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## Environmental Law Slogans for the New Millennium

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## ESSAY

### ENVIRONMENTAL LAW SLOGANS FOR THE NEW MILLENNIUM

*Michael Allan Wolf* \*

Contrary to the bleakest predictions offered by environmental fatalists during the latter half of the 1900s, humanity and much of the plant and animal kingdom survived New Year's Eve 1999. Similarly, contrary to the dire warnings of industrial organizations and lobbyists that overburdening environmental regulations would spell the end of profitable, American capitalism, the year 2000 dawned in the United States with the world's most extensive array of anti-pollution and pro-conservation measures regulating the globe's most impressive economic engines.

New times demand new paradigms; it is much more than a calendar change that occasions a reconsideration of the status and meaning of environmental law. The deindustrialization that typified the 1980s has yielded to the high-tech revolution of the 1990s. Indeed, the word "industry" itself—which for two centuries raised in the mind images of soot, grime, excessive noise, and harmful vibrations—today has a connotation that is much cleaner

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\* Professor of Law and History, University of Richmond School of Law. The author, with at least half of his tongue planted firmly in his cheek, refuses to acknowledge any assistance from friends or colleagues (in order to protect them from attack by extremists on all sides of the environmental struggle). This article is reprinted in part from Michael Allan Wolf, *Environmental Law Slogans for the New Millennium*, 30 ENVTL. L. REP. (Envtl. L. Inst.) 10283 (2000), with permission of the Environmental Law Institute. My esteemed colleagues from the *Law Review*—Fielding Douthat and Scott Crumley—are to be commended for their exemplary citation-sleuthing.

and friendlier to human and nonhuman nature. Moreover, the command-and-control provisions of American environmental law have yielded the battlefield to kinder and gentler, incentive-based regulation.

New paradigms demand new slogans, particularly in a polity driven and shaped by sound bites. Your humble author offers eight aphorisms for the new millennium—eight mottoes (along with short explanations) designed for twenty-first century contestants from all sides to keep in mind as we continue the evolutionary process of shaping, responding to, and reshaping American environmental law.

### I. THERE'S NO PURPLE CRAYON IN THE BOX: YOU MUST CHOOSE EITHER RED OR BLUE

Children love crayons. Even more, children love big crayon boxes—not because those big boxes contain *more* crayons but because they contain more colors, that is, more *kinds* of crayons. Imagine for a moment that you are unfortunate enough to have a very small crayon box—one with only two colors, blue and red. Now imagine that you are asked to express the concept of conservation and environmental protection as one color; you choose the blue crayon from the box. Imagine next that you are asked to express the concept of economic development as one color; that leaves the red crayon. For most of the twentieth century, we were used to choosing one “crayon” or the other to represent policies and projects. The best that we could hope for would be a balance of these two competing demands.

As the century drew to a close, the notion of “sustainable development” captured the attention and entered the vocabulary of a wide range of policymakers and experts.<sup>1</sup> Definitions of the phrase proliferated, so the best I can offer is one that is representative rather than universal. The Department of Energy's Center of Excellence for Sustainable Development Web site includes the following explanation:

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1. See, e.g., J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?*, 8 DUKE ENVTL. L. & POL'Y F. 273 (1998).

Sustainable development is a strategy by which communities seek economic development approaches that also benefit the local environment and quality of life. . . .

Sustainable development provides a framework under which communities can use resources efficiently, create efficient infrastructures, protect and enhance quality of life, and create new businesses to strengthen their economies. It can help us create healthy communities that can sustain our generation, as well as those that follow us.<sup>2</sup>

This is the purple crayon—a perfectly balanced combination of blue and red. But, we must remember that our box contains but two crayons.

Sustainable development, in other words, is an oxymoronic myth. On our zero-sum planet, development consumes and exploits resources; it cannot sustain them. Yet, because of its utopian nature, this oxymoronic myth serves a valuable purpose. It can inspire us to think more carefully about the steps we are taking, the choices we are making. It can remind us of the obligation to do our best to mitigate the inevitable damage to nature that is inherent in building and creating. There is also a risk associated with this myth, however. Some have used the notion of sustainability to rationalize otherwise-objectionable activities and policies. Local government officials have used the concept to mask their exclusionary land-use policies. Real estate developers and their engineers, architects, and contractors have included sustainability in their marketing strategies for products that are not meaningfully new or different.<sup>3</sup> Planting a few hundred seedlings, preserving a wetland in a distant ecosystem, and installing solar panels are admirable strategies. Still, they can never completely compensate for the destruction that they are designed to mitigate, for, so far, what the poet said remains true: “Only God can make a tree.”<sup>4</sup>

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2. CENTER OF EXCELLENCE FOR SUSTAINABLE DEVELOPMENT, U.S. DEPT OF ENERGY, INTRODUCTION, at <http://www.sustainable.doe.gov/overview/ovintro.shtml> (last updated Sept. 12, 2000).

