Regulatory Underkill: The Bush Administration's Insidious Dismantling of Public Health and Environmental Protections

by William Buzbee, Robert Glicksman, Sidney Shapiro and Karen Sokol

A Center for Progressive Regulation White Paper *October 2004*

Introduction

In the 1960s and early 1970s, Congress passed a series of path-breaking laws to shield public health and the environment from the increasingly apparent dangers created by industrial pollution and natural resource destruction. Since that time, regulated corporations have made determined and concerted efforts to use their wealth and political power to diminish or even to eliminate various health, environment, and safety protections. As is documented in the pages that follow, the Bush administration has granted regulated entities unprecedented license in this area, according corporate officials *de facto* policy-making power while excluding the general public from decision-making to the fullest extent possible.

In many ways, the regulatory process provides the ideal setting for this collusion between the administration and corporate interests because there are numerous subtle and quiet ways to scuttle regulatory protections even while the laws embodying those protections remain in force. This CPR white paper illuminates the array of strategies, referred to collectively as the tools of "regulatory underkill," that the Bush administration has used to dismantle regulatory protections of public health and the environment.

The first chapter of this paper provides a general overview of the regulatory-underkill tools. The following chapters show how the Bush administration has repeatedly used these underkill tools to erode the protections provided for in the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act (known as CERCLA or the Superfund law), and the Clean Water Act. In each case, the administration has provided regulatory relief to polluting industries as furtively as possible, evading the accountability that would result from open efforts to change these statutes that the people of the United States have consistently supported. Consequently, the Bush administration, so apparently beholden to corporate interests rather than the general public, has utterly failed to "faithfully execute the laws," as required by the U.S. Constitution, and, indeed, has systematically defied those laws.

The intended and achieved consequence of this effort has been a significant weakening, and in some cases a wholesale abandonment, of many of the vital and statutorily mandated health and safety protections upon which Americans have come to rely.

For example, the Bush administration has:

- proposed a rule change that would relieve thousands of coal-fired power plants of their obligations to install technology that would reduce—by the tons—emissions of harmful airborne pollutants that are significant causes of cancer, neurological disorders, asthma, and lung disease;

- stopped prosecuting lawsuits initiated during the Clinton administration against electric-utility companies for long-standing, systematic violations of requirements to install cleanup technology, thereby permitting the companies to continue spewing out, on a daily basis, tons of pollutants that could be controlled with the legally-required technology;

- entered into a "sweetheart settlement" with the electric-utility industry in a case in which the government almost certainly would have prevailed, agreeing to issue new rules that rescind the Environmental Protection Agency's long-standing interpretation of monitoring requirements in favor of the interpretation sought by the utilities, i.e., one that effectively places monitoring authority in the hands of the regulated industry;

- withdrawn the signature of the United States from the Kyoto Protocol, an international agreement on climate

William Buzbee is a Professor of Law at Emory University School of Law. Robert Glicksman holds the Robert W. Wagstaff Chair at the University of Kansas School of Law. Sidney Shapiro holds the University Distinguished Chair in Law at the Wake Forest University School of Law. All are Member Scholars of the Center for Progressive Regulation. Karen Sokol is a Senior Policy Analyst at the Center for Progressive Regulation. Additional information about the authors appears on page 20 of this white paper.

change that would have required reductions in emissions of carbon dioxide and other "greenhouse gases" that contribute to global warming, and then suppressed scientific information on the reality of and myriad dangers of global warming;

- repeatedly fought reauthorization of a tax on the chemical and petroleum industries historically used to fund cleanups of many hazardous toxic waste sites throughout the country, shifting most the burden of paying for cleanups from the polluting industries to the general public and causing a dramatic slowdown of cleanups of the most contaminated sites in the country, endangering the health of millions of people living near the sites who continue to be exposed to noxious chemicals associated with birth defects, cardiac and pulmonary disorders, compromised immune systems, infertility, and cancer;

- filed an amicus brief urging the Supreme Court to adopt an interpretation of the law governing cleanups of toxic waste sites that would discourage voluntary cleanups by industry and thus, if adopted by the Court, would further slow down the rate at which toxic waste sites are cleaned up;

- unjustifiably used a Supreme Court decision as a pretext to adopt an interpretation of the Clean Water Act, long advocated by regulated industries but vehemently opposed by the general public, that would withdraw protection from many of this country's waters, including 20 percent of the wetlands (20 million acres) and at least 60 percent of all river miles (2.15 million miles) in the contiguous 48 states, threatening to reverse achievements already made under the Act and to preclude any possibility of maintaining and improving water quality in this country;

- issued a rule to "legalize" *ex post facto* the coal-mining industry's long-standing illegal practice of burying thousands of miles of this country's streams beneath wastes from mountaintop-mining, just in time to undermine the efforts of citizens who were successfully challenging the industry's illegal dumping in court; and

- ceased in effect to enforce the Clean Water Act, notwithstanding widespread violations of the Act by industrial facilities, many of which have discharged up to six times the permissible amount of pollutants into waters throughout the country.

None of these steps required congressional approval; most were the subject of little if any public debate. But their collective impact has been to reverse course on a number of the most significant environmental statutes passed by Congress in the last several decades with the overwhelming support of the American public. By careful wielding of the tools of regulatory underkill, the administration has succeeded in undoing years of progress in protecting public health and the environment.

Chapter 1: The Tools and Process of Regulatory Underkill

In the wake of the passage of laws protective of public health and the environment, there has emerged a cottage industry of critics who argue that regulatory policy is irrational and excessive.[1] Their claims of "regulatory overkill," which are based on the authors' estimates of the costs and benefits of government regulation, have been cited time and time again by those who seek less regulatory protection.[2] In reality, however, pervasive and effective environmental and risk regulation remains a rarity. As has been widely established, there are numerous methodological problems with the cost-benefit studies underlying claims of regulatory overkill.[3] Moreover, these studies are based on assumptions that make it clear the analysis is not neutral. The authors invariably resolve any uncertainties in favor of raising the cost of regulation and lowering the benefits. If there is an opportunity to make regulation look bad, the authors choose that option, even though regulation is perfectly reasonable under other equally plausible assumptions.

While the debate over regulatory costs and benefits has been going on, attention has been deflected away from the failure of government to regulate when it is obviously in the public interest. Most academics have been occupied with this debate, and the subject of government failures to regulate has escaped the attention of most reporters because of its complexity. Further, even if the efforts to weaken regulation do not completely escape public attention, it is often difficult to understand their significance without a sophisticated understanding of the regulatory context in which they occur. The path from identification of a pressing harm, to enactment of measures to address it, to implementation of such enactments and alleviation of the threatened harm, is fraught with uncertainty. Because the executive branch largely controls the realm of implementation and enforcement, where, as is currently the case, the administration seeks to weaken regulatory protections, it remains unlikely that a social ill, particularly one involving environmental or workplace risks, will actually be addressed. This is not to suggest that all risks will be completely ignored; someone is likely to act in some way if the public or interest groups clamor for action. But it is far from obvious that political or regulatory action will move from initial or token responsiveness to action that will effectively address societal risks or environmental problems. A regulatory initiative must move through the

legislative, regulatory, implementation, and judicial processes before protective steps actually occur. Because they require the surmounting of numerous hurdles, these processes provide many opportunities for shelving or weakening protective measures.

This chapter traces this political and legal course to highlight common regulatory-underkill tools. The Bush administration's regulatory activities between 2001 and 2004 reveal a remarkably adept use of this menu of tools to erode regulatory protections. Program after program has been weakened, shelved, derailed, underfunded or unenforced, yet often without recourse to frontal attacks on the regulatory programs. Far less visible utilization of these many mechanisms has allowed the Bush administration to undercut important regulatory programs without paying the political costs for underkill.

I. *Initiating the Political Process*

Perhaps the greatest challenge to addressing a social ill through a new regulatory initiative is overcoming citizen, interest group, and political inertia. Confronted by busy lives and excessive work burdens, we all are tempted to rest on our hands, hoping that others will address even an identified risk. This proclivity to "free ride," as economists call it, is a pervasive and tempting phenomenon.[4] If lethargy and laziness are overcome, however, there remains the challenge of prompting others to move in concert and demand political action. Without a substantial and united political voice, or a merging of calls for action by a powerful interest group, legislators, executive branch actors, and regulators will be tempted to leave the issue unaddressed.[5]

Once a political initiative gets on the legislative agenda, the initiative can still easily be blocked by a determined opposition. Where the target of regulation stands to bear substantial new regulatory costs, such as with requirements to modify the production process or a product to reduce toxic risks, it is a virtual certainty that the regulatory target will engage in a sustained attack on the proposed law. The typically less organized and less wealthy supporters of a new law may simply be unable to match the power of industry.[6] A clever legislator aided by a powerful lobby can send virtually any political initiative down a series of low-visibility dead ends through, for example, use of committee procedures, requests for more study, effective use of supermajority hurdles, or linking of a politically unpopular proposal to a risk regulation bill that might otherwise have broad public support.

Nevertheless, protective environmental and risk legislation is periodically passed despite the considerable odds against such laws. The public clamor for action sometimes will not be denied, or a galvanizing catastrophe will weaken even determined opposition, or a legislator will take the lead and seek to gain publicity by acting as an effective political entrepreneur and leader.[7] Most major environmental and risk laws have been enacted through a combination of all of these factors.[8] Most such laws will garner substantial support if they get to the end of the political process and are presented for a president's signature or veto.

II. *The Legislature's Later Derailing Opportunities*

An enacted law, however, is far from an implemented law that will make a real difference in our lives. Every subsequent step in its voyage from enactment to actual implementation requires ongoing legislative support. Many such laws provide little benefit due to a handful of common legislative strategies.

Defunding and Abuse by Appropriations Riders

The most common method of undermining an enacted law is to fail to provide adequate funds for its implementation.[9] Virtually all environmental and risk regulation laws require substantial sustained action by administrative agencies. These agencies must take often vague legislative instructions and, ideally, devise means to achieve statutory goals. Agencies require funds to staff implementation efforts, to hire consultants to conduct studies, to move regulatory initiatives through the notice and comment process, and to enforce the laws and associated regulations. Sometimes Congress will leave a law standing, but completely gut its funding mechanism. As detailed below, the leading federal hazardous waste law, known colloquially as Superfund, has been rendered impotent by eliminating the tax on polluting industries that funded virtually all aspects of the law's implementation. An agency that is generally strapped for cash, or especially an agency that is allocated inadequate funds by Congress for a particular program, is unlikely to carry out its legislative charge. Such a direct, monetary attack on a regulatory scheme is less likely to be noticed than an effort to eliminate the underlying law. Still, broad and concerted underfunding is often eventually noticed and criticized by citizen groups and politicians invested in a law's success.

While direct, broad programmatic underfunding may eventually face significant opposition, more targeted legislative action can completely block aspects of a law less conspicuously. During the past decade, a particularly popular means of derailing programs, but in a low visibility manner, has been through the use of legislative riders.[10] Such riders are typically not freestanding bills that are openly debated and visible for all to see. Instead, they commonly appear without announcement or even an open legislative sponsor.[11]

Riders are appended to other bills, often large appropriations bills that have broad support and reflect hundreds of fiercely negotiated bargains. Laws subject to legislative rider "carve-outs" are effectively rendered a nullity for certain periods or in certain areas. Risk and environmental riders will sometimes explicitly preclude an agency from working on a particular issue (such as the listing of additional endangered species), from implementing a law in a particular area, or from enforcing a law during certain time periods.[12] Because these riders do not involve a frontal attack on a popular law, and their advocates may remain unknown, the public seldom knows of these proposals in time to mount an effective opposition.

Burdensome 'Reform' Process

Enactment of so-called "regulatory reform" legislation that imposes significant new burdensome procedural requirements on agencies and regulatory participants is another recent and popular strategy to derail significant environmental and risk regulations. This strategy, like underfunding and use of riders, similarly allows a law's opponents to weaken a law without directly attacking it. Both laws and executive orders now require agencies to do additional analyses prior to enacting a regulation, including consideration of the costs and benefits of a regulation, of peer-reviewed science and "sound science," and of the burdens imposed by federal regulations on state and local governments. These additional procedural requirements further burden already overworked and underfunded agencies.[13] They also give opponents of regulation additional grounds and settings for attack. Wars of regulatory attrition can easily be won by regulatory opponents dragging out these "reform" procedures and analyses.

III. *Regulatory Slippage in Promulgating Implementing Regulations*

Laws are rarely self-implementing, and they frequently founder when their implementation is handed to an agency. The reasons for such agency inaction are many, ranging from excessive regulatory obligations, insufficient staffing, possible resistance or opposition to a new law, to simple laziness and inertia.[14] Virtually all laws in the risk and environmental regulation areas require agencies to interpret the law and to design effective implementation strategies. Invariably, targets of regulation do not surrender once they are defeated in the legislative forum. Instead, the same points of disagreement and grounds for opposition are transferred to the agency setting. Unsurprisingly, many agencies simply fail to take actions to implement new bodies of law. Federal court decisions are replete with decisions admonishing agencies to do as the law requires by meeting statutory obligations and deadlines.[15] As discussed in the following chapters, the Bush administration has used judicial settlements of cases raising issues about agency obligations and authority to weaken environmental protections.

Skewed Resources and Agency Capture

Once agencies are prodded to act by legislative enactments or perhaps by courts, the regulatory participatory process provides yet another venue in which unequal resources can skew regulatory outcomes. Targets of regulation will always participate, sometimes as individual companies, but often also through industrial associations and anti-regulation think tanks. Supporters of regulation will also participate, but rarely have anywhere near the resources of the opponents of regulation. Often, agency officials are drawn from the very industry they are supposed to regulate; the Bush administration has been particularly eager to appoint regulators who previously worked within or lobbied for reduced regulation on behalf of industry, especially the coal, oil-and-gas, and mining industries. In any event, regardless whether agency officials have ties to the industry they are charged with regulating, they will be inundated with data and criticisms by industry. Consequently, over time, the agency may become sympathetic to regulatory targets.[16] Even if not sympathetic to industry, agency officials are, like all of us, risk averse and would like to avoid public criticism or rejection in the courts. Skewed pressures can result in no agency action at all, or action that is protective of the targets of regulation.

These same skewed resources also can skew cost-benefit analyses now required for most major new regulations. Industry has major economic incentives to generate monetized costs associated with regulations and to get this information before agencies quickly. Industry also has a strong incentive to overstate the costs of regulation. Retrospective studies of regulation demonstrate that agency cost estimates, based on industry data, usually substantially overstate the costs of regulation.[17] It is far more difficult to generate the benefits side of the regulatory equation.[18] Health and environmental benefits, or foregone injuries, tend to be hard to monetize and seem more speculative than the costs of, for example, modifying a production process to reduce toxics exposures. Cost-benefit analyses thus often end up asymmetrical, with costs figures always presented and overstated, and benefits figures often unaccounted for and far understated.

