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George J. Mitchell: Maine's Environmental Senator

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I. INTRODUCTION

The State of Maine is blessed with a history of impressive and respected politicians. Among others, the list includes James Blaine, Margaret Chase Smith, and Edmund S. Muskie. The State now must add the name of George J. Mitchell to these ranks. A native son of Waterville, Maine, he attended Bowdoin College, Georgetown University Law Center, and eventually catapulted himself into one of the most powerful political positions in the United States government when he was elected as majority leader of the United States Senate.[2] During his tenure as majority leader, he helped to redefine the position through his strong work ethic, sense of fairness, and orientation toward results in the Senate. This Comment summarizes some of those results through an environmental lens, focusing on Mitchell's contributions to federal environmental legislation in the late 1980s. As Mitchell served in the Senate for fourteen years, six as the majority leader, he sponsored or cosponsored countless pieces of legislation. Environmental protection, however, always was a focus of his public service.[3] In that vein, this Comment canvasses Senator Mitchell's influence on the provisions of the Water Quality Act of 1987,[4] the Clean Air Act Amendments of 1990,[5] and the Oil Pollution Act of 1990,[6] three major legislative accomplishments aimed at protecting the environment. This Com-

1. The Author extends special thanks to Sharon Sudbay, field representative in Senator Mitchell's office in Portland, Maine. Her help was invaluable and her kind words an inspiration throughout the writing of this Comment.

2. Senator Mitchell's career experiences are varied: Army Counter Intelligence Corps, Berlin, Germany, 1954-1956; L.L.B., Georgetown University Law Center, 1960; United States Department of Justice, Washington, D.C., 1960-1962; Executive Assistant to United States Senator Edmund Muskie, 1962-1965; partner, law firm of Jensen, Baird, Gardner, Donovan & Henry, 1965-1977; Chairman of the Maine State Democratic Party, 1966-1968; Assistant District Attorney for Cumberland County, 1971; Democratic Candidate for Governor, 1974; United States Attorney for Maine, 1977-1979; United States District Court Judge, 1979-1980; United States Senator, 1980-1994; Majority Leader 1988-1994. THE ALMANAC OF AMERICAN POLITICS 554 (1994).

3. Senator Mitchell recently authored a book on environmental protection and the greenhouse effect. *See* SENATOR GEORGE J. MITCHELL, WORLD ON FIRE: SAVING AN ENDANGERED EARTH (1991).

4. Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (codified at 33 U.S.C. §§ 1251-1387 (1988) (amending the Federal Water Pollution Prevention Control Act, 33 U.S.C. §§ 1251-1376 (1987)).

5. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401-7671 (1983 & Supp. 1994)).

6. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (codified at 33 U.S.C. §§ 2701-2761 (Supp. 1994)).

ment analyzes those provisions of each Act for which Senator Mitchell fought most ardently and discusses the different tactics and strategies he employed to secure passage of each of these important bills. Finally, this Comment is a tribute to a Maine native who dedicated his life to public service. This Author recognizes that no one Senator could be solely responsible for any of these three pieces of environmental legislation. Nonetheless, only a few Senators held the key to passage of each of these acts. George J. Mitchell was one of the those Senators.

Senator Mitchell's contributions to environmental law can be understood only by viewing his Senate career in context. First, Mitchell served as a Federal District Court Judge for the District of Maine.[7] Although his tenure as a federal judge did not last a full year, Mitchell retained the aura of a judge throughout his Senate career.[8] Indeed, when he announced his retirement from the United States Senate, rumors persisted about Senator Mitchell's possible appointment to the United States Supreme Court.[9]

Second, George J. Mitchell's environmental influence was a circumstance of time and place. Mitchell was a Senator from the State of Maine. By replacing former Maine Senator Edmund Muskie in 1980, he followed one of the best known environmental activists ever to serve at the federal level[10] and provided a continuity of ser-

7. Senator Mitchell was named to the newly created federal court position in Bangor, Maine by President Jimmy Carter. *See* Jimmy Carter, II PUB. PAPERS 1397 (1979).

8. Summarizing Mitchell's Iran-Contra hearing statements, a commentator noted that "[e]verything Mr. Mitchell says is in earnest; so is everything about him from dark suit to furrowed brow. His words are selected carefully, spoken slowly. He sounds like the judge he was before he was appointed to the Senate in 1980 . . . ." *George Mitchell, Insider with Clout*, THE ECONOMIST, Apr. 13, 1991, at 32. A local commentator recently noted that "[e]verything George Mitchell said publicly had an intellectual cadence-reason with political rhythm. Those lines marched. They still do. He'll be missed as the senator from Maine." *Sen. George Mitchell*, BANGOR DAILY NEWS, Oct. 15, 1994.

9. Mitchell was considered one of President Clinton's possible Supreme Court nominees. *See* Ted Gest and Kenneth T. Walsh, *Life After Blackmun*, U.S. NEWS AND WORLD REPORT, Apr. 18, 1994, at 28 (suggesting that Mitchell would lose his political persona as a Supreme Court Justice); Jack W. Germond and Jules Witcover, *Sen. Mitchell Charts His Own Course*, NAT'L J., Apr. 16, 1994, at 914 (claiming that Mitchell is waiting for Chief Justice Rehnquist to retire). Mitchell declined the possible offer. *See* Douglas Jehl, *Mitchell Rejects President's Offer of Seat on Court*, N.Y. TIMES, Apr. 13, 1994, at A-1.

10. Muskie is responsible for the original Clean Air Act and Clean Water Act. Muskie left the Senate in 1979 to serve as Secretary of State under President Jimmy Carter after Cyrus R. Vance resigned. *See* John Felton, *Muskie Seen Helping Quiet Hill Foreign Policy Discontent*, 38 CONG. Q. WKLY. 1155 (1980). Mitchell was named to the seat by then Maine Governor Joseph Brennan. Muskie continues to offer his support and advice to the environmental movement. *See* Edmund S. Muskie, *Reflections on a Quarter Century of Environmental Activism: On Postponing Deadlines, Second-Guessing the Congress, and Ignoring Problems Until It Is Too*

vice unparalleled in the United States.[11] In addition, Mitchell represented Maine, a state at the forefront of the environmental protection movement. Mitchell's beliefs mirrored, protected, and advanced those interests at the federal level.

Finally, Mitchell's leadership was unique when compared to past majority leaders.[12] His Senate assignments and appointments reveal a man who ascended quickly through the Senate ranks only to share his power upon reaching the highest plateau of majority leader. Instead of accepting two positions regularly held by the majority leader, he delegated the posts to other senators.[13] His leadership paralleled changes in history.[14] He fought for environmental legislation by serving on the Environment and Public Works Committee, the Subcommittee on Clean Water, Fisheries and Wildlife, and the

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Late, 18 Envtl. L. Rep. 10081 (1988). In looking back at his environmental leadership, Muskie concludes that "[i]t has been said that in the 1960s we asked for too little, and that in the 1970s we asked for too much. The truth is that we have not *done* enough." *Id.* at 10082. He argues that the problems of the 1980s surfaced largely because of regulatory ineptitude: "Now is not the time to settle for vague generalities, to further postpone congressionally imposed deadlines or to blanch at hard consequences of implementing the environmental cleanup the public has mandated . . . ." *Id.* at 10083. *Reprinted in* 133 CONG. REC. S. 17583 (daily ed. Dec. 9, 1987) (submitted by Senator Mitchell).

