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# REWRITING THE RULES

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Prepared by

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## REWRITING THE RULES

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### EXECUTIVE SUMMARY

On January 20, 2001, the crowd that was gathered at the Capitol for President Bush's Inauguration had barely dispersed when the President's Chief of Staff, Andrew H. Card, Jr., took one of the most far-reaching and significant steps of the administration's early days: He issued a directive to all Federal agency heads to immediately freeze the Federal regulatory process in its tracks. Although couched in terms more familiar to the bureaucracy than the citizenry, the so-called Card memo had the potential to diminish the health and safety of tens of millions of Americans.

Virtually all Federal agencies issue rules and regulations to flesh out and implement laws passed by Congress. From the school bus and gas pipeline safety rules issued by the Department of Transportation, to the drinking water and clean air regulations issued by the Environmental Protection Agency (EPA), to drug safety provisions put out by the Food and Drug Administration, Federal regulations and their enforcement are what ensure that Americans' environment, safety, and health are protected.

Because of the tremendous impact these rules have on individuals and businesses alike, agencies must go through a structured, open and transparent process before issuing them. That process—known as “notice and comment” rulemaking—requires agencies to notify the public of their intent to issue rules, to allow the public to comment on the proposals, and then to justify, in writing and on the record, why the agencies decided to do what they did.

By Inauguration Day 2001, literally hundreds of regulations had gone through this process, had been published in the Federal Register—the official annals of Federal agencies—and were ready to go into effect. Yet without any notice to the public or opportunity for interested parties to comment, the Card memo directed agencies to hold in abeyance a slew of regulations until they could be reviewed by Bush Administration political appointees.

Although most of these rules passed quickly through the new administration's political filter, some very important ones did not. A number of regulations, some of which had been subjected to years of public scrutiny and deliberation by government agencies, were put through an unusual and, in some cases, time-consuming second look by the Bush Administration. In some of those cases, the second look amounted to a death sentence for the rule.

Troubled by the Card memo's government-wide interference with the regulatory process and the prospect of a reversal of so many regulations, Senator Joseph I. Lieberman asked his Governmental

Affairs Committee staff to look into the matter.<sup>1</sup> Specifically, he charged his staff with reviewing the Card memo and its effect on three important rules that were final before the Bush Administration came into office:

(1) *The Department of Agriculture's rule conserving roadless areas in national forests:* In January 2001, the U.S. Department of Agriculture (USDA) issued a rule prohibiting most road construction and logging in roadless areas of national forests. The rule, which had been in development since early 1998, sought to protect against piecemeal Forest Service decisions that were altering and fragmenting ecologically valuable areas. The rule sought to balance the need for appropriate development with the reality that our national forests contain important watersheds and fragile ecosystems that can be damaged by road development and logging. The rule did not impose an absolute ban. Exceptions included the removal of timber and the construction of roads so as to reduce the risk of wildfires and to protect from the loss of life and property.

(2) *The Department of the Interior's (DOI) rule regulating hard rock mining on public lands:* In November 2000, DOI issued a rule regulating hard rock mining on public lands. The rule had been in development for almost a decade and sought to mitigate hard rock mining's harmful effects on soil, air, ground water, surface water, land-based and water-based vegetation, and wildlife.

(3) *The Environmental Protection Agency's rule capping the permissible level of arsenic in drinking water:* It has long been known that arsenic in drinking water poses a wide variety of health risks. In January 2001, after nearly 2 decades of study and years of development, EPA issued a rule lowering the permissible limit for arsenic in drinking water. The rule brought the U.S. standard in line with that set by the World Health Organization and followed by the European Union.

The development of each of these three rules involved extensive public comment and scrutiny, and each was accompanied by an on-the-record agency justification of its actions. Nonetheless each was promptly subjected to the new administration's second guessing. In the first two cases, the Bush Administration ultimately weakened or otherwise undermined the rules. In the third, the rule initially adopted after years of scientific study was challenged, but ultimately retained after months of additional—and unnecessary—study.

In the course of its inquiry, Committee staff reviewed thousands of documents related to the agencies' initial decisions. The story the documents tell is one of administration actions characterized by a

<sup>1</sup>At the time he initiated the inquiry (in March 2001), Senator Lieberman served as the Governmental Affairs Committee's Ranking Minority Member. On June 6, 2001, he became the Committee's Chairman. The inquiry was conducted pursuant to the Committee's jurisdiction "to study or investigate . . . the efficiency and economy of operations of all branches and functions of the Government with particular references to the operations and management of Federal regulatory policies and programs." S. Res. 54, 107th Cong., 1st Sess. (2001) (ENACTED). The report is based on the review of thousands of pages of agency documents related to initial administration decisions to suspend, delay, reconsider, or modify these regulations. Committee staff began their review of these documents during the Spring and Summer of 2001. The events of September 11, 2001, interrupted the staff's inquiry and refocused Committee resources on homeland security issues and oversight, postponing the release of this report until now.

troubling lack of respect for long established regulatory procedures—an attempt to give short shrift to public input when possible, and to discount the science or record supporting the rules under review.

Committee Majority staff's specific conclusions are outlined below:

*Implementation of the Card memo was of questionable legality and gave an early warning of the administration's lack of respect for the process of developing regulations, including those providing a variety of important environmental and public protections.*

Under governing law, an agency may not adopt a proposal to delay or change a rule's effective date without first giving the public an opportunity to comment on the proposal. But when the Office of Management and Budget (OMB) supplied Federal agencies with a model Federal Register notice to implement the Card memo, it suggested that the agencies not seek public comment, citing generally inapplicable exemptions to the public "notice and comment" requirement. In disregarding these legal requirements to open administrative actions to public review, the Bush Administration set a dangerous precedent. It treated an important legal requirement as an annoyance and an obstacle, rather than a fundamental part of the framework that makes regulatory change fair, transparent, and orderly.

*The administration's decision to revisit the three rules at issue appears based on a pre-determined hostility to the regulations rather than a documented, close analysis of the rules or the agencies' basis for issuing them.*

There is no bar to agencies changing existing rules, but they may do so only by going through the same regulatory process used for adopting rules in the first place. If they ultimately choose to change the rule, agencies must justify the reasons publicly and with reference to a specific record.

Staff's review of the documentation of three agencies' initial decisions to propose to suspend or otherwise undermine the rules under review suggests a disregard for analysis as to whether change was needed. At the Departments of the Interior and Agriculture, the agencies approached the decision to pursue suspension of the rules almost exclusively as a question of "how," not "whether." At EPA, the documents suggest no substantive analysis of the science underlying the rule before the administrator proposed to suspend it. Again, the suggestion that the results of a lengthy and open process are to be reopened without any analysis indicating the error of the original result, at a minimum, speaks volumes about the administration's respect for the value of the rulemaking process and the public's role in it.

*The administration, by choosing not to defend the Agriculture Department's rule protecting roadless areas in national forests, used a third-party lawsuit to undermine the rule without taking public responsibility for its actions.*

Before USDA's rule protecting roadless areas in national forests appeared in the Federal Register, groups opposing the rule filed

suit to overturn it in Federal court. USDA—which had decided to postpone the rule’s effective date without any apparent analysis, research, or systematic review of either the substance or procedure associated with the roadless rule, and considered options for how to rescind or revise the rule with only a bare outline of identified deficiencies—took the opportunity given it by the court challenge to abandon the rule by simply choosing not to defend it in court. The use of stealth tactics rather than an above-board, open rulemaking process was an unacceptable circumvention of the law’s requirements for public participation. The effective reversal through acquiescence in litigation allowed the administration to adopt its own policies and management directives reversing the rule’s prohibitions on timber harvesting and road construction without the scrutiny and comment that should have been afforded to the public—and without the assumption of responsibility for its actions that flows from a public and transparent decision on the record.

*The Bush Administration’s proposal to suspend the hard rock mining rule was not based on documented substantive analysis, and the ultimate decision to rescind parts of the rule will allow mining projects that pose unwarranted environmental and health threats to continue.*

In contrast to the two other rules reviewed by Majority staff, DOI’s hard rock mining rule was not subject to the Card memorandum’s blanket 60-day freeze because it was already in effect when the Bush Administration came into office. Nevertheless, it too was targeted for the waste pile. As in the case of the roadless rule, Interior Department documents reveal no substantive analysis of the existing rule that would set the predicate for a new approach. Majority staff can conclude only that DOI reached its decision based on factors other than reasoned agency analysis, such as a predetermined intent to take such an action or the influence of continuing opposition to the rule by those concerned about mining revenues.

In this case, DOI sought public comment on its proposed suspension of the rule. Although the public overwhelmingly opposed the proposed rollback, DOI adopted a revised version of the rule—one that eliminated key provisions previously identified as objectionable to the mining industry. Furthermore, DOI concluded that existing laws and regulations (most of which had been on the books for more than 20 years) would be adequate to protect the land, its resources, and the water. In Majority staff’s judgment, this is highly unlikely, as those tools were available during the period that gave rise to the concerns about hardrock mining’s environmental and health threats in the first place. In fact, a growing consensus that these requirements were not effectively protecting the environment prompted the Clinton Administration to issue a new hardrock mining rule.

*EPA conducted a time-consuming and unnecessary review of the decades-in-the-making rule limiting arsenic in drinking water.*

EPA’s rule on levels of arsenic permitted in drinking water nearly suffered a fate similar to DOI’s hard rock mining rule. When the new administration entered office, EPA career staff briefed Admin-



istrator Christine Todd Whitman in support of the Clinton-issued rule, some stakeholders reiterated their concerns about compliance costs and uncertainties about health effects, and EPA consulted with White House staff. Administrator Whitman then announced her decision to propose withdrawing the rule, reportedly telling representatives of water agencies that she would “replace sound-bite rule making with sound-science rule making.”

Although Administrator Whitman announced that she wanted to be “sure that the conclusions about arsenic in the rule are supported by the best available science,” Majority staff’s review casts doubt on the substantiveness of EPA’s decision to reconsider the rule. EPA documents generated prior to Administrator Whitman’s announcement reflect no visible comprehensive analysis, work product, or narrative identifying the nature of the deficiencies in the science used to establish the Clinton-issued rule; they are instead limited to brief staff notes with questions regarding cost/benefit analysis and scientific studies.

EPA is required by law to use the best available, peer-reviewed science studies in setting standards under the Safe Drinking Water Act of 1976 (SDWA). Thus, the new administrator’s criticism of the previous administration’s “sound-bite” rule making was a serious allegation certain to be given credence due to her position. It should not have been lodged without appropriate analysis supporting a conclusion regarding deficiencies in the science.

In fact, despite the administrator’s protestation about the previous administration, it was the Bush Administration that seemed to put sound science behind other considerations. In April 2001, OMB staff, in the presence of staff from the White House Domestic Policy Office and the Council of Economic Advisors, pressed the EPA to dilute the arsenic standard, even though the SDWA assigns EPA, not OMB, the responsibility for setting contaminant levels for drinking water. The Majority Staff is troubled by OMB’s role in pressuring the EPA to reject its own expert judgment regarding the science and the application of the law.

In September 2001, an additional study by the National Academy of Sciences confirmed the Academy’s earlier conclusion that the available science required implementing a downward revision of the standard as “promptly as possible.” After 9 months of review, the Bush Administration ended up precisely where the Clinton Administration did: With the view that the Clinton Administration’s standard would stand. In light of these results, and the apparent absence of a rational basis for reopening the rule at the outset, Majority staff question why it was necessary to subject the rule to months of uncertainty and review.

\* \* \* \* \*

The administration’s future intentions for each of these rules is unclear. The USDA, which promised but did not initiate a new rulemaking on roadless areas in national forests, has issued a summary of comments received regarding the management of roadless areas. DOI has solicited comments on possible additional changes to the hardrock mining rule and established a task force to review bonding requirements on a variety of programs, including mining. And EPA has advised a court of its continuing review of its arsenic

standard. Any further actions which may be undertaken by the agencies must be in full compliance with the spirit and the letter of the law and must not further erode environmental protections or rulemaking procedures.

## INTRODUCTION AND BACKGROUND

Typically, when a new law is born, the public is greeted with familiar images of Members of Congress crowding the chamber to vote, and perhaps a Rose Garden signing ceremony by the President. As much as these moments help shape our understanding of our democracy, they do not mark the culmination of the democratic process. In many cases, they are only the beginning; when legislative work ends, the often laborious, complex—and critically important—Federal rulemaking process begins.

Laws, written and passed by the Congress, lay out the general architecture of government policy on an issue. Once laws are enacted, Federal agencies—the components of the Executive Branch—then must shape specific Federal programs to comply with the laws through rules implementing and interpreting the meaning of Congress’ directives. Such rulemaking is a practical necessity; lawmakers simply cannot anticipate every question that will arise with respect to administering a law, and it would not be practical to return to Congress with each question as it arises.

But the Executive Branch latitude in writing the rules is far from unfettered. As the courts have well explained, when Congress confers such decisionmaking authority upon agencies, it must “lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.”<sup>2</sup> The degree of acceptable agency discretion varies according to the scope of the power conferred by Congress.<sup>3</sup>

It is the responsibility of agencies to be diligent in developing these devilish details—and to ensure they faithfully represent the will of the people expressed in the laws passed by Congress. Agencies are not free to redesign the laws Congress passes or simply initiate their own programs in areas where Congress has not authorized them to act; rather, all rules must flow from the agencies’ authorization to act under a preexisting statute. These laws include the enabling statutes for the various Federal agencies, which lay out their general powers and responsibilities, as well as more detailed directives on distinct policy issues. If a rule is challenged in court, the judicial review examines whether the rule is faithful to the laws passed by Congress.<sup>4</sup> Courts reviewing a rule that is challenged will generally apply a standard called the “arbitrary-and-capricious” test.<sup>5</sup> This test focuses on four questions: “(1) whether the rulemaking record supports the factual conclusions upon which the rule is based; (2) the ‘rationality’ or ‘reasonableness’ of the policy

<sup>2</sup> *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 472 (2001), quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>3</sup> *Id.* at 475, citing *Loving v. United States*, 517 U.S. 748, 772–773 (1996).

<sup>4</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

<sup>5</sup> Section 706(2) of the Administrative Procedure Act (APA) provides that the reviewing court shall: “hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; . . .” 5 U.S.C. § 706(2).

conclusions underlying the rule; (3) the extent to which the agency has adequately articulated the basis for its conclusions; and (4) the validity of the agency's statutory interpretations."<sup>6</sup>

In addition to the substantive laws governing an agency's mandate and the specific program to be administered, agencies must follow the Administrative Procedure Act (APA), passed by Congress in 1946.<sup>7</sup> The APA lays out the basic procedural steps that the Executive Branch must follow in issuing rules. Under the APA, the heart of the most common type of rulemaking is known as the "notice and comment" process.<sup>8</sup> First, an agency that plans to change a rule or write a new one must publish a notice of proposed rulemaking in the Federal Register. The proposal must describe the subject and issues addressed in sufficient detail to allow for meaningful comment. Interested parties then must have an opportunity to supply information or views on the proposed rule. After deliberation, the agency must respond to significant points that were raised by the public<sup>9</sup> and publish the final rule at least 30 days before it is to take effect.<sup>10</sup> These are the minimum requirements. Often, depending upon additional statutory or executive requirements, rulemaking involves much more elaborate efforts to solicit and respond to public input.

This process lends legitimacy to rules that, while enacted by an unelected bureaucracy that is part of the Executive Branch, are the practical expression of a law's intent as passed by the legislature. And equally important, the process opens to public scrutiny rules that, despite sometimes appearing arcane and technocratic and often flying below the public radar, have wide-ranging impact on the health and well being of Americans.

The three rules scrutinized in this report well illustrate the point: They regulate the amount of a poison that can legally be dissolved in Americans' drinking water, specify whether development can occur on certain publicly owned forest lands, and set the standards by which miners can extract minerals from public land, including lands in the close vicinity of homes and businesses. As one administrative law scholar has said:

. . . notice and comment procedures serve fundamental democratic purposes. An agency that adopts rules makes new law without direct accountability to the voters. Notice and comment procedure is a surrogate political process. It helps to alleviate the undemocratic character of agency rulemaking and enhances the legitimacy of the process. It provides a channel that allows interested persons to exercise political power by indicating mass opposition to a proposed rule. Notice and comment also enhances the ability of Congress and the President to provide oversight of the rulemaking process.<sup>11</sup>

<sup>6</sup> Jeffrey S. Lubbers, *A Guide to Federal Agency Rulemaking*, 318 (Third Edition, 1998) (hereinafter "Federal Agency Rulemaking").

<sup>7</sup> 5 U.S.C. §§ 551 *et seq.*

<sup>8</sup> See Federal Agency Rulemaking at 45.

<sup>9</sup> *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35-36 (D.C.Cir. 1977).

<sup>10</sup> 5 U.S.C. § 553(d).

<sup>11</sup> Michael Asimow, "Interim-Final Rules: Making Haste Slowly," 51 Ad. L. Rev. 703 (1999).

In short, the “fine print” of the rulemaking process actually plays a critical role in our democracy by ensuring that agencies that exercise significant law-making powers do so in a way that is transparent, rational, orderly, and reflective of the intent of those elected by the people to legislate.

The openness of the rulemaking process—and the values expressed by the notice and comment procedure—came under assault at the outset of the Bush Administration. White House Chief of Staff Andrew H. Card, Jr. issued a memo (“the Card memo”) which directed the delay of recently developed and issued regulations despite the extensive process that had helped to draft these rules and in apparent contravention of the strict procedural requirements regarding their rollback or revision. This report looks at the Card memo and the Bush Administration’s treatment of three specific regulations affecting the environment and public health to determine whether the postponements followed appropriate procedures and to examine the process by which the administration reached decisions to reconsider, or propose to modify or suspend the regulations. Majority staff of the Governmental Affairs Committee concludes that the administration has demonstrated either a lack of attention to or a troubling disregard for the fine points of revising regulations. Rather than carefully weighing the substance and science of final rules to determine whether they should be modified, it expended its energy in devising methods to reach apparently predetermined ends.

## FINDINGS AND CONCLUSIONS

### I. The Card Memo

#### A. What Happened

Although the occupant of the White House may change every 4 or 8 years, the bulk of the Federal Government’s work carries over from administration to administration, even when there is a partisan turnover in power. It was thus not unusual that on Inauguration Day, January 20, 2001, Federal agencies had a large number of rules in the pipeline. Some were in the early stages of development, while others had reached their culmination, having been published in the Federal Register—the official annals of the Federal regulatory world. Those rules which were subject to the public scrutiny requirements of the APA had undergone a lengthy development and review process prior to their publication.

It was unusual, however, that on the afternoon of the Inauguration, President Bush’s Chief of Staff, Andrew H. Card, Jr., issued a directive to agency heads ordering an immediate freeze of recently issued and near-final regulations to allow the administration’s political appointees “to carefully review each of these last minute regulations set by the previous administration.”<sup>12</sup> A White

<sup>12</sup>The White House, Press Briefing by Ari Fleischer, April 17, 2001. <http://www.whitehouse.gov/news/briefings/20010417.html>; U.S. General Accounting Office, *Regulatory Review: Delay of Final Rules Subject to the Administration’s January 2001 Memorandum* GAO-02-370R at 3 (February 15, 2002) (hereinafter “GAO-02-370R”).

Of the prior three presidents, neither President Clinton nor the first President Bush sought immediately to suspend regulations published at the end of his predecessor’s administration. President Reagan did issue a memo (not on Inauguration Day) directing a more narrow suspension of regulations, which also provided that such actions should be taken “to the extent permitted by law.” 46 Fed. Reg. 11227 (February 6, 1981). This was followed by Executive Order 12291 which directed postponement of major rules not yet effective and established a govern-

House spokesman described the review: “It’s our responsibility and it’s sound public policy.”<sup>13</sup> It is worth noting that while the Clinton Administration completed its work on certain rules just prior to the new administration taking office, the rules that agencies actually delayed in response to the Card memo had been subjected to the APA’s public notice and comment process and thus by no stretch of the imagination could be considered “last minute” regulations.<sup>14</sup>

The Card memo directed department heads: (1) not to send any proposed or final regulations to the Federal Register without approval by a Bush-appointed department or agency head; (2) to withdraw any regulations already submitted to the Federal Register, but not yet published, until approved by a Bush appointee; and, (3) for final rules already published in the Federal Register but that had not yet taken effect, to postpone the effective date for 60 days. The memorandum provided that OMB could allow exceptions for emergency or urgent situations relating to “critical health and safety functions,” and it excluded regulations promulgated pursuant to statutory or judicial deadlines.<sup>15</sup> The Card memo failed to direct agencies to comply with Federal laws governing modification of regulations in the process of implementing its instructions.

Scores of rules at various stages of the regulatory process were put on hold. OMB reported that 124 regulations at the Federal Register office were pulled from the queue for further review, (Card memo’s Category 2) and that agencies withdrew 130 regulations from review by OMB.<sup>16</sup> The General Accounting Office (GAO) reported that 371 final rules—rules already published by the Federal Register—were covered by Category 3 of the Card memorandum, only 90 of which were actually postponed.<sup>17</sup> More than half of the 90 postponed rules were rules issued by the EPA, the USDA, the

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ment-wide regulatory process. E.O. 12291 (February 17, 1981), 3 C.F.R. 127. The director of President Clinton’s Office of Management and Budget (OMB) issued a memorandum to agencies requesting the opportunity to review and approve new regulations under development and the withdrawal from the Federal Register of all regulations not yet published in the Federal Register which could be withdrawn under existing procedures. 58 Fed. Reg. 6074 (January 25, 1993).

<sup>13</sup> Eric Pianin, “Bush Scrambles to Block Clinton Rush Orders,” *The Washington Post*, January 21, 2001, A-18.

<sup>14</sup> See U.S. General Accounting Office, Major Rules Database, July 2002.

<sup>15</sup> Exemptions for emergencies were to be determined by the director or acting director of OMB and statutory or court order exclusions reported to the OMB Director. After issuance of the Card memo, OMB issued a memorandum asking departments and agencies to implement the memo. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies from Mitchell E. Daniels, Jr., Director, “Effective Regulatory Review,” January 26, 2001, M-01-09.

<sup>16</sup> Office of Information and Regulatory Affairs, Office of Management and Budget, *Making Sense of Regulation: 2001 Report to Congress on the Costs and Benefits of Regulations and Unfunded Mandates on State, Local, and Tribal Entities* at 35 (2001) (hereinafter “2001 OMB Report”).