Manipulating Science and Uncertainty to Justify Inaction

Agency politicization of science creates another mechanism that can derail or weaken a statute's implementation.[19] On their own, agencies can insist upon

levels of scientific certainty that are impossible, and then use this uncertainty to justify inaction or weaker actions.[20] Some statutes require agencies to consult science advisory panels in deciding on appropriate implementation methods, but often an agency uses such panels pursuant to its implementation discretion. Science advisory panels have the potential to offer sound outside opinions, a valuable check against agency error. However, if such panels become politicized and or are filled with scientists lacking top credentials, they can become a vehicle for obstruction.[21] In particular, science advisory boards are frequently staffed by scientists who are beholden to industry, sometimes even the very industry that is the target of regulation, or who are ideologically opposed to regulation. Many observers of regulation in recent years allege that politicization of science by, *inter alia*, biased advisory boards is leading to unsound regulatory actions.[22] A group of Nobel laureates recently criticized the regulatory misuse of science for just these reasons.[23]

Suppressing Information and Reducing Public Scrutiny

Agencies can further derail statutory initiatives and cause regulatory underkill by suppressing information and taking other actions that reduce public input and oversight. Agencies do have some protected latitude to engage in internal deliberative communications, but are otherwise expected to regulate in a highly public and participatory manner. Broad public access and oversight are a critical antidote to the substantial resources wielded by industry as well as to agency inertia. Agencies will, however, sometimes spend huge periods behind closed doors in formulating proposals or deliberating over comments regarding a proposed regulation. During these phases, the public's access and oversight may disappear, reducing pressure on the agency to act. As more and more regulatory initiatives disappear into a regulatory black hole, the underlying law becomes increasingly meaningless.

Such suppression of information and elimination of public oversight have been among the Bush administration's favorite underkill tools. The administration has harmed efforts to combat the increasing threat of global warming by fighting government dissemination of information about greenhouse gases and by suppressing data, opinions, and agency statements that reveal the misguided nature of the administration's choice to abandon the Kyoto Protocol, an international agreement on climate change.[24] The Data Quality Act, passed through a surreptitious rider, has been used by industry to challenge information posted by agencies on the Web about health and environmental dangers posed by such important problems as toxic chemicals and global warming.[25] Perhaps most egregiously, as discussed in Chapter 2,[26] the Energy Task Force headed by Vice President Cheney provided direct government access to industries seeking to weaken environmental regulations. Not only was the general public excluded from the Task Force; Cheney has also repeatedly denied public demands for access to information about these secret meetings with industry officials.

Antiquated Regulations and Expertise Elimination

Many regulations quickly become outdated but are never revisited by the responsible agency.[27] Agencies have numerous obligations and tend to avoid revisiting old handiwork whenever possible. The multi-year process of enacting major regulations leads many old regulations to ossify. As regulations grow more and more out of date, they may end up injurious to industry due to the regulations' poor fit with industrial reality, but they may also fail to address new risks as required by statute. Failure to update regulations is a pervasive reality that plagues all agencies, regardless of administration. An administration favoring deregulation, however, can strategically fail to update regulations and thereby undercut a law through inaction.

It is highly likely that the problem of agency inaction at the Environmental Protection Agency will be exacerbated by the Bush administration's decision to shift approximately a quarter of the Senior Executive Service staff to areas outside their previous expertise.[28] While the motives behind such a shift may have been a benign effort to keep officials "fresh," and while some officials welcomed the opportunity, such a shift undercut officials' efficacy by removing them from their areas of expertise and leaving them feeling vulnerable to retaliatory reassignment.[29] Former head of EPA enforcement Eric Schaeffer was somewhat neutral about this shift, but noted that "'you need five years in a major office to have a major impact there.'"[30] A mass shift of senior, experienced personnel is virtually certain to undercut official expertise, as well as cause regulatory delay and confusion.

IV. *Implementation and Enforcement Failures*

Much as environmental and risk regulation laws are periodically enacted despite significant obstacles, many environmental and risk regulations are eventually promulgated—most frequently where the underlying law sets deadlines and empowers citizens to enforce the law in court. Once again, however, mere promulgation of regulations is many steps removed from actual implementation and enforcement of the law and the new regulations.

A common means to turn enacted laws and regulations into reality is rolling legal obligations into a permit. Such permits tell industry what must be done and also give citizens benchmarks to determine rates of industry compliance. Despite the requirement in most laws that permits be updated

and made more stringent over time, many permit limits are never revisited once issued.[31] Whether the issuer of the permit is a federal agency or state official under a federally-delegated program, the pressure to update permits is often a low priority. Polluters hence often end up emitting levels of pollution that may comply with an unduly lax permit due to government inaction. As thousands of permits are not updated as required by law, the cumulative associated harms grow.[32] Substantial investments in staffing agencies at the federal and state levels is necessary to ensure that permits comply with the law over time. During periods of funding cutbacks, as has occurred over recent years, illegally lax and outdated permits will remain the norm.

Most federal laws to some extent delegate implementation and enforcement to state agencies. Ideally, such delegation hands authority to state actors who will be more sensitive to local needs and tradeoffs, while also reducing regulatory burdens on federal agencies. The process of delegating authority, however, often takes years and results in regulatory delays and uncertainties over which regulator is responsible. Once the handoff is completed, however, states then have considerable discretion within the bounds of federal law and regulation to tailor the law to their states' goals.[33] However, states often drop the ball for many of the same reasons that federal agencies fail to act, delay action, or issue unduly lax regulations. Furthermore, due to states' greater concern with losing local industry to another state or country, state officials often face even greater pressure to go easy on industry.[34] State officials also confront resource limitations, especially in recent years as federal monetary support for state programs has often failed to keep pace with state needs.

V. *Skewing the Law through Litigation and Collusive Settlements*

As in many areas, it is ultimately in the courts where the letter of risk and environmental laws becomes an enforced reality. The courts have been a vital forum for decades to ensure that federal and state agencies, as well as industry, comply with the law. Many laws enacted since 1970 empower citizens to enforce laws and regulations against industry and government actors who fail to comply with the law. The courts further serve as a critical venue for challenges to agency actions alleged to be "arbitrary and capricious or otherwise not in accordance with law." The courts have thus served as an essential means to make the law real.

The courts, however, have always given the government considerable deference. In theory, judicial deference to agency decisions ensures that only egregious agency failures to act or blatant refusals to apply the law and regulations meet with judicial action against the government. Such deference can be an appropriate means to prevent courts from displacing the policy judgments made by agencies based on their expertise. Furthermore, agencies are viewed as more politically accountable than judges.

Although desirable for the foregoing reasons, judicial deference provides agencies and their executive-branch litigators with the opportunity for abuse. All administrations, be they Democratic or Republican, strategically use their litigation authority. The Bush administration, however, stands out in its use of an array of litigation strategies to undermine regulatory programs. For example, courts tend to give executive-branch settlements with regulatory violators considerable deference. Recent scholarship has documented a number of collusive settlements between the government and industry, settlements that often fail to comport with the law.[35] Once protected by a final, court-approved settlement, industry is insulated from further attack. Citizen litigation against industry can be supplanted by quick and lax settlements between the government and the industry target. Such settlements weaken the reality of the law, reducing incentives for others to take seriously their regulatory obligations, and thus, over time, create a *de facto* enforced law that differs from statutory and regulatory requirements.

The government also can participate in litigation by filing "friend of court" amicus briefs even when not an official party. Due to concepts of deference, courts tend to give substantial weight to the government's view of the law even when it is not an actual litigant. As further detailed in the CERCLA chapter, the Bush administration recently filed briefs advocating a new view of CERCLA that could substantially undercut CERLCA as an incentive for responsible waste-handling and voluntary cleanups of contamination.[36] An administration, like that of Bush, that consistently seeks to weaken regulatory protections can achieve much of that goal by exploiting the tradition of judicial deference to the executive branch.

Finally, but perhaps most significantly, regulatory goals can be derailed and underenforced if citizens' enforcement roles are undercut. Many laws enable citizens to enforce the law directly as well as to prod reluctant regulators to comply with the law. But executive-branch arguments in individual cases, especially before the Supreme Court, have weakened the citizen's enforcement role. During the administrations of Presidents Clinton and Bush, executive-branch lawyers have undercut citizens' enforcement power by arguing in several key cases for more rigorous standing hurdles, as well as for expansion of several related doctrines that can limit citizens' access to the courts. Overall, executive-branch litigation arguments seeking to limit citizen recourse

to the courts have met with a sympathetic reception, especially before the Supreme Court. It is now considerably harder for a citizen to be heard in the courts than in the early 1980s. This reduced citizen access to the courts heightens the risk of regulatory underkill, as both polluters and agency regulators are now more free to act (or to fail to act) without worrying about zealous citizens forcing them to comply with the law.

As the chapters below demonstrate, the Bush administration has undercut program after program for protecting public health and the environment through recourse to a wide array of regulatory-underkill tools.

Chapter 2: Underkill of Clean Air Act Protections

More than three decades ago Congress passed the Clean Air Act ("CAA" or "Act"),[37] landmark environmental legislation borne out of the recognition that safely carrying out basic life processes—such as breathing—could no longer be taken for granted in an industrialized world.[38] Of course, since enactment, regulated industries have sought to influence federal officials charged with reining in the harmful effects of air pollution and, often, have been quite successful in these efforts. The Bush administration, however, has sought to weaken Clean Air protection to an arguably unprecedented extent in cooperation with regulated entities. The administration's effort to protect some of the nation's leading polluters has relied primarily on underkill tools. When Congress refused to pass administration-sponsored legislation to gut key CAA provisions, the administration weakened these provisions using administrative means. In areas where the administration has not sought to change regulatory obligations, it has simply stopped enforcing regulations. Where states have sought to fill in the gaps, the administration has sided with industry in arguing that the stronger state regulation was preempted by weaker federal regulation. Many of these efforts are below the waterline of press attention because of their administrative complexity. For other matters, the administration has sought to deflect press attention by timing public announcements to avoid press scrutiny, suppressing scientific information that supports the adoption of more effective controls on air pollution, or refusing to divulge information that would expose the close alliance between regulatory entities and the administration in weakening CAA regulation.

I. *Background: Overview of the Clean Air Act*

The 1970 CAA remains the core of this country's air pollution control program,[39] but Congress has significantly revised the Act since that time in response to increases both in our understanding of the severity of the public health threat posed by air pollution and in our capacity to mitigate that threat. In order to protect public health and the environment from air polluting emissions, the current version of the CAA authorizes the Environmental Protection Agency ("EPA") to regulate in three primary, interrelated ways: by type of pollutant, by type of source, and by the degree of pollution severity in a given area. States play a significant role in carrying out the national air pollution control program under the Act.

The CAA regulates emissions of various categories of pollutants; two of the most important of these are criteria air pollutants and hazardous air pollutants. Criteria air pollutants are so called because EPA establishes standards for these pollutants (known as "National Ambient Air Quality Standards" or "NAAQSs") based on "air quality criteria," which must "accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects [of the pollutant] on public health or welfare."[40] Thus, NAAQSs are maximum concentrations of pollutants in the air that EPA determines must not be exceeded so that we can "protect the public health" with "an adequate margin of safety."[41] EPA has established NAAQSs for six pollutants: ozone, nitrogen dioxides, sulfur dioxide, carbon monoxide, lead, and particulate matter. The Act specifies various methods of achieving and maintaining NAAQSs. The particular methods that apply depend on whether the pollution source is stationary or mobile; whether a stationary source is new or existing; and whether the area in which the source is located has already attained the NAAQSs. Using this regulatory template, states must develop plans ("State Implementation Plans" or "SIPs") to meet the NAAQs. EPA reviews and approves the SIPs; if a state fails to submit an adequate SIP, EPA must prepare and implement one.

Hazardous air pollutants are chemicals that, even in small quantities, are particularly deleterious to the health of humans and other species, including carcinogens (such as benzene) and neurotoxins (such as mercury). Because of the great threat presented by emissions of hazardous air pollutants and the great danger presented by accidental mass releases, the CAA requires that producers of these toxins use "Maximum Available Control Technology" ("MACT"), the most exacting technology-based standard under the CAA.

II. *Use of Regulatory Underkill Tools to Affect Standard-Setting at the Congressional, International, and Regulatory Levels*

The Bush administration has accorded considerable power over environmental policy to the polluting industries regulated by the CAA (particularly the oil-and-gas and

electric-utility industries). These industries have led the way in identifying underkill strategies adopted by the administration to achieve their objective to pollute more and clean up less. The other side of that coin is that the administration's application of the various underkill tools to the CAA has been marked by concerted efforts to shut out the general public. Indeed, under this administration, even the underkill tools that by their nature are relatively visible to the public, namely, legislative initiatives and agency rule-makings, were largely begat in meetings of Vice President Cheney's "Energy Task Force," which to all intents and purposes consisted of Cheney, other administration officials, and industry executives and lobbyists[42] whose identities, along with records of the meetings, Cheney has refused to disclose all the way to the Supreme Court.[43]

In February 2003, the Bush administration presented Congress with proposed amendments to the CAA packaged as the 'Clear Skies' bill. That appellation is belied by the bill's content, which places the electric utility industry's interest in short-term profit over the public's interest in a clean, healthy environment.

In February 2003, the Bush administration presented Congress with proposed amendments to the CAA packaged as the "Clear Skies" bill.[44] That appellation is belied by the bill's content, which places the electric utility industry's interest in short-term profit over the public's interest in a clean, healthy environment by:

- permitting electric utilities to release significantly more criteria pollutants than under the current CAA, specifically, *68% more nitrogen oxides* (NOx, the principal cause of smog linked to lung disease and asthma) and *225% more sulfur dioxide* (SO_2, which produces acid rain and soot);[45]

- failing, despite Bush's repeated promises during his 2000 presidential campaign to take protective action, to impose any limit on power-plant emissions of carbon dioxide[46] (CO_2, the greenhouse gas bearing the primary responsibility for global warming[47]);

- regulating mercury emissions with a market-based "cap-and-trade" system that is inappropriate in light of the nature of the toxin,[48] rather than treating it as a hazardous pollutant, which, according to EPA estimates, *would have led to a 90% reduction in mercury emissions* from power-plants by 2008;[49] and

- creating a loophole exempting power plants from CAA standards that require installation of modern clean-up technology whenever a new emission source is constructed or an existing source is modified.[50]

The legislation proposed by the administration to exempt the electrical-utility industry from making significant reductions in carbon-dioxide pollution is not the administration's first effort in this direction. Barely two months after being sworn in, Bush revoked the signature of the United States from the Kyoto Protocol.[51] The product of over a decade of international meetings in which the United States was a highly-influential participant,[52] the Kyoto Protocol responds to the increasingly imminent dangers of global climate change by, *inter alia*, specifying targets and timetables for reduction of greenhouse-gas emissions (including carbon dioxide) by industrialized countries.[53] Fortunately, it does not appear that the United States's withdrawal will prevent the Kyoto Protocol from entering into force.[54] However, as the nation with both the greatest responsibility for creating the global threat presented by greenhouse-gas emissions[55] and the greatest capacity to combat that threat, the withdrawal of the United States from the Protocol renders the international community significantly weaker in the battle to protect humans and the environment against the dangers of climate change.

Bush's "Clear Skies" bill has faced significant opposition in both houses of Congress, and, consequently, remains on the committee shelf. However, the administration has employed other underkill tools to "enact" the bill as a practical matter. Among these "extra-congressional" tools are regulatory rulemakings. Perhaps the most dramatic example is the administration's issuance of regulations that effectively eviscerate the CAA's "New Source Review" program ("NSR").

