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New Directions in Environmental Policy Making: An Emerging Collaborative Regime or Reinventing Interest Group Liberalism?***

ABSTRACT

*Scholars and practitioners frustrated by the inefficiencies of environmental policy and the excessive adversarialism of environmental politics have embraced a panoply of "next generation" reforms of policy and process. Reformers hope that emerging policies can be more pragmatic and efficient than those shaped by the laws of the 1960s and 1970s, and that policymaking processes will be more collaborative and less conflictual. There has been movement down the collaborative path in many areas, from habitat conservation planning under the Endangered Species Act to formal and informal attempts at negotiating pollution regulations to local collaborative conservation efforts like the Quivira Coalition. This article acknowledges the depth of the problem of adversarialism in the current environmental policymaking system as well as the potential of some of these collaborative approaches, but argues that this strain of the next generation agenda is in important respects a return to an old and discredited form of the "policy without law" decried by Theodore Lowi in his classic *The End of Liberalism* in the 1960s and attacked by those who built the modern structure of environmental law.*

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I. INTRODUCTION: A COLLABORATIVE REGIME IN ENVIRONMENTAL POLICY MAKING?

Most students of U.S. environmental regulation would agree that the legislative explosion of the 1960s and 1970s was triggered by enthusiasm for the cause of environmental protection unchained from the practical challenges of policy implementation. Statutory commands such as those to eliminate water pollution or ignore economic costs in species protection easily passed the Congress but quickly met intense political resistance and ground against economic and technological realities. Just as quickly, the difficulties of risk assessment and measuring the benefits and costs of regulation generated fundamental conflict over exactly what the Congress had committed the nation to in its eager embrace of environmentalism.¹

The first generation of environmental laws triggered a profound expansion of government power in the service of emergent values and newly powerful interests. The green state—the set of laws, institutions, and expectations dealing with conservation and environmental policy that has been established over the last hundred years—became a focal point for political struggles as the larger political system attempted to come to grips with the laws' enormous economic and social effects. Scholars have noted a loose consensus on the need for strong environmental protections, but environmental issues have divided the Congress, and the regulatory process has been marked by partisan maneuvering and frequent resorts to litigation by frustrated groups.²

Many studies have criticized the efficiency and effectiveness of the environmental statutes passed in the 1970s, and these critiques have underpinned both a conservative assault on the green state and the proposals for reform that have emerged from the so-called "next generation" school.³ The "next generation" of environmental policy making

1. See generally DANIEL A. FARBER, *ECO-PRACTICISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999) (discussing complexities flowing from risk assessment).

2. This article's argument is part of a larger project focused on the state of modern environmental policy making. For a variety of reasons, Congress has been gridlocked on environmental policy since 1990. But this congressional gridlock has not led to policy gridlock. Rather, policy making has moved onto a series of other pathways: appropriations and budget politics, executive politics, judicial politics, the states' involvement, and—the topic of this article—collaboration. See KLYZA & SOUSA, *supra* note ***.

3. See *ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST* (Philip Brick et al. eds., 2001) [hereinafter *ACROSS THE GREAT DIVIDE*]; RONALD D. BRUNNER ET AL., *FINDING COMMON GROUND: GOVERNANCE AND NATURAL RESOURCES IN THE AMERICAN WEST* (2002); *ENVIRONMENTAL GOVERNANCE: A REPORT ON THE NEXT GENERATION OF ENVIRONMENTAL POLICY* (Donald F. Kettl ed., 2002); *ENVIRONMENTAL*

seeks to give greater priority to economic efficiency, pragmatically balance interests, and allow for greater collaboration between government and regulated interests. Yet with very few exceptions, e.g., the Clean Air Act Amendments that created the SO₂ allowance trading program and habitat conservation planning under the Endangered Species Act, the Congress has been unable to respond to sharp critiques of the basic environmental statutes with new laws that would guide the reconstruction of environmental policy making. Instead, policy makers have groped toward "next generation" policies, with "compromises to resolve emerging problems...jury-rigged around and within the existing labyrinth of rules."⁴

II. COLLABORATION AS A RESPONSE TO PROBLEMS IN THE GREEN STATE

While Congress has been unable to guide the reconstruction of environmental policy making with new statutes, policy makers and scholars have embraced new *tools* like economic incentives, reflecting movement toward what Marc Eisner called an "efficiency regime" in regulatory affairs.⁵ Another movement, the subject of this article, involves the embrace of new *processes* aimed at involving interested groups more directly in decision making. Standard administrative procedures for public involvement and the environmental laws' invitation to citizen litigation have been deemed inadequate and even counterproductive; reformers have embraced collaborative approaches that they expect will mitigate conflict and lead to more effective, efficient, and flexible policy choices. Negotiated regulation, less formal "reinvention" projects like President Clinton's Common Sense Initiative and Project XL, habitat conservation planning, collaborative conservation, and "backyard environmentalism" share the goals of managing conflict and addressing endemic inefficiencies by "bringing society back in" to the policymaking process.⁶

Collaboration has gained a foothold and generated enthusiasm in part because it flows from the conventional critique of command-and-control policy making and in part because it has served a range of political

GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES, AND OPPORTUNITIES (Robert F. Durant et al. eds., 2004); MARY GRAHAM, THE MORNING AFTER EARTH DAY: PRACTICAL ENVIRONMENTAL POLITICS (1999); THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Marian R. Chertow & Daniel C. Esty eds., 1997); EDWARD P. WEBER, BRINGING SOCIETY BACK IN: GRASSROOTS ECOSYSTEM MANAGEMENT, ACCOUNTABILITY, AND SUSTAINABLE COMMUNITIES (2003) [hereinafter WEBER, SOCIETY]; EDWARD P. WEBER, PLURALISM BY THE RULES (1998) [hereinafter WEBER, PLURALISM].

4. GRAHAM, *supra* note 3, at 112.

5. MARC ALLEN EISNER, REGULATORY POLITICS IN TRANSITION 170-201 (2d ed. 2000).

6. See WEBER, SOCIETY, *supra* note 3.

interests. President Clinton hoped that his participatory reinvention initiatives would demonstrate the flexibility of beleaguered institutions, thereby fending off crippling attacks on the green state from a hostile Congress. On the other side, the failure of conservative broadsides against the green state in the 104th Congress demonstrated to some business and conservative interests the futility of these attacks. Some saw negotiated regulation and collaboration as attractive alternatives that might take the confrontational edge off the laws adopted in the 1960s and early 1970s and yield more flexible, less costly regulations. At the local level, communities badly divided by environmental conflicts and suffering economic disruptions from new approaches to resource management embraced collaborative conservation models; the movement toward collaborative conservation opened the possibility of shifting the balance of power in disputes over public lands.⁷ Thus, many scholars working in many different areas of environmental policy have studied attempts to renegotiate relations between public authority and private interests defined in the basic environmental laws and some see the halting development of a collaborative pathway in environmental regulation.

This development raises several crucial questions for policy and democratic politics and has therefore been quite controversial. First, substantial parts of the new agenda test the limits of environmental laws—one critic noted of Clinton's collaborative Project XL, "If it isn't illegal, it isn't XL."⁸ The use of administrative action and informal negotiations with affected interests to stretch uncomfortable legal constraints is a serious attack on key premises of the new social regulation, and it is notable that in some cases this is the ultimate "policy without law"—the making of an entirely new approach to regulation and natural resources policy without statutory guidance.

A second, related problem is whether this collaborative approach can create workable and generally satisfying policy choices. For example, if a collaborative group agrees to a proposal for forest management, what is to prevent parties that disagree with the agreement from seeking to block the proposal under a host of laws—the Administrative Procedure Act,⁹ the Endangered Species Act,¹⁰ the National Environmental Policy Act,¹¹ and the

7. See WEBER, PLURALISM, *supra* note 3, at 30–69. See generally ACROSS THE GREAT DIVIDE, *supra* note 3; BRUNNER ET AL., *supra* note 3.

8. Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 147 (1998) (quoting an unknown Environmental Protection Agency staff member).

9. Administrative Procedure Act, 5 U.S.C. §§ 500–551, 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

10. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000).

11. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (2000).

National Forest Management Act¹² for starters? To put it another way, can the collaborative pathway truly flourish without clearing away the multiple layers of the existing green state?¹³

Third, the application of collaborative regulation to resource management raises important accountability problems. How can we ensure that negotiated arrangements are consistent with the public interest? Edward Weber, a strong advocate for collaboration, focused on the accountability problem confronting collaborative conservation groups and argued that well-designed processes can produce accountability.¹⁴ Contrarily, Theodore Lowi looks at the new collaborationism skeptically. In his classic *The End of Liberalism*, published in the 1960s, Lowi attacked the handover of public authority to private interests in the New Deal regulatory system and found the core of the problem in statutory language that provided little guidance to administrative agencies (thus creating ample opportunity for negotiation over statutory interpretation).¹⁵ Lowi decried a "public philosophy" he termed "interest group liberalism," which erased the distinction between public authority and private interests and allowed private interests to use public power to achieve their own purposes.¹⁶ These ideas were central to the critique of captured regulatory policy making in the 1960s and 1970s and shaped the more adversarial approach to regulation laid down in the environmental statutes adopted at that time.¹⁷ Yet here we are again. In attacking more recent arguments for localism and flexibility in environmental regulation, or so-called "backyard environmentalism," Lowi wrote, "This is where I came in 35 years ago in my confrontation with the late New Deal policies....[T]he motivation is the same—to try to finesse the coercive nature of public authority.... Again, pretend away public authority."¹⁸ Frustration with excessive adversarialism has pushed policy making down an old and well-beaten path, one that policy makers in the 1970s thought they had closed off with statutory mandates that are now widely viewed as far too inflexible. The result is an effort to reconstruct what Lowi called "policy without law" in a context in which these efforts will always be highly contentious and open to challenge in the courts.

12. National Forest Management Act, 16 U.S.C. §§ 1600-1687 (2000).

13. See GRAHAM, *supra* note 3.

14. See generally WEBER, SOCIETY, *supra* note 3.

15. THEODORE J. LOWI, *THE END OF LIBERALISM* 92-107 (2d ed. 1979).

16. *Id.* at 42-63.

17. EISNER, *supra* note 5, at 126-27.

18. Theodore J. Lowi, *Frontyard Propaganda: A Response to "Beyond Backyard Environmentalism,"* BOSTON REV., Oct.-Nov. 1999, available at <http://bostonreview.net/BR24.5/contents.html> (last visited Mar. 6, 2007).

This article explores three areas in which policy makers have sought to integrate private interests in the policymaking process in new (and, as it turns out, old) ways. In the 1990s, habitat conservation planning (HCPs) under the Endangered Species Act (ESA) became a crucial part of the Clinton administration's endangered species program. Congress opened the possibility for HCPs in 1982; the Clinton administration pushed the development of the program hard, and in directions not anticipated in the statute. We will review the evolution of habitat conservation planning and briefly focus on the multi-species plan submitted by the Plum Creek Timber Company for management of lands in Washington State. Second, in the regulatory process we have seen movement from formal negotiated regulation under the Negotiated Rulemaking Act of 1990 to more flexible, even extra-legal participatory "reinvention" efforts, to a growing interest in voluntary programs. That section will trace the evolution from more to less formal processes, focusing on the Clinton era reinvention initiatives. Third, through the 1990s, local "collaborative conservation" efforts focusing on the management of natural resources proliferated and gathered considerable attention from scholars and policy makers. This article will look briefly at the collaborative conservation movement and will then compare the work of two groups, California's well-known Quincy Library Group and the Quivira Coalition in New Mexico, in an effort to discern both the potential and the limitations of this emerging pathway for making environmental policy. The conclusion will explore the implications of the movement toward collaboration and negotiation for the green state, and the constraints that settled institutions and the politics of multiple orders place on the possibilities for this emerging pathway.

III. HABITAT CONSERVATION PLANNING: COLLABORATION THROUGH THE ENDANGERED SPECIES ACT

In the rare cases in which it has been aggressively implemented, the ESA has proven to be an extremely powerful law. From the Tellico Dam in Tennessee to the forests and rivers of the Pacific Northwest, the law has driven significant changes in the practices of federal agencies and has disrupted settled patterns of resource exploitation on public lands. Importantly, the ESA also threatens private property rights. Threatened and endangered species often live on private lands, and the ESA – understood to prohibit all "harms" to listed species, including damage to species habitat – may make many otherwise legitimate development activities illegal. From the beginning, this was, of course, a source of considerable concern to large and small landowners alike.

In 1982, Congress amended the law to offer relief to those faced with the possibility of ESA-based limits on the use of their private lands. The conference report declared that the ESA's new section 10 would give

the Secretary of the Interior "more flexibility in regulating the incidental take of endangered and threatened species" and would address "the concerns of private landowners who are faced with having otherwise lawful actions not requiring federal permits prevented by Section 9 prohibitions against taking."¹⁹ The amendment offered non-federal landowners a way around the absolute ban on actions that would damage species habitat and do "harm" to members of listed species. They could negotiate a relaxation of the ESA's "take" prohibition with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS).²⁰

The amendment created a process by which non-federal landowners could gain "incidental take permits" (ITPs) that would allow them to alter habitat despite the possibility of harm to listed species. To receive a permit, a landowner must submit a "habitat conservation plan" estimating the impact of development activities on listed species and showing how the impact of those activities will be minimized and mitigated.²¹ The Secretary of the Interior has authority to issue an ITP if she finds that the HCP will, "to the maximum extent practicable," mitigate the take, and if the resulting harm "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."²² HCPs vary in size and scope, from plans submitted by owners of small lots dealing with one species to comprehensive plans covering hundreds of thousands of acres and many species.

While section 10 had roots in landowners' concerns about property rights, there was also a sense in the ecological community that the ESA's focus on species instead of habitat protection limited the law's effectiveness.²³ Yet Congress was also reacting to political developments taking place on the ground. Private lands on California's San Bruno Mountain targeted for development held habitat for ESA-protected butterflies.²⁴ After a decade-long fight, several California cities, the Fish and Wildlife Service, the California Department of Fish and Game, San Mateo County, landowners, developers, and environmentalists agreed to allow development of some butterfly habitat while committing the landowners

19. Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 279, 295 (1998) (quoting H.R. REP. NO. 97-385, at 29 (1982) (Conf. Rep.)).

20. *Id.* at 295-96; JUDITH A. LAYZER, *THE ENVIRONMENTAL CASE: TRANSLATING VALUES INTO POLICY* 322-23 (2002).

21. Sheldon, *supra* note 19, at 295-96; LAYZER, *supra* note 20.

22. Marj Nelson, *Habitat Conservation Planning*, ENDANGERED SPECIES BULL., Nov./Dec. 1999, at 12-13, available at <http://endangered.fws.gov/esb/99/11-12/12-13.pdf>; Sheldon, *supra* note 19, at 296 (quoting H.R. REP. NO. 97-385, at 29 (1982) (Conf. Rep.)).

23. P.A. Harcombe & P.L. Marks, *Species Preservation*, 194 SCIENCE 383 (1976).

24. Sheldon, *supra* note 19, at 297-98.

to preserve and enhance butterfly habitat in other areas. This was an interesting and innovative deal, but it appeared to be illegal since the development it allowed would kill listed butterflies and such takes on listed species were prohibited by the ESA. Section 10 amended the law to allow deals like this one, and the San Bruno agreement became the first approved HCP.²⁵ San Bruno seemed to show that collaboration and negotiation could lead to reasonable resolutions to classic struggles between environmentalists and developers, and Congress moved “to provide the institutional framework to permit cooperation between the public and private sectors in the interest of endangered species habitat conservation.”²⁶

What sort of cooperation does section 10 anticipate? The only formal participants in habitat conservation planning required by the law are landowners and relevant federal agencies.²⁷ Landowners may open the bargaining process to other groups, such as conservationists or recreation groups or independent scientists, but this is entirely the choice of the landowner submitting the plan. A study of participation in habitat conservation planning that focused on 45 large plans covering more than 1,000 acres found that environmental, tribal, and commodity interests were involved—at varying levels—in 60 percent of the HCPs, meaning that 40 percent were negotiated with no outside participation.²⁸ Where participation occurred, it was not often effective—few FWS staff said that

25. TRA Env'tl. Scis., Inc., The San Bruno Mountain Habitat Conservation Plan: Preservation of an Ecological Island, <http://www.traenviro.com/featuredprojects/sanbruno/sanbruno.html> (last visited Mar. 6, 2007); Press Release, U.S. Dep't of the Interior, Fish & Wildlife Serv., Nation's First Formal Plan to Save Endangered Species Set for Update (July 22, 2004), available at http://sacramento.fws.gov/ea/news_releases/2004%20News%20Releases/SanBruno_HCP_Update_NR.htm (last visited Mar. 6, 2007); LAYZER, *supra* note 20, at 322–23.

26. Sheldon, *supra* note 19, at 298 (quoting H.R. REP. NO. 97-385, at 31 (1982) (Conf. Rep.)).

27. JEREMY ANDERSON & STEVEN YAFFEE, BALANCING PUBLIC TRUST AND PRIVATE INTEREST: PUBLIC PARTICIPATION IN HABITAT CONSERVATION PLANNING, A SUMMARY REPORT 17–18 (1998), <http://www.snre.umich.edu/ecomgt/pubs/hcp.pdf>. Anderson and Yaffee note that the ESA, the National Environmental Policy Act (NEPA), and many state environmental statutes require agencies and applicants to provide public notice of their proposed activities and their potential consequences. With respect to HCPs,

[t]he (Fish and Wildlife) Service typically notices receipt of an HCP application in the Federal Register and then conducts a 30 to 45 day comment period....The law does not require the FWS to incorporate public comments into an HCP or make decisions based on public comments....The law provides the FWS with significant discretion to shape its own public participation policy. However, rather than using the law's flexibility to craft effective public participation the FWS interprets the law narrowly and focuses on explicit disclosure and comment period requirements. The Service encourages applicants to pursue the bare minimum in NEPA documentation and comment period.

Id. at 22.

28. *Id.* at 17.

public participation yielded substantive changes to plans, and in more than one-third of the cases public participation had no apparent effect on the outcome.²⁹ Independent scientists played an even smaller role in the development of the HCPs, with active or moderate involvement in 28 percent of the cases.³⁰ According to Jeremy Anderson and Steven Yaffee, less than a third of the planning staff surveyed reported submitting scientific documents to independent scientists for peer review.³¹

The level of outside involvement in habitat conservation planning varies considerably, depending on the perceived ability of environmental groups to create problems for the planners and with the type of applicant—state and local governments are more likely than are private landowners to involve outside groups in planning processes.³² Overall, as exercises in pluralist decision making, HCPs often seem to fall short. A heavy burden falls on federal agencies with limited budgets and staffing to represent the public interest in negotiating with private interests over what are, in effect, business plans. Political science highlights the risk of “agency capture” inherent in processes like this, and in the case of HCPs, environmentalists have shared the concern that political pressures on the FWS to produce plans, coupled with a negotiation process driven by regulated interests, may subvert the ESA. As will be shown below, experience provides some basis for these concerns: the results of habitat conservation planning have been controversial and, from an ecological perspective, often problematic.

The first 12 years after passage of section 10 saw little action on HCPs; only 14 plans were approved between 1982 and 1992 and, as of 1994, only 39 had been approved.³³ Most of these plans covered only a few acres and focused on individual species.³⁴ Karin Sheldon illuminated the many reasons behind the dearth of HCPs during this period including the costs of developing and implementing plans, which fell heavily on landowners; the high transaction costs involved in negotiating plans; the limited budgets of stressed federal agencies; and landowners’ lack of certainty about whether the plans would hold in the face of changing conditions, changing science, or the discovery of new species on their lands.³⁵ Moreover, since few landowners actually faced legal action under the ESA for illegal takes—federal agencies face staggering problems in monitoring and enforcing the prohibition on takes on private lands and lack the budgets

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 9–11.

33. Sheldon, *supra* note 19, at 300.

34. *Id.*

35. *Id.* at 301–12.

and political will to aggressively enforce the law—incentives to submit plans were weak.³⁶

Yet during the Clinton years, habitat conservation planning moved to center stage. By 1997 over 400 plans covering approximately 19,000,000 acres of land had been approved or were in process.³⁷ In the Pacific Northwest, 27 percent of commercial forestland was covered by HCPs, or was in the process of being covered, and across the country the FWS and NMFS were encouraging landowners to submit plans.³⁸

Why did the HCP program suddenly take off? From a biological perspective, the need to focus on habitat protection generally, and on private lands in particular, was obvious. Ecologists had long thought that the ESA needed to look beyond species counts to habitat protection, and the HCPs offered a way of addressing issues of habitat degradation and fragmentation.³⁹ Further, a 1994 General Accounting Office (GAO) report asserted that 90 percent of ESA-listed species have some or all of their habitat on non-federal lands, and that nearly 40 percent were present only on non-federal lands.⁴⁰ The ESA would have to reach private lands to realize its species protection goals. HCPs were a tool for influencing landowners' choices in ways that would help to fulfill the goals of the ESA.