<sup>17</sup> As reported by the GAO, there were three basic reasons that agencies did not publish notices of delay for many of the rules that were covered by the Card memorandum:

. . . Federal agencies did not delay the effective dates for 281 (about 75 percent) of the 371 rules. The agencies published documents in the Federal Register that explained why some of the rules’ effective dates were not being changed. For example, DOT published a notice in the Federal Register explaining that four of its rules had effective dates far enough in advance . . . that the intent of the Card memorandum could be met without extending those dates. Also, 30 of the 281 rules that were not delayed were issued by independent regulatory agencies . . . that were not required to extend the effective dates of their rules.

GAO-02-370R at 4.

OIRA officials told us that they, the agencies, and the White House agreed shortly after the Card memorandum was issued that certain types of numerous and noncontroversial rules . . . should be allowed to take effect as scheduled.

GAO-02-370R at 5.

Department of Transportation, and the Department of Health and Human Services.<sup>18</sup> On the one year anniversary of the Card memo, of the 90 rules, the majority had gone into effect. Of the remaining, one was withdrawn, three rules were withdrawn and replaced, and nine other rules were modified.<sup>19</sup> Eight of these modified rules were altered without giving the public prior opportunity for comment.<sup>20</sup> Three rules which had been delayed for initial periods longer than 60 days had not gone into effect. Sixteen rules had been delayed more than once.<sup>21</sup> As of the summer of 2002, six had been modified, three were under modification (two were made partially effective and were partially being modified), one was to be further revised, and one continued to be delayed.<sup>22</sup>

To facilitate implementation of the Card memo, the OMB distributed to the departments and agencies a model Federal Register notice to postpone for 60 days the effective date of final rules already published in the Federal Register.<sup>23</sup> The model notice, reprinted in footnote 24 below, characterized the effective-date delay as a final rule and explained that the action did not require notice and comment because the APA's exemptions for a "rule of procedure," 5 U.S.C. § 553(b)(A), or "good cause," 5 U.S.C. §§ 553 (b)(B) and (d)(3), were applicable.<sup>24</sup> In postponing the effective dates, the departments basically followed the model notice distributed by OMB. In some cases, the practice of not seeking public comment extended beyond the initial 60-day delay. The GAO reported that of the 16 rules which were delayed for more than 60 days, "[f]or all but two of these rules, the agencies announced the additional delays without providing the public with a prior opportunity to comment, again generally citing the APA's rule of procedure and/or good cause exceptions."<sup>25</sup>

<sup>18</sup>*Id.* at 5.

<sup>19</sup>GAO-02-370R at 8 and 9.

<sup>20</sup>GAO-02-370R at 9, 14, 20, 29, 30, 36, 38, 40, 41, and 43.

<sup>21</sup>*Id.* at 8.

<sup>22</sup>GAO-02-370R at 7, 17, 25-32, 34-35, 38-40, 45-47, 49; 66 Fed. Reg. 28602 (May 23, 2001); 66 Fed. Reg. 35567 (July 6, 2001); 66 Fed. Reg. 56608 (November 9, 2001); 66 Fed. Reg. 58912 (November 23, 2001); 67 Fed. Reg. 9180 (February 27, 2002); 67 Fed. Reg. 36368 (May 23, 2002).

<sup>23</sup>The model notice was transmitted by a letter from Mitchell E. Daniels, Jr., Director, Executive Office of the President, Office of Management and Budget to The Honorable Joseph I. Lieberman, Ranking Member, Committee on Governmental Affairs, U.S. Senate, Washington, D.C., February 27, 2001.

<sup>24</sup>The model notice instructs departments and agencies to include the following in their Federal Register notices:

In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, entitled "Regulatory Review Plan," published in the Federal Register on January 24, 2001, this action temporarily delays for 60 days the effective date of the rule entitled **[title of published final rule]**, published in the Federal Register on **[date of publication]**, **[Fed Reg cite]**. That rule concerns **[short summary of what rule is about if it is not obvious from the title of the rule]**. To the extent that 5 U.S.C. section 553 applies to this action, it is exempt from notice and comment because it constitutes a rule of procedure under 5 U.S.C. section 553(b)(A). Alternatively, the Department's **[or agency's]** implementation of this rule without opportunity for public comment, effective immediately upon publication today in the Federal Register, is based on the good cause exceptions in 5 U.S.C. section 553(b)(B) and 553 (d)(3), in that seeking public comment is impracticable, unnecessary and contrary to the public interest. The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. **[Add specific "good cause" arguments, as appropriate, to the specifics of the rule involved.]**

<sup>25</sup>GAO-02-370R at 8.

The Card memo and its implementation raise a number of concerns—some legal, others related more generally to whether the administration displayed a sufficiently healthy respect for the regulatory process. Perhaps the most troubling aspect of the Card memo was its instruction regarding its third category—final rules that had been published but had not yet taken effect—a category applicable to two rules discussed later in this report: The roadless area conservation rule and the arsenic rule.

### B. Legal Concerns

By instructing agencies and departments to change the effective date of substantive rules, the Card memo erroneously suggested that agencies have greater authority to unilaterally alter final rules which have not yet become effective than they have over those already being implemented. There is no basis for such a distinction. Under the APA, a rule is final once it is “promulgated.” There is no question that once a rule has been signed by the agency head and published in the Federal Register, it has been promulgated.<sup>26</sup> Moreover, there is no doubt that a rule’s effective date is an integral and substantial component of a final rule, and it is established that a change or suspension in the effective date (either before or after it has gone into effect) may only be accomplished through a further notice and public comment period (unless an exception is appropriate).<sup>27</sup> As noted, such decisions must be supported and have a rational basis. If not, an administration could choose to repeatedly and indefinitely postpone regulations as it saw fit—with no public engagement or accountability.

The Bush Administration’s attitude toward compliance with the requirements of the APA is a matter of concern, as it could manifest itself in failures to comply with other legal requirements. By asserting that the 60-day postponement of rules published—but not yet effective—fell under two exceptions to the law’s notice and comment requirements, the administration tacitly acknowledged that the APA requirements would normally apply. However, the effort to gain blanket immunity from the APA’s requirements by instructing government-wide reliance on the same exemptions was inappropriate. The first claimed exemption, that the delays are “procedural rules” and thereby exempt from notice and comment, could not plausibly be applied to all final rules affected by the Card memorandum. The “procedural rule” exemption is applicable to matters such as an agency rule governing the conduct of its proceedings or delegating authority or duties within the agency.<sup>28</sup> Such rules “address how the agency goes about its substantive work. They do not affirmatively implement the agency’s substantive responsibil-

<sup>26</sup>The D.C. Circuit observed in *Kennecott Utah Copper Corp. v. Department of the Interior*, 88 F.3d 1191, 1212 (D.C. Cir. 1996), while there may be uncertainty about the precise date upon which a regulation is promulgated, “it is surely either the date of issuance or other formal announcement by the agency, the date of filing with the Office of the Federal Register, or the date of publication in the Federal Register.”

<sup>27</sup>See, e.g. *Natural Resources Defense Council, Inc., v. Environmental Protection Agency*, 683 F.2d 752, 759 (3d Cir. 1982) (holding that indefinite suspension of a final rule that had not yet become effective but was promulgated for judicial review purposes was a “rulemaking” subject to notice and comment under the APA); *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 812 (D.C. Cir. 1983); *Environmental Defense Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983); *Natural Resources Defense Council v. EPA*, 725 F.2d 761, 774 (D.C. Cir. 1984); *Associated Builders and Contractors, Inc. v. Herman*, 976 F. Supp. 1, 10 (D.D.C. 1997).

<sup>28</sup>5 U.S.C. § 553 (b)(A). See, Federal Agency Rulemaking at 53.

ities.”<sup>29</sup> The vast majority of the rules that were delayed by the Card memo directly affect the substantive work of the agencies, and therefore, the blanket procedural exception was flatly inapplicable.<sup>30</sup>

The second basis in the model Federal Register notice for justifying the effective date delays was the APA’s “good cause” exception. The APA provides that agencies may issue or modify a rule without the customary notice and comment where, for “good cause,” it finds that such procedures would be “impracticable, unnecessary, or contrary to the public interest.”<sup>31</sup> The model Federal Register notice distributed to and used by the agencies repeated this language as its justification of “good cause”:

. . . to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President’s [Card’s] memorandum of January 20, 2001. Given the imminence of the effective date, seeking prior public comment on this temporary delay would have been impractical, as well as contrary to the public interest in the orderly promulgation and implementation of regulations.<sup>32</sup>

In other words, the Card memo instructed the agencies to find “good cause” for putting off the rules in the fact that they had to comply with the Card memo’s mandate to put off the rules.

Courts have made clear that merely invoking the term “good cause” is not enough to justify the exception’s use to dispense of the critical notice and comment process.<sup>33</sup> When the use of the “good cause” exception is challenged,<sup>34</sup> courts will scrutinize the facts to determine whether it is, in fact, justified, and will only reluctantly uphold reliance on the “good cause” exception.<sup>35</sup> Court interpretations of what constitutes “good cause” vary,<sup>36</sup> but the sheer polit-

<sup>29</sup> *A Rush to Regulate—The Congressional Review Act and Recent Federal Regulations*, Hearing before the Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs, House Committee on Government Reform, Serial No. 107-14 (March 27, 2001) (statement of Thomas O. McGarity, W. James Kronzer Chair, University of Texas School of Law) 127.

<sup>30</sup> GAO-02-370R, Appendix 1. The Appendix contains a chart which lists the 90 rules and summarizes the actions taken. It also contains the agency’s characterization of whether the rules were “significant or substantive in nature.” Based on the description of the rules, two or three, at most a handful, involve agency procedure.

<sup>31</sup> 5 U.S.C. § 553(b)(B) provides a “good cause” exemption for rules from notice and comment procedures, and 5 U.S.C. § 553(d)(3) a “good cause” exemption from advance publication.

<sup>32</sup> *Supra*, note 24.

<sup>33</sup> *Mobil Oil Co. v. Department of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979).

<sup>34</sup> Challenges to specific delays resulting from the Card memorandum were rare and there are no rulings on whether the blanket assertion that the President’s appointees needed time “for further review and consideration of new regulations” was adequate “good cause” to justify delays of scores of final regulations without notice and comment. One case involved a challenge by several states and public interest groups to the Department of Energy’s actions to postpone the final rule that was issued to establish energy efficiency standards for residential central air conditioners and heat pumps. The case was dismissed by the District Court on the grounds that jurisdiction lies in the U.S. Court of Appeals and the challenge is now pending in the Second Circuit. *State of New York v. Abraham*, 199 F. Supp.2d 145 (S.D.N.Y. 2002).

<sup>35</sup> *Council of the Southern Mountains v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981), is an example. This case involved a decision by the Secretary of Labor to postpone a mine safety regulation for 6 months without notice and comment procedures due, in part, to the unavailability of safety devices. The D.C. Circuit upheld the action under the “good cause” exception, but only after carefully scrutinizing the decision and detailing five factors that argued for the delay. Those factors included circumstances beyond the agency’s control and evidence that it had done everything to implement the regulations on time. Even so, the court said that the delay constituted an “extremely close case,” and stressed that its decision should not be interpreted to lower the high threshold under the good cause exception.

<sup>36</sup> Ellen R. Jordan, “The Administrative Procedure Act’s ‘Good Cause’ Exemption,” 36 Ad. L. Rev. 113, 116 (1984).



ical determination of a new administration to suspend the work of its predecessor has not been among them. In fact, in a challenge to the summary suspension of a rule based solely on an executive order issued by President Reagan directing the postponement of major rules, the court voided the suspension when the agency failed to show why it could not comply with the notice and comment requirements.<sup>37</sup> The D.C. Circuit has stated its firm understanding that the exceptions of the provisions of section 553,

. . . will be narrowly construed and only reluctantly countenanced. . . . As the legislative history of the APA makes clear, moreover, the exceptions at issue here are not “escape clauses” that may be arbitrarily utilized at the agency’s whim. . . . Rather, use of these exceptions by administrative agencies should be limited to emergency situations . . . furthermore, the grounds justifying the agency’s use of the exception should be incorporated within the published rule.<sup>38</sup> (Citations omitted)

While courts have found that emergency situations exist in some cases—for example, in response to a court order<sup>39</sup> or a pressing health and safety matter<sup>40</sup>—the “situations are indeed rare,” and “courts will examine closely proffered rationales justifying the elimination of public procedures.”<sup>41</sup> In addition, the exemption for “procedural rules” is not available as an alternative to the “good cause” exemption if the action taken by the agency substantially alters the rights or interests of the regulated parties.<sup>42</sup>

It is hard to see how the desire for a blanket postponement of a broad range of rules issued by the previous administration could possibly qualify under such a narrow exemption. In short, the effect of the Card memorandum’s instructions to agency and department heads to delay final rules without attention to these legal requirements requiring public participation encouraged government-wide non-compliance with the requirements of the APA. Thus, the Card memo set an unacceptable tone in the Executive Branch—an unhealthy disregard for the important procedural constraints by which all administrations must abide. The Executive Branch is charged with the faithful implementation of all the laws passed by Congress, not their selective execution.<sup>43</sup> In the view of Majority

<sup>37</sup> *Natural Resources Defense Council v. Environmental Protection Agency*, 683 F.2d 752, 761–62 (3d Cir. 1982).

<sup>38</sup> *American Federation of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (quoting *State of New Jersey, Department of Environmental Protection v. Environmental Protection Agency*, 626 F.2d 1038, 1045 (D.C. Cir. 1980)). See also, *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 379 (3d Cir. 1979); *American Iron & Steel Institute v. EPA*, 568 F.2d 284 (3d Cir. 1977).

<sup>39</sup> *American Federation of Government Employees, AFL-CIO*, *supra* note 38. This case involved an order issued in response to a suit alleging discrimination in the enforcement of inspection rates in poultry processing plants.

<sup>40</sup> *Washington State Farm Bureau, v. Marshal*, 625 F.2d 296, 306–308 (D.C. Cir. 1980).

<sup>41</sup> *American Federation of Government Employees, AFL-CIO*, *supra* note 38, at 1158, n. 6. *United Steel Corp. v. Environmental Protection Agency*, 595 F.2d 207 (5th Cir. 1979) (argument that statutory deadlines made prior notice and comment impracticable and contrary to the public interest rejected); *Sharon Steel Corp. v. Environmental Protection Agency*, 597 F.2d 377 (3d Cir. 1979) (mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for dispensing with notice and comment).

<sup>42</sup> *Jem Broadcasting Co. v. F.C.C.*, 22 F.3d 320 (D.C. Cir. 1994).

<sup>43</sup> As noted above, the second instruction contained in the Card memo was to withdraw any regulations already submitted to the Federal Register, but not yet published. None of the three regulations discussed later in this report fall within that category. Some Federal courts consider

staff, the Bush Administration's early actions set a troubling tone and raise concern as to whether they set a potentially dangerous precedent.

### C. Public Participation

In addition to concerns about the administration's failure to comply with the law, the Card memo suspensions raise troubling questions about the Bush Administration's regard for the importance of public participation in the regulatory process. As discussed above, the APA public participation mandate is not to be dispensed with lightly; the opportunity for public comment is the public's central means of ensuring that an agency has taken into account all "relevant factors," as it is required to do in making its decision.<sup>44</sup> For instance, in cases where a proposed rule is based on a scientific decision, courts have interpreted the APA to require the rulemaking agency to indicate the scientific literature and studies it relies upon during the public comment period.<sup>45</sup> It is crucial to the workings and spirit of democracy that even regulations that would be characterized as arcane are not hidden from public oversight.

Moreover, the rules being put on hold had already been through the procedural wringer when they were issued in the first place. In other words, they had already been subjected to an interchange between the public and the government—an interchange that, in some cases, occurred over a period of years and involved a significant commitment of resources and staff. The arguments were made and considered, necessary analysis completed, then policy decisions made and a final rule issued. It is disturbing that, with the stroke of a pen, no participation by the public, and generally no justification offered other than the reasons provided in the model Federal Register notice, those final decisions were put on hold, giving short shrift to the role of the public that participated in the notice and comment process in the initial development of the rule.

In some cases, as noted above, following the 60 day or longer delays, the agencies and departments modified, or even withdrew, the final rules. This is not necessarily improper; agencies have some latitude to modify, or even reverse, a rule.<sup>46</sup> However, under the APA, when doing so they must generally go through the same process required for enacting a rule in the first place, which includes a public notice and comment period—a process which was not always followed.

## II. The Bush Administration's Attempts to Change Three Rules

Senator Lieberman, then-Ranking Member of and now Chairman of the Committee on Governmental Affairs, was concerned that the Card memorandum reviews would be used to turn back the clock on important health, safety, and environmental protections and

that the date of filing a regulation with the Office of the Federal Register is the date upon which a regulation is promulgated, thus raising a question about the appropriateness of such withdrawals. *Kennecott Utah Copper Corp. v. Department of the Interior*, 88 F.3d 1191, 1212 (D.C. Cir. 1996).

<sup>44</sup> *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>45</sup> See *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d. Cir. 1977); *Portland Cement Ass'n. v. Ruckelshaus*, 486 F.2d 375, 400 (D.C. Cir. 1973).

<sup>46</sup> *American Trucking Ass'ns., Inc. v. Atchison, Topeka & Santa Fe Railroad Co.*, 387 U.S. 397 (1967); *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

undo years of work on important regulations.<sup>47</sup> EPA Administrator Whitman’s announcement on March 20, 2001, that the EPA would propose withdrawing its standard for arsenic in drinking water<sup>48</sup> increased those concerns, thereby prompting Senator Lieberman to send letters to the Department of Agriculture, the Department of the Interior, and the Environmental Protection Agency requesting information and documents related to agency decisions on three final regulations: USDA’s rule safeguarding roadless areas of the national forests from environmental degradation, DOI’s hardrock mining rule, and EPA’s drinking water standard lowering the amount of arsenic allowed in drinking water.<sup>49</sup> The documents ultimately provided to the Committee or reviewed by the Majority staff demonstrate a lack of a careful review of the rules and the reasons and the science behind the rules prior to the agency’s proposals to suspend or take other action with regard to the rules. Instead, in these three cases, the Bush Administration appears to have pre-determined that the regulations should be changed, and sought to employ whatever tools and tactics it deemed convenient to effect that change.

#### A. Roadless Area Conservation Rule

The USDA’s Forest Service has stewardship over 192 million acres of Federal land,<sup>50</sup> including 155 national forests.<sup>51</sup> It is responsible for managing those publicly-owned lands for multiple uses, including outdoor recreation, range, timber, watershed, and wildlife and fish purposes.<sup>52</sup> The Multiple-Use Sustained-Yield Act of 1960 recognizes that “some land will be used for less than all of the resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.”<sup>53</sup> The duties Congress has assigned to the Secretary of Agriculture include regulating the occupancy and use of the national forest system lands and preserving the forests from destruction.<sup>54</sup> The National Forest Management Act of 1976 (NFMA)<sup>55</sup> authorizes the Secretary to issue regulations implementing its provisions and specifying guidelines for the development of resource management

<sup>47</sup> Letter from Senator Joseph I. Lieberman and Representative Henry A. Waxman to the Honorable Mitchell E. Daniels, Jr., Director, Office of Management and Budget, Washington, D.C., February 4, 2001.

<sup>48</sup> Communications, Education, and Media Relations, U.S. Environmental Protection Agency, “EPA to Propose Withdrawal of Arsenic in Drinking Water Standard; Seeks Independent Reviews,” March 20, 2001.

<sup>49</sup> Letters from Joseph I. Lieberman, Ranking Member, Committee on Governmental Affairs, to the Honorable Christie Whitman, Administrator, Environmental Protection Agency, the Honorable Ann M. Veneman, Secretary of Agriculture, and the Honorable Gale A. Norton, Secretary of the Interior, Washington, D.C., March 22, 2001.

<sup>50</sup> Ross W. Gorte and Carol Hardy Vincent, “Public (BLM) Lands and National Forests,” Congressional Research Service Issue Brief for Congress, IB10076, June 14, 2002 at CRS-1.

<sup>51</sup> Office of the Federal Register, National Archives and Records Administration, *The United States Government Manual, 2001–2002* at 125.

<sup>52</sup> 16 U.S.C. § 528.

<sup>53</sup> 16 U.S.C. § 531. The Multiple-Use Sustained-Yield Act of 1960 also requires “sustained yield,” defined as the “achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forest without impairment of the productivity of the land.” 16 U.S.C. § 531. It authorizes the “multiple use” of the national forests “in the combination that will best meet the needs of the American people” and recognizes that “establishment and maintenance of areas of wilderness” areas is consistent with the purposes of the act. 16 U.S.C. § 529.

<sup>54</sup> 16 U.S.C. § 551.

<sup>55</sup> Pub. L. 94–588, 90 Stat. 2949 (1976).

plans for land in the national forest system.<sup>56</sup> These guidelines are to take into account a variety of economic and environmental considerations,<sup>57</sup> including ensuring that timber will be harvested only where watershed conditions will not be irreversibly damaged.<sup>58</sup> Roads are to be allowed in the forests to meet transportation needs on an economical and environmentally sound basis.<sup>59</sup>

Responding to concerns about the cost of road maintenance, the adverse impact of development on watersheds and ecosystem health, and the continuing controversies associated with the development of roadless areas, on January 12, 2001, the Clinton Administration issued a final regulation<sup>60</sup> prohibiting most new road construction and timber harvesting on 58.5 million acres of “inventoried” roadless areas within the national forest system.<sup>61</sup> Inventoried roadless areas are areas identified by the Forest Service through one or more formal review procedures.<sup>62</sup> They generally contain the characteristics which are listed in the footnote below,<sup>63</sup> and were designated on maps in the Environmental Impact Statement supporting the rule.<sup>64</sup> Over the past 20 years, roads have been constructed in an estimated 2.8 million of National Forest “inventoried” roadless areas.<sup>65</sup> The Forest Service estimated its backlog for upkeep of its existing 373,000 mile road system, used by an estimated 1.7 million vehicles a year,<sup>66</sup> at \$8.4 billion.<sup>67</sup> The area affected by the rule included 9.3 million acres in the Tongass National Forest in Alaska, a part of the Pacific Coast’s temperate rainforest ecosystem encompassing many undisturbed watersheds.<sup>68</sup>

<sup>56</sup> 16 U.S.C. § 1604 (a). These are to be coordinated with the land and resource management planning process of State and local governments and other Federal agencies.

<sup>57</sup> 16 U.S.C. § 1604 (g).

<sup>58</sup> 16 U.S.C. § 1604 (g)(3)(E)(i).

<sup>59</sup> 16 U.S.C. § 1608.