The NSR provisions of the CAA are based on Congress's recognition that thousands of the industrial facilities in operation at the time that those provisions were enacted would not be able to meet the Act's standards without significant, costly reconstruction. Consequently, Congress exempted existing plants from CAA standards, but, understanding that these older plants would eventually have to update their facilities or close down, required industry to install the appropriate technology to ensure that any emission sources constructed or significantly modified after enactment (i.e., "new sources") comply with the Act's pollutant limits.[56] Given that the CAA thus permitted the "grandfathering" of over 17,000 old industrial facilities,[57] NSR is essential to the efficacy of the Act's protections. However, using the related underkill tools of avoiding public scrutiny and squelching information in the form of a series of

strategically-timed announcements—namely, the week before Thanksgiving of 2002, New Year's Eve of 2002, and right before Labor Day weekend of 2003—the Bush administration quietly rendered the CAA's NSR provisions meaningless with the implementation of two regulations.[58]

In short, the Bush administration's NSR regulations contain exclusions that are so broad that they gut the NSR law as enacted by Congress. For example, under the "Equipment Replacement Provision" of the new rules, an industrial facility may modify an emission source without triggering the NSR requirement of installing clean-up technology as long as the cost of the modification does not exceed 20% of the replacement cost of the *entire* source.[59] In a *New York Times* article based on an extensive investigation of the development of the Bush administration's NSR rules, Bruce Barcott wrote that, "[t]o E.P.A. officials who worked on N.S.R. enforcement, who had pored over documents and knew what it cost to repair a generator, *the new threshold was absurd.*"[60] Former EPA official Eric Schaeffer told Barcott: "Five percent would have been too high, but 20? I don't think the industry expected that in its wildest dreams."[61]

Notwithstanding the administration's apparent attempt to eliminate effectively NSR while the nation was on holiday and other efforts to shield the new rules from public scrutiny,[62] fourteen states, local governmental entities, and public-interest organizations voiced their disapproval in federal court, arguing that the administration's NSR rules violated the CAA.[63] On December 24, 2003, the D.C. Circuit Court of Appeals stayed the Equipment Replacement Provision pending review of its legality.[64] While the stay of the regulation is a positive development, its mere issuance has underkill effects: During the Clinton administration, many electric-utility companies, faced with lawsuits brought by EPA to require them to pay substantial fines for decades of flouting NSR requirements, "were on the verge of signing agreements to clean up their plants, which would have delivered one of the greatest advances in clean air in the nation's history."[65] Once Bush administration officials announced the various rule changes, however, the power companies cut off negotiations with EPA officials and continue to emit illegally tons of the most deleterious pollutants.[66] The Office of Inspector General concluded in a report released in September 2004 that the Bush administration's efforts to amend the NSR rules "seriously hampered" pending enforcement cases against electric utilities for violations of the NSR program.[67] As Senator James Jeffords pointed out, the Inspector General's "report shows there is a blatant and willful disregard for the law": "The Bush White House has regularly sought to exempt the biggest, dirtiest power plants and other industrial polluters from legal requirements that would protect local air quality and reduce millions of tons of harmful pollutants."[68]

Thus, although thwarted in its efforts to change air-pollution law through the adoption of weakening amendments to the CAA, the administration has nevertheless succeeded in vitiating regulatory protections as a practical matter by employing multiple underkill tools. By striving to effect underkill with amendments to the CAA and with rule changes at industry's bidding while shutting the public out of the process to the fullest extent possible (i.e., the statutory, rulemaking, and "skewed access" underkill tools), the administration has sent a message to polluters that existing law is in a word, irrelevant—that violators need not fear sanction. The administration has made this message of impunity even clearer by using additional, judicially-related underkill tools to chip away at NSR and other CAA protections, tools even less visible—and thus perhaps even more insidious—than regulatory rulemakings.

III. *Use of Regulatory Underkill Tools in the Judicial System*

As discussed in Chapter 1, the Bush administration has developed an arsenal of underkill tools for use in the judicial system, where citizens and the executive branch may enforce polluters' emission-control obligations, and thereby help to protect public health and the environment from the adverse effects of air pollution. In the context of the CAA, the judicial underkill tools wielded by the administration include failing to prosecute existing lawsuits against the power companies that have been in violation of NSR provisions since their enactment decades ago, entering "sweetheart" settlements with industry rather than defending the CAA's protections in court, and filing amicus briefs supporting industry arguments in ongoing litigation to weaken CAA protections. As a result of these actions, polluters have continued to pour millions of tons of pollution into the air that could have been eliminated by active and aggressive enforcement of CAA regulations.

The NSR provisions of the CAA supply EPA with a particularly valuable mechanism for enforcing the Act's standards against polluting companies, as evidenced by a number of large power companies' indication of their willingness (prior to the Bush administration's rewriting of NSR rules) to clean up their plants in order to settle EPA-initiated lawsuits. These lawsuits undoubtedly would have resulted in the imposition of substantial monetary penalties for decades of NSR violations. Between 1999 and 2001, the Clinton administration filed cases alleging NSR violations against 51 power plants owned by nine of the nation's largest electric-utility companies, including the Tennessee Valley

Authority,[69] Southern Company, American Electric Power, Cinergy, and Duke Energy.[70] EPA had marshaled evidence of the utilities' illegal emissions in the course of an investigation launched in 1997, after officials realized that the agency had not been monitoring the construction activities of coal-fired power plants for NSR compliance.[71] According to Sylvia Lowrance, EPA's head enforcement official at the time, investigators uncovered "the environmental equivalent of the tobacco litigation," finding "*the most significant noncompliance pattern*" in EPA's history.[72]

EPA's evidence provided it with the leverage to force the companies to install the required clean-up technology, thereby significantly reducing emissions of some of the most harmful airborne pollutants. Thus, given the enormity and systematic nature of the power companies' NSR violations, compliance clearly would have had an incredibly positive impact on public health and the environment. Indeed, EPA officials anticipated that compliance with NSR technology requirements by the utilities subject to suit would achieve "not merely incremental cuts in emissions *but across-the-board reductions of 50 percent or more.*"[73] Tellingly, the utilities—many of whose executives had places at the table of Cheney's Energy Task Force and were significant contributors to Bush's 2000 election campaign[74]—would not be in violation of "NSR" as it is envisioned in the Bush administration's new rules.[75] Of course, in light of the judicial stay of the new rules, the utilities continue to violate current law. Nevertheless, EPA has remained quiet after the utilities that had not yet settled walked away from negotiations, allowing the suits to languish and the companies to continue *spewing out, on a daily basis, tons of pollutants that could be controlled with the legally-required technology*.[76]

EPA has not only failed to follow through with the prosecution of the Clinton-era NSR cases, the agency has also apparently all but entirely dispensed with this important enforcement mechanism. Indeed, during its tenure in office, *the Bush administration has filed merely one NSR case*.[77] Not insignificantly, EPA need not rely on current NSR law (and thus validate it) in order to pursue this particular case: the polluting activities of the defendant utility, Eastern Kentucky Power Cooperative,[78] are so egregious that they amount to violations even under the lax NSR rules currently being pushed by the administration.[79]

As made clear by EPA's belated discovery of the utility industry's decades-long, systemic defiance of the CAA, monitoring is essential to enforcing the obligations of the industries under the CAA and, thus, to achieving the statute's goal of protecting public health and the environment from the adverse effects of air pollution. It is not unexpected, then, that industry will often seek to minimize monitoring requirements. This effort is illustrated by *Utility Air Regulatory Group v. EPA*,[80] a recent case brought by industry trade associations (whose members include a number of electric utilities) to challenge EPA's interpretation of monitoring rules under the CAA's permit program for large air emission sources. What *is* unexpected is that the government officials charged with enforcing regulatory protections would concede that they lack the authority to engage in the monitoring that is so obviously necessary to this task. That is, however, precisely what the Bush administration did in *Utility Air*: *instead of defending its monitoring authority*, the government entered in to a settlement with industry in which EPA agreed to issue new rules that rescind the agency's long-standing interpretation of monitoring requirements in favor of the interpretation sought by the utilities, i.e., one that effectively places monitoring authority in the hands of the regulated industry.

That the *Utility Air* "sweetheart settlement" is an example of surreptitious underkill by design becomes even more apparent in light of the fact that the administration gave into the industry's demands in the suit even though, less than one year earlier, the same court (the D.C. Circuit Court of Appeals) dismissed essentially the same suit brought by many of the same industry associations (including the Utility Air Regulatory Group).[81] In fact, in dismissing this first suit, the court reasoned that the industry associations' petition for judicial review was premature because EPA was seeking notice and comment on a proposed rule containing the interpretation being challenged by industry.[82] Evidently, however, instead of following the court of appeals' advice by voicing its opposition through the administrative process, the industry associations decided the better approach would be to file suit against EPA again. Although the logic of that choice may not be readily apparent, it turned out to be a remarkably prescient move on the industries' part. Not only did EPA withdraw the proposed rule containing the challenged interpretation; the agency issued a rule containing the interpretation desired by the utilities and other industries represented in the suit.[83] Furthermore, it was the settlement agreement—and not the new rules that ostensibly arose from it—that EPA published in the Federal Register for notice and comment.[84]

Because the public (other than utilities and other industries) was not given an opportunity to review and comment on the new monitoring rules, environmental and public health groups have challenged the rules in court.[85] In a statement endorsing the suit, Representative Henry Waxman expressed his dismay that "[a]fter years of carrying out [the CAA's monitoring] provisions" as Congress intended, "*EPA is now gutting the monitoring requirements through a new and*

tortured interpretation of the Act."[86] More specifically, according to Waxman, in issuing the new rules,

> [t]he administration is illegally eliminating pollution monitoring requirements that EPA and states need to enforce the law and protect the public. We can't control pollution unless we know it's occurring. EPA's rule allows industry sources to avoid measuring their pollution levels, so no one will ever know when they are illegally polluting. The result will be more air pollution, and more damage to Americans' health.[87]

Once the litigation façade is penetrated, the events surrounding *Utility Air* reveal themselves as yet another manifestation of the regulator/regulated conflation that has pervaded the underkill tactics of the Bush administration. Beginning shortly after Bush was sworn in, with Cheney's Energy Task Force, this increasing obliteration of the line between federal regulators and regulated industry has placed a greater enforcement burden on the states. As mentioned in the introductory section to this chapter, the states share enforcement responsibility with the federal government under the CAA. With increasing frequency, state and local governments have looked to the judicial system to enforce and defend CAA protections. As New York Attorney General Eliot Spitzer stated shortly after New York and three other states sued a power company to force it to install pollution-control technology required under NSR, "From Day 1, the Bush administration has tried to eviscerate and undercut the Clean Air Act. We at the state level will fulfill the critical policy mission of ensuring that the air we breathe is clean."[88]

Ironically, it is in this context, where state and local governments seek to enforce CAA protections, that the Bush administration has demonstrated a willingness to assert its "regulator" role, albeit for the purpose of effecting regulatory underkill and weakening controls on industries that pollute the air. Perversely, but not surprisingly, instead of applauding state efforts to promote cleaner air, the administration has argued that such efforts are illegal because state regulation is preempted by the CAA. This approach is designed to leave polluters as free of obligations to clean the air as possible. A recent example is the administration's bolstering of the industries' position before the U.S. Supreme Court in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*.[89]

In *Engine Manufacturers*, trade associations representing automobile-engine-manufacturing and oil companies challenged "fleet rules" of a political subdivision of California mandating that vehicles purchased to carry out public functions (such as street-sweeping, mass transit, and waste collection) meet certain emission standards.[90] After the district court and the Ninth Circuit Court of Appeals upheld the Management District's emission rules, Engine Manufacturers petitioned the Supreme Court for review.[91] In its amicus brief as well as in oral argument, the administration threw its weight behind the industries' contention that the fleet rules were of the sort that could be issued only by federal authorities under a certain CAA provision.[92] Agreeing with the industries and the administration, the Court reversed the Ninth Circuit's judgment upholding the fleet rules.[93] Although the opinion does not indicate the extent to which the Court was influenced by the administration's advocacy of the industries' position, it bears mention that the Court generally accords substantial deference to the government's arguments as amicus curiae.[94]

IV. *Conclusion: CAA Underkill*

The foregoing is neither, on the one hand, an exhaustive account of the Bush administration's use of various underkill tools vis-à-vis the CAA, nor, on the other hand, a mere recitation of isolated examples. While the public's attention has been focused on fighting the administration's more visible attempts to undermine protections against air pollution by changing existing law through legitimate—i.e., public—means (e.g., asking Congress to amend the CAA or, to a somewhat lesser degree, publishing new NSR rules for notice and comment), the administration has in fact succeeded in vitiating those protections through less visible means. It has employed a dual strategy of declining to enforce existing law (e.g., failing to prosecute existing suits against utilities for NSR violations) while at the same time changing that law by illegitimate means—i.e., out of the public's eye (e.g., issuing new monitoring rules without notice and comment, purportedly pursuant to an agreement with industry "settling" a case in which the government almost certainly would have prevailed). As the Bush administration governs pursuant to the direction of industry, rather than the CAA, breathing becomes an increasingly dangerous activity in this country.

Chapter 3: Underkill of Protections Against Toxic Waste Under CERCLA

Among the public health and environmental protections that have been undermined by the Bush administration are those embodied in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[95] CERCLA was enacted in response to the nation's horrifying realization in the 1970s that U.S. industry had improperly buried tons and tons of toxic substances at sites throughout the country and that, consequently, there

were many people were living—breathing, eating, drinking—in cesspools. Two basic concepts motivate CERCLA's provisions: first, that there must be a system in place on a national level for prompt cleanup of hazardous waste sites, and second, that those responsible for creating the hazardous waste should pay for the costs of cleaning it up.[96]

Relying on underkill tools, the Bush administration has undermined the statutory intent that those companies responsible for toxic waste sites be held liable for the costs of cleaning them up. The administration has failed to request reauthorization of a tax on the petroleum and chemical industries that was used for years to fund cleanups, dramatically reducing the number of toxic waste sites that the government can clean up. The administration has also intervened in a lawsuit pending before the Supreme Court in order to argue that a company that voluntarily cleans up a waste site cannot seek to have other companies pay for some of the cleanup costs where they are also responsible for dumping chemicals into the same site. If the Court agrees with the administration, many fewer corporations will be willing to engage in voluntary cleanups, which will increase the burden on the government to arrange and pay for the cleanup of those sites. These actions have received little press attention, but they are important to the health and safety of the American public. Thousands and thousands of toxic waste sites that have been identified have not yet been cleaned up—so many, in fact, that millions of Americans live within four miles of a contaminated site.