The political logic was also overwhelming. At one level, the approach was consistent with Clinton's embrace of a centrist domestic policy and his commitment to moving beyond a "false choice" between economic prosperity and environmental protection.⁴¹ Thus, the administration acknowledged that landowners had legitimate concerns about the ESA and moved to address those concerns. Assistant Interior Secretary George Frampton recognized that "[f]rom a private landowner's point of view, the Endangered Species Act looks like a nuclear weapon,"⁴² and the administration pursued a series of initiatives to improve the efficiency and effectiveness of the law while protecting property owners. It

36. *Id.* at 292.

37. NAT'L CTR. FOR ENVTL. DECISION MAKING RESEARCH, UNDERSTANDING AND IMPROVING HABITAT CONSERVATION PLANS 2-3 (1998), <http://www.ncedr.org/pdf/hcp.pdf>.

38. *Id.*

39. *See generally* Harcombe & Marks, *supra* note 23.

40. U.S. GEN. ACCOUNTING OFF., GAO/RCED-95-16, ENDANGERED SPECIES ACT: INFORMATION ON SPECIES PROTECTION ON NONFEDERAL LANDS 4-5 (1994).

41. *See generally* E.J. DIONNE, WHY AMERICANS HATE POLITICS 9-15 (1992) (on the politics of "false choices").

42. CLINTON ADMIN. HIST. PROJECT 2000, A HISTORY OF THE U.S. DEPARTMENT OF THE INTERIOR DURING THE CLINTON ADMINISTRATION, 1993-2001, *available at* <http://library.doi.gov/master0105.pdf>. The quote from Secretary Frampton can be found in William K. Stevens, *Future of Endangered Species Act in Doubt as Law Is Debated*, N.Y. TIMES, May 16, 1995, at C4 (internal quotation marks omitted).

saw section 10 as a way of drawing landowners into species protection while sheltering them from the ESA gone nuclear.⁴³

Second, Republicans in the 104th Congress seemed determined to undermine the ESA. In the Senate, Slade Gorton's (R-WA) proposal, deemed the moderate alternative, would have eliminated the threat of fines and imprisonment for landowners who destroyed endangered species habitat and would have dropped the ESA's objective of protecting "the ecosystems upon which endangered species and threatened species depend."⁴⁴ However, Interior Secretary Bruce Babbitt claimed that the Gorton bill would have effectively repealed the ESA.⁴⁵ On the House side, conservatives sought to curtail the role of the federal government in species protection on private lands, relying instead on states, voluntary compliance, economic incentives, and "conservation through commerce including the private propagation of animals and plants."⁴⁶ The Clinton administration found itself squeezed between environmentalists seeking more aggressive species protections, the obvious need for greater protections for species on private lands, and ascendant conservatives seeking to gut the ESA. Section 10 offered a chance of escape, and the administration took that chance. John Kostyack of the National Wildlife Federation observed, "The Clinton Administration...spent six years turning a virtually nonexistent Habitat Conservation Plan program into a major Endangered Species Act initiative covering over 11 million acres of land."⁴⁷

The administration adopted two important rules to encourage landowners' development of HCPs. First, the "no surprises" rule guaranteed landowners that once a plan was approved, the government could not demand changes to the plan in light of new information, new scientific knowledge, or changes in the condition of a species.⁴⁸ (Some plans, like the Plum Creek HCP discussed below, included specific provisions for revisiting plans in light of new information, but these were built into the original agreement signed by the landowner.) "No surprises" gave property owners certainty about management of their lands for the length of the agreement, and often the terms were quite long. Of the 132 plans approved

43. Stevens, *supra* note 42.

44. *Id.* (quoting Gorton proposal) (internal quotation marks omitted).

45. John H. Cushman, *Conservatives Tug at Endangered Species Act*, N.Y. TIMES, May 28, 1995, at 26.

46. *Id.*

47. John Kostyack, *The Need for HCP Reform: Five Points of Consensus*, 16 ENDANGERED SPECIES UPDATE 47 (1999), abstract available at <http://www.umich.edu/~esupdate/library/99.5-6/contents.html>.

48. Sheldon, *supra* note 19, at 315; U.S. Dep't of the Interior, Fish & Wildlife Serv., "No Surprises" Questions and Answers, <http://endangered.fws.gov/hcp/NOSURPR.HTM> (last visited Mar. 3, 2007).

in the West, 30 percent were for terms of 50 years or more, and 50 percent were for terms of 30 years or more—three plans were set for 100 years.⁴⁹ Second, the “safe harbor” rule encouraged voluntary efforts by landowners to manage their lands to support listed species. Landowners receive assurances that, if listed species move onto their property or grow in numbers due to their habitat protection or restoration efforts, they will not face new restrictions on the use of their property.⁵⁰ Once again, the Clinton administration acted to increase predictability for property owners in ways that would encourage them to submit HCPs. Most observers think that the introduction of the “no surprises” rule played a crucial role in encouraging landowners to participate in the program.

These rules were controversial. The practical problems confronting the Clinton administration included pressures from environmentalists, the apoplectic reactions of property owners to potential restrictions on land use, and a Congress in which “moderation” had come to be defined as an effective repeal of the ESA. In a letter to Congress, 150 conservation scientists criticized the “no surprises” rule for locking in land management practices for long periods of time, arguing that this “does not reflect ecological reality and rejects the best scientific judgment of our era. Moreover, it proposes a world of certainty that does not, has not, and will never exist.”⁵¹

“No surprises was, of course, not science policy at all—it was a political necessity designed to attract landowner participation in HCPs. As the National Center for Environmental Decision-making Research (NCEDR) concluded, decision makers in environmental policy rarely use science-centered models.⁵² They

describe themselves as being in the middle, facing the challenge of balancing competing interests and incentives, incorporating multiple perspectives and concerns, and making inevitable tradeoffs. Indeed they use few of the tools and little of the information potentially available to them, partly because they do not think that science provides the answers to their institutional, political, and practical problems.⁵³

49. U.S. Dep’t of the Interior, Fish & Wildlife Serv., *Habitat Conservation Plans, 2007*, http://ecos.fws.gov/conserv_plans/index.jsp (last visited Feb. 3, 2007).

50. U.S. Dep’t of the Interior, Fish and Wildlife Serv., *Endangered Species Program, Safe Harbor Agreements for Private Landowners* (Feb. 2004), <http://www.fws.gov/endangered/recovery/harborqa.pdf>.

51. Gregory A. Thomas, *Where Property Rights and Biodiversity Converge, Part I: Conservation Planning at the Regional Scale*, 17 *ENDANGERED SPECIES UPDATE* 139, 141 (2000).

52. NAT’L CTR. FOR ENVTL. DECISION MAKING RESEARCH, *supra* note 37, at 6.

53. *Id.* (internal quotation marks omitted).

The stakes in the HCP program grew following a crucial Supreme Court decision in June 1995. In *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, the Supreme Court upheld the Fish and Wildlife Service's ruling that the ESA's definition of prohibited "harm" to listed species includes the modification or destruction of species habitat, even on private lands.⁵⁴ This removed any ambiguity about the ESA's restrictions on otherwise lawful private development activities and made it clear that much of the activity on lands inhabited by listed species was illegal. This led landowners — particularly large landowners like timber companies — to the HCP bargaining table.⁵⁵

A. Plum Creek's Cascades HCP

One such company was Plum Creek Timber, which has major land holdings in the Pacific Northwest's spotted owl country. Plum Creek had logged aggressively in the 1980s, creating highly visible clear cuts — some in patches as large as a square mile — along the I-90 corridor through Washington's Cascade Mountains.⁵⁶ A corporate descendant of the Northern Pacific Railroad, its 170,000 acres along the interstate were interspersed with 201,000 acres of Forest Service lands and 41,000 acres of private and state lands in a checkerboard pattern that is the legacy of legislation signed by Abraham Lincoln.⁵⁷ The company had a reputation as a poor environmental steward: one Washington Congressman dubbed Plum Creek the "Darth Vader" of northwest timber companies.⁵⁸

54. *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687 (1995); Kevin D. Batt, *Above All, Do No Harm: Sweet Home and Section Nine of the Endangered Species Act*, 75 B.U. L. REV. 1177 (1995); Tom Kenworthy, *Justices Affirm Wide Power to Protect Wildlife Habitat*, WASH. POST, June 30, 1995, at A1.

55. Eric Pryne, *Decision May Nudge Landowners into Action*, SEATTLE TIMES, June 30, 1995, at B2. For an examination of another major HCP, see Tony Davis, *San Diego's Habitat Triage*, HIGH COUNTRY NEWS, Nov. 10, 2003, available at http://www.hcn.org/servlets/hcn.Article?article_id=14355. Smaller landowners often find HCPs too expensive and complex to develop.

56. Kathie Durbin, *Timber's Bad Boy Comes to the Table*, HIGH COUNTRY NEWS, Aug. 4, 1997, available at http://www.hcn.org/servlets/hcn.PrintableArticle?article_id=3487.

57. Susan Jane M. Brown, *David and Goliath: Reformulating the Definition of "The Public Interest" and the Future of Land Swaps After the Interstate 90 Land Exchange*, 15 J. ENVTL. L. & LITIG. 235, 252-55 (2000); Durbin, *supra* note 56; Eric Pryne, *The Checkerboard Legacy*, SEATTLE TIMES, Nov. 13, 1994, at A1; Mark Miller, *Plum Creek Habitat Conservation Plan* (1999), <http://sunsite.utk.edu/ncedr/casestudies/hcp/plum.htm> (last visited Oct. 29, 2006); PLUM CREEK TIMBER CO. & D.R. SYSTEMS, INC., *PLUM CREEK TIMBER CO.'S CASCADES HABITAT CONSERVATION PLAN*, <http://www.for.gov.bc.ca/hfp/silstrat/habitat/hsworkshop/presentation/4-05/4-05-Reimer.pdf>.

58. Durbin, *supra* note 56.

The spotted owl listings posed major challenges to Plum Creek, particularly given the intermingling of its Cascade lands with federal property. Operating in prime owl habitat, the company found itself compelled by an ESA section 4(d) rule to avoid takes inside a series of 2,523 acre "owl circles," habitat around nesting sites on and overlapping Plum Creek lands.⁵⁹ Logging was illegal or sharply limited within these 1.8 mile radius circles, whose locations changed with the identification of new nesting sites.⁶⁰ Plum Creek representative Lorin Hicks testified to Congress: "The listing of the northern spotted owl and subsequent federal 'guidelines' trapped over 77 percent of Plum Creek's Cascade Region in 108 owl 'circles.' Indeed, with every new listing Plum Creek was skidding closer to becoming the poster child for the taking of private lands."⁶¹

Plum Creek valued the timber within each circle at \$25,200,000 and claimed it spent \$500,000 annually on surveys of owl nesting sites.⁶² The status quo was unacceptable to the company, and Darth Vader was ready to cut a deal with representatives of the republic. "For us," Plum Creek's Hicks said, "the answer came with Habitat Conservation Plans."⁶³

Discussions of the Plum Creek HCP for the Cascades began in 1994 and took nearly two years to complete, with the company investing two million dollars developing the plan.⁶⁴ It was signed on June 27, 1996, at a public ceremony attended by Secretary of the Interior Babbitt and Secretary of Agriculture Dan Glickman, and was seen as a model for future plans.⁶⁵ This "multi-species" HCP addressed habitat issues for four listed species—the northern spotted owl, marbled murrelet, gray wolf, and grizzly bear—as well as 281 other species on 170,000 acres of Plum Creek land.⁶⁶ The company agreed to defer harvests on 2,600 acres of old growth forest, to leave trees around sensitive habitats, and to increase the size of the young forests used by owls for forage and dispersal.⁶⁷ Concerned about

59. *Id.*

60. *Id.*; *Hearing before the Subcomm. on Fisheries, Wildlife, and Drinking Water of the S. Comm. on Env't & Public Works, 97th Cong. (1999)* (statement of Dr. Lorin L. Hicks, Dir. of Fish & Wildlife Resources, Plum Creek Timber Co.) [hereinafter Hicks statement], available at, http://www.epw.senate.gov/107th/hic_7-21.htm (last visited Mar. 8, 2007).

61. Hicks statement, *supra* note 60.

62. Durbin, *supra* note 56; PLUM CREEK TIMBER CO. & D.R. SYSTEMS INC., *supra* note 57, at 4.

63. Hicks statement, *supra* note 60.

64. Durbin, *supra* note 56.

65. Editorial, *Cutting Timber, Protecting Wildlife*, SEATTLE POST-INTELLIGENCER, June 27, 1996, at A12.

66. Miller, *supra* note 57; PLUM CREEK TIMBER CO. & D.R. SYSTEMS, INC., *supra* note 57, at 3.

67. PLUM CREEK TIMBER CO. & D.R. SYSTEMS, INC., *supra* note 57, at 3; Durbin, *supra* note 56.

salmon habitat, the HCP included the development of a riparian strategy for the management of 20 watersheds. Plum Creek agreed to two 100-foot buffers around fish-bearing streams (including a logging ban within 30 feet and a mandate to leave at least half of the commercially available trees in the rest of the buffer) and less stringent buffers around year-round streams not known to be fish bearing.⁶⁸ The plan also anticipated a land swap between the Forest Service and Plum Creek.⁶⁹ In return, the company would get the right to log heavily in other areas, including the right to reduce the percentage of its holdings in old growth from 20 percent (the situation in 1996) to eight percent by 2025.⁷⁰ The plan estimated that the number of nesting sites for owls would decline as a result of the agreement.⁷¹ As Plum Creek biologist Hicks observed, "This is a take mitigation plan, not an owl recovery plan."⁷² The HCP was set for 50 years and is renewable for another 50 years. Hicks noted, "If we didn't have the opportunity to re-up, it would create the perverse incentive to basically provide only what's required and zero out all extra habitat by the end of the permit period."⁷³

Both the Clinton administration and the company celebrated the deal. FWS assistant regional director Curt Smitch said, "This is a huge shift in land management. It's finally managing for an entire ecosystem, which is what scientists and environmentalists have been asking for all along."⁷⁴ Babbitt observed that it was the "most innovative and sophisticated" plan yet developed, calling it

another example of President Clinton living up to his commitment to make the ESA work better.... This Administration has accomplished major strides in making the ESA work better and more flexibly.... [W]e have implemented a number of policies that are revolutionizing our capability to work voluntarily with property owners throughout the country. The flexibility in the Act, and this Administration's goal to encourage certainty for landowners through a multi-species approach to conservation, has allowed companies like Plum Creek Timber to look at ecosystems and watersheds on their

68. PLUM CREEK TIMBER CO. & D.R. SYSTEMS, INC., *supra* note 57, at 21.

69. Brown, *supra* note 57.

70. Durbin, *supra* note 56.

71. *Id.*

72. *Id.* (quoting Hicks).

73. *Id.* (quoting Hicks).

74. Danny Westneat, *Logging That Will Protect Wildlife – Plum Creek Plan Hopes to Do Both*, SEATTLE TIMES, June 26, 1996, at B1 (quoting Smitch).

land and develop a blueprint for long-term protection that we can all be proud of.⁷⁵

Plum Creek representative Hicks testified to the Senate, "For Plum Creek and other applicants, the HCP process has been the principal catalyst for private landowners to undertake unprecedented levels of scientific research and public involvement."⁷⁶

Law professor Oliver Houck echoed Hicks in noting the impact the owl listings and the habitat conservation planning process had on Plum Creek's behavior:

The proof of the Plum Creek plan will be years in the knowing. The purpose of this analysis is neither to praise nor to criticize it, but rather to show how far Plum Creek came in getting to it, literally from the rear of the pack to somewhere close to the front. Doubtless, the company was motivated by the beating it was taking in public relations from such unusual quarters as state governors, members of Congress and the *Wall Street Journal*. But when push came to shove, it was the defined, empirical needs of protected species that drew the circles, brushed in the corridors and stretched out the harvest rotations to more nearly mimic a natural forest environment. "More nearly mimic" will not satisfy everyone; perhaps it will not even satisfy the basic needs of creatures in considerable peril. But given the history of Plum Creek, it has been an incredible journey, and without legally protected indicator species there is no reason to think that it would ever have occurred.⁷⁷

Despite the optimism reflected in these comments, the Plum Creek deal drew substantial criticism from the environmental and scientific communities, as well as from some interested in the principle of collaborative decision making. Critics attacked the no surprises rule, the perceived weakness of the plan's measures for mitigating the impact of planned harvests on listed species, the number of "takes" allowed, the gaps in the science that informed the plan, the central role played by the company itself in monitoring results, and the peripheral involvement of environmental groups in the process. Tim Cullinan, an Audubon Society biologist, observed, "The concern is that the Fish and Wildlife Service is

75. Press Release, U.S. Dep't of the Interior, Secretaries Babbitt and Glickman Sign Agreements with Plum Creek Timber to Improve Habitat Conservation for Wildlife and Fish (June 27, 1996), <http://www.doi.gov/news/archives/pr68m.html> (last visited Mar. 8, 2007) (quoting Babbitt).

76. Hicks statement, *supra* note 60.

77. Oliver S. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 971 (1997).

trying so hard to demonstrate the flexibility and adaptability of the ESA that they're willing to compromise too much."⁷⁸

Two issues in the Plum Creek debate reverberated beyond the plan's specifics to a broader critique of HCPs. First, there was the question of whether the plan was adequately informed by independent science. Plum Creek's Hicks addressed this matter in testimony to Congress:

Let's dispel the myth that HCPs are not based on science. When my company, Plum Creek, created its first HCP, we took on a very complex challenge. Not only did we have 4 listed species in our 170,000 acre Cascade project area, but 281 other vertebrate species, some of which would likely be listed in the next few years. Combine this with the challenges of checkerboard ownership...and you have a planning challenge of landscape proportions. To meet this challenge, we assembled a team of scientists representing company staff, independent consultants, and academic experts. We authored 13 technical reports covering every scientific aspect from spotted owl biology to watershed analysis. We sought peer reviews of 47 outside scientists as well as state and federal agency inputs. As a result of these inputs, we made technical and tactical changes to the plan.⁷⁹

Plum Creek chose to establish the peer review panel voluntarily and named the panel members.⁸⁰ Agency representatives were satisfied with the company's approach, but others complained about the absence of effective input by independent scientists.⁸¹ One participant at the periphery of the process argued, "Plum Creek told the public these [documents] were reviewed from the outside, but really the reviewers were people chosen or hired by Plum Creek or FWS to review these papers."⁸² One panel member said that many suggestions from the reviewers were ignored in the writing of the HCP. "Any suggestions on major issues were simply not addressed."⁸³

A major 1999 study of a broad sample of habitat conservation plans found that generally the plans were not well-informed by science.⁸⁴ Peter

78. Rob Taylor, *A Timber Plan That's Wrapped in Green*, SEATTLE POST INTELLIGENCER, June 25, 1996, at B1 (quoting Cullinan).

79. Hicks statement, *supra* note 60.

80. Miller, *supra* note 57.

81. *Id.*

82. *Id.*

83. *Id.*

84. PETER KAREIVA ET AL., NAT'L CTR. FOR ECOLOGICAL ANALYSIS & SYNTHESIS & AM. INST. OF BIOLOGICAL SCI., USING SCIENCE IN HABITAT CONSERVATION PLANS (1999), <http://www.aibs.org/bookstore/resources/hcp-1999-01-14.pdf> [hereinafter AIBS/NCEAS Study].

Kareiva, the lead investigator on the project, summarized the key findings in testimony to Congress. He observed that planning takes place in the face of a dearth of data about “the most basic biological processes pertaining to endangered species – such as what is the rate of change in their populations locally? [N]ationally? [W]hat is their reproductive schedule? [W]hat is happening to their habitats in quantitative terms...?”⁸⁵ He asserted that for many plans the data “are so scant, that the HCPs really should not be called ‘science based’ since science requires data from which inferences are drawn and tested.”⁸⁶ Further, he said that few plans include adequate provisions for monitoring populations affected by habitat modification: “[So]-called ‘adaptive management’ may be mentioned in HCPs, but an extremely small percentage of HCPs actually establish any adaptive management procedures (complete with statistical power analyses for assessing whether they are likely to work).”⁸⁷

These critical findings spilled over onto the Plum Creek plan, since the Cascades HCP was in the study sample. The study team questioned the finding that the harvests planned for the Cascades project area would have minimal impact on owl populations. One member of the study team asserted that there were “no data available to support this notion.”⁸⁸ Given that Secretary Babbitt’s approval of the plan was contingent upon this finding, the study’s results raised real questions about the Plum Creek agreement. The FWS questioned some of the findings of the Kareiva study but acknowledged that HCPs were a “work in progress” and announced several initiatives for strengthening the scientific basis of HCPs.⁸⁹

The second crucial issue involved participation in conservation planning. As was noted above, conservation planning involves the government agency (FWS or NMFS) and the landowner; landowners may invite other participants into the process at their own discretion. In practice,

85. *National Study of HCPs on Habitat Conservation Science: Hearing Before the Subcomm. on Fisheries, Wildlife, and Drinking Water of the S. Comm. on Environment and Public Works* (1999) (statement of Peter Kareiva, Senior Ecologist, Nw. Region of the Nat’l Marine Fisheries Serv., Nat’l Oceanic & Atmospheric Admin., U.S. Dep’t of Commerce), available at <http://www.ogc.doc.gov/ogc/legreg/testimon/106f/kareiva0720.htm>.

