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THE GEORGE W. BUSH ADMINISTRATION AND THE ENVIRONMENT

VICTORIA SUTTON

INTRODUCTION

On its first day, the George W. Bush Administration (Bush Administration) found itself in the midst of an environmental controversy when it set aside the arsenic in water standard that appeared in the Federal Register. The Bush Administration's review of new or pending regulations is a practice followed by all new administrations in recent history. However, it was the kind of action the media loves, and it set the stage for criticism for the new administration for each action it has taken that affects the environment—whatever the merit of the action.

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2. National Primary Drinking Water Regulations; Arsenic and Clarifications to Compliance and New Source Contaminants Monitoring, 66 Fed. Reg. 6976 (Jan. 22, 2001) (to be codified at 40 C.F.R. pts. 9, 141, 142) [hereinafter National Primary Drinking Water Regulations]. This rule was never codified because the Bush Administration suspended it in order to repeat notice and comment proceedings.


4. “Midnight regulations” are a phenomenon in both political parties; they are the flurry of regulations published at the end of an administration. President Clinton broke all records by publishing 26,000 pages of regulations from November 2000 through January 2001, breaking the record of President Carter’s Administration, which published 24,000 pages of regulations in the same period. President Clinton in the same period for the preceding three years, published only about half as many regulations. It is also the practice for incoming administrations to suspend or delay implementation of these midnight regulations. See Douglas Cox, A Proposal for Addressing Future “Midnight Regulation,” LEGAL BACKGROUNDER (Wash. Legal Found., Washington D.C.), Aug. 9, 2001.
The attacks of September 11, 2001, changed America and our concerns for homeland security. These concerns helped to drive the approval of the Yucca Mountain repository for high-level nuclear waste, an effort to centralize our vulnerabilities to an attack on nuclear facilities to one central location. This approval came after more than twenty years of study and political opposition to an unpopular, but inescapable, decision. The anthrax attacks in the fall of 2001 redirected the Environmental Protection Agency ("EPA") toward a mission in homeland defense for decontamination and water supply security to protect against biological and chemical terrorism.\(^5\)

The Bush Administration has been accused of having the "worst environmental record since our most important environmental regulations became law during Richard Nixon's administration."\(^6\) However, in a poll conducted by The Washington Post in September 2002, the President enjoyed a thirteen percent approval-over-disapproval rating on environmental issues.\(^7\) The midterm elections, which historically mean losses for the winner of the preceding presidential election, resulted in a large victory for the Republicans, and the success was attributed to the high approval rating of President George W. Bush. One could conclude from the landslide Republican victory that the voters were unconcerned about the environment. A better grasp of research interpretation might lead one to conclude, in the alternative, that the voters were showing their approval of the President's many concerted efforts designed to provide faster and more efficient movements toward environmental protection and that voters do care about the environment.

Evolving regulatory mechanisms have been utilized to achieve environmental protection, and as they ceased to be useful, regulators and the regulated community have developed new ones. The

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command-and-control structure set standards for permits and requirements which required intensive regulatory effort and personnel for enforcement. These mechanisms were used in the Clean Air Act and Clean Water Act. The use of liability provisions were utilized in the next generation of federal environmental laws which were passed in response to the Love Canal disaster; other laws—the Superfund, Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and the Resources Conservation and Recovery Act (RCRA)—created joint and several liability for the cleanup of hazardous waste releases and sites. The next generation of mechanisms built upon informational pressure which was utilized in the Emergency Planning and Community Right-to-Know Act of 1986, Title IV, and Title III. This generation of laws provided information to the public with the goal of informing the public who could then make community decisions to demand private sector responses for planning and the reduction of environmental emissions. The trading system was utilized in the Clean Air Act Amendments of 1990 for sulfur dioxide for utilities. It was so successful that it resulted in reduced emissions ahead of the deadlines. Many other incentive and trading proposals have been considered by the EPA, but few have been utilized to the extent of the recommendations made by the Bush Administration. These mechanisms are a new generation of regulations, demonstrated to be successful, with less tax-payer burden and greater environmental protection benefits.