I. *Background: Overview of CERCLA*

The environmental crisis motivating passage of CERCLA was epitomized for the nation by Love Canal, a neighborhood in Niagara Falls, New York from which about 900 families were evacuated after water contaminated with toxic chemicals emerged from the ground, infiltrating an elementary school, backyards, and basements.[97] It turned out that in the 1940s and 1950s, Hooker Chemical and Plastics Corporation (predecessor of Occidental Chemical Corporation) had dumped 21,800 tons of over 80 types of chemical into the abandoned 19th century canal that the Niagara Falls neighborhood had been built on and around.[98] Recognizing that the nation was ill-equipped to deal with the enormous scope and danger of the Love Canal disaster, President Carter declared national emergencies in 1978 and 1980, and soon thereafter Congress passed CERCLA.[99]

Pursuant to CERCLA, EPA may force responsible parties to clean up contamination by issuing an administrative order or bringing a judicial action against them.[100] Alternatively, EPA may perform the remediation itself using funds from the Hazardous Substances Superfund Trust Fund ("Superfund").[101] This Superfund option is particularly important, for example, in cases in which responsible parties are not known, no longer exist, or lack the resources to perform remediation, or in cases of public health emergencies requiring immediate action. Historically, CERCLA, as it was originally adopted and subsequently amended, ensured the availability of funding for such cases while adhering to the "polluter pays" principle by authorizing appropriations to the Superfund from taxes on petroleum and certain chemicals and from a corporate environmental income tax.[102] These taxes expired in 1995, but there was little impact initially because the Superfund had a surplus of nearly $4 billion in that year.[103] Because Congress has declined to reauthorize the Superfund taxes each year since their expiration, however, this surplus has dwindled, necessitating a continuing increase in the amount appropriated to the Superfund from general revenues.[104] As of the end of fiscal year 2003, the surplus from Superfund taxes was completed depleted.[105]

II. *Underkill of the 'Polluter Pays' Principle at the Congressional Level*

In contrast to the Clinton administration, which repeatedly requested reauthorization of the Superfund taxes, the Bush administration has never requested reauthorization in its budget proposals—notwithstanding the acute need for the taxes after Superfund's surplus ran out. Environmental groups have pointed out that, without the dedicated taxes, the Superfund program will have to compete with other EPA programs for funding: "*The net result is that taxpayers are forced to foot the bill for the three out of ten Superfund cleanups where there is no responsible party, and EPA has no choice but to slow down toxic cleanups at other sites*."[106] As one former resident of Love Canal stated in responding to the administration's recent decision to declare the Love Canal cleanup complete, "This is a way for them to talk about how this is a turning point and that we're cleaning up these sites when in fact there's no money to clean up these sites [and consequently] we have less cleanup . . . ."[107]

Numbers bear out the Love Canal resident's assertion: Since President Bush took office, the number of cleanups of sites on the National Priorities List ("NPL")—those sites that EPA deems the most seriously contaminated—has dropped precipitously. Specifically, *the average number of NPL sites that EPA cleaned up per year plunged from 87 sites during the1997-2000 period to only 43 sites during the 2001-2003 period—a 50% reduction.*[108] Tellingly, the administration has adjusted its cleanup goals to accommodate this trend of descent. After falling far short of its goal of 75 cleanups for 2001, when it completed only 47, EPA adjusted its 2002 cleanup goal from 65 to 40.[109] The administration then kept 40 sites as its cleanup goal for 2003, 2004, and 2005.[110] The slowed pace

of NPL site cleanups can have devastating impacts on people's lives. *One quarter of the people in the United States live within four miles of a toxic waste site on the NPL.*[111] Moreover, *EPA "has identified 44,000 potentially hazardous waste sites and continues to discover about 500 additional sites each year."*[112] The slower the cleanups, the greater the danger to the health of the millions of people who remain exposed to toxic substances.[113]

III. *Underkill of the 'Polluter Pays' Principle at the Judicial Level*

Even in the seven out of ten cases of EPA-initiated cleanups in which the responsible party is known, taxpayers are not necessarily relieved of the burden of paying for cleaning up toxic waste sites. In such cases, EPA may bring an action to recover costs from the polluters and replenish the Superfund,[114] but cost recoveries have declined during the Bush administration.[115] Superfund revenue from cost recoveries averaged $304 million per year during the 1995-2000 period, but dropped to $205 million in 2001 and to $248 million in 2002.[116] Cost recoveries plunged even further in 2003, totaling only $147 million.[117] And *the administration has projected cost-recovery revenue for 2004 and 2005 at a mere $125 million, the lowest amount in the past ten years*.[118]

EPA-initiated toxic cleanups are not the only casualty of the Bush administration; cleanups voluntarily performed by responsible parties are threatened as well. Voluntary cleanups are particularly helpful in working toward fulfilling CERCLA's purpose of prompt cleanup of toxic sites because each case in which a responsible party initiates cleanup voluntarily is a case in which the EPA does not have to expend its (increasingly) limited funding on cleanup, finding responsible parties, or enforcement actions. Voluntary cleanup may be desirable to a responsible party because it believes that overseeing the remediation of its property will cost less than waiting for EPA either to clean up the site itself (and then being required to reimburse the government for its cleanup costs) or to order clean up by the responsible party (and then being required to pay EPA's oversight costs). A voluntary cleanup also reduces the spread of hazardous-substance contamination and attendant risks to neighbors and the environment, especially groundwater. A voluntary cleanup thus can eliminate regulatory risks, avoid higher bureaucratic costs, alleviate environmental contamination, and also make tort liability far less likely.

The slowed pace of NPL site cleanups can have devastating impacts on people's lives. One quarter of the people in the United States live within four miles of a toxic waste site on the NPL. Moreover, EPA 'has identified 44,000 potentially hazardous waste sites and continues to discover about 500 additional sites each year.' The slower the cleanups, the greater the danger to the health of the millions of people who remain exposed to toxic substances.

In the many cases in which multiple parties are responsible for contamination of a given site, however, one party is unlikely to perform a cleanup voluntarily without the assurance provided by a right to seek contribution from the other responsible parties for their fair share of the cleanup costs. CERCLA contains a contribution provision that has repeatedly been invoked successfully by responsible parties who have initiated cleanup voluntarily,[119] but in a recent Supreme Court case, the Bush administration has taken the position that this statutory right to contribution is not applicable to voluntary-cleanup situations. Rather, according to the administration, a party may not seek contribution unless that party has already been the subject of an enforcement action under CERCLA.

The case in which the administration advocates that parties who voluntarily perform cleanups be denied the right to contribution is *Cooper Industries, Inc. v. Aviall Services, Inc*.[120] *Aviall* arose out of Aviall's discovery that property it had purchased from Cooper was contaminated as a result of both Aviall's and Cooper's activities in the airline engine maintenance business. Aviall reported the contamination to the Texas environmental agency and began cleaning up the site under the agency's instructions. After spending millions of dollars in its remediation efforts, Aviall filed a suit in district court seeking contribution from Cooper under section 113 of CERCLA.[121] Holding that a party's right to seek contribution under section 113 is conditioned on the party's being subject to a CERCLA civil action, the district court granted summary judgment in favor of Cooper. A divided panel of the Fifth Circuit affirmed, but was reversed on rehearing by the full court.[122]

The majority agreed with the dissenting judge from the earlier panel decision that Congress intended to create a broad contribution right that is triggered whenever a potentially responsible party ("PRP") has incurred cleanup costs, regardless whether that party has been sued under CERCLA to perform or pay for the cleanup.[123] The majority further noted that conditioning a party's section 113 right of contribution on the party's being subject to a CERCLA suit would "create substantial obstacles to achieving the purposes of CERCLA—not only by slowing

the reallocation of cleanup costs from less culpable PRPs to more culpable PRPs and by discouraging voluntary expenditure of PRP funds on cleanup activities, but by diminishing the incentives for PRPs voluntarily to report contamination to state agencies."[124]

On January 9, 2004, the Supreme Court granted Cooper's request that it hear the case.[125] The Bush administration filed an amicus brief supporting Cooper's position that section 113's right to contribution is limited to cases in which the party that has incurred cleanup costs is subject to a CERCLA civil action. Like the decline in the number of cost-recovery actions that have been brought under the Bush administration, the amicus brief submitted by the administration in *Aviall* is less visible than the President's refusal to request reauthorization of the Superfund taxes, but it has the potential to have a similarly destructive impact on the effectiveness of CERCLA in protecting public health and the environment. In the words of the dissent from the Fifth Circuit panel that denied Aviall's contribution claim, *the government's position frustrates "the overarching goal of CERCLA [ ] to create strong incentives for responsible parties to perform cleanups of sites without waiting for the hammer of litigation to drop."* [126] Indeed, restricting section 113's contribution right "*encourages* PRPs to postpone, defer, or delay remediation and to 'lie behind the log' until forced to incur cleanup costs by (federal) governmental order, either administrative or court."[127] This result is particularly problematic given the dramatic reduction in the number of such governmental orders that have been issued under the Bush administration and the waning ability of the federal government to finance cleanups due to a depleted Superfund.[128]

Moreover, the limitation of CERCLA's right to contribution urged by the administration would also seriously impede the states' ability to clean up the increasing number of contaminated sites being neglected by the federal government because of the funding shortage. Particularly in light of the current budget crisis that states are experiencing, "state cleanup programs generally present a feasible alternative (to the federal program) only when a viable and cooperative responsible party has been identified to fund and perform the cleanup."[129] *Even if viable responsible parties are identified, however, they are unlikely to cooperate with state officials by paying for cleanups if there is no right to contribution in the absence of federal action*. Encouraging voluntary cleanup by responsible parties (whether independently of or in conjunction with a state cleanup program) is increasingly vital to carrying out CERCLA's purpose of prompt cleanups. If the Supreme Court upholds the position taken by the government in its *Aviall* brief, parties will be much less likely to perform voluntary cleanups. The result almost certainly will be that cleanups of the most toxic sites in the country will slow down even further than they already have because of the depletion of the Superfund.

IV. *Conclusion: CERCLA Underkill*

By using various underkill tools in effect to abrogate the "polluter pays" principle on which the efficacy of CERCLA depends, the Bush administration has surreptitiously shifted the burden of paying for the cleanup of the environmental catastrophes that Congress intended CERCLA to address from those who caused the contamination to the general public. These same tools have also dramatically slowed down the pace of toxic waste site cleanups, thereby endangering the health of millions of people across the country who are exposed to toxic waste on a daily basis.

Chapter 4: Underkill of Clean Water Act Protections

Along with the CAA and CERCLA, the Clean Water Act ("CWA" or "Act")[130] is a fundamental part of this country's effort to address the deleterious effects of industrial activity on public health and the environment. Although implementation of the CWA has been tremendously successful in cleaning up this nation's surface waters, there remains much to be done,[131] and constant vigilance is necessary to preserve the progress that has been made. Unfortunately, the Bush administration has undermined CWA protections with the use of underkill tools, threatening to reverse achievements already made under the CWA and to preclude any possibility of continuing improvement of water quality in this country.

As in the other areas, the administration's efforts have been difficult to perceive by the media and the public because of their complexity and the tendency of the administration to implement its environmentally damaging decisions in a manner that avoids public scrutiny. Behind this shield of complexity and secretiveness, the administration has interpreted the CWA in a manner that excludes many waterways from CWA regulation altogether and that permits mining companies to dump their wastes into rivers and streams without the limitations imposed by prior regulation. Other underkill efforts are not noticed because they consist of many small steps. For example, the administration has in effect stopped bringing CWA enforcement actions against polluters.

I. *Background: Overview of the Clean Water Act*

Originally enacted as a set of amendments to the Federal Pollution Water Control Act, the CWA provides the framework for the current national program for controlling

surface water pollution.[132] In order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[133] Congress not only mandated strict limitation and monitoring of the discharge of pollutants into waters, but also provided for strong enforcement of CWA standards. More specifically, the CWA prohibits *all* discharges of water pollutants into "waters of the United States" unless the discharge is specifically authorized by one of two types of permit.[134] These national permit programs are designed to ensure that individual sources of water pollution comply with the CWA's limitations on pollutant discharges.

The first of the two permit programs, known as the National Pollutant Discharge Elimination System ("NPDES"), administers national, technology-based limits on pollutant discharges from industrial facilities and publicly-owned sewage treatment plants. The degree of control required depends on the type of source (e.g., petroleum refinery, power plant, chemical-manufacturing plant, or municipal sewage-treatment plant) and the type of pollutant (e.g., a "conventional" pollutant such as bacteria from human and animal waste[135] or a "toxic" pollutant such as heavy metals and pesticides[136]).[137] The other CWA permit program governs the discharge of dredged or fill material into the waters of the United States and is administered by the U.S. Army Corps of Engineers ("Corps") under EPA's guidance.[138]

Having concluded that "[a] major weakness of the prior federal program (for control of water pollution) lay in the area of enforcement," Congress set out "to ensure vigorous enforcement" with the passage of the 1972 amendments that became known as the CWA.[139] Thus, the CWA provides that, whenever EPA finds "any person" is in violation of the Act, it "shall issue an order requiring [the violator] to comply" or "shall bring a civil action."[140] Furthermore, the CWA's citizen-suit provisions authorize and encourage citizen enforcement to supplement government enforcement initiatives.[141]

II. *Underkill at the Rulemaking Stage*

Because of the strict standard-setting, oversight, and enforcement made possible by the CWA's blanket prohibition of all discharges of pollutants into the waters of the United States without a permit, the most efficacious way to undermine CWA protections would be to narrow the reach of the permit systems. And that is precisely what the Bush administration has done. It has replaced the long-standing, broad definition of "waters of the United States," which governs the scope of both the NPDES and dredge-and-fill permit programs, with a much more limited one. To understand fully the grave implications of the administration's redefinition, some background regarding CWA "waters" is necessary.

The CWA applies to the discharge of pollutants into "navigable waters," which the Act defines as "waters of the United States, including the territorial seas."[142] Congress understood that, in order to achieve the CWA's goal of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters,"[143] the "waters" to which the CWA applies must be understood in the "broadest possible" sense.[144] Accordingly, as the Supreme Court recognized in *United States v. Riverside Bayview Homes, Inc.*, one of its landmark CWA cases, "waters of the United States," rather than "navigable waters," is the operable term for the purpose of carrying out Congress's intent: "Although the Act prohibits discharges into 'navigable waters,' the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import."[145] Consistent with this understanding of the CWA, EPA and the Corps of Engineers have adopted broad interpretations of "waters of the United States" in their regulations implementing the CWA. For example, in its current regulations governing the dredge-and-fill permit program, the Corps defines "waters of the United States" not only as "waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce,"[146] but also as "all other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce"[147] and the tributaries to such waters.[148]

The fluid nature of water and the interconnectedness of waterways make such an expansive definition of CWA "waters" a necessity for effective control of water pollution. As the Corps has explained:

> The regulation of activities that cause water pollution cannot rely on . . . artificial lines . . . but must focus on waters that together form the entire aquatic system. Water moves in hydrologic cycles, and the pollution of [one] part of the aquatic system . . . will affect the water quality of the other waters within that aquatic system.[149]

Undoubtedly because the administration was aware that there would be significant public opposition to any attempt to narrow the CWA's scope by redefining "waters of the United States," *the administration's underkill at the rulemaking stage involved two deceptive twists*. First, the administration speciously relied on an unnecessarily expansive reading of a Supreme Court opinion to justify the new definition. Second, it issued

a "memorandum" instructing EPA and Corps field staff to apply the new definition even though the agencies have not promulgated a rule containing the new definition, thereby eliminating the normal opportunity afforded by the rulemaking process for the public to comment before the change goes into effect.

In *Solid Waste Agency of Northern Cook County v. United States* ("*SWANCC*"),[150] the Supreme Court held that the Corps could not assert CWA authority over the discharge of waste into isolated wetlands located on an abandoned gravel pit simply because the pit provided a habitat for migratory birds.[151] Consistent with the long-standing understanding that CWA "waters" should be interpreted broadly, *the Court limited its holding to the specific case at hand*. The Corps had determined that various localities could not use the gravel pit for waste disposal without meeting the requirements for a permit.[152] In doing so, the Corps relied on language in a 1986 rule "clarifying" that the "all other waters" definition quoted above[153] included waters, such as the gravel pit, that are used as habitat by migratory birds. This "clarification" was referred to as the "Migratory Bird Rule."[154] The Supreme Court concluded that Congress did not intend CWA "waters" to include "isolated ponds, some only seasonal, wholly located within two Illinois counties . . . *because* they serve as habitat for migratory birds."[155] The decision thus precluded the Corps from relying on the Migratory Bird Rule as a justification for requiring a dredge-and-fill permit.