86. *Id.*

87. *Id.*

88. Rob Taylor, *State Is “Proving Ground” for Habitat Plan, Babbitt Says*, SEATTLE POST-INTELLIGENCER, July 11, 1998, at A11 (internal quote marks omitted).

89. U.S. Fish & Wildlife Serv., Response to AIBS/NCEAS’s Study, *Using Science in Habitat Conservation Plans* (1999), <http://endangered.fws.gov/hcp/response.htm>. For more recent assessments of the use of science in HCPs, see Laura Stiffler & Robert McClure, *Too Often, Inadequate Science Hampers Habitat Planning: Suburbs Bearing Down on Cave X, Home to Rare Spider*, SEATTLE POST-INTELLIGENCER, May 4, 2005, at A1; Robert McClure & Laura Stiffler, *A License to Kill: Flaws in Habitat Conservation Plans Threaten the Survival of Scores of Species*, SEATTLE POST-INTELLIGENCER, May 3, 2005, at A1.

the extent of outside group participation varies, but the most systematic report on this topic (conducted at the University of Michigan but financed by the Defenders of Wildlife) argued that too often planning processes do not include extensive outside participation.⁹⁰ This makes it easier to come to agreements but, the study suggested, often substantially weakens the resulting plans in technical and legal-political terms.⁹¹

Whether the Plum Creek process was appropriately inclusive is a matter of some debate. Mark Miller of the NCEDR produced a case study of the process and identified three "layers" of participants.⁹² The primary actors were the company, FWS, NMFS, and consultants hired by the company.⁹³ The second layer consisted of the Washington State Departments of Fish and Wildlife and Natural Resources, the Environmental Protection Agency (EPA), and local tribes.⁹⁴ These participants reviewed the plan and offered suggestions. The third layer included some environmental and recreational groups, the Northwest Indian Fisheries Commission, and the city of Tacoma.⁹⁵ The Sierra Club's Checkerboard Project, the Mountaineers (an outdoor recreationists' group), and the Alpine Lakes Protection Society were described as the most active of these organizations in raising criticisms of the plan and offering unofficial reviews of the National Environmental Policy Act (NEPA) reports.⁹⁶

Unsurprisingly, views about the openness of the process varied depending upon the "layer" in which participants found themselves. Company and agency representatives said that they thought that there was a sound process for integrating the views of outside groups, though some acknowledged that greater efforts could have been made to reach out to the tribes.⁹⁷ Plum Creek took a "proactive" role in informing outside groups about the plan because the lands in question were popular recreational areas, but it also sought a streamlined process that would allow it to move through the planning process quickly.⁹⁸ Outside groups complained that there were few opportunities for meaningful public input.⁹⁹ One non-decision-making participant in the process observed, "By the time the

90. ANDERSON & YAFFEE, *supra* note 27, at 4.

91. *Id.* at 21-30.

92. Miller, *supra* note 57.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

NEPA process was opened up, the public was only rubber stamping the plan. The deal had already been done."¹⁰⁰

Anderson and Yaffee found that in the perception of some participants, Plum Creek offered outsiders many opportunities to participate early in the process, but that the company was not responsive later in the process.¹⁰¹ Many "outside" stakeholders concluded that their comments were ignored and their views were not adequately incorporated into the plan.¹⁰² Despite a commitment to openness, Anderson and Yaffee found that "Plum Creek tightly controlled the development of the HCP."¹⁰³ Charlie Raines of the Sierra Club said, "as it went farther along, you could tell they were smiling and being very pleasant, but they weren't changing the substance. It was sugar krispies: sugar-coated on the outside but no nutritional value."¹⁰⁴ Yakima Indian Nation representative Jim Matthew asserted, "It was basically a Plum Creek and FWS show, and whatever they...came up with is what we got."¹⁰⁵ A Plum Creek representative acknowledged that groups may be frustrated when participation does not translate into influence;¹⁰⁶ an FWS official took a harder line: "Maybe these groups always feel like they are under-represented in the process."¹⁰⁷

As the expansion of the HCP program proceeded, FWS and NMFS addressed several criticisms of the approach in an addendum to the HCP Handbook called the "5-point policy."¹⁰⁸ Under this policy, the agencies would (1) require HCPs to include clear statements of biological goals to clarify their purposes, (2) push for adaptive management to address uncertainties about the plan's effects on listed species, (3) provide for more effective monitoring, (4) clarify the criteria used by the agencies to establish the duration of plans, and (5) provide more opportunities for public participation in planning processes.¹⁰⁹ These changes were warmly received by scientists and by much of the environmental community, but as a "work

100. *Id.* (internal quote marks omitted).

101. ANDERSON & YAFFEE, *supra* note 27, at 29.

102. Miller, *supra* note 57.

103. ANDERSON & YAFFEE, *supra* note 27, at 17.

104. *Id.* (quoting Raines) (internal quote marks omitted).

105. *Id.* (quoting Matthews) (internal quote marks omitted).

106. *Id.* at 18.

107. Miller, *supra* note 57 (quoting FWS official) (internal quote marks omitted).

108. Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process, 65 Fed. Reg. 35241 (June 1, 2000) [hereinafter Notice]; Env'tl. News Network, *U.S. Fine-tunes Habitat Conservation Plans*, CNN, Mar. 10, 1999, <http://www.cnn.com/NATURE/9903/11/habitat.enn/index.html?eref=sitesearch>; U.S. DEP'T OF THE INTERIOR, FISH & WILDLIFE SERV. & NAT'L OCEANIC & ATMOSPHERIC ADMIN., ADDENDUM TO THE HCP HANDBOOK: EXECUTIVE SUMMARY (2000) [hereinafter FWS & NOAA], http://www.fws.gov/endangered/hcp/executive_summary.pdf.

109. FWS & NOAA, *supra* note 108. *See also* Notice, *supra* note 108.

in progress" it remains to be seen whether the HCP program's scientific integrity and participatory character can be significantly improved.

B. Conclusion: HCPs: Policy Under Law, Policy Without Law?

HCPs are a core component of the emerging collaborative pathway in environmental policy making, reflecting many of the larger movement's strengths. Significantly, the program is grounded in statutory language. Congress, seeing shortcomings in the 1973 law and the emergence of a promising experiment in the San Bruno Mountains, enacted section 10. HCPs promised to solve a range of practical, ecological, and political problems that appeared intractable under the original language of the ESA. Effective species protection requires participation by private landowners, and it is unlikely that property holders are going to accept sharp restraints on the use of their lands or that the resource-strapped federal government will compel compliance with the ESA. HCPs address this problem by offering incentives to landowners to participate in species protection. Conservation biologists and ecologists have emphasized the need to focus on problems of habitat degradation and fragmentation as part of the endangered species program; HCPs have created opportunities for such ecosystem management.

The Clinton administration's development of the HCP program seemed to create possibilities for more effective species protection involving some negotiation and compromise with affected interests. With the "no surprises" and "safe harbor" policies and an accommodating attitude, Clinton sought to create a context in which landowners would see the value of entering into negotiations and ultimately submitting plans to the FWS or NMFS. Habitat conservation planning might at once address some key policy problems and salve the bitter controversies surrounding the ESA.

Yet despite its statutory grounding, the program confronts serious concerns about its legitimacy and effectiveness. The expansion of the HCP program came in the context of severe budgetary and personnel problems in the larger ESA program. The FWS and the NMFS could not effectively process listing petitions, designate critical habitat, or consistently compel federal "action agencies" to take actions necessary to protect listed species. Critics argued that rather than simply *supplementing* other efforts under the ESA, the HCP program — while itself underfunded — *displaced* other legally mandated activities. One of the most vocal critics of HCPs was Kieran Suckling of the Center for Biological Diversity. Suckling observed,

As these plans become bigger and bigger, they supersede recovery planning. There are no recovery plans for 70 percent of all endangered species. The Fish and Wildlife Service says it has no money to do recovery plans, but it has found money

to do more than 400 HCPs....Babbitt has created a shadow ESA. He's saving the ESA by killing endangered species.¹¹⁰

The language of the ESA is clear, and section 10 did not repeal requirements for listing species or designating critical habitat. These opponents have taken their case to the courts as well, challenging the no surprises rule. Although the rule is technically still intact after years of litigation, the litigation over the no surprises rule and the related "permit revocation rule" is still very much alive.¹¹¹ Yet in spite of the seeming clarity of the ESA and these legal challenges, the Clinton administration used its administrative discretion to alter the priorities of the endangered species program, perhaps to take a broader ecosystem-based focus, but undoubtedly shifting resources to cutting deals with landowners.

Moreover, there is significant concern about the processes that produce HCPs, the quality of the science upon which they are based, and the weakness of monitoring programs. The extent and nature of participation varies from case to case, depending upon the attitudes of the property owners and the demands of agency officials. There appears to be at least some legitimate concern that representation is asymmetric, with property owners exercising considerable—even disproportionate— influence over the planning process. Property rights are obviously extremely important, but it is necessary to recall that the ESA asserts a national interest in species preservation; planning processes should reflect this reality.

Further, as has been shown, studies of HCPs indicate that plans typically lack solid scientific grounding and that outcomes have not been aggressively monitored. HCPs represent a major federal commitment—for example, roughly one-fourth of the land area of the state of Washington is now managed under HCPs, with more lands to be added to the total soon¹¹²—and not only does it appear that many plans were not well-grounded in science, but it is also difficult to determine whether the plans are meeting their species protection goals.

Supporters of the program see a healthy flexibility, a new kind of environmental policy making for a new era. Skeptics see old politics—government cutting deals with landowners hither and yon, with little understanding of the consequences of those choices. The new HCP

110. Durbin, *supra* note 56 (quoting Suckling).

111. *Spirit of the Sage Council v. Norton*, 294 F. Supp. 2d 67 (D.D.C. 2003); Daniel Cusick, *Court Dismisses FWS Appeal Over "No Surprises,"* GREENWIRE, May 31, 2005, <http://www.eenews.net/Greenwire/2005/05/31/archive/18>.

112. Robert McClure & Lisa Stiffler, *A License to Kill: Flaws in Habitat Conservation Plans Threaten the Survival of Scores of Species*, SEATTLE POST-INTELLIGENCER, May 3, 2005, available at <http://seattlepi.nwsourc.com/specials/licensetokill/>.

Handbook provides more guidance for framing and monitoring the plans, in essence acknowledging the weaknesses of the program to date. Still, to date there has been little systematic monitoring of these plans and they are vulnerable to legal challenge.

One of the core premises of the movement for the new social regulation in the 1960s and 1970s was that agency capture had been a core problem for the American regulatory state. Policy would be better and more democratic if we created processes that would invite interest group conflict in the legislative process and then in the courts, rather than excluding some interests in the name of streamlined processes governed by experts and regulated interests. The conflictual policy environment that resulted certainly has problems of its own, and there is need for creative thinking about ways to escape that trap. The HCP framework appears promising, but it also risks a retreat to decision making involving asymmetric representation in which property owners drive the process, federal agencies are under mandates to speed through plans satisfactory to those private interests, and the public interest in species preservation is weakly represented.

IV. REINVENTING REGULATION THROUGH NEGOTIATION: COLLABORATION THROUGH THE NEGOTIATED RULEMAKING ACT AND CLINTON'S COMMON SENSE INITIATIVE AND PROJECT XL

The regulatory system that emerged in the late 1960s and early 1970s resulted from changes in values, the emergence of the new public interest movement reflecting those values, and concerns about the problem of "agency capture" in the New Deal regulatory regime.¹¹³ Hostility to the political power of big business melded with the perception that many agencies were controlled by the industries they were built to regulate, prompting new thinking about institutional design. As was noted earlier, Lowi's influential *The End of Liberalism* argued that the core problem was excessive, vague delegations of legislative authority to regulatory agencies and the resulting appropriation of public power by private interests in policy implementation.¹¹⁴ Broad delegations gave agencies too much discretion over policy, and too many regulatory agencies used that discretion to serve organized interests at the expense of the broader public interest.¹¹⁵ Lowi decried the ideology underlying these delegations, labeled it "interest group liberalism," and argued that the New Deal approach to

113. EISNER, *supra* note 5, at 120-21.

114. LOWI, *supra* note 15, at 92-126.

115. *Id.*

regulation obliterated the distinction between private interest and public authority by handing the tools of government power to private interest groups.¹¹⁶ The reformers of the late 1960s aimed to set this right with the "new social regulation."¹¹⁷

The new social regulation simultaneously attacked agency capture and the political influence of business corporations. First, Congress wrote more specific legislation holding agencies to clear goals and deadlines.¹¹⁸ This was particularly important in environmental regulation, where goals and deadlines were sometimes unrealistic but their impact was profound. Congress forced the EPA's hand, limiting its "discretion while fostering an adversarial relationship between the regulators and the regulated."¹¹⁹ Action-forcing statutes would help to ensure that the agency pursued the public interest as defined by Congress, mitigating the threat of agency capture.¹²⁰ Second, citizen groups would play a more significant role in rule making and policy implementation, balancing the influence of business groups. The courts required agencies to open their decisionmaking processes to greater participation by public interest groups, while Congress and the courts made it easier for citizen groups to sue to enforce agency accountability.¹²¹ Reformers built a new regulatory regime reflecting concerns about the New Deal system and the new balance of forces in American politics.¹²²

Before long, however, strong opposition to the new social regulation emerged. Resurgent business interests attacked environmental regulations for imposing unnecessary expenses and irrational constraints on their operations.¹²³ Academic critics found the system plagued by a "malaise" marked by inefficiency, excessive costs, delays, and an entrenched adversarialism that focused debate on procedural questions rather than problem solving.¹²⁴

Although reform proposals abound, building a more efficient system has proven difficult. Congress has achieved some reforms—the tradable permit system adopted in the Clean Air Act Amendments of 1990

116. *Id.* at 50–61.

117. EISNER, *supra* note 5, at 125–30.

118. *Id.* at 128.

119. *Id.*

120. *See id.*

121. *Id.* at 127.

122. RICHARD N.L. ANDREWS, *MANAGING THE ENVIRONMENT, MANAGING OURSELVES: A HISTORY OF AMERICAN ENVIRONMENTAL POLICY* 239–42 (1999); EISNER, *supra* note 5, at 128–29.

123. *See generally* MICHAEL PERTSCHUCK, *REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT* (1982); DAVID VOGEL, *FLUCTUATING FORTUNE: THE POLITICAL POWER OF BUSINESS IN AMERICA* (1989).

124. Philip J. Harter, *Negotiated Regulations: A Cure for Malaise*, 71 *Geo. L.J.* 1, 6–7 (1982).

is the key example¹²⁵ – but for the most part it has been unable to move major regulatory reform legislation. In the Clinton years, for example, environmentalists feared opening the major environmental statutes to revision and reform because they thought that the Republicans would use this as an opportunity to weaken protections. After suffering early defeats on their rollback agenda, Republican leaders in Congress wanted neither to position themselves as enemies of the environment nor to give Clinton legislative successes. In the second Bush administration, environmental issues were a low priority and the administration's agenda centered on administrative changes while it tried to avoid bloody fights in the Senate. Despite decades of criticism, pollution regulation is still dominated by the "lords of a little while ago" – the laws and institutions that grew out of the public-interest movement of the late 1960s and 1970s.¹²⁶

Presidents have wrestled with the green state through administrative centralization, Office of Management and Budget-centered regulatory clearance, cost-benefit analysis requirements, and bodies like Vice President Quayle's Council on Competitiveness.¹²⁷ This section deals with a different angle of attack on the green state: experiments to remake regulation through negotiations with regulated interests and other groups. The search for more collaborative approaches has been central to the next generation agenda. Marian Chertow and Daniel Esty observed that the old system "compartmentalized problems by environmental media" in complex, rigid, and sometimes internally contradictory statutory and regulatory structures.¹²⁸ It created few incentives for exceptional environmental performance, invited litigation, and "implied a level of absolutism in pursuit of environmental purity" that prevented rational tradeoffs between environmental protection and other values.¹²⁹ Chertow and Esty called for new "policies that are not confrontational but cooperative, less fragmented and more comprehensive, not inflexible but rather capable of being tailored to fit varying circumstances."¹³⁰ This perspective has been influential, culminating in the Clinton administration's 1995 National Performance Review document, "Reinventing Environmental Regulation," which embraced both the conventional critique of command

125. EISNER, *supra* note 5, at 149–51; RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW 200–02* (1998).

126. This borrows from the discussion of the "lords of yesterday" in CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 3–27* (1992).

127. EISNER, *supra* note 5, at 184–85.

128. THINKING ECOLOGICALLY, *supra* note 3.

129. *Id.*

130. *Id.*

and control regulation and the case for moving beyond adversarialism.¹³¹ There have been many experiments with environmental partnerships, many of them aimed at circumventing constraints imposed by golden era statutes. In these experiments, policy makers seek solutions to particular regulatory problems and a testing ground for approaches that might underpin a transformation of the regulatory system.

This section focuses on three such experiments: negotiated regulation or "reg-neg" and two Clinton-era initiatives, the sector-level "Common Sense Initiative" and the site-focused "Project XL." It summarizes these efforts and shows that despite high hopes and occasional successes in particular cases there is little evidence that they have made much progress in either tackling narrow regulatory problems or rebuilding environmental regulation along new lines. We then turn to a broader analysis of collaborative regulation and the prospects for building a "next generation" green state somewhere along the pathway marked by these experiments. Institution-building will be extraordinarily difficult given the politics of environmental policy in the era of legislative gridlock and the complexity of the existing green state.¹³²

A. One Step Down the Collaborative Pathway: Negotiated Rule Making

Under conventional "notice-and-comment" rule making, agencies gather information, draft proposed rules, and then publish those proposed rules in the *Federal Register*.¹³³ Agencies may hold informal meetings with interested groups prior to the publication of the proposed rule, but formal participation takes place after the draft rule is published.¹³⁴ Interested parties then have the right to submit written comments and the agency may hold public hearings.¹³⁵ If the agency chooses to go forward with the rule, it publishes the final version at least 30 days before it becomes effective.¹³⁶ The average time for developing rules by the conventional process is several years, and hostile interests regularly challenge rules in court in

131. PRESIDENT BILL CLINTON & VICE-PRESIDENT AL GORE, *REINVENTING ENVIRONMENTAL REGULATION* (1995), <http://govinfo.library.unt.edu/npr/library/rsreport/251a.html>.

132. See EISNER, *supra* note 5, at 2-26.

133. For an overview of the rulemaking process, see CORNELIUS M. KERWIN, *RULEMAKING* 75-86 (1998).

134. *Id.* at 83-84.

135. *Id.*

136. *Id.* at 84-85.

lengthy proceedings.¹³⁷ David Pritzker and Deborah Dalton summarize some key concerns with the conventional approach:

The adversarial nature of the normal rulemaking process is often criticized as a major contributor to the expense and delay associated with regulatory proceedings. Agency rulemaking may be perceived as merely the first round in a battle that will culminate in a court decision. The need to establish a formal record as a basis for potential litigation sharpens the divisions between parties, and may foreclose any willingness to recognize the legitimate viewpoints of others.

In these circumstances, parties often take extreme positions in their written and oral statements. They may choose to withhold information they view as damaging.... What is lacking is an opportunity for the parties to exchange views and to focus on finding constructive, creative solutions to problems.¹³⁸

In 1990, building on experiments from the previous two decades, Congress adopted the Negotiated Rulemaking Act.¹³⁹ The law's basic premise is that under certain conditions it may be desirable to bring interested parties together to negotiate the text of a proposed rule before that proposed rule is published in the *Federal Register*.¹⁴⁰ Congress concluded that traditional rulemaking "may discourage the affected parties from meeting and communicating with each other," leading to unnecessary conflict and litigation, and that it "deprives the affected parties and the public of the benefits of...cooperation" as well as the advantages of "shared information, knowledge, expertise, and technical abilities possessed by the

137. Clare M. Ryan, *Regulatory Negotiation: Learning from Experiences at the U.S. Environmental Protection Agency*, in *MEDIATING ENVIRONMENTAL CONFLICTS* 205-08 (J. Walton Blackburn & Willa Marie Bruce eds., 1995). See generally Cornelius M. Kerwin & Scott R. Furlong, *Time and Rulemaking: An Empirical Test of the Theory*, 2 J. PUB. ADMIN. RES. & THEORY 113 (1992). Some sources assert that 80 percent of EPA rules are litigated, but Cary Coglianese found that the number is much lower, around 26 percent. Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1296-99 (1997).