3. Cf. J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L.J. 31, 43-44 (1999) (discussing the difficulties involved in harmonizing the competing concerns of the environment, the economy, and equity).

4. 1 JOYCE KILMER, *Trees*, in POEMS, ESSAYS AND LETTERS 180 (Robert Cortes Holliday ed., 1918).

## II. WE ALL LIVE IN WHAT USED TO BE SPRAWL

The jargon keeps shifting in the discussion of unbridled residential growth. Originally, opponents of the first generation of restrictions (such as permit moratoria and population limits) employed the pejorative “growth control.”<sup>5</sup> Then, as we moved to notions of concurrency and the requirement of adequate public amenities before permitting, the more positive “growth management” gained popularity.<sup>6</sup> Today, the lingo is “smart growth.”<sup>7</sup> Indeed, the American Planning Association touts its service-marked “Growing Smart” project.<sup>8</sup> If we wanted to pursue truth in advertising, we would call the current package of retooled planning and post-Euclidean zoning devices<sup>9</sup> “smart *anti*-growth.”

The common enemy for all of these strategies—no matter what name is used—is the evil of sprawl. There are not many social observers or politicians who are fond of the visual clutter, low-density construction, and automobile-dependent development on the nation’s metropolitan fringes. Nor are many Americans excited about the prospect of losing prime farmland and cherished, environmentally sensitive refuges to the madness of city life. So, it makes sense and it is good planning strategy to direct future residential and commercial development back into the center city and older suburbs, rather than to allow the leapfrogging that mars the metropolitan landscape and frustrates urban planners nationwide.<sup>10</sup>

There is a downside to the anti-sprawl fight that must not be

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5. For perhaps the leading case dealing with “growth control,” see *Golden v. Planning Board of Town of Ramapo*, 285 N.E.2d 291 (N.Y. 1972).

6. See 1 PATRICK J. ROHAN, *ZONING AND LAND USE CONTROLS* § 4.01[1] (Eric Damian Kelly ed., 2000).

7. See Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 249 (2000) (“Smart growth is a relatively new term. It began to be discussed around 1994 . . .”) (internal quotation omitted).

8. American Planning Association, *Growing Smart*, at <http://www.planning.org/plnginfo/GROWSMAR/gindex.html> (last visited Feb. 6, 2001).

9. See CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND* 255-88 (4th ed. 1989) (“Post-Euclidean Modifications of the Zoning Ordinance”).

10. Anti-sprawl literature is itself now sprawling. For a sample volume that discusses the leading work, see F. KAID BENFIELD ET AL., *ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA’S ENVIRONMENT, ECONOMY AND SOCIAL FABRIC* (1999).

ignored. As courts in New Jersey and Pennsylvania discovered in the 1970s, many of the people who are attempting to leap over older neighborhoods and areas in need of redevelopment are lower and moderate-income residents of our most distressed inner cities, many of whom are elderly or ethnic minorities.<sup>11</sup> To this population, sprawl means relief from a hopeless existence. The environmental justice implications of this situation are palpable.<sup>12</sup>

History instructs us that where we, the overwhelming majority of Americans, live used to be sprawl. The original waterfront settlements and military outpost communities of the first European-Americans are no longer significant pockets of population. Native Americans were forcibly removed from their ancestral lands. The central cities and older suburbs of 2000 were the prime farmland and country estates of 1850, 1890, even 1950 in many cases.<sup>13</sup> What exactly is the rationale for reversing this trend today? I doubt that it is solely good planning theory, given the disrespect development-happy local lawmakers traditionally showed planners during the second half of the twentieth century. Nor has there been a recent dramatic revelation that our environment and our rural lifestyle are, for the first time, endangered. In many regrettable ways, the move against sprawl is a strategy pursued by "we got ours" against the "we want some, toos."

The first challenge for planners and politicians in the new century is to craft an anti-sprawl strategy purged of this negative socioeconomic baggage. The second challenge is to craft a set of legislative responses that is much more sensitive, responsible, and dependable than freezing development without compensation or development rights transfer to landowners. We are already witnessing a controversy over modifications of the urban growth boundaries in metropolitan Portland, Oregon, the region whose policies have been nearly universally praised by the sworn ene-

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11. See generally CHARLES M. HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996).

12. See, e.g., Michael Allan Wolf, *Dangerous Crossing: State Brownfields Recycling and Federal Enterprise Zoning*, 9 *FORDHAM ENVTL. L.J.* 495, 514-19 (1998) [hereinafter Wolf, *Dangerous Crossing*] ("The Environmental Justice Double Bind").