<sup>60</sup> 66 Fed. Reg. 3244 (January 12, 2001). The rule was effective March 13, 2001. The Department also published two other related rules: A rule affecting roads that make up the Forest Development Transportation system focused on providing and maintaining the minimum forest transportation system needed for safe and efficient travel. 66 Fed. Reg. 3206. (January 12, 2001). New planning regulations required that changes in the use of roadless areas be determined through the planning process. 65 Fed. Reg. 67514 (November 9, 2000).

<sup>61</sup> 66 Fed. Reg. 3246 (January 12, 2001).

<sup>62</sup> The Forest Service has conducted several reviews of inventoried roadless areas, beginning in 1972 with a national screening process to identify areas that would be suitable for preservation as wilderness areas. A second national review of roadless areas was completed in 1979 and additional reviews through the planning process have been conducted since then. *Id.*

<sup>63</sup> A road was defined in the Roadless Conservation Area rule as a “motor vehicle travelway over 50 inches wide, unless designated and managed as a trail.” 36 CFR § 294.11. The rule also described inventoried roadless areas as generally characterized by several features: High quality or undisturbed soil, water, and air; sources of public drinking water; diversity of plant and animal communities; habitat for threatened, endangered, proposed, candidate and sensitive species and for those species dependent on large, undisturbed areas of land; primitive, semi-primitive non-motorized and semi-primitive motorized classes of dispersed recreation; reference landscapes; natural appearing landscapes with high scenic quality; traditional cultural properties and sacred sites; and other locally identified unique characteristics. 66 Fed. Reg. 3272 (January 12, 2001).

<sup>64</sup> Maps showing where inventoried roadless areas are located are reprinted in Volume 2 of the Final Environmental Impact Statement. U. S. Department of Agriculture, *Forest Service Roadless Area Conservation, Final Environmental Impact Statement*, Vol. 2 (November 2000) (hereinafter “Roadless Area FEIS”).

<sup>65</sup> 66 Fed. Reg. 3246 (January 12, 2001).

<sup>66</sup> 63 Fed. Reg. 4350 (January 28, 1998).

<sup>67</sup> 64 Fed. Reg. 56306 (October 19, 1999).

<sup>68</sup> The Tongass National Forest has a full complement of native species including bald eagles, wolves, black-tailed deer, brown bears, and five species of anadromous salmon. Letter to the Honorable William J. Clinton, President of the United States, Washington, D.C., from Paul Alaback, Ph.D., Assistant Professor, School of Forestry, University of Montana and more than 200 additional signatories who are scientists, December 20, 1999.

The inventoried roadless areas, which have long received special management attention<sup>69</sup>—with many areas being managed by the Forest Service as natural, primitive, or wilderness areas—are found within 661 of the over 2,000 major watersheds in the continental United States.<sup>70</sup> These areas generally have high quality or undisturbed water and air and serve as sources of public drinking water for millions of Americans, containing all or portions of 354 municipal watersheds.<sup>71</sup> The watersheds provide about 14 percent of the water flow of the nation, 33 percent of which is in the west.<sup>72</sup> Healthy watersheds catch, store, and safely release water over time, protecting downstream communities from flooding, providing clean water for many uses, and helping maintain abundant fish and wildlife populations. They are also biological strongholds for populations of threatened and endangered species. Of the Nation’s species listed or proposed for listing under the Endangered Species Act, approximately 25 percent of animal species and 13 percent of plant species are likely to have habitat within inventoried roadless areas.<sup>73</sup>

The rule promulgated by the Clinton Administration in January 2001 restricted logging to activities that maintained or restored the forest, to existing timber contracts, and to activities for which an environmental analysis was already formally underway. Existing leases, rights, and statutory rights were preserved, as well as roads needed for these leases and rights. The rule also contained specific provisions to address concerns about the dangers of wildfires. In appropriate circumstances, timber could be removed to reduce the risk of uncharacteristic wildfire effects and, in the case of an imminent threat of fire that would cause the loss of life or property, the construction of roads could be authorized.<sup>74</sup> The USDA also issued a final policy, previously the subject of public comment, which provided for science-based analysis<sup>75</sup> in assessing the need for new road construction and emphasized the maintenance and decommissioning of existing roads rather than the construction of new roads.<sup>76</sup>

By imposing national limitations on road construction and timber harvesting, the rule represented a significant departure from the prior practice of making decisions regarding roadless areas on a forest-by-forest basis. The stated justification for the rule addressed concerns about the cumulative impact of these piecemeal decisions:

If management decisions for these areas were made on a case-by-case basis at a forest or regional level, inventoried roadless areas and their ecological characteristics and social values could be incrementally reduced. . . . Added together, the nation-wide results of these reductions

<sup>69</sup>Pamela Baldwin, “The National Forest System Roadless Areas Initiative,” Congressional Research Service Report for Congress, RL30647, January 22, 2002 at 4 (hereinafter “RL30647”).

<sup>70</sup>Roadless Area FEIS, Vol. 1 at 3–50.

<sup>71</sup>66 Fed. Reg. 3245 (January 12, 2001).

<sup>72</sup>66 Fed. Reg. 3246 (January 12, 2001).

<sup>73</sup>66 Fed. Reg. 3245 (January 12, 2001).

<sup>74</sup>66 Fed. Reg. 3272–73 (January 12, 2001).

<sup>75</sup>66 Fed. Reg. 3219 (January 12, 2001).

<sup>76</sup>The policy described a “science-based roads analysis” as an analysis, conducted through an “authorized” process by an interdisciplinary team and which provides critical information needed to identify and manage a minimum road system. It identified the process outlined in the U.S. Department of Agriculture’s publication, “Roads Analysis: Information Decisions About Managing the National Forest Transportation System” as an “authorized science-based road analysis.” Misc. Report FS–643 (1999). 66 Fed. Reg. 3234 (January 12, 2001).

could be a substantial loss of quality and quantity of roadless area values and characteristics over time.<sup>77</sup>

In short, the rule made clear that after years of incursions, the Federal Government would limit further erosion of roadless areas.

*(1) The Rule's Development*

The rule had been developed over the course of several years. In January 1998, the Forest Service published an Advance Notice of Proposed Rulemaking to solicit comments on revising the National Forest Road system.<sup>78</sup> Pending its work on a comprehensive overhaul of the forest road policy, the Forest Service issued a second notice proposing temporary suspension of road construction and reconstruction.<sup>79</sup> After holding 31 open houses attended by an estimated 2,300 people and receiving 53,000 comments, the agency issued an interim rule on February 12, 1999 which suspended road construction for 18 months.<sup>80</sup>

On October 13, 1999, President Clinton directed the Forest Service to develop and propose for public comment regulations that would provide long-term protection for already inventoried roadless areas.<sup>81</sup> On October 19, 1999, following the procedures provided for in the National Environmental Policy Act (NEPA), the agency published a Notice of Intent to prepare a Draft Environmental Impact Statement (DEIS) to consider the effects of eliminating road construction activities in the remaining “un-roaded” portions of inventoried roadless areas and of establishing criteria to ensure that social and ecological values would be protected through the forest planning process. (NEPA requires Federal agencies to prepare an environmental impact statement regarding major Federal actions significantly affecting the quality of the human environment.)<sup>82</sup> The notice also initiated a rulemaking process to restrict road construction in the inventoried roadless areas.<sup>83</sup> In response to the Notice of Intent, about 16,000 people attended 187 public meetings. More than 517,000 responses were received by the time the next steps were taken, when the Forest Service published a DEIS on May 10, 2000.<sup>84</sup> It also published a proposed rule prohibiting road construction and reconstruction in most inventoried roadless areas of the national forest system, and requiring evaluation of roadless area characteristics when revising land and management plans.<sup>85</sup> Following publication of the DEIS, the Forest Service held two cycles of public meetings regarding the draft and the proposed rule—about 230 for information sharing and about 200 for collecting oral and written comments.<sup>86</sup> About 16,000 people attended comment meetings, at which nearly 7,000 (or 44 percent of the attendees)

<sup>77</sup> 66 Fed. Reg. 3252–53 (January 12, 2001).

<sup>78</sup> 63 Fed. Reg. 4350 (January 28, 1998).

<sup>79</sup> 63 Fed. Reg. 4350–51 (January 28, 1998).

<sup>80</sup> 64 Fed. Reg. 7290 (February 12, 1999).

<sup>81</sup> 66 Fed. Reg. 3244, 3247 (January 12, 2001).

<sup>82</sup> 42 U.S.C. § 4332(C).

<sup>83</sup> 64 Fed. Reg. 56306 (October 19, 1999).

<sup>84</sup> Roadless Area FEIS, Vol. 1 at 1–7.

<sup>85</sup> 65 Fed. Reg. 30276 (May 10, 2000).

<sup>86</sup> 66 Fed. Reg. 3248 (January 12, 2001).

spoke.<sup>87</sup> The Forest Service received more than 1.1 million written comments on the DEIS which it analyzed and addressed.<sup>88</sup>

In response to public comments, the final rule, issued on January 12, 2001, included a prohibition on timber harvesting.<sup>89</sup> Eight lawsuits were filed in six Federal judicial districts—the most significant of which, for the purposes of this review, were filed on January 8 and 9, 2001, in U.S. District Court in Idaho, even before the rule appeared in the printed Federal Register.<sup>90</sup>

*(2) Department Delays and Reviews Rule*

Soon after taking office, and in accordance with the Card memo's instructions, USDA Secretary Ann Veneman postponed the rule's effective date for 60 days. The notice, which appeared in the Federal Register on February 5, 2001, used the OMB model notice and delayed the effective date from March 13 to May 12, 2001 to give "Department officials the opportunity for further review and consideration of new regulations. . . ." <sup>91</sup>

As discussed above, the roadless rule by this time was a final regulation—the product of an extensive and public process. It was, without dispute, a substantive rule—not, in any reasonable interpretation, simply a rule affecting agency procedure. Therefore, the procedural exemption to the APA was not applicable. Furthermore, the USDA offered no explanation to justify invoking the "good cause" exception from public comment—neither in the Federal Register notice nor in any decision documents for the Secretary—other than the model notice's generic reference to the imminence of the effective date and the desire for review by new administration officials—justifications that were, in Majority staff's view, inappropriate.

Because the rule had been developed during the Clinton Administration with extensive public participation, one would hope that before upsetting the results of this extensive process, the new administration would carefully review the rule, the data supporting it, and undertake to revise it only if there appeared to be a rational basis for doing so, within the requirements of the applicable statutes. Based on the documents provided by the agencies, however, it appears no such review was undertaken. Nevertheless, the rule—about which OMB staff specifically requested information regard-

<sup>87</sup> Roadless Area FEIS, Vol. 1 at 1–7.

<sup>88</sup> Roadless Area FEIS, Vol. 1 at 1–7 and Vol. 3.

<sup>89</sup> 66 Fed. Reg. 3256 (January 12, 2001). Although not contained in the proposed rule, this alternative was described in the Draft Environmental Impact Statement and was identified as a preferred alternative in the Final Environmental Impact Statement. The rule was issued in accordance with authority contained in a variety of laws, including those providing for the general management, regulation of occupancy, and preservation of the forests. 16 U.S.C. §§ 475, 529, 551, 1608, 1613, as cited at 66 Fed. Reg. 3272. In addition to the Multiple Use Sustained Yield Act of 1969 and the National Forest Management Act of 1976 mentioned above, the Organic Act of 1897 directs that the national forests be managed to improve and protect the forests or "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; . . ." 16 U.S.C. § 475. It authorizes the Secretary to issue regulations to "regulate the occupancy and use of the forests and to preserve them from destruction; . . ." 16 U.S.C. § 551.

<sup>90</sup> *Kootenai Tribe of Idaho v. Veneman*, CV01–10–N–EJL (D. Id. filed January 8, 2001) and *State of Idaho v. United States Forest Service*, CV01–11–N–EJL (D. Id. filed January 9, 2001).

<sup>91</sup> 66 Fed. Reg. 8899 (February 5, 2001).

ing compliance with the Card memo directive<sup>92</sup>—was targeted for delay and/or alteration.

The USDA produced and the Majority staff reviewed approximately 20,000 pages of departmental documents. While the documents contain reference materials that would be relevant to a rule review,<sup>93</sup> they also contain nothing that could be considered work product, analysis, research, or narrative reflecting a systematic review of either the substance or procedure associated with promulgation of the final rule. Similarly, there are no tasking memoranda creating such reviews, schedules for completing such a task within such a relatively short period of time, or identifiable work product that would have been produced from such reviews. There is a one page document which listed five issues regarding implementation of the rule,<sup>94</sup> and a plan to gather information from the field to “substantiate NFMA violations.”<sup>95</sup>

In place of a focus on whether the rule should be modified, the administration concerned itself with tactics. The documents reviewed contained proposals and option papers discussing tactically how to achieve the desired result—an overturning of the rule as written.<sup>96</sup> The preferred result was to replace the rule with a return to the traditional decisionmaking by local Forest Service officials.<sup>97</sup> In other words, it appears that a pre-determination had been made that the new national requirements were wrong and should be reversed—the issue for the department was how to achieve that goal. Various options for accomplishing this were addressed, such as further extensions of the effective date to allow time for a replacement rule and an expedited rulemaking process. A USDA-produced document entitled “Talking Points and Options for Rescinding the Roadless Rule,” with multiple copies, laid out the options as follows:

- (1) extend the effective date before May 12, remove the rule later, no comment period.
- (2) rescind the rule “immediately”, no comment period.
- (3) rescind the rule “immediately” (no comment period on the removal) and include a new rule (no NEPA<sup>98</sup> but

<sup>92</sup> E-mail from Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, to staff at U.S. Department of the Interior and U.S. Department of Agriculture, “suspension of effective date,” January 24, 2001.

<sup>93</sup> These include sections of the Environmental Impact Statement, tallies of affected lands, a paper on the history of laws governing forest lands, etc.

<sup>94</sup> The issues listed were impacts on the national fire plan, conflicts with policies for leasing minerals, lack of exemptions for utility corridors and provisions for necessary adjustment to boundaries, and questions regarding the effective date. Memorandum from staff at Intermountain Region, U.S. Forest Service to Dave Tenny, Acting Under Secretary for Natural Resources and Environment, Subject: “Roadless Area Conservation Rule Issues,” March 7, 2001.

<sup>95</sup> E-mail from David Tenny, U.S. Department of Agriculture to OSECNET.UASEC. Christopher, “Draft Rule,” April 3, 2001.

<sup>96</sup> These include, for example, several undated, unidentified documents with the headings “Roadless Options”; “Talking Points & Options for Rescinding the Roadless Rule”; and “Privileged & Confidential: Rulemaking Options for Adjusting the Roadless Rule.”

<sup>97</sup> Unidentified, undated document: “Privileged & Confidential: Rulemaking Options for Adjusting the Roadless Rule”; Draft Talking Points, dated 4/6 and part of Communication Plan, Roadless Area Conservation Rules. Interestingly, one strategy advanced in an undated, unsigned note addressed to “Dave” for rescinding the rule involved announcing, as did the EPA with respect to arsenic, that the rule would be rescinded, then seeking public comment. “That will make it hard for opposition groups to rally support for another million or two comments. Basically, the announcement makes it clear the debate is over.”

<sup>98</sup> As discussed above, page 31, “NEPA” requires an agency to prepare a detailed statement on the environmental impact of a major Federal action significantly affecting the quality of the



with a comment period) that establishes the requirements for the Forest Service to a) complete an EIS for roadless entry, and b) consider Roadless Management Areas in Forest Plan Revisions.<sup>99</sup>

### (3) *Legal Strategy*

Conveniently, there was another route available for the administration's efforts to overturn the rule: The courts. From the outset, department officials were conscious of the relationship of their actions with the existing litigation challenging the rule. The Governor of Idaho wrote to Secretary Veneman advising her of the State's challenge to implementation of the roadless rule and requesting an opportunity for his negotiating team to brief the Secretary's staff. His letter describes an order from the U.S. District Court in Idaho, in which, although dismissing a challenge at an early stage of the rule's analysis under NEPA, the court expressed skepticism about the adequacy of public participation.<sup>100</sup> A meeting on roadless issues was scheduled between USDA officials and Governor Kempthorne's representatives on February 27, 2001.<sup>101</sup> This was a week after the plaintiffs in a parallel case in the Idaho District Court filed a motion seeking a preliminary injunction<sup>102</sup> to prevent implementation of the rule.<sup>103</sup> The judge set an expedited schedule with a hearing on March 30, 2001.<sup>104</sup> An undated USDA options paper proposing to effectively rescind the roadless rule specifically noted that "(a)ny rulemaking effort must be closely coordinated with the ongoing litigation challenging the roadless rule. . . . On March 30, 2001, the Federal District Court for the District of Idaho (Judge Lodge) is expected to hold a preliminary injunction hearing on whether to enjoin implementation of the roadless rule prior to or upon the scheduled effective date (May 12, 2001)."<sup>105</sup>

After Judge Lodge scheduled a hearing, attorneys from the Department of Justice (DOJ) and USDA were scheduled to meet on March 12 with the Acting Under Secretary for Natural Resources and Environment.<sup>106</sup> Handwritten notes from that date regarding short-term and long-term legal options identified the further extension of the effective date as an option, noting as a "benefit—keeps

human environment before such an action can be taken. 42 U.S.C. §§ 4321, *et seq.* Presumably, the statement "No NEPA" means that no such statement would be prepared.

<sup>99</sup>The document is undated. However, its contents include projections for actions "doable" by May 1.

<sup>100</sup>Letter from Dirk Kempthorne, Governor of Idaho to the Honorable Ann Veneman, Secretary of Agriculture, Department of Agriculture, Washington, D.C., January 25, 2001 with enclosures, including *State of Idaho v. U. S. Forest Service*, No CV99-611-N-EJL (D. Id. Feb. 17, 2000) (order dismissing complaint).

<sup>101</sup>Schedule notice: "Subject: Re: Roadless—Erika Eaton, Bruce Smith [Governor Dirk Kempthorne's Office] w/Michael Bogert, Clive Strong, Jan Polin [sic]," February 27, 2001.

<sup>102</sup>A preliminary injunction is a legal order essentially prohibiting the defendant from doing what it wants to do, pending a full review on the merits. Because it is a grant of relief to the plaintiffs before the court has even heard the evidence, some courts, including the Ninth Circuit, impose a high hurdle on those seeking a preliminary injunction which upsets the status quo—they must show, among other things, that they are likely to prevail on the merits and that they will be irreparably harmed without injunctive relief. Fed. R. Civ. P. 65; Thomas R. Lee, "Preliminary Injunctions and the Status Quo," 58 Wash & Lee L. Rev. 109, 116 (Winter 2001).

<sup>103</sup>*Kootenai Tribe of Idaho v. Veneman*, CV01-10-N-EJL (D. Id. February 20, 2001) (Motion for Preliminary Injunction).

<sup>104</sup>*Kootenai Tribe of Idaho v. Veneman*, CV01-10-N-EJL (D. Id. March 9, 2001) (Order).

<sup>105</sup>Undated, unidentified document, "Privileged & Confidential, Rulemaking Options for Adjusting the Roadless Rule."

<sup>106</sup>Schedule notice, "Subject: Re: Roadless—with Jan Polin [sic], Mike Gippert, Vince DeWitt, [OGC], Lucy Clark, Andrea Berlow, Jack Haugrud [Justice]," March 12, 2001.

case before a judge we know” and identifies as next steps to “confer with White House” and “take options to Secretary and White House decision makers.”<sup>107</sup>

The next day, on March 13, officials from OMB (including the General Counsel’s Office and the Office of Information and Regulatory Affairs), the Council on Environmental Quality and the office of the White House Chief of Staff met with representatives of DOJ and USDA to discuss roadless issues.<sup>108</sup> On March 15, David Tenny, Acting Under Secretary for Natural Resources and Environment, forwarded to officials at the White House and the DOJ draft talking points explaining the anticipated request for a delay of the government’s filing until May 12. He explained that the “purpose of the government’s motion is to ensure that this review process can continue while also preserving the court’s ability to hear the plaintiff’s case. Until the review of the roadless policy is completed, the administration will not comment on the merits of the policy.”<sup>109</sup>

By most appearances, the administration lacked a commitment to defending the case. On March 16, the date on which objections to the request for preliminary injunction were due, the United States did not object but filed a Motion for Enlargement of Time to allow for review of the rule.<sup>110</sup> In their response to the motion, plaintiffs argued, *inter alia*, that in the Ninth Circuit, “in a lawsuit to compel compliance with NEPA, no one but the Federal Government can be a defendant.” (Citations omitted)<sup>111</sup> Plaintiffs “submit that defense of an agency’s NEPA compliance—the only matter at issue in the instant Motion for Preliminary Injunction—is within the sole province of the agency.”<sup>112</sup>

On March 21, the government filed its response to the motion for preliminary injunction, and in fact—in what must be quite unusual for a party in litigation—did not comment on the merits on the case. Rather than making any effort to defend the rule, it reported that the “. . . Secretary of Agriculture is prudently conducting a careful review” of the rule, which the USDA anticipated completing prior to May 12, 2001, the postponed effective date of the rule.<sup>113</sup>

This approach did not sit well with veteran members of the department. Immediately after the papers were filed in court, the career Chief of the Forest Service (a named defendant in the lawsuit) sent a letter to Secretary Veneman expressing his frustration at the administration’s “lackadaisical and half-hearted” defense of the

<sup>107</sup> Notes dated 3/12, “Roadless Policy.” Attached are notes which contain the phrases “balance bad news with good news” and “pro environment message going out at the same time” under the heading “White House.”

<sup>108</sup> E-mail string, from Acting Associate General Counsel, Natural Resources to Attorney, Office of General Counsel, U.S. Department of Agriculture, “FR Notice,” March 13, 2001; Sign in sheet, listing names and agencies, March 13, 2001.

<sup>109</sup> E-mail from Acting Under Secretary for Natural Resources and Environment, U.S. Department of Agriculture, to Office of Policy Development, Executive Office of the President and Office of the Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, “Talking Points on Idaho Roadless Lawsuit,” March 15, 2001.

<sup>110</sup> *Kootenai Tribe of Idaho v. Veneman*, CV01–10–N–EJL (D. Id. March 16, 2001) (Federal Defendant’s Motion for Enlargement of Time). The request for an enlargement of time was denied. *Kootenai Tribe of Idaho v. Veneman*, CV01–10–N–EJL (D. Id. March 20, 2001) (Order).

<sup>111</sup> *Kootenai Tribe of Idaho v. Veneman*, CV01–10–N–EJL (D. Id. March 19, 2001) (Plaintiff’s Opposition to Federal Defendants’ Motion for Enlargement of Time; Motion to Strike Opposition Pleadings of Defendant-Intervenors; Request for Entry of Preliminary Injunction at 3).

<sup>112</sup> *Id.* at 4.