11. In an introductory profile of Mitchell, *Congressional Quarterly* prophesied that "Mitchell . . . is expected to follow closely Muskie's political stands in the Senate." 38 CONG. Q. WKLY. 1332 (1980). Two years later, he would leap into the attempted Clean Air amendments. *See* Joseph A. Davis, *Key Clean Air Compromise Emerging in Senate Panel*, 40 CONG. Q. WKLY. 1580 (1982) (Acid rain provisions and amendments introduced by Mitchell); Joseph A. Davis, *Committee Completes Work on Clean Air Act Rewrite*, 40 CONG. Q. WKLY. 2066 (1982) (reporting Clean Air Rewrite out of Senate Environment and Public Works Committee on August 19 by a 15-1 vote). *But see* Joseph A. Davis, *Chances Fading for Action On Clean Air Act Rewrite Despite EPA Sanction Threat*, 40 CONG. Q. WKLY. 2969 (1982) (spelling doom for Clean Air Rewrite in congressional session).

12. For a historical perspective on the position of majority leader, *see* Senator Robert C. Byrd, THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE (1991). Byrd details a majority leader's duties as being the party spokesman, receiving preferential recognition on the floor, securing unanimous consent agreements limiting debate time, making determinations of what will be on the floor, and simply being on the floor for most of the session. *Id.* at 189-92.

13. Instead of accepting the Chairmanship of the Democratic Steering Committee, he named Daniel K. Inouye of Hawaii to the post. He asked Thomas A. Daschle of South Dakota to head the Democratic Policy Committee. "I've said I do not intend to be a one-man band and I've meant it. . . . By involving more people in the process, you tend to generate more support for whatever decisions the process yields." Ronald D. Elving, *Mitchell Will Try to Elevate Policy, Predictability*, 46 CONG. Q. WKLY. 3423 (1988).

14. Mitchell pondered: "Can a 200-year-old institution respond to such change? We answer that question affirmatively every day. Throughout its existence, despite its built-in bias against haste, the U.S. Senate has been a revolutionary body. . . . The Senate has been a guardian of tradition without becoming a barrier to change." *The Senate of 1989 and Beyond*, S. Doc. No. 101-37, 100th Cong., 2d. Sess. (1989).

Subcommittee on Water Resources, Transportation and Economic Development.

In 1984 Senator Mitchell was chosen to be Chairman of the Democratic Senatorial Campaign Committee.[15] Only a few weeks after the 1986 election, he was named deputy president pro tempore of the Senate.[16] He was elected as the Majority Leader of the United States Senate a scant two years later.[17]

Part II of this Comment tracks George Mitchell's role as a Senator in the development of the Clean Water Act Amendments of 1987. It briefly describes the provisions of the Amendments. Part III describes Mitchell's work as Senate Majority Leader in passage of the Clean Air Act Amendments of 1990 and provides a brief overview of those amendments. Part IV of this Comment presents Mitchell's role as Senator from Maine in enacting the Oil Pollution Act of 1990. It also describes the provisions of the Oil Pollution Act.

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15. In 1986, after the two-year chairmanship, the Democrats regained control of the Senate by gaining eight seats to hold a ten seat edge. For his action in the Committee, *see Two Savvy Coaches*, NAT'L J., Nov. 1, 1986, at 2633 ("Mitchell has gained a reputation for hard work and easy-going style and . . . he has spoken eloquently about his party's need to do a better job of appealing to middle-class voters."); *see also* Hays Gorey, *A Hardball Player for the Senate; New Majority Leader Mitchell is a Liberal with an Iron Will*, TIME, Dec. 12, 1988, at 30 (pointing out that Mitchell raised $12.4 million as head of the committee). In the race for majority leader, all of the contenders made efforts to raise money for candidates. *See* David S. Cloud, *Hands-on Style for Heavyweight Fund-Raiser*, 46 CONG. Q. WKLY. 2785 (1988). The author noted that Mitchell "often seemed like a one-man fundraising machine . . . ." *Id.*

16. Senator Byrd, the existing majority leader, said that the position was awarded to Mitchell for leading Democrats to the majority in the Senate. *Senate Leaders Selected; Party Chiefs Begin Committee Assignment Process*, Daily Report For Executives (BNA) No. 225, at F-1 (Nov. 21, 1986).

17. For an extensive coverage of the election of Mitchell to the top post, *see* Ronald D. Elving, *Mitchell Will Try to Elevate Policy, Predictability*, *supra* note 13. Mitchell received 27 votes on the first ballot running against Senator J. Bennett Johnston from Louisiana and Senator Daniel K. Inouye from Hawaii. The two senators then had Mitchell voted in by acclamation. Ronald D. Elving, *Mitchell's Big Vote Tally Shows Broad Support*, 46 CONG. Q. WKLY. 3425 (1988). *See also* Richard E. Cohen, *A Consensus Builder to Lead the Senate*, NAT'L J., Dec. 3, 1988, at 3079 (Mitchell dispersed authority to others, including Inouye); Richard E. Cohen, *Setting the Senate Democrats' Agenda*, NAT'L J., Feb. 25, 1989, at 484 (concluding that "the evidence suggests that [Mitchell's] apparent caution in building a consensus ultimately will yield a more dynamic and confident leadership."); Steven Manning, *A New Congress Gets Down to Business*, SCHOLASTIC UPDATE, Feb. 24, 1989, at 6 (noting that Mitchell will set legislative priorities and guide bills through the Senate).

II. MITCHELL AS LAW MAKER: THE WATER QUALITY ACT OF 1987

A. *Passing the Water Quality Act of 1987*

The original Clean Water Act was passed in 1972[18] to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[19] A major overhaul of the Act was undertaken in 1977.[20] The Clean Water Act seeks to control water pollution from both point and non-point sources.

The clean water program uses three regulatory methods to achieve control of pollution from point sources: effluent limitations, water quality standards, and a complex permit system for pollution discharges.[21] In addition, the Act authorizes the Environmental Protection Agency (EPA) to make grants to states, municipalities, and other groups for the construction of waste treatment facilities that are publicly and privately owned.[22] The statute limits the duration of the federal role in the grant program by phasing out federal monies in favor of state-run revolving funds. Finally, enforcement is achieved through a myriad of administrative, civil, and criminal penalties levied against violators.[23]

Congress's intent is to reevaluate environmental statutes such as the Clean Water Act periodically to ensure that the law reflects the current state of ongoing scientific knowledge and changing circumstances. To this end, the 1977 reauthorization was designed to expire in 1982. However, the Clean Water Act was not reauthorized by Congress until a full five years later, in 1987, due to heavy resistance from the executive branch.[24] This Section tracks the Clean Water Act's journey to reauthorization as the Water Quality Act of 1987.

Senator Mitchell and several other staunchly environmental Senators guided the Clean Water bill into law despite a series of vetoes by President Reagan. Senator Mitchell served as the Democratic floor manager of the bill with Senator John Chafee of Rhode Island as his Republican counterpart. In their hands, the Water Quality Act of 1987 represented one of the first significant pieces of environmental legislation to survive the arduous travel through the legisla-

18. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) (amended 1977).

19. 33 U.S.C. § 1251(a) (1988).

20. Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 .

21. *See* JOHN HENRY DAVIDSON & ORLANDO DELOGU, 1 FEDERAL ENVIRONMENTAL REGULATION 2-7 to 2-14 (1993).