13. For perceptive discussions of the issues pertaining to suburban growth, see KENNETH T. JACKSON, *CRABGRASS FRONTIER* (1985); SAM B. WARNER, JR., *STREETCAR SUBURBS* (1962).

mies of sprawl as a beacon unto the benighted.<sup>14</sup> What hope is there for the rest of us? Most promising are subsidies for builders who promise to do their magic in the central city and older suburbs, not shallow incentives and development-unfriendly regulations included in state and federal codes.<sup>15</sup> The New Jersey Supreme Court told us a quarter-century ago, in its first *Mount Laurel*<sup>16</sup> decision, that “[c]ourts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government.”<sup>17</sup> Twenty-five years later and wiser, our policymakers should pursue strategies designed to enhance the “in-filling” builder’s bottom line, not to draw a “Do Not Cross” line at the metropolitan fringe.

### III. WE DON’T SALUTE A GREEN FLAG

It is hard to deny that a significant percentage of Americans identify themselves as environmentalists.<sup>18</sup> Recycling waste and disposing of litter are now second nature for much of the population. Politicians, too, on both sides of the aisle have made strong and serious commitments to ecological protection and the conservation of natural resources.<sup>19</sup> Despite this firm belief in the principle of *environmentalism*, the nation’s chief strategy for addressing the harms attributable to pollution and other byproducts

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14. See *D. S. Parklane Dev. Corp. v. Metro*, 994 P.2d 1205 (Or. Ct. App. 2000).

15. See, e.g., Cameron McWhirter & David Josar, *Fed Cash Props Up Detroit Rebirth: Government Subsidies Back Many Projects; More Private Funds Needed for True Comeback*, DETROIT NEWS, May 30, 1999, at A1 (noting that, despite federal housing and empowerment zone programs, experts still believe Detroit “is in the midst, not of a renaissance, but of a possible pre-revival”).

16. *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

17. *Id.* at 734.

18. See Riley E. Dunlap, *Americans Have Positive Image of the Environmental Movement*, GALLUP POLL MONTHLY, Apr. 2000, at 19, 20 (reporting that “83 percent of Americans express agreement and only 15 percent express disagreement with the goals of the environmental movement.”).

19. Compare DEMOCRATIC NATIONAL COMMITTEE, 2000 DEMOCRATIC NATIONAL PLATFORM 31, available at <http://www.democrats.org/hq/resources/platform/index.html> (Aug. 15, 2000) (“Democrats know that for all of us there is no more solemn responsibility than that of stewards of God’s creation.”), with REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PLATFORM 2000, <http://www.rnc.org/2000/2000platform6> (last visited Feb. 1, 2001) (“Today’s Republican party stands in the proud tradition of Teddy Roosevelt, the first President to stress the importance of environmental conservation.”).

of modern life—federal *environmental law*—does not resonate deeply with the American ethos.

The post-*Silent Spring*<sup>20</sup> agglomeration of statutes and regulations is still typified by top-down control effected by expert (nameless, faceless) bureaucrats. While Americans come from many countries and cultures, one thing that many of us have in common is a learned or inherited distaste for centralized authority (remember George III, Louis XIV, the tsars?) that is far removed, geographically and politically, from local control and local needs.

Our system of local land-use planning and zoning, while often criticized for depriving landowners of anticipated value, is also widely appreciated for the way in which it can enhance such value as well, for example, by segregating residential uses from the nuisance-like externalities of would-be industrial and commercial neighbors.<sup>21</sup> Federal environmental law rarely provides this benefit, at least in an easily recognizable fashion. Regulated industries are quick to point out the often-significant, immediate costs of newly imposed environmental controls and restrictions to the company's bottom line and to shareholder profits, as well as the eventual cost to consumers.<sup>22</sup> The only apparent gainers are

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20. RACHEL CARSON, *SILENT SPRING* (1962).

21. The nuisance-neutralization potential of zoning was recognized long ago by important observers such as Justice George Sutherland. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (discussing the role of nuisance law in determining when a particular zoning ordinance should be valid).

22. Congressional testimony given by "Corky" Frank, the president of the fourth largest petroleum refiner in the United States is typical in this regard:

Let me now say a word or two about cost:

Our estimate of five cents per gallon of additional consumer cost for the lower sulfur gasoline EPA is proposing may not seem like a lot of money to some. I would urge you to think about this in the context of the average multi-vehicle family, or in the case of a single parent or elderly couple struggling to cover the costs of health care, housing, food and other necessities on a limited income. Another way to look at this is that the annualized cost of this program to consumers nationally is \$5.7 billion.

The impact on refiners would also be considerable. . . . [T]he added costs of EPA's proposal would total more than \$7 billion. . . . This would be a daunting challenge for [an] industry, which is already struggling to provide a satisfactory return on investment for its shareholders. . . .

For some refiners, EPA's proposed regulation will be the straw that breaks the camel's back. Facilities will close and jobs will be lost.

*Clear Air Act: Sulfur in the Tier 2 Standards for Automobiles: Hearing Before the Subcomm. on Clear Air, Wetlands, Private Property, and Nuclear Safety of the Senate Comm. on Environment and Public Works*, 106th Cong. 70 (1999) (statement of J. Louis Frank, President, Marathon Ashland Petroleum LLC).



those businesses engaged in providing the new control technologies.