<sup>113</sup> *Kootenai Tribe of Idaho v. Veneman*, CIV 01–010–N–EJL (D. Id. March 21, 2001) (Federal Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction at 2).

rule in court and the failure to consult with him or the staff that helped to draft the rule “in either fashioning the strategy to be used in defending against legal challenges or in developing the arguments presented in any of the filings made thus far.”<sup>114</sup>

At a consolidated hearing on the two cases, government counsel simply made a statement reporting that the USDA planned to review the rule. Thus it fell to the intervenors—environmental groups—to fill the gap by defending the rule, including the adequacy of the government’s compliance with NEPA.<sup>115</sup> Plaintiffs had asserted that the Forest Service failed to comply with NEPA in not considering a reasonable range of alternatives to the proposal, in not adequately analyzing its cumulative impacts, and in failing to provide a legally sufficient notice and comment process. In an order issued on April 5, Judge Lodge took note of the lack of a government position on the merits of the plaintiffs’ case, the government’s actions postponing the rule, and its commitment to undertake a full review. Not surprisingly in light of the government’s non-defense, Judge Lodge concluded that it was likely the plaintiffs would succeed on the merits of their claims arising from NEPA. For the time being, the judge deferred a decision of whether or not there was irreparable injury justifying issuance of a preliminary injunction until the government’s status report concerning the rule would be provided to the court on May 4, 2001.<sup>116</sup>

The April 5 order was followed by further meetings regarding “roadless,” within USDA, including meetings scheduled with the Secretary of Agriculture and with the OMB.<sup>117</sup> Although many of the documents USDA produced for the Committee are not tied to specific meetings, what is demonstrable in this period is a continuing focus on plans to eliminate the national decision to protect roadless areas. For example, on April 19, the Acting Under Secretary faxed copies of several versions of draft rules rescinding or amending the rule to Dale Bosworth, the incoming Chief of the Forest Service. One version included the explanation that it was “premised on the conclusion that the published roadless rule does not meet basic principles of sound environmental decision-making.”<sup>118</sup> As already mentioned, none of the documents provided to the Committee indicate how this conclusion was reached.

Despite their apparent belief that the rule was flawed and their efforts to undo it, agency officials seemed hesitant to publicly acknowledge their views and plans because of concerns of how that might affect public perception of the administration’s environ-

<sup>114</sup> Letter from Mike Dombeck, Chief, Forest Service to Secretary Ann Veneman, United States Department of Agriculture, Washington, D.C., March 23, 2001.

<sup>115</sup> *Kootenai Tribe of Idaho v. Veneman*, CIV 01-10-N-EJL (D. Id. March 21, 2001) (Response of Idaho Conservation League to Plaintiff’s Motion for Preliminary Injunction).

<sup>116</sup> *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp.2d 1231 (D. Id. 2001). The injunction hearing on this case was consolidated with *State of Idaho v. U.S. Forest Service*, CV01-11-N-EJL (D. Id. May 10, 2001), 2001 U.S. District Lexis 21990.

<sup>117</sup> Scheduling notices: “Roadless Meeting at OMB,” April 12, 2001; “Briefing on Roadless Issues w/Dave Tenny, Kevin, Dale, Jim Moseley,” April 18, 2001; “Roadless—with Chris Risbrudt,” April 25, 2001; “Roadless—with the Secretary, Jan Poling, Chris Risbrudt, Bill Sexton, Ed Nesselroad,” 4/27/01; “Roadless Briefing—Tenny + 4,” April 27, 2001; Unidentified, redacted calendar, April 18 and May 1, 2001; “Roadless with the Secretary and Ed Nesselroad,” 5/1/2001; “Briefing on Roadless with the Secretary, Jan Poling, Dale Bosworth, and Ed Nesselroad,” 5/3/2001.

<sup>118</sup> U.S. Department of Agriculture, Fax from: Dave Tenny, Office of the Under Secretary for Natural Resources and Environment to: Dale Bosworth, Subject: “Roadless Highly Confidential,” 4/19/01.

mental record. An April 16 note addressed to “Dave” and commenting on a “road map” of time lines for decision on the roadless rule observed that the proposed schedule, “leaves you virtually announcing the Administration’s decision on the roadless rule right before Earth Day. Perfect timing for opposition interests to make full use of the move in the sure to happen ‘blast the administration’ initiative around Earth Day.”<sup>119</sup> The note identified options, recommending that the USDA be prepared to act sooner so that the news value “could be pretty well drained out of the media by the time the rule process actually comes into play” and “if there’s a PI [preliminary injunction] granted use that as cover. . . .”<sup>120</sup> So too, a pre-March 30 document cautioned against virtually all of its contemplated options, including the preferred option of outright rescission of the rule, on the grounds that it might feed the “[p]erception of diminished concern for environmental protection.”<sup>121</sup>

But, there appeared to be a solution. As one of the option papers put it: “[w]ait for the judge to make a final ruling that the rule is illegal and comply with the court order.”<sup>122</sup> A handwritten notation on the back of a copy of this undated document contained in the Acting Under Secretary’s files states: “Action: Write brief to prevent unilateral rescission—let judge take rule down.”<sup>123</sup> In other words, it appears that USDA officials were all too happy to have the court take the blame for a decision that the administration itself supported, but was not willing to take the heat for having made.

The subsequent court filings confirm USDA’s apparent strategy of using the court case to undermine the rule. On May 4, 2001, the government filed its Status Report with the court. Again, in what must be quite unusual for any agency, or any defendant for that matter, it told the court that the plaintiffs may well be right:

The USDA advises that it will propose, in a June 2001 rulemaking, retaining the Rule’s protections for roadless values while acknowledging the need to include public participation in the forest planning process. States, Tribes, local communities and this court have voiced significant concerns about the process through which the Rule was promulgated. After a review of the Rule and the administrative record, the USDA shares many of these concerns.<sup>124</sup>

The May 4 filing contained only the barest of descriptions of the USDA’s review:

The Department’s review necessarily has addressed both the substance of the Rule and the process leading up to its promulgation. From a substantive perspective, the review

<sup>119</sup> Unsigned, undated note addressed to Dave.

<sup>120</sup> *Id.*

<sup>121</sup> Undated, unidentified document, “Privileged & Confidential, Rulemaking Options for Adjusting the Roadless Rule,” which contains a footnote reference, “On March 30, 2001 . . . is expected to hold a preliminary injunction hearing. . . .”

<sup>122</sup> Undated, unidentified paper, with heading “Roadless Options:” with handwritten notes on front and back, from Mr. David Tenny’s files. (The options document was located in other files as well.)

<sup>123</sup> *Id.*, back side of document.

<sup>124</sup> *Kootenai Tribe of Idaho v. Veneman*, CIV 01–010–N–EJL (D. Id. May 4, 2001) (Federal Defendants’ Status Report at 2) (hereinafter “Status Report”).

examined the geographic scope of the Rule and the prohibitions established by it, as well as the exceptions to those prohibitions. Procedurally, the review focused on the legal requirements for rulemaking processes generally, as well as the process for this particular Rule and the level of public involvement in that process.<sup>125</sup>

Other than the statement sharing the concerns, the Status Report did not describe the review's findings. As discussed above, the internal agency documents provided to the Committee did not reflect an examination of the issues described above, although some documents contain conclusory statements regarding these issues.

The Status Report included a declaration from the new Chief of the Forest Service, Dale Bosworth,<sup>126</sup> that the USDA and the Forest Service would propose amendments to the regulation by the end of June 2001. These proposed amendments "will seek to maintain the protections embodied in the current rule" in part "by retaining the Roadless Rule's principles against timber harvesting and road building."<sup>127</sup> With regard to the pending request for the preliminary injunction, the government made a statement in virtual support of the plaintiffs: "although the USDA shares plaintiffs' concerns about the potential for irreparable harm in the long-term under the current Rule, it would appear unlikely that such harm will occur in the short-term given the lengthy planning horizons needed for activities in inventoried roadless areas."<sup>128</sup>

The day that the report was filed with the court, May 4, 2001, Secretary Veneman announced: The "Department's decision to uphold the Roadless Area Conservation Rule. Through this action, we are reaffirming the Department of Agriculture's commitment to the important challenge of protecting roadless values."<sup>129</sup> What's more, the Secretary announced that the rule would go into effect on May 12 and that in June, USDA would propose amendments to the rule to address issues relating to "informed decision making": Working with local communities, protecting from the effects of wildfire, and insuring access to private property in roadless areas. There appears to have been no rigorous process supporting the basis for the Secretary's announcement that the rule would go into effect. Although meetings and briefings on "roadless" were scheduled with the Secretary during that week, the documents produced to the Committee contain no decision document presenting options for the Secretary's May 4 announcement.<sup>130</sup> The briefing book dated May 4 contains a tally of support and opposition to the Draft Environmental Impact Statement from elected officials, and a summary list

<sup>125</sup> Status Report at 2. See discussion in Section II. A. (1) of this report regarding the extent of public participation in the rulemaking process.

<sup>126</sup> Mike Dombeck resigned as Chief of the Forest Service effective March 31, 2001. On April 12, 2001, the USDA announced the appointment of Dale N. Bosworth to succeed him. USDA Forest Service, "USDA Forest Service Chief Mike Dombeck to Retire," March 27, 2001; United States Department of Agriculture, Office of Communications, "Dale Bosworth Selected As USDA's New Forest Service Chief," April 12, 2001.

<sup>127</sup> Status Report at 3.

<sup>128</sup> Status Report at 4.

<sup>129</sup> Office of Communications, U.S. Department of Agriculture, "Remarks by Secretary of Agriculture Ann M. Veneman, Roadless Area Conservation Rule," May 4, 2001.

<sup>130</sup> Scheduling notice: "Roadless—with the Secretary, Jan Poling, Chris Risbrudt, Bill Sexton, Ed Nesselroad," 4/27/01, "Roadless with the Secretary and Ed Nesselroad," 5/1/2001, "Briefing on Roadless with the Secretary, Jan Poling, Dale Bosworth, and Ed Nesselroad," 5/3/2001, and "Briefing with the Secretary on roadless—with Dale Bosworth, Ed Nesselroad," 5/4/2001.

of “concerns that have been raised.”<sup>131</sup> Despite the Secretary’s assertions, it is clear from the documents that the USDA was in fact working to undermine the very protections the Secretary claimed to support.

Citing the government’s concession that the rule was flawed, on May 10, 2001, Judge Lodge issued a preliminary injunction suspending the rule’s implementation—an outcome which appears to have been virtually assured by the administration’s handling of the defense of the rule.<sup>132</sup> The court found the government’s “vague commitment” to propose amendments to the rule indicative of a failure of the agency to take the requisite “hard look” in preparing the Environmental Impact Statement and noted that “. . . the Federal Government has conceded that without the proposed rule-making amending the Roadless Rule there is potential for long-term irreparable harm.”<sup>133</sup> In other words, the government’s general acknowledgment of error convinced the court that the USDA should be enjoined from implementing the rule.

Not surprisingly, after failing to defend the rule in the first instance, the USDA recommended against appeal of the District Court’s decision.<sup>134</sup> In the absence of the government’s participation, environmental groups—who had been granted intervenor status in the case—appealed the decision to the Ninth Circuit Court of Appeals. They argued that the District Court should not have issued the preliminary injunction because it lacked jurisdiction over the claims, in part because NEPA’s requirement to prepare a detailed environmental impact statement was not applicable. Alternatively, the intervenors defended the adequacy of the Federal Government’s environmental impact analysis supporting the rule’s initial promulgation.<sup>135</sup>

As of October 2002, the Idaho preliminary injunction was still in effect, further proceedings stayed at the District Court level, and the appeal in the Ninth Circuit still pending. To date, its effect has been the same as a rescinding of the rule, accomplished without the administration ever having to publicly detail its evaluation of relevant data or its conclusions regarding why the process adopting the rule was flawed. By and large, the USDA has avoided the negative publicity it feared from a proposal to rescind the rule and, to date, has eluded the requirements of the APA to provide for the public to comment on a new rule and a reasoned analysis for a changed course of action. It has avoided the scrutiny—the “hard

<sup>131</sup> “Roadless Rule Briefing Book, U.S. Department of Agriculture,” Washington, D.C., May 4, 2001.

<sup>132</sup> *State of Idaho v. U.S. Forest Service*, CV01–11–N–EJL (D. Id. May 10, 2001) (order issuing preliminary injunction at 3). Judge Lodge held a consolidated injunction hearing on March 30, 2001 in the parallel cases, *State of Idaho v. U.S. Forest Service* and *Kootenai Tribe of Idaho v. Veneman*.

<sup>133</sup> Virtually identical orders were issued in the cases described in the footnote above. The order enjoining the rule also enjoined the portion of the planning rule that addresses roadless areas (new 36 CFR § 219.9(b)). *State of Idaho v. U.S. Forest Service*, CV01–11–N–EJL (D. Id. May 10, 2001). The cases were consolidated for purposes of appeal to the Ninth Circuit. *Kootenai Tribe of Idaho v. Veneman*, No. 01–35472 *et al.* (D. Id. May 21, 2001).

<sup>134</sup> Letter from James Michael Kelly, Associate General Counsel, U.S. Department of Agriculture to John C. Cruden, Acting Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., May 31, 2001.

<sup>135</sup> *Kootenai Tribe of Idaho v. Veneman*, No. 01–35472, *et al.* (D. Id. May 31, 2001).

look”—which is required by the Supreme Court when an agency has changed course and rescinded a rule.<sup>136</sup>

*(4) Forest Service Implementing Policies Less Protective than Rule*

Despite the USDA’s representation to the court, June 2001 came and the USDA did not propose a revised rule. Instead, citing the preliminary injunction, the pendency of eight lawsuits in seven States, and the expectation of protracted litigation, the new Chief of the Forest Service issued a policy memo reserving to himself all decisions governing roadless areas.<sup>137</sup> On July 10, 2001 USDA issued an Advanced Notice of Proposed Rulemaking asking for the public’s views on the gamut of management issues involving roadless areas.<sup>138</sup> This request fell far short of the new rule USDA told the court it would propose by June.

The June policy was subsequently incorporated into a series of interim directives published in the Federal Register on August 22, 2001.<sup>139</sup> On December 20, 2001, the Forest Service published additional interim directives, effective as of December 14, 2001 that replaced in large part previous directives and continued to reserve authority to the Chief to approve or disapprove certain proposed timber harvests in inventoried roadless areas.<sup>140</sup> An analysis, prepared by the American Law Division of the Congressional Research Service, describes the key elements of the interim directives and the circumstances under which timber harvests and road construction could occur, without the Chief’s approval, as follows:

The December directive states that the Chief’s authority with respect to timber harvests “does not apply” if a Record of Decision for a forest plan revision was issued as of July 27, 2001—as was true of the Tongass National Forest—and will otherwise terminate when a plan revision or amendment that has considered the protection and management of inventoried roadless areas is completed.<sup>141</sup>

The Chief’s authority with respect to road construction is to remain in effect until a forest-scale roads analysis is completed and incorporated into each forest plan, at which point it terminates. The Regional Forester is to make many decisions on road construction projects under new Sec. 1925.04b.<sup>142</sup>

. . . .

. . . until a forest-scale roads analysis . . . is completed and incorporated into a forest plan, inventoried roadless areas shall, as a general rule, be managed to preserve

<sup>136</sup>Merrick B. Garland, “Deregulation and Judicial Review,” 98 Harv. L. Rev. 507, 526–568 (1985).

<sup>137</sup>United States Department of Agriculture, Delegation of Authority/Interim Protection of Roadless Areas, June 7, 2001.

<sup>138</sup>66 Fed. Reg. 35918 (July 10, 2001).

<sup>139</sup>66 Fed. Reg. 44111 (August 22, 2001). On August 24, 2001 an earlier Interim Directive affecting roadless area protection, which was effective May 31, 2001, was also published in the Federal Register. 66 Fed. Reg. 44590 (August 24, 2001).

<sup>140</sup>66 Fed. Reg. 65796 (December 20, 2001).

<sup>141</sup>The Forest Service website reported that 12 forests had revised forest plans as of July 27, 2001. <http://www.fs.fed.us/forum/nepa/nfmalrmp.html>

<sup>142</sup>RL30647 at 18.

their roadless characteristics. However, where a line officer determines that an exception may be warranted, the decision to approve a road management activity or timber harvest in these areas is reserved to the Chief or the Regional Forester as provided in FSM 1925.04a and 1925.04b.<sup>143</sup>

The CRS analysis further states that “while environmental analyses and protection are permissible, and may in fact ensue under the new management directives, those outcomes are neither compelled nor as likely as they would have been under the previous management prescriptions and policies.”<sup>144</sup>

Public comment was requested on the interim policy, after it was finalized and published, and the public was advised its input would be considered in issuing any final policy.<sup>145</sup> In other words, under cover of the Idaho preliminary injunction,<sup>146</sup> by means of a directive finalized even before public comment was requested, the Forest Service established a policy essentially having the weight of a rule.<sup>147</sup> This non-rule undercuts the national protections which the roadless area conservation rule sought to provide by allowing road construction; allowing timber harvests and road construction authorized by plans which were issued as of July 27, 2001; and ultimately returning such decisions to the forest level when the management of roadless areas is considered in the planning process. Thus, under cover of the preliminary injunction, the Forest Service has essentially changed—at least for the short term—a rule which was developed with extensive public comment and, which, if formally rescinded, would require public notice and comment.<sup>148</sup>

In the Summer of 2002, the Forest Service published an analysis of public comments received in response to its July 2001 Advanced Notice of Proposed Rulemaking. Chief Bosworth stated that the Forest Service, “will use the public comments to help inform our decision-making on where to go next. . . .”<sup>149</sup> One appropriate next step is for the Forest Service to assure meaningful public involvement by communicating more clearly the actions that it is taking. For example, while the CRS analysis provided an explanation of the policy changes, it also pointed out that the full effect of the

<sup>143</sup> 66 Fed. Reg. 65801 (December 20, 2001).

<sup>144</sup> RL30647 at 21.

<sup>145</sup> 66 Fed. Reg. 65800 (December 20, 2001).

<sup>146</sup> The U.S. Forest Service is affording nationwide effect to the injunction which is somewhat ambiguous on its face. Thinning Actions for the Bark Beetle Analysis, U.S. Forest Service, Deputy Regional Forester, Resources, Decision File Code: 1570 (2002-02-06-0029) A215A (July 12, 2002) at 4. This nationwide deference contrasts with the position taken by the administration in another case in which the court’s ruling was protective of the environment. The Army Corps of Engineers has worked to limit the effect of an injunction barring them from issuing mining permits that allow companies to use waste as “fill material,” arguing that the injunction should only apply to the geographic area under the jurisdiction of the court, not to the entire nation. See *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 206 F. Supp.2d 782 (S.D.W.V. June 17, 2002). (United States’ Reply Brief in Support of its Motion for a Stay Pending Appeal, for Clarification and for Expedited Consideration at 11.)

<sup>147</sup> In the context of rulemaking, permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rulemaking process in a meaningful way. *City of New York v. Diamond*, 379 F. Supp. 503, 517 (S.D.N.Y. 1974); *Mobil Oil Corp. v. Department of Energy*, 610 F.2d 796, 805, n. 11 (Em. App. 1979).

<sup>148</sup> Interim directives expire 18 months from issuance and may be reissued once for a total duration of 36 months. 66 Fed. Reg. 65800 (December 20, 2001).

<sup>149</sup> USDA Forest Service News Release, “Forest Service Completes Review of Public Comments on Roadless,” June 26, 2002.



December directive is difficult to ascertain because of the confusing manner in which it is written.<sup>150</sup> The CRS analysis observed that it was difficult to say with any certainty exactly what management requirements and direction currently apply or who the decision-makers are to be in any particular instance.

In sum, the actions of the USDA in adopting confusing manual policies without prior public comment, which effectively changed the prohibitions contained in a rule developed with extensive public comment, and, which—as discussed—was suspended because of the failure of the government to defend the rule, reflects a continuing and troubling lack of respect for public participation in the administrative process. These actions are not just hypothetical concerns about the integrity of the administrative process, they have consequences. For example, the Forest Service is currently preparing for timber sales in an area of the Tongass National Forest, an area in which such sales were prohibited by the rule.<sup>151</sup>

#### B. Hardrock Mining (“3809”) Regulation

USDA’s summary actions discounting the results of a lengthy and public rulemaking process with no apparent substantive agency analysis of the promulgated rule were replicated in yet another early Bush Administration decision, this time involving the dismantling of an important Interior Department rule. On November 21, 2000, the DOI published regulations—effective January 19, 2001—which were intended to remedy long-standing problems associated with hard rock mining for minerals such as silver, copper, or gold—so-called “locatable minerals”—on land managed by the Bureau of Land Management (BLM).<sup>152</sup>

Hardrock mining occurs on public lands in Alaska, Arizona, California, Colorado, Idaho, Montana, New Mexico, Oregon, Utah, Washington, and Wyoming.<sup>153</sup> The Mining Law of 1872 allows miners to secure exclusive rights to mine public lands through the location of valid mining claims.<sup>154</sup> It allows free access to the public

<sup>150</sup>The CRS report provided examples of confusing provisions and noted:

. . . the Notice does not clearly indicate which provisions are being replaced or the precise extent of revisions. The published explanatory material states that affected material is set out and unaffected material is not. Yet, some of the earlier provisions are neither shown nor discussed and therefore, may still be in effect. However, the final text of new FSM Sec. 1925 does not show these undiscussed earlier provisions—as though they are now superseded. Therefore it is not clear which of the previous materials is still in effect. RL30647 at 16–17.

<sup>151</sup>The Forest Service has proposed to harvest an estimated 8 million board feet on Wrangell Island, Tongas National Forest, Alaska. Approximately 65 percent of the proposed sale units are located within inventoried roadless areas. 67 Fed. Reg. 10661 (March 8, 2002).

<sup>152</sup>Authority for issuance of the regulation was based in part on the Federal Land Policy and Management Act (FLPMA), which provides that the Secretary of the Interior is to manage the Federal public lands, including those lands containing mining claims located under the Mining Law of 1872. 43 U.S.C. § 1732 (b) provides that the Secretary is to manage the development of the public land: “In managing the public lands, the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the public lands.” In addition, 30 U.S.C. § 22, the general statute authorizing exploration and purchases of mineral deposits on public lands, opens the public lands “under regulations prescribed by law.”

<sup>153</sup>An estimated 43 percent of gold production; 36 percent of silver; and 1 percent of copper production in the United States comes from Federal lands in these States. Department of the Interior, Bureau of Land Management, *Environmental Impact Statement, Surface Management Regulations for Locatable Mineral Operations*, October 2000, Vol. 1, at 268 (hereinafter “Surface Management EIS”).

