expected to result from market forces alone."<sup>36</sup> The NAS Committee made numerous recommendations for improving the existing CAFE standards, including targeting standards to reduce vehicle height and weight (referencing SUV's) and improve highway safety.<sup>37</sup> However, the Bush Administration refused to include stronger CAFE standards in the energy bill produced by Vice President Cheney's industry-dominated Energy Task Force, the same Task Force that refuses to disclose the identity of its members.<sup>38</sup> Additionally, the administration blocked bipartisan efforts in the Senate to add strengthening amendments when it had the opportunity, and responsibility, to support them.<sup>39</sup> As a final insult, the administration supported a \$100,000 tax credit for the Hummer.<sup>40</sup> The administration

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*Catches Some Heat*, HOUS. CHRON., June 14, 2002 at A51 (detailing criticism of the White House's "go slow" emissions reduction policy);

35. COMMITTEE ON EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS, NATIONAL RESEARCH COUNCIL, EFFECTIVENESS AND IMPACT OF CORPORATE AVERAGE FUEL ECONOMY (CAFE) STANDARDS (2002), available at <http://www.nap.edu/books/0309076013/html/> (last visited May 5, 2004).

36. *Id.* at 5.

37. *Id.* at 5-6.

38. See Brief for the Petitioners, *Cheney v. United States District Court*, 2003 U.S. BRIEFS 475 (U.S. 2004) (No. 03-475) (arguing separation-of-powers prohibits the District Court from compelling information about the Energy Task Force). Justice Scalia, in spite of a close, cozy relationship with Vice President Cheney, refused to recuse himself from the case. *Cheney v. United States District Court*, 124 S. Ct. 1391 (2004) (Scalia, J., denying motion to recuse); see also Robert Scheer, *Old McDonald Had a Judge*, L.A. TIMES, Feb. 17, 2004, at B11 (quoting remarks by Justice Scalia at Amherst College, "[t]his was a government issue. It's acceptable practice to socialize with executive branch officials when there are not personal claims against them. That's all I'm going to say for now. Quack, quack.").

39. Richard Simon, *Plan to Toughen Fuel-Mileage Rules Thwarted*, L.A. TIMES, July 30, 2003, at 11.

40. Shannon Buggs, *Driving Down Your Taxes*, HOUS. CHRON., Mar. 22, 2004, at Business 1; Taxpayers For Common Sense, *A Hummer of a Tax Break*, at <http://www.taxpayer.net/TCS/whitepapers/SUVtaxbreak.htm> (Dec 13, 2003).

also helped kill the bipartisan bill co-sponsored by Senators Lieberman and McCain that called for a modest, phased-in schedule of GHG reductions, using the administration's preferred cap and trade approach.<sup>41</sup> This method would bring emissions back down to 1990 levels by 2016. With heavy lobbying by industry and the White House, the bill was narrowly defeated on the Senate floor by a vote of fifty-five to forty-three.<sup>42</sup>

In his 2003 State of the Union message, the president unveiled his "Freedom Car" initiative.<sup>43</sup> This proposal involves a five-year, \$1.2 billion research and development ("R&D") program to produce hydrogen-powered automobiles. Accelerating the development and commercial application of hydrogen vehicles is clearly a worthy goal, but it is not a substitute for immediate action to improve fuel efficiency of the existing fleet. Moreover, the President's proposal does not address the key question: where will the hydrogen come from? Hydrogen does not occur as an elemental substance in nature; it must be produced. For the foreseeable future (at least until enhanced renewable energy sources like solar and wind are greatly expanded), hydrogen must be produced by fossil fuels or nuclear power.<sup>44</sup> This means that, from a carbon cycle standpoint, the Freedom Car is not likely to produce any net reduction in GHG emissions for a very long time.

Elsewhere within his administration, however, there is growing concern about the risks of global warming. Recently, it was reported that the Pentagon commissioned a secret study, *Abrupt Climate Change Scenario and its Implications for United States National Security*, which concluded that "the risk of abrupt climate change, al-

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41. *Carbon Caps: Senators' Bill Deserves Support*, STAR TRIB. (Minneapolis), Oct. 30, 2003, at A18; Editorial, *Climate Care: Using Market Forces to Curb Carbon Dioxide Emission Would be Good for the Planet*, NEWSDAY (N.Y.), Oct. 27, 2003 at A22; see also Pew Center on Global Climate Change, *Summary of the Lieberman-McCain Climate Stewardship Act*, at [http://www.pewclimate.org/policy\\_center/analyses/s\\_139\\_summary.cfm](http://www.pewclimate.org/policy_center/analyses/s_139_summary.cfm) (last visited May 5, 2004) (summarizing the provisions of the Climate Stewardship Act).

42. 149 CONG. REC. S13,572, 13,598 (2003); Editorial, *Promising Vote on Global Warming*, N.Y. TIMES, Nov. 1, 2003, at A14.

43. See Address Before a Joint Session of the Congress on the State of the Union, 23 WEEKLY COMP. PRES. DOC. 109 (Feb. 3, 2003) (proposing \$1.2 billion in funding so "America can lead the world in developing clean, hydrogen-powered automobiles").

44. See David W. Keith & Alexander E. Farrell, *Rethinking Hydrogen Cars*, SCI. MAG., July 18, 2003, at 315 ("A near-zero emission source of hydrogen is required if hydrogen cars are to reduce CO<sub>2</sub> emissions substantially.").

though uncertain and quite possibly small, should be elevated beyond a scientific debate to a U.S national security concern.”<sup>45</sup>

Doomsday scenarios aside, there are a number of “no regrets” policies that could be taken right now to significantly reduce GHG emissions and other harmful emissions from the burning of fossil fuels, which could be implemented cost-effectively resulting in net social benefits. These “no regret” policies include eliminating subsidies for fossil fuels, creating incentives for fuel efficient hybrid engines, supporting net metering and energy portfolios, promoting wind energy (the fastest growing energy source in the world), and implementing a “reverse auction” where the government would buy GHG reductions. The refusal to support *any* of these measures speaks volumes about sad state of the administration’s energy program.

In sum, global warming is here, humans are largely responsible for it, and the effects are already manifest. Alaskan permafrost, the Antarctic ice shelf, the snows of Kilimanjaro and the glaciers in Glacier National Park are melting.<sup>46</sup> Sea levels are rising and have resulted in the evacuation of the island nation of Tuvalu.<sup>47</sup> Tropical diseases are spreading.<sup>48</sup> Global warming is also evident in the bleaching of coral reefs. In 1998 coral reefs around the world experienced the most extensive and severe bleaching in recorded history.<sup>49</sup> Coral

45. Tom Regan, *Global Warming: Bigger Threat than Terrorism?*, CHRISTIAN SCI. MONITOR, Feb 27, 2004, available at <http://www.csmonitor.com/2004/0227/dailyUpdate.html?s=entg>. This article also reports that an independent panel commissioned by the World Bank has warned of dire consequences and called for the phasing out of all fossil fuels within the next eight years. *Id.* For the full text of the Pentagon-commissioned study, see PETER SCHWARTZ & DOUG RANDALL, GLOBAL BUSINESS NETWORK, ABRUPT CLIMATE CHANGE (Feb. 2004), available at <http://www.gbn.org/ArticleDisplayServlet.srv?aid=26231> (last visited May 5, 2004).

46. See Pew Center on Global Climate Change, *Science FAQs*, at [http://www.pewclimate.org/global-warming-basics/faq\\_s/glance\\_faq\\_science.cfm](http://www.pewclimate.org/global-warming-basics/faq_s/glance_faq_science.cfm) (last visited May 5, 2004) (noting melting in Antarctica and Alaska); Sydney Levitus, et al., *Anthropogenic Warming of Earth’s Climate System*, SCI., Apr. 13, 2001, at 267 (noting Antarctic and glacial melting); Kevin Krajick, *All Downhill from Here?*, SCI., Mar. 12, 2004, at 1600, 1602 (“Two-thirds of the glaciers present in Glacier National Park in 1850 are already gone, and the rest could disappear by 2030”); Robert Irion, *AAAS Meeting: The Melting Snows of Kilimanjaro*, SCI. MAG., Mar. 2, 2001, at 1690.

47. See Matthew Brace, *Sinking Islands Send SOS*, TIMES (London), Aug. 1, 2003, at 14.

48. Chris Dye & Paul Reiter, *Climate Change and Malaria: Temperatures Without Fevers?*, SCI., Sept. 8, 2000, at 1697.

49. Terence C. Done, Int’l Soc’y for Reef Studies, *ISRS Statement on Global Coral Bleaching in 1997-1998*, at <http://www.fit.edu/isrs/council/bleaching.htm> (last visited, May 5, 2004); Clive Wilkinson, *The 1997-1998 Mass Bleaching Event Around the World*, in AUSTRALIAN INSTITUTE OF MARINE SCIENCE, STATUS OF CORAL REEFS OF THE WORLD: 1998 (Clive Wilkinson, ed.,

bleaching was reported in sixty countries and island nations at sites in the Pacific Ocean, Indian Ocean, Red Sea, Persian Gulf, Mediterranean and Caribbean.<sup>50</sup> Indian Ocean corals were particularly severely impacted, with greater than 70% mortality reported in the Maldives, Andamans, Lakshadweep Islands, and in Seychelles Marine Park System.<sup>51</sup> Unlike most previous bleaching events in which severe impacts were limited to coral within fifteen meters of the surface, the 1998 bleaching affected corals that were as deep as fifty meters.<sup>52</sup> This mass bleaching followed similar but less severe events in 1987 and 1990. Prior to the early to mid 1980s, bleaching tended to be rare and localized, and corals generally recovered.<sup>53</sup>

There is further evidence of global warming in the intermountain West where snowpack is steadily declining, contributing to record droughts and catastrophic wildfires across the country.<sup>54</sup> In the northeastern part of the country, maple syrup production is declining, and here in Vermont Law School our beloved sugar maples are slowly migrating northwards.<sup>55</sup>

It will take decades of determined effort to replace the fossil fuel economy with one that is "carbon neutral." We are already way behind the curve and fast running out of time, especially if the abrupt climate change scenario proves correct.<sup>56</sup> We have squandered more

1998), available at <http://www.aims.gov.au/pages/research/coral-bleaching/scr1998/scr-00.html> (last modified Aug. 15, 2000).

50. Wilkinson, *supra* note 49.

51. *Id.*

52. *Id.*

53. See Union of Concerned Scientists, *Early Warning Signs: Coral Reef Bleaching*, at [http://www.ucsusa.org/global\\_environment/global\\_warming/page.cfm?pageID=511](http://www.ucsusa.org/global_environment/global_warming/page.cfm?pageID=511) (last modified Nov. 10, 2003).

Coral reefs are one of the most productive ecosystems on Earth, providing many critical services to fisheries, shoreline protection, tourism, and to medicine. They are also believed to be among the most sensitive ecosystems to long-term climate change (Nurse et al., 1998). Elevated sea surface temperatures can cause coral to lose their symbiotic algae, which are essential for the nutrition and color of corals. When the algae die, corals appear white and are referred to as "bleached." Water temperatures of as little as one degree Celsius above normal summer maxima, lasting for at least two to three days, can be used as a predictor of coral bleaching events (Goreau and Hayes, 1994). Studies indicate that most coral are likely to recover from bleaching if the temperature anomalies persist for less than a month, but the stress from sustained high temperatures can cause physiological damage that may be irreversible (Wilkinson et al., 1999).

54. Robert F. Service, *As the West Goes Dry*, SCI. MAG., Feb. 20, 2004, at 1124.

55. NEW ENGLAND REGIONAL ASSESSMENT GROUP, PREPARING FOR A CHANGING CLIMATE: THE POTENTIAL CONSEQUENCES OF CLIMATE VARIABILITY AND CHANGE (2001), available at <http://www.necci.sr.unh.edu/2001-NERA-report.html> (last modified Aug. 30, 2001).

56. See Ruth Shaw, CEO Duke Power Co., Roundtable Discussion at Creating a Sustainable Energy Future: A Duke University Leadership Forum (March 9, 2004), available at

than a decade in denial and with ideological debates about the roles of the government and the private sector in addressing this pressing problem. The Bush Administration has utterly failed in its stewardship responsibility to future generations. Its adamant refusal to participate in international efforts to address this issue is a deep and abiding scar on the stature of our nation within the world community.