Americans' fondness for the myth of a free market and for the dream of owning a single-family detached dwelling, much like their deep distaste for bureaucratic red tape, cannot be dismissed by policymakers. One positive development from the end of the last century has been the development of market and incentive-based devices such as the trading of sulfur dioxide emissions allowances<sup>23</sup> and the bargained-for exchange of credits under the Clean Fuel Fleet program.<sup>24</sup> The move from all-or-nothing permitting decisions has also been encouraging. A provocative step in this direction is the Fish and Wildlife Service's habitat conservation plan (HCP) program.<sup>25</sup> According to the service, "[t]he HCP process is more than just a permitting mechanism, but a program that, at its best, can integrate development activities with endangered species conservation, provide a framework for broad-based conservation planning, and foster partnership and cooperation."<sup>26</sup> While some critics are understandably concerned about the risks involved in negotiating these agreements, this strategy is certainly an improvement over the political grandstanding involved in congressional proposals for limiting the agency's ability to list and protect endangered and threatened species.<sup>27</sup>

With this incorporation of market, incentive, and public-private cooperative techniques into the regulatory mix, Americans may begin to feel more comfortable with our legal apparatus for improving the nation's environment. While environmental law is not likely to join Mom and apple pie in our hearts in the foreseeable future, we can certainly work hard to narrow the gap between our environmentalist aspirations and legal realities.

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23. See Clean Air Act of 1990 § 403, 42 U.S.C. § 7651b (1994).

24. See *id.* § 246(f), 42 U.S.C. § 7586(f) (1994).

25. See FISH AND WILDLIFE SERVICE, U.S. DEP'T OF INTERIOR, HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK (1996).

26. William E. Lehman, *Reconciling Conflicts Through Habitat Conservation Planning*, ENDANGERED SPECIES BULL., Jan.-Feb. 1995, at 16, 18.

27. See, e.g., Endangered Species Listing and Delisting Process Reform Act of 1999, S. 1305, 106th Cong. (1999); Endangered Species Fair Regulatory Process Reform Act, H.R. 494, 106th Cong. (1999).

#### IV. SAUSAGES: BAD TO WATCH THEM BEING MADE, WORSE FOR YOUR HEART

Disasters breed environmental law. One can easily trace the origins of several federal statutory schemes to specific ecological calamities. While it would be an exaggeration to isolate one incident and identify it as the *sole cause* for a statute, we can legitimately ask whether the *United States Code* would have contained the Air Pollution Control Act of 1955<sup>28</sup> without the Donora, Pennsylvania disaster and Los Angeles's poisonous smog; the Coastal Zone Management Act<sup>29</sup> without the Santa Barbara oil spill; the Oil Pollution Act of 1990<sup>30</sup> without the *Exxon Valdez* debacle; or the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>31</sup> without Love Canal.

Two aphorisms come to mind when considering the road from environmental disaster to environmental law. An English proverb reminds us of the many slips between cup and lip, and we apparently can thank Otto von Bismarck for the observation that one would rather not watch sausages or laws being made.<sup>32</sup> Members of Congress and presidential administrations during the late twentieth century should be applauded for passing and implementing an impressive array of pollution control and prevention, conservation, planning, and disposal measures.<sup>33</sup> So, too, we should fault these same parties for consistently failing to address the immediate problems faced by the victims of the very disasters that inspired the legislative effort.

This failure is attributed chiefly to three factors. First, our federal legislative and regulatory agenda is determined more by lobbyists than by expressed constituent desires. Grassroots community groups too often take a back seat to regulated industry trade groups, labor unions, and other heavily financed interest groups. Second, the true measure of agency heads and committee chairs

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28. Ch. 360, 69 Stat. 322 (1955) (current version at 42 U.S.C. §§ 7401-7671(q) (1994 & Supp. IV 1998)).

29. 16 U.S.C. §§ 1451-1465 (1994 & Supp. V 1999).

30. 33 U.S.C. §§ 2701-2761 (1994 & Supp. IV 1998).

31. 42 U.S.C. §§ 9601-9675 (1994 & Supp. IV 1998).

32. *See Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 51 (D.C. Cir. 1984).

33. For an overview of the proliferation of federal environmental laws and regulations during the latter half of the twentieth century, see WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* § 1.4[A] (2d ed. 1994).

is in the number of programs and billions of dollars in government funds that they administer. The lesson learned during the Reagan years is that even the most committed anti-government administration cannot resist the temptation of territorial (and budgetary) expansion.<sup>34</sup> Third, courts often put glosses on statutory language that are unanticipated by the very lawmakers who passed or approved the legislation.<sup>35</sup> The burden is then placed on dissatisfied legislators to propose new fixes for the judicial interpretation and to convince most of their colleagues to go along with the changes.