<sup>154</sup>This is accomplished by individuals and corporations obtaining free access to the lands, and upon making a discovery of a “valuable mineral deposit,” staking a claim on the deposit.

lands for prospecting, and a valid claim entitles the holder to purchase surface and mineral rights at the rate of \$2.50 per acre for placer claims and \$5 per acre for lode claims.<sup>155</sup> Mining affects to varying degrees the soil, air, groundwater and surface water, aquatic and terrestrial vegetation, and wildlife.<sup>156</sup> As the National Research Council (NRC) explained in a report on hardrock mining: “Actions based on environmental regulations may avoid, limit, control or offset many of these potential impacts, but mining will, to some degree, always alter landscapes and environmental resources.”<sup>157</sup> Harmful impacts on water quality, vegetation and aquatic life often extend beyond the immediate area of the mine site.<sup>158</sup> Repeated failures by mining companies to reclaim<sup>159</sup> sites adversely affected by their mining activities have left landscapes throughout the West marred by large open pits and land erosion, and water resources polluted by toxic drainage.

As the EPA has reported: “Mining in the western United States has contaminated stream reaches in the headwaters of more than 40 percent of the watersheds in the West.”<sup>160</sup> However, the full extent of environmental problems at modern mine sites is not known, nor are the costs of reclamation and remediation.<sup>161</sup> The GAO issued a series of reports highlighting abuses from hardrock mining and the need for better bonding of mining operations and reclamation.<sup>162</sup> Fourteen years ago, GAO made statistical projections estimating the amount of unreclaimed acreage on Federal land and its cost of reclamation at about \$284 million.<sup>163</sup>

Beginning in the 1980’s, the increased use of a technology called “cyanide leaching” to extract gold from relatively low-grade ores raised concerns about the adequacy of BLM rules to protect land and water resources from such practices.<sup>164</sup> The most common cyanide leaching process, “heap leaching,” involves digging large pits

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Claimants must pay an annual maintenance fee of \$100 to hold the claim, and the minerals can be developed without obtaining a patent to the surface rights.

<sup>155</sup>“A placer deposit is an alluvial deposit of valuable minerals usually in sand or gravel; a lode or vein deposit is of a valuable mineral consisting of quartz or other rock in place with definite boundaries.” Marc Humphries, “Mining on Federal Lands,” Congressional Research Service Issue Brief, IB89130, January 3, 2002, at CRS-2 (hereinafter “IB89130”).

<sup>156</sup>Committee on Hardrock Mining on Federal Lands, Committee on Earth Resources, Board on Earth Sciences and Resources, Commission on Geosciences, Environment, and Resources, National Research Council, National Academy of Sciences, *Hardrock Mining on Federal Lands*, 1999, Executive Summary at 3 (hereinafter “NRC Hardrock Mining Report”).

<sup>157</sup>*Id.*

<sup>158</sup>*Id.* at 1.

<sup>159</sup>What constitutes reclamation depends on the individual site. The hardrock mining rule identified various components of reclamation, including control of or removing acid forming and toxic substances; regrading the land to conform with adjacent land; revegetation; rehabilitation of fisheries or wildlife habitat; controlling drainage and minimizing erosion; removing structures; plugging drill holes; and providing for post-mining monitoring or treatment. 64 Fed. Reg. 6452 (February 9, 1999).

<sup>160</sup>Office of Water, United States Environmental Protection Agency, *Liquid Assets 2000: America’s Water Resources at a Turning Point*, May 2000, at 10.

<sup>161</sup>According to the National Research Council, the full extent of problems will not be known until better information is collected and analyzed. The EPA reports that remediation costs are highly variable because of the site-specific nature of environmental problems encountered at mine sites. U.S. Environmental Protection Agency, *Costs of Remediation at Mine Sites*, April 1998.

<sup>162</sup>U.S. General Accounting Office, *Public Lands: Interior Should Ensure Against Abuses From Hardrock Mining*, GAO/RCED 86-48, March 1986; *Federal Land Management: Financial Guarantees Encourage Reclamation of National Forest System Lands*, GAO/RCED 87-157, August 1987; *Federal Land Management: Limited Action Taken to Reclaim Hardrock Mine Sites*, GAO/RCED 88-21, October 1987.

<sup>163</sup>*Federal Land Management: An Assessment of Hardrock Mining Damage*, GAO/RCED 88-123BR, April 1988, at 1.

<sup>164</sup>64 Fed. Reg. 6423 (February 9, 1999).

to extract huge amounts of ore, piling the extracted ore into heaps, then spraying a cyanide solution over the heaps so that cyanide trickles through the ore and strips out the mineral. Cyanide is well known as a very poisonous—and sometimes lethal—chemical. High level exposure harms the brain and heart; low levels may result in breathing difficulties, vomiting, blood changes, and enlargement of the thyroid gland.<sup>165</sup> Acute poisoning may occur from mining-related accidents, but the “more common environmental problems are likely to result from the chronic contamination of surface and ground waters by lower concentrations of cyanides and related breakdown compounds. . . . Many of the breakdown compounds, while generally less toxic than the original cyanide, are known to be toxic to aquatic organisms, and may persist in the environment for significant periods of time.”<sup>166</sup>

The 1982 poisoning of the drainage that supplied fresh drinking water for the town of Zortman, Montana with 52,000 gallons of cyanide solution<sup>167</sup>—poisoning which resulted in the construction by the mining company (which since has filed for bankruptcy protection)<sup>168</sup> of a community well to provide alternative drinking water—and the 1992 contamination of 17 miles of the Alamosa River in Colorado brought public attention to the damage which can result from these practices.<sup>169</sup> The Alamosa spill killed all aquatic life in the contaminated stretch and 10 years later, downstream users of water remain concerned about the impact of continuing acid mine drainage into the Alamosa River on livestock, agricultural crops, and wildlife.<sup>170</sup> To BLM, instances such as this demonstrated that “mining operations sometimes carry a risk of serious environmental harm that is very expensive, or even impossible to repair.”<sup>171</sup> BLM, which became increasingly responsible for reclamation of sites due to the bankruptcy of operators, was also concerned with finding ways to ensure reclamation by the operators.<sup>172</sup>

The rule that became effective on January 19, 2001, had three principal features: (1) regulations requiring mining companies to reclaim the land and clean-up toxic waste; (2) updated environmental performance standards which would, among other things, reduce groundwater pollution from mining activity; and (3) a provision enabling the BLM to deny miners’ plans of operation that could cause “substantial irreparable harm” to the area. This last provision—the so-called “veto”—was intended to give BLM the ability to regulate hardrock mining on public lands where it might prove extremely harmful to surrounding areas or inhabitants.

<sup>165</sup> U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, “Cyanide,” September 1997.

<sup>166</sup> Moran, “Cyanide Uncertainty: Cyanide in Mining: Some Observations on the Chemistry, Toxicity, and Analysis of Mining Related Waters,” Invited Paper, Presented at the Central Asia Ecology—99 Meeting, Lake Issyk Kul, Kyrgyzstan, June 1999.

<sup>167</sup> Mineral Policy Center, MPC Fact Sheet: Cyanide, August 2000.

<sup>168</sup> Robert McClure, “Pegasus Gold—from boom to bankruptcy: Miner makes a fortune on public land, sticks taxpayer with cleanup,” *Seattle Post-Intelligencer Reporter*, June 13, 2001.

<sup>169</sup> Mineral Policy Center, MPC Fact Sheet: Cyanide, August 2000.

<sup>170</sup> Tripp Baltz, “Justice Department, Colorado Settle Case With Former Owner of Mine Site,” *Daily Environment Report*, December 28, 2000, at A-1; U.S. Geological Survey, The Summitville Mine and Its Downstream Effects, An On-Line Update of Open File Report 95-23, Updated 11 July 1995. <http://geology.cr.usgs.gov/pub/open-file-reports/ofr-95-0023/summit.htm>

<sup>171</sup> 65 Fed. Reg. 70083 (November 21, 2000).

<sup>172</sup> 64 Fed. Reg. 6442 (February 9, 1999); 65 Fed. Reg. 70007 (November 21, 2000).

*(1) The Rule's Development*

The hardrock mining rule has a pedigree dating back over 2 decades. In 1980, the BLM adopted “surface management” regulations—also called “3809 regulations” after the section in the Code of Federal Regulations in which they are codified—to protect public lands from unnecessary or undue degradation and to ensure that areas disturbed during the search for and extraction of mineral resources would be reclaimed. During the first Bush Administration, a consensus began developing that these regulations were inadequate. Thus, in 1989, BLM set up a task force, which recommended changes in policies.<sup>173</sup> In July 1991, BLM published a proposed rule to require submission of financial guarantees (bonds) for reclamation for all hardrock mining operations greater than casual use,<sup>174</sup> and in October 1991, published a Notice of Intent to Propose Rulemaking to modify the 3809 regulations, requesting public comment on seven questions. These included whether the definition of “unnecessary or undue degradation” in the regulations should be revised and whether “the regulations should contain additional environmental and reclamation requirements.”<sup>175</sup> BLM conducted four public workshops in Western States and received written comments.

In April 1992, a task force consisting of BLM employees presented its recommendations to the Director of the BLM. BLM then decided to put the initiative on hold, in deference to legislative proposals for mining law reform then under consideration by the Congress. After two successive Congresses without any successful legislation on the issue, Interior Secretary Bruce Babbitt announced on January 6, 1997 that BLM would pick up the thread and again begin the rulemaking process.<sup>176</sup> Shortly thereafter, in February, BLM issued a final bonding rule requiring submission of financial guarantees for reclamation of all hardrock mining operations greater than casual use.<sup>177</sup>

On April 4, 1997, BLM issued a notice informing the public of the agency’s intent to prepare an Environmental Impact Statement for further revision of the regulations, and requesting comments on what the scope of the regulations and the environmental analysis should be. It specifically requested comments on current operation and reclamation requirements and the definition of “unnecessary or undue” degradation.<sup>178</sup> Throughout 1997 and 1998, in efforts to refine the regulations, BLM consulted with representatives of State agencies, sometimes under the auspices of the Western Governors Association.<sup>179</sup> BLM held public hearings in 11 Western cities and Washington D.C., which were attended by over 1,000 people in total.<sup>180</sup> The Bureau also received more than 1,800 comment letters

<sup>173</sup> 64 Fed. Reg. 6423 (February 9, 1999).

<sup>174</sup> The 1980 regulations provided that if an activity would disturb more than 5 acres, or take place in certain designated areas, the BLM could, at its discretion, require a bond (a firm assurance or guarantee that the miner would pay for the cost of reclamation). 43 C.F.R. §3809.1-4 and §3809.1-9 (1980). The effect of this provision was that most exploration and some extraction activities were not bonded. 56 Fed. Reg. 31602 (July 11, 1991).

<sup>175</sup> 56 Fed. Reg. 54815 (October 23, 1991).

<sup>176</sup> 64 Fed. Reg. 6424 (February 9, 1999).

<sup>177</sup> 62 Fed. Reg. 9093 (February 28, 1997).

<sup>178</sup> 62 Fed. Reg. 16177 (April 4, 1997).

<sup>179</sup> 64 Fed. Reg. 6424 (February 9, 1999).

<sup>180</sup> *Id.*

from individuals and representatives of State and local governments, the mining industry, and citizens' groups.<sup>181</sup> In addition, in February and August 1998 it posted two drafts of proposed regulatory provisions on the Internet for public comment and received comments on the drafts from a variety of interested parties, including State officials. It also held a series of meetings to receive comments from industry representatives, citizens, and environmental groups, and made revisions in response to these informal comments.<sup>182</sup>

The process stalled when the House of Representatives included a rider in Interior's Fiscal Year 1998 appropriations act to prevent DOI from publishing proposed or final regulations prior to November 15, 1998.<sup>183</sup> This prohibition was subsequently extended through September 1999.<sup>184</sup> In October 1998, Congress directed BLM to pay for a study by the National Research Council (NRC) Board on Earth Sciences and Resources of the National Academy of Sciences to examine the control of the environmental effects of hardrock mining.<sup>185</sup>

When the riders expired, BLM published a Notice of Proposed Rulemaking. The February 9, 1999 notice proposed rewriting the BLM's 3809 regulations in "plain English" and "upgrading" the regulations in several respects, including requiring financial guarantees for all operations greater than casual use, insuring the availability of resources for the completion of reclamation; implementing provisions of the Federal Land Policy and Management Act relating to administrative enforcement; requiring a plan of operations for those operations more likely to pollute the land and those located in sensitive areas and requiring examination of the validity of claims before allowing plans of operations to be approved in withdrawn areas;<sup>186</sup> establishing performance standards; and defining "unnecessary or undue degradation."<sup>187</sup> The notice gave the public 120 days to submit comments on the proposal.

On February 17, 1999, BLM sought comment on a Draft Environmental Impact Statement analyzing the environmental consequences of the existing 3809 regulations, the proposed changes, and two additional alternatives.<sup>188</sup> Immediately thereafter, another Congressional rider prohibited issuing a final rule until after a 120-day public comment period following completion of the NRC report commissioned in 1998. DOI's appropriations acts for FY 2000 and FY 2001 provided that the Secretary could issue regulations "which are not inconsistent with the recommendations contained in the

<sup>181</sup> *Id.*

<sup>182</sup> 64 Fed. Reg. 6425 (February 9, 1999).

<sup>183</sup> Pub. L. 105-83, § 339 (b), 111 Stat. 1543, 1603.

<sup>184</sup> Pub. L. 105-277, Division A, Title I—Department of the Interior, § 120 (d), 112 Stat. 2681-258.

<sup>185</sup> Pub. L. 105-277, Division A, Title I—Department of the Interior, § 120 (a), 112 Stat. 2681-257.

<sup>186</sup> DOI has authority to withhold an area of Federal land from settlement, sale, location, or entry under the general land laws to limit activities under those laws in order to maintain other public values in the area or to transfer jurisdiction over an area of Federal land from one department or bureau to another. 43 U.S.C. § 1702 (j).

<sup>187</sup> 64 Fed. Reg. 6422-23 (February 9, 1999).

<sup>188</sup> The Final Environmental Impact Statement included an additional alternative consisting of recommendations made by the National Research Council. Surface Management EIS.

[NRC Report] so long as these regulations are also not inconsistent with existing statutory authorities.”<sup>189</sup>

On September 29, 1999, the National Research Council issued its report.<sup>190</sup> The report assessed the adequacy of the existing regulatory framework for hardrock mining and addressed a broad range of mining issues, but it did not analyze the proposed rule. The NRC concluded that the current regulations needed improvement, although the overall structure of Federal and State regulation was well coordinated. The NRC recommended filling regulatory gaps by requiring financial assurances for reclamation of disturbances to the environment caused by all mining activities and requiring plans of operations for mining and milling operations, regardless of size (with exceptions for “casual use”). The NRC said that the BLM and Forest Service should improve the criteria for modifications to plans of operation; plan for long-term post-closure management of mine sites; and provide that land managers could issue administrative penalties for violations of regulatory requirements.<sup>191</sup> Upon receipt of the recommendations from NRC, BLM opened another 120-day comment period on the proposed rule, as required by the Emergency Supplemental Appropriations Act, and added a request for comment on the draft EIS.<sup>192</sup> During the two 120-day comment periods in 1999, BLM received over 2,500 comments.<sup>193</sup>

BLM published the final rule on November 21, 2000. The rule responded to the recommendations described above, contained changes to the proposed rule to insure consistency with specific recommendations made by the NRC, and included additional regulatory changes considered necessary to prevent unnecessary or undue degradation of the public lands, most notably, the “veto” provision.<sup>194</sup>

Following issuance of the revised 3809 rules, mining companies and environmental groups filed three lawsuits challenging the rules in the U.S. District Court for the District of Columbia.<sup>195</sup> The State of Nevada also sued in U.S. District Court for Nevada.<sup>196</sup> The industry plaintiffs and the State of Nevada asserted that BLM violated numerous statutes in issuing the regulations. The environmental plaintiffs asserted that the rules were not sufficiently stringent and improperly allowed mining operations on lands without valid mining claims. On January 19, 2001, the judge in the lawsuit

<sup>189</sup> Pub. L. 106–113, Division B, Appendix C, Title III, § 357; Pub. L. 106–291, Title I, § 156.

<sup>190</sup> 65 Fed. Reg. 69998–99 (November 21, 2000).

<sup>191</sup> Other recommendations included providing better information regarding mining on the Federal lands; maintaining a management system that effectively tracks compliance with operating requirements; making regulatory changes to address temporarily idle mines and abandoned operations; the identification of public land areas with cultural and environmental sensitivities; more effective and timely participation in the planning process under NEPA; improved staffing; and better guidance to staff responsible for regulating mining operations. The NRC also recommended modifications to existing laws and regulations to promote cleanup of abandoned mine sites without causing operators to incur additional environmental liabilities. NRC Hardrock Mining Report, Executive Summary, at 6–9.

<sup>192</sup> 64 Fed. Reg. 57613 (October 26, 1999).

<sup>193</sup> 65 Fed. Reg. 69998 (November 21, 2000).

<sup>194</sup> DOI’s Solicitor had interpreted the phrase “not inconsistent with” the report to mean that so long as the final rule did not contradict the specific recommendations of the NRC Report, the rule could address subject areas BLM determined were warranted to improve the regulations and meet the requirements of the FLPMA. 65 Fed. Reg. 70003 (November 21, 2000).

<sup>195</sup> *National Mining Association v. Babbitt*, No. 00–CV–2998 (D.D.C. filed December 15, 2000); *Newmont Mining Corporation v. Babbitt*, No. 01–CV–23 (D.D.C. filed January 5, 2001); *Mineral Policy Center v. Babbitt*, No. 01–CV–73 (D.D.C. filed January 16, 2001).

<sup>196</sup> *State of Nevada v. Department of the Interior*, No. CV–N01–0040–ECR–VPC (D. Nev. filed January 19, 2001).

brought by the National Mining Association (NMA) and defended by the Justice Department in the waning days of the Clinton Administration denied NMA's motion for a preliminary injunction to stay the effective date of the final rules, holding that the plaintiff did not successfully meet its burden of showing that the revised 3809 rules becoming effective would cause irreparable harm and that it, "is not clear that NMA will prevail on any of its causes of action."<sup>197</sup>

(2) *Department Considers Suspension Options*

In contrast to the rules affected by the Card memo, the mining rule was already in effect when the Bush Administration entered office. Nonetheless, the rule did not escape the new administration's sights as a target for regulatory revision. Indeed, the mining industry and its supporters apparently believed they had a virtual commitment by the incoming administration to get rid of the mining rules. A BLM Field Manager reported to Washington, D.C. officials regarding her conversation with an industry representative: "They asked me if I knew that Bush had signed a moratorium on Jan. 20 pertaining to the 3809 regs. The information being told to company people is that if the document signed on the 20th did not stay the regs, that the Administration would find a way to do that."<sup>198</sup> On February 2, Governor Guinn of Nevada—a State which accounts for approximately 45 percent of the total mining claims on public land<sup>199</sup>—wrote to Secretary Norton: "When we last spoke concerning the implementation of the 3809 mining regulations, we were hopeful that they would be subject to the moratorium President Bush initiated on the day of his inauguration."<sup>200</sup>

On February 7, a DOI attorney prepared an internal memo regarding Governor Guinn's February 2 request to postpone the rules under a provision of the APA which permits agencies unilaterally to suspend rules pending judicial review "where justice so requires."<sup>201</sup> Governor Guinn's letter had argued that extensive data provided by the States during the rulemaking proceeding showed the revisions were unnecessary and that postponement of the effective date pending completion of judicial review would serve the interests of justice by keeping in place the pre-existing 3809 rules

<sup>197</sup> *National Mining Association v. Babbitt*, No. 00–CV–2998 (D.D.C. January 25, 2001) (memorandum and order at 8).

<sup>198</sup> String e-mail, Deputy Assistant Director, Minerals, Realty and Resource Protection, Bureau of Land Management, Washington Office to BLM Field Manager, Elko, Nevada, "Moratorium on 3809???", January 31, 2001.

DOI provided the following information in response to a question from Senator Lieberman regarding meetings about the rule with outside parties:

Secretary Norton met with various western Governors, including Governor Guinn of Nevada, at which the Governors' concerns with the 3809 rules may have been discussed. We have no records describing such meetings. The Governors of Nevada and Alaska, among others, also sent letters to the Secretary . . . expressing their concerns with the rules.

Letter from Shayla Freeman Simmons, Acting Director, Congressional and Legislative Affairs to the Honorable Joseph I. Lieberman, Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate, April 6, 2001.

<sup>199</sup> IB89130 at CRS–2.

<sup>200</sup> Letter from Kenny C. Guinn, Governor, State of Nevada to the Honorable Gale Norton, Secretary of the Interior, U.S. Department of the Interior, February 2, 2001 (hereinafter "Governor Guinn letter").

<sup>201</sup> 5 U.S.C. § 705. Memorandum from Attorney-Advisor to Assistant Solicitor, General Legal Services, General Law Division, Office of the Solicitor, Department of the Interior, February 7, 2001.

that the “National Academy of Sciences believe are fully adequate to protect public lands and the environment.”<sup>202</sup> The action, he wrote, “would avoid the significant losses of revenue and jobs that BLM predicts will result from the new rules, until the courts decide whether or not the rules are valid.”<sup>203</sup>

A paper submitted to the Secretary’s Office on February 8 listed options focused not on whether to suspend the rule, but on how—whether through a delay, an administrative rule, or, as in the case of the USDA, simply not defending the case.<sup>204</sup> The paper offered no discussion of why the rule was flawed, nor indicated the evidentiary basis for upending the results of a multi-year regulatory process.<sup>205</sup> The administration seemed bent on pursuing whatever procedural means would best meet its predetermined end of suspending the rule. The options outlined in the paper were the following:

- (1) a unilateral postponement of the rule pending judicial review under section 705 of the Administrative Procedure Act;
- (2) entering into a stipulation in the litigation with the plaintiffs to delay implementation of the rule and submit it for court approval;
- (3) DOI moving in the litigation for a stay of the rules while the case was pending;
- (4) electing not to further defend the industry and Nevada lawsuits, DOI moving either unilaterally or as part of a settlement for voluntary remand of the mining rules to address the substantial legal deficiencies raised by those plaintiffs and for the court to reinstate the old regulations;
- (5) DOI publishing a notice of proposed rulemaking proposing suspension of the revised rules and reinstatement of the prior rules with a 30-day comment period; and
- (6) DOI promulgating an interim final rule suspending the revised rules and reinstating the prior rules.<sup>206</sup>

The Department’s papers reflect that the administration again hewed to its familiar pattern: Investing energy in exploring how to dismantle this important environmental protection—not conducting a serious or substantive analysis of the value of the regulations themselves.