138. DAVID M. PRITZKER & DEBORAH S. DALTON, *NEGOTIATED RULEMAKING SOURCEBOOK* 2-3 (1995) (reference manual prepared for the Admin. Conf. of the United States).

139. Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §§ 561-570a (2000)). On negotiations in the 1970s and 1980s, see Coglianese, *supra* note 137; Daniel J. Fiorino, *Regulatory Negotiation as a Policy Process*, 48 PUB. ADMIN. REV. 764 (1988) (reprinted in PRITZKER & DALTON, *supra* note 138, at 849-57); Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. REG. 133 (1985) (reprinted in PRITZKER & DALTON, *supra* note 138, at 704-36).

140. Susskind & McMahon, *supra* note 139, at 150-51.

affected parties.”¹⁴¹ All of these problems were exacerbated by the activism of public interest groups and the openness of the courts to citizen suits—in essence, negotiated rulemaking (reg-neg) was a response to problems associated with the new social regulation. Thus, the *solution* to the problem of agency capture—a more adversarial, less flexible rulemaking process—became a *problem* to be solved by a more cooperative approach in which interested parties would participate formally in the very earliest stages of rule making.

Thus, Congress revived an old and controversial premise of regulatory policy making: “the parties who will be significantly affected by a rule [would] participate in the development of the rule.”¹⁴² It hoped that involving relevant interests early in rulemaking, rather than waiting for the notice-and-comment period, would speed rulemaking and “increase the acceptability and improve the substance of rules, making it less likely that the affected parties will resist enforcement or challenge such rules in court.”¹⁴³ However, critics revived concerns about agency capture and business influence.¹⁴⁴ They worried that flexibility sought by champions of negotiated rulemaking would “subvert the basic, underlying concepts of American administrative law—an agency’s pursuit of the public interest through law and reasoned decision-making. In its place, negotiated rulemaking would establish privately bargained interests as the source of putative public law.”¹⁴⁵

How does the formal reg-neg process work?¹⁴⁶ The law does not require agencies to use negotiated regulation, but gives them the option where it appears the approach might yield good results.¹⁴⁷ After determining whether reg-neg is appropriate for a given problem, the agency convenes an advisory committee representing the interests affected most directly by the rule.¹⁴⁸ Agencies typically seek balanced representation, though participants frequently report that some relevant group has been

141. *Id.*

142. *Id.*

143. *Id.*

144. See generally William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 DUKE L.J. 1351 (1997).

145. *Id.* at 1356.

146. There are useful descriptions of the reg-neg process in Coglianese, *supra* note 137, at 1266–68, and in U.S. Env’tl. Prot. Agency, *Negotiated Rulemaking Fact Sheet* (2003) [hereinafter EPA, *Fact Sheet*], <http://www.epa.gov/brownfields/aai/negregfs.htm> (last visited Nov. 23, 2004).

147. In some cases, Congress may direct agencies to use reg-neg. For example, in 1992 amendments to the Higher Education Act, Congress directed the Secretary of Education to submit rules concerning the student loan program to negotiation. *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).

148. EPA, *Fact Sheet*, *supra* note 146.

excluded.¹⁴⁹ Committee meetings are open to the public, though typically only committee members speak.¹⁵⁰ The objective is to develop consensus on a proposed rule. The agency then uses the consensus agreement as the basis for a draft rule published in the *Federal Register*.¹⁵¹ Committees operate under ground rules negotiated in advance. For example, participants may agree not to submit negative comments or litigate on points of consensus.¹⁵² Formally, negotiated rulemaking supplements rather than displaces conventional rulemaking. Negotiated rules are still subject to conventional notice-and-comment procedures after the draft rule is published.¹⁵³

The promised benefits of reg-neg go beyond simply improving rulemaking efficiency and reducing litigation. Advocates see the approach as a cornerstone of a new regulatory system. Philip Harter, a law professor and leading advocate for reg-neg, argues that negotiated rules will enjoy greater legitimacy than rules adopted through conventional procedures.¹⁵⁴ Negotiating consensus will, he hopes, yield more satisfying, reasonable decisions reflecting sound data.¹⁵⁵ Jody Freeman argued that a sustained commitment to reg-neg could transform the regulatory state by challenging "the conceptual constraints of the traditional administrative regime," thereby encouraging broad participation, problem solving, and the erosion

149. On perceptions that some groups are excluded, see Laura I. Langbein & Cornelius M. Kerwin, *Regulatory Negotiation Versus Conventional Rulemaking: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599-633 (2000). One example of balanced representation is the reg-neg committee established to develop woodstove emissions standards, which included representatives from four states and the Natural Resources Defense Council as well as industry representatives. William H. Funk, *When the Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest - EPA's Woodstove Standards*, 18 ENVTL. L. 55, 61 (1987); SUSAN L. PODZIBA, FINAL CONVENING ASSESSMENT REPORT ON THE FEASIBILITY OF A NEGOTIATED RULEMAKING PROCESS TO DEVELOP THE ALL APPROPRIATE INQUIRY STANDARD UNDER THE SMALL BUSINESS LIABILITY RELIEF AND BROWNFIELDS REVITALIZATION ACT (2002) (report prepared for the U.S. Env'tl. Prot. Agency).

150. EPA, *Fact Sheet*, *supra* note 146.

151. *Id.*

152. *Id.* See, e.g., NAT'L PARK SERV., FIRE ISLAND NATIONAL SEASHORE: NEGOTIATED RULEMAKING ADVISORY COMMITTEE FOR OFF-ROAD DRIVING REGULATIONS GROUNDRULES, (2002), <http://www.fiyrra.com/fiyrra/negreggroundrules.html>. In this reg-neg, focused on off-road vehicle use at Fire Island, consensus was defined as "no dissent by any representative," with representatives promising not to dissent without "serious reservations." The National Park Service promised to make the consensus rule the basis for its first notice of proposed rulemaking; committee members promised not to make negative comments on the "consensus-based language during the rulemaking and any associated processes." *Id.*

153. EPA, *Fact Sheet*, *supra* note 146.

154. Harter, *supra* note 124, at 7.

155. *Id.* at 28-31.

of the public-private divide.¹⁵⁶ Bill Clinton shared these hopes, supporting reg-neg as part of the regulatory reinvention project. The 1993 National Performance Review endorsed the approach, and Clinton's Executive Order 12,866 directed federal agencies "to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking."¹⁵⁷ Clinton also demanded that agencies either identify at least one rulemaking in which they would use reg-neg or explain to the Office of Management and Budget why the approach was not feasible for them.¹⁵⁸

The EPA led the way in reg-neg, using the process more frequently than any other agency.¹⁵⁹ Between 1983 (when the first serious experiments took place) and 1996, federal agencies produced 36 final rules linked to reg-negs.¹⁶⁰ The EPA issued 12 of those rules; no other agency issued more than seven.¹⁶¹ The agency used the approach to tackle some difficult issues including developing standards for reformulated gasoline under the 1990 Clean Air Act Amendments, residential woodstove emissions, coke oven emissions, workers' exposure to agricultural pesticides, chemical leaks, and wood furniture manufacturing.¹⁶² Some of these reg-negs seem to have been successful while others have fallen short, but there has been considerable controversy over the general effectiveness of negotiated rulemaking.

Some EPA cases reveal reg-neg's potential. For example, the chemical equipment leaks rulemaking begun in 1989 pushed the policy debate in creative directions, yielding consensus language that satisfied environmentalists and the industry's need for phased implementation.¹⁶³ There, reg-neg produced enforceable standards and participants deemed the consensus process successful.¹⁶⁴ Freeman found that reg-neg developed a new conceptual approach to the control standard and led to discussions of greener production processes and information sharing among companies seeking best practices.¹⁶⁵ Further, the negotiations revealed that pollution control and production goals could be compatible, an understanding that

156. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 35-36 (1997). See also Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000).

157. Exec. Order No. 12,866 § 3(a)(2), 58 Fed. Reg. 51,735 (Oct. 4, 1993), reprinted as amended in 5 U.S.C. § 601 n. (2000).

158. Negotiated Rulemaking, Memorandum for Executive Departments and Selected Agencies [and the] Administrator of the Office of Information and Regulatory Affairs, 58 Fed. Reg. 52,391 (Oct. 7, 1993) (alteration in original).

159. Coglianesse, *supra* note 137, at 1273.

160. *Id.* at 1274.

161. *Id.*

162. *Id.* at 1281.

163. Freeman, *supra* note 156, at 41-49.

164. *Id.* at 46.

165. *Id.* at 44.

had not been widely shared in the industry before reg-neg.¹⁶⁶ Negotiated regulation apparently can yield innovative solutions to vexing policy problems.

Yet more systematic analyses have raised doubts about the general effectiveness of negotiated rulemaking. First, reg-negs are rare and are likely to remain so because (a) the conditions under which the approach is likely to succeed do not appear very often and (b) negotiations are time-consuming, straining the resources of all participants.¹⁶⁷ Between 1991 and 1996, 24 of the 20,190 final rules issued by federal agencies (one-tenth of one percent) emerged from reg-negs.¹⁶⁸ In 1996, the peak year for reg-negs, only seven of the 3,762 rules issued by federal agencies were rooted in formal regulatory negotiations.¹⁶⁹ It is unlikely, then, that agencies or stakeholders can sustain a large number of reg-negs on complicated and contentious issues. Therefore, most rulemaking proceeds using less formal consultations and standard notice-and-comment procedures. Second, Cary Coglianese undermined two central claims for the advantages of reg-neg, finding that it neither reduced the amount of time needed to write rules nor reduced litigation rates.¹⁷⁰ Indeed, in the subset of cases he studied, it appeared that negotiated rules were more likely to be litigated than rules generated in the traditional notice-and-comment process.¹⁷¹ Reg-neg participants tend to be more satisfied with the process than participants in conventional rule making, but it is unclear that participant satisfaction is related to the quality of policy choices.¹⁷² Coglianese's findings have drawn fire,¹⁷³ but the softest version of his conclusion — negotiated rulemaking has not yet delivered on some of its key promises — seems consistent with the evidence.¹⁷⁴

166. *Id.* at 47–48.

167. Coglianese, *supra* note 137, at 1276–77. A 1998 EPA assessment of its reg-neg pilots (while generally positive) found that negotiated regulation was labor-intensive and placed a heavy burden on both the agency and participants. Funk, *supra* note 144, at 1366–67.

168. Coglianese, *supra* note 137, at 1276.

169. *Id.* at 1277.

170. Coglianese, *supra* note 137. There is evidence that environmentalists are less likely to litigate against negotiated rules than conventional rules, suggesting that reg-neg may overcome any agency biases toward regulated interests. See Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411 (2000).

171. Coglianese, *supra* note 137, at 1286–309.

172. See Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Rulemaking* (John F. Kennedy School of Gov't Faculty Research Working Paper RWP02-038, 2000), [http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP02-038/\\$File/rwp02_038_coglianese.pdf](http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP02-038/$File/rwp02_038_coglianese.pdf); Freeman & Langbein, *supra* note 156.

173. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000).

174. Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter*, 9 N.Y.U. ENVTL. L.J. 386 (2001).

Coglianeses' work challenges the faith that we can process around the basic conflicts that give rise to struggles over environmental policy and that reg-neg can contain conflict to the negotiating room, preventing it from spilling over into other venues. Further, negotiated regulation highlights at least two critical issues for collaborative approaches: the problem of squaring administrative flexibility with the law and the potential for the development of a path through the environmental policy labyrinth to "cleaner, cheaper, smarter" regulation.

B. Negotiated Rulemaking: Policy Against Law?

The new social regulation of the 1960s and 1970s created inefficiencies and unnecessary conflict, but reformers took the less flexible, more adversarial course for defensible reasons. In *The End of Liberalism*, Lowi decried "policy without law," or ad hoc choices made by administrative agencies in the absence of clear congressional guidance.¹⁷⁵ The new collaborative approaches present us with this problem of policy without law and another difficulty: the possibility of inconsistency between negotiated agreements and reasonably clear statutory requirements, or in other words, policy *against* law. There are at least two questions here. First, can reg-negs consistently serve the public interest while respecting the integrity of law? Second, since they are, in part, responses to perceived flaws in the existing regulatory structure, can collaborative approaches actually succeed within the constraints of law, absent statutory changes that would clear the path toward greater flexibility and efficiency? This section will deal with the first of these questions; the second is treated in light of experiences with the Clinton reinvention project discussed in the following section.

Although unrelated to environmental policy, a 1996 court case concerning negotiated regulation highlighted one key problem of policy without law. In *USA Group Loan Services v. Riley*, federal circuit judge Richard Posner confronted a tension between negotiated rulemaking and well-established notice and comment procedures in rulemaking.¹⁷⁶ Congress had ordered the Education Department to use reg-neg to craft new rules governing the student loan program.¹⁷⁷ The department did so, but ultimately refused to use the negotiated rule as the basis for the proposed rule.¹⁷⁸ A group of loan-servicing companies argued that the department had violated the Negotiated Rulemaking Act by failing to publish the

175. LOWI, *supra* note 15, at 92-126.

176. *USA Group Loan Servs., Inc. v. Riley*, 82 F.3d 708, 714-15 (7th Cir. 1996).

177. *Id.* at 714.

178. *Id.*

rule.¹⁷⁹ Posner rejected the industry claim, concerned that “[t]he practical effect... would be to extinguish notice and comment rulemaking in all cases in which it was preceded by negotiated rulemaking; the comments would be irrelevant if the agency were already bound by promises” made during regulatory negotiations.¹⁸⁰ Judge Posner attacked the notion that agencies could be bound to rules shaped in negotiations with interest groups: “The propriety of such a promise may be questioned. It sounds like an abdication of regulatory authority to the regulated, the full burgeoning of the interest-group state, and the final confirmation of the ‘capture’ theory of administrative regulation.”¹⁸¹

Although the court upheld the Department of Education’s handling of negotiated rulemaking, upholding requirements for traditional notice and comment, two problems remain. First, as William Funk wrote, under reg-neg, “agencies learn that achieving consensus of the parties is the measure of success.... Thus, the agencies are likely to see their role not as serving the public interest, but as generating a consensus among the parties to a negotiation. Public choice theory is not resisted; it is adopted with a vengeance.”¹⁸² Importantly, there is no tension in the run of cases where the agency *does* hold to its commitment to the negotiated language, regardless of whether in the final analysis that language serves the public interest. Second, and more practically, uncertainty about an agency’s commitment to use the negotiated language as the basis for a proposed rule will weaken incentives for industries and interest groups to participate in reg-neg. To the extent that agencies *are bound* by the negotiated language, Posner and Funk’s concerns about the influence of organized interests take on greater weight: agencies may lose the autonomy to serve the public interest anticipated by the Administrative Procedure Act. To the extent that agencies *are not bound* by the negotiated language, the reg-neg approach will not attract much interest. Groups will be wary of coming to the table if they cannot trust the government to hold to consensus commitments.¹⁸³

Reg-negs can also break through the boundaries set by environmental statutes. This often occurs under traditional rulemaking as well, but the very value of reg-neg lies in its flexibility, which can lead to consensus deals that are “better than the law” from the perspective of the parties. For example, Funk’s study of the EPA’s 1987 woodstove regulations showed that the reg-neg produced consensus rules that violated several terms of the Clean Air Act.¹⁸⁴ Negotiators were aware of at least some of

179. *Id.*

180. *Id.* at 714–15.

181. *Id.* at 714.

182. Funk, *supra* note 144, at 1386.

183. WEBER, PLURALISM, *supra* note 3, at 129–30.

184. Funk, *supra* note 149, at 66–89.

these problems but agreed to work around them where they found agreement within the group.¹⁸⁵ Thus, consensus rather than statutory language became the legitimizing standard for the woodstove rules. This is not to say that the negotiated rules were not credible. They promised to improve air quality, and arguably the reg-neg process worked better than conventional rulemaking. Yet the parties' agreement on what worked for them overrode statutory limits. Whatever legitimacy these rules might gain through negotiation is lost to the extent that they set policy against law. Importantly, there was no legal challenge to the woodstove rules because all of the parties to the agreement had agreed not to sue, and outsiders lacked the resources to challenge the decisions.¹⁸⁶ Funk was justified in worrying that "the incentives to make negotiated rulemaking succeed...undermine and subvert the principles underlying traditional administrative law by elevating the importance of consensus among the parties above the law, the facts, or the public interest."¹⁸⁷ The fact that traditional administrative law and the environmental statutes have not always served us well cannot justify simply ignoring those statutes.¹⁸⁸

C. Negotiated Rulemaking: More Efficient Processes, or the Bullet Train into the Labyrinth?

Edward Weber describes the reformulated gasoline (RFG) rule adopted in 1991 as a successful application of negotiated regulation.¹⁸⁹ Yet

185. *Id.* at 89-96.

186. *Id.* See also Robert Choo, *Judicial Review of Negotiated Rulemaking: Should Chevron Deference Apply?*, 52 RUTGERS L. REV. 1069 (2000). The woodstove negotiation is not the only reg-neg in which participants moved forward despite uncertainty about the legality of their actions. In the 1991 negotiations over reformulated gasoline standards, participants agreed on a compliance program that would focus not on gallon-by-gallon emissions but whether, on average, fuel producers met Clean Air Act standards. EPA officials and some environmentalists charged that averaging was illegal, and "there was no doubt about the intent of environmental advocates and states to litigate the averaging provisions if adopted outside the reg-neg. Yet within the context of the reg-neg, the averaging issue became negotiable." Edward P. Weber & Ann Khademian, *From Agitation to Collaboration: Clearing the Air Through Negotiation*, 57 PUB. ADMIN. REV. 396, 403 (1997) (emphasis added).

187. Funk, *supra* note 144, at 1387.

188. DONALD F. KETTL, REINVENTING GOVERNMENT? APPRAISING THE NATIONAL PERFORMANCE REVIEW 27-30 (1994).

189. WEBER, PLURALISM, *supra* note 3, at 120-47. See also SUSAN L. MEYER ET AL., IMPLEMENTATION OF THE REFORMULATED GASOLINE PROGRAM (Cong. Res. Serv., CRS Rep. 95-850 ENR, 1995), <http://www.cnre.org/nle/CRSreports/Air/air-12.cfm>; MIGDON SEGAL, ETHANOL AND CLEAN AIR: THE "REG-NEG" CONTROVERSY AND SUBSEQUENT EVENTS (Cong. Res. Serv., CRS Rep. 93-614 SPR, 1993), <http://ncseonline.org/NLE/CRSreports/Air/air-7.cfm>; Ellen Siegler, *Regulatory Negotiations and Other Rulemaking Processes: Strengths and Weaknesses from an Industry Viewpoint*, 46 DUKE L.J. 1429 (1997); Michael Weisskopf, *Rare Pact Reached to*

it is also true that, far from offering a clear path through the environmental policy labyrinth, even this successful rulemaking faced difficult twists and turns and dangerous intersections with other policymaking paths. Though the negotiated agreement held against strong political challenges, even interests that saw themselves as winners seemed discouraged by the process.¹⁹⁰ The RFG fight simultaneously demonstrates some of the strengths of reg-neg and the difficulties of creating any equilibrium out of the complex, contentious stuff of contemporary environmental politics.

In the Clean Air Act Amendments of 1990, Congress took aim at urban smog with a reformulated gasoline program.¹⁹¹ The program mandated the use of cleaner burning fuels in nine cities with serious air quality problems and required that the new fuel formula yield (a) no net increase in nitrous oxide emissions and (b) a 15 percent reduction in the volatile organic compounds (VOCs) produced by standard gasoline.¹⁹² Congressional debate focused on the definition of clean fuels and led to a compromise embracing methanol, ethanol, natural gas, and reformulated gasoline.¹⁹³ Congress gave the EPA the authority to define a clean fuels model that would meet the smog control goals set by Congress.¹⁹⁴

As Weber noted, this was no minor decision: the oil and auto industries, midwestern agricultural interests, environmentalists, and state regulators held huge stakes in EPA's decision.¹⁹⁵ Big oil worried about the costs of developing and distributing RFG and the impact of new "mixed" formulas on its share of the gasoline market. The industry faced years of planning and billions in expenditures to retool facilities.¹⁹⁶ Auto manufacturers worried that vehicles using RFGs might not meet federal mileage standards, forcing them to develop new engine designs.¹⁹⁷ Agricultural interests and allied legislators saw the possibility for enormous profits in a rule supporting the use of corn-based ethanol.¹⁹⁸ Environmentalists wanted tough standards,¹⁹⁹ and state regulators wanted a clear, enforceable policy on vehicle pollution that would reduce pressures on them to bring the anti-smog hammer down on stationary, industrial

Fight Smog, WASH. POST, Aug. 16, 1991, at A1.

