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THE BUSH ADMINISTRATION AND THE ENVIRONMENT: AN OVERVIEW AND INTRODUCTION

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On Thursday, January 27, 2000, President Bill Clinton delivered his last State of the Union address. It celebrated the economic growth with which the United States started the 21st century. It also addressed the environment three times. Calling environmental progress a community value (both local and global), and a product of improved science and technology—two of the larger themes of his speech—President Clinton set as a goal for the 21st century that "[w]e will bring prosperity to every American community. We will reverse the course of climate change and leave a cleaner, safer planet. America will lead the world toward shared peace and prosperity, and the far frontiers of science and technology." Similarly, toward the end of his speech, President Clinton outlined steps that would "allow America to lead toward the far frontiers of science and technology—enhancing our health, environment, and economy.

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2. Id.
in ways we cannot even imagine today. At a time when science, technology and the forces of globalization are bringing so many changes into our lives, it is more important than ever that we strengthen the bonds that root us in our local communities and in our national communities.  

In between, President Clinton set out an express environmental agenda for the nation, deeming environmental improvement and economic expansion to be non-exclusive goals:

I am grateful for the opportunities the vice president and I have had to work hard to protect the environment and finally to put to rest the notion that you can't expand the economy while protecting the environment. As our economy has grown, we have rid more than 500 neighborhoods of toxic waste and ensured cleaner air and water for millions of families. In the past three months alone, we have acted to preserve more than 40 million acres of roadless lands in our national forests and created three new national monuments.

But as our communities grow, our commitment to conservation must grow as well. Tonight, I propose creating a permanent conservation fund to restore wildlife, protect coastlines and save natural treasures from California redwoods to the Everglades. This Lands Legacy endowment represents by far the most enduring investment in land preservation ever proposed.

Last year, the vice president launched a new effort to help make communities more livable—so children will grow up next to parks, not parking lots, and parents can be home with their children instead of stuck in traffic. Tonight, we propose new funding for advanced transit systems—for saving precious open spaces—for helping major cities around the Great Lakes protect their waterways and enhance their quality of life.

The greatest environmental challenge of the new century is global warming. Scientists tell us that the 1990s were the hottest decade of the entire millennium. If we fail to reduce emissions of greenhouse gases, deadly heat waves and droughts will become more frequent, coastal areas will be flooded, economies disrupted. Many people in the United States and around the world still believe we can't cut greenhouse gas pollution without slowing economic growth. In the Industrial Age that may have been true. In the digital economy, it isn't.

New technologies make it possible to cut harmful emissions and provide even more growth. For example, just last week, automakers unveiled cars that get 70 to 80 miles a gallon—the

3. *Id.*
fruits of a unique research partnership between government and industry. Before you know it, efficient production of biofuels will give us the equivalent of hundreds of miles from a gallon of gas.

To speed innovations in environmental technologies, I propose giving major tax incentives to businesses for the production of clean energy—and to families for buying energy-saving homes and appliances and the next generation of super-efficient cars when they hit the showroom floor. I also call on the auto industry to use available technologies to make all new cars more fuel efficient right away. And on Congress to make more of our clean-energy technologies available to the developing world—creating cleaner growth abroad and new jobs at home.  

For President Clinton, the environment was a topic worthy of relatively lengthy discussion in the State of the Union address—and a topic seamlessly interwoven into his general themes of community and advancement in science and technology. The future of America required consideration of its environmental integrity.

Two years later, on Tuesday, January 29, 2002, President George W. Bush delivered his first State of the Union address to the nation. The context of the speech was quite different from President Clinton's last speech, focusing primarily on the nation's recovery from the September 11 terrorist attacks and from a recession. Nevertheless, many of the President's general topics were the same—the state of the American economy, jobs, the budget, voluntary service, the unity of the nation, energy, health care, improvement of schools, and welfare reform.

In President Bush's view of the United States, however, "[o]ur first priority must always be the security of the nation."  

In a speech that emphasized national security and the war on terror, President Bush mentioned the environment only twice. First, he mentioned the environment in the context of creating new job opportunities, emphasizing his energy program: "Good jobs also depend on reliable and affordable energy. This Congress must act to encourage conservation, promote technology, build infrastructure, and it must act to create energy production at home so America is less dependent on foreign oil."  

Consistent with this emphasis on domestic energy production, President Bush "had invited the president of the Teamsters, James P. Hoffa, to join the guests—chiefly

4. Id.
6. Id.
for his support of drilling in the Arctic Wildlife Refuge, which would create thousands of union jobs."\(^7\)

Second, President Bush mentioned the environment as he looked toward projects for the future, but (unlike in President Clinton’s last address) the environment was buried in a long list of agenda items for Congress to take up in 2002. Specifically, President Bush promised the members of Congress that “you and I will work together in the months ahead on other issues: productive farm policy, a cleaner environment, broader home ownership, especially among minorities, and ways to encourage the good work of charities and faith-based groups.”\(^8\)

President Bush’s State of the Union address, coming one year after he took office, thus offered little evidence that the President considers the environment to be a priority for his Administration and signaled a sea change regarding environmental issues from the last days of the Clinton Administration. Ironically, however, President Bush’s elision of environmental issues in his speech came just as pro-environmental voices began to reassert themselves after the September 11 attacks. For example, earlier in January 2002, New York Times writer Katharine Q. Seelye explicitly tied Bush “environmentalism” to attracting votes, noting that even then “[t]he peculiar thing is that while the administration is clearly attuned to the political power of the environment, some of its actions continue to suggest a heedless disregard of that knowledge.”\(^9\) Similarly, in early February 2002, Time magazine reported that, despite high public approval ratings in general from the public, forty-four percent of the American public gave President Bush grades of “D” or “F” when it came to the environment.\(^10\)