The saga of CERCLA is probably the best example of this regrettable phenomenon. More than twenty years passed between New York's declaration of a state of emergency at the Love Canal hazardous waste disposal site (August 1978) and the final meeting of the Love Canal Revitalization Agency, the body charged by the state legislature with restoring safe housing to the devastated, poisoned neighborhood (December 1999).<sup>36</sup> Litigation with the offending chemical companies lasted for two decades as well.<sup>37</sup> In the interim, Congress created (CERCLA, 1980) and significantly revamped (Superfund Amendments and Reauthorization Act of 1986 (SARA))<sup>38</sup> an immensely costly and technically confusing program ostensibly designed to clean up the thousands of sites containing hazardous substances and thereby posing significant risks to the human and nonhuman environment.

The needs and demands of local residents represented by Lois

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34. See Nancy C. Staudt, *Constitutional Politics and Balanced Budgets*, 1998 U. ILL. L. REV. 1105, 1160 (1998) As the author noted:

Using terminology that recalled the Victorian era and that would satisfy those politically and morally opposed to deficit spending, Reagan argued, "Balancing the budget is like protecting your virtue: all you have to do is learn to say no." Yet, President Reagan chose not to propose either a balanced budget or a series of budgets that had any realistic chance of ever achieving a balance. Instead, Reagan created the largest peacetime deficit in American history, doubling the nation's debt in just five years.

*Id.* (internal citations omitted).

35. For a notable example of this phenomenon, see *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

36. See Bill Michelmore, *Finishing a Nightmare; After 20 Years, Love Canal Agency Closes its Doors*, BUFF. NEWS, Dec. 8, 1999, at 1A.

37. See *Settlement Reached in Final Love Canal Superfund Site*, HAZARDOUS WASTE LITIGATION REP., July 23, 1999, at 6.

38. Pub. L. No. 99-499, 100 Stat. 1613-1782 (codified as amended in scattered sections of 42 U.S.C. §§ 9601-9675 (1994 & Supp. IV 1998)).

Gibbs and other community activists,<sup>39</sup> whose lives were most affected by the disposal of deadly chemicals, were often ignored by federal legislators and administrators who created a statutory and bureaucratic labyrinth on the eve of Ronald Reagan's first inauguration.<sup>40</sup> Fear of a conservative veto does not completely explain the problems with the Superfund scheme, however. By the end of its first decade of existence, CERCLA was criticized broadly for putting more money into government administration and legal and expert fees than into actual cleanup of contaminated sites.<sup>41</sup> Rather than cut back the program, Congress and the administration expanded its reach.<sup>42</sup>

Ambiguities in the statutory language gave rise to extensive judicial interpretation of CERCLA. Retroactivity, joint and several liability, and strict liability are, thanks to judicial gloss, mainstays of the CERCLA regime,<sup>43</sup> much to the consternation of congressional critics who bear the burden of effecting change.<sup>44</sup> While environmentalists might be cheered by this judicial activism, conservative opponents have lately sought to rally the anti-Superfund troops by identifying these and other expansive aspects of CERCLA applicability as justifying significant limitations on the program.

Over the last few years, we have seen a shift away from disaster reaction in the pattern of environmental lawmaking. Today, we are more likely to witness efforts to prevent and address environmental harm by widening public access to information regarding potential polluters, expanding opportunities for public input at multiple stages of regulatory activity, encouraging citizen lawsuits to complement government enforcement, and investigating alternative strategies such as ecosystem protection and multi-media permitting. Time will tell whether politicians inside the beltway will be able to resist the temptation to federalize and bureaucratize the next ecological disaster.

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39. Lois Gibbs was a homemaker who became a prominent activist in the wake of the Love Canal disaster. See LOIS MARIE GIBBS & MURRAY LEVINE, *LOVE CANAL: MY STORY* (1982).

40. See RODGERS, *supra* note 33, at § 8.1.

41. See Wolf, *Dangerous Crossing*, *supra* note 12, at 505.

42. See RODGERS, *supra* note 33, at § 8.2.

43. See *id.* at § 1.4[B]4.

44. See, e.g., Superfund Cleanup Acceleration Act of 1997, S. 8, 105th Cong. (1997).

## V. BEWARE INSTANT ENVIRONMENTAL ACTIVISTS

Before the 1970s, those relatively few Americans who identified themselves as environmental activists were ridiculed as nonconformist, hippie-like, anti-capitalist oddballs. Certainly today—when the strategy of “reduce, reuse, and recycle” is championed by lawmakers at all levels of government and memorized by schoolchildren—members of the Sierra Club and other “mainstream” nongovernmental organizations need no longer feel marginalized. With this new acceptance of environmental ideals comes a new political figure—the instant environmental activist.