### B. *Clear Skies: A Smokescreen for Dirty Powerplants*

In 1977, Congress badly miscalculated when it grandfathered existing Midwestern power plants out from under the strict technology requirements of the landmark Clean Air Act of 1970.<sup>57</sup> The idea seemed reasonable at the time: focus controls on new sources where there was the opportunity to design the plants right the first time, and allow the older dirty plants to live out their useful lives and retire to the scrap heap. Only retirement has not become a reality. Nearly all the plants operating in 1977 are still operating today and still pumping out tons of SO<sub>2</sub>, NO<sub>x</sub>, mercury, particulates, and carbon dioxide.<sup>58</sup> The continued emission of these and other pollutants impair breathing, aggravate respiratory ailments, shorten lives, shroud cities in smog, acidify alpine lakes, contaminate fish, pollute estuaries, and generally degrade the quality of life for millions of Americans living downwind of these aging plants.<sup>59</sup>

The 91st Congress was at least wise enough to include a “new source review” (“NSR”) provision, which mandates that pollution controls must be updated whenever utilities make “major modifications” that significantly increase emissions.<sup>60</sup> However, EPA has been very slow to enforce these requirements. Not until the mid-90s did EPA move aggressively to tighten the “routine maintenance” loophole and launch a campaign to effectively enforce the NSR require-

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<http://www.nicholas.duke.edu/energy/v-roundtable.html> (discussion the large lead-time in any large change in energy policy and the lack of any large change for the foreseeable future).

57. Press Release, U.S. Senate Committee on Environment and Public Works, Jeffords, Leahy Set Joint Hearing on Clean Air Act Rollback Plan (Jan. 8, 2002), available at [http://epw.senate.gov/maj\\_pr\\_01-10-02.htm](http://epw.senate.gov/maj_pr_01-10-02.htm).

58. *Id.*; Associated Press, Bush Touts Energy Plan at Coal Fired Plant, USA TODAY, Sept. 15, 2003, available at [http://www.usatoday.com/news/washington/2003-09-15-bush-energy\\_x.htm](http://www.usatoday.com/news/washington/2003-09-15-bush-energy_x.htm) (“The Clean Air Act anticipated that these older plants eventually would be phased out, but many are still operating—still without the better pollution-control devices, said Bob Perciasepe, vice president of policy at the National Audubon Society and former EPA assistant administrator for air during the Clinton administration.”).

59. See, e.g., U.S. Dept. of Energy, *Health Effects of Coal Plant Emissions*, at [http://www.netl.doe.gov/coalpower/environment/air\\_q/health\\_effects.html](http://www.netl.doe.gov/coalpower/environment/air_q/health_effects.html).

60. 42 U.S.C. § 7411(a)(4) (2000).

ments. The EPA ultimately sued nine utilities, including major players like the Tennessee Valley Authority, Duke Power, and Alabama Power Company.<sup>61</sup> The Agency scored a breakthrough when it reached settlements with Tampa Electric, Virginia Electric Power Company, and the Cinergy Company in 2000.<sup>62</sup>

When the Bush Administration came into office, one of the first things it did was to propose a change in the rules to enlarge the "routine maintenance" loophole.<sup>63</sup> EPA Administrator Whitman even went so far as to publicly advise defendant utilities that they might want to hold off on any settlements with the government until they saw the results of the rulemaking that she was initiating.<sup>64</sup> Some heeded the call and left the negotiating table.<sup>65</sup> Eric Schaeffer, the head of EPA's Enforcement Office and the principal architect of the NSR enforcement strategy, resigned in protest.<sup>66</sup> Members of Congress, including moderate Republicans like Senators Lincoln Chafee of Rhode Island, Susan Collins of Maine, and Olympia Snowe of Maine, expressed outrage over what they perceived to be rewriting of the statute.

In July 2003, as the rulemaking was nearing completion, a federal district judge in Ohio handed the EPA a sweeping victory in a case brought during the Clinton Administration. In *United States v. Ohio Edison*, Judge Sargus held that Congress clearly intended to require

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61. *Tenn. Valley Authority v. EPA*, 278 F.3d 1184 (11th Cir. 2002).

62. Press Release, U.S. Dep't of Justice and EPA, U.S. Announces Clean Air Settlement with Cinergy (Dec. 21, 2000), available at <http://www.usdoj.gov/enrd/cinergy.htm>.

63. See Press Release, Natural Res. Defense Council, Bush Weakening Air Act Threatens Public Health Says NRDC (<http://www.nrdc.org/media/pressreleases/021122.asp>) (Nov. 22, 2002).

64. Memorandum from Governor Whitman to Vice President Cheney (May 4, 2001), available at <http://www.rffund.org/eip/docs/WhitmanMemo.pdf>; Darren Samuelsohn, *Bush Environmental Record Scrutinized: NSR Debate Heats Up*, ENV'T & ENERGY DAILY, Mar. 8, 2002. ("In addition, EPA administrator Christine Todd Whitman received a great deal of criticism when she told a Senate committee that, were she the counsel for power companies litigating a New Source Review dispute, she would not recommend settling with the agency before knowing the outcome of a lawsuit between the EPA and the Tennessee Valley Authority").

65. *Whitman Warned Administration in 2001 Against Attack on Plant Modification Rules*, ENVTL. RPTR., Oct. 17, 2003, available at <http://ehscenter.bna.com/pic2/ehs.nsf/id/BNAP-SSEGWQ?OpenDocument&PrintVersion=Yes>.

66. Eric Schaeffer, *Clearing the Air: Why I Quit Bush's EPA*, July/Aug. 2002, available at <http://www.washingtonmonthly.com/features/2001/0207.schaeffer.html>; Press Release, Senate Committee on Government Affairs, Lieberman Challenges Bush Environmental Record, Blames Administration (Mar. 7, 2002), at [http://govt-aff.senate.gov/index.cfm?Fuseaction=PressReleases.View&PressRelease\\_id=468&Affiliation=C](http://govt-aff.senate.gov/index.cfm?Fuseaction=PressReleases.View&PressRelease_id=468&Affiliation=C).

older plants to upgrade pollution control equipment when they make major modifications.<sup>67</sup>

Snatching defeat from the jaws of victory, the administration promptly published a rule in August 2003 allowing utilities to escape NSR requirements as long as plant improvements do not exceed 20% of the replacement cost of the facility.<sup>68</sup> To give context to what this means, 20% amounts to millions of dollars of plant upgrades, enough to keep these old plants running and polluting indefinitely. Not surprisingly, all of the downwind states in the Northeast, along with several others, have banded together to sue to overturn the rule.<sup>69</sup> On December 24, 2003, the U.S. Court of Appeals for the District of Columbia issued a stay preventing the rule changes from taking effect pending hearing on the merits.<sup>70</sup> This is a classic example of how the Bush Administration cloaks its anti-environmental actions in green rhetoric. The NSR rules are not perfect and could be modified to allow plant improvements that do not cause more pollution. But that is not what the administration has done: it has simply allowed *de facto* rollbacks of NSR that ultimately defeats its purpose.

### C. NSR: Myths and Realities

The Bush Administration's policy regarding NSR has been clouded by a number of myths. One myth is that changes are needed to make it easier for utilities to meet the demand for electricity.<sup>71</sup> But the fact is that since the NSR enforcement cases were filed in 1999, electricity plant capacity has steadily expanded. According to Department of Energy figures, 2001 was a "record year for new capacity."<sup>72</sup> There is now excess capacity in some parts of the system, and some projects are being deferred.<sup>73</sup>

A second myth is that utilities are discouraged from investing in energy efficiency and cleaner technology, which could lead to lower

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67. 276 F. Supp. 2d 829 (S.D. Ohio 2003).

68. 68 Fed. Reg. 61247 (Oct. 27, 2003).

69. *New York v. EPA*, No 03-1380 (D.C. Cir. 2003).

70. National Petrochemical & Refiners Association, *New Source Review*, at [http://www.npradc.org/issues/environmental/new\\_source.cfm](http://www.npradc.org/issues/environmental/new_source.cfm) (last visited August 20, 2004).

71. Environmental Integrity Project, *Myths and Facts About New Source Review*, at <http://www.environmentalintegrity.org/pub90.cfm> (October 8, 2003) (citing Energy Information Association, *Electricity Generating Capacity, 2002-2003*, at <http://www.eia.doe.gov/cneaf/electricity/page/capacity/capacity.html>).

72. *Id.*

73. EPA, *Myths and Facts About New Source Review*, at <http://www.epa.gov/nsr/documents/nsrmythfact.pdf> (last visited Aug. 20, 2004).

emissions. This misrepresents how NSR works: NSR does not apply unless the major modification results in a significant net *increase* in emissions (different thresholds are used depending on the pollutant and ambient air quality levels).<sup>74</sup> It simply is not true that modifications to improve efficiency or install cleaner technology, without increasing emissions, trigger NSR.

A third myth is that states do not support the current NSR. However, while *source* states may not favor NSR, *downwind* states sure do. According to the State and Territorial Air Pollution Control Administrators:

[T]he NSR requirements under the Clean Air Act are an essential tool, critical to state and local air pollution control agencies' ability to attain and maintain the health and welfare standards mandated in the Act. . . . NSR has resulted in millions of tons of reductions of nitrogen oxides and sulfur dioxides that would not otherwise have occurred.<sup>75</sup>

Further, according to a recent survey conducted by the General Accounting Office, officials from twenty-seven of forty-four states who responded said that the administration's overhaul of NSR would increase air pollution.<sup>76</sup>

Another myth is that the rule changes will not result in significant increases in pollution over current levels. For several reasons, this is not true. First, current levels of pollution from these plants are unacceptably high. Locking antiquated plants in for an indefinite period of time is not a good outcome from a human health and environmental perspective. Second, it is much too early to predict how the new rule changes will play out. It is counter-intuitive to expect utilities will not take advantage of the opportunity to increase the output of electricity with corresponding increases in emissions. A study of two existing plants in Illinois and Indiana showed that nitrogen oxides (smog precursors) would increase by about 124 tons and 200 tons under the proposed new rule.<sup>77</sup> In November 2002, EPA permitted more than 17,000 old, coal-fired utilities, oil refineries, and other factories

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74. 42 U.S.C. § 7411(a)(4) (2000).

75. John A. Paul, State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials, Testimony On the U.S. Environmental Protection Agency's 90-Day NSR Review Process (July 10, 2001), available at <http://www.4cleanair.org/Testimony-july2001.PDF>.

76. U.S. General Accounting Office, *Survey of State and Local Air Quality Officials Opinions on the Impacts of the Environmental Protection Agency's Revisions to the Clean Air Act's New Source Review Program (GAO-04-337SP)*, at <http://www.gao.gov/special.pubs/gao-04-337sp/> (last visited Aug. 20, 2004).

77. Environmental Integrity Project, *supra* note 71.

to expand or renovate without installing pollution-control equipment, as the agency previously had required.<sup>78</sup>

A further myth is that the legislation proposed as part of Clear Skies seeks to reduce power plant emissions by 70 percent by 2018, relying on a cap and trade program, which will achieve more reductions faster and cheaper than the old NSR rules.<sup>79</sup> Yet, this is not true either. First, a number of outside reviews have cast serious doubt on the administration's claims that Clear Skies will be faster and better than existing CAA regulations.<sup>80</sup> Second, a cap and trade program for utilities and NSR are not mutually exclusive. Clear Skies would only apply to utilities whereas NSR applies to refineries, cement kilns, smelters, pulp mills, and other major sources of pollution.<sup>81</sup> These sources emit as much smog-forming nitrogen oxide as utilities, as well as more particulates and volatile organic compounds, some of which are regulated as hazardous air pollutants.<sup>82</sup> Third, according to a study by the General Accounting Office ("GAO"), the proposed cap and trade is likely to lead to "pollution hot spots," some of which will be in minority communities, raising environmental justice issues.<sup>83</sup> Finally, people are dying today from respiratory diseases related to air pollution from these old plants. Why should populations at risk have to wait until 2018 for relief?

Inaction regarding air quality is especially unacceptable, as it is the most serious environmental health problem in the country, affecting hundreds of millions of people. According to Abt Associates, EPA's principal consultant on air quality, fine particle pollution from U.S. power plants cuts short the lives of over 30,000 people each

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78. *Id.*

79. White House, *The Clear Skies Initiative*, at <http://www.whitehouse.gov/news/releases/2002/02/clearskies.html> (Feb. 14, 2002).