22. 33 U.S.C. § 1281(g)(1), (h) (1988).

23. *See* 33 U.S.C. § 1319 (1988 & Supp. II 1990).

24. For a historical summary of the legislative reauthorization, *see* Mary J. Houghton, *The Clean Water Act Amendments of 1987*, Envtl. Rptr. (BNA), Vol. 18, No. 19, at 25-38 (Sept. 4, 1987).

tive and executive branches during the 1980s. In particular, the amendments signalled the willingness of Congress to begin to act as environmental regulators in the face of a hostile administration and an inactive EPA. The late 1980s saw the greening of Congress, marked by the Water Quality Act of 1987.

Environmental progress came slowly, however. Historical changes that ultimately marked the path for passage of the Clean Air Act Amendments of 1990 and the Oil Pollution Act of 1990 had not yet occurred. First, Mitchell's meteoric rise in the Senate only had begun. Second, President Reagan was in the midst of his second term. President Reagan's opposition to comprehensive environmental regulation and the threat of a Presidential veto were barriers to the passage of meaningful legislation during the early 1980s.[25] Nevertheless, Senator Mitchell and allied Senators guided the Clean Water bill into law without President Reagan's approval.

Work on the reauthorization of the Clean Water Act began in earnest in 1985.[26] Early in that year, the Senate Environment and Public Works Subcommittee on Environmental Protection approved a bill that authorized $18 billion over the next nine years for the construction of municipal sewage treatment facilities.[27] The Senate bill (S. 1128) also provided for $300 million in funding for the states' development of non-point source pollution programs within eighteen months of passage. The Senate committee retained the original Clean Water Act's five-year term for wastewater discharge permits

25. Joseph A. Davis, *Defending the Status Quo: Environmentalists Hold Edge as Laws Come Up for Renewal*, 43 CONG. Q. WKLY. 81 (1985) (noting that only one out of ten environmental laws up for renewal had been renewed). Davis blamed the ineffectiveness of the Clean Water Act on the Environmental Protection Agency by noting that "The 1972 Clean Water Act, for example, required EPA to set up a 'pretreatment' program for regulating the discharge of pollutants by industry into municipal sewage systems. More than a decade later, EPA has yet to succeed in coming up with a workable program." *Id.*

26. Houghton, *supra* note 24. Previous attempts had failed. The Senate Environment and Public Works Committee held hearings in 1982. No legislative action flowed from the committee. A bill was reported by the Senate in 1983, but various filibuster threats kept the bill from being voted on in that year. *Id.* at 25. *See also* Joseph A. Davis, *House Panel Ducks Fight on Offshore Leasing*, 43 CONG. Q. WKLY. 803 (1985) (noting progress of bill).

27. Houghton, *supra* note 24, at 26. The Administration opposed this type of funding and sought to limit the funding to $6 billion with the hope of ending the program before 1994. *Id. See also* Joseph A. Davis, *Reagan Seeking Phase-out: Clean Water Debate to Focus on Sewage Grant Program*, 43 CONG. Q. WKLY. 491 (1985) (noting that the Senate was charting the middle course between the House and Administration proposals for funding levels). In the beginning of his presidency, Reagan argued that the program should not last forever. Congress obliged, but "[w]hile it was nowhere written into the law, members from both parties in both chambers believed they had an agreement with the administration to fund the remaining $23 billion in needs at $2.4 billion annually over the next 10 years." *Id. See infra* text accompanying note 48.

instead of extending it to ten years as was provided for in the House bill.

On May 2, 1985, the Senate Environment and Public Works Committee reported S. 1128 by a 13-2 vote and prepared to put the bill on the floor of the Senate.[28] A major conflict arose at the committee level over the allocation formula for individual state funding for the sewer grants.[29] Another source of conflict was the bill's modification of the EPA practice of granting toxic pollutant variances to certain businesses, as had been approved by the Supreme Court in *Chemical Manufacturers Ass'n v. Natural Resources Defense Council*.[30] As the bill neared floor consideration, EPA Administrator Lee Thomas sent a letter to Senate Majority Leader Robert Dole outlining the Reagan Administration's disapproval of the bill in its committee format. Thomas openly criticized the bill's funding levels for phase-out of the municipal sewage treatment facility construction grants and for non-point source pollution programs.[31] Mitchell reviewed the successes of the federalization of water pollution control in order to respond to this criticism.[32]

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28. *See* Joseph A. Davis, *Floor Fight Likely Over Sewer Grants: Senate Committee Approves Renewal of Clean Water Act*, 43 CONG. Q. WKLY. 863 (1985).

29. *See* Houghton, *supra* note 24, at 26. The two dissenters, Dave Durenberger of Minnesota and New York Senator Daniel Patrick Moynihan, disagreed with the adoption of a new formula to allocate construction grant money to the states. *Id.*

30. 470 U.S. 116 (1985). In that case, Justice White concluded that both statutory language and legislative history permitted the EPA's interpretation that it had authority to grant variances for effluent limitations on the basis of fundamentally different factors under section 301(l) of the Clean Water Act. *Id.* at 129-30. *See* 33 U.S.C. § 1311(n) (1988). For a discussion of fundamentally different factors, see Davidson, *supra* note 21, at 2-22 to 2-23; William Funk, *The Exception That Approves the Rule: FDF Variances under the Clean Water Act*, 13 B.C. ENVTL. AFF. L. REV. 1 (1985). Congress enacted strict specifications on these variances, such as placing the burden of proof on the company and not allowing the businesses to use cost as a reason for departure from the guidelines. *See* Davis, *supra* note 28, at 864. Mitchell commented that "[w]hile there is currently no basis for the regulations in the act, the conferees concluded that some expansion of the Administrator's authority in this area is an appropriate addition to the act." 133 CONG. REC. S739 (daily ed. Jan. 14, 1987). *See also* 133 CONG. REC. H131, H136-37 (daily ed. Jan. 7, 1987), *reprinted in* 1987 U.S.C.C.A.N. 5, 22.

31. Houghton, *supra* note 24, at 27-28. The Administration's main argument was that these types of monies should have come from the states. Thomas expounded that "[e]xperience . . . argues against a federal responsibility in non-point source control implementation." *Id.* at 27. *See also* Joseph A. Davis, *Conflict with Reagan on Sewer Grants: Clean Water Act Renewal Awaits House, Senate Action*, 43 CONG. Q. WKLY. 1009 (1985).

32. My response to that is that before 1972 we did not have any significant Federal program to deal with the problem of water pollution in our country. And as a result, almost every major river in the United States was a stinking, open sewer. . . . Since 1972, since we passed the Federal Clean Water Act, hundreds and hundreds of American rivers have been cleaned up. And the American people overwhelmingly want this program to continue.