This article will review seven major areas of environmental protection and the policies and actions taken in those areas by the Bush Administration. By examining the approach taken in such areas as water, air, natural resources, hazardous and nuclear waste, energy, environmental justice, and international environmental law, a pragmatic and comprehensive approach arises which is interconnected to the realities that the Bush Administration must deal with on a day-to-day basis. While this approach departs from the command and control regiment, it is one that seeks to implement new regulatory mechanisms that will lead to environmental progress, environmental enforcement, and ultimately a more realistic and more functional approach to environmental protection.

I. Water

A. Safe Drinking Water Act – Arsenic in Drinking Water

Days before the Clinton Administration left office, it set in mo-
tion the publication of final regulations for the maximum contaminant level standard for arsenic in drinking water, changing it from 50 parts per billion (ppb) to 10 parts per billion (ppb). ⁸ On March 20, 2001, three days before the rule was to become effective, the Bush Administration moved to withdraw the newly published standard for further study. ⁹ The Bush Administration stated that further consideration was required to evaluate the science that the new standard was based upon, as well as to evaluate the costs of implementing a 10 ppb standard. ¹⁰

On April 18, 2001, the EPA began a study of the standard, examining ranges of 3 ppb to 20 ppb. On May 22, 2001, the Bush Administration announced it would suspend the arsenic standard. ¹¹ The Natural Resource Defense Council ("NRDC") and four U.S. Senators joined in filing an action to compel the Administration to reinstate the newly published standards. ¹² However, the Bush Administration went forward with a new notice and comment proceeding and finalized the regulation, unchanged, with the proposed standard of 10 ppb on October 31, 2001. ¹³

In a move which has gone unmentioned by environmental groups, the Bush Administration closed a loophole in the arsenic standard which would have remained in the Clinton final rule. Under the Bush Administration proposal made December 23, 2002, the standard would be expressed as 0.010 mg/L instead of 0.01 mg/L, which makes clear that compliance with the new standard is to be measured to the nearest 0.001 mg/L. ¹⁴ This change prevents the possibility of "rounding down" measurements, so that, for example, 0.014 mg/L cannot be rounded to meet the 0.01 mg/L standard. ¹⁵

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⁸ National Primary Drinking Water Regulations, supra note 2.
⁹ Id.
¹² The Senators who joined the action were Barbara Boxer (D-Cal.), Harry Reid (D-Nev.), Hillary Rodham Clinton (D-N.Y.), and Jon Corzine (D-N.J.). Id.
¹⁵ Id.
B. *Clean Water Act – Wetlands*

In 1988, Vice President George H.W. Bush campaigned with a promise that there would be “no net loss” of wetlands. When in office, his Administration became the first Administration to articulate such a policy. President George H.W. Bush sought to implement that policy during his presidency. The George W. Bush Administration has made efforts to continue the fight of the first Bush Administration through a similar policy of “no overall net loss” of wetlands.  

In August 2000, the Clinton Administration proposed revisions to the nationwide permits program that would have: (1) allowed flexibility to waive the 300-foot zone requirement where there are only minimal impacts from intermittent and perennial streams involving agricultural, recreational, or stormwater management facilities, residential, commercial, or institutional developments; (2) permitted the use of vegetative buffers by developers in compensatory wetlands mitigation measures; (3) permitted an increase in discharge limitations for single family housing, utility line activities, and linear transportation projects in 100-year flood plains at the discretion of the district engineer; and (4) allowed for flexibility in waiving the acre-for-acre mitigation requirement for compensatory actions. This set of standards, however, might have resulted in an overall loss of wetlands in a zone because the standards focused on a project-by-project basis, which would not allow flexibility within environmental zones. On the other hand, the Bush Administration actions announced in August 2001 allow the thirty-eight Corps of Engineers districts to each maintain the “no overall net loss” policy within their districts. This allows flexibility in how to manage each project, as long as the district-wide actions result in “no overall net loss.”

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18. Id. at 42,071.

19. Id. at 42,081.

20. Id. at 42,080.

ment reflects the complexity of exosystems and ensures that the goal of an overall net loss is achieved.