The Bush Administration’s track record on the environment during its two years in office has been spotty at best. One of President Bush’s first actions as President was to stop publication of all new administrative rules promulgated during the last few weeks of the Clinton Administration, including many sets of new environmental regulations. In a memorandum written the day President

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8. Text of President Bush’s State of the Union Address to Congress, supra note 5, at A22 (emphasis added).
Bush took office, Andrew H. Card, Jr., President Bush’s assistant and Chief of Staff, requested that “[i]n order to ensure that the President’s appointees have the opportunity to review any new or pending regulations,” heads and acting heads of executive departments and agencies should “send no proposed or final regulation to the Office of the Federal Register (the “OFR”) unless and until a department or agency head appointed by the President after noon on January 20, 2001, reviews and approves the regulatory action.”11 “With respect to regulations that have been sent to the OFR but not published in the Federal Register,” agency heads were requested to “withdraw them from OFR for review and approval.”12 Because the federal Administrative Procedures Act (APA) and other statutes generally require federal agencies to publish new regulations in the Federal Register before those regulations can become effective,13 this memorandum effectively halted many last-minute regulations from the Clinton Administration. According to the General Accounting Office (GAO), some 371 sets of regulations were subject to the memorandum, at least ninety of which were delayed as a result.14 The fates of these proposed regulations have varied, but some have yet to reappear. For example, the EPA’s proposed revisions to the Clean Water Act’s ocean discharge criteria—the first proposed revisions to these ocean pollution standards since 1980—were withdrawn from the Office of the Federal Register in response to President Bush’s regulatory review memorandum and, as of March 2003, still have not been re-proposed.

A series of environmental controversies dogged the Bush Administration’s first few months in office. The first, regarding the acceptable levels of arsenic in drinking water, arose directly out of the Administration’s forced review of Clinton-era administrative regulations. On January 17, 2001, in the last days of the Clinton Administration, the EPA announced that it would be establishing a new standard for arsenic in drinking water that would reduce acceptable levels of arsenic from 50 parts per billion (ppb) to 10 ppb—an 80% reduction.15 The EPA issued the new standard on

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12. Id.
January 22.\textsuperscript{16} However, two months later, the Bush Administration made national headlines—and created a public outcry—when it forced the EPA to withdraw the new standards in order to seek independent reviews of the science underlying the new standard and the costs it would impose on local communities.\textsuperscript{17}

Opposition to withdrawal of the arsenic standard was swift, loud, and effective. Two days after the EPA announced its withdrawal of the standard, "Senate Democrats [announced that they would introduce] legislation to reinstate [the] pending safety standard governing arsenic in drinking water that the Bush Administration proposed withdrawing."\textsuperscript{18} By mid-April, the Bush Administration had backed down: "After weeks of controversy over its environmental policies, the Bush Administration said . . . it’s considering limits on arsenic in drinking water similar to the Clinton-era limit it overruled less than a month ago."\textsuperscript{19} However, the EPA did not plan to re-issue the new rules until February 2002.\textsuperscript{20}

The delay was unacceptable. On June 28, the Natural Resources Defense Council (NRDC) filed suit against the EPA and EPA Administrator Christine Todd Whitman, alleging that the EPA had violated a June 22 congressional deadline for establishing a plan to reduce arsenic levels in drinking water.\textsuperscript{21} A month later, the House of Representatives voted to restore the Clinton-era standards for drinking water, followed by a 97-to-1 vote in the Senate on August 1 to require the tougher arsenic standards.\textsuperscript{22} By the end of August, states were beginning to act on their own, with Delaware adopting the most stringent arsenic standard for drinking water in the nation.\textsuperscript{23} In addition, scientific review was demonstrating the

\textsuperscript{16} Arsenic in Drinking Water, GROUND WATER & DRINKING WATER (EPA), at http://www.epa.gov/safewater/arsenic.html (last updated Apr. 9, 2003).
\textsuperscript{19} Traci Watson & Judy Keen, EPA to Take a New Look at Arsenic in Drinking Water, USA TODAY, Apr. 19, 2001, 2001 WL 5460535.
\textsuperscript{20} John Heilprin, Environmental Group to Sue EPA over Arsenic Standards in Drinking Water, AP NEWSWIRES, June 28, 2001.
\textsuperscript{21} Id.
\textsuperscript{23} Press Release, State of Delaware, Delaware to Lower Permissible Arsenic Levels in Drinking Water to 10 Parts Per Billion, Becomes First State to Do So (Aug.
dangers of arsenic in drinking water, including its carcinogenic properties at very low concentrations.

In the end, the EPA could not wait until 2002 to address the arsenic issue. Instead, rather quietly in the wake of September 11, it announced on October 31, 2001 that it was adopting a new 10 ppb standard for arsenic in drinking water — the same standard that President Clinton’s Administration tried to put into effect before President Clinton left office.24

Arsenic was not President Bush’s only headlining environmental battle during his first months in office. President Bush and Vice President Dick Cheney are committed to opening many new areas of the United States to oil and gas drilling and to expanding offshore oil drilling. Offshore drilling expansion made headlines in April 2001 because it was met with strong opposition from President Bush’s brother, Florida Governor Jeb Bush,25 as well as the environmental community. In July 2001, the Bush Administration dealt with Florida's objections by "reduc[ing] by 75% the size of a new offshore tract in . . . the Gulf of Mexico in response to objections from Gov. Bush.”26 However, the President Bush/Governor Bush negotiations regarding oil drilling off Florida’s coasts continued well into 2002. On May 30, 2002, President Bush announced that the federal government would spend $235 million to buy back federal oil and gas leases "in a large tract off the Florida coast and in parts of the Everglades.”27