The Bush administration has gone well beyond that narrow holding. After *SWANCC*, the Bush administration prohibited EPA and Corps officials from asserting regulatory authority based on the Migratory Bird Rule. But *the administration also misrepresented the holding of SWANCC by insisting that the decision had narrowed the definition of what constitutes a regulated waterway in a manner that drops many waterways from regulation altogether, even if the basis for including the waterways within the regulatory program in the first place had nothing to do with their use as migratory bird habitat.* Instead of continuing the decades-long practice of determining the scope of the CWA jurisdiction by focusing on the meaning of the term "waters of the United States," the administration exploited the *SWANCC* decision by issuing a guidance memorandum that essentially instructs EPA and Corps officials to decide whether or not a waterway is subject to regulation based on the discredited test of "navigability."[156] More specifically, the guidance memorandum requires that agency officials "seek formal project-specific (headquarters) approval" *only* "prior to asserting jurisdiction over waters" that are not "traditional navigable" waters, adjacent wetlands, or the tributaries to such waters.[157] Officials need not obtain approval, however, before *declining* to exercise jurisdiction over the many waterbodies that do not meet the "traditionally navigable" definition. Because many of these waters have been protected under long-standing CWA regulations and interpretations, the logical "default"—and the one consistent with the remedial purpose of the CWA—is continued protection. But the guidance memorandum flies in the face of the CWA's purposes by requiring approval only for continued protection and thereby implicitly sanctioning—and even encouraging—*withdrawal* of CWA protection from many waters.

Moreover, consistent with the Bush administration's proclivity for undermining environmental and public health protections as surreptitiously as possible, *the administration avoided public input before taking action to narrow the scope of regulation.* The administration could have proposed the change as a new regulation, which would have required providing the public with notice and the opportunity to comment before the administration could adopt its new position. Instead, the administration issued the guidance memorandum, which went into effect immediately, and then sought public input on an "Advance Notice of Proposed Rulemaking" ("ANPRM") that called into question the long-standing definition of "waters of the United States" as it applies to all CWA programs—i.e., programs such as the NPDES permit program and the oil-spill program as well as the dredge-and-fill permit program.[158] Thus, although ostensibly awaiting pubic input before drafting a rule redefining CWA "waters," the administration in fact had already put the new definition into effect in the guidance memorandum.

The *SWANCC* opinion does not support the Bush administration's redefinition of CWA "waters." As Senator Russell Feingold stated during a hearing on the implications of *SWANCC*, "both the guidance memo and the proposed rulemaking go far beyond the holding in *SWANCC*."[159] Rather, the impetus for the administration's redefinition of CWA "waters" in the wake of *SWANCC* was almost certainly provided by the polluting industries whose activities subject them to the CWA. For years, these industries have sought to evade the CWA's requirements by urging a more limited definition of the scope of the term "waters of the United States."[160] In its *SWANCC* opinion, the Court did not call into question its earlier determination in *Riverside Bayview Homes* that, because "Congress chose to define the waters covered by the Act broadly"(i.e., as "waters of the United States"), "the term 'navigable' as used in the Act is of limited import."[161] Rather, the Court reaffirmed that conclusion and held merely that the Corps may not base its CWA jurisdiction solely on a water's status as a migratory-bird habitat.[162] This is the reading of *SWANCC* that has been adopted by the

vast majority of lower courts that have addressed the effect of the decision on the scope of CWA "waters."[163]

A broad definition of "waters of the United States" has been critical to the success of the CWA in controlling water pollution. The administration's redefinition of "waters" puts *20% of the wetlands (or 20 million acres) and at least 60% of all river miles (2.15 million miles) in the contiguous 48 states at risk of losing CWA protections*.[164] The many lakes, ponds, streams, and other waters that the Bush administration and industry seek to exclude from the Act's protections are not only important in their own right as, *inter alia*, ecosystems and recreational sites. From a scientific standpoint, these numerous waterbodies cannot be separated from the "traditional navigable waters" that the Bush administration and industry concede fall within the CWA's jurisdiction:

> Wetlands, intermittent and ephemeral streams, and tributaries are integral parts of watersheds that affect the health of all water systems, even those that are seemingly "isolated." These waters drain into larger waterbodies and groundwater sources, so pollution or fill dumped into them destroys important water resources and eventually ends up in larger lakes and rivers.[165]

A broad definition of 'waters of the United States' has been critical to the success of the CWA in controlling water pollution. The administration's redefinition of 'waters' puts 20% of the wetlands (or 20 million acres) and at least 60% of all river miles (2.15 million miles) in the contiguous 48 states at risk of losing CWA protections.

In light of the massive withdrawal of CWA protections that the administration's redefinition would effect, it is not surprising that *almost 99% of the 137,000 comments submitted in response to the ANPRM opposed any limitation of the CWA's scope.*[166] In December 2003, EPA Administrator Mike Leavitt announced that the administration was abandoning its plans to issue a new rule redefining CWA "waters," proclaiming that, in so doing, "we are reaffirming and bolstering protections for wetlands, which are vital for water quality, the health of our streams and wildlife habitat."[167] *This public reassurance of its commitment to implement CWA protections, however, is belied by the administration's failure to withdraw the guidance memorandum, which remains in effect*.[168] The administration's reaction to the tremendous public consensus in favor of the long-standing definition of CWA "waters" makes clear that the Bush administration never truly intended to involve the public in its decision regarding the definition of CWA "waters." The "ANPRM" notwithstanding, the industry-backed decision had been made. As Joan Mulhern of Earthjustice, one of the groups that opposed the ANPRM, noted:

> When the Bush administration announced it was dropping plans to rewrite the rules saying which waters are protected by the Clean Water Act, we all assumed that meant they would uphold and enforce existing law. It is nothing short of duplicitous for the administration to publicly abandon the rulemaking but privately and cynically abandon many streams and wetlands, leaving them open to unlimited pollution and destruction.[169]

Despite the administration's apparent attempt to shield its withdrawal of CWA protections from public scrutiny, some environmental groups have succeeded in getting at least a partial picture of the effect of the guidance memorandum through Freedom of Information Act requests.[170] These groups note, however, that their report on this information "understates the problem because several Corps districts do not appear to be documenting any of their decisions not to regulate and, in many cases, the Corps is not consulting or coordinating with EPA or the Fish and Wildlife Service prior to abandoning protection for previously protected waters."[171] Given the information that they were able to obtain, the groups concluded that "[o]ne thing is certain: The result of the Bush administration's policy is that untold thousands of acres of wetlands, small streams, and other waters that provide critical environmental values are being opened up to destruction and degradation without any federal environmental review or limitations."[172] Thus, in spite of overwhelming opposition by the public, EPA and the Corps continue to work pursuant to an executive fiat that defies long-standing administrative and judicial interpretations of the CWA by significantly narrowing its scope and thereby depriving many of this country's waters of protection.

III. *Underkill by Failure to Enforce*

As noted above, the CWA's strong enforcement provisions supply government officials and citizens with effective tools to ensure that polluters comply with the Act's requirements.[173] Nevertheless, government enforcement of the CWA has dropped precipitously during the Bush administration. Over Bush's first three years in office, the number of notices of CWA violations issued by EPA *fell by 74% compared with the first Bush and Clinton administrations*.[174]

Violations notices are important indicators of overall enforcement activity. As Eric Schaeffer, former head of EPA enforcement, has explained, a drop in notices means that "the flow of new cases into the (enforcement process) for handling and settlement prosecution is slowly drying up."[175] Indeed, in 2002, the number of cases for judicial action that EPA referred to the Department of Justice—the next step in the enforcement process when a violation notice goes unheeded—*declined by 38%*.[176] This drop was not by any means the result of a dearth of CWA violations. During roughly the same time period, over 60% of industrial and municipal facilities violated the CWA by discharging pollutants into waters throughout the country in excess of the limits in their NPDES permits.[177] Furthermore, the violations were quite serious: on average, the facilities discharged six times the amount of pollutants prescribed in the applicable permits.[178]

Simply failing to enforce the CWA is more difficult in areas where ongoing enforcement efforts have been inherited from the previous administration. One such area is the illegal discharge into streams of wastes from mountaintop-removal coal mining. In many ways, the story of the CWA violations associated with mountaintop-removal coal mining eerily parallels the story of the CAA violations associated with coal-fired power plants. In both cases, toward the end of the Clinton administration, it appeared that the coal industry was finally going to be forced to comply with the law after EPA began to ascertain the severity of long-standing patterns of violations. In the case of the CAA, coal-fired electric utilities had failed to install the required emission-control technology required under the Act's NSR provisions.[179] In the case of the CWA, coal-mining companies had destroyed hundreds of miles of streams by burying them with the wastes from mountaintop-removal mining. Also as with the CAA violations, "[o]nly in the late 1990s did the problems (with mountaintop-removal mining) begin to command the sustained attention of federal environmental officials."[180] And finally, in both cases, the subsequent efforts to enforce environmental protections came to a halt when President Bush was elected, and thereafter the administration sought to sanction the destructive industry practices.

IV. *Underkill by Stopping Enforcement Efforts and Changing the Rules to 'Legalize' Ex Post Facto*

Unlike the NSR violations, the federal government was aiding the coal industry in its illegal dumping of mountaintop-mining wastes by issuing dredge-and-fill permits authorizing the practice. As the Corps acknowledged in *Kentuckians for the Commonwealth v. Rivenburgh*—the most recent of a series of cases brought by environmental and citizens' groups challenging the issuance of these permits—*this dumping of wastes, and thus the permits, violated the agency's 1977 regulations*,[181] which specify that "fill material" "does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act (i.e., the NPDES permit program)."[182] Given this admission, it makes sense that, in an e-mail evaluating the case, a government official stated: "It appears the (Justice Department) may feel they have a loser in this suit."[183] *However, instead of recommending that the Corps simply cease authorizing the illegal practice and begin to enforce the law, the official suggested that "[c]hanging the rule on what could be disposed of could 'moot the lawsuit.'"*[184] And that is precisely what the administration did: while the court was considering the case, EPA and the Corps finalized a rule redefining "fill material" to include the mining waste at issue,[185] and then filed a brief informing the presiding judge that the new rule mooted the citizens' group's claims.[186]

In contrast to the Bush administration's response to the citizens' claims in *Kentuckians for the Commonwealth*, the Clinton administration settled a similar case brought by an environmental group in 1998, promising "closer scrutiny of mining permits and a thorough scientific review [in an] environmental impact statement."[187] Thereafter, the Clinton administration began negotiations with coal-industry officials to craft a "comprehensive approach" that "would allow mining debris to be deposited in streams (known as "valley fills"), but only in a way "that would address long-term environmental concerns."[188] However, not unlike the negotiations with the coal industry regarding NSR violations under the Clean Air Act, the "[n]egotiations between EPA and industry officials on proposals for limiting the size of valley fills stalled and then stopped altogether as the presidential election of 2000 approached."[189] *Shortly after taking office, the Bush administration made clear to the coal industry that it no longer needed to worry about lawsuits challenging the permits authorizing the illegal discharge of mountaintop-mining wastes.* As Department of the Interior Deputy Secretary Steven Griles told the West Virginia Coal Association, "[w]e will fix the federal rules very soon on water and soil placement."[190] As a former lobbyist for the coal industry, Griles's appointment to a top environmental policy-making position is among the many instances of the Bush administration's use of the underkill tool of appointing officials with backgrounds antagonistic to their regulatory duties.

The administration "fixed" the Corps's 1977 regulation by greatly expanding the definition of "fill material," thereby carving a potentially devastating loophole in the CWA. The long-standing Corps regulation confined "fill material" to "material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of

an [sic] water body."[191] In contrast, under the new rule, "fill material means material placed in waters of the United States where the material *has the effect* of [r]eplacing any portion of a water . . . with dry land" "or [c]hanging the bottom elevation of any portion of a water."[192] Consequently, as the district court pointed out in *Kentuckians for the Commonwealth*, the administration's new definition "is a tautology," for "all fills have the effect of filling."[193] "Through this empty definition, the agencies allow the waters of the United States to be filled, polluted, and unavoidably destroyed for any purpose, including waste disposal."[194]

Under the 1977 regulation, the discharge of pollutants into waters primarily for the purpose of waste disposal is governed by section 402 of the CWA (the NPDES permit program). Importantly, the section 402 permit program imposes stricter requirements than the section 404 (i.e., dredge-and-fill) permit program. Thus, not surprisingly, throughout the CWA's history, industry has "sought to expand the coverage of the section 404 program where the alternative is regulation by EPA" pursuant to the section 402 program.[195] By finalizing the new rule during the course of the litigation, the administration obviously sought to allow a particularly destructive industry practice—i.e., the submerging of this nation's streams with wastes from mountaintop-removal coal mining—to continue virtually unchecked pursuant to relatively permissive section 404 permits. Furthermore, the administration's new definition of "fill material" to include any pollutant that displaces water, regardless of the purpose of the discharge, has the potential to achieve an even greater expansion of the section 404 program at the expense of the section 402 program. Although the new rule does specify that "fill material does not include trash or garbage,"[196] the rule qualifies this qualification by stating that "trash or garbage *generally* should be excluded from the definition of fill material," and (only somewhat more precisely) that "there are very specific circumstances where certain types of material *that might otherwise be considered trash or garbage* may be appropriate for use in a particular project to create a structure or infrastructure in waters of the U.S."[197] Thus, it is unclear whether the "trash or garbage" caveat will actually serve to prevent the Corps from issuing section 404 permits for the discharge of all kinds of refuse and anything else that displaces water.

In *Kentuckians for the Commonwealth*, the district court rejected the government's invocation of the new rule to moot the case, noting: "When the illegitimate practices were revealed by court decisions in this district, the agencies undertook to change not their behavior, but the rules that did not support their permit process."[198] The new rule, however, was not at issue in the case and has not otherwise been subject to judicial review. Consequently, *under the current redefinition of "fill material," industry may continue destroying this country's waters by heaping upon them wastes from mountaintop mining and undoubtedly, given the sweeping nature of the redefinition, many other kinds of waste from pollutant-producing industrial activities.*

V. *Conclusion: CWA Underkill*

Although this chapter does not catalog all of the Bush administration's uses of underkill tools to weaken the CWA, the examples highlighted make clear that the administration has sought to dilute significantly the Act's restrictions on pollution of the nation's surface waters. By attempting to restrict the "waters" to which the CWA applies, the administration threatens to deprive all the waters—even those that remain within the CWA's scope under the administration redefinition—of the CWA's protections. Of the discharges that remain subject to the Act under its redefinition of CWA "waters," it appears likely that the administration will either simply fail to enforce the CWA's requirements or seek to regulate as many as possible as "fill material" under the less protective dredge-and-fill permit program.

Conclusion

As the foregoing chapters make clear, the principal reason that the tools of regulatory underkill have been so effective is that they are subtle and often obscure, and consequently the public remains largely unaware of the Bush administration's undermining of the laws protecting our health and the environment. With this paper, CPR seeks to shift some power from the administration and regulated industry to the public by exposing the administration's use of the tools of regulatory underkill. "If you know what's happening you're in a position to figure out how to do something about it, and that's always uplifting."[199]

About the Authors

William W. Buzbee is a Professor of Law and Director of the Environmental and Natural Resources Law Program at Emory Law School. He has taught, lectured, and written in the areas of administrative law, environmental law, land use, federalism, and statutory interpretation. Prior to joining the Emory faculty in 1993, he clerked for a federal judge, worked as an attorney-fellow at the Natural Resources Defense Council, and practiced environmental and land use law in the private sector at Patterson, Belknap, Webb & Tyler in New York City. His publications in recent years have been published in Stanford Law Review, University of Pennsylvania Law Review, Michigan Law Review, Cornell Law Review, The Administrative Law Review, and an array of other journals, including the environmental journals at top law schools such at NYU and Duke. In 1997, Professor Buzbee raised money from foundations and was responsible for Emory Law School launching its now well-established Turner Environmental Law Clinic.