190. See generally Siegler, *supra* note 189.

191. For a good overview of the politics of reformulated gasoline in this period, see WEBER, *Pluralism*, *supra* note 3, at 120-42.

192. *Id.* at 122.

193. *Id.* at 121-22. See also SEGAL, *supra* note 189.

194. WEBER, *PLURALISM*, *supra* note 3; SEGAL, *supra* note 189.

195. WEBER, *PLURALISM*, *supra* note 3, at 122-23.

196. *Id.*; MEYER ET AL., *supra* note 189.

197. WEBER, *PLURALISM*, *supra* note 3, at 122; MEYER ET AL., *supra* note 189.

198. WEBER, *PLURALISM*, *supra* note 3, at 123; MEYER ET AL., *supra* note 189; Guy Gugliotta, *Prosperity Once Again Strikes White Lightning*, WASH. POST, Dec. 2, 1990, at A3.

199. WEBER, *PLURALISM*, *supra* note 3, at 123.

sources of pollution.²⁰⁰ The EPA found itself at the center of what promised to be a bitter fight.

As a response, the agency turned to negotiated regulation to try to speed the rulemaking and avoid future litigation. At the outset, the parties to the reg-neg and the White House agreed to a formal protocol blocking intervention from the executive branch outside the reg-neg, forbidding participants from lobbying outside the reg-neg, and committing all parties to support the consensus agreement by promising not to sue. This "assurance mechanism" bound the groups, the EPA, and the White House to honor the results of the negotiations and was crucial in securing the participation of environmentalists and state regulators in the process.²⁰¹ The mechanism would ensure that the agreement would stick, giving the negotiated rule safe passage through the environmental policy labyrinth.

After difficult negotiations, the parties struck an agreement in August 1991, and in April 1992 the EPA published a proposed rule based on the consensus language.²⁰² As the deal took shape, however, ethanol interests grew nervous. The typical ethanol-gasoline blend is more volatile than gasoline itself, meaning that it releases more VOCs into the atmosphere than normal gasoline.²⁰³ In fact, the blend's volatility exceeded the normal standard set in the Clean Air Act Amendments of 1990.²⁰⁴ Section 211(h) of the amendments provided an "ethanol waiver" allowing the blend to be sold in the "high ozone season" in urban areas, but the law did not include any waiver for ethanol in setting the requirements for reformulated gasoline in section 211(k).²⁰⁵ The reg-neg agreement did not specifically include the waiver, either, but it did contain an ambiguous provision that might be read to allow the ethanol blends.²⁰⁶ The EPA did not think that it had legal authority to include an ethanol waiver in the RFG program, however, and the industry was hit hard when the proposed rule did not contain that waiver.²⁰⁷

Over the howls of the other parties to the agreement, ethanol broke its promise not to lobby outside the reg-neg and raced to Congress and the White House for help.²⁰⁸ The industry secured a non-binding "sense of the Senate" amendment to an appropriation bill that called the proposed rule

200. *Id.* at 123-24.

201. *Id.* at 130-31.

202. SEGAL, *supra* note 189.

203. *Id.*

204. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified in scattered sections of 29 U.S.C. & 42 U.S.C.).

205. SEGAL, *supra* note 189.

206. *Id.*

207. *Id.*

208. *Id.*; WEBER, PLURALISM, *supra* note 3, at 135-37.

illegal.²⁰⁹ It appealed to the White House, and the ethanol waiver became an issue in the 1992 presidential campaign.²¹⁰ In October 1992, President Bush announced that he would grant the ethanol waiver, upsetting the reg-neg and breaking the administration's commitment to the process.²¹¹ While EPA officials argued that Bush's proposed waiver would have to go through normal rulemaking procedures,²¹² Clinton simultaneously dismissed the Bush decision as a campaign ploy and promised the corn growers support for ethanol in a Clinton presidency (though he did not promise the ethanol waiver).²¹³ Neither campaign could easily ignore the pleas of ethanol interests given the political importance of the corn-growing states.

So the conflict over RFG quickly spread beyond the confines of the negotiating room. In late 1993, the Clinton administration reversed Bush's decision on the ethanol waiver and published a final rule in keeping with the original negotiated agreement.²¹⁴ But along with that decision the administration announced a program to appease ethanol interests that threatened the reg-neg: the EPA adopted a rule requiring that at least 30 percent of the gasoline sold in cities with the worst air quality contain additives from renewable sources, a boon to ethanol.²¹⁵ Oil industry groups challenged the 30-percent rule in the courts and succeeded in blocking it.²¹⁶ Importantly, the oil industry did not charge that EPA's sop to ethanol had violated the reg-neg.²¹⁷ Rather, industry attorneys convinced their clients that the reg-neg was an "unenforceable 'gentlemen's agreement'" rather than a legal contract, despite the parties' commitments to the pre-negotiation protocols.²¹⁸ Ethanol was dealt a blow and the oil industry won an important victory.²¹⁹

209. SEGAL, *supra* note 189.

210. *Id.*; Charles Babcock, *Bush's Sidestep on Ethanol Is Fueling Dispute*, WASH. POST, Sept. 28, 1992, at A6; Keith Schneider, *Bush Offers Plan for Wider Use of Ethanol in Fuel*, N.Y. TIMES, Oct. 2, 1992, at A15.

211. WEBER, PLURALISM, *supra* note 3, at 135-36; DAVID GUSHEE, ALTERNATIVE TRANSPORTATION FUELS AND CLEAN GASOLINE: BACKGROUND AND REGULATORY ISSUES (Cong. Res. Serv., CRS Rep. IB91008, 1996), <http://ncseonline.org/nle/crsreports/air/air-6.cfm>; Schneider, *supra* note 210.

212. WEBER, PLURALISM, *supra* note 3, at 136.

213. SEGAL, *supra* note 189.

214. WEBER, PLURALISM, *supra* note 3, at 136.

215. *Id.*; Siegler, *supra* note 189, at 1433-34.

216. Siegler, *supra* note 189, at 1433-34; *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1115 (D.C. Cir. 1995).

217. Siegler, *supra* note 189, at 1434.

218. *Id.*

219. *Id.*

Yet the actions of the White House and the EPA raised questions about the reg-neg process as a whole, even for the winners. American Petroleum Institute (API) attorney Ellen Siegler wrote,

[O]ne of the most important benefits API sought in the fuels reg-neg was a degree of certainty that the informal agreement would be implemented without major changes sufficient to allow API members to plan to meet Clean Air Act fuels requirements until at least the year 2000. At the conclusion of the reg-neg, API believed it had achieved this objective. The events that occurred after the completion of the reg-neg – the NOx reduction requirements and the ethanol mandate, including the ensuing litigation over the ethanol mandate and the petition for reconsideration regarding the NOx requirement – taught API that this benefit can be taken away by an agency for political or other reasons.... The experience of the fuels reg-neg, in short, left API with the view that the costs of a reg neg can far outweigh its benefits and that the federal government can too easily find ways to walk away from a deal.²²⁰

In this area, reg-neg delivered on some of its promises. Under difficult circumstances, participants developed a workable solution, on time, that satisfied most of the parties. The agreement held against powerful political pressures as two presidential administrations and important legislators sought ways to appease ethanol. Yet the case also highlights the limitations on reg-neg procedures and the difficulties of establishing a policy equilibrium in this field. After ethanol and the Bush administration broke the agreement to support the negotiated consensus, the Clinton administration tried to find a middle ground but also ended up appeasing ethanol with policies inconsistent with the reg-neg. This dispute and several others landed in the courts, an outcome reg-neg is designed to avoid.²²¹ The agreement held, but the collapse of the pre-negotiation protocols raised doubts about the approach, as evidenced by the comments from the oil industry attorney quoted above. These deals are embedded in swirling, contentious politics marked by many venues in which they might be undone; the politics of RFG could not be contained by the reg-neg.

And of course ethanol politics rolled on, with the industry probing various points of access to the policymaking process and seeking to attach

220. *Id.* at 1435–36.

221. Cary Coglianese noted, “[I]n terms of avoiding litigation and reducing conflict, the reformulated gasoline rule has turned out to be anything but successful.” Coglianese, *supra* note 137, at 1290. Groups representing the oil industry, the automobile industry, the renewable fuels industry, and the tank truck industry challenged the rule in court, and the American Petroleum Institute attacked the rule administratively. *Id.* at 1290–92.

its ambitions for corn-based fuel additives to the tax code, farm bills, and other legislation.²²² The RFG program was challenged on environmental and public health grounds, in part because the oil industry's additive, a petroleum-based product called Methyl tertiary-butyl ether (MTBE), has been linked to cancer as it has seeped into local water supplies.²²³ Interestingly, Agriculture Secretary Dan Glickman spoke at the press conference at which EPA Administrator Carol Browner announced a plan to ban MTBE and increase the use of corn-based additives in its place, a proposal that drew criticism from oil interests and environmentalists skeptical about the environmental benefits of ethanol.²²⁴ California banned the use of MTBE in 1994 and fought hard for an exemption from the use of ethanol.²²⁵ Meanwhile, in mid-2001 Bush administration officials raised the possibility of abandoning the oxygenated fuels program mandated by the Clean Air Act Amendments of 1990 altogether.²²⁶ The Energy Policy Act of 2005 achieved this goal, abandoning the requirement that reformulated gasoline have two percent oxygen content by weight, and embracing a "renewable fuel standard" requiring increasing production of fuel from renewable sources between 2006 and 2012, and mandating that fuel from renewables grow at a rate equal to or greater than gasoline production after 2012.²²⁷

D. Down the "Alternative Path" to Common Sense and Project XL

As was noted above, the Clinton administration endorsed negotiated rulemaking but also forged beyond it, seeking to develop models of a more collaborative, flexible regulatory system.²²⁸ Unlike reg-neg,

222. Gushee, *supra* note 211; Gary Lee, *EPA Backs Ethanol for Fuel*, WASH. POST, July 1, 1994, at A1; Cindy Skrzycki, *EPA Finds Rewriting a Rule Is No Barrel of Laughs*, WASH. POST, May 12, 1995, at F1; David E. Rosenbaum, *Lobbying Salvages a Subsidy for Ethanol*, N.Y. TIMES, June 22, 1997, at A17.

223. MEYER ET AL., *supra* note 189; *Oil Companies Are Sued over Use of Additive*, N.Y. TIMES, Aug. 9, 1998, at A21; David Stout, *EPA Urges Substitution of an Additive to Gasoline*, N.Y. TIMES, Mar. 21, 2000, at A20.

224. Rick Weiss, *EPA Seeks to End Use of Additive in Gasoline*, WASH. POST, Mar. 21, 2000, at A1.

225. Dale Kasler, *EPA to State: Ethanol Rule Stands*, SACRAMENTO BEE, June 3, 2005; Katharine Seelye, *Bush to Insist on Ethanol Use in California*, N.Y. TIMES, June 12, 2001, at A24.

226. *Washington in Brief*, WASH. POST, June 22, 2001, at A6.

227. James A. Duffield & Keith Collins, *Evolution of Renewable Energy Policy*, 21 CHOICES, 1st Q. 2006, at 9, 12. See also Justin Blum, *Congress Could Send Bush Energy Bill Today*, WASH. POST, July 29, 2005, at A4.

228. CLAUDIA COPELAND, REINVENTING THE ENVIRONMENTAL PROTECTION AGENCY AND THE EPA'S WATER PROGRAMS (Cong. Res. Serv., CRS Rep. 96-283 ENR, 1996), <http://www.ncseonline.org/NLE/CRSreports/water/h2o-20.cfm>; JAMES E. MCCARTHY, VOLUNTARY PROGRAMS TO REDUCE POLLUTION (Cong. Res. Serv., CRS Rep. 95-817, 1995), <http://www.ncseonline.org/Nle/crsreports/pollution/plgen-1.cfm>.

though, the Clinton reinvention efforts were not legitimized by statutes, yet the Clinton EPA sought to reconstruct regulatory policy making anyway. Seeking ways around the existing regulatory structure, reinvention efforts moved a long way down the collaborative path, beyond areas of the map charted by the Congress.

The Common Sense Initiative (CSI), launched in 1994, and Project XL (for Excellence in Leadership), launched in 1995, were major elements of the reinvention program. CSI, described by EPA Administrator Carol Browner as "probably the biggest new direction in environmental protection since the founding of the EPA," embraced a sector-level approach to regulatory negotiation and improvement.²²⁹ Project XL, called "one of the most ambitious and potentially consequential U.S. experiments seeking common ground in environmental policymaking," focused largely on controlling emissions at the level of individual plants.²³⁰

CSI promised "cleaner, cheaper, smarter" regulation and legislative proposals for improving environmental policy making.²³¹ CSI would enhance environmental protection and lower compliance costs by addressing problems industry-by-industry rather than by focusing on individual pollutants.²³² The EPA created a CSI Council and six industrial subcommittees: auto manufacturing, computers and electronics, iron and steel, metal finishing, oil refining, and printing.²³³ These committees were asked to seek ways to improve environmental protection while reducing compliance costs, develop projects on pollution prevention, streamline permitting and reporting requirements, encourage superior performance and the development of new technologies, and ensure enforcement of chronic violators.²³⁴ Browner said that CSI would "take environmental

229. Cary Coglianese & Laurie K. Allen, *Building Sector-Based Consensus: A Review of the EPA's Common Sense Initiative 2* (John F. Kennedy School of Gov't Faculty Research Working Paper No. RWP03-037, 2003), <http://ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP03-037> (citing Gary Lee, *EPA Chief Plans Major "New Direction,"* WASH. POST, July 20, 1994, at A9).

230. See generally ALFRED A. MARCUS ET AL., *REINVENTING ENVIRONMENTAL REGULATION: LESSONS FROM PROJECT XL 2* (2002). See also Steinzor, *supra* note 8, at 122-40.

231. KERR, GREINER, ANDERSEN, & APRIL, INC., *ANALYSIS AND EVALUATION OF THE EPA'S COMMON SENSE INITIATIVE*, at i (1999), http://www.epa.gov/sectors/pdf/pubs_finalcsi.pdf. See generally U.S. ENVTL. PROT. AGENCY, EPA100-R-980911, *THE COMMON SENSE INITIATIVE: LESSONS LEARNED ABOUT PROTECTING THE ENVIRONMENT IN COMMON SENSE, COST EFFECTIVE WAYS* (1998); U.S. GEN. ACCOUNTING OFF., GAO/RCED-97-164, *REGULATORY REINVENTION: EPA'S COMMON SENSE INITIATIVE NEEDS AN IMPROVED OPERATING FRAMEWORK AND PROGRESS MEASURES* (1997); Coglianese & Allen, *supra* note 229.

232. U.S. ENVTL. PROT. AGENCY, *supra* note 231, at 4.

233. Coglianese & Allen, *supra* note 229, at 3-4; U.S. ENVTL. PROT. AGENCY, *supra* note 231, at 7-9; U.S. GEN. ACCOUNTING OFF., *supra* note 231, at 16.

234. Coglianese & Allen, *supra* note 229, at 2-3; U.S. GEN. ACCOUNTING OFF., *supra* note 231, at 7-9.

protection beyond the command-and-control, pollutant-by-pollutant approach...[by] developing more integrated, comprehensive strategies for protecting our air, our water, and our land."²³⁵ In assessing CSI, Browner claimed that it "promoted unprecedented levels of cooperation among stakeholders, those most affected by environmental decisions...In this manner, we avoided the old adversarial approach that produced gridlock in the past."²³⁶

Unfortunately, independent assessments show that CSI had little success. A 1997 GAO report noted that in three years the project generated only three formal recommendations to the EPA, none of them major.²³⁷ The report criticized the EPA for focusing on CSI's apparent success in generating activities like stakeholder meetings while giving little attention to its ineffectiveness in generating substantive improvements to regulation.²³⁸ Some of the subcommittees were more successful than others, but CSI participants interviewed for one program assessment reported that they "gradually came to believe that the Initiative would not be the vehicle for gaining far-reaching change to EPA's rules and regulations."²³⁹ For example, Coglianesse and Allen concluded that "the tangible results (of CSI) have been quite modest," noting that only five of roughly 30 subcommittee recommendations had led to changes to EPA rules.²⁴⁰ Few of the projects produced much in the way of substantive policy change or environmental improvements; most led to the generation of some informational and educational materials.²⁴¹ Although CSI was eventually terminated, some projects continued under different auspices and the George W. Bush EPA has pursued a "Sector Strategies Program" that bears some resemblance to CSI.²⁴² The sector-level approach to negotiating regulations is sensible and it is hard to imagine that the idea will ever be completely abandoned. Yet CSI's problems offer a cautionary note.

235. U.S. ENVTL. PROT. AGENCY, *supra* note 231, at 4 (prefatory remarks by EPA Administrator Carol Browner).

236. *Id.* at 3.

237. U.S. GEN. ACCOUNTING OFF., *supra* note 231, at 6-7.

238. *Id.* at 27-28.

239. KERR, GREINER, ANDERSEN, & APRIL, INC., *supra* note 231, at ii. *See also* MARTIN R. LEE, CONG. RES. SERV., THE ENVIRONMENTAL PROTECTION AGENCY'S FY 2003 BUDGET 6 (Cong. Res. Serv., CRS Rep. IB10101, updated June 16, 2003), available at <http://openocrs.cdt.org/document/IB10101>.

240. Coglianesse & Allen, *supra* note 229, at 2. *See also* U.S. GEN. ACCOUNTING OFF., *supra* note 231, at 5-6.

241. Coglianesse & Allen, *supra* note 229, at 9-11.

242. U.S. ENVTL. PROT. AGENCY, SECTOR STRATEGIES PERFORMANCE REPORT (2004), <http://www.epa.gov/sectors/pdf/2004/performancebw.pdf>.

Like CSI, Project XL, rooted in the Aspen Institute's discussion of the "alternative path,"²⁴³ was also ambitious. Administrator Browner said that XL would be "where we will find the next generation of environmental improvement, the next generation of environmental technology."²⁴⁴ The project promised flexibility, a better fit between regulatory demands and the needs of specific firms, and ongoing communication between regulated firms, regulators, and members of the public interested in clean plant operations.²⁴⁵ Movement down the collaborative path had finally rolled past the negotiation of general rules and sector-specific plans to the gates of individual firms, where government officials, business representatives, environmentalists, and others might find common ground on "cleaner, cheaper, smarter" rules for governing plant-level operations.

Project XL encouraged site-specific pollution control projects as alternatives to existing command-and-control requirements.²⁴⁶ For example, if a new approach promised to deliver superior environmental performance, the EPA would waive constraining regulatory requirements.²⁴⁷ Companies would submit proposals for projects to the EPA, which would evaluate them using several criteria, including the promise of superior environmental performance, cost savings and efficiency gains, the level of support from parties with stakes in the project, the existence of progress measures, the promise that the program would test new ideas that might eventually inform other EPA programs, and effects on workplace safety and environmental justice.²⁴⁸ Proposals would identify stakeholders, and the EPA could comment on the list and even reject a proposal if the list was inadequate, but it was up to the regulated firm to keep interested parties involved in negotiations. The final project agreement would reflect a consensus of the stakeholders.²⁴⁹ Bush EPA Administrator Christine Todd Whitman, who would oversee the end of XL, described it as a model of how regulators should work by building partnerships with stakeholders,

243. MARCUS ET AL., *supra* note 230, at 17.

244. Dennis D. Hirsch, *Bill and Al's XL-ent Adventure: An Analysis of the EPA's Legal Authority to Implement the Clinton Administration's Project XL*, 1998 U. ILL. L. REV. 129, 132 (quoting Browner) (internal quote marks omitted).

245. See generally *id.* at 136-46; MARCUS ET AL., *supra* note 230, at 1-6.

246. For general overviews of the program, see MARCUS ET AL., *supra* note 230, at 1-2, 14-18; Hirsch, *supra* note 244, at 136-46; U.S. Envtl. Prot. Agency, *What Is Project XL?*, <http://www.epa.gov/projectxl/file2.htm> (last visited Jan. 31, 2007); Steinzor, *supra* note 8, at 122-42.

247. Steinzor, *supra* note 8, at 122-23; MARCUS ET AL., *supra* note 230, at 17-18; Lisa C. Lund, *Project XL: Good for the Environment, Good for Business, Good for Communities*, 30 ENVTL. L. REP. 10,144-47 (2000).