Observers view the seemingly pro-environmental decision regarding offshore oil drilling in Florida as inextricably tied to Bush family politics: “Bush’s decision to preserve what he terms ‘some of our nation’s most beautiful national treasures’ should bolster his environmental credentials in Florida [the state that, after all, made him President], as well as help his brother Jeb, who is seeking re-election there as governor.”28 Indeed, as the Administration con-


27. Id.

28. Id. at A1-2.
continues to push for more offshore oil development, Florida stands in sharp contrast to other states with rich offshore oil reserves, such as California. California’s Governor Gray Davis is just as opposed to offshore drilling as his Florida counterpart Jeb Bush.29 Unlike Governor Bush, however, Governor Davis is a Democrat, and California has received few concessions with respect to offshore drilling.

New offshore oil leases are banned off the California coast, but the state still has 36 undeveloped leases that were issued by the federal government between 1968 and 1984. The tracts in question lie more than three miles off the coasts of Ventura, Santa Barbara, and San Luis Obispo counties.30

In August 2001, the Bush Administration decided to appeal to the Ninth Circuit a district court ruling that California’s Coastal Commission could review, pursuant to the Coastal Zone Management Act, these longstanding federal oil and gas leases.31 In fall of 2001, the Bush Administration offered California a settlement, under which some of the leases would have been extinguished in exchange for California dropping its lawsuit. Governor Davis rejected the deal in November 2001.32 Nevertheless, while the Ninth Circuit’s decision was pending, and in the wake of President Bush’s May 2002 agreement with Governor Bush, Governor Davis sought a similar deal for California,33 but was rejected by Interior Secretary Gale Norton in June.34 Affronted by the Administration’s disparate treatment of the two states, the House of Representatives stepped into the fray in July 2002, voting to amend the Department of the Interior’s spending bill “to cut off federal money needed to permit new oil drilling off the state’s coast.”35 The Ninth Circuit

29. See Martin Kasindorf, Oil-Drilling Hits Choppy Seas; Administration’s Plan to Boost Offshore Output is under Attack in Several States, USA TODAY, Mar. 19, 2002, at A03, 2002 WL 4722170 (linking California and Florida as states opposed to drilling).
33. Werner, supra note 30.
35. Id.
eventually sided with California, requiring environmental reviews of all new activity pursuant to old oil leases.\(^{36}\)

On land, President Bush’s and Vice President Cheney’s pursuit of oil and gas development created a two-year public debate over the Arctic National Wildlife Refuge (ANWR), a pristine wilderness area in Alaska. Public debates over whether ANWR should be opened to drilling plagued President Bush from the beginning of his term, with each side accusing the other of misrepresentation. In mid-February 2001, for instance, a study by the World Resources Institute argued that oil from ANWR would not help to relieve the United States of its dependence on foreign oil;\(^{37}\) by June, however, pro-drilling factions were attacking the environmental group’s figures regarding the amount of oil available.\(^{38}\) The ANWR issue emphasized partisan politics in Washington, D.C., actively pitting Democrats against Republicans, House against Senate. In March, Senator John Kerry (D-Mass.) threatened to filibuster any bill that would allow drilling in ANWR. After the House of Representatives passed an ANWR drilling bill in early August, “Senate Majority Leader Thomas A. Daschle (D-S.D.) . . . abruptly halted further committee consideration of major energy legislation after Democrats concluded there were probably enough votes on the panel to approve the Bush Administration’s plan for drilling in Alaska’s Arctic National Wildlife Refuge.”\(^{39}\)

Like offshore oil drilling, the ANWR debate continued into 2002. The issue seemed “finally” resolved in April 2002, when the Senate voted not to allow drilling in the Refuge.\(^{40}\) Undaunted, the Bush Administration has simply turned its focus elsewhere—to the Rockies\(^{41}\) and to the National Petroleum Reserve in Alaska.\(^{42}\) The latter exists on a “remote Arctic coast,” and new studies show that

\(^{36}\) California v. Norton, 311 F.3d 1162, 1172-73 (9th Cir. 2002).
\(^{41}\) Rockies Eyed as Plan to Drill Oil-Rich Refuge Heads to Defeat, AP Newswire, Apr. 22, 2002.
its deposits of oil are bigger than ANWR’s. However, “the U.S. Geological Survey said the deposits are less concentrated and more remote than ANWR’s and would prove more lucrative to exploit only with a substantial increase in oil prices,” suggesting that the ANWR debate would resurface. And it did. In the wake of the November 2002 elections, the Bush Administration toyed with adding ANWR drilling to the 2002 appropriations bill. In the end, however, the bill that Congress finally passed in February 2003 did not include provisions to allow drilling in ANWR but did pass with money approved for “pre-drilling” activities there.

Despite these ongoing issues, criticism of the Bush Administration’s environmental policies virtually halted in the wake of the September 11 terrorist attacks on the World Trade Center in New York and on the Pentagon in Washington, D.C. Silence from critics, however, did not mean that the Administration had ceased to work to weaken protections for the environment. In October 2001, for instance, the U.S. Army Corps of Engineers released new guidance on mitigation for wetlands filled pursuant to the provisions of the Clean Water Act. The guidance replaces the Corps’ previous emphasis on in-kind mitigation—replacement of filled wetlands with new wetlands similar in function and ecology—with a more flexible approach to mitigation. Fourteen environmental groups protested the new guidance, claiming “that the guidance abandons the principle of no net loss of wetlands.” In November 2001, “Interior Secretary Gale A. Norton announced . . . that she would close the federal Office of Everglades Restoration,” which “was created in the last month of the Clinton Administration to coordinate federal agencies involved in the 30-year, $7.8 billion Everglades restoration project.”