Another example of the Bush Administration's commitment to the wetlands is its response to a court challenge to the Tulloch Rule.22 The Tulloch Rule was adopted by the U.S. Army Corps of Engineers in 1993 in response to a challenge by environmental groups to the application of the permit requirement to a developer who was draining 700 acres of wetlands in North Carolina.23 The rule required a permit for any incidental redeposit of dredged materials.24 The rule was challenged in 199725 and 199826 and held to be outside the authority granted under the Clean Water Act.27

The Bush Administration, however, has revised the Tulloch Rule consistent with the courts' holdings, to remove "incidental fallback" from the definition of redeposits of dredged material, with a final rule issued in 2001.28 This decision by the Bush Administration was based in part upon the additional loss of 20,000 acres of wetlands which has occurred since 1998.29

II. CLEAN AIR ACT

A. Clear Skies Initiative

The Clean Air Act requires that national ambient air quality standards (NAAQS) be developed to set a level of air quality to protect public health within an adequate margin of safety.30 The states are responsible for creating a state implementation plan (SIP), which sets out the manner in which the states will comply with the NAAQS within the air quality control regions (AQCRs) established in each state.31 Facilities regulated under the Clean Air Act...
Act are issued permits, which require the facilities to keep their emissions below levels set out in their permits or pay civil penalties.

The trading regulatory mechanism for the reduction of sulfur dioxide in Title IV, creates an allowance trading system. One allowance equals one ton of emissions per year, and any improvements made by a facility in reducing their emissions by a ton will result in the need for the facility to own one less allowance. This allows the facility to benefit from its reduction by selling the one allowance to another facility or new facility in need of an additional allowance. This has proven to be one of the most successful regulatory mechanisms in federal environmental law.

On July 29, 2002, the George W. Bush Administration proposed legislation—the Clear Skies Act of 200232—to implement the President’s Clear Skies Initiative,33 based upon the successes of the existing market-based, trading system in Title IV. The Clear Skies Initiative amends Title IV of the Clean Air Act to reduce further emissions from electric power generating facilities and to provide an alternative regulatory control for emissions of sulfur dioxide, nitrogen oxides, and mercury through a cap-and-trade program regime. 34

Part A of the Clear Skies Act will require the EPA to establish a trading program for sulfur dioxide, nitrogen oxides, and mercury, similar to that of the existing Acid Rain Program. It also permits the direct sale of allowances by the Administrator at a fixed price for use in meeting the requirement to stabilize emissions at current levels.35 Part B of the Clear Skies Act will retain the sulfur dioxide program, but beginning on January 1, 2010, there would be lower caps on total sulfur dioxide emissions.36 Part C of the Act will include caps for nitrogen oxides, and lower caps beginning on January 1, 2008. Part D will include lower caps on mercury allowances, beginning January 1, 2010. Lastly, Part E will establish “performance standards for all new boilers, combustion turbines, and integrated

35. Id. at 2.
36. Id. at 6.
gasification combined cycle plants.”

The proposal, which ratchets down the emissions levels, has some tradeoffs for industry. For example, requirements to obtain a new permit for upgrading facilities would be redefined to allow for more upgrading action without the attendant burden of obtaining a new permit. The requirement for best-available retrofit technology is replaced completely by the new emissions standards. The NRDC objects to this proposal, arguing that 17,000 of the heaviest polluters would avoid the complete installation of pollution-control equipment when “they modernize or expand their plants.” However, the NRDC fails to recognize the benefits of the Bush Administration proposal. The new proposal encourages incremental improvements in air quality by allowing companies to update pollution control equipment as they modernize each section of a plant. Under the old proposals, potential improvements were slowed or halted because any modernization to a facility required that the entire facility be retrofitted with new pollution control equipment, thereby leading companies to choose no updates at all.

The Clear Skies Initiative builds upon the success of the existing single pollutant trading system for sulfur dioxide. It is expected to eliminate approximately thirty-five million tons of sulfur dioxide, nitrogen oxides, and mercury emissions and to reduce overall power plant emissions an average of seventy percent from today's levels. The synergistic benefits of reductions of multiple air pollutants—nitrogen oxides, mercury, and sulfur dioxide—are expected to produce more rapid results in attaining clean air with a more rapid reduction in respiratory illnesses that are the result of air pollution.