248. U.S. Envtl. Prot. Agency, *supra* note 246.

249. Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 WM. & MARY L. REV. 411, 419 (2000).

focusing on results, and moving away from conventional command and control approaches to more cooperative partnerships.²⁵⁰

Project XL had some success, achieving about 40 final project agreements with firms and state pollution control agencies.²⁵¹ The idea that businesses should be free to seek the most effective means of achieving environmental standards set by regulators remains powerful, and few would challenge the notion that it is important to bore down to the level of individual plants to achieve flexible, smart rules. Yet, like the experience with CSI, the overall performance of the program disappointed most observers and many participants.²⁵² Environmentalists complained that they were marginalized in technical debates. Businesses complained about the vague standard for the “superior environmental performance” they would have to deliver in return for regulatory flexibility, and both firms and state agencies chafed against the EPA’s caution about stretching existing statutes and rules.²⁵³ The program suffered from a mismatch between the initial promise and what EPA leaders thought they could deliver. Clinton’s open invitation to businesses to apply for exemptions from regulatory requirements generated requests for broad waivers and big changes to policy. The EPA balked because it lacked clear legal authority to make these changes, and negotiations dragged on.²⁵⁴ Despite the EPA’s efforts to improve Project XL while it was in progress and the creation of an Office of Reinvention to oversee XL and other reform initiatives, the project continued to disappoint.²⁵⁵ On average, agreements took more than 20 months to negotiate, environmentalists decried XL projects as industry-driven, and businesses thought the whole process too slow and saw the EPA as unnecessarily rigid.²⁵⁶

What common problems plagued these collaborative experiments? First, there was the problem of “policy against law.” Both CSI and XL were plagued by uncertainty about whether the EPA had the authority to grant

250. MARCUS ET AL., *supra* note 230, at 2.

251. Env’tl. Prot. Agency, Project XL, Implementation and Evaluation, <http://www.epa.gov/projectxl/implemen.htm> (last visited Apr. 20, 2007) (listing projects in implementation phase).

252. U.S. GEN. ACCOUNTING OFF., GAO-02-268, ENVIRONMENTAL PROTECTION: OVERCOMING OBSTACLES TO INNOVATIVE STATE REGULATORY PROGRAMS 5–8 (2002); *Water Quality Trading – An Innovative Approach to Achieving Water Quality Goals: Hearing Before the Subcomm. on Water Resources and the Env’t of the H. Comm. on Transp. and Infrastructure*, 107th Cong. (2002) (testimony by Rena Steinzor, Ctr. for Progressive Reg.), available at <http://www.progressiveregulation.org/commentary/steinzor.pdf> [hereinafter Steinzor testimony]. See generally MARCUS ET AL., *supra* note 230, at 159–77.

253. Steinzor, *supra* note 8, at 123; MARCUS ET AL., *supra* note 230, at 149–53, 179–89, 205–10.

254. U.S. GEN. ACCOUNTING OFF., *supra* note 252; Steinzor testimony, *supra* note 252.

255. U.S. GEN. ACCOUNTING OFF., *supra* note 252; Steinzor testimony, *supra* note 252.

256. MARCUS ET AL., *supra* note 230, at 181.

the waivers of statutory and regulatory requirements anticipated by the programs.²⁵⁷ The regulatory reform initiatives were undertaken in part because Congress had been unable to fix many problems in the regulatory system due to gridlock. Yet the progress of those initiatives was limited by the very gridlock that motivated them. Alfred Marcus and colleagues studied the failure of an XL project at the Hutchinson, Minnesota 3M facility and found that uncertainty about the legality of the project contributed to its collapse.²⁵⁸ They wrote,

[A] troubling issue was whether Project XL-Minnesota could be carried out without violating existing environmental laws and requirements. The project by no means was operating with a clean slate, because it had to contend with the massive structure of environmental laws and regulations created since the birth of the EPA in 1970. If the statutory foundation for the pilot was insufficient, how could EPA proceed? The agency's view was that there was not much leeway in the law.... Without additional legal authority, it was unclear if the agency could make the changes that XL required.... It was unclear, for instance, if EPA had the authority to grant 3M facility-wide air pollutant emissions standards, waiver of individual emissions source permitting requirements, and reduced reporting of compliance. In comparison with congressional enactments, the Clinton-Gore declaration of XL policy did not have the legal standing to permit exceptions to the law.²⁵⁹

As Charles Caldart and Nicholas Ashford observed, "A fundamental problem with Project XL is that it envisions a kind of regulatory flexibility that has not been authorized by Congress."²⁶⁰ The lack of congressional approval led the EPA to behave cautiously and firms—fearing being sued by citizen groups—to approach the expensive process of negotiating a consensus warily.²⁶¹ The EPA expected hundreds of applications from firms to participate in the program from which it would select 55 for experiments. By the end of 1996, the EPA had received

257. *Id.* at 172-73.

258. *Id.* at 53.

259. *Id.* See also Carol Wiessner, *Regulatory Innovation: Lessons Learned from the EPA's Project XL and Three Minnesota Project XL Pilots*, 32 ENVTL. L. REP. 10,075, 10,077-92 (2002) (discussing the Minnesota projects).

260. Charles C. Caldart & Nicholas A. Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Safety and Health Policy*, 23 HARV. ENVTL. L. REV. 141, 183 (1999).

261. On the legal problems confronting Project XL, see Hirsch, *supra* note 244; Bradford C. Mank, *The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Reauthorization*, 25 ECOLOGY L.Q. 1, 28 (1998); Steinzor, *supra* note 8.

only 45 proposals, in part because it was unclear to businesses what the purchase would be given statutory constraints.²⁶²

The same questions plagued the Common Sense Initiative, which focused on overcoming a fundamental problem in the structure of the American green state, its media-specific focus, through sector-level deliberation.²⁶³ Unfortunately, the major environmental statutes limit the EPA's discretion to waive, trade, and bargain across media.²⁶⁴ However rational, well intended, and justified the effort, it is difficult to turn environmental policy making into the "grand bazaar."²⁶⁵ There were sharp limits to what the EPA could achieve through this program because the very statutes it was designed to amend through consensus bargaining cast a long shadow over those negotiations.²⁶⁶ A September 1996 industry report on the reinvention program stated, "there is no short cut, no way around the difficult task of trying to legislate a better system."²⁶⁷ Yet, the legislative pathway appears to be blocked. In the 1990s, Republican legislators had little interest in giving Clinton a legislative victory on environmental questions, and environmental advocates were terrified of opening up the environmental laws to greater flexibility in the conservative climate of the 104th and 105th congresses. Experiments like this appeared to be the only path to a better system for policy makers.

These reinvention experiments were also hampered by the commitment to consensus.²⁶⁸ There are good reasons to pursue consensus. If environmentalists and community representatives participate, consensus decision rules may mitigate concerns that collaborative processes will be dominated by industry. Further, consensus can serve as an alternative source of legitimacy for decisions that may be at odds with the existing legal framework. Given the vulnerability of these deals to litigation, getting agreement from the interested parties is, if it can be achieved, quite sensible. The consensus approach is also appealing on its face, squaring nicely with the assumption that environmental protection goals are consensual and that modern policy making needs to focus on sensible means for achieving ends that we all agree upon. Finally, consensus processes may yield narrower yet

262. David W. Case, *The EPA's Environmental Stewardship Initiative: Attempting to Revitalize a Floundering Regulatory Reform Agenda*, 50 EMORY L.J. 1, 44 (2001).

263. Coglianese & Allen, *supra* note 229, at 1-2.

264. Mank, *supra* note 261, at 38-42; Coglianese & Allen, *supra* note 229, at 1.

265. This term is from WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE?: THE BETRAYAL OF AMERICAN DEMOCRACY* 105-22 (1992).

266. Coglianese & Allen, *supra* note 229, at 12.

267. GEN. ACCOUNTING OFF., GAO/RCED-97-155, ENVIRONMENTAL PROTECTION: CHALLENGES FACING EPA'S EFFORTS TO REINVENT ENVIRONMENTAL REGULATION 10 (1997) (quoting "a September 1996 industry report") (internal quotation marks omitted).

268. Coglianese & Allen, *supra* note 229, at 12-13.

important benefits: better informed policy, less litigation, and improved compliance.

Yet gaining consensus is cumbersome, and there is little evidence that consensus rules reduce conflict and litigation or yield superior policy choices.²⁶⁹ In fact, Coglianese and Allen have found that consensus approaches create new issues around which conflict can occur (Who will participate? What does the agreement we struck mean? Does the policy eventually adopted reflect the agreement?), that they do not reduce litigation, and that consensus-based decision making does not necessarily lead to better choices.²⁷⁰ In fact, he argues, consensus groups tend to focus on areas where there is widespread agreement, giving less energy and attention to more contentious (and perhaps more important) questions.²⁷¹ Thus, he found that most CSI projects produced research and education projects, shying away from more difficult issues that would provoke conflicts of value and interest.²⁷² Environmentalists' complaints about their lack of influence in a Project XL project at an Intel facility in Arizona provoked the following outburst from the company's government affairs director: "People have misconstrued what the stakeholder process is all about. Citizens are going to make decisions...that are binding on Fortune 500 companies?"²⁷³

This comment reflects an important issue at stake in these consensus efforts and the larger collaborative enterprise of which they are a part. The collaboration project forces agency officials, firms, and citizen groups to seek the boundaries of public authority on a case-by-case basis. Where should the line be drawn between public authority and private choices? Can the objections of citizen groups force Fortune 500 companies to modify their production processes? Can the EPA waive requirements here to achieve some compensating benefit there? Once collaborative efforts get past agreements to produce educational materials and confront harder choices, participants must tackle fundamental questions about the scope of public authority at individual plants, in particular regions, or for specific economic sectors. Widespread agreement that we can do better than the existing system will not help participants mark the boundaries of public authority case-by-case, time and again, as these collaborations spread across

269. *Id.*

270. *Id.* at 3; Cary Coglianese, *Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking*, in *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 69 (Rosemary O'Leary & Lisa B. Bingham eds., 2003).

271. Coglianese, *supra* note 270, at 12-13.

272. *Id.*

273. Cindy Skrzycki, *Critics See a Playground for Polluters in EPA's XL Plan*, WASH. POST, Jan. 24, 1997, at D1. See also John H. Cushman, *EPA and Arizona Factory Agree on Innovative Regulatory Plan*, N.Y. TIMES, Nov. 20, 1996, at A18.

the environmental policy landscape. They are unlikely to prove to be a solution to adversarialism, but instead the source of a different *kind* of adversarialism – perhaps more manageable, perhaps not – in this field.

E. Reconstructing Environmental Regulation

The failings of these reinvention efforts have not curbed enthusiasm for reform, with advocates seeking lessons that might improve the next generation of next generation ideas.²⁷⁴ The reform process will be incremental, marked by setbacks and learning that might, advocates hope, inform the development of a new regulatory pathway. Some key conditions for significant changes in the basic structure of regulatory policy seem to be in place. We have seen economic change generate new pressures on U.S. firms; demands from businesses, academics, environmentalists, and others for more efficient and effective policies; and growing interest in new policy tools (e.g., economic incentives) and new administrative doctrines emphasizing collaboration and “command and covenant” thinking.²⁷⁵ These have produced some major policy changes (e.g., the Clean Air Act Amendments’ SO₂ emissions trading system) and a raft of experiments in rulemaking.²⁷⁶

Yet despite decades of criticism and rising pressures for reform, the basic structures of the green state created in the 1970s to deal with pollution problems remain firmly in place. Pollution control is a basic commitment of the American state embedded in legislation, the institutional structure and organizational commitments of the EPA, and public expectations expressed by environmental groups. The regulatory reforms anticipated by next generation reformers amount to efforts at institutional reconstruction, confronting all of the difficulties involved in a reconstructive project.²⁷⁷ It is not surprising that the collaborative experiments we have seen thus far appear to have made only limited headway against the “tenacious organization of power” that emerged out of the golden era of environmental legislation.²⁷⁸

274. For example, even while showing Project XL’s problems in Minnesota, Marcus and colleagues conclude that these experiments should continue as “opportunities for learning” how to improve regulatory policy making. See generally MARCUS ET AL., *supra* note 230, at 179–96.

275. E. Donald Elliot, *Toward Ecological Law and Policy*, in THINKING ECOLOGICALLY, *supra* note 3, at 170, 183–85.

276. *Id.* at 170–86; EISNER, *supra* note 5, at 4–10; Robert Stavins & Bradley Whitehead, *Market-Based Environmental Policies*, in THINKING ECOLOGICALLY, *supra* note 3, at 105.

277. See generally STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* (1982).

278. *Id.* at 9.

First and foremost, the laws set basic limits on the changes that can be achieved in environmental policy, and, despite all of the apparent problems with the statutes, they have proven difficult to change.²⁷⁹ The movement toward collaboration is driven by frustration with the inflexibility of existing statutes and rules, but progress down this path is hampered by uncertainty about the amount of flexibility that negotiators have to bend rules and bargain across media. The familiar critiques of top-down, command-and-control regulation, and the media-specific focus of the EPA lock in on flaws at the very core of the green state, embedded in its statutes. Some important changes can be achieved at the margins, but it will be difficult to address the basic inefficiencies of the green state, and the fundamental criticisms of scholars and practitioners, without new laws. And again, given the current configuration of political forces and the structure of American political institutions, statutory change is at best unlikely.

Arguably, experiments like CSI and Project XL can set the stage for new legislation, just as early reg-negs cleared the way for the Negotiated Rulemaking Act. Yet the political context has changed considerably since 1990, and the focus of CSI and XL on substantive policy changes (rather than amendments to the rulemaking process subject to correction through normal administrative procedures) makes building on the Clinton experiments more difficult. Even if we can assume a receptive political environment, there is still a Catch-22 here. Most of these experiments have made limited progress, in part because of uncertainty about the legality of the bargains to which environmentalists, firms, and the EPA can agree. This lack of progress, and the accompanying frustration surrounding the projects, weakens the case that experiments like Project XL and CSI can serve as models for a new approach to regulation and undermines the argument that they are harbingers of new laws and new cultures of regulation. We cannot change the statutes because we cannot demonstrate the full benefits of flexibility, and we cannot show the benefits of flexibility because we cannot change the statutes. At some point it will be necessary to build the new ideology of collaboration and consensus into the laws. Again, given the current structure of political forces, the prospects of this seem dim at best.

Furthermore, the failure to embed these projects in statutes leaves them vulnerable to election results, interfering with the process of institutionalization. Participants in debates over environmental policy are aware that Republican and Democratic administrations will carry different priorities. Firms and environmental groups involved in negotiations over

279. Hirsch, *supra* note 244, at 129, 131-35; Mank, *supra* note 261, at 42-43; Steinzor, *supra* note 8, at 178.

regulations have to look beyond the discussions at hand in hopes that the voters will deliver them a friendlier EPA and White House next time around. Why accept a deal now when the EPA might be amenable to one that you would like much better one or two years hence? Can we trust the EPA to hold to this commitment, given that it may soon have different political masters? Beyond this, political instability will slow the process of cultural change at the EPA. It will be difficult to keep up the pressures necessary to move the agency to embrace more flexible, collaborative processes to the extent that the commitment to collaboration (and different types of collaboration) depends on which party controls the White House.

Institutionalizing flexibility will be extraordinarily difficult in any case. In an early assessment of the Clinton reinvention project, Donald Kettl observed that the effort lacked an integrating force, any "glue" that might organize dozens of ongoing projects and hundreds of decisions being made across the government into a force for lasting change.²⁸⁰ Too many "large mandates supported by mushy thinking...fueled the sense of adhococracy...a sense...only increased by the frenzy of accompanying reform."²⁸¹ How will policy makers translate "a sense of adhococracy" into a coherent reform program? And how will the lawmaking process lay the foundation for a new and flexible green state? Terry Moe showed how interests struggling over the structure of the laws and agencies that would implement the new social regulation fought hard over the amount of flexibility the agencies would have, the role that courts and groups would play in overseeing implementation of those laws, and the impact of executive authority on regulatory policy making.²⁸² Moe showed that the outcomes were perverse, with victorious advocates of strong regulation favoring rigid rules that tied down "their" agencies because they feared that their opponents would someday regain the political advantage, and the "losers" seeking maximum flexibility, anticipating the day when they would be in a dominant position again.²⁸³ As policy makers turn to serious efforts to institutionalize flexibility, the difficulties of the "politics of bureaucratic structure" will surely reemerge.²⁸⁴

Advocates of the next generation of environmental policy making note that their agenda rests on a "firm foundation," a strong public consensus favoring pollution control and the conservation of public lands.²⁸⁵

280. KETTL, *supra* note 188, at 31.

281. *Id.*

282. Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267-329 (John E. Chubb & Paul E. Peterson eds., 1989).

283. *Id.*

284. *Id.*

285. See Daniel C. Esty & Marian R. Chertow, *Thinking Ecologically: An Introduction*, in *THINKING ECOLOGICALLY*, *supra* note 3, at 1, 1-13.

This is an important point, yet this public consensus is a weak reed upon which to rest ambitions to “reconfigure and reinvigorate the environmental policy debate in America.”²⁸⁶ This classic “permissive consensus” in public opinion predicts little about environmental politics or policy except that few politicians will risk proclaiming that they are anti-green. And it certainly has not prevented growing partisanship on environmental issues. The commitment to collaboration, if it is to transform the green state, will almost surely have to drive changes in statutes. Moreover, it will have to confront old questions about appropriate relationships between public authority and private interests in policy making.

Reformers in the 1960s and 1970s understood the pathologies of “interest group liberalism” and attacked the “cozy triangles” that marked much of regulatory politics. They advanced a new vision of the way that the boundaries of public authority should be marked and defended. Modern critics of command-and-control, top-down environmental regulation have offered persuasive arguments about the inefficiencies of the green state and the pathologies of command-and-control regulation. Advocates of collaborative approaches confront the challenge of establishing grounds—perhaps statutory grounds—for the legitimacy of their vision of a more flexible, negotiated green state.

V. COLLABORATIVE CONSERVATION: SEEKING COMMON GROUND ON PUBLIC LANDS MANAGEMENT

In the wake of intensifying conflict over public lands management in the West—on issues ranging from grazing to logging to recreation to water to wildlife—collaborative conservation initiatives throughout the region have risen.²⁸⁷ Collaborative conservation may be defined as efforts to bring opposing stakeholders together to work toward win-win policy outcomes. These efforts most typically center on bringing together commodity interests and environmental groups, though often recreation interests have a key role as well. Government officials play an ambiguous role in these collaborative efforts. Although they usually have a seat at the table, they must be careful due both to their roles as enforcers of federal laws and federal laws dealing with advisory boards.²⁸⁸ Nongovernmental stakeholders often seek to influence the government officials—in the areas of timber harvests, grazing, wilderness designation, and the like. These

286. *Id.*

287. See *ACROSS THE GREAT DIVIDE*, *supra* note 3; BRUNNER ET AL., *supra* note 3; WEBER, *SOCIETY*, *supra* note 3.

288. ROBERT B. KEITER, *KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS* 252 (2003).

efforts seek to integrate economic and environmental goals, and in most cases primarily involve local participants. That is, the stakeholders are mainly those who live and work in the area rather than national environmental groups or corporate executives from headquarters.²⁸⁹ These approaches have generated widespread scholarly, media, political, and foundation interest.²⁹⁰ Given the often informal and ephemeral nature of these collaborations, no one knows for sure how many groups exist; estimates range from the hundreds to the thousands.²⁹¹

Of course, collaborative conservation has both supporters and critics. Supporters of collaborative conservation have focused on descriptive terms such as decentralized, holistic, enhanced government performance, consensus, active citizen participation, and new governance arrangements. These supporters often argue that collaborative conservation will not only improve environmental policy making but will also help to revitalize democracy and community in these rural areas by involving local citizens in real governance.²⁹² Critics, including many national environmental groups, have focused on accountability, authority, expertise, and capture.²⁹³ These skeptics of collaborative conservation argue that the integrity of national political authority is at stake.²⁹⁴ Congress has passed a set of environmental laws that determine how federal public lands must be managed and allowing local groups — no matter how well-intentioned — to have a special role in interpreting these laws and managing these lands is a dangerous precedent.²⁹⁵

289. BRUNNER ET AL., *supra* note 3, at 7; WEBER, SOCIETY, *supra* note 3, at 4.

290. Recent significant works include ACROSS THE GREAT DIVIDE, *supra* note 3; BRUNNER ET AL., *supra* note 3; KEITER, *supra* note 288, at 219–72; TOMAS M. KOONTZ ET AL., COLLABORATIVE ENVIRONMENTAL MANAGEMENT: WHAT ROLES FOR GOVERNMENT? (2004); WEBER, SOCIETY, *supra* note 3; JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT (2000); Cassandra Moseley, *New Ideas, Old Institutions: Environment, Community, and State in the Pacific Northwest* (Dec. 1999) (Ph.D. dissertation, Yale University). Leading advocates for and sources of information on collaborative conservation in the media include *High Country News*, Northern Lights Institute and its journal *Chronicle of Community*, and the *Red Lodge Clearinghouse*.