80. For example, according to the Natural Resources Defense Council,

The Clear Skies plan would allow three times more toxic mercury emissions, 50 percent more sulfur emissions, and hundreds of thousands more tons of smog-forming nitrogen oxides. It would also delay cleaning up this pollution by up to a decade compared to current law and force residents of heavily-polluted areas to wait years longer for clean air compared to the existing Clean Air Act.

Natural Resources Defense Council, *The Bush Administration's Air Pollution Plan*, at <http://www.nrdc.org/air/pollution/qbushplan.asp#clearskies> (last updated August 5, 2003)

81. Clean Air Act, Pub. L. No. 101-540, § 216, 104 Stat. 2399 (1990).

82. Environmental Integrity Project, *Separating EPA & the Energy Lobby's Myths about Clean Air Act "Reforms" from Fact*, 2, Nov. 22, 2002, at [http://www.rffund.org/eip/docs/NSRfacts\\_vsmysths2.pdf](http://www.rffund.org/eip/docs/NSRfacts_vsmysths2.pdf).

83. GAO, *Air Pollution: Meeting Future Electricity Demand Will Increase Emission of Some Harmful Substances*, GAO-03-49 (Oct. 30, 2002), available at <http://www.gao.gov/docdb/air/details.php?rptno=GAO-03-49>.

year.<sup>84</sup> In more polluted areas, fine particle pollution can shave several years off its victims' lives.<sup>85</sup> Hundreds of thousands of Americans suffer from asthma attacks, cardiac problems and upper and lower respiratory problems associated with fine particles from power plants.<sup>86</sup> The elderly, children, and those with respiratory disease are most severely impacted by fine particle pollution from power plants. Metropolitan areas near coal-fired power plants feel their impacts most acutely.<sup>87</sup> Death rates for this demographic, which are much higher than in areas with few or no coal-fired power plants, is clearly attributable to their proximity to these plants.<sup>88</sup> Power plants outstrip all other polluters as the largest source of sulfates—the major component of fine particle pollution.<sup>89</sup> Approximately two-thirds of deaths (over 18,000 deaths) due to fine particle pollution from power plants could be avoided by implementing policies that cut power plant sulfur dioxide and nitrogen oxide pollution to 75 percent below 1997 emission levels.<sup>90</sup> Particulate matter generated by just eight of the utilities sued by EPA in the NSR initiative were responsible for 5,900 premature deaths per year.<sup>91</sup>

#### D. *The Clean Water Act: Now You See It, Now You Don't*

In January 2001, a sharply divided U.S. Supreme Court issued its decision in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* (“SWANCC”).<sup>92</sup> The Court applied the Clean Water Act (“CWA”) Section 404, on the narrowest conceivable set of facts, to rule that the Corps exceeded its statutory authority by asserting jurisdiction over an “intrastate, non-navigable, iso-

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84. CLEAN AIR TASK FORCE, *DIRTY AIR, DIRTY POWER: MORTALITY AND HEALTH DAMAGE DUE TO AIR POLLUTION FROM POWER PLANTS* 3 (2000), available at [http://www.catf.us/publications/reports/death\\_disease\\_dirty\\_power.php](http://www.catf.us/publications/reports/death_disease_dirty_power.php).

85. See EPA, *Health and Environmental Impacts of PM*, at <http://www.epa.gov/air/urbanair/pm/hlth1.html> (Sept. 30, 2003) (“Many scientific studies have linked breathing PM to a series of significant health problems, including . . . premature death”); D.W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 *NEW ENG. J. MED.* 1753 (1993).

86. EPA, *supra* note 85.

87. CLEAN AIR TASK FORCE, *supra* note 84, at 3.

88. *Id.*

89. *Id.*

90. *Id.*

91. Abt Associates, *Particulate-Related Health Impacts of Eight Electric Utility Systems*, available at <http://www.environmentalintegrity.org/pubs/PMimpacts8utilities.pdf>

92. 531 U.S. 159 (2001).

lated” pond based “solely” on its use by migratory birds under the “migratory bird rule,” which is neither a rule nor only about birds.<sup>93</sup>

The pond at issue was an abandoned sand and gravel pit that had become habitat for a number of aquatic birds, no doubt due to the fact that most of the wetlands in Northern Cook County have long since been developed and lost. In an opinion strongly criticized by Justice Stevens in dissent, Chief Justice Rehnquist concluded that the intent behind the CWA was to protect commercially navigable waters.<sup>94</sup> Though wrong, this interpretation of the Act can be confined to the narrow facts presented and to the precise question certified for review. That is exactly what the Clinton Administration did in a legal memorandum signed by the General Counsel of EPA and the Army.<sup>95</sup>

Then along comes the Bush Administration looking for another opportunity to deregulate. Opponents of the Section 404 program and other CWA regulatory programs were ready with a suggestion: interpret *SWANCC* as a mandate to rollback the jurisdiction of the CWA to the traditional navigable waters test under the 1899 Rivers and Harbors Act, plus major tributaries and immediately adjacent wetlands, and remove the vast bulk of the “waters of the United States which lie above the point of navigation, from protection under the CWA.”<sup>96</sup>

In January 2002, the administration published two documents addressing how it would implement *SWANCC*. The first was a guidance document directing the field staff of the Corps and EPA to cease using the migratory bird rule to assert jurisdiction over “isolated waters,”<sup>97</sup> and to “check with Washington” before asserting jurisdiction over any such waters on any other basis and strongly suggesting that no such permission would be forthcoming (and in fact none has).<sup>98</sup>

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93. *Id.* at 171-72. The “rule” is actually preamble language from the 1986 rulemaking under § 404. Migratory birds were cited as one of many examples to illustrate a nexus between waterways and interstate commerce.

94. *Id.* at 173.

95. Memorandum from Gary S. Guzy, General Counsel, EPA, *Supreme Court Ruling CWA Jurisdiction over Isolated Water*, available at <http://www.spk.usace.army.mil/pub/outgoing/co/reg/SWANCC.pdf> (last visited Sept. 19, 2004).

96. Since *SWANCC* interpreted the term “navigable waters,” which is the jurisdictional basis for the entire CWA, the decision has implications that go far beyond the 404 program. *United States v. Deaton*, 209 F.3d 331, 334 (4th Cir. 2003).

97. 68 Fed. Reg. 1991 (Jan. 15, 2003).

98. The guidance states: “in light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction . . . over isolated, intrastate, non-navigable waters (i.e. uses of the water by interstate or foreign travelers for recreational or other purposes; the presence of fish or shellfish

The second document is an advanced notice of proposed rulemaking (“ANPRM”) inviting comments from interested persons on a series of questions, the thrust of which is, “How far should we roll back the jurisdiction of the CWA?”<sup>99</sup> The ANPRM also invited comments from the states on alternative ways of providing protection for waters that might be excluded from a redrawn CWA.

The agencies received over 130,000 comments on the ANPRM, the vast bulk of which opposed any changes to the CWA.<sup>100</sup> Thirty-nine states submitted comments opposing any decrease in CWA jurisdiction.<sup>101</sup> Some, such as Arizona, pointed out that approximately 95 percent of the state’s waters are “intermittent” meaning that they could potentially be excluded from CWA jurisdiction under a broad reading of the *SWANCC* case.<sup>102</sup> Nevertheless, the administration pressed ahead, drafting a rule that would eliminate protection for “ephemeral washes and streams,” waterways that do not flow more than six months of the year and many wetlands.<sup>103</sup> When word of this reached Capitol Hill, it sparked a rare outburst of congressional opposition to the administration’s environmental initiatives. Half the House of Representatives, including twenty-six Republicans, wrote President Bush on November 25, 2003 urging him to scrap efforts to rollback the CWA.<sup>104</sup>

Remarkably, the White House backed off the ANPRM, announcing on December 16, 2003 that it was abandoning the rulemaking effort—at least for now.<sup>105</sup> However, the guidance remains in place and is creating problems in the field. According to a recent GAO study:

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that could be taken and sold in interstate commerce; use of the water for industrial purposes by industries in interstate commerce). 68 Fed. Reg. at 1996.

99. *Id.* at 1994-95.

100. J.R. Pegg, *Opposition Rises to Bush Clean Water Policy*, ENVTL. NEWS SERV., Nov. 26, 2003.

101. Sierra Club, *States Denounce Suggestion to Exclude Many Wetlands and Streams from Federal Clean Water Safeguards*, at <http://www.sierraclub.org/cleanwater/quotes.pdf> (last visited Aug. 21, 2004) (“Environmental and natural resource agencies from 39 states, including 17 with Republican governors, opposed decreasing the jurisdiction of the Clean Water Act.”)

102. *Id.*

103. Elizabeth Shogren, *Rule Drafted That Would Dilute the Clean Water Act*, L.A. TIMES, Nov. 6, 2003, at A12.

104. See John Heilprin, *House Members Ask Bush to Keep Water Act*, ASSOCIATED PRESS, Nov 6, 2003.

105. Press Release, EPA, EPA and Army Corps Issue Wetlands Decision (Dec. 16, 2003), available at <http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562c7004dc686/540f28ac38d7f9b85256dfe00714ab0?OpenDocument>.

Corps districts differ in how they interpret and apply the federal regulations when determining which waters and wetlands are subject to federal jurisdiction. For example, one district generally regulates wetlands within 200 feet of other jurisdictional waters, while other districts consider the proximity of the wetlands to other jurisdictional waters without any reference to a specific linear distance.<sup>106</sup>

Conservation organizations claim that tens of thousands of wetlands are being lost due to faulty jurisdictional determinations under the guidance.<sup>107</sup>

The situation calls for a legislative remedy.<sup>108</sup> The objective of the CWA to “restore and maintain the chemical, physical and biological integrity of the nation’s waters”<sup>109</sup> cannot be achieved without protecting the entire aquatic system. If we have learned nothing else from over thirty years of trying to make our waters fishable and swimmable, it is that pollution must be attacked at the source, and it must be done on a watershed basis. Waiting for pollution to reach commercially navigable waters will not work. States have an important role to play, but the floor of protection provided by federal law is as critical today as it was when the CWA was first enacted. Prior to the CWA, raw sewage poured into waterways, rivers caught fire, and lakes were declared dead. Thanks to the CWA, those events no longer occur, and the nation has seen real progress on restoring water quality. But the job is far from complete. Over 40 percent of the nation’s waters still do not meet water quality standards.<sup>110</sup> Now, that progress is threatened by an administration determined to block new rules and reduce the scope of waters to benefit from the Act’s protections. The administration’s suggestion that states can fill the gap, especially without significant financial assistance, is at best wishful thinking and at worst cynical politics.

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106. GAO, Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction, February 2004 (GAO-10-297), available at <http://www.gao.gov/cgi-bin/getrpt?gao-04-297>.

107. National Wildlife Federation, *License to Fill*, at <http://www.nwf.org/resourceLibrary/details.cfm?officeID=15D39898-FEF7-0077-300221CD0852182F&catID=2BB3C4D9-65BF-09FE-B45CDB82DAB898FC> (last updated Mar. 8, 2004).

108. Legislation has been introduced to overturn SWACC. The Clean Water Authority Restoration Act of 2003, H.R. 962, S. 473, 108th Cong. (2003).

109. 33 U.S.C. § 1251(a) (2000).

110. EPA, *Water Quality Standards, Policy & Guidance Fact Sheet*, available at <http://www.epa.gov/OST/standards/planfs.html> (last updated Feb. 5, 2004) (“Approximately 40 percent of the Nation’s waters still do not meet water quality goals and about half of the Nation’s 2000 major watersheds have water quality problems”).

### E. *Endangered Species: Putting the Fox in Charge of the Chickens*

The Secretary of the Department of Interior is the “guardian ad litem” of the nation’s most imperiled flora and fauna. The Secretary administers the Endangered Species Act (“ESA”), a law the U.S. Supreme Court has called “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>111</sup> For his Interior Secretary, President Bush chose Gale Norton, a James Watt protégé, who, as Attorney General of Colorado, urged the Supreme Court to declare the ESA unconstitutional.<sup>112</sup> Secretary Norton wasted little time putting her mark on the endangered species program, as the following examples illustrate.