The President of the National Environmental Trust, Phil Clapp, supported the efforts of the proposal to make utilities finan-

37. Id. at 15.
42. The National Environmental Trust “is a non-profit, non-partisan membership group established in 1994 to inform citizens about environmental problems and how they affect our health and quality of life.” About Net, The National Environmental Trust, at http://environet.policy.net/about/ (last visited Apr. 14, 2003).
cially responsible for their pollution emissions. However, he criticized language which would require for the first time that studies with a cost-benefit analysis of adding pollution controls be included with the requirement of studies of the public health. Mr. Clapp said, "This is an outrageous repeal of one of the fundamental elements of the Clean Air Act, which is that public health is a first priority, not polluter profits."43

New scientific information indicates that carbon dioxide can be controlled through increasing "sinks"44 to absorb carbon and take it out of the atmosphere, which led the Bush Administration to omit caps on carbon dioxide production. A competing bill, the Clean Power Act of 2001,45 limits carbon dioxide in addition to the pollutants regulated under the Clear Skies Act. This is unlikely to gain the support of coal-producing and coal-dependent states' Senators. For example, Senator Byrd from West Virginia, a state which is a large producer of high-sulfur-content coal, prevented the consideration of amendments to the Clean Air Act for almost a decade, because of the fear that his state's economy would suffer as a result of tougher air regulations on sulfur dioxide emissions.

B. Diesel Engines

Among the environmental regulations that the Bush Administration suspended pending further examination were the new standards for diesel fuel and heavy-duty diesel engines.46 In 2002, the Bush Administration published the regulations as promulgated by the Clinton Administration for both diesel fuel and heavy-duty diesel engines.47

The new regulations require exhaust control devices (also known as "afterburners") on heavy-duty diesel engines in the 2007 model year.48 The diesel fuel regulations require refiners to reduce

44. “Sinks” are sources in the environment which take up carbon, thereby taking it out of the atmosphere; for example, trees take up carbon dioxide providing a large resource for taking carbon out of the atmosphere. Glossary of Climate Change Terms, EPA, at http://yosemite.epa.gov/OAR/globalwarming.nsf/content/Glossary.html#Carbon_sinks (last visited May 8, 2002).
47. 40 C.F.R. §§ 80.500, 520, 86.113-07 (2002).
48. § 86.007-11.
the sulfur content of diesel fuel by ninety-seven percent from 500 parts per million (ppm) to 15 ppm, beginning in 2006. This action has prompted refiners and commercial trucking firms to fear that these regulations will lead to rapidly escalating costs to consumers and disrupt fuel supplies. Once again the Clinton Amidnight regulations in the realm of environmental protection were not all jetisoned, as some commentators would suggest. Rather, the Bush Administration was simply fulfilling their duty to review all changes before the new standards went into effect.

C. California Electric Cars

On October 9, 2002, the Bush Administration joined with the automobile industry to oppose California’s requirement that automobile manufacturers sell electric cars as ten percent of their car sales in California. California is requiring “10 percent of the vehicles sold in the 2003 to 2008 model years [to] be electric or ‘zero-emission vehicles.’” The Bush Administration argues that the Clean Air Act has preempted the regulation of fuel economy standards, and therefore California’s regulations must be vacated.

The automobile industry argues that the zero-emission vehicles are technologically impossible to produce because of the large lead-acid batteries and the short distance that these cars can travel without recharging the batteries. California offered to allow automobile manufacturers to sell hybrid cars which run partially on electricity and partially on gasoline, however, opposition to the quotas remains.

Title II of the Clean Air Act provides that the EPA will establish nationally-uniform emission standards for automobiles. This indicates congressional intent to provide a national set of standards. However, California was given special legislative provisions to develop their own clean air standards because of their particularly severe air pollution problems, caused by automobiles. The Bush

49. § 80.500, .520.
53. Id.
54. Id.
Administration has proposed a bold initiative to support the development of a hydrogen-powered automobile, which does not emit exhausts like fossil fuel-powered engineers, instead producing water as the byproduct of the energy created.56

III. NATURAL RESOURCE LAW

A. Endangered Species Act

The Endangered Species Act57 requires that federal agencies “not jeopardize the continued existence of any endangered species or threatened species or [take actions that] result in the destruction or adverse modification of habitat of such species.”58 In order for an agency to determine whether an endangered species “may be present” in the area of any proposed action, it must inquire of the Fish and Wildlife Service whether such a species exists there.59 If the Secretary of the Fish and Wildlife Service advises that an endangered species is present in the area, the federal agency must prepare a biological assessment to determine whether the species is “likely to be affected” by the federal action.60 If the determination by the agency finds that the species is “likely to be affected” then they must prepare a formal “biological opinion.”61 If the agency determines that the species would be jeopardized,62 then the project may not go forward without an alternative that avoids jeopardizing the species,63 or without implementing specific measures required by the Fish and Wildlife Service.64