<sup>202</sup> Governor Guinn letter.

<sup>203</sup> *Id.*

<sup>204</sup> E-mail from Attorney-Advisor, Solicitor’s Office, Headquarters, to Counselor to the Secretary, U.S. Department of the Interior, “Revised draft attached,” February 8, 2001.

<sup>205</sup> The DOI produced and the Majority staff reviewed approximately 1,500 pages, consisting primarily of drafts of Federal Register notices and press releases, question and answer sheets and letters and comments for the public. The Majority staff reviewed an additional approximately 200 pages at DOI’s offices, after DOI asserted that those documents contained “privileged” material. The Committee’s request called for all such documents related to the review of the rule, and although they contained materials relevant to such a review, including statistics and copies of legal cases, they did not include an analysis of the existing rule, therefore, we must conclude that no such analysis existed within the Department. Letter from Joseph I. Lieberman, Chairman, Committee on Governmental Affairs, United States Senate to The Honorable Gale A. Norton, Secretary, Department of the Interior, Washington, D.C., June 6, 2001.

<sup>206</sup> Option paper entitled “Postponing 3809 Implementation,” drafted by DOI attorney Joel Yudson and given to DOI policymakers.



On February 9, a meeting was scheduled between the Counselor to the Secretary and attorneys from the DOI's Solicitor's Office.<sup>207</sup> Two days later, on Sunday, February 11, one of the scheduled meeting participants, an attorney in the Solicitor's Office, drafted two versions of a notice for the Federal Register.<sup>208</sup>

On Monday, February 12, an Executive Assistant in the White House Office of Strategic Initiatives,<sup>209</sup> sent an e-mail to the Solicitor's Office asking for a copy of the "BLM memo," which she thought was "supposed to be finished."<sup>210</sup> The next day, the Counselor to the Secretary sent the options paper to the White House, with an explanation saying that she had not yet had a chance to talk to the Secretary about the options.<sup>211</sup>

On February 27, Secretary Norton met with Governor Guinn of Nevada. On March 2, Governor Guinn sent the Secretary another letter urging suspension of the mining rules and raising particular concerns about the veto and performance standard provisions.<sup>212</sup>

A March 9 e-mail reported on a meeting with "senior members of the Secretary's staff last night" where the author learned of the decision to proceed to propose suspension of the new rules and reinstate the old rules in their place.<sup>213</sup> The e-mail indicated that DOI planned to keep certain parts, but dispose of others. "For instance, DOI did decide to leave in place those portions of the final rule that implement the NRC recommendations. As currently drafted, the proposed rule would make it clear that DOI does not intend to retain the 'SIH' standard that is one primary focus of the lawsuits."<sup>214</sup> (The SIH standard was the provision for government veto over mine operation plans.) However, when the rulemaking notice was published, it proposed suspension of the rule, without specific attention to plans to eliminate the veto provision. The documents provided to the Committee shed virtually no light on how the decision regarding the veto provision was made.

On March 21, 2001, BLM staff communicated with OMB staff in the Office of Information and Regulatory Affairs regarding the notice of proposed rulemaking for the 3809 rule, indicating "Ann Klee at Interior has coordinated with the White House. . . . Apparently, WH is eager for this to get out."<sup>215</sup> Two days later, on March 23,

<sup>207</sup> E-mail Deputy Associate Solicitor, Solicitor's Office, Headquarters, to Staff Assistant, Solicitor's Office, Headquarters, Department of the Interior, "Klee meeting moved to 4:15 today," February 9, 2001.

<sup>208</sup> E-mail, Attorney-Advisor, Solicitor's Office, Headquarters, to Deputy Associate Solicitor, Solicitor's Office, Headquarters, Department of the Interior, "Draft Federal Register notices," February 11, 2001.

<sup>209</sup> The Office of Strategic Initiatives is responsible for coordinating the planning and development of a long-range strategy for achieving Presidential priorities.

<sup>210</sup> E-mail, White House Office of Strategic Initiatives to Solicitor's Office, Headquarters, Department of the Interior, "Re: BLM paper," February 12, 2001.

<sup>211</sup> E-mail from Counselor, Office of the Secretary to Acting Associate Solicitor, Solicitor's Office, Headquarters, forwarded to Attorney-Advisor, Solicitor's Office, Department of the Interior, February 13, 2001.

<sup>212</sup> Letter from Kenny C. Guinn, Governor of Nevada to Gale Norton, Secretary of Interior, Washington, D.C., March 2, 2001.

<sup>213</sup> Portion of string e-mail from U.S. Department of Justice Attorney Gregory Page, Environment and Natural Resources Division replying to Department of the Interior attorney Joel Yudson, Solicitor's Office, Headquarters, Department of the Interior, discussing a DOI meeting concerning the 3809 rule, Washington, D.C., March 9, 2001.

<sup>214</sup> *Id.*

<sup>215</sup> Ann Klee is the Counselor to the Secretary of the Interior. E-mail from Group Manager, Regulatory Affairs, Bureau of Land Management, Department of the Interior to Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, "Subject: 3809," March 21, 2001.

BLM proposed to suspend the final regulations which had been published on November 21, 2000.<sup>216</sup> BLM requested comments on the proposed suspension as well as whether some of the provisions should not be suspended while BLM conducted a review of the “substantial legal and policy” concerns raised by plaintiffs in the pending litigation. In a horse-before-cart rulemaking process, addressing those substantial legal and policy concerns would naturally come before a decision to proceed to suspend the rule, but, based on the documents, they appear to be an afterthought.

BLM explained: “If a final decision is reached to suspend the revised rules, BLM would reinstate the previous rules verbatim as a final rule to avoid a regulatory vacuum while judicial and administrative review of the revised 3809 rules proceed.”<sup>217</sup> BLM stated that it “cannot predict the outcome of its review of the issues that have been raised . . . at some point either the suspension will be lifted or BLM may engage in further rulemaking.”<sup>218</sup> The notice stated that plaintiffs in the lawsuits had asserted that BLM improperly issued the revised rules in violation of a variety of statutes,<sup>219</sup> and the environmental plaintiffs asserted that the rules were not sufficiently stringent. While the notice described the Nevada Governor’s concerns about the loss of jobs and income from miners being precluded from engaging in operations that they might otherwise pursue, there was no discussion of the impact of some of these practices on the natural resources and on taxpayers who must pay the costs of clean-up—just a generic reference to “environmental concerns” raised by the plaintiffs in the lawsuit. For example, no mention was made of the fact that a joint State/Federal task force in Nevada had estimated that there are anywhere from 200,000 to 500,000 abandoned mine “features” in that State, 2,000 to 15,000 of which may have the potential to impact surface or ground waters.<sup>220</sup>

BLM received approximately 49,000 comments, 95 percent of which were opposed to the proposed suspension.<sup>221</sup> But on October 30, 2001 BLM issued a new final rule<sup>222</sup> which amended some provisions of the November 2000 rule and returned others to the pre-existing regulations. Notably, the new regulation changed the definition of “unnecessary and undue degradation” to eliminate the provision “causing substantial irreparable harm to significant scientific, cultural, or environmental resource values . . .” and it eliminated the provision by which BLM could disapprove a plan of

<sup>216</sup> 66 Fed. Reg. 16162 (March 23, 2001).

<sup>217</sup> 66 Fed. Reg. 16164 (March 23, 2001).

<sup>218</sup> *Id.*

<sup>219</sup> Allegations regarding violations of law included the notice and comment provisions of the APA, NEPA, the Regulatory Flexibility Act, the Federal Land Policy and Management Act, the General Mining Law, and prohibitions in the Appropriations Acts for Fiscal Years 1999 and 2000. As noted above, the plaintiffs had not succeeded in obtaining a preliminary injunction to prohibit implementation of the regulation.

<sup>220</sup> “Features” is not defined. Among the types of features listed throughout the report are acid mine drainage, releases from tailings ponds, ground and surface water contamination or the potential for contamination, heap leaches, elevated levels of cyanide and metals in leach pads, drums, trenches, pipelines, and abandoned buildings and equipment. The document was prepared, among other reasons, to set priorities for funding remediation of abandoned sites in Nevada. State of Nevada, Interagency Abandoned Mine Land Environmental Task Force, “Nevada Abandoned Mine Lands Report,” September 1999 at 4.

<sup>221</sup> 66 Fed. Reg. 54836 (October 30, 2001).

<sup>222</sup> 66 Fed. Reg. 54834 (October 30, 2001).

operation because it would cause such harm.<sup>223</sup> It also eliminated the sections establishing administrative civil penalties,<sup>224</sup> and took out “most of the 2000 rules’ environmental and operational performance standards and replaced them with the 1980 rule standards,”<sup>225</sup> but retained the standards on acid-forming materials and leaching operations.<sup>226</sup> BLM’s rule returned the liability provisions to the regulations in place prior to the 2000 change and retained the financial guarantee (“bonding”) provisions to assure “that mining operators, rather than the nation’s taxpayers, bear the costs of reclaiming mined lands.”<sup>227</sup> The Federal Register notice invited comments on the final rule indicating that BLM “may make further adjustments to the rules.”<sup>228</sup> That same day, BLM also published the final rule as a proposed rule “to obtain further public comment on changes to these regulations that BLM is adopting in a final rule that appears elsewhere in today’s Federal Register” and to seek comment on five topics, including whether the regulations published contained “other provisions which are either overly burdensome or fail to provide adequate environmental protection,” whether “additional innovative means are available to provide sound and reliable financial guarantees,” and “whether we should amend the regulations regarding BLM’s relationship to states and the delegations these rules provide.”<sup>229</sup>

### *(3) Changes Address Industry Concerns*

The changes that were made in the final rule closely track what appear to have been initial expectations for the regulations, as reflected in a document dated March 22, the day before the proposed suspension appeared in the Federal Register on March 23, 2001. This seven-page document (marked “Preliminary Draft—Not Reviewed or Approved”) consists of a chart, which, when compared to the revised regulation published on October 30, 2001, raises a question as to how much was decided before the proposal was published for comment. It lists by subject more than 80 sections of the regulations. The chart has columns entitled “initial assessment” (retain, modify, reconsider, drop) and “comment/rationale.” The government veto provisions had the initial assessment “drop.” Among the provisions identified as “reconsider” were the joint and several liability provisions (“Industry hates; . . .”); “performance standards” (“Entire section requires review. . . . Industry believes some of the requirements go too far”); and “civil penalties” (“NRC supports but le-

<sup>223</sup> 66 Fed. Reg. 54849 (October 30, 2001).

<sup>224</sup> BLM said it removed the provisions because its authority was uncertain and would “work with the Congress to clarify our authority.” *Id.* On October 25, 2001, the Secretary transmitted a letter to Congress in which she urged Congress to draft legislation that includes “permanent authorization of a mining claim holding fee; revision of the patent system; authorization of a production payment system; authorization of administrative penalties; and an expanded role for the States in managing the mining program.” Letter to the Honorable Jeff Bingaman, Chairman, Committee on Energy and Natural Resources, United States Senate, Washington, D.C., from Gale A. Norton, Secretary of the Interior, Washington, D.C., October 25, 2001.

<sup>225</sup> 66 Fed. Reg. 54836 (October 30, 2001).

<sup>226</sup> 66 Fed. Reg. 54845 (October 30, 2001).

<sup>227</sup> October 25, 2001 news release.

<sup>228</sup> 66 Fed. Reg. 54835 (October 30, 2001).

<sup>229</sup> 66 Fed. Reg. 54863 (October 30, 2001). The version of the final rule which was published as a proposed rule contained some modifications from the final version. The comment period was re-opened through May 13, 2002. 67 Fed. Reg. 17962 (April 12, 2002).

gality question. Industry opposed.”)<sup>230</sup> On November 29, 2001, the National Mining Association filed a notice of dismissal of its challenge to the rule, and the case was dismissed without prejudice.<sup>231</sup>

In issuing the new final regulation, the BLM concluded that its action was consistent with the directive contained in the Federal Land Policy and Management Act to “prevent unnecessary or undue degradation”<sup>232</sup> of the public lands, determining that other existing laws and regulatory requirements were sufficient to protect the land.<sup>233</sup> Of course, the majority of these authorities were in place during the time period that BLM had not succeeded in controlling the impacts of cyanide leach mining which led to the proposal of the change in the first place. Thus, it is not surprising that many were skeptical that reliance on these requirements would provide adequate protection, even with the few new provisions that were retained.

As noted above, public comment on the proposed suspension of the rule was overwhelmingly against the rollback. In a hearing before the Senate Governmental Affairs Committee, a resident of Yarnell, Arizona expressed his frustrations over the impact on his community of the DOI’s decision to eliminate the “veto” provision as a tool to prohibit mining in certain circumstances. Without it, he believes that the residents of Yarnell have no hope of stopping a proposed open-pit cyanide heap-leach gold mine to be located 500 feet from their homes. He testified: “[t]he completed mine would tear down the site of our 5,000-foot mountain and replace it with a huge, 400 foot-deep open pit, unfilled forever. Add to that the fact that the mine would use 7 million pounds of cyanide to extract the gold, and you have a monumental threat to our town, our water, our health, and our safety.”<sup>234</sup> (At the time of the hearing, the op-

<sup>230</sup> Untitled document, March 22, 2001, marked as “Preliminary Draft—Not Reviewed or Approved. Subject to Change” and Attorney Work Product, Deliberative Process/Predecisional, Attorney Client Privilege, distributed March 22, and released in litigation.

<sup>231</sup> *National Mining Association v. Norton*, No. 00-2998 (HHK) (D.D.C. filed November 29, 2001) (Notice of Dismissal); (D.D.C. filed January 10, 2002) (Order dismissing complaint).

<sup>232</sup> 66 Fed. Reg. 54835 (October 30, 2001). On October 23, 2001, the new DOI Solicitor issued a legal opinion in support of the rule. (Solicitor’s Opinion M-37007, the “Meyers” Opinion). It addressed the department’s legal authority and reversed an opinion issued in December 1999 by the previous Solicitor (Solicitor’s Opinion M-36999, the “Lesly” Opinion). The Lesly opinion had concluded that DOI had the authority to deny a plan of operations for a mine and the authority to issue new regulations changing the regulation definition of “unnecessary or undue degradation” to clarify that operators must not cause “substantial irreparable harm” to significant resources that cannot be effectively mitigated. Mr. Lesly’s conclusion was based in part on the language in FLPMA, 43 U.S.C. § 1732 (b): “The conjunction ‘or’ between ‘unnecessary’ and ‘undue’ speaks of a Secretarial authority to address separate types of degradation—that which is ‘unnecessary’ and that which is ‘undue.’” As to activities under the Mining Law, he said that the question is not *whether* a mine causes any degradation or harmful impacts, but rather, how much, of what character and whether it is “undue.” The Meyers opinion concluded that the standard established in the 2000 regulations could not be supported. He acknowledged that “unnecessary or undue degradation” is not defined by the statute and that there is no legislative history on the matter, nevertheless he concluded, in part, that in construing the language in FLPMA regarding “undue or unnecessary degradation,” the word “or” means “and.”

<sup>233</sup> BLM provided the following explanation that existing laws were adequate: “BLM does not need an SIH standard in its rules either to protect against unnecessary degradation or to protect against undue degradation. FLPMA does not define either concept to mean substantial irreparable harm. Moreover, BLM has other statutory and regulatory means of preventing irreparable harm to significant scientific, cultural, or environmental resource values. These include the Endangered Species Act, the Archaeological Resources Protection Act, withdrawal under Section 204 of FLPMA (43 U.S.C. § 1714), the establishment of areas of critical environmental concern (ACEC’s) under Section 202 (c)(3) of FLPMA, 43 U.S.C. § 1712 (c)(3) and the performance standards in section 3809.420 to recite a partial list.” 66 Fed. Reg. 54838 (October 30, 2001).

<sup>234</sup> *Public Health and Natural Resources: A Review of the Implementation of Our Environmental Laws, Part I and II*, Hearing before the Senate Committee on Governmental Affairs, S.

erator had not proceeded further to establish operations, however, residents feared an increase in the price of gold would rekindle interest in pursuing its operation.)

In essence, after a nearly decade and a half effort aimed at improving protection against the ill-effects of hardrock mining, the Bush Interior Department issued an amalgamated regulation eliminating many of the new provisions that were most troublesome to the mining industry. Subsequently, BLM began “evaluating comments, including some on the lack of available surety bonds, on its final Surface Management regulations”<sup>235</sup> and is currently participating in a DOI bonding task force examining the industry’s ability to get bonds as a result of losses in the surety industry after the events of September 11.<sup>236</sup>

### C. Arsenic in Drinking Water Standard

The Bush Administration’s desire to reconsider environmental regulations that had been subject to extensive consideration repeated itself with the EPA’s regulation regarding arsenic in drinking water. After decades of study and years of public comment, EPA issued a final regulation lowering the maximum contaminant level—the “MCL”—for arsenic in drinking water to 10 parts per billion (“ppb,” also equal to micrograms per liter ( $\mu\text{g}/\text{L}$ )) which appeared in the printed Federal Register of January 22, 2001.<sup>237</sup> The EPA regulation replaced the 50 parts per billion standard which had been in place since 1942.<sup>238</sup> The new regulation brought the U.S. standard into line with the one set by the World Health Organization (WHO),<sup>239</sup> a standard also followed by the European Union.<sup>240</sup> The agency set an effective date for the regulation of March 23, 2001 and set certain compliance dates effective by January 22, 2004 and January 23, 2006.<sup>241</sup> The delayed starts were due to the lengthy lead time necessary for utilities to make the equipment and other changes necessary to comply with the regulation. The rule provided that for purposes of judicial review, it was promulgated as of January 22, 2001.<sup>242</sup> In announcing the rule, EPA observed that the new standard would provide additional protection for 13 million Americans against cancer and other health prob-

Hrg. 107-466 (March 7 and 13, 2002) (statement of Donald Newhouse, Guardians of the Rural Environment).

<sup>235</sup>Prepared statement of Tom Fulton, Deputy Assistant Secretary for Land and Minerals Management, U.S. Department of the Interior, Statement on “Availability of Bonds to Meet Federal Requirements for Mining, Oil & Gas Projects,” before the Subcommittee on Energy and Mineral Resources, House Committee on Resources, July 23, 2002 at 3.

<sup>236</sup>*Id.* at 1.

<sup>237</sup>66 Fed. Reg. 6976 (January 22, 2001).

<sup>238</sup>Mary Tiemann, “Arsenic in Drinking Water: Recent Regulatory Developments and Issues,” CRS Report for Congress, RS20672, April 29, 2002, at CRS-2 (hereinafter “RS20672”).

<sup>239</sup>EPA pointed out that while the same, the WHO standard and the EPA’s new standard were based on different factors. Therefore, EPA observed that a future change in the WHO standard would not necessarily lead to a change in the EPA standard. 66 Fed. Reg. 7025 (January 22, 2001).

<sup>240</sup>New Drinking Water Directive. (Council Directive 98/83/EC on the quality of water intended for human consumption.) November 3, 1998.

<sup>241</sup>66 Fed. Reg. 6976 (January 22, 2001).

<sup>242</sup>Regulations that are subject to judicial review are also promulgated for APA purposes. *Natural Resources Defense Council v. Environmental Protection Agency*, 683 F.2d 752, 759 (3d Cir. 1982).

lems, including cardiovascular disease and diabetes, as well as neurological effects.<sup>243</sup>

Most occurrences in the United States of arsenic exposures have been caused by ingesting arsenic in drinking water, or by eating plants or animals exposed to arsenic in water. Arsenic in water is both naturally occurring—from the erosion of the earth’s crust—and the result of pollution. It can be introduced into the water supply as the result of releases from agriculture, mining, and its use as a wood preservative, and as an ingredient in paints and semiconductors.<sup>244</sup> In a 1999 report, the National Academy of Sciences (NAS) concluded that the EPA’s then-in-force maximum contaminant level for arsenic in drinking water of 50 ppb “does not achieve EPA’s goal for public-health protection and, therefore, requires downward revision as promptly as possible.”<sup>245</sup> The NAS found sufficient evidence from studies in Taiwan, Chile, and Argentina to conclude that chronic arsenic exposure, primarily from drinking water, caused skin and internal cancers and cardiovascular and neurological effects.<sup>246</sup> NAS concluded that large epidemiology studies in Taiwan provided the best empirical human data available and there was sufficient evidence of a dose-response relationship between those cancers and exposure to arsenic in drinking water. For example, one study showed that among males, “mortality increased with increasing arsenic concentrations in water for cancers of all sites combined, and cancers of the bladder, kidney, skin, lung, liver, prostate, and leukemia when considered separately. Among females, increase in mortality were observed for all sites combined and cancers of the bladder, kidney, skin, lung, and liver.”<sup>247</sup> From other studies, NAS reported that, “arsenic might induce overt gastrointestinal disturbances, ranging from mild abdominal cramping and diarrhea to severe life-threatening hemorrhagic gastroenteritis associated with shock.”<sup>248</sup> It also reported that exposures “in the range of milligrams to grams per day have induced the rapid appearance of serious overt cardiovascular manifestations, including hypotension, congestive heart failure, and cardiac arrhythmias.”<sup>249</sup> NAS also reported that “[a]cute inorganic arsenic intoxication that produces initial gastrointestinal or cardiovascular symptoms can be followed by . . . central-nervous-system effects” ranging from mild confusion to seizures and coma.<sup>250</sup> Other reported effects include alterations in pulmonary, hematological (e.g. anemia) and reproductive/developmental function,<sup>251</sup> and in the pigmentation of the skin and the development of keratoses.<sup>252</sup>

<sup>243</sup> U.S. Environmental Protection Agency, Office of Water, “Drinking Water Standard for Arsenic,” January 2001.

<sup>244</sup> RS20672 at CRS-1.

<sup>245</sup> Subcommittee on Arsenic in Drinking Water, Committee on Toxicology, Board on Environmental Studies and Toxicology, Commission on Life Sciences, National Research Council, *Arsenic in Drinking Water*, National Academy Press, Washington, D.C. 1999 (hereinafter “1999 NRC Report”). Executive Summary at 9.

<sup>246</sup> 1999 NRC Report, Executive Summary at 2.

<sup>247</sup> Another study showed a “significant association with arsenic concentration was found for cancers of the liver, nasal cavity, lung, skin, bladder, and kidney in both sexes and for prostate cancer in males.” 1999 NRC Report at 93.

<sup>248</sup> 1999 NRC Report at 105.

<sup>249</sup> *Id.* at 106.

<sup>250</sup> *Id.* at 119.