#### 1. The Florida Manatee

In January 2001, a landmark settlement was reached between conservation organizations and the U.S. Fish and Wildlife Service (“FWS”), calling for a series of actions to better protect the critically endangered Florida manatee.<sup>113</sup> The greatest single threat to the continued existence of the manatee is boat collisions, which continue to kill and maim hundreds of manatees.<sup>114</sup> The settlement called upon FWS to designate thirteen new sanctuaries and strictly control boat traffic in manatee transit zones.<sup>115</sup> It didn’t take long for politics to take hold.

On May 29, 2001, Governor Jeb Bush wrote Secretary Norton asking her to hold off on designating any sanctuaries until the State of

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111. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978). This is the famous “snail darter” case in which the Court ruled that “the language, history, and structure of the [ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174.

112. *Babbitt v Sweet Home Communities for a Greater Oregon*, 515 U.S. 687 (1995). This was one of the most important rulings in an environmental case in two decades. At issue was whether the Endangered Species Act protected the habitat as well as the individual species living on private and state land. The court ultimately ruled six to three against the position advocated by Norton.

113. *Save the Manatee Club v. Ballard*, Civ. No. 00-76 (D.D.C. 2001), available at <http://southeast.fws.gov/pubs/manatee.pdf> (hereinafter *Save the Manatee*).

114. Wildlife Advocacy Project, *Manatee Report from the Last Days of the 106th Congress: A Million for Manatees Update*, at <http://www.wildlifeadvocacy.org/programs/MillionforManateesUpdate.htm> (last visited Aug. 20, 2004) (“The greatest human-related threats are boating accidents that knock manatees unconscious, keeping them from reaching the surface to breathe.”).

115. U.S. Fish & Wildlife Serv., *Fact Sheet on Federal Designation of 13 Manatee Protection Areas in Eight Florida Counties*, available at <http://northflorida.fws.gov/Manatee/Documents/MPARules/Nov02%20Rule/MPA-Final-Fachseet-Nov02.htm> (last visited Aug. 20, 2004).

Florida, which was not a party to the case, could have its say.<sup>116</sup> By August, FWS had designated only two of the fourteen sanctuaries called for under the court-approved settlement.<sup>117</sup> In October, conservation groups formally notified the Justice Department of a breach of the agreement.<sup>118</sup> Nothing happened. Finally, in July 2002, at the plaintiffs' request, Judge Emmett Sullivan issued a Show Cause Order threatening to hold Secretary Norton in contempt for failing to implement the settlement agreement.<sup>119</sup> That got Norton's attention, and in January 2003, a new settlement with a revised schedule was entered, backed up by more resources and renewed promises of compliance.<sup>120</sup> Unfortunately, by the time the legal wrangling was over, a record eighty-five manatees had been killed by boats in 2002.<sup>121</sup> The Save the Manatee Club, the lead plaintiff in the case, estimates that a third of those deaths could have been prevented if the settlement had been implemented on time.<sup>122</sup>

## 2. The Oregon coho

On the other side of the country, high in the sagebrush desert of Southern Oregon and Northern California, another endangered species tragedy is playing out on Secretary Norton's watch. This is the Klamath Basin, as nasty a water fight as you are likely to find anywhere in the West. To make a long and very complex story brutally short, the Bureau of Reclamation ("BuRec") is in charge of one of the nation's first irrigation projects, dating from 1905, and is operating it in a manner that seems calculated to extirpate a whole suite of threatened and endangered species, from suckers to salmon to bald eagles, all of which depend on the Klamath Basin water for their con-

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116. *Save the Manatee Club v. Ballard*, Civ. No. 00-76, slip op. at 6 (D.D.C. July 9, 2002), available at <http://www.eswr.com/manateeop702.pdf> (hereafter Sullivan Opinion).

117. *Id.* at 9-10.

118. Press Release, *Save the Manatee Club, Gail Norton and Other Federal Officials Charged with Flagrant Breaches of Landmark Manatee Settlement Agreement* (Oct. 24, 2001), available at <http://www.savethemanatee.org/newsprbreach.htm>.

119. Sullivan opinion, *supra* note 116, at 13-14. ("[N]o justification for this delay has been offered other than Governor Bush's request to allow the state to proceed alone with respect to manatee protection in Florida.")

120. Craig Pittman, *Manatees' Status Still Unsettled*, ST. PETERSBURG TIMES, Jan. 24, 2003, at [http://www.sptimes.com/2003/01/24/State/Manatees\\_\\_status\\_stil.shtml](http://www.sptimes.com/2003/01/24/State/Manatees__status_stil.shtml).

121. *Manatee Deaths in 2002 Have Already Set a Record*, ST. PETERSBURG TIMES, Sept. 28, 2002.

122. Defenders of Wildlife, *Manatee Coalition Returns to Court to Further Prevent Manatee Deaths* (Oct. 15, 2002), at <http://www.defenders.org/releases/pr2002/pr101502.html>.

tinued existence.<sup>123</sup> The poster child for this controversy among water users is the Oregon coho, which swims up the Klamath River, at least as far as BuRec will let it at Iron Gate Dam in the Trinity Alps of Northern California, to spawn in what was historically one of the richest salmon rivers on the west coast.<sup>124</sup> In January 2002, after a hurried three-month review, a special committee of the NRC issued a “preliminary report,” finding the available data was not sufficient to establish a causal connection between water levels and fish mortality.<sup>125</sup>

However, the committee also found that the water levels recommended by BuRec similarly lacked a sound scientific basis.<sup>126</sup> In other words, the committee did what cautious scientists usually do: it called for more research and better data. But the scientists also stressed that their opinion was not meant to answer the legal and policy questions posed by the ESA—namely, with scientific uncertainty, on which side do you err? The answer to that question is clear; you should err on the side of protecting the endangered species using the best *available*, not necessarily the “best,” science.<sup>127</sup> So, what did Secretary Norton do with this preliminary, qualified scientific report card? She ordered BuRec to use it as the basis for allocating water to meet irrigators’ demands for the 2002 irrigation season over the objections of government scientists, one of whom, Michael Kelly, blew the whistle on how the biologists were muzzled in the process.<sup>128</sup> And what happened? The worst fish kill in the history of the Klamath River: 33,000 dead salmon in September 2002.<sup>129</sup> While most of the fish killed were

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123. U.S. Fish & Wildlife Serv., *Klamath River Basin Ecosystem, Endangered Species*, at <http://endangered.fws.gov/klamath.html> (last visited Aug. 24, 2004).

124. Friends of Trinity River, *Trinity Division History: Background*, at <http://www.fotr.org/history.html> (last visited Aug. 21, 2004).

125. Comm. on Endangered and Threatened Fishes in the Klamath River Basin Board on Envtl. Studies and Toxicology Division on Earth and Life Studies Nat. Research Council, *Scientific Opinions on Endangered and Threatened Fishes in the Klamath River Basin*, Interim Report, 18 (2002), available at <http://www.nap.edu/books/0309083249/html/R1.html>.

126. *Id.*

127. See *Tenn. Valley Auth.*, 437 U.S. at 177 (noting that the legislative history that ESA represents the “institutionalization of caution”).

128. *Federal Biologist Accuses White House of Undermining Fish Protection*, L.A. TIMES, Oct. 29, 2002.

129. DENNIS D. LYNCH & JOHN C. RISLEY, U.S. DEP’T OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, *KLAMATH RIVER BASIN HYDROLOGIC CONDITIONS PRIOR TO THE SEPTEMBER 2002 DIE-OFF OF SALMON AND STEELHEAD WATER-RESOURCES INVESTIGATIONS REPORT 03-4099 1* (2003), available at <http://or.water.usgs.gov/pubs/WRIR03-4099>.

chinook, a large number of protected coho died.<sup>130</sup> The immediate causes of death were two parasites that attack the gills, causing death by asphyxiation.<sup>131</sup> These parasites thrive in warm water, and the temperature of the Klamath in September was close to lethal at near seventy degrees.<sup>132</sup>

Did the reduced flows cause or contribute to the fish kill? No, said the irrigators and Secretary Norton.<sup>133</sup> Yes, said the California Fish and Game Department and the tribes with treaty rights to the fish.<sup>134</sup> For months the debate raged until finally, over a year later, the FWS released its final report concluding that a combination of low-river flows, high water temperatures, and crowding of fish precipitated the disease outbreak that resulted in the “largest known pre-spawning salmonid die-off recorded for the Klamath River and one of the largest on the West Coast.”<sup>135</sup> The report confirmed what the states of Oregon and California and the Klamath and Yurok tribes had been saying for months, namely that the irrigation diversions were a key factor in the disaster. As Glen Spain, Northwest Regional Director of the Pacific Coast Federation of Fishermen’s Associations (“PCFFA”), which represents lower river and coastal salmon fishermen, put it: “You cannot expect fish to survive in a warm water trickle of what was once a mighty river.”<sup>136</sup>

Then, in July 2003, the Wall Street Journal broke the story that Karl Rove, White House political strategist, had attended a meeting of top Department of Interior officials in January 2002, at which he delivered a Powerpoint presentation on “poll results, critical constituencies and . . . water levels in the Klamath River basin.”<sup>137</sup> Mr. Rove had just returned from a trip to Oregon with the President where they visited with a Republican senator facing re-election, and he was seek-

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130. *Id.*

131. CALIFORNIA FISH AND GAME DEPARTMENT, SEPTEMBER 2002 KLAMATH RIVER FISH KILL, PRELIMINARY ANALYSIS OF CONTRIBUTING FACTORS 12 (2003), available at [www.dfg.ca.gov/html/krfishkill-2004.pdf](http://www.dfg.ca.gov/html/krfishkill-2004.pdf).

132. LYNCH & RISLEY, *supra* note 129, at 10 (acknowledging that water temperatures in the Klamath Basin were idea for disease in Salmon).

133. Eric Bailey, *U.S. Denies Blame for Salmon Die-Off*, L.A. TIMES, Oct. 2, 2002, at B1.

134. CALIFORNIA FISH AND GAME DEPARTMENT, *supra* note 131.

135. U.S. FISH & WILDLIFE SERVICE, KLAMATH RIVER FISH DIE-OFF: CAUSATIVE FACTORS OF MORTALITY (2003), available at [http://sacramento.fws.gov/ea/news\\_releases/2003%20News%20Releases/Causative%20Factors%2011-07-03public.pdf](http://sacramento.fws.gov/ea/news_releases/2003%20News%20Releases/Causative%20Factors%2011-07-03public.pdf).

136. Earthjustice, *Federal Report Finds Low Flows a Major Factor in 2002 Klamath Fish Disaster*, at <http://www.earthjustice.org/news/display.html?ID=731> (Nov. 19, 2003).

137. Tom Hamburger, *Water Saga Illuminated Rove's Methods*, WALL ST. J., July 30, 2003, at A4.

ing support for the farmers in the Klamath.<sup>138</sup> The President said, "We'll do everything we can to make sure water is available for those who farm."<sup>139</sup> The next day, Mr. Rove made sure that commitment did not fall through the cracks. He visited the fifty Interior managers attending a department retreat at a Fish and Wildlife Service conference center in Shepherdstown, West Virginia and made it clear that the administration was siding with agricultural interests.<sup>140</sup> Three months later, Interior Secretary Gale Norton stood with Oregon Senator Gordon Smith in Klamath Falls, opened the irrigation-system head gates that increased the water supply to 220,000 acres of farmland, and set in motion the events that led to a disaster that administration officials had been repeatedly warned about.<sup>141</sup>

### 3. The Grizzly

Secretary Norton is famous for her "4 C's" credo: "Communication, Consultation, Cooperation, all in the name of Conservation."<sup>142</sup> Except when it comes to introducing grizzly bears to central Idaho. After a multi-year effort, a remarkable consensus was achieved among conservationists, mining interests, timber interests, and sportsmen to back a plan to restore the grizzly bear to the Bitterroot-Selway Wilderness, containing some of the best bear habitat, and most remote backcountry left in the lower forty-eight.<sup>143</sup> The recovery plan for the grizzly bear recommended restoring the great bear to its historic range in the Bitterroot Mountains.<sup>144</sup> Though the plan had the support of 77 percent of people polled nationally and 62 percent of Idahoans, it did not have the support of Republican Governor Dirk Kempthorne, who complained that this was an effort by the Clinton Administration to force "massive, flesh-eating carnivores into

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138. *Id.*

139. *Id.*

140. *Id.*

141. At Senator John Kerry's request the Department of Interior Inspector General investigated this incident and found "no basis" for the claim that Mr. Rove had improperly influenced the decision on Klamath water deliveries. See Associated Press, *Bush Adviser Cleared In Water Policy Inquiry; Rove Not Part of Klamath River Decision, IG Finds*, WASH. POST, Mar. 13, 2004, at A2. Senator Kerry said he accepted the IG's conclusion but still wondered why a political operative was briefing senior Interior officials about complex resource issues. *Id.*

142. See e.g., Statement of Gale Norton Before the Senate Indian Affairs Committee, at <http://www.doi.gov/news/20040517a.htm> (last visited Feb 28, 2001).