When confronted with competing interests often present in the application of the Endangered Species Act, the Bush Administration has worked to achieve appropriate solutions. One such example occurred in the Klamath Falls region of Oregon where agricultural, conservationist, and tribal interests were in direct conflict. The farmers needed water from the Klamath Basin, while the threatened Coho Salmon needed that same water to survive. In ad-

58. § 1536(a)(2).
59. § 1536(c)(1).
60. Id.
61. § 1536(b).
62. § 1536(a)(2).
63. § 1536(b)(3)(A).
64. § 1536(b)(4)(ii)-(iii).
dition, the Native American Nations in the area (who held treaty fishing rights) would be deprived of the fish if the water dropped to a dangerously low level. On March 2, 2002, in a move to rescue the devastated agricultural enterprises in the Klamath Basin, the Secretary of the Interior, Gale Norton, and the Secretary of Agriculture, Ann Veneman, opened the canal headgates to release water to the irrigators, one day after the Bush Administration established the Klamath River Basin Working Group. By April 2, 2002, the Council on Environmental Quality Chair, James Connaughton, announced the formation of partnerships with The Nature Conservancy and the Klamath Basin Rangeland Trust, to develop a plan to provide water for the Klamath project.

Another example of the Bush Administration’s efforts to resolve these conflicts occurred in New Mexico, in May 2001. The New Mexico Cattle Growers Association brought an action challenging the Fish and Wildlife Service's (FWS’s) critical habitat designation for the southwestern willow flycatcher, based on FWS’s failure to consider economic impacts when designating the critical habitat. Critical Habitat Designations (CHD) are required by the Endangered Species Act and provide that the FWS perform an analysis of the economic effects of the CHD before making a final designation. The court found that economic impacts must be considered at the time of the designation of critical habitat, regardless of whether the impacts are co-extensive with other causes, such as listing a species as endangered. Since the long-standing policy of the FWS has been not to designate critical habitat at the time of the listing of an endangered species, the court considered the critical habitat designation as largely immaterial to the survival of the species.

As a result of the preceding judicial interpretation of CHD, other CHDs were challenged. The Quino checkerspot butterfly was

70. N.M. Cattle Growers Ass'n, 248 F.3d at 1284.
originally designated for 300,000 acres of critical habitat protection, but in April 2002, the FWS withdrew 128,000 acres from the original 300,000. The California red-legged frog CHD was the subject of a challenge by the Home Builders Association of Northern California on the ground that the critical habitat did not consider economic impacts. A settlement with the FWS required that the Bush Administration reduce the red-legged frog CHD from its original 4.1 million acres to 200,000 acres. In March 2002, nineteen salmon and steelhead populations were also designated for reductions in critical habitat when a challenge was brought by the National Association of Home Builders. The suit alleged "excessive" federal endangered species protections and led to a settlement reducing the protected habitat in accordance with the standard set in *New Mexico Cattle Growers Association*.

A particularly vociferous battle ensued over the Northwest Forest Plan which included CHD protection for snails, fungi, and lichens in Oregon. The Plan, a compromise between environmentalists and loggers developed in a rush to completion at the end of the Clinton Administration, included a survey-and-manage provision. This provision, at least in part, caused the Forest Service to fall short of the harvest promised to timber companies. Scientific studies deemed questionable by some were included as a last minute addition. The Bush Administration, on the other hand, has sought to "draw on sound science" as the basis for decision-making.

B. **Healthy Forests Initiative**

In August 2002, the Bush Administration released the Healthy Forests Initiative in response to the devastating fires of the year. During the summer fires, 6.3 million acres of forests burned, approximately 2100 homes were destroyed, and 21 people died. This Initiative calls for collaboration among tribal, local, state, and federal officials in implementing policies on thinning, planned

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burns, and native forest restoration projects. In support of that Initiative, on September 4, 2002, the Healthy Forests Reform Act of 2002 was introduced to provide for forest thinning projects—logging. The bill also provides for the “categorical exclusion” of forest thinning projects from the National Environmental Policy Act ("NEPA") environmental assessment and environmental impact statement requirements and the public comment period.