133 CONG. REC. S1005-06 (daily ed. Jan. 21, 1987) (statement by Senator Mitchell).

The floor fight reflected these main committee issues. Several senators attempted to amend the bill because their home states would receive diminished funding under the new allocation formula prescribed by the Senate committee. Mitchell and Rhode Island Senator John Chafee realized that the allocation formula was a thorny issue, as it had been throughout the committee process. To avoid a possible filibuster, Mitchell and Chafee drafted a compromise provision that retreated slightly from the committee bill but did not give the opponents all that they had desired. On June 13, 1985, the Senate passed its compromise bill by a unanimous vote. The House subsequently passed its version of the bill by a wide margin.[33] The conference to resolve the differences between the two bills progressed slowly, however, and the process remained at a virtual standstill for an entire year.[34]

The conferees finally compromised by once again altering the formula for state funding. In addition, several other substantive amendments were made to the conference bill.[35] At the completion of the conference, competing sides both claimed victory. Environmentalists lauded the conference bill's inclusion of the Senate's five-year renewals of pollution discharge permits; the House bill would have extended that time frame to ten years. The compromise bill also adopted the Senate's recommendation of $18 million to fund the construction grant program; President Reagan could claim this as partial vindication because the money allocated was less than the amount provided by the House version, and the program still would be taken over by the states in 1994.

A conference between members of the Senate and House of Representatives usually signals the end of the legislative process. Often the final vote is uneventful. In this case, however, the two years of work reflected in the conference bill were merely the beginning of the fight for the new Clean Water Act. Flirting with the end of the Congressional session, Congress passed the conference bill unanimously.[36] President Reagan, however, exercised his pocket veto power, refusing to act on the bill, and the veto became effective two days after the biannual Congressional elections.[37] In his pocket veto

33. The House measure passed by a vote of 340-83. Joseph A. Davis, *House Refuses FY '86 Freeze on Spending for Clean Water*, 43 CONG. Q. WKLY. 1481, 1482 (1985).

34. *See* Janet Hook, *Congress Heads for Grand Legislative Finale*, 44 CONG. Q. WKLY. 1960, 1969 (1986) (noting that one of the major problems in conference was how the funding would be divided among the states).

35. *See* Houghton, *supra* note 24, at 31-33.

36. Joseph A. Davis, *Congress Votes Unanimously for $20 Billion Water Cleanup*, 44 CONG. Q. WKLY. 2623 (1986). The House approval occurred on October 15 by a vote of 408-0, and the Senate passed the conference bill the next day 96-0. *Id.*

37. *See Pocket Veto Possible for Clean Water Bill*, 44 CONG. Q. WKLY. 2799 (1986) (noting that although the conference bill cleared Congress on October 16, the bill did not arrive at the White House until October 25. "Senate officials say the bill

message, the President explained his fiscal dissatisfaction with the bill:

> S. 1128 . . . would authorize . . . the reinstatement of a Federal financial assistance program to pay for local plans to control diffuse sources of pollution. Over $500 million was spent on a similar program between 1973 and 1981, with little or no positive result. Restarting expensive planning grant programs that have failed in the past is not justifiable.[38]

The 100th Congress convened on January 6, 1987. The Senate waited two weeks to bring the legislation to a vote.[39] When it did, on January 21, 1987, the Senate as predicted quickly passed the Water Quality Act of 1987. During the floor debate, the Reagan Administration offered a substitute provision. Introduced by Majority Leader Dole, it would have reduced the funding for sewage construction grants by $6 billion and cut back money for non-point source pollution programs.[40] Mitchell assisted in the defeat of this bill by exhorting that "[t]he President does not need this fight. We do not want this fight. The American people will not benefit from this fight. The American people want clean water."[41] Senator Mitchell seized the opportunity to speak about the environmental legislation he had guided on the floor:

> The current bill is in fact a modest, responsible compromise between the very large costs of the many needed projects, on the one hand, and the need to control spending, on the other hand. Accepting this substitute would not be a compromise. It would be a failure of the Congress to meet its responsibility.[42]

Senate members, including Senator Dole, complained that the federal government was intervening in state and local land use plan-

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got caught in the backlog of paperwork that always follows adjournment."); *see also* Joseph A. Davis, *Reagan Vetoes Clean Water Bill; Members Vow to Pass It Again*, 44 CONG. Q. WKLY. 2874 (1986) (explaining the pocket veto).

38. Ronald Reagan, *Memorandum of Disapproval of the Bill Amending the Clean Water Act*, II PUB. PAPERS 1529 (1986).

39. Democrats in the Senate agreed to wait until after President Reagan's State of the Union Address. In return, the Senate Republicans agreed not to try to block the veto. Amy Stern, *In Gesture to President Reagan, Senate Delays Clean Water Vote*, 45 CONG. Q. WKLY. 116 (1987).

40. Mitchell noted that the "administration bill would replace direct authorizations with a scheme allowing States to use a part of their construction grant funds . . . to support nonpoint programs. This is asking States to rob Peter to pay Paul. These funds are committed years in advance to specific community projects." 133 CONG. REC. S914 (daily ed. Jan. 20, 1987).

41. 133 CONG. REC. S769 (daily ed. Jan. 14, 1987) (debating Senator Robert Dole's substitute bill).

42. 133 CONG. REC. S913 (daily ed. Jan. 20, 1987) (statement by Senator Mitchell on the Dole substitute bill).

ning decisions by dealing with non-point source pollution.[43] Mitchell defended the legislation by focusing on the severity of the non-point source problem and the bill's efforts to curb it.[44] Mitchell reassured Senators that the EPA would do no assessments unless the states failed to act within the allotted time period.[45] Further, if the EPA were required to act, the effort would be aimed only at garnering national data on non-point source pollution.[46] The Dole amendment was defeated 82-17.

The bill Congress then considered was virtually identical to the one pocket vetoed by President Reagan in late 1986. On the Senate floor Mitchell criticized the Reagan Administration harshly, repeatedly arguing that it was trying to duck responsibility for a funding commitment made six years earlier.[47] Mitchell saw this veto and opposition as contravening that earlier commitment: "And so Members of the Senate, President Reagan's veto of this bill last year . . . is a breach of that understanding; it is a violation of that agreement; it is a reneging on that commitment."[48] The vast majority of members from both parties agreed with Mitchell. Unfortunately, President Reagan once more exercised his veto power, despite Congressional pressure to sign the bill.[49] An impatient House of Repre-

43. *See Senate Approves Water Act Reauthorization; Leaders Claim Margin to Override Presidential Veto*, Daily Report for Executives (BNA) No. 14, at A-21 (Jan. 22, 1987). The fact that decreasing non-point source pollution requires changes in land use is supported by commentators. "[N]on-point sources are not thought to be susceptible to correction by technology, but instead require changes in the way land is used for such activities as forestry, agriculture, mining, and construction." DAVIDSON & DELOGU, *supra* note 21, at 2-5, *citing* John H. Davidson, *Little Waters: The Relationship Between Water Pollution and Agricultural Drainage*, 17 ENVTL. L. REP. 10074 (1987).

44. Mitchell joined other Senators in pointing out the threat of non-point source pollution by noting that "the bill provides for State programs to identify and control nonpoint source pollution, such as runoff from city streets and agricultural lands. These nonpoint sources of pollution are thought to cause over half of the remaining water pollution problems." 133 CONG. REC. S19 (daily ed. Jan. 6, 1987). Mitchell defended the bill against the criticism that the federal government was planning land use.

> [C]haracterization of this legislation as Federal land use planning is totally unfounded and incorrect . . . I want to point out that this section was carefully designed in long negotiations with House conferees. We responded to those who expressed concern about Federal intervention in local decisions. . . . The nonpoint source provision is [sic] our bill is balanced and workable.

133 CONG. REC. S915 (daily ed. Jan. 20, 1987).

45. 133 CONG. REC. S914 (daily ed. Jan. 20, 1987).

46. *Id.*

47. For information on the commitment, see *supra* note 27.

48. 133 CONG. REC. S767 (daily ed. Jan. 14, 1987).