Think about a recent battle over development in or near your locality. Perhaps it involved plans for a new—heaven forbid—Wal-Mart superstore.<sup>45</sup> Maybe a real estate developer was trying to disturb a single-family residential enclave by building garden apartments or townhouse condos nearby. Possibly there were plans to construct a mega-mall in a sleepy exurban community. More likely than not, the forces opposing the proposed intrusion included a grass-roots organization or two, often a coalition of neighborhood associations. There is a good chance that at least one of these opposing groups included environmentalist rhetoric as a central part of its anti-development strategy—in public hearings, on protest signs, or even on a special Web site.<sup>46</sup>

The targeted project might be as vast as a new theme park or as limited as a new overpass for a county road. A subtle transformation takes place in middle and upper-middle class homes in and around the zip code of the project site: homeowners who drive SUVs to work instead of carpooling or taking public transportation; who regularly spray pesticides on their lawns; who replace their rakes for screaming, gas-powered leaf-blowers; and who scoff at the “myth” of global warming are now officers of and leading contributors to Neighbors Organized to Stop Trashing Our Rural Environment (NO STORE!). While we might hope that, once they are bitten by the green bug, these new converts might sustain their ecological fervor, what is the likelihood that they hosted a Gore-Lieberman fundraiser last year?

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45. For a list of communities who successfully shut out megastores, see Sprawl-Busters, *Sprawl-Busting Victories*, at <http://www.sprawl-busters.com/victoryz.html> (last updated May 2000).

46. See, e.g., *Friends of Humboldt County*, at <http://humboldt1.com/friends> (last visited Feb. 6, 2001).

The environmental harms posed by “big-box” stores, megamalls, and multi-family housing—particularly nonpoint source pollution over vast expanses of parking lots and increased burdens on out-dated and inadequate sewage treatment facilities—are serious.<sup>47</sup> Still, it is fair to ask if our new instant environmental activists do their shopping at a (non-NIMBY)<sup>48</sup> Wal-Mart or shopping mall, or if they or their grown children were ever thankful to find an affordable housing complex when the income stream was much less copious.

The chief challenge for the 2000s is to find a way to maintain, strengthen, and harness this proto-environmentalism—to link these reactive, rhetorical spurts to the wider campaign to make American post-industrial life safer for living things. Without that linkage, we run the risk of diluting the power of the green message.

## VI. IF THEY'RE “ANTZ,” THAT MAKES US “HUMANTZ”

In 1998, Hollywood released *Antz*<sup>49</sup> and *A Bug's Life*,<sup>50</sup> two films in which insects and other small creatures behave amazingly like humans. That was the charm of the two movies—we could relate to these small creatures because they had the same foibles, emotions, and, when times were the most demanding, strengths as human beings.

During the late twentieth century, debates raged over the anthropocentrism (or human-centeredness) of American environmental law.<sup>51</sup> This debate was particularly relevant to the En-

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47. One commentator has noted:

The environmental challenges in Edge Cities are substantial. Edge Cities seriously degrade the environment, and polluted stormwater is one of the Edge Cities' more acute environmental problems. In Edge Cities, stormwater runoff stems from many sources. Parking lots, driveways, streets, and patios, with impervious asphalt covers that facilitate runoff, take up enormous amounts of space.

Joel B. Eisen, *Toward a Sustainable Urbanism: Lessons from Federal Regulation of Urban Stormwater Runoff*, 48 WASH. U. J. URB. & CONTEMP. L. 1, 33 (1995).

48. The acronym NIMBY is short for Not In My Back Yard. See Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 495 (1994).

49. ANTZ (Dreamworks SKG 1998).

50. A BUG'S LIFE (Pixar Animation Studios and Walt Disney Pictures 1998).

51. See Michael Allan Wolf, *Fruits of the “Impenetrable Jungle”: Navigating the Boundary Between Land-Use Planning and Environmental Law*, 50 WASH. U. J. URB. &

dangered Species Act (ESA).<sup>52</sup> Should this legislation, which bans the sale, killing, and taking of threatened and endangered species, be justified and defended because it represents humanity's stewardship obligation toward our fellow earth inhabitants, or do we deem it a positive move because rare plants and animals might comprise some vast medicine cabinet that contains miracle cures for our most devastating diseases? Some of the most radical defenders of species protection, many of whom adhere to various theories labeled "deep ecology," consider human beings barely a notch above pestilence and plague when it comes to the health of the planet—present and future. Some even dream of a utopian earth without humans.<sup>53</sup>

Just as Hollywood has recently reminded us of the human attributes of insects—in an admittedly exaggerated way—it might be a helpful step for the future of American environmental law to consider for a moment some of the ways in which many of our most offensive human behaviors are shared by non-human creatures. For example, we are not the only animals to kill plant and tree life for shelter and sustenance. Nor are we the only living things to scatter our waste, even those materials that do not degrade swiftly. Like ants, we build cities because we are inherently social animals. Because we have built our settlements in intemperate climates—sometimes in an effort to fulfill our "natural" desires to increase our material well-being—we have had to consume much of the organic matter around us for heat, clothing, and shelter. Moreover, like so many animal species that are legendary for their reproductive capacity, we find ourselves contending with the hazards of overpopulation.