A compromise bill, proposed on October 7, 2002, includes “NEPA streamlining authority” for those proposed thinning projects where forested areas are near urban areas. The language of the bill defines such a wildland/urban interface (WUI) as “an area of Federal lands that: (A) meets or intermixes with areas containing humans and their homes, structures, or other human developments; and (B) may be vulnerable to wildfire.” On that same day, the compromise bill passed the House Resources Committee by a 23-14 vote.

The Bush Administration has agreed to further logging in the Northwest, following a challenge in January 2002 by the timber industry, alleging that the Northwest Forest Plan was economically harmful to the logging industry. The Forest Service and the Bureau of Land Management are revising current regulations, which provide for surveys of species of wildlife in the old growth forests. The Administration plans to revise the Northwest Forest Plan through a supplement environmental impact statement, with a final Record of Decision expected in July of 2003. The NRDC has criticized the Bush Administration for taking steps to compromise with the logging industry, stating, “This is yet another example of the Bush Administration’s eagerness to cut a deal that helps industry profit at public expense by rolling back rules that protect our national forests.” The revised regulations will enable forestry management practices of thinning and harvesting to proceed without untimely

80. Id. at 70,576.
delays which may have contributed to the devastating fires in the summer of 2002.

IV. HAZARDOUS AND NUCLEAR WASTE

A. Nuclear Waste Repository and Yucca Mountain

Since the 1940s, radioactive materials have been accumulating at sites managed by the Department of Energy. Since 1957, commercial reactors and storage facilities across the country have added to this accumulation of radioactive materials. Currently, there are 131 temporary commercial reactors and storage facilities locations in thirty-nine states.

For more than forty years, the United States has considered and evaluated various methods for safe storage and disposal of radioactive waste. Since the passage of the Nuclear Waste Policy Act of 1982, which established the process for developing geologic depositories for these wastes, no suitable site had been developed. A 1987 amendment to this Act directed the Secretary of Energy to evaluate the suitability of the Yucca Mountain site as a high-level nuclear waste depository for all of the nation's waste.

On May 7, 2001, the Secretary of Energy announced his recommendation of the Yucca Mountain site and initiated a public comment period to extend through October 19, 2001. A supplemental comment period was added from November 14, 2001 through December 14, 2001. After the recommendation by the Secretary of Energy of the Yucca Mountain site to President Bush, the Senate approved the Yucca Mountain repository in July 2002; on July 23, 2002, President Bush signed the House Joint Resolution which es-
tablished Yucca Mountain as the nation’s high-level nuclear waste repository.

B. Small Business and Brownfields

In January 2002, President Bush signed the Small Business Liability Relief and Brownfields Act,91 which amends the Comprehensive Environmental Response Compensation and Liability Act of 198092 ("CERCLA") by providing for funding for brownfields and by limiting liability for owners of contaminated properties. The President has asked to double the budget for brownfields to an amount of $200 million for fiscal year 2003.

In July of 2002, the Bush Administration implemented the first “Ready for Reuse” determination,93 which is a decision that the environmental conditions of a property are acceptable for its current use and future use as specified. Ready for Reuse determinations allow formerly contaminated sites to be reused without seeking out “greenfields”—areas which are uncontaminated—for uses which would be appropriate for these formerly contaminated properties.94 Since Superfund was passed in 1980, the inability to determine when a contaminated site was clean and closure of its status as a Superfund site had created a growing number of useless properties. The utilization of the Ready for Reuse determination is a milestone in our nation’s cleanup efforts which began in 1980.

V. Energy—Arctic National Wildlife Refuge

Congress established the Arctic National Wildlife Refuge (ANWR) in 1960, which was about nine million acres in size. It was expanded to nineteen million acres to include the coastal plains, of which 1.5 million acres was to be considered for oil and gas exploration. In 1987, the Department of the Interior concluded that the environmental impacts would be negligible on the wildlife in the area designated for oil exploration.95 To date, broad opposition to disturbing the ANWR has prevented oil exploration. However,

94. Id.
President Bush has stated his support of oil exploration in ANWR, particularly to address the need to reduce greenhouse gases through the provision of natural gas and increasing gaslines infrastructure:

We need to have an active exploration program. One of the big debates that's taking place in the Congress, or will take place in the Congress, is whether or not we should be exploring for natural gas in Alaska, for example, in ANWR. I strongly think we should in order to make sure that we’ve got enough gas to be able to help reduce greenhouse emissions in the country. See, gas is clean, any [sic] yet there is not enough of it. And we’ve got pipeline capacity problems in the country. We have an energy shortage. . . . But I will not accept a plan that will harm our economy and hurt American workers.96

With the Republicans controlling the House of Representatives and the Senate, there is speculation that the President will pursue oil exploration in ANWR again. Some Republicans, such as Sen. Chafee (R-RI) who serve on the Senate Committee on Environment are opposed to oil exploration, and in a closely divided Senate, such lack of support among Republicans leaves the question of oil exploration in ANWR in doubt. However, the events of 9/11 and the President's Energy Policy, which seeks to reduce dependence on foreign fossil fuels, puts more pressure on the need to utilize our resources in ANWR for national security reasons.

VI. ENVIRONMENTAL JUSTICE—EPA/NOBLE CRIMES INITIATIVE

Surveys of geographical locations of hazardous waste sites and illegal “midnight dumping” indicate that these activities occur disproportionately more frequently in minority communities. While environmental justice initiatives from the Department of Justice have provided some guidance for equal protection of minority interests, the National Organization of Black Law Enforcement Executives (“NOBLE”) crimes initiative seeks to address the heart of purposeful environmental crimes with the help of local law enforcement personnel.

President Bush has entered into a partnership through the EPA and NOBLE in order to create a training and public aware-

ness program to address environmental crimes in economically disad


98. Id.


advantaged areas. The partnership will focus on combating crimes through training and observation to respond to such activities as illegal asbestos and lead paint removal and illegal hazardous waste dumping.

Utilizing local law enforcement, who are close to the citizens whose lives and homes are affected by such illegal activities, will provide a broad, national initiative to begin to reduce this threat to politically disenfranchised communities. Local control and community pride are tenets of Bush Administration policy, and these efforts are consistent with that policy.

VII. INTERNATIONAL ENVIRONMENTAL LAW

A. Global Climate Change

In 1988, the United Nations formed the Intergovernmental Panel on Climate Change (IPCC) to address the climate change issue through a consideration of the science and policies for implementing policy choices to address climate change. The United States led the effort to begin a framework for a global climate convention, and the George H.W. Bush Administration made global climate change a priority. The global climate change initiative was coordinated through the Office of Science and Technology Policy for the President and was funded in 1989 budget with $133.9 million and grew to $191.5 million in the 1990 budget. The success of that Administration’s program resulted in Congress codifying the program as law, which has projected funding at a level of $4.5 billion in the President’s 2003 budget.

The current Bush Administration has approached the global climate change issue with the economic considerations necessary to ensure that we can continue to address the global climate change problem. The EPA Administrator declared her Administration’s
plan to be the "strongest, smartest, and most practical climate-change program the U.S. has ever had."\textsuperscript{103} President Bush has a three-part approach to the climate change problem: (1) resolve the uncertainties in the sciences of global climate; (2) develop and use new technologies; and (3) strengthen domestic and international efforts to become more energy efficient and less energy dependent.\textsuperscript{104} The Administration has engaged in a strategy of bilateral agreements with developed and developing nations in climate change partnerships, including China, Japan, India, Italy, Canada, and Australia.\textsuperscript{105}

Vice President Al Gore signed the Kyoto Protocol for the United States in Kyoto, Japan, although he knew that the U.S. Senate had rejected the essential principles of the Kyoto Protocol. The Senate has never since ratified the Protocol.\textsuperscript{106} The major factors which made the Protocol unacceptable were first, the economic effects of the Kyoto Protocol would be at the cost of our economy, potentially driving the nation into a recession, and second, the allowance of exemptions from targets and timetables for developing countries left developed countries carrying the majority of the burden.\textsuperscript{107}

In 2001, 160 countries met in Morocco to forge the final Kyoto Protocol, without the United States.\textsuperscript{108} The treaty requires about forty industrialized countries to reduce emissions of carbon dioxide and other greenhouse gases by an average of 5.2\% below their 1990 levels by 2012. In 2001, the United States reported emitting carbon dioxide—just one greenhouse gas—at a rate 14\% faster than in 1990. The Bush Administration fears that drastic reductions as required by the Kyoto Protocol would be devastating to the economy and to families in the United States; because prices for energy would be driven higher and higher in order to curb the rising rate of emissions.\textsuperscript{109}

President Bush has been criticized for reversing his commitment to put caps on carbon dioxide emissions, but he explained to


\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} Eric Pianin, \textit{160 Nations Agree to Warming Pact; U.S. Was on Sidelines in Morocco Talks}, \textit{WASH. POST}, Nov. 11, 2001, at A01.