49. In his veto message on January 30, President Reagan stated that the non-point source pollution program

> threatens to become the ultimate whip hand for Federal regulators. For example, in participating States, if farmers have more run-off from their

sentatives scheduled a veto override vote for February 3, 1987, and the Senate scheduled their vote for a day later.[50] The votes were consistent. The House overrode the veto 401-26, and the Senate blocked the veto by an 86-14 vote.[51] While the obvious tension between the executive and legislative branches at that time explained the voting pattern,[52] Mitchell believed that the bill succeeded on its environmental merits, not through politics.[53] In support of this view, Mitchell ardently defended the legislation against the President's argument that the bill was essentially legislative "pork."[54]

Mitchell's contributions to the passage of the Water Quality Act of 1987 were extraordinary. First, Mitchell acted as one of the floor managers of the legislation. By guiding the bill on the floor, he was able to push the legislation to a series of votes and to craft compromises to gain enough votes to overcome a filibuster and a presidential veto. The one-sided vote is evidence of Mitchell's ability to work out a compromise on the allocation formula, funding for the construction grant program, and a more comprehensive non-point source pollution program. In passing the Water Quality Act of 1987, Senator George Mitchell demonstrated his ability to work with his colleagues to pass lengthy, detailed environmental legislation in the face of formidable opposition.[55]

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land than the Environmental Protection Agency decides is right, that Agency will be able to intrude into decisions such as how and where the farmers must plow their fields, what fertilizers they must use, and what kind of cover crops they must plant.

Ronald Reagan, *Message to the House of Representatives Returning Without Approval the Water Quality Act of 1987*, I PUB. PAPERS 95 (1987). *See also Sent by the President Jan. 30: President Reagan's Message On Veto of Clean Water Act*, 45 CONG. Q. WKLY. 253 (1987).

50. *Capital Boxscore: Reagan Vetoes Clean Water Bill*, 45 CONG. Q. WKLY. 214 (1987).

51. Joseph A. Davis, *Only 40 Members Back Reagan: Congress Easily Overrides Veto of $20 Billion Clean Water Bill*, 45 CONG. Q. WKLY. 240 (1987).

52. *See* James M. Strock, *The Congress and the President: From Confrontation to Creative Tension*, 17 ENVTL. L. REP. 10006 (1987).

53. Davis, *supra* note 51.

54. *Id.* Mitchell pointed out that although almost every state would receive funding for specific projects, they "address truly unique circumstances, posing serious environmental threats, which are beyond the reach of standard clean water programs." *Id.* He noted that "[i]f Congress proposes it, it's pork . . . if the president proposes it, it's roast sirloin." *Id. See also Congress Overrides Reagan's Veto by Big Margin to Renew Clean Water Act Into 1990s*, Daily Report for Executives (BNA) No. 23, at A-13 (Feb. 5, 1987) (pointing out Mitchell's conclusion that all of the special projects included in the passed bill were also included in the administration substitute bill).

55. *See, e.g.*, Strock, *supra* note 52. In the middle of the legislative and executive volleying of the Water Quality Act, Strock suggested that "the Reagan Administration should mitigate the mistrust engendered by its early environmental record . . . . [T]he apparent lack of White House concern for environmental matters has never been wholly dispelled." *Id.* at 10008.

B. *Provisions of the Water Quality Act of 1987*

This section presents a brief overview of the Water Quality Act of 1987[56] and its implications for the continuing improvement of water quality. This section also includes a description of criticisms of the legislation. Although this section focuses on the bill's construction grant program and efforts to curb non-point source pollution, the Water Quality Act of 1987 also provided for extended compliance deadlines to accommodate the EPA's delay in establishing guidelines. Additionally, the 1987 amendments also included allowances for permit modifications, increased penalties for violations, and new programs to deal with toxic pollution "hot spots."

The construction grant program's purpose is "to require and to assist the development and implementation of waste treatment management plans and practices."[57] As described in the last section, the amendments to the grant program engendered the most controversy during consideration of the bill.[58] Under the amendments, the capitalization of state loan programs is financed at a top level of $9.6 billion until 1990, with a cap of $8.4 billion for 1990 to 1994.[59] The EPA Administrator must enter into a written agreement with the grant applicant that specifically states which items of a particular project are eligible for federal monies.[60] The 1987 amendments contain the allotment formula providing funding amounts for each state.[61] At least one commentator concluded that this final provision for construction grants actually was quite positive for both the legislative and executive branches.[62]

The 1987 amendments also tackle new sources of pollution. The Water Quality Act states that "it is the national policy that programs for the control of non-point sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met . . . ."[63] To that end, section 316 of the Water Quality Act was drafted to deal with non-point source water pollution. Non-point source pollution is identified as pollution that does

56. For a section-by-section analysis, see 133 CONG. REC. H131 (daily ed. Jan. 7, 1987) *reprinted in* 1987 U.S.C.C.A.N. 5 (prepared by the late New Jersey Representative James T. Howard, Chair of the House Committee on Public Works and Transportation) [hereinafter Clean Water Legislative History].

57. 33 U.S.C. § 1281(a) (1988).

58. *See supra* text accompanying notes 29, 33.

59. *See* 33 U.S.C. § 1285 (1988).

60. *Id.* § 1283(a)(2).

61. *Id.* § 1285(c)(3).

62. "The Construction Grants program was a major piece of compromise legislation. It did authorize direct grants at a much higher level than President Reagan desired . . . ." Lawrence R. Liebesman and Eliott P. Laws, *The Water Quality Act of 1987: A Major Step in Assuring the Quality of the Nation's Waters*, 17 ENVTL. L. REP. 10311, 10314 (1987). The author pointed out, however, that the program is eventually phased out at the federal level. *Id.* at 10312.

63. 33 U.S.C. § 1251(a)(7) (1988).

not come from a single, identifiable source. The Clean Water Act defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[64] Congress provided $400 million over four years to study and implement non-point source management programs.[65] The EPA must provide annual reports to Congress on the success of programs concerning non-point source pollution in the states.[66]

Both opponents and proponents of the amendments criticized the non-point source pollution program included in the Water Quality Act of 1987. Legal commentators portrayed the non-point source pollution program as inadequate,[67] while President Reagan's attack on the legislation centered on fiscal and federalism concerns. The President believed the programs should be left entirely to the states because the federal government simply could not afford to finance

64. *Id.* § 1362(14). Mitchell has defined non-point source pollution as caused "by general runoff, rather than discharge from a specific pipe." 133 CONG. REC. S734 (daily ed. Jan. 14, 1985) (statement by Senator Mitchell).

65. 33 U.S.C. § 1329(j) (1988). Each state had to submit a report within 18 months of enactment that was subject to the approval of the Administrator within the following 180 days. *Id.* § 1329(c)(2). If a state failed to submit a report, then EPA could prepare one for that state. *Id.* § 1329(d)(3).

66. *See* Clean Water Legislative History, *supra* note 56, at 32.