143. 50 C.F.R. § 17.84(l) (2000); 65 Fed. Reg. 69,644 (Nov. 17, 2000), available at <http://www.r6.fws.gov/bitterroot/FedRegROD111700.pdf>.

144. 50 C.F.R. § 17.84(l); 65 Fed. Reg. 69,644.

Idaho.”<sup>145</sup> Secretary Norton was thus confronted with a vexing problem: should she accept the advice of the scientists on the grizzly bear recovery team and respect the hard-won consensus agreement among the major stakeholders or bow to Governor Kempthorne’s political pressure? No contest: Politics trumped the 4 C’s.<sup>146</sup>

#### 4. Shutting Down the Listing Process

The ESA requires the Secretary to list species as either threatened or endangered based solely on the best available scientific and commercial data available to the Secretary.<sup>147</sup> FWS has determined that there are almost 300 candidate species eligible for listing but waiting for official action.<sup>148</sup> Thousands of other rare species have not even been evaluated. Species get no protection until they are listed. But few species are making it onto the list. In fact, the only way to get Secretary Norton to list a species is to sue her.<sup>149</sup>

Shortly after taking office, Secretary Norton gave her support to an appropriation rider that would have precluded citizen suits by environmentalists (who have a habit of winning) by prohibiting the Interior Department from spending money on any listings or critical habitat designations other than those already under court order.<sup>150</sup> The rider failed, but that has not stopped the Secretary from submitting inadequate budgets to Congress, then crying poor when confronted with court orders to comply with the ESA.<sup>151</sup> Of course, the reason

145. Press Release, Office of Gov. Dick Kempthorne, *Grizzly Bear Discussion Positive but No Agreement Yet* (April 25, 2001), available at [http://www2.state.id.us/gov/mediacenter/press/pr01/prapr01/Pr\\_01\\_056.htm](http://www2.state.id.us/gov/mediacenter/press/pr01/prapr01/Pr_01_056.htm). In fact, the Governor’s concerns are wildly overstated. According to the Great American Bear by Jeff Thorne, the risk of being killed by a bee sting is twelve times as great as being killed by a grizzly bear. Moreover, for every person killed by a bear, 64 are killed by domestic dogs, and 90,000 by fellow humans. The chance of being mauled by a bear in Yellowstone National Park is 1 in 2.9 million. See Sierra Club, *Just What Are Your Chances of Getting Mauled by a Grizzly Bear?*, at <http://www.sierraclub.org/grizzly/pdfs/Mauling.PDF> (last visited Aug. 24, 2004).

146. Office of Gov. Dirk Kempthorne, *supra* note 145.

147. 16 U.S.C. § 1533(b) (2000).

148. U.S. Fish & Wildlife Serv., *Threatened and Endangered Species System*, at [http://ecos.fws.gov/tess\\_public/TESSWebpageNonlisted?listings=0&type=both](http://ecos.fws.gov/tess_public/TESSWebpageNonlisted?listings=0&type=both) (last visited Aug. 24, 2004).

149. See Defenders of Wildlife, *Sabotaging the ESA*, at <http://www.defenders.org/wildlife/esa/report/report.pdf> (Dec. 3, 2003). Based on analysis of FWS data, DOW concludes that the administration has listed only twenty-five species since 2001, all of them under court order. By contrast, the Clinton Administration listed sixty-five species per year, and the first Bush Administration fifty-eight per year. *Id.*

150. Center for Biodiversity, *Bush Extinction Rider Rejected By Congress*, at <http://www.biologicaldiversity.org/swcbd/activist/ESA/bush-esa.html> (Jan. 21, 2002).

151. Defenders of Wildlife, *supra* note 149.

Secretary Norton does not have enough money to comply with the ESA is because she will not ask for it. FWS estimates that it needs a total of \$157 million to clear the backlog, which works out to about \$20 million per year.<sup>152</sup> Yet, the appropriation request for Fiscal-Year 2004 was only \$9 million.

### 5. Eliminating Protection for Critical Habitat

The ESA defines critical habitat as places that are “essential to the conservation of threatened and endangered species.”<sup>153</sup> The Act directs the Secretary to designate critical habitat at the same time a species is listed “to the maximum extent prudent and determinable.”<sup>154</sup> Once designated, critical habitat must be strictly protected. Federal agencies must consult with the FWS before taking any action that might affect any designated habitat, and any action that is “likely to result in [its] adverse modification” is prohibited.<sup>155</sup>

Secretary Norton, however, is not a big fan of critical habitat. Shortly after taking office, she ordered that the following disclaimer be inserted in all public notices and press releases dealing with critical habitat designations: “Designation of critical habitat provides little additional protection to species.”<sup>156</sup> This is in sharp contrast to the importance Congress attaches to critical habitat. In the 1978 amendments to the ESA, Congress rebuffed attempts to weaken the critical habitat provision, stating: “[T]he ultimate effectiveness of the Endangered Species Act will depend upon the designation of critical habitat.”<sup>157</sup> Norton’s position is also at odds with a long line of court cases rejecting the argument that designation provides little additional protection.<sup>158</sup> In a recent case, exasperated at Interior’s “nonsensical” position, a Federal District Judge suggested that it might be time for the Secretary to reassess the Department’s policy position against designating critical habitat.<sup>159</sup> Instead, Norton announced on May 28, 2003

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152. Endangered Species Coalition, *On Top of the Hill*, at <http://www.stopextinction.org/Team/Team.cfm?ID=820&c=28> (Feb. 27, 2003).

153. 16 U.S.C. § 1532(5) (2000).

154. 16 U.S.C. § 1533(a)(3) (2000).

155. 16 U.S.C. § 1536(a)(2) (2000).

156. Jennifer Lee, *Money Gone, U.S. Suspends Designation of Critical Habitats*, N.Y. TIMES, May 29, 2003, at A18.

157. 1978 U.S.C.C.A.N. 2557, 2561-62.

158. See, e.g., *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 442-44 (5th Cir. 2001) (noting the importance that Congress attached to designation of critical habitat as an essential element of species recovery).

159. *Judge Orders Revisions to Spotted Owl Habitat*, ENVTL. NEWS SERV., Jan. 16, 2003.

that the Department was suspending any further critical habitat designations because the program had run out of money.<sup>160</sup> In fact, however, the Secretary was simply refusing to request a supplemental appropriation to cover the shortfall, while the Appropriations Committee had specifically invited such a request.<sup>161</sup> Following a court decision invalidating the critical habitat designation of the Southwestern willow flycatcher,<sup>162</sup> an industry trade group filed suit in Washington D.C. challenging the critical habitat designations for all seventeen species of Pacific salmon.<sup>163</sup> The administration immediately caved in and settled, revoking all nineteen designations covering fourteen watersheds.<sup>164</sup> In all the administration has revoked 25 designations, covering 16.4 million acres, in response to industry lawsuits.<sup>165</sup> Further, proposed designations have undergone increasing political scrutiny. According to a study by the advocacy group Center for Biological Diversity, proposals developed by FWS biologists in the field have been slashed by 93 percent and eleven have been cancelled altogether.<sup>166</sup>

Assistant Secretary Craig Manson, who oversees the endangered species program, has testified before Congress that the critical habitat designation “provides little real conservation benefit, consumes enormous agency resources and imposes huge social and economic costs.”<sup>167</sup> However, several independent studies of critical habitat des-

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160. Press Release, Dep't of Interior, Endangered Species Act “Broken”—Flood of Litigation Over Critical Habitat Hinders Species Conservation (May 28, 2003), available at <http://www.doi.gov/news/030528a.htm>.

161. Center for Native Ecosystems, *Is There Really No Money For the Endangered Species Act*, available at [http://www.nativeecosystems.org/esa/ESA\\_budget\\_crisis\\_fact\\_sheet.pdf](http://www.nativeecosystems.org/esa/ESA_budget_crisis_fact_sheet.pdf) (last visited Aug. 21, 2004).

162. *N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001).

163. *Nat'l Ass'n of Home Builders v. Evans*, 2002 U.S. Dist. LEXIS 25521 (D.D.C. 2001).

164. Nat'l Oceanic and Atmospheric Admin., *Vacated Critical Habitat Designations for 19 Pacific Salmon and Steelhead Evolutionarily Significant Units (ESUs)*, at [www.nwr.noaa.gov/1habcon/habweb/VacatedCH/Vacated\\_CH.pdf](http://www.nwr.noaa.gov/1habcon/habweb/VacatedCH/Vacated_CH.pdf) (last visited May 10, 2004).

165. CENTER FOR BIOLOGICAL DIVERSITY, *REAGAN REDUX: A REVIEW OF THE BUSH CRITICAL HABITAT RECORD 3* (July 1, 2003), available at [http://www.biologicaldiversity.org/swcbd/programs/policy/Bush\\_CH\\_record.pdf](http://www.biologicaldiversity.org/swcbd/programs/policy/Bush_CH_record.pdf).

166. *Id.* at 2.

167. Testimony of Craig Manson, Assistant Secretary of Fish and Wildlife and Parks, Dep't of the Interior, Before the Subcommittee on Fisheries, Wildlife, and Water of the Senate Committee on Environment and Public Works, *Regarding the Designation of Critical Habitat under the Endangered Species Act*, available at <http://laws.fws.gov/TESTIMON/2003/2003april10.html> (Apr. 10, 2003).

ignations cast serious doubt on that claim.<sup>168</sup> In the most recent study, analyzing data submitted to Congress by the Department of Interior, the researchers concluded, after controlling for other variables, such as the existence of a recovery plan, that “species with critical habitat were more than twice as likely to be improving . . . than species without critical habitat.”<sup>169</sup> As the authors of the study are quick to point out, this kind of analysis does not necessarily prove a cause-effect relationship, but it does demonstrate a statistically strong correlation between critical habitat and recovery, exactly as Congress had foreseen. On the other hand, the administration has produced no evidence supporting the contention that critical habitat provides “little protection.”

The final exhibit in the administration’s war on critical habitat is the provision tacked onto the Defense Appropriations Act exempting military lands from critical habitat requirements.<sup>170</sup> In lieu of complying with the ESA, the military now has the authority to decide how to manage critical habitat.<sup>171</sup> This is significant since there is over 25 million acres of lands administered by the Department of Defense. Much of that land contains habitat important for endangered species and other wildlife.<sup>172</sup> It did not take the military long to capitalize on this newfound flexibility. The FWS just signed off on a plan for the Army to expand its tank training center in the Mojave Desert near Fort Irwin, California.<sup>173</sup> The expansion will occupy 75,000 acres of what was once designated as critical habitat and will result in the death of one-third of the Desert tortoise living there.<sup>174</sup> As FWS biologist Ray Bransfield wistfully put it: “some of the tortoises will persist—maybe forever—in the hills where the tanks don’t go, and as long as they stay

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168. DR. MARTIN TAYLOR ET AL., CRITICAL HABITAT SIGNIFICANTLY ENHANCES SPECIES RECOVERY, available at <http://www.biologicaldiversity.org/swcbd/programs/policy/ch/Final.htm> (Oct. 6, 2003).

169. *Id.*

170. National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, 117 Stat. 1392, § 318 (2004).

171. *Id.*

172. U.S. DEP’T OF DEFENSE AND U.S. FISH & WILDLIFE SERVICE, PROTECTING ENDANGERED SPECIES ON MILITARY LANDS, available at <http://endangered.fws.gov/DOD/ES%20on%20military%20lands.pdf> (Sept. 2002).

173. Louis Sahagun, *The State; Federal Officials Set Aside Worries over Desert Tortoise, Rare Plant*, L.A. TIMES, Mar. 26, 2004, at B6.