<sup>251</sup> U.S. Department of Health and Human Services, Agency for Toxic Substances and Disease Registry, 1998.

<sup>252</sup> 66 Fed. Reg. 7001 (January 22, 2001).

*(1) The Rule's Development*

The SDWA required the EPA to establish limits on the extent to which public drinking water may contain different contaminants, including arsenic. In 1985, EPA had proposed a recommended maximum contaminant level of 50 µg/L (or 50 ppb).<sup>253</sup> In 1986, Congress included arsenic on a list of 83 contaminants for which EPA was required to issue new standards by 1989. EPA missed that deadline due to its extensive review of risk assessment issues.<sup>254</sup> In the 1996 amendments to the SDWA, Congress again directed the EPA to establish a new standard for arsenic, this time requiring a proposal by January 1, 2000 and a final standard by January 1, 2001.<sup>255</sup> (The January 1, 2001 deadline was extended by the EPA's FY 2001 appropriations act to June 22, 2001.)<sup>256</sup> The amendments also required the development of a comprehensive research plan for arsenic and required that EPA conduct its studies in consultation with the National Academy of Sciences and others. Congress authorized appropriations of \$2.5 million for each of fiscal years 1997 through 2000 for arsenic studies.<sup>257</sup>

The SDWA requires EPA to set two specific concentrations for each designated contaminant in drinking water—the maximum contaminant level goal (“MCLG”) and the maximum contaminant level (“MCL”). The nonenforceable MCLG is the level at which no known or anticipated adverse health effects occur and that allows an adequate margin of safety,<sup>258</sup> based on the best available information.<sup>259</sup> EPA must then set an enforceable standard (MCL) as close to the MCLG as is “feasible,” taking into account the best technology, treatment, or other means available (and taking costs into consideration).<sup>260</sup> EPA's determination of whether a standard is “feasible” is based on costs to systems serving more than 50,000 people.<sup>261</sup> In 1996, Congress amended the SWDA to require that when proposing a rule, EPA must publish a determination as to whether or not the benefits of the standard justify the costs. If EPA determines that the benefits do not justify the costs, EPA may set the standard at the level that maximizes health risk reduction benefits at a cost that is justified by the benefits,<sup>262</sup> although the statute limits the circumstances under which such authority can be exercised.<sup>263</sup> The 1996 amendments also provided that States or EPA may grant temporary exemptions from the standard if, due to compelling factors—including economic factors—a system cannot comply on time.<sup>264</sup> The SWDA also contains the so-called “anti-backsliding provision”—it provides that any revision of a national drinking water regulation shall maintain or provide for the greater health of persons.<sup>265</sup>

<sup>253</sup> 50 Fed. Reg. 46936 (November 13, 1985).

<sup>254</sup> RS20672 at CRS-2.

<sup>255</sup> Pub. L. 104-182, § 109(a).

<sup>256</sup> Pub. L. 106-377, Appendix A, Title III, 114 Stat. 1441A-41.

<sup>257</sup> Pub. L. 104-182, § 109(a).

<sup>258</sup> 42 U.S.C. § 300g-1(b)(4)(A).

<sup>259</sup> 42 U.S.C. § 300g-1(b)(3)(A).

<sup>260</sup> 42 U.S.C. § 300g-1(b)(4) (B) and (D).

<sup>261</sup> RS20672 at CRS-4.

<sup>262</sup> S. Rept. 104-169, 30.

<sup>263</sup> 42 U.S.C. § 300g-1(b)(6) (A) and (B).

<sup>264</sup> 42 U.S.C. § 300g-5.

<sup>265</sup> 42 U.S.C. § 300g-1(b)(9).

On December 6, 1996, EPA sought public comment on four arsenic research topics.<sup>266</sup> In 1997, 1998, and 1999 EPA held general public meetings to present information on EPA's plans to develop a National Primary Drinking Water Regulation, seeking input from the regulated community, public health organizations, State and Tribal drinking water programs, academia, environmental and public interest groups, engineering firms, and other stakeholders.<sup>267</sup> In 1999, it met with State representatives and in 2000 held a dialogue with State officials and associations that represent elected officials to consult on expected compliance and implementation costs.<sup>268</sup>

In 1997, EPA requested the National Academy of Sciences' (NAS) Subcommittee on Arsenic of the Committee on Toxicology of the National Research Council to review EPA's assessments of arsenic. The resulting NAS report, along with information regarding other relevant studies, was made available for public review in connection with EPA's publication of its proposed rule on June 22, 2000.<sup>269</sup> The June 22 notice proposed setting the MCLG at 0, and the MCL at 5 ppb. EPA had determined that the "feasible" level was actually 3 ppb, but since the benefits at this level would not justify the costs, it proposed the 5 ppb standard.<sup>270</sup> It also requested public comments on alternative MCLs of 3, 10, and 20 ppb.<sup>271</sup> After consideration of the comments and further analysis of the costs and benefits, EPA ultimately set the standard at 10 ppb, citing its authority under the SDWA to set the standard at a level that maximizes health risk reduction benefits at a cost that is justified by the benefits.<sup>272</sup> In issuing the final rule, EPA anticipated that some water systems would need to utilize the law's authority providing for temporary exemptions from the standard.<sup>273</sup>

As soon as the decision was announced, the National Mining Association, the American Wood Preservers Institute, the Western Coalition of Arid States, the States of Nebraska and New Mexico, as well as the Cities of El Paso, Texas, Albuquerque, New Mexico and Superior, Nebraska all challenged the rule in the U.S. Court of Appeals for the District of Columbia.<sup>274</sup> In their view, EPA had moved hastily with its decision to lower the maximum level of allowable arsenic.<sup>275</sup> Among their objections were costs, disagreements with the conclusions EPA reached regarding the scientific support for the standard, questions about the feasibility of treatment tech-

<sup>266</sup> 61 Fed. Reg. 64739 (December 6, 1996).

<sup>267</sup> 63 Fed. Reg. 3890 (January 27, 1998); 63 Fed. Reg. 15401 (March 31, 1998); 64 Fed. Reg. 23297 (April 30, 1999); 66 Fed. Reg. 6993 (January 22, 2001).

<sup>268</sup> 66 Fed. Reg. 6993 (January 22, 2001).

<sup>269</sup> 65 Fed. Reg. 38899 (June 22, 2000).

<sup>270</sup> RS20672 at CRS-4.

<sup>271</sup> 65 Fed. Reg. 38888 and 38899 (June 22, 2000).

<sup>272</sup> 66 Fed. Reg. 7045 (January 22, 2001).

<sup>273</sup> 66 Fed. Reg. 6988 (January 22, 2001).

<sup>274</sup> *American Wood Preservers Institute v. Environmental Protection Agency*, No. 01-1097 (D.C. Cir. filed March 1, 2001), *State of Nebraska, ex rel. v. Environmental Protection Agency*, No. 01-1101 (D.C. Cir. filed March 5, 2001), *City of Albuquerque v. Environmental Protection Agency*, No. 01-1105 (D.C. Cir. filed March 6, 2001), *City of El Paso v. Environmental Protection Agency*, No. 01-1106 (D.C. Cir. filed March 6, 2001), *State of New Mexico v. Environmental Protection Agency*, No. 01-1107 (D.C. Cir. filed March 7, 2001), *Western Coalition of Arid States ("WESTCAS") v. Environmental Protection Agency*, No. 01-1108 (D.C. Cir. filed March 7, 2001), *National Mining Association v. Environmental Protection Agency*, No. 01-1109 (D.C. Cir. filed March 7, 2001).

<sup>275</sup> Darren Samuelsohn, "Arsenic: EPA's Rule Invites Lawsuits Legislation," *Greenwire*, March 9, 2001; "Arsenic: Evidence Strong for New EPA Standard—NAS," *Greenwire*, September 12, 2001.



nology, and complaints that EPA ignored issues raised by its science advisory board.<sup>276</sup> The American Wood Preservers Institute—whose members pressure-treat lumber and wood products with a mixture that includes arsenic—was concerned about EPA’s finding that there is no safe threshold for arsenic.<sup>277</sup> The Natural Resources Defense Council (NRDC) sued to strengthen the standard.<sup>278</sup>

(2) *Arsenic Rule Targeted for Change*

Although it is unclear exactly when, it appears that the Bush Administration targeted the arsenic rule for review even before it took office and had its new EPA administrator engage in any review of the extensive administrative record. The regulation is listed on an undated, untitled document submitted by EPA which appears to summarize the responses to a questionnaire for the Transition Advisory Team regarding “significant administrative actions that should be reviewed early in the Administration.” The document states: “This rule significantly lowers the allowable limit for arsenic in drinking water and should be reviewed to ensure that its benefits are justified in light of its costs.” Another unidentified and undated document provided during the inquiry states “the Administration should actively review this [arsenic] rule” and describes the regulatory implications as follows: “EPA may adopt inappropriately conservative risk assessment assumptions used in this rule in development of other water quality criteria.”<sup>279</sup>

After the 10 ppb standard appeared in the Federal Register dated January 22, 2001, a member of the White House staff and a representative of Kennecott Utah Copper Corporation—which had supported continuation of the 50 ppb standard<sup>280</sup>—contacted EPA to question the publication of the final arsenic rule in light of the Card memo’s requirements.<sup>281</sup> The response was deferred to the “transition team” for an answer, but the understanding among EPA staff was that the Federal Register “went to bed on Friday”

<sup>276</sup>*American Wood Preservers Institute v. Environmental Protection Action*, No. 01–1097 (D.C. Cir. March 22, 2002) (Non-Binding Statement of Issues filed by American Wood Preservers Institute at 2) (Statement of Issues Submitted by Petitioners State of New Mexico, City of Albuquerque, City of El Paso and Western Coalition of Arid States at 2–3).

<sup>277</sup>Thomas E. Knauer, “EPA Issues Controversial Arsenic Standard,” *Virginia Environmental Compliance Update*, March 2001.

<sup>278</sup>Cindy Skrzycki, “The Regulators: Wood Preservers Feel the Pressure,” *The Washington Post*, March 20, 2001. NRDC subsequently withdrew this petition for review. *Natural Resources Defense Council v. Whitman*, No. 01–1291 (D.C. Cir. April 16, 2002) (Unopposed Motion for Voluntary Dismissal).

<sup>279</sup>This document has a matrix entitled “Regulatory Actions Subject to Bush Administration Regulatory Review Plan” and lists 10 EPA regulatory actions.

Administrator Whitman’s representative reported that “two meetings were held between EPA representatives and the Bush Administration transition team after November 7, 2000, at which the arsenic rule may have been discussed.” Letter from Edward D. Krenik, Associate Administrator, Office of Congressional and Intergovernmental Relations, U.S. Environmental Protection Agency to the Honorable Joseph I. Lieberman, Chairman, Committee on Governmental Affairs, United States Senate, Washington, D.C., July 10, 2001.

<sup>280</sup>Letter from Robert J. Fensterheim, Executive Director, Environmental Arsenic Council, Washington, D.C. to J. Charles Fox, United States Environmental Protection Agency Headquarters, Washington, D.C., November 20, 2000. (The Environmental Arsenic Council is a trade organization representing chemical and mining companies, including Kennecott Corporation.)

<sup>281</sup>E-mail from Congressional Liaison Staff, Office of Congressional and Intergovernmental Affairs, to staff, Office of Congressional and Intergovernmental Affairs, U.S. Environmental Protection Agency, “White House staff call re: arsenic,” January 29, 2001. E-mail from “Adams, William (KUCC)” to staff, Target and Analysis Branch, Standard and Risk Management Division, Office of Ground Water and Drinking Water, U.S. Environmental Protection Agency, “Re: Request for hard copies of the Arsenic Final Rule and Fact Sheets,” January 22, 2001.

and the new administration could not stop publication.<sup>282</sup> That understanding was consistent with the position taken by the Office of Federal Register where an official stated that the rules which appeared in the Federal Register on Monday, January 22, 2001 were actually printed on the evening of January 19, 2001 and the morning of January 20, 2001. “Therefore . . . rules published on January 22, 2001, should be counted as ‘published’ by the time the Card memorandum was issued”<sup>283</sup>—and thus final.

The new administrator received requests to reconsider the rule, mirroring arguments that had been raised against the standard and which were analyzed and addressed during the lengthy rule-making process.<sup>284</sup> For example, the National Rural Water Association sent a brief memorandum asking EPA to “take another look” at the rule “to include enhanced flexibility for small towns faced with outrageous costs. . . .”<sup>285</sup> Members of Congress from Western States also voiced their concerns that utilities and States in areas with the highest naturally occurring levels of arsenic would bear a high cost of compliance.<sup>286</sup> The Director of the Office of Ground Water and Drinking Water, Office of Water (OW) asked staff of the OW and the Office of General Counsel (OGC) to prepare talking points for use if there were an opportunity to engage Administrator Whitman on arsenic. Staff prepared a one-page document which broadly outlined the status of the regulation, its time sensitivity, a summary of the regulation, its regulatory impacts, and stakeholder involvement to date and stakeholder reaction. The document noted OMB’s preference for a “higher final MCL based on their belief that EPA had underestimated the costs of compliance and was overly conservative in the Agency’s risk analysis for arsenic.”<sup>287</sup> An additional page of talking points, which appear to have been prepared by the staff of the OW, state: “We believe that the final MCL of 10 ppb is appropriate from a number of standpoints: health effects, science, uncertainties, costs and benefits.”<sup>288</sup> There were concerns expressed within the agency about a change:

EPA could have set a more stringent standard (3 ppb), based on good science and available technologies. However, as SDWA allows, EPA took cost considerations into ac-

<sup>282</sup> E-mail string, from Attorney, Water Law Office, Office of General Counsel, to staff, Target and Analysis Branch, Standard and Risk Management Division, Office of Ground Water and Drinking Water, U.S. Environmental Protection Agency, “Re: Request for hard copies of the Arsenic Final Rule and Fact Sheets,” January 30, 2001; E-mail string from Associate General Counsel, Water Law Office, Office of General Counsel, to Acting Assistant Administrator, Office of Water, “Request for hard copies of the Arsenic Final Rule and Fact Sheets,” January 30, 2001.

<sup>283</sup> GAO-02-370R at 3.

<sup>284</sup> 66 Fed. Reg. 6987–89, 6992, 7018–22, 7036, and 7038–7044 (January 22, 2001).

<sup>285</sup> Memorandum from Mike Keegan and John Montgomery, National Rural Water Association, to Administrator Whitman, Environmental Protection Agency, January 31, 2001; Letter from Robert Johnson, Chief Executive Officer, National Rural Water Association to W-99-16 Arsenic Comment Clerk, Environmental Protection Agency, Washington, D.C., August 30, 2000.

<sup>286</sup> Letter from Representative Doug Bereuter, *et al.*, U.S. House of Representatives to Christine Whitman, Administrator, Environmental Protection Agency, Washington, D.C., January 30, 2001; Letter from Senator Pete Domenici, U.S. Senate to Christine Whitman, Administrator, Environmental Protection Agency, Washington, D.C., February 12, 2001.

<sup>287</sup> E-mail from Chief, Targeting and Analysis Branch, Standard and Risk Management Division, Office of Ground Water and Drinking Water to Director, Office of Ground Water and Drinking Water, Office of Water, U.S. Environmental Protection Agency, February 12, 2001, with attachment, “Arsenic in Drinking Water Final Rule.”

<sup>288</sup> *Id.* and e-mail from Chief, Targeting and Analysis Branch, Standard and Risk Management Division, Office of Ground Water and Drinking Water to Director, Office of Ground Water and Drinking Water, Office of Water, “Revised Talking Points on Arsenic,” February 13, 2001, with attachment, “Arsenic in Drinking Water. Additional Talking Points.”

count and set a reasonable standard (10 ppb). . . . The rule as written allows us to re-open it a later date based on new information. If EPA were to re-open the rule now, the debate will be contentious and highly politicized, and decision making will be very difficult. . . .<sup>289</sup>

The outgoing General Counsel had identified the obstacles presented by the APA and the SDWA in delaying—and changing—a rule already published in the Federal Register,<sup>290</sup> a concern shared by the Acting General Counsel: “We have no good cause argument to make here. . . . A revision to the Jan. 22 rule requires a record that explains why we have changed our mind . . . and a revision that makes the standard less stringent without a prior withdrawal is problematic under the SDWA “anti-backsliding” provision, which states that any revision to a drinking water standard must maintain or provide for greater health protection.”<sup>291</sup>

On March 6, 2001, staff from the OW and other staff briefed the Counselor to the Administrator on the background and options for the arsenic standard, including a discussion of the impact of the law’s anti-backsliding provisions, and concerns expressed by some States regarding costs. The prepared slides contained OW’s recommendation:

Support the final rule because

- It took over 20 years to issue and we need to move forward to ensure safe drinking water.
- While some questions remain, there is more than adequate scientific support for the rule.
- It is a reasonable decision that is entirely consistent with the international community. (e.g., World Health Organization; European Union both set the standards at 10 ppb).<sup>292</sup>

This was followed by a briefing for Administrator Whitman on March 8—the slides for that briefing did not include this recommendation.<sup>293</sup> A briefing paper provided to Administrator Whitman in advance identified “Key Policy Issues: Many utilities and States in most hard-hit areas believe final rule is overly stringent, citing the relatively high costs of compliance and uncertainties surrounding the health effects science.”<sup>294</sup> During this time, rep-

<sup>289</sup> E-mail from Policy Staff, Immediate Office of the Assistant Administrator to Elizabeth Laroe, Acting Director, Water Policy Staff, Office of Water, U.S. Environmental Protection Agency, February 22, 2001.

<sup>290</sup> Memorandum from General Counsel to Deputy Administrator, Subject: “Whether the Administrator can withhold, withdraw from publication or revise a rule document that has been signed and published in the Federal Register, or otherwise disseminated, without going through further notice and comment rulemaking procedures,” U.S. Environmental Protection Agency.

<sup>291</sup> This discussion occurs in the context of an “interim final rule option,” applying the “good cause” exemption contained in the Administrative Procedure Act. Notes of Acting General Counsel, U.S. Environmental Protection Agency, “Interim Final Rule Option,” March 4, 2001.

<sup>292</sup> Office of Water, “Providing Safe Drinking Water: The Role of the New Arsenic Standard, Briefing for Jessica Furey,” Counselor to the Administrator, U.S. Environmental Protection Agency, March 6, 2001.

<sup>293</sup> Office of Water, “Providing Safe Drinking Water, The Role of the New Arsenic Standard,” Briefing for Governor Christine Whitman, Administrator, U.S. Environmental Protection Agency, March 8, 2001.

<sup>294</sup> Copy of e-mail from Director, Office of Ground Water and Drinking Water, Office of Water to Counselor to the Administrator, Office of the Administrator, “Two-Pager for the Adminis-

representatives of the American Water Works Association<sup>295</sup> and the Western Governor's Association (WGA) were in contact with the EPA regarding the standard. The WGA proposed a forum with Administrator Whitman to discuss the new arsenic rule—a forum for which the proposed topics included EPA's authority to void the new rule.<sup>296</sup> Notes made by the acting assistant administrator, Office of Water, from a March 12 meeting with agency officials states: "Revisit arsenic rule. Not convinced on. Need options: legal and policy."<sup>297</sup>

EPA officials were in communication with the White House regarding a proposed withdrawal of the standard. On March 14, EPA submitted by e-mail the weekly cabinet report to the Executive Office of the President, which identified plans for arsenic:

EPA is discussing with White House staff the recommendation for a proposed withdrawal of the arsenic standard for drinking water in order to seek additional public comment and input and to pursue external peer review. . . . Issues under question include the inconclusiveness of health effects studies in establishing a safe level of arsenic and the cost-benefit aspect of the rule, which has a disproportionate impact on small systems. . . . The Administrator will participate in roundtable discussions at a Western Governors' Association meeting.<sup>298</sup> . . . A decision to propose to withdraw the rule will not lessen protection conferred by the existing standard during the time of the review.<sup>299</sup>

The March 15 notes made during a meeting with Administrator Whitman contain the notation: "meeting with Bridgeland Arsenic Rule."<sup>300</sup> (John Bridgeland is the Director of the White House Office of Domestic Policy.)

Less than 2 weeks after her briefing, on March 20, Administrator Whitman, noting that she wanted to examine "what may have been a rushed decision" and to be "sure that the conclusions about arsenic in the rule are supported by the best available science," announced that EPA would "propose to withdraw the pending arsenic

trator on Arsenic," attachment "Final Arsenic in Drinking Water Rule," March 7, 2001 with handwritten notation, "Given to CTW prior to 3/08/01 briefing."

<sup>295</sup> E-mail from Alan Roberson, Director of Regulatory Affairs, American Water Works Association to Counselor to the Administrator, Office of the Administrator and Deputy Associate Administrator, Office of Congressional and Intergovernmental Relations, U.S. Environmental Protection Agency referring to conversation that took place "yesterday," March 13, 2001.

<sup>296</sup> E-mail from Shaun McGrath, Program Manager, Western Governor's Association to U.S. Environmental Protection Agency, "WGA Arsenic Forum," March 7, 2001, with attached draft agenda.

<sup>297</sup> Notes from 3/12 meeting of Acting Assistant Administrator, Office of Water, U.S. Environmental Protection Agency.

<sup>298</sup> On March 22, Administrator Whitman participated in a forum organized by the WGA to discuss the rule. Reportedly, she expressed uncertainty regarding the level of appropriate protection and stated—"We want to make sure all the stakeholders come to the table" during a new comment period. . . ." Kit Miniclier, "Tougher arsenic standard promised, EPA reassures West on drinking water," *The Denver Post*, March 23, 2001 at A-01.

<sup>299</sup> E-mail from Associate Director, Drinking Water Protection Division, Office of Water, U.S. Environmental Protection Agency to Executive Office of the President, "Weekly Cabinet Report: Environmental Protection Agency," March 14, 2001.

<sup>300</sup> Notes of Associate Administrator, Office of Communications, Education, and Media Relations, U.S. Environmental Protection Agency during meeting with Administrator Whitman, March 15, 2001.

standard for drinking water that was issued on January 22.”<sup>301</sup> Without providing specifics, or explaining how the decades long deliberations that produced the rule could be characterized as a “rushed decision,” EPA Administrator Whitman cited concerns about scientific uncertainty and high implementation costs<sup>302</sup> reportedly telling representatives of water agencies: “In short, we’re going to replace sound-bite rule-making with sound-science rule-making.”<sup>303</sup> In a Letter to the Editor of *The New York Times*, she noted: “Sound science and strong analysis should not be overlooked in a rush to an arbitrary deadline.”<sup>304</sup> This theme was reiterated by President Bush who reportedly was quoted as arguing that: “At the very last minute, my predecessor made a decision, and we pulled back his decision so that we can make a decision based upon sound science and what’s realistic.”<sup>305</sup>

Administrator Whitman’s reported assertion that the final rule was based on “sound-bite” rather than “sound-science” rule-making<sup>306</sup> was a serious allegation suggesting non-compliance with a core requirement of the SDWA. The act requires the administrator to use the best available, peer-reviewed science studies in setting standards.<sup>307</sup> In this case, the rule was decades in the making; arsenic had been the subject of numerous scientific studies; and the 1999 report from the National Academy of Sciences had concluded that downward revision of the limit from 50 ppb was required as “promptly as possible.”