291. BRUNNER ET AL., *supra* note 3, at 36; WEBER, SOCIETY, *supra* note 3, at xiii, 8.

292. See Philip Brick & Edward Weber, *Will Rain Follow the Plow? Unearthing a New Environmental Movement*, in ACROSS THE GREAT DIVIDE, *supra* note 3, at 15; Philip Brick, *Of Impostors, Optimists, and Kings: Finding a Political Niche for Collaborative Conservation*, in ACROSS THE GREAT DIVIDE, *supra* note 3, at 172.

293. See, e.g., George Cameron Coggins, *Of Californicators, Quislings, and Crazies: Some Perils of Devolved Collaboration*, in ACROSS THE GREAT DIVIDE, *supra* note 3, at 163.

294. *Id.* at 169–70; KEITER, *supra* note 288, at 305–06.

295. Among the variety of names this pathway goes by are collaborative conservation, community conservation, community-based conservation, cooperative ecosystem management, grassroots ecosystem management, watershed democracy, and the watershed movement. See WEBER, SOCIETY, *supra* note 3, at xiii, 3.

There has been a boom in writing on the collaborative conservation movement. Most of the work has focused on case studies of collaboration centered on public lands issues in the West. Ronald Brunner and coauthors argued that community-based initiatives can represent an innovative way to advance the common interest.²⁹⁶ This innovation is a response to the increasing gridlock and citizen disconnect in natural resources policy, a way around a system in which “participants of all kinds are trapped to a considerable extent in a complex structure of governance that institutionalizes conflict more than it facilitates the integration or balancing of different interests into consensus on policies that advance the common interest.”²⁹⁷ Brunner and coauthors examined the state of collaborative conservation by studying four cases – water management and the Upper Clark Fork Steering Committee in Montana, wolf recovery in the northern Rockies, bison management in the greater Yellowstone ecosystem, and timber management in the Sierra Nevada through the Quincy Library Group (QLG).²⁹⁸ The Upper Clark Fork case represented the clearest success for collaborative conservation; wolf and bison management could not, in any sense, be described as successes for collaborative conservation.²⁹⁹ The QLG, which has received the most attention of any collaborative conservation case, receives further discussion below.

Edward Weber produced another significant recent work on collaborative conservation. He argued that grassroots ecosystems management (GREM) is an exciting institutional innovation because “[i]n search of better governance *and* enhanced accountability to a broader array of interests, coalitions of the unlike...are creating and choosing alternative institutions for governing public lands and natural resources.”³⁰⁰ Case studies of the Applegate Partnership in Oregon, the Henry’s Fork Watershed Council in Idaho, and the Willapa Alliance in Washington confirmed numerous positive on-the-ground results in areas such as habitat protection, invasive species control, timber harvests, and stream flows, as well as finding that the groups exhibited a complex and holistic accountability.³⁰¹ Why did these groups form? According to Weber, “Participants in GREM criticize government as inaccessible, biased, inefficient, and ineffective. The perception is that existing participation processes are not fair because they are dominated by organized interests and tend to place too much emphasis on science and expertise and not

296. BRUNNER ET AL., *supra* note 3, at 7–8.

297. *Id.* at 29.

298. *See id.* at 48–200.

299. *Id.* at 66–87, 105–25, 140–58.

300. WEBER, SOCIETY, *supra* note 3, at 3.

301. *See id.* at 107–91.

enough on social/community impacts and needs.”³⁰² In response, “[a] number of citizens in the Applegate, Henry’s Fork, and Willapa areas accepted the challenge offered by reconciliation and the idea that if they could just get the institutions right, they would be better able to discover the common ground necessary for building and sustaining a new community.”³⁰³ Yet, since Weber completed his research, two of his case study groups have collapsed – the Willapa Alliance disbanded in 2000 after eight years (due to a drying up of foundation support) and the Applegate Partnership suspended its meetings two years later (due to the failure of some participants to follow group norms, making it very difficult to reach consensus).³⁰⁴

There is no doubt that collaborative conservation is part of a new next generation pathway based on negotiation and consensus, but how significant will it become? Does it represent the future of environmental politics as its most optimistic boosters claim? What of the numerous failures and the limited successes thus far? We turn now to an examination of two collaborative conservation initiatives, the first, the QLG, focused on achieving a particular policy outcome, and the second, the Quivira Coalition in New Mexico, focused on altering the process of grazing policy and management on public and private lands. After examining these two initiatives, we will return to offer a general analysis of the collaborative conservation pathway.

A. The Quincy Library Group: New Governance in the Old Labyrinth

Plumas County Supervisor Bill Coates, local environmentalist Michael Jackson, and Tom Nelson of the timber company Sierra Pacific founded the Quincy Library Group in December 1992.³⁰⁵ These individuals began meeting at the local library to see if they could find any common ground regarding the management of local national forests, policy that was currently frustrating environmentalists and the timber industry alike.³⁰⁶ The local environmental group Friends of the Plumas was frustrated with the Forest Service’s Plumas National Forest plan, adopted in the late 1980s.³⁰⁷ The group, with allies among the national environmental groups,

302. *Id.* at 52.

303. *Id.* at 61.

304. Personal communication with Kathleen Sayce, former botanist, Willapa Alliance (Apr. 19, 2005); see generally WEBER, SOCIETY, *supra* note 3, at 254.

305. BRUNNER ET AL., *supra* note 3, at 168.

306. *Id.* at 161–68; KEITER, *supra* note 288, at 274–76; Ed Marston, *The Quincy Library Group: A Divisive Attempt at Peace*, in ACROSS THE GREAT DIVIDE, *supra* note 3, at 79, 82–83.

307. BRUNNER ET AL., *supra* note 3, at 163–66.

unsuccessfully appealed the plan on water and wildlife grounds.³⁰⁸ Local timber interests were upset because timber sales from northern California national forests were declining, from 205,000,000 board feet in 1987 to 120,000,000 board feet in 1991, due to environmental group appeals and lawsuits.³⁰⁹ To the north, the spotted owl was having dramatic effects on timber harvesting.³¹⁰ A related local subspecies, the California spotted owl, and a potential Endangered Species Act listing cast a shadow over the northern Sierra Nevada.³¹¹ Coates, Jackson, and Nelson sought a way out of this mess. The QLG developed a Community Stability Proposal for the management of the Lassen, Plumas, and portions of the Tahoe National Forests in the summer of 1993.³¹² The plan proposed some timber harvesting, with a focus on fire and fuel reduction, as well as watershed restoration in order to enhance fisheries and watershed health generally.³¹³ Logging would avoid roadless areas, riparian areas, and scenic river corridors.³¹⁴

To the surprise of QLG, the Forest Service declined to accept the proposal.³¹⁵ The local forest supervisor and regional forester were uncomfortable with the lack of expert participation in developing the proposal, noting as well the need to work in the framework of existing procedural laws.³¹⁶ QLG was not to be denied; it took its case to Washington, securing a meeting with Forest Service Chief Jack Ward Thomas and Assistant Secretary of Agriculture Jim Lyons.³¹⁷ Lyons and the Clinton administration generally embraced the QLG proposal and instructed the Forest Service to implement the Community Stability Proposal.³¹⁸ On the ground, however, the local Forest Service officials did not embrace the proposal.³¹⁹ A version of the proposal was included as an alternative in the environmental impact statement (EIS) of the California

308. *Id.* at 165.

309. *Id.* at 166; KEITER, *supra* note 288, at 275.

310. George Hoberg, *The Emerging Triumph of Ecosystem Management: The Transformation of Federal Forest Policy*, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 55, 67-70 (Charles Davis ed., 2d ed. 2001) [hereinafter WESTERN PUBLIC LANDS].

311. BRUNNER ET AL., *supra* note 3, at 168; KEITER, *supra* note 288, at 275-76; Marston, *supra* note 306, at 83.

312. BRUNNER ET AL., *supra* note 3, at 168-69; KEITER, *supra* note 288, at 276-77; Marston, *supra* note 306, at 84.

313. BRUNNER ET AL., *supra* note 3, at 169; KEITER, *supra* note 288, at 277; Marston, *supra* note 306, at 84.

314. BRUNNER ET AL., *supra* note 3, at 169; KEITER, *supra* note 288, at 277; Marston, *supra* note 306, at 84.

315. BRUNNER ET AL., *supra* note 3, at 170; KEITER, *supra* note 288, at 278.

316. BRUNNER ET AL., *supra* note 3, at 170; Marston, *supra* note 306, at 85.

317. BRUNNER ET AL., *supra* note 3, at 170-71.

318. *Id.* at 171.

319. *Id.* at 172.

Spotted Owl report,³²⁰ but this process was sidetracked when the agency decided to undertake the Sierra Nevada Conservation Framework.³²¹ By 1996, three years after presenting its proposal to the Forest Service, QLG decided it had had enough of the agency's bureaucratic recalcitrance.³²²

QLG then went to Congress. Local Representative Wally Herger (R-CA) shepherded a bill through the House directing the Forest Service to implement the Community Stability Proposal as a pilot project.³²³ In July 1997, it passed 429 to 1.³²⁴ National environmental groups, however, opposed the bill; they claimed it violated existing procedures and they disagreed with the volume and location of the proposed logging.³²⁵ Environmentalist lobbying stalled the bill's movement in the Senate, where it remained ensnared in environmental politics for months.³²⁶ Even California's senators were caught up in the morass, with Senator Diane Feinstein (D) supporting the bill and Senator Barbara Boxer (D) opposing it.³²⁷ The bill eventually passed the Senate as a rider to an omnibus appropriations bill in October 1998.³²⁸ Despite passage of the Herger-Feinstein Quincy Library Group Forest Recovery Act,³²⁹ the QLG proposal became enmeshed in further policy problems. By the time the Forest Service completed the final EIS related to the Community Stability Proposal, the agency had to scale back timber cutting to reduce fire risk pursuant to the Sierra Nevada Conservation Framework, which covered 11 national forests in the mountain range.³³⁰ QLG (as well as other groups) appealed the Forest Service's decision, arguing that by reducing the amount of timber cutting allowed, the agency unraveled the collaborative core of the proposal. However, all appeals were rejected, and the agency began to implement this variant of the Community Stability Proposal in spring 2000, nearly seven years after it was developed by QLG.³³¹

Administrative changes continued, however. The Forest Service finalized the Sierra Nevada Framework in early 2001, further limiting harvesting.³³² By that time, the patience of QLG members had nearly come

320. *Id.*

321. *Id.*

322. *Id.* at 170-73; KEITER, *supra* note 288, at 277-78; Marston, *supra* note 306, at 85-86.

323. BRUNNER ET AL., *supra* note 3, at 173.

324. *Id.*

325. *Id.*; Marston, *supra* note 306, at 80, 85-86.

326. BRUNNER ET AL., *supra* note 3, at 173-74; Marston, *supra* note 306, at 85-86.

327. BRUNNER ET AL., *supra* note 3, at 173-74.

328. *Id.* at 174.

329. Herger-Feinstein Quincy Library Group Forest Recovery Act, Pub. L. No. 105-277, tit. IV, § 401, 112 Stat 2681-305 to 2681-310 (1998) (codified at 16 U.S.C. § 2104 (2000)).

330. BRUNNER ET AL., *supra* note 3, at 174-76; KEITER, *supra* note 288, at 281.

331. BRUNNER ET AL., *supra* note 3, at 175-76; KEITER, *supra* note 288, at 280.

332. BRUNNER ET AL., *supra* note 3, at 176; KEITER, *supra* note 288, at 280-81.

to an end. Working with the Forest Service was a “process with no end and no results,” according to QLG cofounder Coates.³³³ The Bush administration made additional changes to the Sierra plan, leading the QLG to file a lawsuit in March 2003 against the Forest Service for failure to implement the 1998 congressional act—not enough timber would be harvested and some of the proposed cutting would occur in roadless areas and would require new roads.³³⁴ The Forest Service responded by stating that it would implement the QLG Proposal, leading to a counter-lawsuit by environmental groups.³³⁵

While QLG might represent collaborative conservation success in developing the Community Stability Proposal, once it entered the labyrinth that is the green state, it met with frustration, and its activities can hardly be termed collaborative. Its first barrier was the multi-tiered Forest Service bureaucracy. QLG failed at the local and regional levels but seemed to achieve success at the national level, gaining the support of the Assistant Secretary of Agriculture.³³⁶ Nevertheless, with Forest Service Chief Thomas opposed to the QLG proposal, the agency could prevent implementation of the group’s plan by forcing it to conform to a welter of existing laws (most significantly the Endangered Species Act and the National Environmental Policy Act),³³⁷ the regional Sierra Nevada initiative,³³⁸ and funding shortfalls—all in the face of a congressional statute.³³⁹ On the legislative track, although its proposal sailed through the House, it quickly became caught in the congressional gridlock on environmental politics in the Senate. There, it could only escape through the stealth technique of appropriations politics. And finally, in the face of Forest Service actions under the Clinton and Bush administrations, QLG felt it had no alternative but to turn to the courts.³⁴⁰ Once there, it was joined by a number of mainstream environmental groups challenging the Forest Service’s plan from a different perspective.³⁴¹ In the end, what began as a new way to make policy, finding common ground among environmentalists and timber interests, wound its way through the green state labyrinth for several years

333. Jane Braxton Little, *Quincy Collaboration Heads to Court*, HIGH COUNTRY NEWS, Dec. 17, 2001, available at http://www.hcn.org/servlets/hcn.Article?article_id=10922.

334. *Id.*

335. *Id.*; BRUNNER ET AL., *supra* note 3, at 173–200; KEITER, *supra* note 288, at 278–81; Jane Braxton Little, *Motion Filed to Defend Forest Plan*, SACRAMENTO BEE, Apr. 25, 2003, at B2; Marston, *supra* note 306, at 86–88.

336. BRUNNER ET AL., *supra* note 3, at 170–71.

337. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2000); National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (2000).

338. KEITER, *supra* note 288, at 280–81.

339. *Id.* at 281–99; Marston, *supra* note 306, at 85–88.

340. Little, *supra* note 333.

341. Little, *supra* note 335.

before emerging at a familiar place in environmental policy – the courts. As this case demonstrates, it is difficult to escape the green state to achieve policy goals, even when many parties agree that it is desirable. We now turn to another type of collaborative conservation, one focused more on process than particular policy proposals.³⁴²

B. The Quivira Coalition: Defining the “Radical Center” in Public Lands Management

The management of grazing on the public lands was of little concern to environmental groups until the 1970s. Since then, this policy issue has become one of the most contentious in the environmental arena. A number of environmental groups have called for an end to public lands grazing.³⁴³ Some groups have focused on using existing laws (such as the ESA) and the courts to reduce livestock numbers on public lands.³⁴⁴ More recently, environmentalists have proposed a voluntary program through which the federal government would buy out ranchers’ grazing permits and permanently retire grazing allotments.³⁴⁵ Legislation to create such a program was introduced in the House in 2003.³⁴⁶ Ranchers, facing declining economic returns, development pressures in many locations, and environmental group opposition, have responded strongly – building the wise use movement and the county supremacy movement, for example, as well as relying on powerful political connections in western states.³⁴⁷ Several ranchers have refused to recognize federal authority over public lands, resulting in long-running criminal cases in Arizona, Nevada, and New Mexico.³⁴⁸ In response to this increased polarization and high level of

342. KEITER, *supra* note 288, at 281–99; Marston, *supra* note 306, at 85, 88–90.

343. April Reese, *Grazing: Enviros Turning to ESA to Ban Cattle from Public Lands*, LAND LETTER, Jan. 2, 2003, available at <http://www.landletter.com/>.

344. *Id.*

345. April Reese, *The Big Buyout*, HIGH COUNTRY NEWS, Apr. 4, 2005, at 8–13, available at http://www.hcn.org/servlets/hcn.Article?article_id=15398.

346. Press Release, Nat’l Public Lands Grazing Campaign, Shays, Grijalva Introduce Voluntary Grazing Buyout Bills in Congress (Oct. 20, 2003) (referring to Voluntary Grazing Permit Buyout Act (H.R. 3324 108th Cong (2003)), available at http://www.publiclandsranching.org/htmlres/release_bills_introduced.htm (last visited Apr. 20, 2007); Reese, *supra* note 345.

347. See generally Charles Davis, *Politics and Public Rangeland Policy*, in WESTERN PUBLIC LANDS, *supra* note 310, at 87–109; CHRISTOPHER MCGRORY KLYZA, WHO CONTROLS PUBLIC LANDS?: MINING, FORESTRY, AND GRAZING POLICIES, 1870–1990, at 109–40 (1996).

348. The case in Arizona involved Wally Klump, who was jailed for refusing to remove his trespassing cows from Bureau of Land Management (BLM) land. Charlie LeDuff, *For 28 Cows and Precious Water, a Man’s Got to Sit in Jail*, N.Y. TIMES, May 9, 2004, at 14. In Nevada, ranchers Ben Colvin and Jack Vogt grazed cattle on a BLM allotment without paying the government, leading to fines, confiscation of their cattle, and continuing legal battles. Jon Christensen,

conflict, a number of groups throughout the West have sought to address these grazing issues through collaborative conservation.

Ranchers and conservationists in a number of locales in the West sought to come together to a middle ground or what has come to be called the "radical center."³⁴⁹ Ranchers feared for their future. As they battled environmentalists and the bureaucracy on a number of fronts, several ranchers sought another way. A number of environmentalists sought another approach as well. Although often successful in court cases, these environmentalists were not pleased with the health of watersheds even after cattle were removed. They sought restoration, not just removal, and they wanted to enlist ranchers to help with this restoration.³⁵⁰ Furthermore, many environmentalists became increasingly concerned that rural subdivisions were a far greater threat to the landscape than ranching, and under the motto "cows not condos" sought ways to connect with the ranching community.³⁵¹ In this context, the Quivira Coalition was founded in 1997 to focus on this radical center, primarily in New Mexico, but spilling over into Arizona as well.³⁵² Rancher Jim Winder and conservationists Barbara Johnson and Courtney White founded the influential group.³⁵³ Its original mission statement read:

The purpose of the Quivira Coalition is to teach ranchers, environmentalists, public land managers, and other members of the public that ecologically healthy rangeland and economically robust ranches can be compatible. Our mission is to define the core issues of the grazing conflict and to articulate a new position based on common interests and common sense. We call this new position the New Ranch. It addresses the ecological and economic needs not only of ranchers and environmentalists, but also of the nation as a whole. In a regular newsletter, in lectures, workshops, site

Showdown on the Nevada Range, HIGH COUNTRY NEWS, Aug. 27, 2001, available at http://www.hcn.org/servlets/hcn.Article?article_id=10672. In New Mexico, Kit and Sherry Laney (Farr) battled the Forest Service, claiming it had no authority to order them to reduce cattle grazing on national forest land. Tony Davis, *The Diamond Bar Saga Goes On – and On*, HIGH COUNTRY NEWS, Mar. 4, 1996, available at http://www.hcn.org/servlets/hcn.Article?article_id=1689.

349. *An Invitation to the Radical Center*, 2003, in FORGING A WEST THAT WORKS: AN INVITATION TO THE RADICAL CENTER, at vi–viii (Barbara H. Johnson & Quivira Coalition eds., 2003) [hereinafter FORGING A WEST].

350. Courtney White, *The Far Horizon*, QUIVIRA COALITION NEWSL., June 1997, at 4–5, available at http://quiviracoalition.org/QC_Publications/Newsletters/index.html.

351. Jeremy D. Maestas et al., *Holy Cow! Biodiversity on Ranches, Developments, and Protected Areas in the "New West,"* in FORGING A WEST, *supra* note 349, at 103–18.

352. Tony Davis, *Rangeland Revival*, HIGH COUNTRY NEWS, Sept. 5, 2005, available at http://www.hcn.org/servlets/hcn.Article?article_id=15743.

353. *Id.*

tours, and in research, the Quivira Coalition will facilitate the definition and application of the New Ranch.³⁵⁴

Winder sought collaboration and new ideas in the face of increasing economic challenges to his ranching business.³⁵⁵ White, currently the executive director of the Quivira Coalition, offered an environmentalist's perspective on the attractiveness of the radical center.³⁵⁶ Tired of the political and legal approach to environmentalism that in his view was accomplishing little to improve land health, he was attracted to working with ranchers to improve soil, water, and grass quality. Keys to improving the health of this land include returning functionality, such as fire, recognizing grazing as a natural form of ecological disturbance, and active and widespread monitoring.³⁵⁷ "The principal chore ahead is restoration," wrote White. Ranchers could help to achieve this in a way lawsuits could not.³⁵⁸

William de Buys, a member of the Quivira Coalition, described the radical center as:

collaborative and interest-based...when we are smart enough to separate our interests from our political positions, then we can do some really good work. Then we can have the flexibility to experiment, to innovate, to make mid-course corrections, to take on partners we never thought we'd be working with, and so on.³⁵⁹

354. This profile of the Quivira Coalition is based on FORGING A WEST, *supra* note 349; *Our Mission: Introducing the Quivira Coalition*, QUIVIRA COALITION NEWSL., June 1997, at 1. *Forging a West* is a compilation of articles from the group's newsletter. All of the Quivira Coalition's newsletters are available at the group's website: <http://www.quiviracoalition.org>. "Quivira" is a Spanish word referring to a fabulous realm just beyond the horizon.