174. Land Letter, *FWS Allows Army to Expand Fort Irwin With Tortoise Protections*, available at <http://www.eenews.net/Landletter/Backissues/040104/040104ll.htm#7> (Apr. 1, 2004).

up there, they'll be fine. But eventually, the rest will probably get smushed."<sup>175</sup>

#### IV. MISUSE OF SCIENCE

Secretary Norton and other senior members of the Bush Administration are fond of stressing the need for "good science" in setting environmental policies. But what exactly do they mean? The Union of Concerned Scientists ("UCS"), an independent nonprofit alliance of more than 100,000 citizens and scientists, including a number of Nobel Laureates, decided to find out. It undertook an investigation of the allegations that the administration was not using good science. This involved a review of the public record, analysis of internal government documents, and interviews with current and former government officials.

##### A. *The UCS Findings*

The UCS found that there is a well-established pattern of suppression and distortion of scientific findings by high-ranking Bush Administration political appointees across numerous federal agencies.<sup>176</sup> These actions have consequences for human health, public safety, and community well-being. It also found that there is strong documentation of a wide-ranging effort to manipulate the government's scientific advisory system to exclude advice that might run counter to the administration's political agenda.<sup>177</sup> Further, it found that there is evidence that the administration often imposes restrictions on what government scientists can say or write about "sensitive" topics.<sup>178</sup> There is significant evidence that the scope and scale of the manipulation, suppression, and misrepresentation of science by the Bush Administration is unprecedented.<sup>179</sup>

With release of the report, more than sixty leading scientists—including twenty Nobel Laureates, leading medical experts, former federal agency directors, and university chairs and presidents—issued a statement calling for regulatory and legislative action to restore scientific integrity to federal policymaking. Dr. Kurt Gottfried, emeritus

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175. *Id.*

176. UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICYMAKING, AN INVESTIGATION INTO THE BUSH ADMINISTRATION'S MISUSE OF SCIENCE 2 (2004), available at [http://www.ucsusa.org/documents/RSI\\_final\\_fullreport.pdf](http://www.ucsusa.org/documents/RSI_final_fullreport.pdf).

177. *Id.*

178. *Id.*

179. *Id.* at 28-29.

professor of physics at Cornell University and Chairman of the Union of Concerned Scientists, stated: "Across a broad range of issues, the administration has undermined the quality of the scientific advisory system and the morale of the government's outstanding scientific personnel. . . . Whether the issue is lead paint, clean air or climate change, this behavior has serious consequences for all Americans."<sup>180</sup>

Echoing Dr. Gottfried's comments, Dr. Neal Lane, a former director of the National Science Foundation and a former Presidential Science Advisor stated: "We are not simply raising warning flags about an academic subject of interest only to scientists and doctors. . . . In case after case, scientific input to policymaking is being censored and distorted. This will have serious consequences for public health."<sup>181</sup>

### 1. Some Examples of Abuse of Science

After twelve years of research, scientists at the Interior Department concluded that oil drilling in ANWR would adversely affect the Porcupine Caribou herd.<sup>182</sup> When presented with the result of this painstaking research, Secretary Norton called it "science fiction" and ordered a new study.<sup>183</sup> A week later the U.S. Geological Survey issued a two-page report that supported the administration's previous claims that drilling would not harm wildlife.<sup>184</sup>

In 1995 and 1997, FWS biologists warned that energy exploration and development in ANWR would disrupt polar bear denning in violation of an international treaty.<sup>185</sup> In 2001, the Secretary's Office issued a statement that the report "no longer reflects the Interior Department's position."<sup>186</sup> On another front, FWS biologists prepared a scathing critique of the Corps of Engineers' proposal to change wet-

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180. Press Release, Union of Concerned Scientists, *Preeminent Scientists Protest Bush Administration's Misuse of Science*, available at [http://www.ucsusa.org/global\\_environment/rs/rsirelease.html](http://www.ucsusa.org/global_environment/rs/rsirelease.html) (Feb. 18, 2004).

181. *Id.*

182. *U.S. Rejects Study by its own Arctic Scientists*, SEATTLE POST-INTELLIGENCER, Mar. 30, 2002, at [http://seattlepi.nwsource.com/national/64604\\_arctic30.shtml?searchpagefrom=1&searchdiff=877](http://seattlepi.nwsource.com/national/64604_arctic30.shtml?searchpagefrom=1&searchdiff=877).

183. *Id.*

184. Robert Perks & Gregory Wetstone, *Rewriting the Rules, Year-End Report 2002: The Bush Administration's Assault on the Environment 2* (January 2003), at <http://www.nrdc.org/legislation/rollbacks/rr200.pdf>.

185. DEMOCRATIC STAFF OF COMM. ON RESOURCES, WEIRD SCIENCE: THE INTERIOR DEPARTMENT'S MANIPULATION OF SCIENCE FOR POLITICAL PURPOSES, at <http://www.ourforests.org/weirdscience.pdf> (Dec. 17, 2002) (hereinafter WEIRD SCIENCE).

186. *Id.*

land mitigation policy and forwarded it for clearance to the Secretary's Office. The comments never made it out of the building.<sup>187</sup>

When the U.S. Geological Study prepared an economic analysis of the Klamath Basin, concluding that restoration of flows to support fisheries and the six National Wildlife Refuges located there would produce economic benefits six times greater than agriculture, the study was kept under wraps, until it was leaked.<sup>188</sup> In the litigation over the Klamath fish kill, NMFS biologist Michael Kelly has testified that the views of agency scientists were overruled in the 2002 biological opinions. Kelly's request for whistleblower protection has been rejected by the Office of Legal Counsel, and he ultimately resigned from his position in the National Marine Fisheries Service.<sup>189</sup>

Secretary Norton supports a bill, H.R. 4840, that would replace the ESA standard of "best scientific and commercial information available" with a judicial standard of "clear and convincing evidence" for determining whether species deserve listing and whether actions are likely to jeopardize listed species.<sup>190</sup> As a practical matter, this is an unattainable standard, and it would overturn the "precautionary principle" that underlies the ESA.<sup>191</sup> It would put the risk of extinction squarely on the species, rather than on those who have the power to prevent it. When the Bush Administration recently proposed its research agenda to assess the real risks of climate change, a panel of scientists convened by the National Academy of Sciences panned it, saying it "lacks most of the elements of a strategic plan" and was woefully underfunded.<sup>192</sup> One distinguished panel member, Dr. William Schlesinger, Dean of the Nicholas School of the Environment and Earth Sciences at Duke University, commented that "in some areas it's as if these people were not cognizant of the existing science. . . . Stuff that would have been cutting edge in 1980 is listed as a priority for the future."<sup>193</sup>

According to Dr. Carolyn Raffensperger, executive director of the Environmental Health Network, the administration has been sys-

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187. Perks & Wetstone, *supra* note 184, at 41.

188. *Id.* at 39.

189. *Id.* at 38; Don Thompson, *Federal Whistleblower Quits, Alleges Politicization of Science*, ASSOCIATED PRESS, May 19, 2004, at <http://www.sanluisobispo.com/mld/sanluisobispo/news/politics/8705712.htm>.

190. WEIRD SCIENCE, *supra* note 185, at 7.

191. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978).

192. Andrew C. Revkin, *Panel of Experts Faults Bush Plan to Study Climate*, N.Y. TIMES, Feb. 26, 2003, at A1.

193. *Id.*

tematically silencing scientists who disagree with it.<sup>194</sup> She cites examples of a group of distinguished scientists, including Dr. Richard Jackson, the senior environmental health official at the Center for Disease Control, and Dr. Lynn Goldman, former head of EPA's Office of Pesticides, who were uninvited to an EPA conference on pesticides. Raffenberger cites numerous examples of scientists being removed from key advisory panels and replaced with scientists with closer ties to regulated industries. These include Dr. Michael Weitzman, a leading expert on childhood lead poisoning, who was replaced on the HHS Advisory Committee on Childhood Lead Poisoning by Dr. William Banner, who testified for the lead paint manufacturers in a toxic tort case brought by the State of Rhode Island.<sup>195</sup>

#### V. SUE AND SETTLE

The Bush Administration is not the first to enter sweetheart deals to settle lawsuits brought by favored interests (environmentalists have benefited from these in the past), but it is the first to use this technique routinely to make major policy decisions without public participation or Congressional review. The Roadless Rule<sup>196</sup> provides one such example. Not surprisingly, the Roadless Area Conservation Rule, adopted in the waning hours of the Clinton Administration, was one of the first rules put on hold by the incoming Bush Administration.<sup>197</sup> The Roadless Rule essentially prohibits, with some important exceptions, logging, mining, and road-building on nearly sixty-million acres of roadless areas in National Forests.<sup>198</sup> In addition to some great backcountry hiking, these areas are the last strongholds for large predators like the grizzly, gray wolf, lynx, and wolverine that need space away from motorized access. Naturally, the Rule was immediately challenged in nine lawsuits involving seven states.<sup>199</sup>

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194. Carolyn Raffenberger, *Bush Brings Sound of Silence, Not Science*, ENVTL. F., Jan./Feb. 2003, at 12.

195. *Id.*

196. 36 C.F.R. § 294 (2001); Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001).

197. See Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8899 (Feb. 5, 2001).

198. 36 C.F.R. § 294.12(b).

199. Michael Doyle & Ron DeLacy, *Logging Plan to Shift Some Control*, MERCED SUN-STAR, July 13, 2004, at <http://www.mercedsun-star.com/local/story/8841030p-9729215c.html>.

The lead cases were filed by the State of Idaho and Boise Cascade, who used the Kootenai Tribe for cover.<sup>200</sup> Borrowing a page from the environmentalists' playbook, the suits attacked the adequacy of the Environmental Impact Statement ("EIS").<sup>201</sup> Their arguments included complaints that there were not enough maps and the 120-day comment period was too short.<sup>202</sup>

Most expected the Bush Administration to admit error and pull the Rule. Instead, it did something far more interesting; it simply did not show up, declining at one point even to file an answer.<sup>203</sup> Luckily, two sets of conservation organizations were allowed to intervene to defend the Rule.<sup>204</sup> When the plaintiffs filed a motion for preliminary injunction, the administration filed a status report in lieu of a full brief, advising the court of its ongoing review of the Rule.<sup>205</sup> In May 2001, Judge Lodge found the EIS deficient and enjoined the Rule from taking effect because, incredibly, it threatened to do irreparable harm to the National Forests.<sup>206</sup> The administration declined to appeal.<sup>207</sup> Once again, the intervenors filled the gap and ultimately succeeded in getting the Ninth Circuit panel to overturn the District Court decision, whereupon plaintiffs/appellees filed a petition for rehearing en banc.<sup>208</sup> The administration sat that out as well.

No sooner had the injunction against the rule been lifted than Forest Service Chief Bosworth issued guidance instructing forest supervisors to continue planning road projects in roadless areas but to get his permission before actually building any.<sup>209</sup> Then Assistant Sec-

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200. See *Kootenai Tribe v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001) (holding that opponents of the Roadless Rule had standing and would likely succeed on the merits, but that finding irreparable injury was premature); *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) (reversing the district court's later, unreported grant of a preliminary injunction, on appeal by pro-rule intervenors).

201. *Kootenai Tribe*, 313 F.3d at 1116-1121.

202. *Id.* at 1117.

203. Jamey Fidel, *Court Battles Looming Over the Protection of Roadless Areas*, VT. ENVTL. L.J., at <http://www.vje.org/editorials/2001S/fidel.html#fn13>.

204. *Kootenai Tribe of Idaho*, 313 F.3d at 1107-1111 (interpreting FED. R. CIV. P. 24 and holding that the intervening parties had standing to defend the challenged governmental processes).

205. *Id.*

206. Heritage Forests Campaign, *Attempts to Undermine the Roadless Rule*, at [http://www.ourforests.org/risk/bush\\_undermine.html](http://www.ourforests.org/risk/bush_undermine.html) (last visited Aug. 21, 2004).

207. *Id.*

208. *Kootenai Tribe of Idaho*, 313 F.3d at 1094.