In January 2002, public criticisms of the Bush Administration’s environmental policies resumed with force, and the Bush Administration continued to make decisions regarding the environment—especially with regard to its energy and extractive resources poli-

43. Id.
44. Id.
45. Id.
47. Id.
49. Id. at 22.
cies—that continued to inspire such criticisms well into 2002. As the *New York Times* reported in early January 2002:

This week the Bush administration moved closer to relaxing the rules for air-pollution controls on dirty power plants, and it moved in a California court to promote offshore oil drilling. It took an aggressive step forward for the nuclear power industry, declaring a Nevada mountain scientifically safe for the storage of nuclear waste. And it replaced a research program for auto fuel efficiency that was showing modest success for cars on the road with a more ambitious program that won’t affect the car fleet for years, if ever, and in the meantime does nothing to cut gas consumption or promote efficiency.

These actions followed months of other pro-business regulatory actions that were hardly noticed in the post-Sept. 11 world: allowing more roads and powerline construction on public lands, weakening rules over mining permits, delaying a ban on snowmobiles in national parks, letting developers build on wetlands without replacing them.50

Indeed, the Bush Administration inspired criticism of its environmental policies on a nearly weekly basis throughout the first eight months of 2002:

- January 1, 2002: Trade journals announce that “[t]he Natural Resources Defense Council has filed suit in hopes of forcing the Energy Department to turn over documents related to the development of the Bush administration’s energy policy.”51

- January 4, 2002: “As the Bush Administration prepares to announce regulatory changes that could weaken the Clean Air Act, White House officials appear to be haunted by the ghost of controversial environmental decisions past.”52 The new rules would make it easier for facilities to modify themselves without triggering the Clean Air Act’s stringent requirements for new sources of air pollution.

- January 8, 2002: The Earthjustice Legal Defense Fund holds a conference to discuss the Bush Administration’s environmental record in its first year in office.53

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50. Seelye, supra note 9.

January 11, 2002: Bush’s Energy Secretary announces that he has picked Yucca Mountain, in Nevada, as the site for storing nuclear waste. The State of Nevada is expected to protest the decision. On the same day, President Bush signs a new law that will give $250 million per year for five years, beginning in 2003, to clean up lightly contaminated “brownfields” sites.

January 14, 2002: “The environmental community has grown increasingly concerned that the Bush Administration is quietly rolling back water, air and land protections, making changes that have gone largely unnoticed as war and the economy have dominated the headlines.”

January 14, 2002: The Bush Administration announces “that developers no longer will have to restore or create new wetlands for every acre they drain or fill. . . . Instead of requiring acre-for-acre restoration on each project, the new regulations require only that there be ‘no net loss’ of wetlands in any of the corps’ 38 districts, which are established on the basis of watersheds rather than state boundaries.”

January 15, 2002: Governor Gray Davis pledges to fight President Bush’s plans to increase offshore oil and gas drilling off the coast of California.

January 21, 2002: Criticism of the Bush Administration’s energy plan increases as news breaks that the Enron Corporation advocated at least seventeen of the policies that the energy task force adopted.

January 24, 2002: “In a flurry of assessments of President Bush’s first year in office, environmentalists largely quiet since the terrorist attacks are trying to set the stage for the 2002 elections by condemning the White House as a captive of industry and unre-

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mittingly hostile to environmental protection.”

- January 25, 2002: The Bush Administration announces that it will seek $21 million from Congress for a new program within the EPA to clean up water pollution. The plan, however, is designed to aid only ten watersheds.

- January 30, 2002: The Bush Administration announces that it will seek $100 million for a new Cooperative Conservation Initiative, “to encourage private landowners to take up conservation projects with public land managers and local communities.” Carl Pope, Executive Director of the Sierra Club, criticizes the initiative as “‘another example of a good but lower-priority program which is being funded at the expense of the basic legal obligations of the Department of the Interior.’” On the same day, the GAO announces that it will sue the White House to obtain records from the Bush Administration’s energy task force.

- February 4, 2002: When the Bush Administration announces its proposed budget, environmental groups immediately attack its allocation of money for environmental programs. “According to Friends of the Earth, the Bush administration’s 2003 budget—unveiled today—severely shortchanges environmental programs at home and abroad, and in some cases, the White House uses accounting gimmicks to mask deep cuts in environmental programs and budget increases for anti-environmental programs.” Other commentators note that President Bush’s proposed budget “seeks to speed up oil and gas development and open up more of the West for exploration.”

- February 10, 2002: Joanne Ditmer of The Denver Post asks, “Is the Bush Administration using the war on terrorism to divert public attention from the destructive activities it is carrying out to gut key environmental safeguards?”

- February 14, 2002: President Bush proposes his overhaul of air

61. Tom Kenworthy & Traci Watson, Environmentalists Take Aim at Bush Record; In Election Year, Green Groups Push Their Concerns Back into the Spotlight, USA TODAY, Jan. 24, 2002, at A02, 2002 WL 4717573.


pollution laws and "a more modest plan to deal with global warming." Environmental groups call the proposals a "gift to polluters."  

- February 16, 2002: President Bush affirms his Energy Secretary's decision to site nuclear waste at Yucca Mountain, Nevada, prompting more protests from the state.  