Perhaps in the new millennium, we will recognize the futility and illogic of viewing the environment as a contest that pits human beings against nonhuman life. In our efforts to make the ESA and other laws protecting animals and plants less vulnerable to political attacks, we should stress those needs that we have in common—for example, habitat protection, a clean food and water supply, and adequate recreational space. Respect just might breed restraint.

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CONTEMP. L. 5, 66-69 n.323 (1996) [hereinafter Wolf, *Impenetrable Jungle*].

52. 16 U.S.C. §§ 1531-1544 (1994 & Supp. IV 1998).

53. For a provocative collection of representative writings on the Deep Ecology movement, see BILL DEVALL & GEORGE SESSIONS, *DEEP ECOLOGY: LIVING AS IF NATURE MATTERED* (1985).

## VII. THERE ARE NO COMMIES OR NAZIS HERE

Given the very high stakes involved in debates over environmental issues such as nuclear power, wetlands preservation, air pollution standards, and the survival of endangered species, we should not be surprised that the rhetorical exchanges too often decline into name-calling and personal attacks. Opponents of “onerous” regulations often cloak themselves in the American flag and compare the current anti-private property regime to the Soviet Union.<sup>54</sup> Their representatives in Congress warn that cherished principles of freedom and liberty are at stake in the battles over turtle excluder devices for shrimp trawlers<sup>55</sup> and over disk-ing weeds in the critical habitat of kangaroo rats.<sup>56</sup> Supporters of these and other “unnecessary” restrictions are labeled “extremists,” “overzealous bureaucrats,” “radical environmentalists,” and even “new tyrants depriving us of our inalienable rights of life, liberty, and property.”<sup>57</sup> One of their favorite tactics is to tell mythical horror stories of landowners whose lives and livelihoods are threatened by radical laws.<sup>58</sup>

On the other end of the spectrum, defenders of a strong environmental protection agenda speak of the “blitzkrieg against the natural world,”<sup>59</sup> complain about “overpaid corporate environmentalists who suck up to bureaucrats and industry,”<sup>60</sup> and accuse opponents of terror, disinformation and violence.<sup>61</sup> In this debate, neither side has a monopoly on hyperbole.

When the modern American environmental movement began in the 1960s, when green was just a color and not a political statement, a certain amount of alarmism and mutual suspicion was understandable. Today, when it is impossible to identify environmentalism or conservation with one political party (or even

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54. See Michael Allan Wolf, *Overtaking the Fifth Amendment: The Legislative Backlash Against Environmentalism*, 6 *FORDHAM ENVTL. L.J.* 637, 651-53 (1995).

55. See *id.* at 643.

56. See *id.* at 644-45.

57. *Id.* at 651-53.

58. *Id.*

59. Earth First, *The Problem*, at <http://www.enviroweb.org/ef/primer/Problem.html> (last modified May 20, 1998).

60. Earth First, *Why Earth First!?* at <http://www.enviroweb.org/ef/primer/WhyEF!.html> (last modified May 20, 1998).

61. See, e.g., Redwood Summer Justice Project, *Judi Bari Home Page*, at <http://www.judibari.org> (last updated Jan. 29, 2001).



one ideological branch of a party), this strident rhetoric has no place in the American polity. It is well past time for opponents of legal restrictions and controls to realize that the great majority of the American people support some restrictions on private sector and government activities that cause pollution, endanger fragile populations (human and nonhuman), and exploit precious natural resources.<sup>62</sup> Likewise, those most strongly committed to ecological protection need to realize that there is very little likelihood that the American voting public would abide a set of statutory and administrative constraints that disregards the effects on privately held property, freezes (if not reverses) economic growth, and frustrates our desires as mass consumers.

#### VIII. IF YOU DON'T WANT SOMEONE TO BREAK IT, THEN PAY FOR IT

The spate of federal legislative activity regarding air, water, toxics, oceans, public lands, and endangered species in the 1970s and 1980s was reduced to a relative trickle by the close of the century. The same cannot be said for states and localities, in which the momentum has grown for complementary programs designed to fill coverage gaps left by Congress and to address more parochial concerns, particularly the use and abuse of private lands.<sup>63</sup>

Unfortunately for those responsible for crafting and administering these state and local initiatives, in the late 1970s the United States Supreme Court reversed a fifty-year practice of allowing states and localities to experiment with land-use control devices,<sup>64</sup> the most controversial of which have involved conditioning development permission on landowner dedications that enhance environmental protection and conservation. By the early 1990s, through opinions in cases such as *Nollan v California*

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62. See generally, Dunlap, *supra* note 18, at 19-25 (noting America's sympathy for the goals of the environmental movement).

63. See Wolf, *Impenetrable Jungle*, *supra* note 51 at 74-77.

64. This happened most frequently in the constitutional setting. The most notable case in this regard is *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (upholding decision by New York City Landmarks Preservation Commission designating Grand Central Terminal as a historic landmark). See also *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Walter v. Seldin*, 422 U.S. 490 (1975).