209. Michael Milstein, *Bush Offer's New Roadless Rules*, THE OREGONIAN, July 13, 2004, available at [http://www.oregonlive.com/news/oregonian/index.ssf?/base/front\\_page/1089719722144960.xml](http://www.oregonlive.com/news/oregonian/index.ssf?/base/front_page/1089719722144960.xml).

retary Mark Rey, a former timber industry lobbyist who oversees the Forest Service, announced that Western Governors were being invited to "request targeted relief" from the Roadless Rule.<sup>210</sup> Rey also announced that the administration had settled a challenge to the Roadless Rule in Alaska by agreeing to remove 2.7 million acres from protection at the request of the Alaska delegation.<sup>211</sup>

Subsequently, in yet another case, the Wyoming District Court enjoined the rule, on the same grounds that the Ninth Circuit had already rejected.<sup>212</sup> The government did file a brief in this case, but declined to appeal.<sup>213</sup> When intervenors appealed, the State of Wyoming objected that third parties had no right to appeal where the government had abandoned the case,<sup>214</sup> whereupon the Justice Department filed an amicus brief agreeing with Wyoming and urging the Tenth Circuit to summarily dismiss the appeal without hearing the merits.<sup>215</sup> Fortunately, the Tenth Circuit declined, and the case has been fully briefed and argued and is awaiting decision.

More recently, the Administration has proposed to repeal the Roadless Rule altogether and replace it with a "rule" requiring governors to petition for designation of roadless areas in National Forests within their states.<sup>216</sup>

An even more remarkable series of maneuvers preceded the recently announced settlement between the government and Utah involving wilderness study areas on Bureau of Land Management ("BLM") lands.<sup>217</sup> This case involves Secretary Babbitt's Wilderness Inventory Handbook, which directs BLM land managers to identify potential wilderness areas and maintain their wilderness values, pending congressional action on formal wilderness designation.<sup>218</sup> Babbitt adopted the policy in 1996 after concluding that previous wilderness inventories conducted by his predecessors, Manual Lujan and Donald

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210. Land Letter, *Bush Administration Invites Western Governors to Apply for Roadless Rule Exemptions* (June 12, 2003).

211. *Id.*

212. *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003).

213. Brief of Amicus Curiae The United States, Wyoming Outdoor Council (No. 03-8058) 1, available at [http://www.ourforests.org/documents/feds\\_amicus.pdf](http://www.ourforests.org/documents/feds_amicus.pdf) (last visited Feb. 6, 2004).

214. *Id.*

215. *Id.* No decision has been rendered as of this writing.

216. Felicity Barringer, *Bush Seeks Shift in Logging Rules*, N.Y. TIMES, July 13, 2004, at A1.

217. Press Release, Earthjustice, *Conservationists Challenge Bush Administration Abandonment of Wilderness Protections*, at <http://www.earthjustice.org/news/display.html?ID=593> (May 5, 2003).

218. *Utah Wilderness Inventory: Secretarial Discretion*, at <http://www.ut.blm.gov/utah/wilderness/wrpt/wrptintro.html> (last visited Aug. 23, 2004).

Hodel, had left out millions of acres of land with wilderness qualities.<sup>219</sup> Utah sued, claiming Babbitt had no authority to conduct any further inventories under the Federal Land Planning and Management Act (“FLPMA”) section 603 which established a fifteen-year deadline, which expired in 1991.<sup>220</sup> The state won in the District Court, but on appeal the Tenth Circuit ruled that Utah had failed to establish that the handbook caused any demonstrable injury and dismissed seven of the eight claims brought.<sup>221</sup> The case languished for six years until Representative Cannon (R. Utah) wrote Secretary Norton on March 12, 2003, urging that the handbook be withdrawn.<sup>222</sup> Then events accelerated.

On March 28, following closed-door negotiations, Utah moved to reopen the case indicating a settlement was in the works.<sup>223</sup> On April 8, after getting wind of the deal, the Southern Utah Wilderness Alliance (“SUWA”) and other conservation groups moved to intervene in the case.<sup>224</sup> On April 12, the Justice Department filed a Proposed Stipulation, Settlement Agreement, and Order dismissing the case with prejudice.<sup>225</sup> On April 14, without ruling on SUWA’s intervention motion, Judge Benson approved the agreement and issued an Order incorporating the Stipulation as findings and dismissed the case without adjudicating the validity of the underlying claims.<sup>226</sup> Even though the case dealt with “only” 2.6 million acres of disputed wilderness quality lands in Utah, much of it the spectacular redrock canyons of Southern Utah, the Secretary “stipulated” that she had *no* authority to manage lands for wilderness values except for the Wilderness Study Areas WSA’s designated by her Republican predecessors un-

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219. *Id.*

220. Press Release, Earthjustice, State of Utah, Others Sue to Attack Utah Wilderness, Apr. 8, 2003, at <http://www.earthjustice.org/news/display.html?ID=577>.

221. *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998).

222. Press Release, Rep. Chris Cannon, Cannon Statement on H.R. 1500 (Sept. 28, 2001), at [http://www.house.gov/cannon/press\\_102899.html](http://www.house.gov/cannon/press_102899.html).

223. Earthjustice, *supra* note 220.

224. *Id.*

225. *E.g.*, The Wilderness Society, *Bush Administration Record on Public Lands: Irresponsible Management of the People’s Land*, at [www.wilderness.org/Library/Documents/Bushrecord.cfm](http://www.wilderness.org/Library/Documents/Bushrecord.cfm) (Aug. 8, 2003); Press Release, The Wilderness Society, Backroom Deal Exposed, Illegal Wilderness Settlement Contested (Apr. 5, 2004), at <http://www.wilderness.org/NewsRoom/Release/20040405.cfm>; National Res. Defense Council, *Interior Department Paves Way for New Roads on Federal Lands in Utah*, at [http://www.nrdc.org/bushrecord/2003\\_04.asp](http://www.nrdc.org/bushrecord/2003_04.asp) (Apr. 9, 2003).

226. Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint, *Utah v. Norton*, No. 96 Civ. 0870 (B) (D. Ut. Apr. 11, 2003).

der FLPMA section 603 prior to 1991.<sup>227</sup> This means that 220 million acres of public lands, containing millions of acres of de facto wilderness, are released for development. This backroom deal is dead wrong on the law and represents a breathtaking concession of federal authority and public rights. Conservation groups have vowed to fight this appalling breach of the public trust; hopefully they can quickly find a venue to do so.

As for Secretary Norton's 4 C's, where was the communication with the public, the true owners of these lands? Where was the consultation with Congress on foreclosing its options to designate additional wilderness? Where was the cooperation with states, such as New Mexico and Oregon, which have voiced support for expanding the category of BLM wilderness study areas? Where was the consideration for the conservation values jettisoned in the rush to do the deal? Where was respect for the rule of law?

As the WSA case was being worked out, Utah was busy lining up another, even sweeter deal. This one involves R.S. 2477, a Civil War-era provision of the Mining law of 1866.<sup>228</sup> This decadent law originally allowed states to claim rights of ways for "the construction of highways across public lands not otherwise reserved for public uses."<sup>229</sup> This provision was repealed by Federal Land Policy and Management Act in 1976 subject to valid existing rights, that is to say "valid lease, permit, patent, right of way, or other land use right existing on the date of approval of this Act."<sup>230</sup> Long dormant, but never forgotten by landlocked western communities, this vague grandfather provision was revived by Secretary Hodel in 1988, and states like Utah, California, and Alaska started gearing up to claim hundreds of thousands of miles of Right-of-Ways ("ROWs") across public lands. Some even sought to claim ROWs through National Parks, Forests, Refuges, Wilderness Areas, and wilderness study areas.<sup>231</sup>

In 1994, Secretary Babbitt proposed rules under FLPMA establishing criteria for Interior to "disclaim" interests in lands where

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227. *Id.* at 12, ¶3.

228. An Act Granting Right of Way To Ditch and Canal Owners Over The Public Land, and for Other Purposes (Mining Law of 1866), Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, codified at R.S. 2477, recodified at 43 U.S.C. § 932, repealed by Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

229. See Southern Utah Wilderness Alliance, *RS2477 Legislative History*, at [http://www.suwa.org/library/RS\\_2477\\_Legislative\\_History.pdf](http://www.suwa.org/library/RS_2477_Legislative_History.pdf) (Mar. 20, 2003).

230. 43 U.S.C. § 1701(a).

231. *Robbing Future Generations by Paving Our Parks and Wilderness*, at <http://www.leaveitwild.org/takeaction/Robbery.pdf>.

states, counties, and municipalities could establish bona fide claims to highway ROW's across public lands that had not been withdrawn.<sup>232</sup> However, Congress reacted by attaching section 108 to the Interior Appropriations Act of 1994 to provide that "no final rule [pertaining to R.S. 2477] shall take effect unless expressly authorized by an Act of Congress."<sup>233</sup> In 1997, in response to a request from several western congressmen to clarify the effect of section 108, the General Accounting Office ("GAO") issued an opinion that section 108 established "permanent law."<sup>234</sup> Babbitt countered these legislative moves by issuing a new policy that revoked the Hodel policy and, pending congressional approval of final RS 2477 rules, directed that no claims would be recognized except where there was a "compelling and immediate need."<sup>235</sup>

Enter Secretary Norton—who, in January 2003, issued new recordable disclaimer rules liberalizing the basis for 2477 claims.<sup>236</sup> These new rules attempt to waive the application of the twelve-year statute of limitations that generally applies to land claims against the federal government for claims by states, counties, or municipalities.<sup>237</sup> This latter provision arguably exceeds the scope of the Federal Quiet Title Act, which imposes a twelve-year statute of limitation except for states, without mentioning counties or municipalities.<sup>238</sup> Interestingly, Norton's rules were issued as final and never secured the requisite congressional approval. This prompted several congressmen to write a letter to the Secretary asserting that the rules are illegal.<sup>239</sup>

Undaunted, Secretary Norton inked a Memorandum of Understanding ("MOU") on April 9, 2003 with former Utah Republican Governor and current EPA Administrator Mike Leavitt calling for a

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232. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (proposed Aug. 1, 1994).

233. Department of the Interior and Related Agencies Appropriations Act, 1997, § 108, enacted by the Omnibus Consolidated Appropriations Act, 1997, § 108, Pub. L. No. 104-208, 110 Stat. 3009, 3009-200 (1996).

234. Letter of Robert P. Murphy, General Counsel, GAO, B-277719, at 1 (Aug. 20, 1997).

235. U.S. Dep't of the Interior, Interim Departmental Policy on Revised Statute 2477 Grant of Right-Of-Way for Public Highways (Jan. 27, 1997), available at <http://www.rs2477roads.com/2jan22.htm>.

236. Conveyances, Disclaimers and Correction Documents, 68 Fed. Reg. 494 (Jan. 6, 2003) (to be codified at 43 C.F.R. pt. 1860).

237. *Id.*

238. 28 U.S.C. § 2409a.

239. See Letter from Rep. Mark Udall et al., to Sec. of the Interior Gale Norton (Apr. 16, 2003), available at [http://www.suwa.org/library/Udall\\_RS2477\\_letter.pdf](http://www.suwa.org/library/Udall_RS2477_letter.pdf) (last visited May 13, 2004).

simplified process to acknowledge the state's 2477 claims.<sup>240</sup> The MOU contains some limits regarding which roads qualify for acknowledgment. It also excludes claims on National Parks, Wilderness, pre-1993 wilderness study areas (but not those determined eligible by Secretary Babbitt in his re-inventory), and Refuges.<sup>241</sup> However, the MOU also directs the BLM State Director for Utah to issue recordable disclaimers where "the requirements of the applicable statutes and regulations" have been satisfied.<sup>242</sup>

This issue is far too complicated to do it justice here. Suffice it to say, however, the Secretary's willingness to enter into an agreement with such sweeping implications without any public involvement is outrageous. In Utah alone, there have been claims to over 2 million ROW acres, some of which are cow paths and riverbeds involving claims to places like Zion National Park and the Staircase-Escalante National Monument.<sup>243</sup> Even though the MOU does not automatically grant rights to any of these areas, it is clearly the camel's nose under the tent. The MOU makes no provision for any public involvement in the acknowledgment process, where key decisions are made. Further, reliance on the recordable disclaimer regulations to provide the substantive criteria for what qualifies as a valid existing right under FLPMA, in the absence of the explicit authorization required by section 108, is probably illegal, as the Comptroller General recently concluded.<sup>244</sup>

The above is a small sampling of the sweetheart deals that have gone on under this administration. These include the agreement to reverse the ban on snowmobiles in Yellowstone, and an agreement to withdraw the listing of the Oregon coho salmon rather than appeal the Oregon District decision invalidating it on the dubious grounds that hatchery fish must be counted with wild fish.<sup>245</sup> Other similar sweetheart deals include the agreement to review the listing of the

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240. Memorandum of Understanding, Dep't of the Interior and State of Utah (Apr. 9, 2003), available at <http://www.doi.gov/news/mours2477.htm>.