- February 23, 2002: On a Saturday night, the Interior Department's Administrative Review Board "took the extraordinary step of acting . . . to halt the Yellowcat seismic exploration project on Dome Plateau, right next to Arches National Park"—a project directly related to oil and gas exploration—despite the Bureau of Land Management's ("BLM") stated policy of giving priority to such projects. "In its decision, the review board rebuked BLM, charging that it had 'capriciously' ignored environmental concerns and that seismic testing alone—much less drilling—could cause irreparable harm to the desert landscape."  

- February 28, 2002: U.S. District Judge Gladys Kessler orders the Energy Department to turn over "thousands of records" relating to the energy task force to the Natural Resources Defense Council, beginning March 25 and finishing no later than April 10, 2002.  

- March 1, 2002: Eric V. Schaeffer, a twelve-year EPA employee and Director of Regulatory Enforcement, publicly resigns from the EPA, stating that "the Bush Administration has failed to crack down on companies that pour 7 million tons of toxins into the air every year" and "accusing the administration of dragging its feet on lawsuits filed against nine power companies he blamed for one-fourth of the nation's annual sulfur dioxide pollution—a gas known to cause haze, acid rain and lung ailments." On the same day, review of President Bush's proposed budget reveals $300 million cuts in the EPA's budget.

for fiscal year 2003. The largest cuts are in the EPA’s climate change program.  
• March 5, 2002: “The federal Bureau of Land Management is proposing changes to federal law that will allow it to give away some of America’s most beautiful and pristine wild lands to special interests.”
• March 13, 2002: “The Bush Administration said it opposes a House plan to make billions more available to help states with clean water projects because defense spending must take priority.”
• March 18, 2002: Environmentalists worry over proposals in the Bush Administration budget to shift the costs of contaminated site cleanups from the businesses that caused them to the taxpayers.
• March 19, 2002: Several states, such as Alaska, California, and Michigan, protest the Bush Administration’s plan to increase offshore oil and gas drilling in the outer continental shelf.
• March 20, 2002: “Even as the Bush Administration promised to renew efforts to preserve sacred American Indian sites on public land, Indian leaders cast doubt on how effective the move will be.”
• March 28, 2002: As part of continued questioning over how the Bush Administration formulated its energy policy, a senator sought disclosure from the White House regarding the energy task force’s contacts with Enron, while environmental groups sued again to force release of the task force’s documents.
• March 30, 2002: The federal government forces release of water in the drought-afflicted Klamath Basin in Oregon for farming irrigation, despite protests from environmentalists and tribes that endangered fish need the water to survive.

80. John Enders, Ore. Farmers Rejoice at Water’s Release; Conservationists, Tribes
• April 11, 2002: A review of documents that the Bush Administration released regarding its energy task force reveal that "[a]fter months of meeting with corporate executives, the Energy Department directed a staffer to make a cursory, two-day sweep of environmental groups to gather their views for Vice President Dick Cheney's energy task force."  

• April 19, 2002: After more than a year of debate and pressure by the Bush Administration, the Senate votes not to allow oil drilling in ANWR.  

• April 23, 2002: Environmental groups in Ohio criticize EPA's newly proposed rules for wetlands, asserting that the new rules will hurt water quality.  

• April 28, 2002: The Bush Administration again upsets environmentalists by rejecting a more stringent clean air plan from EPA in favor of its own Clear Skies proposal.  

• May 1, 2002: When the EPA finally proposes air pollution rules for ocean ships, environmentalists criticize the rules as being too lenient.  

• May 2, 2002: President Bush expresses support for an agriculture bill that environmental groups denounce as too costly.  

• May 8, 2002: "President Bush is endangering public lands and wildlife in proposing to cut environmental spending by $1 billion next year, critics said . . . ."  

• May 9, 2002: When President Bush proposes to use money slated for cleaning up abandoned mine sites for other purposes, environmentalists protest.  

• May 9, 2002: A federal judge invalidates new federal rules that


85. H. Josef Hebert, _EPA Proposes Limits on Air Pollution from Oceangoing Ships: Environmental Groups Say It's Too Little, Too Late_, AP NEWSWIRES, May 1, 2002.


would have made it easier to dispose of mine wastes in waters of the United States, holding the Bush Administration rules to violate the Clean Water Act.89

• May 10, 2002: Analysis of the Bush Administration’s plans for new oil and gas leases—especially offshore oil and gas leases—shows that the new leasing plans will have far more effect than the proposed drilling in ANWR. “The environmental community is crying foul, but it will have a harder time stopping the new lease offerings than it had persuading the Senate to kill ANWR drilling.”90

• May 17, 2002: Environmentalists criticize the Bush Administration for recommending against protecting any more of the Alaska Tongass region.91

• May 19, 2002: Ranchers in Wyoming protest the Bush Administration’s plans to increase natural gas drilling in Wyoming, claiming that the increased drilling will interfere with their way of life.92

• May 23, 2002: New Bush Administration rules weaken the energy efficiency requirements for air conditioners, meaning that “[s]ummers will be more expensive for consumers, [and] dirtier for the environment.”93 On the same day, the Bush Administration cancels a ban on mining in Oregon, opening 500,000 acres of federal National Forest in the southwestern part of the state to mining, despite threats to salmon.94

• May 24, 2002: A federal judge refused to dismiss a lawsuit against Vice President Cheney’s energy task force claiming violations of the Federal Advisory Committee Act (FACA).95