67. *See* Robert D. Fentress, Comment, *Nonpoint Source Pollution, Groundwater, and the 1987 Water Quality Act: Section 208 Revisited?*, 19 ENVTL. L. 807 (1989). The author criticized the section 319 amendment to the Clean Water Act since it establishes a voluntary program for the states. *Id.* at 838. However, he also acknowledged, "If little or no progress is made by the states under section 319 in controlling the NPS problem, and Congress is serious . . . it will use the information provided by the states under section 319's reporting requirements to justify stronger measures." *Id. See also* William F. Pedersen, Jr., *Turning the Tide on Water Quality*, 15 ECOLOGY L.Q. 69 (1988) (stating that "[t]he statutory revisions enacted in 1987 . . . do little more than mirror the inherited structure"); John H. Davidson, *Thinking About Nonpoint Sources of Water Pollution and South Dakota Agriculture*, 34 S.D. L. REV. 20 (1989). Davidson notes that the 1987 non-point source program "is a start, [but] it is far from being dramatic or decisive; arguably, it leaves any resulting improvement in water quality entirely to the political will of individual states." *Id.* at 43.

his program.[68] Some critics focused on the specific effects the new section could have on home states.[69]

These criticisms, however, should not cloud the fact that this amendment to the Clean Water Act is the legislative branch's most comprehensive step ever regarding non-point source pollution.[70] Such criticisms reflect the nature and meaning of compromise in the legislative branch. The non-point source pollution efforts in the Water Quality Act of 1987 represent a mandate defining the middle ground between the fiscal conservatives, who believed the monetary cost was too high to do more, and environmentalists and scholars, who believed the environmental cost of neglecting non-point source problems was too high not to do more.

The 1987 Act extended compliance dates for standards due to the EPA's delay in establishing certain guidelines. Deadlines were delayed for effluent limitations on "priority toxic pollutants, conventional pollutants, and non-conventional pollutants [to] three years after EPA promulgates the limits . . . ."[71] Congress realized the necessity of directing the EPA to set the limitations in a timely fashion so that deadlines could be met. To that end, the Water Quality Act of 1987 directs the EPA Administrator "to promulgate such limitations as expeditiously as possible."[72]

The 1987 amendments also allow for modifications to permits detailing discharge limitations under certain circumstances. For instance, permit modifications may be made for nonconventional pollutants such as ammonia, chlorine, color, iron, and total phenols under certain conditions.[73] Discharges from publicly owned treat-

68. President Reagan delivered his veto message in late January. "Let me repeat—controlling non-point source pollution has the potential to touch, in the most intimate ways, practically all of us as citizens, whether farmers, business people, or homeowners. I do not believe State programs should be subject to Federal control." Reagan, *supra* note 49, at 96. Senator Mitchell's consistent response was that this view was erroneous. "It is the intention of the conferees that grants to States be used to implement . . . . Grants are not intended to be used to support the development of such programs or plans. The conferees expect that States will use State resources to develop nonpoint plans and programs." 132 CONG. REC. S16432 (daily ed. Oct. 16, 1986) (statement of Senator Mitchell).

69. *See, e.g.*, Davidson, *supra* note 67. Davidson points out that since "agricultural practices are the principal source of nonpoint source pollution, and there is increasing evidence that a substantial percentage of all water pollution falls into the nonpoint source category, these changes are likely to have a disproportionate and significant impact on South Dakota agriculture." *Id.* at 21.

70. *See* 33 U.S.C. § 1314(f) (1988). This was the only non-point source provision existing before the 1987 amendments to the Act.

71. *See id.* § 1311(b)(2)(C)-(E). In no event could they be finished later then March 31, 1989. *Id.* § 1311(b)(2)(C).

72. 133 CONG. REC. H131, H135 (daily ed. Jan. 7, 1987).

73. 33 U.S.C. § 1311(g)(1) (1988). The operator or owner must show the Administrator that compliance will still occur, no other sources will be subjected to additional requirements as a result of the modification, and the modification will not

ment works into marine waters may be modified if a list of nine conditions is met to the satisfaction of the Administrator and the State.[74] In addition, Congress created a new provision that affirmed and modified an existing non-statutory EPA administrative program dealing with compliance variances for businesses, based on the fundamentally different factors of different businesses.[75]

Increased use of penalties to compel enforcement was a major part of the 1987 amendments to the Clean Water Act.[76] The EPA and the Secretary of the Army obtained new authority to assess administrative penalties for violations of the Act.[77] These administrative penalties are divided into two classes. Class I has a cap of $10,000 per violation, and the maximum penalty in Class II is $10,000 per day for each violation, with total limits of $25,000 and $125,000, respectively.[78] The EPA Administrator or Secretary of the Army examines such factors as the "nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."[79]

The amendments increased the civil penalty amount from $10,000 per day to $25,000 per day for violations of effluent limitations, water quality-related effluent limitations, toxic and pre-treatment effluent standards, the Clean Lakes Program, and the disposal or

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"interfere with the attainment or maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife . . . ." *Id.* § 1311(g)(2)(C). Pollutants can also be added to the list of pollutants whose discharge may be modified. *See id.* § 1311 (g)(4)(A), (B)(i).

74. *Id.* § 1311(h).

75. Congress tightened the EPA's ability to grant these permits in response to the Supreme Court's ruling in Chemical Manufacturers Ass'n v. Natural Resources Defense Counsel, Inc., 470 U.S. 116 (1985). "The conferees intend . . . that the Administrator use the new authority in this section sparingly . . . . [This section] should not be used to generally relax or retreat from national, minimum requirements for an industry." 133 CONG. REC. S739 (daily ed. Jan. 14, 1987) (statement of Sen. Mitchell). The legislative history spells out the factors upon which to base variances. "These factors include the age of equipment and facilities, the process employed, the engineering aspect of the type of control techniques, process changes and other factors deemed appropriate by the administrator. The bill specifically excludes consideration of costs . . . as a basis for establishing a fundamental difference with regard to an individual facility." 133 CONG. REC. H131, H136 (daily ed. Jan. 7, 1987).

76. Senator Mitchell commented that "[t]his provision will substantially increase the agency's authority to assure full enforcement of the act." 133 CONG. REC. S742 (daily ed. Jan. 14, 1987). For a pre-1987 history of the enforcement provisions, see William L. Andreen, *Beyond Words of Exhortation: The Congressional Prescription for Vigorous Federal Enforcement of the Clean Water Act*, 55 GEO. WASH. L. REV. 202 (1987).

77. 33 U.S.C. § 1319(g) (1988).

78. *Id.* § 1319(g)(2).

79. *Id.* § 1319(g)(3).

use of sewage sludge.[80] Authorities are directed to look at factors similar to the previous administrative guidelines to determine penalties.[81] Congress also enacted increased criminal penalties for negligent and knowing violations.[82]

In response to the concern that special controls, beyond existing statutory guidelines, would be needed in order to control particularly hazardous pollution, the legislation addresses toxic "hot spots."[83] Under this new section, states must "identify those water bodies within or adjacent to them which will not meet State water quality standards because of toxic pollutants after the implementation of [Best Available Technology], new source performance standards and pretreatment standards."[84] The states then must provide individual control strategies for dealing with these pollutants.[85] If no strategy is developed by February 4, 1989, the EPA is directed to promulgate a strategy for the state in question.[86]

In conclusion, the Water Quality Act of 1987 is an ambitious set of amendments that assists in the prevention of future water pollution. Despite the fact that the non-point source management program has been criticized as too soft to be effective, the constraints of compromise inherent in the legislative process demanded that states' rights be respected. Former EPA Deputy Administrator Rebecca Hanmer notes that the State requirements and the focus on water quality are the two special parts of the Act.[87] These amendments passed as the result and the completion of a lengthy process. Senator Mitchell, as floor manager, passed the important and overdue Clean Water Act of 1987 in the face of unyielding opposition from the Reagan administration.