241. *Id.* ¶2.

242. *Id.* ¶4.

243. Alaska Wilderness League, et al., *Stop the Public Lands Giveaway*, at [www.highway-robbery.org/documents/Land\\_grab\\_fact\\_sheet\\_9-16-03.doc](http://www.highway-robbery.org/documents/Land_grab_fact_sheet_9-16-03.doc) (Sept. 16, 2003).

244. Recognition of R.S. 2477 Rights-of-Way under the Department of the Interior's FLPMA Disclaimer Rules and Its Memorandum of Understanding with the State of Utah, Compt. Gen., B-300912 (Feb. 6, 2004).

245. David Kravets, *Appeals Court Blocks Judge's Delisting of Oregon Coho Salmon*, ASSOCIATED PRESS, Dec. 15, 2001, available at <http://www.montanaforum.com/rednews/2001/12/15/build/wildlife/cohosalmon.php?nnn'6>.

northern spotted owl, on the heels of recent evidence that the owls' population is declining faster than thought,<sup>246</sup> and the agreement to settle industry challenges to the Northwest Forest Plan and allow more logging in spotted owl reserves.<sup>247</sup>

## VI. THE LUNTZ MEMO: SPINNING A WEB OF DECEIT

What do the foregoing examples say about how this administration makes decisions on complex environmental issues? Does the administration approach each issue on its merits and make the best call it can? Or is there a pattern, a theme running through these examples that might help to explain the results? For clues, we can look to a remarkable "insiders" document that found its way into the public domain—the Luntz Memo.

The Luntz Memo is a "straight talk" memorandum prepared by GOP political strategist Frank Luntz, who is credited with being the architect of the Newt Gingrich "Contract With America" revolution that swept Republicans into control of the Congress in 1994.<sup>248</sup> The memo was distributed to Republican congressional and executive leaders in 2002.<sup>249</sup> The memo covers a range of issues and contains a significant section on the environment. Though it is clearly a political strategy document rather than a policy document, it nonetheless provides a revealing look at how the administration thinks. The spinwords that Luntz recommends are similar to language the White House actually uses for policies as they are announced, which are usually released late on a Friday before a holiday to avoid press coverage.<sup>250</sup> Here are some of the more salient points from the memo:

The environment is probably the single issue on which Republicans in general and President Bush in particular are most vulnerable. . . . Therefore, any discussion of the environment has to be grounded in an effort to reassure a skeptical public that you care about the envi-

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246. See Press Release, U.S. Fish & Wildlife Serv., U.S. Fish & Wildlife Service to Conduct Review of the Northern Spotted Owl and Marbled Murrelet (Apr. 2001), at <http://news.fws.gov/newsreleases/r1/CA9CB20E-D98E-41E9-BDE18F539CF5CA14.html> (noting that the review was prompted by a settlement agreement for two cases, *Western Council of Industrial Workers v. Secretary of the Interior* (regarding the northern spotted owl) and *American Forest Resource Council v. Secretary of the Interior* (regarding the marbled murrelet)).

247. See Press Release, U.S. Forest Service, USDA Announces Tentative Agreement Ending Northwest Forest Plan Lawsuit, at <http://www.fs.fed.us/gpnl/press/1999/pr203.htm> (last updated Nov. 19, 1999).

248. Press Release, Environmental Working Group, Briefing: Luntz Memo on the Environment, at <http://www.ewg.org/briefings/luntzmemo/> (last visited May 13, 2004).

249. *Id.*

250. See, e.g., *Id.*

ronment for its own sake—that your intentions are strictly honorable. The good news is that . . . once you show people that your heart is in the right place and make them comfortable listening to what you have to say, then the conservative, free market approach to the environment actually has the potential to be quite popular.<sup>251</sup>

The Memo cites the arsenic rule as a case study in how not to handle environmental issues.<sup>252</sup>

Recall that one of the first Clinton rules the Bush administration targeted was lowering MCL for arsenic in drinking water from 50 PPB to 10 PPB. This rule was strongly urged by, among others, the World Health Organization (“WHO”).<sup>253</sup> Luntz, however, does not criticize the administration for making the wrong policy decision and ignoring “good science.” Rather, he chastises the White House for failing to follow this communication ladder in announcing the policy:

1. Every American has the right to clean, healthy and safe drinking water.
2. Republicans are dedicated to the continued improvement of our nation’s water supply, and to ensuring that Americans have the best quality water available. We all drink water. We all want it safe and clean.
3. Today, there are minute, tiny amounts of arsenic in our drinking water. It has always been, this way. It will always be this way
4. Based on sound science, the government’s standard is that there should be no more than 50 parts of arsenic per billion.
5. In the last weeks before Bill Clinton left office, he issued an executive order reducing the standard from 50 to 10 parts of arsenic per billion, but he did not act for eight years because it was neither a priority nor a health risk.
6. Before this new standard takes effect, we would like to make sure that it is necessary to make this change. The decision was reached quickly, without public debate, and without evidence that this change will make our water appreciably safer.<sup>254</sup>

In other words, according to the Luntz memo, the problem was the message, not the policy. The fact that there might be something wrong with exposing the public to risks that the medical community had found to be unacceptable was not even worth noting. Ultimately, of course, the administration did yield to sound science and the huge

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251. THE LUNTZ RESEARCH COMPANIES, STRAIGHT TALK 132, available at [http://www.ewg.org/briefings/luntzmemo/pdf/LuntzResearch\\_environment.pdf](http://www.ewg.org/briefings/luntzmemo/pdf/LuntzResearch_environment.pdf).

252. *Id.* 133-34.

253. Douglas Jehl, *EPA to Abandon New Arsenic Limits for Water Supply*, N.Y. TIMES, Mar. 21, 2002, at A1.

254. STRAIGHT TALK, *supra* note 251, at 133-34.

public outcry over the attempt to weaken the standard and maintained the 10 PPB standard.<sup>255</sup> Nonetheless, the political strategists' take on this debacle was that the administration could have done a better job of selling the weaker standard if only it had been properly packaged. That is a disturbing revelation into the thinking of the people who are closest to the centers of power in this country today.

The Luntz memo offers several tips for future packaging:

While we may have lost the environmental communications battles in the past, the war is not over. When we explain our environmental proposals correctly, more than seventy percent of the nation prefers our positions to those of our opponents. Let me emphasize, however, that when our environmental policies are explained ineffectively, not only do we risk losing the swing vote, but our suburban female base could abandon us as well. . . . As Republicans, we have the moral and rhetorical high ground which [sic] we talk about values, like freedom, responsibility, and accountability. The same values apply to the environment as to other examples of government-knows-best solutions. But when we talk about "rolling back regulations" involving the environment, we are sending a signal Americans don't support. If we suggest that the choice is between environmental protection and deregulation, the environment will win consistently). . . . You cannot allow yourself to be labeled "anti-environment" simply because you are opposed to the current regulatory configuration (your opponents will almost certainly try to label you that way). The public does not approve of the current regulatory process, and Americans certainly don't want an increased regulatory burden, but they will put a higher priority on environmental protection and public health than on cutting regulations. Even Republicans prioritize protecting the environment. . . . That is why you must explain how it is possible to pursue a common sense or sensible environmental policy that "preserves all the gains of the past two decades" without going to extremes, and allows for new science technologies to carry us even further. Give citizens the idea that progress is being frustrated by over-reaching government, and you will hit a very strong strain in the American psyche.<sup>256</sup>

The memo then takes on global warming. Here is where the most revealing insights can be found regarding the thinking of those who have the President's ear. Note the memo's warning to capitalize on "scientific uncertainty" while there is still time:

The scientific debate remains open. Voters believe that there is no consensus about global warming within the scientific community. Should the public come to believe that the scientific issues are set-

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255. Press Release, EPA, EPA Announces Arsenic Standard For Drinking Water of 10 Parts per Billion (Nov. 1, 2001), available at [http://www.epa.gov/epahome/headline\\_110101.htm](http://www.epa.gov/epahome/headline_110101.htm).

256. STRAIGHT TALK, *supra* note 251, at 136.

tled, their views about global warming will change accordingly. Therefore, you need to continue to make the lack of scientific certainty a primary issue in the debate, and defer to scientists and other experts in the field. . . . The scientific debate is closing [against us] but not yet closed. There is still a window of opportunity to challenge the science. Americans believe that all the strange weather that was associated with El Nino had something to do with global warming, and there is little you can do to convince them otherwise. However, only a handful of people believe the science of global warming is a closed question. Most Americans want more information so that they can make an informed decision. It is our job to provide that information. . . . Technology and innovation are the key in arguments on both sides. Global warming alarmists use American superiority in technology and innovation quite effectively in responding to accusations that international agreements such as the Kyoto accord could cost the United States billions. Rather than condemning corporate America the way most environmentalists have done in the past, they attack us for lacking faith in our collective ability to meet any economic challenges presented by environmental changes we make. This should be our argument. We need to emphasize how voluntary innovation and experimentation are preferable to bureaucratic or international intervention and regulation.<sup>257</sup>

The memo then provides examples of “Words That Work” (to delay action on climate change).

We must not rush to judgment before all the facts are in. We need to ask more questions. We deserve more answers. And until we learn more, we should not commit America to any international document that handcuffs us either now or into the future. . . . Scientists can extrapolate all kinds of things from today’s data, but that doesn’t tell us anything about tomorrow’s world. You can’t look back a million years and say that proves that we’re heating the globe now hotter than it’s ever been. After all, just 20 years ago scientists were worried about a new Ice Age. . . . Unnecessary environmental regulations hurt moms and dad, grandmas and grandpas. They hurt citizens on fixed incomes. They take an enormous swipe at miners, loggers, truckers, farmers anyone who has any work in energy intensive professions. They mean less income for families struggling to survive and educate their children. . . . Don’t confuse my opposition to excessive regulation with a desire for inaction. We don’t need an international treaty with rules and regulations that will handcuff the American economy or our ability to make our environment cleaner, safer, and healthier.<sup>258</sup>

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257. *Id.* at 137-41.

258. *Id.*

It is tempting to dismiss the Luntz Memo as campaign rhetoric, except for the fact that it so closely tracks how the administration approaches every environmental issue, right down to the language used to reassure the American public of its genuine concern for the environment, all the while working to do industry's bidding and undermine the laws and institutions that form the bulwark of environmental protection in this country.

#### VII. CONCLUDING THOUGHTS: REGAINING OUR LEADERSHIP IN THE WORLD

After making tremendous progress through the 60s, 70s and 80s on a host of serious environmental problems—getting the lead out of the air; controlling acid rain; restoring two-thirds of the nation's waters to fishable/swimmable status; cleaning up thousands of abandoned hazardous waste sites; reducing toxic releases by over a half; cutting annual loss of wetlands by 80 percent; repairing the hole in the ozone layer; conserving millions of acres of wilderness; rescuing the Bald Eagle, Peregrine Falcon, Whooping Crane, Gray Whale, and many other species from the brink of extinction; reining in the worst of the dam-building, river-killing projects of the Corps of Engineers and Bureau of Reclamation, to name a few—the pace of progress slowed considerably through the 90s and has all but ground to a halt today. At a time when global environmental challenges—such as climate change, mass extinctions, over-fishing, desertification, water shortages—have never been more daunting, the United States government (not necessarily with the support of the people) has lost the mantle of leadership it once had on environmental issues.

Now, when American industry wants to buy “state of the art” environmental technology, it must go shopping in Europe. Instead of being admired as a model of environmental stewardship, the U.S. is now regarded by many of the nations of the world as an arrogant outlaw, dismissive of international agreements like Kyoto and the Biodiversity Convention, and too powerful and self-centered to pay much attention to the collective efforts of other nations. More than any other administration in my lifetime, the Bush Administration is responsible for the sad condition of our standing in the world community. This must change.