May 30, 2002: A group of environmental organizations, including the Earthjustice Legal Defense Fund, Environmental Defense, the Sierra Club, the Natural Resources Defense Council, the Clean Air Coalition, the Clean Air Trust, and others from Michigan, Ohio, and Georgia, joined by the American Lung Association, "formally notified EPA Administrator Christie Whitman that they planned to ask the courts to impose a timetable for the already five-year-old ozone regulation if steps are not taken within six months." The ozone standard in question has been in existence since 1997, although it was tied up in litigation until February 2001, when the Supreme Court upheld it. The environmental groups want the EPA to take the next step of "determining what counties would be unable to meet the new ozone requirements."96

June 13, 2002: "The Bush administration, in a move attacked by environmentalists and applauded by industry, announced it is relaxing air pollution regulations to make it easier for companies to expand or upgrade their facilities so they can produce more energy."97 Critics touted the proposed rules as "a victory for energy producers."98

Mid-July 2002: "The Bush administration is considering a plan to reduce federal oversight of a key Clean Water Act anti-pollution program and instead 'trust states' to clean up more than 20,000 dirty rivers, lakes and estuaries, internal Environmental Protection Agency documents show." Specifically, the Administration is considering eliminating the Clinton Administration's stringent rules regarding total maximum daily loads (TMDLs) under the Clean Water Act.99

July 2002: The Bush Administration launches a review of the National Environmental Policy Act (NEPA), promising to streamline its time-consuming and costly Environmental Impact Statement (EIS) requirement; "environmentalists fear it's a move to roll back crucial protections."100

100. Matthew Daly, Bush Administration Reviews New Environmental Law, AP NEWSWIRES, Aug. 29, 2002.
August 7, 2002: The Bush Administration announces that it is drafting "a new rule to govern the cleanup of pollution in more than 20,000 lakes, ponds, streams, and rivers across the country," despite the fact that, one month earlier, "[a] coalition of 10 of the largest environmental groups asked EPA Administrator Christine Todd Whitman . . . not to develop the new rules" but instead focus on making the old rules work.101

August 12, 2002: The Bush Administration announces plans "to allow oil and gas companies to expand beyond the boundaries of their leases at the Canyons of the Ancients National Monument in southwest Colorado." Environmentalists categorize the announcement as an example "of the administration's policy of increasing energy development on the nation's most-prized public lands."102

August 25, 2002: President Bush promotes his new forest plan, which would "allow more logging on federal lands to prevent catastrophic fires," and also threatens to change the carefully negotiated compromise Northwest Forest Plan negotiated during the Clinton Administration to protect the endangered Northern Spotted Owl.103

As the November 2002 elections approached, however, the Bush Administration scaled back its environmental work. Cynics might suggest that the Administration was simply trying to keep the environment—traditionally a Democratic issue—off the election agenda. Indeed, the Administration's June 2002 announcement that it would relax air pollution requirements prompted "[n]early half the Senate, including two Democratic presidential aspirants and three Republicans, [to] urge[ ] the administration . . . to postpone plans to ease enforcement of industrial air pollution regulations—a sign that environmental issues may be gaining prominence in the November elections."104

Nevertheless, environmental issues did not subside entirely, although the Bush Administration appeared, briefly, to be working harder to portray a pro-environment image. On September 13, for

example, "[t]he Bush administration issued emissions standards . . . that would force makers of snowmobiles and other off-road vehicles to make their products cleaner." 105 Less than a month later, however, the Bush Administration rescinded a Clinton-era ban on snowmobiles in the Yellowstone and Grand Teton National Parks. 106

Other environmentally questionable announcements appeared sporadically pre-election. On September 19, 2002, for example, the Bush Administration announced "that it will consider new rules for enforcing the Clean Water Act, prompting concern among environmentalists that the government may sharply scale back protection for hundreds of thousands of miles of small streams, tributaries, and wetlands." 107 This reconsideration stemmed from the U.S. Supreme Court's January 2001 decision in Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 108 which invalidated expansive federal jurisdiction over isolated waters. On October 21, the Bush Administration announced that "it is seeking public comment on a plan to relax environmental rules that require detailed surveys of forest life before logging of federal lands in the Pacific Northwest." 109

Moreover, whatever restraint the Bush Administration chose to exercise before the November elections, it resumed its implementation of pro-industry environmental policies with renewed vigor almost immediately after those elections occurred:

- November 22, 2002: In the wake of the elections, the Bush Administration publishes its new regulations governing new source review under the Clean Air Act, prompting an immediate lawsuit by at least three northeastern states. 110
- November 27, 2002: The Bush Administration publishes new regulations governing national forests that will allow increased logging and other uses in those forests. 111

111. Id.
say the proposed legislation would affect a combined area of 78 [million] hectares (192 [million] acres) of forest and grasslands—more than three times the size of Britain—and dismantle a generation of protective regulations.”

- December 19, 2002: The Office of Information and Regulatory Affairs (OIRA) releases a report containing 316 recommendations to twenty-six federal agencies regarding changes to their regulations. At the top of the list was the Environmental Protection Agency (EPA), to which OIRA directed sixty-five proposed changes.

- December 19, 2002: “As part of what appears to be a continuing effort to eliminate civil society representatives from trade policymaking, the Bush administration is refusing to abide by a court order and appoint an environmentalist to a key trade advisory committee,”—the Chemical Trade Advisory Committee.

- December 24, 2002: The Bush Administration announces a repeal of Clinton Administration policies regarding roadbuilding through public lands. As a result, “[t]he Bush administration, in a move that has outraged environmentalists, is about to hand a big victory to Westerners who want to use a post-Civil War-era law to punch dirt-bike trails and roads into backcountry.”