80. *Id.* § 1319(d). Several courts have used this section extensively: Sasser v. Administrator, United States Environmental Protection Agency, 990 F.2d 127 (4th Cir. 1993) (upholding jurisdiction of Administrator where landowner discharged pollutants into wetlands without a permit); United States v. Confederate Acres Sanitary Sewer and Drainage System, Inc., 767 F. Supp. 834 (W.D. Ky. 1990) (holding that $17,000 penalty was adequate because that was the approximate benefit from the violation); United States v. Ciampitti, 669 F. Supp. 684 (D. N.J. 1987) (affirming $1,000 a day penalty for developer who filled in federal wetlands area even after being made aware of their existence).

81. 33. U.S.C. § 1319(d) (1988).

82. 33 U.S.C. § 1319(c) (1988 & Supp. II 1990).

83. 33 U.S.C. § 1314(l) (1988).

84. 133 CONG. REC. H131, H136 (daily ed. Jan. 7, 1982).

85. *Id. See* 33 U.S.C. § 1314(l)(1)(D) (1988). The Administrator then has 120 days after the February 4, 1989 deadline to approve the plan. *Id.* § 1314(l)(2).

86. *Id.* § 1314(l)(3).

87. *See* Houghton, *supra* note 24, at 4.

III. MITCHELL AS MAJORITY LEADER: THE CLEAN AIR ACT AMENDMENTS OF 1990

A. Passing the Clean Air Act Amendments of 1990

Beginning in 1980, Senator Mitchell fought for laws to protect the country from air pollution. In October 1994, he summarized his beliefs on the subject: "We will either agree to control and reduce pollution and take the necessary steps to achieve that result, or we will continue to suffer from air pollution. Those are the choices available."[88] Mitchell expended enormous energy in passing the Clean Air Act Amendments of 1990. The early 1980s were a bleak decade for clean air advocates seeking to pass new legislation. After the 1977 reauthorization of the Clean Air Act expired in 1982, clean air legislation died in committee each session until the late 1980s, when clean air advocates found new hope. Their renewed optimism sprang from two sources. First, Senator Mitchell was elected majority leader in 1988. Second, the Reagan Administration gave way to the environmentally friendlier Bush Administration.[89] This transition guaranteed a better dialogue between the White House and Congress in Washington. While these two events set the stage, the passage of comprehensive clean air legislation required hard work from Congress and the President.

President Bush introduced clean air legislation in 1989 to fulfill a campaign pledge, but Congress discarded the President's draft after considerable criticism and rallied instead behind its members' own separate bills. Senator Mitchell guided the committee process and defended the final legislative product from harmful amendments on the floor. That work precipitated one of the Senator's most difficult and controversial actions during his tenure as majority leader. During tense moments early in the floor debate when the bill looked vulnerable to a filibuster, Mitchell yanked it off the floor and convened three weeks of late night negotiations in his office in order to save the bill. These unusually secret negotiations resulted in a compromise. The Clean Air Act Amendments of 1990 included acid rain provisions in a separate, new title, reflecting Mitchell's commit-

88. George J. Mitchell, *Spending for the Air We Breathe*, BANGOR DAILY NEWS, Oct. 15, 1994.

89. George Bush campaigned as a friend of the environment. *See* George Bush, *George Bush on the Environment*, 18 ENVTL. REP. 10293 (1988). In contrast, Rochelle L. Stanfield points to the regulatory resistance provided by the opponents of acid rain legislation during the Reagan Administration:

> By stubborn adherence to the refrain that the link between coal-burning boilers and acid rain damage has yet to be proved and, therefore, that expensive control legislation might be wasteful, their representatives in Congress and the Reagan Administration have been able to hold off acid rain legislation for six years.

Rochelle L. Stanfield, *Air of Zealotry*, NAT'L. J., Aug. 1, 1987, at 2003.

ment to the State of Maine and rewarding efforts throughout his career to pass acid rain provisions.

Acid rain was not a new legislative subject in 1990, and Senator Mitchell personally had been considering the problem for the previous decade.[90] Congress passed the Acid Precipitation Act in 1980.[91] This legislation formed the National Acid Precipitation Assessment Program, which was required to study the acid rain problem and report its findings and subsequent recommendations to Congress. Senator Mitchell introduced the first bill to control acid rain in 1981.[92] In fact, the Senate Committee on Environment and Public Works reported acid rain legislation, mostly sponsored by Mitchell, in 1982, 1984, and 1987.[93] Unfortunately, until the late 1980s the prospects of an acid rain bill or a larger Clean Air Reauthorization bill moving past a committee vote were distant. In 1987, however, compliance deadlines for standards set out in the 1977 amendments would take effect. As some in Congress sought to extend these mandated deadlines, a window of opportunity opened for the legislators during 1987 to argue that the entire Clean Air Act needed to be reviewed and updated.

In January of that year, Mitchell introduced an acid rain proposal that gave states a sufficient amount of time to develop acid rain programs and called for a national reduction of the emission of twelve million tons of sulfur dioxide and four million tons of nitrogen oxide

90. His convictions were apparent in the first few weeks of his tenure in the Senate. When Congress was considering legislation which would reduce foreign oil consumption by favoring coal, Mitchell was astounded that the bill ignored the environment: "It was a good proposal but I was shocked to find out it had no environmental protection provision in it." Mary Kate Cranston, States News Service, July 31, 1987, *available in* LEXIS, Nexis Library, News File.

91. 42 U.S.C. §§ 8901-8912 (1988). *See also* 42 U.S.C. § 7403(j) (Supp. IV 1992).

92. The bill, S. 1706, would have required a ten million ton reduction in annual sulfur dioxide emissions in thirty-one midwestern and eastern states by 1990. At that time, those states emitted approximately twenty-four million tons of sulfur dioxide a year. *See* Lawrence Mosher, *Congress May Have to Resolve Stalled U.S.-Canadian Acid Rain Negotiations*, NAT'L J., Mar. 13, 1982, at 456. Mitchell, trying to fight the Reagan Administration's complacency, stated to EPA assistant administrator Kathleen M. Bennett, "What I would like to know is when will you have enough information to say, 'All right, we have studied it enough now. We know enough. Here is what we should do.' " *Id.* Bennett responded: "Within two to three years, we expect to have some very important findings that will help guide us . . . . It is possible that those will suggest further activities that are necessary, and it is possible they won't." *Id.*

93. *See* S. REP. No. 228, 101st Cong., 2nd. Sess. 4 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3390. Mitchell's amended 1982 bill required an eight million ton reduction in annual sulfur dioxide emissions with different deadlines depending on the use of conventional approaches, innovative technologies, or the use of low-sulfur fuel. *Congress Fails to Act on Clean Air Rewrite*, 38 CONG. Q. ALMANAC 425, 428 (1982).

into the atmosphere.[94] Introducing the bill, Mitchell stated, "[A]s I have in each Congress since I joined the Senate, I am today introducing acid rain legislation. I hope this is the last time I will have to do so."[95] Although Mitchell's past bills had been aimed at only thirty-one Eastern states, Mitchell now argued that acid rain was a national problem that called for a bill that was national in scope.[96] Consequently, he sought to require national reductions in both sulfur dioxide and nitrogen oxide.[97]

The bill was sent to the Senate Subcommittee on Environmental Protection. Mitchell, the sub-committee chairperson, held hearings on the bill in June 1987.[98] On June 10, Mitchell introduced a bill to extend the compliance deadlines that were to take effect at the end of 1987.[99] The bills were approved by Mitchell's subcommittee as part of comprehensive Clean Air Act amendments by an 11-0

94. 133 CONG. REC. S865 (daily ed. Jan. 16, 1987) (statement by Senator Mitchell introducing S. 321).