Robert L. Glicksman holds the Robert W. Wagstaff Chair at the University of Kansas School of Law. His areas of expertise include pollution control, public natural resources management, and administrative law. Prior to joining the faculty of the University of Kansas, Professor Glicksman practiced in the Washington, D.C. office of Cleary, Gottlieb, Steen & Hamilton, serving industrial clients in the energy and chemical industries. Professor Glicksman is the lead co-author of an environmental law casebook, *Environmental Protection: Law and Policy* (Aspen Law and Business), now in its fourth edition (with Professors Markell, Mandelker, and Tarlock). His law review articles have been published in a range of distinguished journals including the Pennsylvania Law Review, the Duke Law Journal, the Vanderbilt Law Review, and the Columbia Journal of Environmental Law. Professor Glicksman has been instrumental in the expansion of the environmental law curriculum at the University of Kansas School of Law, and helped to establish a certificate program in environmental and natural resources law.

Sidney A. Shapiro holds the University Distinguished Chair in Law at the Wake Forest University School of Law. He has taught and written in the areas of Administrative Law, Regulatory Law and Policy, Environmental Policy, and Occupational Safety and Health Law for 25 years. Professor Shapiro began his legal career as a trial attorney in the Bureau of Competition of the Federal Trade Commission and later worked as the Deputy Legal Counsel, Secretary's Review Panel on New Drug Regulation at the Department of Health, Education and Welfare. His books include *Workers at Risk*, co-authored with Thomas O. McGarity, which describes rulemaking, implementation and enforcement in the Occupational Safety and Health Administration from its inception in 1970 through 1990. Professor Shapiro has published dozens of articles on regulatory policy, health and safety laws, environmental law and administrative law in prominent law reviews, such as the Harvard Law Review, Duke Law Journal and the Wake Forest Law Review, as well as in specialty journals, such as the Administrative Law Review and the Ecology Law Quarterly.

Robert Glicksman and Sidney Shapiro are the authors of *Risk Regulation At Risk: Restoring a Pragmatic Balance* (Stanford University Press 2003), which takes issue with the notion that economic efficiency should be the sole or even principal criterion governing the establishment and implementation of laws and regulations designed to reduce the health and environmental risks attributable to industrial activities. The authors urge instead a pragmatic approach to risk regulation that takes into account other values.

Professors Buzbee, Glicksman and Shapiro are all Member Scholars of the Center for Progressive Regulation.

Karen Sokol is a Senior Policy Analyst at the Center for Progressive Regulation. She graduated from the Yale Law School in 2000. Prior to joining the Center for Progressive Regulation, Ms. Sokol clerked for Chief Judge Carolyn Dineen King of the United States Court of Appeals for the Fifth Circuit.

End Notes

[1] *See, e.g.*, RISKS, COSTS & LIVES SAVED: GETTER BETTER RESULTS FROM REGULATION (Robert W. Hahn ed., 1996); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1992); JOHN MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCES REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION (1988).

[2] For a description of these efforts, see Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345, 1349-54 (2004); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 1993-98 (1998).

[3] *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004); SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH (2003), at ch. 5; THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION (1993), at chs. 18 & 19; Parker, *supra* note 2; Heinzerling, *supra* note 2.

[4] *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 334-35.

[5] With many sources of risk and harm, especially environmental harms, a related challenge is even identifying what political or regulatory actor should be the focus of demands for action. With many potential actors who could address the problem, even citizens who agree on a problem and the desired cure may fragment their calls for action and fail to constitute a powerful and unified voice. In response to dissipated calls for action, political actors will be strongly inclined to do nothing. *See* William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1 (2003).

[6] *See* OLSON, *supra* note 4, at 141-43 (1965).

[7] *See* David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 436 (2002); Clayton P. Gillette, *Plebicites, Participation, and Collective Action in Local Governance Law*, 86 MICH. L. REV. 930, 976 (1998).

[8] *See* RICHARD N.L. ANDREWS, MANAGING THE ENVIRONMENT, MANAGING OURSELVES (1999).

[9] Abner J. Mikva & Michael F. Hertz, *Impoundment of Funds—The Courts, The Congress and The President: A Constitutional Triangle*, 69 NW. U. L. REV. 335 (1974).

[10] Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997); Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantice Policy Changes*, 19 HASTINGS CONST. L.Q. 457 (1992).

[11] *See* William W. Buzbee, *CERCLA's New Safe Harbors for Banks, Lenders, and Fiduciaries*, 26 ENVTL. L. REP. 10656 (1996) (discussing how an unexamined and undebated appropriations rider contained substantial amendments to CERCLA).

[12] *See id.* at 455-56 (use of a legislative rider to bypass the Northwest Forest Plan's regulation of timber sales).

[13] *See* J.B. Ruhl & James Salzman, *Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003).

[14] Daniel A. Farber, *Taking Slippage Seriously*, 23 HARV. ENVTL. L. REV. 297, 301 (1999); Michael C. Blumm & William Warnock, *Roads Not Taken: EPA vs. Clean Water*, 33 ENVTL. L. 79 (2003) (describing EPA's failure to enact adequate regulations under the Clean Water Act for the sake of administrative and political convenience).

[15] Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L. REV. 1241, 1243 n.7 (1985); Robert L. Glicksman, *The Value of Agency-Forcing Citizen Suits to Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353 (2004).

[16] STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEM, TEXT, AND CASES 26 (3rd. ed. 1992) (discussing regulatory capture).

[17] *See* Thomas O. McGarity & Ruth Ruttenberg, *Counting the Costs of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997 (2002).

[18] *See* Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1361 (1971) ("Readily quantifiable factors are easier to process—and hence more likely to be recognized and then reflected in the outcome—than are factors that resist ready quantification").

[19] *See* Wendy Wagner & David Michaels, *Equal Treatment for Regulatory Science: Extending the Controls Governing the Quality of Public Research to Private Research*, 30 AM. J.L. & MED. 119 (2004).

[20] *See* Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7, 17-18 (1998) (explaining how the "sound science" movement backed by industry would lead to insufficient risk regulation).

[21] Patrice McDermott, *Withhold and Control: Information in the Bush Administration*, KAN. J.L. & PUB. POL'Y 671, 685-86 (2003) (noting that individuals with favorable ideologies, rather than scientific credentials, are receiving appointments to important scientific advisory panels).

[22] *Id.* at 686; Letter from Twelve Members of the U.S. House of Representatives to Tommy Thompson, Secretary, U.S. Department of Health and Human Services (Oct. 21, 2002), *available at* http://www.house.gov/reform/min/pdfs/pdf_inves/pdf_admin_hhs_africa_hiv_aids_policy.pdf. (complaining of a "growing number of cases providing evidence that actions directly affecting public health are being driven by ideology rather than by science"); *compare* Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate Over the Role of Science in Public Health and Environmental Regulation*, 66 LAW AND CONTEMP. PROBS. 63 (2003) (describing the criticism of agency misuse of science).

[23] James Glanz, *Scientists Say Administration Distorts Facts*, N.Y. TIMES, Feb. 19, 2004, at 18A.

[24] *See infra* Chapter 2, text accompanying notes 51-55.

[25] *See* Sidney A. Shapiro, *The Information Quality Act and Environmental Protection: The Perils of Reform by Appropriations Riders*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 339 (2004).

[26] *See infra* Chapter 2, notes 42 & 43 and accompanying text.

[27] Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 Tex. L. Rev. 525 (1997).

[28] Joel A. Mintz, *"Treading Water": A Preliminary Assessment of EPA Enforcement During the Bush II Administration*, 34 ENVTL. L. REP. 10912, 10916 (2004).

[29] *Id*.

[30] *Id*.

[31] David L. Markell, *The Role of Deterrence-Based Enforcement in a 'Reinvented' State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1, 55-61 (2000).

[32] *See* CLIFFORD RECHTSCHAFFEN, CTR. FOR PROGRESSIVE REGULATION, ENFORCING THE CLEAN WATER ACT IN THE TWENTY-FIRST CENTURY: HARNESSING THE POWER OF THE PUBLIC SPOTLIGHT 1-2, 4 (2004), *available at* http://www.progressiveregulation.org/articles/Enforcement_WP_Oct_2004.pdf.

[33] *See* Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917 (1985).

[34] Kirsten H. Engel, *Environmental Standard-Setting: Is There a "Race" and Is It "To The Bottom?"*, 48 HAST. L.J. 271 (1997).

[35] *See* Michael Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP. 10397 (May 2004); Michael C. Blumm & William Warnock, *Roads Not Taken: EPA vs. Clean Water*, 33 ENVTL. L. 79 (2003). An example of such a "sweetheart settlement" between the Bush administration and the electric-utility industry is discussed *infra* Chapter 2, text accompanying notes 80-84.

[36] *See infra* Chapter 3, text accompanying notes 120-28.

[37] Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401-7641 (2000)).

[38] *See* 42 U.S.C. § 7401(a)(2) (finding "that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare").

[39] *See* EPA, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT, *at* http://www.epa.gov/oar/oaqps/peg_caa/egcaa10.html#topic10.

[40] 42 U.S.C. § 7408(a)(2).

[41] *Id.* § 7409(b)(1).

[42] According to then-Treasury Secretary Paul O'Neill, who was among the cabinet members present at the Task Force's meetings, government officials "routinely embraced" the recommendations of lobbyists for the energy industry. RON SUSKIND, THE PRICE OF LOYALTY 153 (2004). O'Neill found that "[i]n many areas," he and then-EPA Administrator Christine Whitman "were articulating the environmental and conservationist views—the basic idea that thirty years of regulations to protect land, water, and air were of value." *Id*. Explaining that "[w]hen you have people with a strong ideological position, and you only hear from one side, you can pretty much predict the outcome," O'Neill stated that "the [Task Force's] recommendations generally did not meet the high standard of 'in the broad public interest.' " *Id.* at 156; *see also* Bruce Barcott, *Changing All the Rules*, N.Y. TIMES, Apr. 4, 2004, at sec. 6, p. 38 ("Cheney's energy task force solicited suggestions from various quarters, but few outside a tight circle of industry insiders were able to make themselves heard.").

[43] After Cheney's Task Force (formally known as the National Energy Policy Development Group) issued its report (*National Energy Policy*), the Sierra Club and Judicial Watch filed actions in federal district court seeking disclosure of the Task Force's meeting materials pursuant to the Federal Advisory Committee Act and other federal statutes. *See Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 23-24 (D.D.C. 2002). The district court denied Cheney's motion to dismiss the case and ordered a "tightly-reined discovery process" to proceed. *See id.* at 54. After the D.C. Circuit Court of Appeals rejected Cheney's appeal of the district court's discovery order, he filed a petition for certiorari with the U.S. Supreme Court, which vacated the appellate court's judgment and remanded to that court for reconsideration of Cheney's appeal. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 124 S. Ct. 2576, 2593 (2004).

[44] Clear Skies Act of 2003, S. 485, 108th Cong. (2003), H.R. 999, 108th Cong. (2003).

[45] SIERRA CLUB, FACTS ABOUT THE BUSH ADMINISTRATION'S PLANS TO WEAKEN THE CLEAN AIR ACT, *at* http://www.sierraclub.org/cleanair/clear_skies.asp.

[46] *Id.*

[47] *See* PEW CTR. ON CLIMATE CHANGE, GLOBAL WARMING BASICS: FACTS AND FIGURES, *at* http://www.iata.org/soi/environment/climatechange.htm.

[48] As Paul Krugman recently pointed out in his *New York Times* editorial column, "[t]he science clearly shows that cap-and-trade is inappropriate for mercury." In particular, he explained:

> Mercury is heavy: much of it precipitates to the ground near the source. As a result, coal-fired power plants . . . create "hot spots"—chemical Chernobyls—where the risks of mercury poisoning are severe. Under a cap-and-trade system, these plants are likely to purchase pollution rights rather than cut emissions. In other words, the administration proposal would perpetuate mercury pollution where it does the most harm.

Paul Krugman, *The Mercury Scandal*, N.Y. TIMES, Apr. 6, 2004.

[49] *Id.*

[50] *See* SIERRA CLUB, *supra* note 45.

[51] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add.1, 37 I.L.M. 32 (1998), *available at* http://unfccc.int/files/essential_background/kyoto_protocol/application/pdf/07a01.pdf [hereinafter Kyoto Protocol]. The United States submitted its signature to the Kyoto Protocol on December 11, 1998. *See* UNITED NATIONS, KYOTO PROTOCOL: STATUS OF RATIFICATION, *available at* http://unfccc.int/resource/kpstats.pdf.

[52] *See* Paul Kevin Waterman, *Note: From Kyoto to ANWR: Critiquing the Bush Administration's Withdrawal from the Kyoto Protocol to the*

Framework Convention on Climate Change, 13 TRANSNAT'L L. & CONTEMP. PROBS. 749, 755, 757-58 (2003).

[53] *See* Kyoto Protocol, *supra* note 51, art. 3.

[54] Initially, "[t]he failure of the United States to ratify the Protocol . . . caused many to believe that its future was doomed, since virtually all other industrialized nations must ratify it if the United States does not." Gary C. Bryner, *Carbon Markets: Reducing Greenhouse Gas Emissions Through Emissions Trading*, 17 TUL. ENV'L L.J. 267, 278 (2004). Specifically, industrialized nations responsible for at least 55% of the world's carbon-dioxide emissions must ratify before the Protocol will enter into force. *See* Kyoto Protocol, *supra* note 51, art. 25(1). However, given that the European Union announced its ratification in May 2002, Press Release, European Union, European Union Ratifies the Kyoto Protocol (Brussels, May 31, 2002), *at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/794&format=HTML&aged=0&language=EN&guiLanguage=en, the 55% threshold will be attained with Russia's ratification, which now appears almost certain. On September 30, President Putin's administration approved the Protocol and recommended ratification by the Russian Parliament. *Russian Government Approves Kyoto Protocol Ratification*, MOSCOW NEWS, Sept. 30, 2004, *at* http://www.mosnews.com/money/2004/09/30/kyotoapproved.shtml. As Putin's party commands a majority in both houses of the Russian Parliament, ratification is widely expected by the beginning of next year, if not before. *See id.*; *see also Russia Backs Kyoto Climate Treaty*, BBC NEWS, Sept. 30, 2004, *at* http://news.bbc.co.uk/2/hi/europe/3702640.stm ("The necessary law on ratification is set to pass through the Russian parliament unhindered and, in theory, the treaty could come into force within three months.")

[55] *See* Waterman, *supra* note 52, at 750 (noting that "the United States is the world's top emitter of greenhouse gases, justifying the belief of the leaders of the rest of the developed world that the U.S. government has an obligation to take the lead in efforts to combat global climate change"); *see also* Julian Borger, *Bush's Pollution Charter*, THE GUARDIAN, Aug. 23, 2003, *at* http://www.guardian.co.uk/usa/story/0,12271,1028090,00.html (pointing out that the United States is the source of one quarter of the world's carbon emissions, which represents 10% more than all of western Europe).