*Coastal Commission*,<sup>65</sup> *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>66</sup> and *Lucas v. South Carolina Coastal Council*,<sup>67</sup> a majority of the Justices were sending a message to government regulators that conditional permitting is highly suspect and that environmental regulation and land-use regulation cannot completely devalue private real property. This pattern was continued in 1994's *Dolan v. City of Tigard*,<sup>68</sup> and the decade ended with confirmation of the Court's concern in *City of Monterey v. Del Monte Dunes*.<sup>69</sup>

There is little likelihood that the Supreme Court, or the state and lower federal courts that are following its lead, will reverse this trend in the foreseeable future. States and localities would seem to have two real choices. First, they can get out of the conditional permitting business, instead just saying "no" to developers under "traditional" land-use planning and zoning law (employing a variance procedure in cases of undue hardship). Second, governments can acquire environmentally sensitive parcels through eminent domain, or development rights for those parcels, or they can encourage others to do the same through incentive programs.

In other words, the time has passed when courts will take the word of government officials that private lands (or rights to use those lands) must be sacrificed completely to the public good without compensation. Happily, there has been significant experimentation with the second option noted in the preceding paragraph. Conservation easements, authorized by nearly all states<sup>70</sup> and supported by newly enhanced federal tax provisions,<sup>71</sup> are a popular method for ensuring that more intensive and environmentally harmful uses cannot be made on private lands.<sup>72</sup> Land trusts have increased their efforts over the last two decades to acquire undeveloped parcels in areas such as Nantucket, where development pressures are extremely hard to re-

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65. 483 U.S. 825 (1987) (regional coastal controls).

66. 482 U.S. 304 (1987) (local floodplain regulation).

67. 505 U.S. 1003 (1992) (state beachfront preservation).

68. 512 U.S. 374 (1994) (local floodplain and transportation controls).

69. 526 U.S. 687 (1999) (local threatened species protection).

70. See 4 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 34A.01 n.1 (Michael Alan Wolf ed., 2000) (indicating that every state except Wyoming has a special statute permitting conservation easements).

71. See 26 U.S.C. § 2031(c) (Supp. IV 1998).

72. See Stephanie L. Sandre, Note, *Conservation Easements: Minimizing Taxes and Maximizing Land*, 4 DRAKE J. AGRIC. L. 357 (1999).

sist.<sup>73</sup> The most ambitious plan to date is New Jersey's decision to expend hundreds of millions of dollars over the next decade on farmlands and open space, including that state's precious Pine-lands.<sup>74</sup> Even the federal government got into the act, as the Clinton Administration proposed to underwrite Better America Bonds, to be issued by states, localities, and tribal governments and designated for open space preservation, as well as water quality improvement and brownfields redevelopment.<sup>75</sup>

## IX. CONCLUDING THOUGHTS

It has become commonplace among historians to identify events or time periods as watersheds, a term derived from the natural phenomenon of an elevated ridge that divides two areas that drain into separate river systems. Based on the changes noted in this essay, the closing years of the twentieth century may well be viewed as the watershed of American environmental law. The tools employed by legislatures and regulators, the attitude of chief judicial arbiters, the nature of environmental advocacy and politics have all undergone significant, apparently irreversible, shifts during this time period.

Yet it is the second definition of "watershed," the one more familiar to contemporary students of ecology, that better symbolizes these crucial years and the decades to follow. This alternative meaning considers watersheds not to be the dividing points, but the areas, defined by hydrology, that drain into bodies of waters. To take a watershed approach is to attempt to manage the diverse uses within the area (a region that often crosses and lies under political boundaries) as an alternative to the traditional dichotomies of land versus water, surface water versus groundwater, and point source versus nonpoint source.

This alternative definition corresponds with the nascent multimedia approach in environmental law, the growing popularity of

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73. See Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077 (1996).

74. See Garden State Preservation Trust Act, N.J. STAT. ANN. §§ 13:8C-1 to -42 (West Supp. 2000).

75. See United States Environmental Protection Agency, *Better America Bonds*, <http://www.epa.gov/bonds/> (last updated Mar. 16, 2000). See also Community Open Space Bonds Act of 1999, S. 1558, 106th Cong. (1999).

encouraging net pollution reduction in a defined region (especially under, though not limited to, the Clean Air Act),<sup>76</sup> the urge to approach (if not achieve) sustainability, the dissatisfaction with environmental lawmaking as disaster reaction, and the futility of considering environmental and land-use regulation apart from its impact on private property. With these slogans to remind us of the new nature of environmental law, we can hope that others will look back on 2000 as a (high-point) watershed that divided our contentious, often frustrating past from an (interdependent) watershed legal regime.

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76. See Clean Air Act of 1990 § 173(c), 42 U.S.C. § 7503(c) (1994).

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