\textsuperscript{109} Id.
the press in March 29, 2001, that his decision changed because the nation’s energy shortage occurred since the election. He said:

Ours is going to be an administration that makes decisions on science, what’s realistic, common-sense decisions.

For example, circumstances have changed since the campaign. We’re now in an energy crisis. And that’s why I decided to not have mandatory caps on CO₂, because in order to meet those caps, our nation would have had to have had a lot of natural gas immediately flow into the system, which is impossible. We don’t have the infrastructure able to move natural gas.¹¹⁰

The Bush Administration’s strategy establishes realistic goals toward reducing greenhouse gas emissions. The Administration has proposed an 18% reduction over the next ten years in greenhouse gas emissions.¹¹¹ Several policy approaches are used to achieve these reductions. For example, businesses can register with the Greenhouse Gas Reduction and Sequestration Registry,¹¹² and they are provided with transferable credits which would be protected from any future policy changes from subsequent administrations.¹¹³ Further, tax credits for utilization of “clean” technologies, including a 10% credit for the use of co-generation systems, are also provided in the President’s policy.¹¹⁴ Tax credits to individuals for residential solar energy systems, wind-generated electricity, and energy produced from landfill-generated methane gas contribute to the economically balanced approach.¹¹⁵ Because the President has planned these reductions in the context of the economic means to do so, the Administration hopes to reach the goals of the Kyoto Protocol without massive costs to the economy.¹¹⁶

¹¹³. GLOBAL CLIMATE CHANGE POLICY BOOK, supra note 111.
¹¹⁴. Id.
¹¹⁵. Id.
¹¹⁶. Id.
B. Regulation of Persistent Organic Pollutants\textsuperscript{117} Through International Treaties

The Bush Administration has proposed to regulate new substances added to international treaties through the EPA. The Administration offered compromise language to two Senate proposals\textsuperscript{118} in order to provide a regulatory mechanism through the EPA to allow the ratification of two treaties which seek to regulate persistent organic pollutants: the Stockholm Convention on Persistent Organic Pollutants (POPs) and the POPS protocol of the Convention on Long Range Transboundary Air Pollution\textsuperscript{119}.

The proposed language would give the EPA authority if "the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use or disposal of the chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment."\textsuperscript{120}

CONCLUSION

The Bush Administration has made significant efforts toward implementing regulatory mechanisms and has learned from successes and failures in the grand experiment of federal environmental regulation. The command-and-control regulatory approaches of the 1970s have been useful for the job for which they were created, but they were administratively unwieldy and enforcement was spotty. The public information and corporate image mechanisms of the federal environmental statutes of the 1980s were also effective for the jobs at hand, but their effectiveness is limited. The next generation of regulatory mechanisms must be a combination of incentives that have proven to be successful in the past. Such mechanisms and trading in emissions allowances are such a device. The Bush Administration has made the bold step of pushing us into the next generation of regulatory mechanisms, with the promise of the successes we need in environmental protection. As has been said, "[T]here is nothing more difficult to carry out, nor more doubtful of

\begin{itemize}
\item \textsuperscript{117} Persistent Organic Pollutants (POPs) "are a small group of organic chemicals exhibiting the combined properties of persistence, bioaccumulation, toxicity, and long-range environmental transport." Persistent Organic Pollutants, Notice of Availability, 67 Fed. Reg. 40,735 (June 13, 2002).
\item \textsuperscript{118} S. 2118, 107th Cong. (2002); S. 2507, 107th Cong. (2002).
\item \textsuperscript{119} Pat Phibbs, Administration Proposal Would Give EPA Authority Over Persistent Organic Pollutants, 26 CHEM. REG. REP. at 40 (2002).
\item \textsuperscript{120} Id.
success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order . . . .” 121 Environmental activists and politicians who hope to profit politically from an assault on the Bush Administration Environmental Policy Agenda may themselves pose the greatest threat to regulatory progress in protecting the environment.