- December 31, 2002: The Bush Administration issues regulations changing the “dolphin safe” tuna labeling requirements so that tuna caught by encircling dolphins with nets can still qualify for the label, “open[ing] the way for Mexico and Ecuador, who use such encircling practices, to ship tuna to the United States.”

- January 3, 2003: The U.S. Fish & Wildlife Service withdraws a proposal to declare the flat-tailed horned lizard a threatened species, after a ten-year legal battle to list the species for protection under the Endangered Species Act.

- January 31, 2003: The EPA issues “final air emissions standards for large sea-going vessels such as oil tankers, cruise ships, and


cargo vessels that,” according to environmental group Bluewater Network, “will do virtually nothing to clean the air.”

- February 11, 2003: The Heritage Forests Campaign launches its “Don’t Kiss Off the Roadless Rule” campaign, trying to convince the Bush Administration to rethink its national forest policies.

- February 12, 2003: Kiplinger Business Forecasts predicts that the Bush Administration will: “[r]educe a Department of Energy standard that gradually increases the minimum energy-efficiency requirement for new clothes dryers and central air conditioners”; “[g]ive affected landowners more say in each stage of an Endangered Species Act rulemaking, including the economic analysis used in making designations”; “[r]equire holders of federal permits to graze on public lands to use them for actually grazing livestock and not for environmental land conservation”; “[r]emove from endangered species protections grizzly bears in Yellowstone National Park and gray wolves in the Great Lakes region”; “[r]equire further studies on a proposed rule to reduce permissible exposure limits of hexavalent chromium used in chrome plating, stainless steel welding and the pigment and dye industries”; “[e]ase regulations aimed at reducing exposure to lead paint in the residential-construction industry”; “[r]equire more cost/benefit study of proposed increases in fuel economy standards for light trucks”; “[r]equire additional ecological risk-assessment and cost/benefit analyses for proposed regulations governing rodenticides and other pest poisons”; and “[r]elax export notification requirements for chemical products that contain only negligible amounts of chemicals for which export is restricted.”

As these examples show, the Bush Administration’s priorities (to no one’s great surprise) are defense, energy, and extractive industries—oil, gas, and mining. As Symposium speaker Dr. Mamie Parker, Regional Director, U.S. Fish and Wildlife, emphasized generally with regard to the Bush Administration and the environment, “What you see is what you get.” The Bush Administration, both nationally and regionally, is pursuing known goals, consistent with the known track records of its environmental appointees. As these

examples also demonstrate, the Bush Administration's preferred tools for effecting its environmental policies have been administrative procedures and budget manipulation, not legislation. Ours is a nation of checks and balances, however, and the Bush Administration can push its agenda at the expense of the environment only so far. One such check has been the Congress, especially the Senate. As noted, both branches of the legislature voted to strengthen arsenic standards for drinking water after President Bush had the EPA withdraw the Clinton rules. Similarly, when the Bush Administration issued new rules providing for easier disposal of mining waste in the waters of the United States, a bipartisan group of House members announced that they would introduce legislation "to counteract this destructive rule change."\textsuperscript{121}

Specifically, the Senate briefly gained power as an opponent to Bush's anti-environmental policies when, on May 25, 2001, Senator Jim Jeffords of Vermont left the Republican party to become an Independent, changing the 50-50 Democrat/Republican split in the Senate into a 50-49-1 Democratic majority.\textsuperscript{122} Senator Jeffords' switch put the new Senate Majority Leader Tom Daschle in the position to block the first round of ANWR bills in 2001 and helped to ensure a Senate defeat for ANWR drilling in 2002.

The November 2002 elections, however, returned Congress to Republican control. Nevertheless, the Senate remains prominent in checking the Administration's relaxation of environmental protections. In early January 2003, for instance, Senator Barbara Boxer (D-California) announced that she would introduce legislation to counter the Bush Administration's December 2002 regulations that "gutted" the "dolphin safe" tuna labeling requirements.\textsuperscript{123}

Courts, of course, have been another check on overzealous anti-environmental policies. Citizen lawsuits have been instrumental in challenging rules deemed to violate environmental laws, such as the mining rules just discussed, and in ensuring that the Bush Administration follows proper administrative procedure. It was the Ninth Circuit, after all, that finally resolved the offshore oil drilling issues in California. Currently, ongoing lawsuits are challenging the Bush Administration's failure to release key environmental docu-


\textsuperscript{123} Kravets, \textit{supra} note 116.
ments pursuant to the Freedom of Information Act, and the Ninth Circuit undid much of the Bush Administration’s logging and roadbuilding plans in a December 2002 decision. Environmental lawsuits are projected to become an even more important tool in the future. Earthjustice Legal Defense Fund, for example, has noted that its caseload has nearly doubled since President Bush took office in January 2001, and “[t]he courts are being viewed as the last line of defense, because the Bush administration cannot be counted on to put up an active defense when industry sues to challenge regulatory actions.”

Under the United States system of federalism, moreover, states also play prominent roles in environmental regulation. In fact, the consensus of the three government panelists at the Environmental Law Symposium was that states would play a dominant role in preserving higher levels of environmental protection within their respective boundaries during the Bush Administration. Speaking in unofficial capacities, Ira Leighton, the Acting Regional Director of EPA Region 1 (“EPA New England”), Dr. Mamie Parker, Regional Director of the U.S. Fish & Wildlife Service’s Region 5, and Robert Bell, the Chief Regional Counsel for the Massachusetts Department of Environmental Protection, each discussed the states’ roles in implementing environmental protection even as they outlined federal environmental programs and appointments. Mr. Leighton, for instance, discussed a variety of projects that EPA New England is undertaking, but emphasized community-based projects to clean up toxics and watershed-level actions to improve water quality.