[56] *See* 42 U.S.C. §§ 7411, 7475(a), 7503.

[57] *See* NAT'L RESOURCES DEF. COUNCIL, EPA's CHANGES TO NEW SOURCE REVIEW, Mar. 2003, *at* http://www.nrdc.org/air/pollution/pnsr.asp.

[58] *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (to be codified at 40 C.F.R. §§ 51-52); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Revew (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248 (Oct. 27, 2003) (to be codified at 40 C.F.R. §§ 51-52).

[59] *See* EPA, FINAL RULE TO IMPROVE THE ROUTINE MAINTENANCE, REPAIR, AND REPLACEMENT EXCLUSION UNDER EPA'S NEW SOURCE REVIEW PROGRAM: FACT SHEET 2, *at* http://www.epa.gov/nsr/documents/827factsheet.pdf.

[60] Barcott, *supra* note 42 (emphasis added).

[61] *Id.* The Office of Inspector General also recently found that the 20% threshold for exemption from NSR requirements had little basis in the public record developed during the NSR rulemaking. Office of Inspector General, New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-Fired Electric Utilities, Report No. 2004-P-00034 (Sept. 2004), at 18, *available at* http://www.epa.gov/oigearth/reports/2004/20040930-2004-P-00034.pdf [hereinafter Inspector General's Report on NSR Rule Change].

[62] For example, the administration refused to comply with Senator James Jefford's repeated requests for documents containing information that "would help [Congress] and the public better understand how the administration arrived at its questionable interpretations of the Clean Air Act." Associated Press, *Jeffords Holds Bush EPA Nominees* (Apr. 8, 2004), *available at* http://www.foxnews.com/story/0,2933,116541,00.html.

[63] *New York v. EPA*, (D.C. Cir. Nos. 02-1387, 03-1380, and consolidated cases); *see also* Press Release, Earthjustice, Lawsuit Challenges Gutting of Crucial Clean Air Act Program (Oct. 27, 2003), *at* http://www.earthjustice.org/news/display.html?ID=705 (announcing the suit and summarizing the petitioners' legal arguments against the new NSR rules).

[64] *See* Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion; Stay, 69 Fed. Reg. 40,274-76 (July 1, 2004) (issuing an administrative stay of the Equipment Replacement Provision pursuant to the D.C. Circuit's order).

[65] Barcott, *supra* note 42.

[66] *Id.*

[67] Inspector General's Report on NSR Rule Change, *supra* note 61, at ii, 8.

[68] Darren Samuelsohn, *Bush NSR Reforms Harmed NSR Enforcement Efforts —IG Report*, GREENWIRE, Oct. 1, 2004, *at* http://www.eenews.net/sr_nsr.htm.

[69] Because TVA is a federally-owned power company, the enforcement mechanism was an administrative compliance order. *See* Barcott, *supra* note 42.

[70] Darren Samuelsohn, *Second Wave of NSR Cases Await Bush Administration Action*, GREENWIRE, July 14, 2004, *at* http://www.eenews.net/sr_nsr.htm [hereinafter Samuelsohn, *Second Wave*].

[71] *See* Barcott, *supra* note 42.

[72] *Id.* (emphasis added).

[73] *Id.* (emphasis added); *see also id.* ("On sulfur dioxide alone, we (EPA) expected to get several million tons per year out of the atmosphere.") (quoting Bruce Buckheit, director of EPA's air-enforcement division at the time the lawsuits were initiated).

[74] For example, Southern Company, one of the nation's largest coal-burning utilities that is the defendant in a number of NSR suits initiated during the Clinton administration, recommended that the Bush administration "review and 'improve' the [NSR] program" after having contributed $315,918 to the Bush-Cheney campaign and the Republican National Committee and $100,000 for Bush's inaugural celebration. MARIA WEIDNER, EARTHJUSTICE, & NANCY WATZMAN, PUB. CAMPAIGN, PAYBACKS: HOW THE BUSH ADMINISTRATION IS GIVING AWAY OUR ENVIRONMENT TO CORPORATE CONTRIBUTORS 14 (Sept. 2002), *available at* http://www.earthjustice.org/policy/pdf/payback_report_final.pdf.

[75] Barcott, *supra* note 42.

[76] *See id.* Barcott points out that Tampa Electric, one of the defendant companies in the Clinton-era NSR cases, "agreed in February 2000 to spend more than $1 billion on new pollution controls and pay a $3.5 million civil penalty. The agreement took 123,000 annual tons of pollution out of the sky, and the civil penalty amounted to a little less than 2 percent of Tampa Electric's profits from 1999." *Id.*

[77] Samuelsohn, *Second Wave*, *supra* note 70.

[78] *Id.*

[79] *See* Inspector General's Report on NSR Rule Change, *supra* note 61, at 8. According to the Office of Inspector General's report, the assistant administrator of EPA's Office of Enforcement and Compliance Assurance "announced to his enforcement staff that they should 'stop enforcing' NSR unless the utility violated the 'new' rule." *Id.* at 18. The report further points out that, of the utilities under threat of suit for NSR violations during the Clinton administration, "only five smaller utilities, emitting a relatively small amount of SO_2 and NO_x would still be in violation of NSR" under the new rule. *Id*. at 8. It is the larger utilities "with significant emissions" that "would be in compliance with NSR under the 20-percent threshold." *Id.* at 8-9. As a result, "nearly all of the projected emission reductions of 1.75 million tons of SO_2 and 629,000 tons of NO_x would not be realized under NSR enforcement efforts (pursuant to the new rule)." *Id.* at 9.

[80] D.C. Cir. No. 02-1290.

[81] *See Utility Air Regulatory Group v. EPA*, 320 F.3d 272, 278-79 (D.C. Cir. 2003).

[82] *Id*. (citing Revisions to Clarify the Scope of Sufficiency Monitoring Requirements for Federal and State Operating Permits Programs, 67 Fed. Reg. 58,561 (proposed Sept. 17, 2002)).

[83] *See* Revisions to Clarify the Scope of Certain Monitoring Requirements for Federal and State Operating Permits Programs, 69 Fed. Reg. 3202 (Final Rule, Jan. 22, 2004) (to be codified at 40 C.F.R. pts. 70 & 71) [hereinafter Revisions to Monitoring Requirements].

[84] *Compare* Proposed Settlement Agreement, Clean Air Act Petitions for Review, 68 Fed. Reg. 65,700 **(**Nov. 21, 2003), *with* Revisions to Monitoring Requirements, *supra* note 83.

[85] Press Release, Physicians for Social Responsibility, PSR Joins Environmental, Public Health Groups in Suit to Block EPA's Weakened Air Pollution Monitoring Rules (Mar. 16, 2004), *at* http://www.psr.org/documents/psr_doc_0/program_3/EPA_Suit_PR_03_18_2004.pdf.

[86] Press Release, House Comm. on Gov't Reform, Rep. Henry A. Waxman Endorses Lawsuit to Stop EPA from Weakening Clean Air Act (Mar. 18, 2004), *at* http://www.environmentalintegrity.org/pubs/Statement_of_Congressman_Waxman.pdf. (emphasis added).

[87] *Id.*

[88] Anthony DePalma, *4 Northeast States Join Against Pollution*, N.Y. TIMES, May 21, 2004, at A25. Similarly, faced with the administration's failure to limit carbon-dioxide emissions, *see supra* text accompanying notes, 46-47, 15-19, eight states and New York City filed suit against the five utilities that are collectively responsible for 10% of the country's carbon-dioxide emissions to force them to reduce emissions. *See* Andrew C. Revkin, *8 States Sue 5 Biggest Emitters of Carbon Dioxide*, N.Y. TIMES, July 21, 2004. In justification of the suit, Connecticut Attorney General Richard Blumenthal stated: "Some may say that the states have no role in this kind of fight or that there's no chance of success. To them I would say think tobacco . . . . We're here because the federal government has abdicated its responsibility as it also did with tobacco." Associated Press, Larry Neumeister, *California Joins Suit Against Power Companies over Global Warming* (July 21, 2004), *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2004/07/21/state1811EDT0121.DTL.

[89] 124 S. Ct. 1756 (2004).

[90] *See id.* at 1760.

[91] *See id.* at 1760-61.

[92] Brief for the United States as Amicus Curiae Supporting Reversal, *Engine Mfrs. Ass'n S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1456 (2004) (No. 02-1343), *available at* http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2002-1343.mer.ami.pdf; Oral Argument Transcript at 20-28, *Engine Mfrs. Ass'n S. Coast Air Quality Mgmt. Dist.*, 124 S. Ct. 1456 (2004) (No. 02-1343), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1343.pdf.

[93] 124 S. Ct. at 1765.

[94] *See, e.g.*, Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33, 49 (2004) (noting that "[a]fter amicus briefs from the solicitor general and the states, clerks reported giving deference to briefs filed by other government entities").

[95] 42 U.S.C. §§ 9601-9675 (2000).

[96] *See H.R.* REP. NO. *96–1016, pt. 1, at 17 (1980), reprinted in 1980 U.S.C.C.A.N. at 6119–20.*

[97] *See* Anthony De Palma, *Love Canal Declared Clean, Ending Toxic Horror*, N.Y. TIMES, Mar. 18, 2004, at A1; Associated Press, Carolyn Thompson, *Original Superfund Site Declared Clean* (Mar. 18, 2004), *available at* http://www.nrdc.org/news/newsDetails.asp?nID=1303/.

[98] *See* De Palma, *supra* note 97; Thompson, *supra* note 97.

[99] *See* DePalma, *supra* note 97.

[100] 42 U.S.C. § 9606(a).

[101] *See* 42 U.S.C. § 9611; 26 U.S.C. § 9507 (2000).

[102] *See* James E. McCarthy, *Superfund Taxes or General Revenues: Future Funding Options for the Superfund Program*, CONG. RES. SERV., Feb. 12, 2003, at 1-2, *available at* http://www.ncseonline.org/nle/crsreports/03Apr/RL31410.pdf.

[103] *See id.* at 3.

[104] *See id.* at 3-4.

[105] *See* Letter from John B. Stephenson, Director, GAO Natural Resources and Env't Div., to Sen. James M. Jeffords (Feb. 18, 2004), *at* http://www.gao.gov/new.items/d04475r.pdf.

[106] DEFENDERS OF WILDLIFE ET AL., THE BUSH ADMINISTRATION'S FY 2005 BUDGET FOR THE ENVIRONMENT: PUTTING OUR FUTURE AT RISK 4 (Feb. 4, 2004), *at* http://www.ems.org/bush_budget/FY05_analysis.pdf (emphasis added); *see also, e.g.*, *Delisting Love Canal*, N.Y. TIMES, Mar. 22, 2004 (stating that Congress's refusal to reinstate the Superfund taxes, "plus the Bush administration's lack of aggressiveness, has dramatically slowed the rate at which sites are being cleaned up").

[107] Thompson, *supra* note 97.

[108] U.S. General Accounting Office, SUPERFUND PROGRAM: CURRENT STATUS AND FUTURE FISCAL CHALLENGES (July 2003), at 1, *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-03-850 (hereinafter GAO, SUPERFUND PROGRAM).

[109] Letter from Rep. John D. Dingell, Ranking Member, House Comm. on Energy and Com., & Rep. Frank Pallone, Jr., Ranking Member, House Subcomm. on Env't and Hazardous Waste, to Nikki I. Tinsley, Inspector Gen., EPA, (Apr. 17, 2002), *at* http://www.house.gov/commerce_democrats/press/107ltr163.htm.

[110] *See* Press Release, Office of Rep. Frank Pallone, Jr., Pallone Introduces Legislation Ensuring Polluters Pay for Superfund Cleanup (Feb. 5, 2003), *at* http://www.house.gov/apps/list/press/nj06_pallone/pr_feb5_superfund.html; DEMOCRATIC STAFF OF COMM. ON ENERGY AND COM., *Environment Budget Highlights: FY 2005 Budget Request* (Mar. 22, 2004), *at* http://www.house.gov/commerce_democrats/press/bu-envirofy05.htm (hereinafter DEMOCRATIC STAFF, *Environment Budget*).

[111] GAO, SUPERFUND PROGRAM, *supra* note 108, at 20.

[112] *Id.* at 1; *see also id.* at 3 (noting that "EPA added 283 sites to the NPL from fiscal years 1993 through 2002") (emphasis added).

[113] *See, e.g.*, *S. 8, Superfund Cleanup Acceleration Act: Hearing Before the Senate Comm. on Env't and Pub. Works*, 105th Cong. (1997), *at* http://epw.senate.gov/105th/epa_9-04.htm (statement of Carol M. Browner, EPA Adm'r) (noting that studies performed by the Agency for Toxic Substances and Disease Registry "show a variety of health effects that are associated with some Superfund sites, including birth defects, cardiac disorders, changes in pulmonary function, impacts on the immune system (the body's natural defense system from disease and sickness), infertility, and increases in chronic lymphocytic leukemia").

[114] *See* 42 U.S.C. § 9607(a).

[115] *See* McCarthy, *supra* note 102, at 6.

[116] *See* GAO, SUPERFUND PROGRAM, *supra* note 108, at 10, tbl. 1.

[117] Julie Wolk, *The Truth about Toxic Waste Cleanups* (Sierra Club & U.S. PIRG Educ. Fund, Feb. 2004), at 9, *at* http://www.uspirg.org/reports/TruthaboutToxicWasteCleanup04.pdf.

[118] DEMOCRATIC STAFF, *Environment Budget*, *supra* note 110.

[119] *See* James B. Slaughter & Meredith L. Flax, *Superfund Update 2001: Courts of Appeals Narrow Liability*, TOXIC TORTS & ENV'L L. (Def. Res. Inst.), Spring 2002, at 2, http://www.bdlaw.com/media/news/news.140.pdf (citing cases in support of the statement that reading CERCLA's contribution provision as inapplicable to cases of voluntary cleanup "challenges accepted practice in CERCLA contribution litigation and a significant body of precedent").

[120] 124 S. Ct. 981 (2004).

[121] 42 U.S.C. § 9613(f)(1) (providing that "[a]ny person may seek contribution from any other person who is liable or potentially liable [under CERCLA] during or following any civil action" brought under CERCLA to perform a cleanup or pay for the costs of cleanup).

[122] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001), *rev'd on reh'g en banc*, *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677 (5th Cir. 2002).

[123] *See Aviall*, 312 F.3d at 681, 686.

[124] *Id.* at 689-90.

[125] *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 124 S. Ct. 981 (2004).

[126] *Aviall*, 263 F.3d at 155 (Weiner, J., dissenting) (emphasis added).

[127] *Id.* at 156 (Weiner, J., dissenting).

[128] *See supra* text accompanying notes 102-06, 114-18.

[129] GAO, SUPERFUND PROGRAM, *supra* note 108, at 18.

[130] 33 U.S.C. §§ 1251-1387 (2000).

[131] *See, e.g.*, ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 874-75 (2d ed. 1996) ("The Clean Water Act has kept levels of many water pollutants substantially below what they would otherwise be. Yet severe water pollution problems remain, particularly as a result of non-point pollution, combined with sewer overflows, and discharges from sewage treatment plants."); Scott Jerger, *EPA's New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 STAN. ENVTL. L.J. 91, 92 (2004) (noting that "the United States has had significant success in decreasing water pollution," but that "nearly forty percent of rivers and streams in America are still impaired from a wide range of pollution sources"); Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of a Public Spotlight*, 55 U. ALA. L. REV. 775, 776 (2004) ("Controlling point source discharges has led to impressive improvements in water quality over the past thirty years, although considerable problems and challenges remain. Prominent among these is the spotty record of government enforcement of the CWA's permitting requirements.").