The Coalition adopted a new mission statement in June 2003: "The mission of the Quivira Coalition is to foster ecological, economic, and social health on Western landscapes through education, innovation, collaboration, and progressive public and private land stewardship." Jim Winder et al., *From the Founders*, 6 QUIVIRA COALITION NEWSL., June 2003, at 3.

The Malapi Borderlands Group, another leading collaborative conservation group, first coined the phrase "radical center." For a discussion of the group, see Kelly Cash, *Malapi Borderlands: The Searchers for Common Ground*, in ACROSS THE GREAT DIVIDE, *supra* note 3, at 112; William McDonald, *The Malapi Borderlands Group: Building the Radical Center*, in FORGING A WEST, *supra* note 349, at 3-10.

355. Sherry Robinson, *Rancher, Conservationists Teamed Up to Form Coalition*, ALBUQUERQUE TRIB., July 8, 1999, at B1.

356. Courtney White, *A New Environmentalism*, in FORGING A WEST, *supra* note 349, at 53-70.

357. *Id.* at 62-63, 69.

358. *Id.* at 61.

359. William de Buys, *Looking for the "Radical Center,"* in FORGING A WEST, *supra* note 349, at 51-52.

The four principal characteristics of the radical center, according to de Buys, were as follows: “[i]t involves a departure from business as usual; it is not bigoted...; [it] involves a commitment to using a diversity of tools...; [and it] is experimental.”³⁶⁰ In early 2003, under the auspices of the Quivira Coalition, 20 environmentalists, ranchers, and scientists wrote and signed an “Invitation to Join the Radical Center” in an effort to move the grazing debate away from lawsuits and political polarity toward a shared middle ground.³⁶¹ This invitation, addressed to anyone interested, distributed the Quivira Coalition’s message to a larger audience, especially ranchers and environmental group members who might not be getting an accurate picture of the grazing debate from the groups to which they belonged.³⁶²

Moving from the abstract to the concrete, what is it that the Quivira Coalition is doing on the ground? The group does not file lawsuits or lobby for new legislation; rather it advocates for the new ranch method, restoration, and land health through education, outreach, and demonstration projects.³⁶³ Among the techniques the group uses are outdoor classrooms, workshops, newsletters, site tours, and books.³⁶⁴ It has also established a third party monitoring and assessment arm under the name Cibola Services.³⁶⁵ Among other topics, the Quivira Coalition has focused its attention on riparian area restoration and management, herding and holistic management, grass banking, the importance of rangelands monitoring, defining and marketing conservation values, and biodiversity management.³⁶⁶ Many ranchers who have worked with the Quivira Coalition are enthusiastic about the group.³⁶⁷ The greatest outputs from the Coalition’s numerous activities are sharing knowledge, building trust, and, in a number of locations, improving the health of the land.³⁶⁸

The conscious decision of the Quivira Coalition to avoid lawsuits and lobbying is an important one. This collaboration of environmentalists and ranchers is based on a growing but still fragile sense of trust. Many differences of opinion remain on issues ranging from endangered species to water management. Having to determine a particular policy position could severely strain this collaboration. As for lawsuits, the effort to find

360. *Id.* at 51.

361. FORGING A WEST, *supra* note 349, at v–viii.

362. *Id.*

363. White, *supra* note 356, at 53–70.

364. *See* FORGING A WEST, *supra* note 349; *see generally* The Quivira Coalition, http://quiviracoalition.org/About_Us/index.html (last visited June 27, 2007).

365. Courtney White, *Announcing Cibola Services Environmental Monitoring*, QUIVIRA COALITION NEWSL., Mar. 2001, at 4–7, available at http://quiviracoalition.org/QC_Publications/Newsletters/index.html.

366. *See* FORGING A WEST, *supra* note 349; *see generally* The Quivira Coalition, *supra* note 364.

367. Davis, *supra* note 352.

368. *See* FORGING A WEST, *supra* note 349; *see generally* The Quivira Coalition, *supra* note 364.

common ground was launched, in many ways, in response to the myriad lawsuits focused on public lands grazing throughout the West.

Although the Quivira Coalition has had tremendous influence in New Mexico and beyond, garnering the support of many leading environmentalists, ranchers, and state and national officials, many other ranchers and environmentalists have opted not to move to the radical center. Eric Ness, spokesperson for the New Mexico Farm and Livestock Association, suggested that the Quivira Coalition was a fine group, but an unnecessary one.³⁶⁹ "To imply that they're doing a somehow better job than the regular old day-to-day rancher," he said, "I don't think that's right. We've been ranching here for 400 years with no problems."³⁷⁰ John Horning, executive director of the New Mexico environmental group Forest Guardians, was critical of the Coalition for different reasons.³⁷¹ "I think the people at the Quivira Coalition are driven by a cultural imperative to protect and revitalize ranching and the ranching culture.... I think they have huge blind spots to the impacts of ranching in the Southwest."³⁷² Robin Silver of the Center for Biological Diversity is more blunt: "The best thing that could happen to the ranchers (in the West) would be that we just shut them all down."³⁷³

The voices of Ness, Horning, and Silver, especially the latter two, illuminate the greatest challenge that the Quivira Coalition and other collaborative conservation groups face. Ranchers like Ness simply may not participate in the new ranching without some coercion. Theoretically, over time, Ness and others like him will move in the Quivira Coalition's direction since it is in their self-interest. This view may very well be true; many ranchers around the West are adopting more progressive and sustainable techniques for economic and stewardship reasons. The problems presented by recalcitrant environmentalists and rigid agencies are another matter. Dan Dagget, former Quivira Coalition board member, made exactly this point while describing his frustration when ranchers were trying to get a new, progressive grazing plan approved for their Forest Service allotment in Arizona.³⁷⁴ "Finally, with everyone at the end of their patience," he wrote, "one of the Forest Service people said, 'You don't seem

369. April Reese, *Quivira Coalition Charts Middle Ground in Ranching Debate*, LAND LETTER, Jan. 22, 2004, available at <http://www.landletter.com/>.

370. *Id.* (quoting Ness).

371. *Id.*

372. *Id.* (quoting Horning).

373. Heather Clark, *Group Urges Ranchers, Conservationists Bridge Ideological Divide*, ASSOCIATED PRESS, July 23, 2001 (quoting Silver).

374. Dan Dagget, *The New Environmentalism: It's About Results*, QUIVIRA COALITION NEWSL., Oct. 2001, at 2, available at http://quiviracoalition.org/QC_Publications/Newsletters/index.html.

to get it. Our decision will be made on the basis of process and process only. Results are irrelevant to what we're doing here. Our decisions are based on process because that's what we get sued on."³⁷⁵ For all the progress that the Quivira Coalition has made in building trust and in helping ranchers and other landowners improve their management, the green state and its "process" remains. As long as it does, groups like the Center for Biological Diversity will make use of it to achieve their goals.

C. Can the Radical Center Hold? Collaboration, Public Lands, and the Green State

Clearly, when we can make policy in an inclusive, collaborative way that leads to win-win outcomes, we should follow this path. Collaborative conservation has demonstrated a variety of ways in which on-the-ground results have been achieved in areas like stream restoration and habitat improvement, accomplished in ways that build trust and lessen hostility within communities. The organic growth of such initiatives across the country demonstrates that they are likely here to stay, and that it is likely that communities and interests will venture down this pathway as far as they can. The likelihood that collaborative conservation will become a major new pathway or, as some optimistic next generation boosters maintain, the new way of making conservation and natural resources policy is another matter. So far, the successes of groups like the Quivira Coalition seem to be as far as collaborative conservation can go. The experience of the QLG is perhaps more indicative of what happens when collaborative efforts engage larger policy issues. The QLG is seeking significant on-the-ground policy change, and in a policy arena as diverse as public lands policy, consensus is highly unlikely. Those groups outside the collaborative process will turn to alternative pathways to block policy changes they oppose. The outlines of the QLG story are likely to be repeated across the western landscape. By seeking voluntary change from willing partners, the Quivira Coalition presents both a less threatening, but also a less directly significant policy pathway.³⁷⁶

There are a variety of limitations and problems with the collaborative conservation pathway. Much of the criticism thus far has focused on questions of accountability and legitimacy—that is, how are participants selected? In what sense are they representative of the larger citizenry? What of the rule of law? Collaborative conservation faces three other major challenges. First, can collaboration overcome fundamental

375. *Id.* at 2.

376. For arguments in support of collaborative conservation, see Brick & Weber, *supra* note 292, at 15–24; Brick, *supra* note 292, at 172–79.

value differences? For example, can it work when some parties are opposed to grizzly bear reintroduction under any circumstances and other parties have as their primary goal grizzly bear reintroduction? Second, can the economic sustainability goals of collaborative conservation—even when agreed upon and implemented—be successful in the face of the increasing reach of global capitalism? That is, will western agriculture and timber production be competitive against beef from Argentina and timber from Chile, even with local support? As land and water values rise, will rural landowners and communities be able to respond financially? Third, and perhaps most importantly, can collaborative conservation negotiate a path through the labyrinth of the green state—the existing laws and institutions created over the last hundred years?³⁷⁷

Most advocates of collaborative conservation recognize the federal—and often state as well—green state. Indeed, it is this green state and its accompanying gridlock that, in their eyes, necessitated the innovative approach of collaborative conservation. Donald Snow's comment is illustrative: "by the mid-1980s most actors in the nation's and the West's environmental debates came to realize that regardless of their political positions or the constituencies they represented, positive advancement of agendas had become stalled."³⁷⁸ Collaborative conservation, they argued, is used as a way to get around the welter of laws, regulations, agencies, and national groups that block on-the-ground progress.³⁷⁹ But supporters come in a variety of stripes; from those who argue that collaborative conservation is a new way of making policy, one that is part of "a transformation that rivals the movement's shift from protest politics in the 1960s to its institutionalization in American politics in the 1970s and 1980s"³⁸⁰ to those who make far more modest claims: "[t]he future of public lands management is likely to be much more mundane—it will continue to be characterized by incremental modifications to existing, national policy regimes, but hopefully with a flexibility and creativity that can only come from experimentation on the periphery—from local partnerships."³⁸¹ To be sure, supporters of collaborative conservation also recognize that the green state helped to create the conditions leading to its rise; laws such as the Endangered Species Act and the National Forest

377. For critiques of collaborative conservation, see Coggins, *supra* note 293, at 163–71; KEITER, *supra* note 288, at 251–58; Lowi, *supra* note 18.

378. Donald Snow, *Coming Home: An Introduction to Collaborative Conservation*, in ACROSS THE GREAT DIVIDE, *supra* note 3, at 1, 4.

379. GRAHAM, *supra* note 3, at 112; Snow, *supra* note 378, at 3–4.

380. ACROSS THE GREAT DIVIDE, *supra* note 3.

381. Brick, *supra* note 292, at 173.

Management Act have given environmental groups leverage to force commodity interests to discuss altering their ways of doing business.³⁸²

Yet, for collaborative conservation to succeed in a widespread and significant way, for it to become central to a next generation of environmental policy, these very components of the green state must be bypassed. But how to create space and authority for real collaboration in the face of the existing, often conflicting, institutional orders? Jack Ward Thomas, Chief of the Forest Service in the mid 1990s, commented that “[t]he combination of laws passed from 1870 to now is a sort of blob. It doesn’t work, and we try to go around it to get things done.”³⁸³ But Thomas also made use of that blob to block implementation of the QLG plan, even in the face of a statute and support by his superiors in Washington.³⁸⁴ Kent Connaughton, supervisor of the Lassen National Forest during part of the QLG debate, is not quite so blunt, but he does make clear reference to the difficulty of navigating through the green state – for QLG as well as his own agency: “a welter of laws, regulations, court decisions, and microbudgeting from Congress that hinder a forest from moving decisively in any one direction.”³⁸⁵ Another example comes from the Applegate Partnership. One of the first collaborations, a jointly planned timber sale called Partnership One, failed because “the ranger district wrote a sloppy environmental assessment and regional environmentalists successfully appealed the sale.”³⁸⁶ Collaborative conservation gets lost in the labyrinth yet again.

Given the gridlock in Congress that protects the fundamental components of the status quo, it appears unlikely that collaborative conservation can achieve the significant goals its supporters hold out for it. As successful as a local collaboration may be, it still must deal with existing agencies and regulations, laws, and interests. There is nothing to stop the Center for Biological Diversity from filing a lawsuit under the Endangered Species Act that unravels a carefully constructed proposal, or from stopping timber interests from suing an agency for violation of the Federal Advisory Committee Act. We see collaborative conservation, then, as a new pathway for conservation and environmental policy. But we do not think it will become the central component of a next generation of environmental policy making as long as the existing institutional, legal, and regulatory environmental order – the green state – is still in place. Simply getting the institutions right may not sound too difficult, but changing the web of

382. ACROSS THE GREAT DIVIDE, *supra* note 3, at 13; Brick, *supra* note 292, at 173; Snow, *supra* note 378, at 4.

383. BRUNNER ET AL., *supra* note 3, at 218 (quoting Thomas).

384. MARSTON, *supra* note 306, at 85.

385. *Id.* at 88 (paraphrasing Connaughton).

386. Cassandra Moseley, *The Applegate Partnership: Innovation in Crisis*, in ACROSS THE GREAT DIVIDE, *supra* note 3, at 102, 106.

environmental laws, regulations, and institutions created over one hundred years for a variety of aims is a gargantuan enterprise. Creating space for the successful proliferation of these groups would require nothing less than re-creating the green state.

VI. CONCLUSIONS

This article has described movements toward collaboration in environmental policy making in three areas: endangered species, pollution regulation, and natural resources management. Each of these three movements emerged independently, out of concerns about excessive conflict and policy problems unique to each issue area. The expansion of habitat conservation planning was motivated by landowner outrage at the ESA, threats to the law in Congress, and a growing recognition of the importance of gaining landowners' cooperation in species protection. Proponents hoped that the ESA could be saved from its critics and that its effectiveness could be improved through cooperative conservation planning around private lands. In the context of pollution regulation, concerns about delay and inefficiency in rulemaking, and the inefficiency of rules themselves, led Congress to embrace negotiated regulation, which then allowed for the resulting administrative "reinvention" experiments involving private interests deeply in the process. Reg-neg advocates hoped that negotiations would bring more common sense to the process and help to build a common sense of purpose that would overcome the confrontational politics so often seen in regulatory policy making. On public lands, intense conflict over emerging, greener management priorities generated enthusiasm for collaborative conservation projects involving locals in shaping those priorities. Proponents hoped that collaborative conservation could end the wars in the woods and on the range, producing mutually beneficial management strategies reflecting both economic realities and good stewardship.

Each of these movements also dealt with a crucial issue in the basic architecture of environmental policy, the problem of balancing public authority and private interests, by striking new balances in favor of greater stakeholder participation. The laws of the 1960s and 1970s were designed, in part, to avoid the pathologies of agency capture and interest group liberalism by imposing action-forcing requirements on bureaucracies and providing for citizen lawsuits to monitor agencies' compliance with the laws. In all three of these areas, the embrace of collaboration aimed to alleviate conflicts endemic to "top-down" decision making and to draw stakeholders together with agency officials for a range of purposes: to open space for discussion about priorities; to avoid "regulatory unreasonable-

ness",³⁸⁷ to use local knowledge and businesses' understandings of their own production processes in crafting public policy; and to engage citizens with diverse interests in building a sustainability ethic.

The dream of collaboration has deep roots in American political culture, where the ideological attractions of pluralism and traditional concerns about big government join in the interest group liberal commitment to self-regulation under the auspices of the state. It also reflects unique features of the environmental policy arena, where, presumably, the public consensus that environmental protection and conservation are important is shared by environmental lobbyists, chemical industry officials, logging companies, and all of the other participants in stakeholder bargaining. Within that consensus, and limited by that consensus, new approaches to environmental policy might emerge out of pluralistic bargaining.

The goals of collaboration are worthy, and in some cases these experiments have made impressive gains. But there remain substantial accountability challenges, pressing questions about who should participate and how various demands should be weighed by public officials, and concerns about the legality of some pragmatic, flexible solutions to policy problems given statutes that impose clear and at times rigid demands on agency officials and private interests. The collaborative project confronts basic problems of striking appropriate balances between public authority and private interests, of ensuring proper representation and weighing competing demands in bargaining, and of maintaining the integrity of law in a regulatory regime committed to flexibility and negotiation. Moreover, it faces these problems in a thick institutional setting in which all of these problems have been addressed before, with past resolutions embedded in the practices of political institutions, statutory language, and accompanying rules. Advocates for the collaborative regime face the challenge of building new, more cooperative approaches to policy inside institutions that invite and even force conflict.

Importantly, in each of these cases Congress did act in some way to open collaborative policymaking pathways, yet in all cases the legislative action was insufficient to break through the labyrinth. For example, a federal district court decision in *Sierra Club v. Babbitt* showed that HCPs are vulnerable to legal claims that the scientific bases of the plans are inadequate and that the mitigation efforts anticipated by the plans are insufficient.³⁸⁸ The court found no rational basis in the administrative record

387. See generally EUGENE BARDACH & ROBERT KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (2002).

388. *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274 (S.D. Ala. 1998). See also *Sierra Club v. Norton*, 207 F. Supp. 2d 1310 (S.D. Ala. 2002).

for incidental take permits granted to an Alabama developer to take listed beach mice, finding that the Interior Department's assessment that development would have "no significant impact" on mouse populations had no basis in population inventories, population trend data, or information on the minimum size of a viable population.³⁸⁹ Indeed, the court concluded, while it was "unclear...on what basis the findings of no significant impact were made,"³⁹⁰ it was apparent that the finding was *not* made using sound scientific evidence. Given findings that the science underpinning many of the plans is weak and that there has been little effective monitoring, there is likely to be legal controversy in this area over the next few years. Further, section 10 of the ESA did not suspend requirements that the appropriate federal agencies list species, designate critical habitat, or develop recovery plans. The HCP project is vulnerable to the extent that it displaces rather than supplements actions required by the law.

Negotiated regulation delivered on some of its promises, but the most systematic studies of its general effectiveness in speeding rulemaking and heading off litigation indicate that it has fallen far short of its proponents' hopes.³⁹¹ Even the reformulated gasoline case, touted with good reason as an important success, appears to be at best a mixed bag 15 years after the negotiations.³⁹² Movements beyond negotiated regulation to administrative experiments in collaborative rulemaking at the plant and sector levels made little progress, constrained by conflicts over the appropriate levels of participation and influence by various stakeholders and, of course, the absence of statutory mandates that would clarify for participants what can and cannot be negotiated at the bargaining table.³⁹³ Finally, the Quincy case demonstrated that however well-intentioned, practical, and mutually satisfying to participants, local collaborative conservation experiments are, for better and worse, deeply embedded in the green state's layers of institutions, rules, and processes. The collaborative conservation movement represents something important and even admirable in the politics of environmental policy making, but when the agenda pushed beyond highlighting the value of collaboration for good stewardship (the Quivira approach) to rewriting forest management plans and policies (QLG), collaborative conservation as policy making quickly moved onto difficult and uncertain pathways in the congressional appropriation process, the administrative process, and the courts. The new,

389. *Sierra Club v. Babbitt*, 15 F. Supp. 2d at 1284-89.

390. *Id.* at 1288-89.

391. *See generally* Coglianesse, *supra* note 137.

392. *Id.*

393. Marcus et al., *supra* note 230; Steinzor, *supra* note 8; Hirsch, *supra* note 244.

collaborative order in environmental politics was quickly drawn into the conflictual, unpredictable politics of the old order.

Advocates of next generation reforms have looked to these collaborative initiatives as harbingers of change in the character of regulation, to be joined with tools like the use of economic incentives to reconstruct environmental policy. There is evidence that such experiments can serve as the basis for wide-ranging changes in policy and, ultimately, new statutes initiating a new regulatory regime. Yet the record thus far shows that despite the promise of these efforts, the collaborative impulse faces a "tortuous course"³⁹⁴ through the green state, facing the "tenacious organization of power"³⁹⁵ embedded in the layers of political development and the multiple pathways or points of access that exist in the policymaking system. Furthermore, while critics of top-down regulation have developed powerful criticisms of traditional approaches to making regulatory policy, and while they have made a strong case that collaboration can yield both procedural and substantive improvements, they have not yet shown how these approaches can successfully address core questions of political architecture or public philosophy – how can private interests and public authority be effectively balanced in a bargaining regime?

394. SKOWRONEK, *supra* note 277, at 9.

395. *Id.*