Before suggesting that the agency’s own final rule and analysis of the science was in need of further review, it is reasonable to expect the administrator to articulate the basis for her concerns with the rule and the science. Under court challenge, EPA would ultimately be required to provide a rational basis and a new record for concluding that the final standard required replacement and a different standard was justified, particularly in the face of an extensive record supporting the January 2001 rule. Yet, it appears that it was only after the administrator’s announcement of the decision to propose to withdraw the rule that officials focused attention on a key element of the decisionmaking process supporting the January rule—the record. On March 21, EPA staff were advised of an upcoming meeting with the “Transition Team” to discuss “the record for the arsenic rule.”<sup>308</sup>

<sup>301</sup> Communications, Education, and Media Relations, U.S. Environmental Protection Agency, “EPA to Propose Withdrawal of Arsenic in Drinking Water Standard; Seeks Independent Reviews,” March 20, 2001.

<sup>302</sup> Jocelyn Kaiser, “Science Only One Part of Arsenic Standards,” 291 *Science* at 2533, March 30, 2001; “EPA Reinstates Its Arsenic Rule,” 108 *Chemical Engineering* at 23, December 1, 2001.

<sup>303</sup> Bill McAllister, “Arsenic standard dumped. Bush drops tougher Clinton regulations on drinking water,” *The Denver Post*, March 21, 2001 at A-01.

<sup>304</sup> Christine Todd Whitman, Administrator, Environmental Protection Agency, Letter to the Editor, *The New York Times*, March 23, 2001, at A-18.

<sup>305</sup> David L. Greene, “Economy comes first Bush says: President places people’s energy needs ahead of environment,” *The Baltimore Sun*, March 30, 2001 at 1A.

<sup>306</sup> *Supra*, notes 303 and 304.

<sup>307</sup> 42 USC § 300g-1(b)(3)(A).

<sup>308</sup> E-mail from Chief, Targeting and Analysis Branch, Standard and Risk Management Division, Office of Ground Water and Drinking Water, to Division Director, Office of Ground Water and Drinking Water, Office of Water, U.S. Environmental Protection Agency, “Arsenic—Meeting with the Administrator’s Staff on Monday, March 26,” March 21, 2001. The e-mail asks recipients to prepare an overview of the formal procedural steps that were followed, the process used to develop the major elements of the rule, outreach efforts, and ideas for obtaining additional review of “controversial” pieces.

The documents made available for review reflect that prior to the administrator's announcement of her concerns about "sound-science," the agency undertook no comprehensive review of either the record or the science supporting the January 2001 standard. What there is consists of three pages of notes of a Bush appointee reviewing regulations at the EPA, that list a variety of issues and observations, including what appear to be concerns raised by OMB.<sup>309</sup> In essence, when announcing the proposed rollback, the administrator seemed to be practicing the very "sound-bite" policy-making that she criticized.

Upon hearing of the administrator's March 20 announcement, some career staff within EPA expressed surprise and unhappiness, with one voicing the opinion that, in fact, much of the science pushed for a more stringent standard (5µg/l) than was adopted.<sup>310</sup> In response to a complaint about not involving the arsenic MCL team in the discussion, a senior OW official explained the decision: "As I'm sure you can appreciate, this was a policy decision on the part of the Administration. We were given the chance to brief the administrator and made, I believe, a strong case for the rule."<sup>311</sup> Another noted that options were fairly discussed and "[it] was made very clear that this was not a science but a policy decision under consideration."<sup>312</sup> This is telling. In decisions regarding public health and environmental protection, policy decisions should be science-based decisions—the two types of decisions should not be considered mutually exclusive.

Sixty days after issuance of the Card memo, on March 23, 2001, EPA published a Federal Register notice delaying, without public comment, the effective date of the new rule from March 23 until May 22, 2001, except for specific amendments which were not effective until 2004 and 2006.<sup>313</sup> The notice used the OMB model language to invoke the rule of procedure and "good cause" exceptions to the APA to justify avoidance of the public comment process. Once again, the rationales for invoking the exceptions to public notice and comment do not stand up to scrutiny. Clearly, the procedural exemption did not apply. A regulation establishing the acceptable maximum contaminant level for arsenic in water is not a rule governing the conduct of agency proceedings, but a substantive health and environmental protection standard required by the SDWA. Furthermore, no attempt was made to justify, based on the specific facts of the rule, that "good cause" for a delay existed. (One staff person at EPA raised the question as to whether or not the rule was covered by the Card memorandum since the rule was

<sup>309</sup>The notes include the statement "look at incremental gains from 20 to 10" and the notation: "call John Graham." (John Graham was Director of the Center for Risk Analysis at the Harvard School of Public Health until March 15, 2001. On July 19, 2001, he was confirmed by the U.S. Senate as Administrator of the Office of Information and Regulatory Affairs at OMB.) Notes of Program Advisor, Office of the Administrator, U.S. Environmental Protection Agency, March 16, 2001.

<sup>310</sup>E-mail from Arsenic MCL Team, to Acting Deputy Assistant Administrator for Science, "Note to As team," forwarding message and reply, U.S. Environmental Protection Agency, March 21, 2001.

<sup>311</sup>E-mail from Chief, Targeting and Analysis Branch, Standard and Risk Management Division, Office of Ground Water and Drinking Water to Arsenic MCL Team, "EPA to Propose Withdrawal of Arsenic Standard," U.S. Environmental Protection Agency, March 20, 2001.

<sup>312</sup>E-mail from Acting Deputy Assistant Administrator for Science to Arsenic MCL Team, "EPA to Propose Withdrawal of Arsenic Standard," U.S. Environmental Protection Agency, March 21, 2001.

<sup>313</sup>66 Fed. Reg. 16134 (March 23, 2001).

issued “pursuant to” a statutory deadline (Exemption 4 of the Card memo). However, there was also a question suggesting that the transition team wanted the rule reviewed in any event.)<sup>314</sup> This unsupported use of the APA exemptions is another indication of decisionmakers who either did not respect or did not understand the role of public comment in the rulemaking process.<sup>315</sup>

After issuing the notice to delay the effective date of the rule, administration officials focused attention on cost-benefit issues and a debate over a less stringent standard. On March 26, the rule’s reviewer received a comprehensive briefing on the decisions supporting the rule<sup>316</sup> and scheduled a second meeting for the next day with the “Office of Water staff to go into cost issues in greater detail.”<sup>317</sup>

During this time, there were contacts between EPA officials, the OMB, and the White House regarding the standard. However, the full extent and substance of these contacts cannot be determined from the EPA documents. For example, an April 3, 2001 message from the Associate Director, Drinking Water Protection Division, Office of Water, to a Special Assistant, Office of Research and Development, said, “Jessica Furey will give me the current status of arsenic later this afternoon after she meets with the White House.”<sup>318</sup> An April 4 Weekly Report noted: “The Agency is discussing with White House staff and OMB outstanding issues regarding the independent review.”<sup>319</sup>

What is clear from the documents is that OMB staff advocated a change to a less stringent standard. An activity report, written by an EPA participant, describes a meeting between EPA and OMB staff on April 10 “to determine whether record would support 20 ppb.”<sup>320</sup> The meeting was also attended by a Special Assistant to the Director of the White House Domestic Policy Council, and an unidentified person from the Council on Economic Advisors.<sup>321</sup> According to a memorandum describing the meeting, OMB presented its view that the record would support a final standard of 20 ppb

<sup>314</sup> E-mail string, including e-mail from Attorney, Water Law Office, Office of General Counsel to Policy Staff, Immediate Office of the Assistant Administrator, Office of Water, U.S. Environmental Protection Agency, “Draft Federal Register Notices Extending Effective Date for Arsenic,” January 29, 2001.

<sup>315</sup> EPA solicited public comment on a subsequent notice further delaying the effective date. 66 Fed. Reg. 20580 (April 23, 2001).

<sup>316</sup> Office of Water, “Arsenic in Drinking Water Standard, Presentation to the Administrator’s Transition Team,” U.S. Environmental Protection Agency, March 26, 2001.

<sup>317</sup> E-mail from Program Advisor, Office of the Administrator, to Deputy General Counsel, Office of General Counsel, Program Advisor, Office of the Administrator, Counselor to the Administrator, Office of the Administrator, Associate Administrator, Office of Policy, Economics and Innovation, Acting Assistant Administrator, Office of Water, and Associate Deputy Administrator, U.S. Environmental Protection Agency, “Arsenic meeting,” March 26, 2001.

<sup>318</sup> E-mail regarding status of arsenic regulations, April 3, 2001. The schedule of the Counselor to the Administrator for that day included a meeting with Jay Lefkowitz, General Counsel, Office of Management and Budget and Bob Fabricant, Program Advisor, Office of the Administrator, at the Old Executive Office Building. Jessica Furey calendar, Environmental Protection Agency, April 3, 2001.

<sup>319</sup> E-mail from Special Assistant, Office of Research and Development to Associate Director, Drinking Water Protection Division, Office of Water, U.S. Environmental Protection Agency, “Weeklies,” contains 4 weekly cabinet report summaries, April 18, 2001.

<sup>320</sup> E-mail from Division Director, Office of Ground Water and Drinking Water, Office of Water to Acting Assistant Administrator, Office of Water, “Activity Update for Week of April 9 for Regas,” U.S. Environmental Protection Agency, April 17, 2001.

<sup>321</sup> Undated memorandum from Division Director, Office of Ground Water and Drinking Water, Office of Water to Director, Office of Ground Water and Drinking Water, Office of Water, summary of meeting with Office of Management and Budget and U.S. Environmental Protection Agency. An outline of issues to be discussed at the meeting was provided in advance to EPA by OMB.

and EPA defended its 10 ppb decision as reflected in the January rule. The Program Advisor, Office of the Administrator, reported that the new administrator had not made a decision on what the standard should be.<sup>322</sup>

Communications continued with OMB after the April 10 meeting. EPA provided OMB a draft Federal Register notice “for meeting at 6 p.m. today” to postpone the effective date of the rule, with a blank left for the length of time.<sup>323</sup> An April 16 EPA e-mail message noted the need to coordinate on information being sent to OMB, “since the administrator’s office is negotiating with OMB officials at very senior levels.”<sup>324</sup> There was also mention of a meeting on April 17 with White House and OMB staff to make decisions regarding how to proceed with arsenic.<sup>325</sup>

### (3) *Additional Study and Decision to Retain Standard*

Shortly after the meeting in which OMB advocated a less stringent standard, on April 12, officials from EPA and the DOJ met with litigants who had challenged the arsenic standard.<sup>326</sup> According to a report regarding the meeting, “Industry emphasized major concern that EPA not move too fast on substance at expense of record support or industry participation. Industry indicated strong willingness to consider 9–12 month process although Westcas<sup>327</sup> continued to emphasize need to extend final 2006 compliance date. Bottom line: Industry more than willing to support independent review process. . . .”<sup>328</sup> Two weeks later, on April 23, EPA issued a notice proposing and seeking comment on further delay of the arsenic standard’s effective date for 9 months (from May 22, 2001 to February 22, 2002). EPA provided this rationale:

Stakeholders have an understandable desire to ensure that any new regulation be based on accurate and reliable compliance cost estimates. Stakeholders also want to be confident that the health risks associated with a new standard have been appropriately evaluated and are based on the best available science.<sup>329</sup>

Like the administrator’s announcement of her plans to withdraw the standard, this notice provided no information regarding specific concerns relating to the reliability of the cost estimates or the quality of the science.

EPA then requested that the National Academy of Sciences convene a panel of scientific experts to review EPA’s interpretation

<sup>322</sup> *Id.*

<sup>323</sup> E-mail from Assistant General Counsel, Water Law Office, Office of General Counsel to Office of Management and Budget, “Document for Jay Lefkowitz,” April 11, 2001.

<sup>324</sup> E-mail from Division Director, Office of Ground Water and Drinking Water, Office of Water to Chief, Targeting and Analysis Branch, Standard and Risk Management Division, Office of Ground Water and Drinking Water, U.S. Environmental Protection Agency, “Occurrence,” April 16, 2001.

<sup>325</sup> E-mail from Division Director, Office of Ground Water and Drinking Water, Office of Water to Acting Assistant Administrator, Office of Water and others, “Arsenic and Yucca Mountain Update,” with attachment “Activity Update for Week of April 9 for Regas,” U.S. Environmental Protection Agency, April 17, 2001.

<sup>326</sup> *Id.* As noted above, on March 1, the American Wood Preservers had filed the first of several petitions for review of the final rule with the D.C. Circuit Court.

<sup>327</sup> “Westcas” is the Western Coalition of Arid States.

<sup>328</sup> *Supra*, note 325. The participants in the meeting included many of the litigants: The Utah Water Act Group (UWAG), the National Mining Association, the Western Coalition of Arid States, the State of Nebraska, and the Natural Resources Defense Council.

<sup>329</sup> 66 Fed. Reg. 20581 (April 23, 2001).



and application of arsenic research from the 1999 report of the National Research Council, and to evaluate any new arsenic research that had become available since 1999. It also announced that it would work with the National Drinking Water Advisory Council<sup>330</sup> to review assumptions and methodologies underlying the Agency's estimate of arsenic compliance costs.<sup>331</sup>

A majority of the commenters on the April 23, 2001 notice opposed the extension, yet on May 22, 2001, EPA announced that it would delay the effective date for the rule until February 22, 2002.<sup>332</sup> This would allow time to "complete the reassessment process . . . and to afford the public a full opportunity to provide further input on the science and costing analysis underlying EPA's promulgation of the January 22, 2001 arsenic standard."<sup>333</sup> Without explanation as to why the decade long process did not provide the necessary full opportunity for comment, EPA concluded that the delay was justified because it agreed with the "commenters who argued that this rule is very important and the issues of cost and science that are central to the rulemaking deserve one final review before concluding this rulemaking,"<sup>334</sup> and that the delay would provide more time to develop a mitigation strategy for those affected by the costs as well as to review scientific information that had recently become available.<sup>335</sup> The commenters who supported the extension, "most of whom represented the drinking water industry, small system water providers, and States," believed review was warranted, "to consider the financial impact on small systems."<sup>336</sup>

Consequently, a year after its June 2000 request for comments on whether the standard should be set at 3, 5, 10, or 20 ppb, on July 19, 2001, EPA made a strikingly similar request in the Federal Register soliciting public comment on whether the standard should be set at 3, 5, 10, or 20 ppb.<sup>337</sup> A week later, on July 27, 2001, the House of Representatives amended the EPA's appropriations bill to prohibit the delay of the regulation or an increase in the allowable arsenic level.<sup>338</sup>

Within the next 2 months, the studies commissioned by EPA to provide assurances to stakeholders that cost estimates were accurate and health risks were appropriately evaluated were submitted, and both reports contained those assurances. The National Drinking Water Advisory Council, Arsenic Cost Working Group<sup>339</sup> submitted its cost review report to Administrator Whitman on August

<sup>330</sup> The National Drinking Water Advisory Council consists of members of the general public, and representatives of State and local agencies and private groups who are concerned with safe drinking water. It advises the EPA on "everything that the Agency does relating to drinking water." Office of Water, U.S. Environmental Protection Agency, "National Drinking Water Advisory Council." <http://www.epa.gov/ogwdw/ndwac/council.html>

<sup>331</sup> 66 Fed. Reg. 28580 (April 23, 2001).

<sup>332</sup> 66 Fed. Reg. 28345 (May 22, 2001).

<sup>333</sup> 66 Fed. Reg. 20580 (April 23, 2001).

<sup>334</sup> 66 Fed. Reg. 28346 (May 22, 2001).

<sup>335</sup> 66 Fed. Reg. 28347 (May 22, 2001).

<sup>336</sup> Memorandum from Acting Assistant Administrator, Office of Water to Christine Whitman, Administrator, Subject: "Final Rule for National Primary Drinking Water Regulation for Arsenic—ACTION MEMORANDUM," U.S. Environmental Protection Agency, May 16, 2001.

<sup>337</sup> 66 Fed. Reg. 37617 (July 19, 2001).

<sup>338</sup> 147 Cong. Rec. H4743–51, H4758–59 (July 27, 2001).

<sup>339</sup> The Arsenic Cost Working Group was a panel of nationally recognized technical experts established to work with EPA's National Drinking Water Advisory Council to review the cost of compliance estimates associated with the final arsenic rule. 66 Fed. Reg. 22551 (May 4, 2001).

23, 2001, which concluded that the EPA originally did a “credible job” of computing the costs to water systems.<sup>340</sup> In September 2001, the NRC submitted an update of its 1999 report supporting the scientific findings. As described above, the 1999 report had found sufficient evidence that ingestion of arsenic in drinking water caused skin, bladder, and lung cancer. In the 2001 update, the NRC considered several hundred new scientific articles on arsenic, and concluded that these “other recent studies of arsenic in humans, taken together with the many studies discussed in the 1999 NRC report, provide a sound and sufficient database showing an association between bladder and lung cancers and chronic arsenic exposure in drinking water, and they provide a basis for quantitative risk assessment.”<sup>341</sup> The updated report also found new evidence that chronic exposure to arsenic in drinking water might also be associated with an increased risk of high blood pressure and diabetes. In short, EPA’s review process not only confirmed its findings and refuted charges that the original rule was based on something less than sound science, it provided additional evidence of the need for change, and, as reflected in subsequent litigation filed on December 14, 2001, raised questions as to whether the standard should be further strengthened.

On October 31, 2001, the date on which public comments were due on the contents of the reports,<sup>342</sup> EPA issued a press release announcing Administrator Whitman’s decision that the arsenic standard would be 10 parts per billion, stating that “we are reassured by all of the data that significant reductions are necessary . . . a standard of 10 ppb protects public health based on the best available science and ensures that the cost of the standard is achievable.”<sup>343</sup> No explanation was provided for the reasons underlying the decision or addressing the material developed since issuance of the January 2001 rule. On November 8, the Congress approved its final language prohibiting EPA from using funds appropriated for FY 2002 to delay the January rule.<sup>344</sup> It was accompanied by a House and Senate Conference Report which contained language directing EPA to review the agency’s affordability criteria, assess how small system variance and exemption programs should be implemented for arsenic, and recommend procedures to grant more time for compliance by small communities in cases where compliance by 2006 would pose an undue economic hardship.<sup>345</sup> EPA later reported to Congress that it planned to conduct a thorough examination of its approach to implementing the affordability provisions of the Safe Drinking Water Act, including consideration of issues raised by commenters on the regulation proposals and by the Arsenic Cost Working Group of the National Drinking Water Advisory Council. EPA also committed to using all tools

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<sup>340</sup> Report of the Arsenic Cost Working Group to the National Drinking Water Advisory Council, Final, August 14, 2001.

<sup>341</sup> Subcommittee to Update the 1999 Arsenic in Drinking Water Report, Committee on Toxicology, Board on Environmental Studies and Toxicology, Division on Earth and Life Studies, National Research Council, National Academy Press, *Arsenic in Drinking Water: 2001 Update* at 3 and 5.

<sup>342</sup> 66 Fed. Reg. 50961 (October 5, 2001).

<sup>343</sup> U.S. Environmental Protection Agency, Headquarters Press Release, Washington, D.C., “EPA Announces Arsenic Standard for Drinking Water of 10 Parts Per Billion,” October 31, 2001.

<sup>344</sup> Pub. L. 107-73, Title IV, § 430 and endnote.

<sup>345</sup> H.R. Rept. 107-272, 175.

available under the SDWA to provide assistance to small systems.<sup>346</sup>

On December 14, 2001, the Natural Resources Defense Council filed a petition with the D.C. Court of Appeals challenging EPA's October 31 action, arguing that the 2001 National Academy of Sciences report demonstrated that EPA had substantially underestimated cancer risks in promulgating the January rule. Based on the NAS report and new scientific data available, NRDC argued that a more protective standard than the 10 ppb standard was required by the provisions of the SDWA.<sup>347</sup> In a motion to dismiss the petition, EPA argued that the agency's review of the arsenic MCL is still underway, a review that will continue until 2007.<sup>348</sup> The EPA had repeatedly stated it would issue a rule based on its review,<sup>349</sup> and the OMB reported that the "Bush Administration will issue a final rule based on the results by February 22, 2002"<sup>350</sup>—notwithstanding the fact that a final rule had been issued in January, 2001. No decision has yet been rendered in this case, which is among the consolidated cases currently under consideration by the court.<sup>351</sup>

OMB also identified the arsenic rule as a "High Priority Regulatory Review Issue" in a report to Congress, based on recommendations from the Mercatus Center that "benefits do not justify costs at standards of either 5 or 10 ppb."<sup>352</sup> This, coupled with EPA's statements to the court, raises questions regarding the EPA's future intentions regarding the arsenic standard.



<sup>346</sup> Office of Water, U.S. Environmental Protection Agency, *Report to Congress: Small Systems Arsenic Implementation Issues*, March 2002, at 11 and 18.

<sup>347</sup> *Natural Resources Defense Council v. Whitman*, No. 01–1515 (D.C. Cir. filed December 14, 2001). NRDC asserted that the press release announcement was a final decision, subject to review by the court.

<sup>348</sup> *American Wood Preservers Institute v. United States Environmental Protection Agency*, No. 01–1097 (Respondent EPA's Refiled and Amended Motion to Dismiss Petition Numbers 01–1291, 01–1515, and 01–1529 for Lack of Jurisdiction at 6, filed April 4, 2002).

<sup>349</sup> 66 Fed. Reg. 20582 (April 23, 2001); 66 Fed. Reg. 28344–47 (May 22, 2001); 66 Fed. Reg. 37628 (July 19, 2001); 66 Fed. Reg. 42975 (August 16, 2001); 66 Fed. Reg. 50962 (October 5, 2001).

<sup>350</sup> 2001 OMB Report at 38, *supra* note 16.

<sup>351</sup> *American Wood Preservers Institute v. Whitman*, No. 01–1097 and consolidated cases (D.C. Cir. Dec. 19, 2001).

<sup>352</sup> 2001 OMB Report at 63 and 113, *supra* note 16.