[132] Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2000)).

[133] 33 U.S.C. § 1251(a).

[134] *See id.* §§ 1311(a), 1342(a)(1), 1344(a).

[135] *Id.* § 1314(a)(4).

[136] *See* PERCIVAL, *supra* note 131, at 877.

[137] 33 U.S.C. § 1311(b).

[138] *See id.* § 1344.

[139] Rechtschaffen, *supra* note 131, at 776-77 (quoting William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202, 203 (1987)). In particular, Rechtschaffen notes:

> For Senator Edmund Muskie, the chief Senate architect of the bill, "[f]eeble enforcement . . . was the principal target of (his) ire." Muskie declared that "enforcement under the previous program had been so 'spotty' and ineffective that polluters had been able to continue spoiling the streams and lakes of the nation with apparent impunity. . . . During consideration of the bill on the Senate floor, senator after senator "rose to call for tougher, more effective federal enforcement."

Id. at 777 (alterations in original) (citations omitted).

[140] 33 U.S.C. § 1319(a)(3).

[141] The CWA provides that "public participation in the development, revision, and *enforcement* of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e) (emphasis added). In addition, administrative enforcement actions under the Act "preclude citizen enforcement only in carefully circumscribed circumstances," namely, "where EPA or the State has issued a final order and the violator has paid a penalty assessed under the Clean Water Act or 'such comparable state law.' " Rechtschaffen, *supra* note 131, at 779 & n.28 (quoting 33 U.S.C. § 1319(g)(6)(A)(iii)). Although citizens also may not bring suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order," the CWA provides that "in any such action . . . any citizen may intervene as a matter of right." 33 U.S.C. § 1365(b)(1)(B).

[142] 33 U.S.C. § 1362(7).

[143] *Id.* § 1251(a).

[144] S. REP. NO. 92-1236, at 144 (1972); *see also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985) (highlighting that the CWA's "objective incorporated a broad, systemic view of the goal of maintaining and improving water quality," and thus that "Congress chose to define the waters covered by the Act broadly").

[145] 474 U.S. at 133.

[146] 33 C.F.R. § 328.3(a)(1) (2004).

[147] *Id.* § 328.3(a)(3).

[148] *Id.* § 328.3(a)(4).

[149] 42 Fed. Reg. 37,128 (1977).

[150] 531 U.S. 159 (2001).

[151] *Id.* at 167.

[152] *Id.* at 164-65.

[153] *See supra* text accompanying notes 147-48.

[154] 51 Fed. Reg. 41,206, 41,217 (1986).

[155] *SWANCC*, 531 U.S. at 171-72 (emphasis added).

[156] Advance Notice of Proposed Rulemaking on the Clean Water Act Regulatory Definition of "Waters of the United States," 68 Fed. Reg. 1991, 1996 app. A (Jan. 15, 2003) (setting up a jurisdictional "navigable"/"non-navigable" dichotomy by asserting that "[i]n light of *SWANCC*, it is uncertain whether there remains any basis for jurisdiction under . . . § 328(a)(3)(i)-(iii) over isolated, non-navigable, intrastate waters," and then declaring that "traditional navigable waters are jurisdictional").

[157] 68 Fed. Reg. at 1997-98. Notably, even the extent to which the administration intends to continue protecting "tributaries" to "traditional navigable" waters and adjacent wetlands is questionable in light of the memorandum's qualifying instruction: "Field staff should continue to assert jurisdiction over traditional navigable waters (and adjacent wetlands) and, *generally speaking*, their tributary systems (and adjacent wetlands)." *Id.* at 1998 (emphasis added).

[158] *Id. at* 1993-94. Although the guidance memorandum is attached as an appendix to the ANPRM, the administration did not seek public comment on the memorandum, which, in any event, would not have been meaningful given that the memorandum was effective upon issuance. *See id.* at 1996 app. A (noting that EPA and the Corps "are issuing this updated guidance, which supersedes prior guidance on this issue").

[159] *The Regulatory and Legal Status of Federal Jurisdiction of Navigable Waters under the Clean Water Act: Hearing Before the Subcomm. On Fisheries, Wildlife, and Water of the Senate Comm. on Env't & Pub. Works*, 108th Cong. (2003) (statement of Sen. Feingold), *available at* http://epw.senate.gov/108th/Feingold_061003.htm. Senator Feingold further explained that "[t]he confusion over the interpretation of the *SWANCC* decision is growing, but not, I believe, because of the holding in the *SWANCC* case itself, but because of the manner in which federal agencies are implementing the decision." *Id.*

[160] For example, the oil industry—one of the principal contributors to water pollution in this country as well as to both of Bush's presidential campaigns—recently brought suit against EPA challenging a regulation on the ground that it uses the long-standing definition of CWA "waters" rather than the "traditional navigable" definition. *See* Memorandum in Support of Motion to Intervene by Natural Resources Defense Council and Sierra Club at 5, *American Petroleum Inst. v. Leavitt* (D.D.C. 2002) (No. 02-2247) and consolidated cases, *available at* http://www.earthjustice.org/news/documents/7-03/InterventionMotion.pdf. In the two consolidated cases—*American Petroleum Institute v. Leavitt* and *Marathon Oil Co. v. Leavitt*—the oil-industry plaintiffs urge the court to adopt a definition of CWA "waters" that bears remarkable similarity to the one that the administration instructs agency officials to apply in the guidance memorandum. Specifically, the American Petroleum Institute and Marathon Oil contend that CWA jurisdiction "extends only to waters that are, have been or could reasonably be made, navigable in fact ('traditional navigable waters') and wetlands adjacent

to traditional navigable waters." *Id.* After negotiations, EPA and the oil-industry plaintiffs settled all claims except the one challenging the definition of CWA "waters." *See* Notice Concerning Certain Issues Pertaining to the July 2002 Spill Prevention, Control, and Countermeasures (SPCC) Rule, 60 Fed. Reg. 29,728, 29,728 (May 25, 2004) ("Settlement discussions between EPA and the plaintiffs have led to an agreement on all issues except one."); EPA OIL STAFF, *SPCC Settlement Issues Presentation*, at 25 (Mar. 31, 2004), *available at* http://www.epa.gov/oilspill/pdfs/SPCCFinalSettlementPres.pdf ("The issue of navigable waters was not resolved in the settlement and it currently appears that it will be litigated by the parties."). However, given the administration's history of underkill by various litigation strategies, coupled with the fact that the guidance memorandum is still the applicable "law" as far as EPA and Corps field staff are concerned, it is highly doubtful that the administration will vigorously defend the long-standing definition of CWA "waters" in the oil industry's lawsuit. (For this reason, Earthjustice, the Natural Resources Defense Council, and the Sierra Club intervened in the litigation. *See* Press Release, Earthjustice, *Industry Groups Argue for Weakened Clean Water Protections*, June 9, 2004, *at* http://www.earthjustice.org/news/display.html?ID=853.)

[161] 474 U.S. at 133; *see also supra* text accompanying note 145.

[162] *See SWANCC*, 531 U.S. at 171-72. Indeed, as the Court pointed out, "[t]he Corps initially concluded that it had no jurisdiction over the site, and it was only "after the Illinois Preservation Commission informed the Corps that a number of migratory bird species had been observed at the site [that] the Corps reconsidered and ultimately asserted jurisdiction over the balefill site pursuant to . . . the 'Migratory Bird Rule.' " *Id.* at 164.

[163] Among federal courts of appeals, the Fourth, Sixth, Seventh, and Ninth Circuits have all held that *SWANCC* limits CWA jurisdiction only to the extent that it is based on the Migratory Bird Rule. *See United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003); *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003); *United States v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001). Only the Fifth Circuit has espoused a broad reading of the decision. *See In re Needham*, 354 F.3d 340, 345-46 (5th Cir. 2003); *Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2001).

[164] *See* Eric Pianin, *EPA Scraps Changes to Clean Water Act*, WASH. POST, Dec. 17, 2003, at A20 (wetlands); NANCY STONER, NATURAL RESOURCES DEFENSE COUNCIL & CLEAN WATER NETWORK, CLEAN WATER AT RISK: A 30TH ANNIVERSARY ASSESSMENT OF THE BUSH ADMINISTRATION'S ROLLBACK OF CLEAN WATER PROTECTION 20 (2002) (rivers).

[165] STONER, *supra* note 164, at 20; *see also* Press Release, Earthjustice et al., Bush Administration Anti-Clean Water Policies Threaten the Health of Waters Americans Treasure (Mar. 23, 2004), *at* http://www.ems.org/nws/2004/03/23/bush_administrat [hereinafter Earthjustice Press Release] (pointing out that the administration's narrow definition of CWA "waters" "excludes the vast and diverse category of other waters—such as lakes, bogs, freshwater marshes, forested wetlands and even seasonal streams—that perform essential chemical, physical and biological functions within stream and river networks").

[166] EARTHJUSTICE ET AL., RECKLESS ABANDON: HOW THE BUSH ADMINISTRATION IS EXPOSING AMERICA'S WATERS TO HARM 5 (2004) [hereinafter RECKLESS ABANDON]. "[A]n overwhelming majority" of the states that submitted comments on the ANPRM "objected to the idea of limiting the scope of the Clean Water Act," "rais[ing] concerns about clean drinking water, the inadequacy of local protections to keep waters free of pollution, having adequate state funds to keep waters clean, and the ecological reality that pollution in one body of water will likely result in the pollution of entire aquatic systems." EARTHJUSTICE, CLEAN WATER FOR ALL: STATES WANT CONTINUED FEDERAL SAFEGUARDS FOR CLEAN WATER 1 (2003), *at* http://www.cwn.org/docs/issues/scope/earthjusticestates.pdf. Specifically, 39 of the 42 states that commented urged against the adoption of a rule redefining CWA "waters." *Id.*

[167] Pianin, *supra* note 164.

[168] In a letter accompanying a General Accounting Office report submitted to Congress after the ANPRM withdrawal, the Assistant Secretary of the Army stated: "Following the *SWANCC* decision, it may generally be said that a water (and associated aquatic resources) will be subject to Clean Water Act jurisdiction if the water is either a territorial sea, a traditional navigable water, a tributary to a traditional navigable water, or an adjacent wetland." Earthjustice Press Release, *supra* note 165; *see also* RECKLESS ABANDON, *supra* note 166, at 5 (noting that the guidance memorandum "was not withdrawn and EPA and the Corps have indicated that they have no plans to do so, effectively leaving many waters unprotected even though the law has not been changed").

[169] Earthjustice Press Release, *supra* note 165.

[170] *See* RECKLESS ABANDON, *supra* note 166, at 6. The groups that submitted the FOIA requests are Earthjustice, the Natural Resources Defense Council, the National Wildlife Federation, and the Sierra Club. *Id.*

[171] *Id.*

[172] *Id.*

[173] *See supra* notes 139-41 and accompanying text.

[174] Knight-Ridder, Seth Borenstein, *Far Fewer Polluters Punished Under Bush Administration, Records Show*, Dec. 9, 2003, *available at* http://www.commondreams.org/headlines03/1209-02.htm.

[175] *Id.* (alteration in original).

[176] James R. May, *Now More than Ever: Trends in Environmental Citizen Suits at 30*, 10 WIDENER L. REV. 1, 40 (2003).

[177] Press Release, U.S. Pub. Interest Research Group, *Polluters Continue to Violate Clean Water Act: 60 Percent Exceeded Pollution Permits in Recent 18-Month Period* (Mar. 30, 2004), *at* http://www.ems.org/nws/pf.php?p=383.

[178] *Id.*

[179] *See supra* Chapter 2, text accompanying notes 69-72.

[180] Joby Warrick, *Appalachia Is Paying Price for White House Rule Change*, WASH. POST, Aug. 17, 2004, at A1. EPA's deputy administrator at the time, W. Michael McCabe, explained to the *Washington Post* reporter that the agency "had not anticipated the exponential growth of mountaintop mines." *Id.*

[181] *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 204 F. Supp. 2d 927, 930 (S.D. W. Va. 2002), *rev'd*, 317 F.3d 425 (4th Cir. 2003).

[182] *Id.* at 938 (quoting 33 C.F.R. § 323(e) (2001)) (emphasis omitted).

[183] Robert McClure, *New Rule Would OK Dumping by Mines; Environmentalists Say Nation's Water at Risk; EPA Says Little Will Change*, SEATTLE POST-INTELLIGENCER, May 14, 2002, at B1, *available in* 2002 WL 5933713 (alteration in original).

[184] *Id.* (emphasis added).

[185] *Kentuckians for the Commonwealth*, 204 F. Supp. 2d at 930 n.3, 944.

[186] *See* Ken Ward, *Valley Fill Rewrite Due by April*, CHARLESTON GAZETTE, Feb. 26, 2002, *at* http://www.wvgazette.com/section/Series/Mining+the+Mountains/2002022634 (referencing the government's brief arguing that the new rule rendered the case moot and noting that "rather than risk a ruling that would block coal operators from burying miles of Appalachian streams, the federal government is moving to change the rules"). The Bush administration is also fighting citizen efforts to ensure effective implementation of the CWA in another context; namely, by vigorously contesting suits by private citizens and public interest groups to force EPA to abide by its own regulatory responsibilities, such as its obligation to issue regulations by statutory deadlines. In his statistical analysis of suits brought by citizens against EPA for its failure enforce the CWA and other environmental statutes over the 1995-2002 period, Professor James May concluded that the dramatic drop in such suits since 1999 was in part because "the Bush Administration is more prone both to defend itself vigorously against citizen suits and to contest attorney fees . . . making (agency) action-forcing litigation less attractive." May, *supra* note 176, at 30-31.

[187] Warrick, *supra* note 180.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] 33 C.F.R. § 323(e) (2001) (emphasis added).

[192] Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,143 (May 9, 2004) (emphasis added).

[193] 204 F. Supp. 2d at 945.

[194] *Id.*

[195] Nathaniel Browand, Note, *Shifting the Boundaries Between the Sections 402 and 404 Permitting Programs by Expanding the Definition of Fill Material*, 31 B.C. ENVTL. AFF. L. REV. 617, 618 (2004).

[196] 67 Fed. Reg. at 31,143.

[197] *Id.* at 31,134 (emphasis added).

[198] 204 F. Supp. 2d at 946.

[199] Alexander Cockburn, *Understanding the World with Paul Sweezy*, THE NATION, Mar. 22, 2004, at 8.

About the Center for Progressive Regulation

Founded in 2002, the Center for Progressive Regulation is a nonprofit research and educational organization of university-affiliated academics with expertise in the legal, economic, and scientific issues related to regulation of health, safety, and the environment. CPR supports regulatory action to protect health, safety, and the environment, and rejects the conservative view that government's only function is to increase the economic efficiency of private markets. Through research and commentary, CPR seeks to inform policy debates, critique anti-regulatory research, enhance public understanding of the issues, and open the regulatory process to public scrutiny. Direct media inquiries to Matthew Freeman at mfreeman@progressiveregulation.org. For general information, email info@progressiveregulation.org. Visit CPR's website at www.progressiveregulation.org. The Center for Progressive Regulation is grateful to the Deer Creek Foundation for its generous support of this project and CPR's work in general.

CPR CENTER FOR PROGRESSIVE REGULATION

1200 New York Ave., NW, Suite 400, Washington, DC 20005
202-289-4026 (phone) / 202-289-4402 (fax)