Dr. Parker noted that the Northeast region will “be okay”


125. See Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094 (9th Cir. 2002) (restoring the Clinton-era roadless rule on NEPA grounds); see also John Heilprin, Bush Administration Forest Plans Set Back by 9th Circuit Ruling, AP NEWSWIRE, Dec. 13, 2002 (describing the import of the decision).


127. The two private sector panelists—Mr. Dan Meyer, the General Counsel for Public Employees for Environmental Responsibility (PEER), and Mr. Christopher B. Myhrum of Bulkley, Richardson & Gelinas LLP—have contributed their own pieces to this volume.
under the Bush Administration. She pointed out that there have been few surprises in the Bush Administration's environmental policy—Gail Norton, after all, had longstanding ties to oil and cattle before she was appointed Secretary of the Interior. However, in the Northeast region, the Fish & Wildlife Service, a division of the Interior Department, was working hard to get state officials involved in its various programs. Dr. Parker also noted that the states cooperate in the Northeast, helping to ensure continued environmental protection for the region.

Mr. Bell was most effusive regarding the states' role in environmental protection, emphasizing that Massachusetts in particular had felt "little impact" from the change in the presidential administration because all states have independent authority under most of the federal environmental statutes and Massachusetts has state statutes that parallel the federal laws, often imposing stricter requirements to prevent pollution. For example, the Massachusetts laws for the protection of wetlands are so comprehensive that federal wetlands laws and regulations rarely come into play. Similarly, with respect to contaminated sites, Massachusetts has its own state cleanup laws, and although the larger sites tend to be governed by the federal CERCLA and its Superfund provisions, thousands of contaminated sites in Massachusetts have been cleaned up under state law. The new federal brownfields statute, Mr. Bell asserted, will not affect most contaminated sites in Massachusetts—although it will provide money to states to help with brownfields cleanup.

Mr. Bell did predict interactions between federal and state environmental law in the future. For example, the new arsenic standard for drinking water will affect Massachusetts because the state will have to "tighten up" its drinking water regulation. Of more concern to Mr. Bell, however, were the Bush Administration's new regulations under the Clean Air Act, which Mr. Bell predicts will make it less likely that power plants in the Midwest will be required to use the best technologies as older plants are renovated. As a result, given the prevailing air currents, Massachusetts stands to be affected by the higher levels of nitrogen oxides, which cause ozone, smog, and sulfur dioxide, which in turn causes acid rain, from these power plants.

Mr. Bell's concerns about the new Clean Air Act regulations materialized toward the end of 2002. Almost immediately after the November elections, the Bush Administration issued its long-awaited New Source Review regulations. In the words of the Houston Chronicle's Editor, "President Bush put into effect a rule that
will ease clean air regulation of oil refineries and certain other industrial plants. The new rule will allow plants to replace, alter and expand equipment without having to install the latest anti-pollution devices."

Moreover, the Bush Administration followed up in December with similar rules for the Clean Air Act’s Prevention of Significant Deterioration (PSD) program, again relaxing the requirements for more stringent regulation. Nine northeast states immediately filed suit against the Administration to challenge this rule.

As a group, however, the panelists conceded that the nation is likely to experience regional differences in the details of environmental protection as a result of the change in presidential administration and as a result of the Bush Administration’s use of administrative processes and the budget. For example, Mr. Dan Meyer, General Counsel for Public Employees for Environmental Responsibility, emphasized, as President Bush has repeatedly done, that national defense is the Bush Administration’s number one priority, with the result that the Administration has shifted, and will continue to shift, money to defense and away from environmental protection. He also pointed to the role of discretionary enforcement of federal environmental laws, noting that at the federal level the nation has “excellent environmental laws that work quite well,” but not if they’re not enforced. Mr. Chris Myhrum, the Chair of the Environmental Practice Group at Bulkley, Richardson & Gelinas LLP in Springfield, Massachusetts, opined that no president can really change environmental policy. However, presidential appointments and Executive Orders can certainly set a certain tone for the nation. Ironically, Mr. Myhrum noted, the change in presidential administration and the arsenic fiasco have both helped funding for environmental organizations.

Perhaps Dr. Parker and Mr. Myhrum together best enunciated the import of the Bush Administration for the environment. As Dr. Parker repeatedly noted, “What you see is what you get.” The Bush Administration has made no secret of its priorities, and President Bush’s environmental appointments have only underscored those priorities—energy (especially oil and gas) and, in the wake of September 11, national defense. Mr. Myhrum also noted, however,

that environmental politics is like all other politics, feeding on public image and money.

Whatever the Bush Administration may want, its particular environmental policies and decisions must be able to withstand public and legal scrutiny in order to survive. Many of those particulars have not met these political and legal challenges. The Clinton Administration's arsenic standard is now in place, drilling in ANWR was halted (at least temporarily), Bush's proposed energy policy was subject to intense scrutiny with respect to the influence of Enron and other large energy companies, and the courts have stepped in when called upon to ensure that existing statutes are followed. These events suggest that, even in the wake of September 11, the Bush Administration's view of the environment may truly be, as one New York Times writer suggested, anachronistic. One thing is for certain: the next two years will be an interesting dance of environmental politics and a president's domestic and international agenda, of states using the principles of federalism written into federal environmental statutes to set for themselves the level of environmental protection that they desire, and, one hopes, of continued citizen activism to ensure that the quality of the United States environment does not become another victim of the terrorist attacks.

130. Seelye, supra note 9.