95. *Id. See also Sen. Mitchell Offers Acid Rain Bill Giving States Wide Flexibility in Achieving Reductions*, Daily Report for Executives (BNA) No. 13, at A2 (Jan. 21, 1987) (noting that the bill required states to develop plans to cut emissions in two years and directed the President to negotiate with Canada and Mexico regarding air pollution).

96. 133 CONG. REC. S865 (daily ed. Jan. 16, 1987) (statement by Senator Mitchell).

97. *Id.* Mitchell stated that "[i]n some respects this bill is more stringent than those I have introduced in the past. But the need is more urgent than ever.... This is the beginning of a process that I hope will conclude with passage of acid rain legislation in this Congress." *Id.* Mitchell produced evidence to substantiate his view. On February 3, health experts testified before a Senate panel about the extensive damage resulting from acid rain. *Acid Rain Components Damage Human Health at Existing Levels, Four Health Experts Tell Senate Panel*, Daily Report for Executives (BNA) No. 22, at A-8 (Feb. 4, 1987) (summarizing findings from four health experts from the American Public Health Association, the American Lung Association, the American Academy of Pediatrics, and Mt. Sinai Medical Center in New York City).

98. Mary Kate Cranston, States News Service, June 5, 1987, *available in* LEXIS, Nexis Library, News File (noting that Mitchell scheduled the hearings during a break from the Iran-Contra hearings); *Witnesses Praise Mitchell Air Act Plan at Hearing, but Issue Caveats on Controls, Loopholes*, Daily Report for Executives (BNA) No. 115, at A-10 (June 17, 1987). The author noted that "each witness pressed for changes to accommodate a special interest." *Id.* Mitchell exhorted to "those who say they should not be responsible for reductions, I ask: 'Who will control their emissions if you do not control yours?' " *Id.*

99. *Sen. Mitchell Offers Clean Air Act Extension Bill; New Deadlines Tied to Pollution Control*, Daily Report for Executives (BNA) No. 111, at A-3 (June 11, 1987). Mitchell estimated that about seventy areas would fail to meet the ozone and carbon monoxide deadlines at the end of 1987. *Id.*

vote.[100] On July 29, the fifth title concerning air toxics passed the subcommittee.[101]

The Reagan Administration remained equivocal on the subject of acid rain during the early part of 1987. On March 18, 1987, President Reagan proposed $2.5 billion in spending over five years to study new technology to combat acid rain.[102] In early April, President Reagan traveled to Canada for an annual summit, and discussed, among other things, acid rain, but no new agreements on acid rain were reached.[103] Moreover, in July of 1987, EPA Administrator Lee Thomas criticized Mitchell's bill as too expensive and lacking scientific accuracy.[104] Senator Mitchell countered by stating, "[t]his committee has heard for seven years the chorus of EPA Administrators claiming that it will take years before we will know enough to decide whether to control acid rain. I believe we know enough now to control acid rain."[105] Mitchell's view prevailed in the committees.

The Senate Environment and Public Works Committee continued work on the bill by holding hearings in September.[106] However, the

100. For a discussion of the committee work, see generally Joseph A. Davis, *Wide-Ranging Clean-Air Bill Wins Approval by Senate Panel*, 45 CONG. Q. WKLY. 1441 (1987); *Senate Subcommittee Approves Clean Air Act Reauthorization, Addresses Acid Rain, Toxics, Auto Emissions*, Daily Report for Executives (BNA) No. 126, at A-2 (July 2, 1987); *Panel Approves Optional Ozone Timetable Measure; Senate Environmental Protection Subcommittee*, The Oil Daily, July 2, 1987, at 1; Steve Marcy, *Mitchell Package Would Mandate All Three Ozone Approaches; George Mitchell Ozone Control Legislation; Gasoline Volatility*, The Oil Daily, July 20, 1987, at 7.

101. Martha Bridegam, *Senate Panel Oks Clean-Air Bill Tightening Pollution Controls*, 45 CONG. Q. WKLY. 1734 (1987).

102. Ronald Reagan, *Statement on Acid Rain*, I PUB. PAPERS 254 (1987).

103. *See* Ronald Reagan, *Address to a Joint Session of Parliament in Ottawa, Canada*, I PUB. PAPERS 335-41 (1987).

104. *See EPA Chief Says Senate Clean Air Act Renewal Bill is Too Costly, Would Undermine Role of States*, Daily Report for Executives (BNA) No. 140, at A-13 (July 23, 1987) (Lee Thomas testifying that the cost of the program could reach $30 billion a year); Mary Kate Cranston, States News Service, July 22, 1987, *available in* LEXIS, Nexis Library, News File.

105. Cranston, *supra* note 104. Thomas urged Mitchell not to "overreact because you're frustrated." Mick Rood, States News Service, July 22, 1987, *available in* LEXIS, Nexis Library, News File. Several law review commentators, however, had already focused on the Clean Air Act's inability to deal with acid rain. *See, e.g.*, Timothy Stein, Comment, *Acid Rain: The Clean Air Act Cannot Handle the Problem*, 56 UMKC L. REV. 139 (1987) (noting that economists argued that dealing with the acid rain was more expensive than trying to prevent it). *See also* Paul N. Edwards, *Through the Crevices: Acid Rain and the Clean Air Act*, 11 OHIO N.U. L. REV. 671 (1984); Valerie Lee, *Interstate Sulfate Pollution: Proposed Amendments to the Clean Air Act*, 5 HARV. ENVTL. L. REV. 71 (1981); Carol J. Garland, Note, *A Break in the Acid Rain Clouds*, 9 HAMLINE L. REV. 613 (1986).

106. For a host of amendments, see *Senate Committee Opens Clean Air Act Markup By Tackling Motorcycles, Bakeries, and Cold Auto Starts*, Daily Report for Executives (BNA) No. 179, at A-4 (Sept. 17, 1987); *Diesel Fuel, Offshore Require-*

Congressional Budget Office's (CBO) report in September complicated the Committee's efforts. The CBO concluded that the acid rain provisions would exact a high cost for the Western and Gulf Coast states.[107] Nevertheless, the bill cleared the Environment and Public Works Committee on October 22, 1987, with a multitude of acid rain amendments, by a vote of 14-2.[108]

Work on the bill intensified, but the extensive committee work ultimately would be in vain. Senators still debated the legislation close to the end of the session. On November 20, 1987, Senator Christopher Dodd of Connecticut stated that Congress should fulfill its collective promise: "The American people are counting on the 100th Congress to protect our health, environment, and economy from the air pollution plague."[109] However, on November 17, the EPA announced that it would relax certain attainment standards whose deadlines some businesses would fail to meet by the end of the year.[110] Legislators felt this announcement squelched the motivation to quickly pass a bill.[111] Although the Senate passed an amendment to an appropriations bill sponsored by Senator Mitchell to extend the existing deadlines,[112] the package of amendments that

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ments Retained in Senate Committee's Clean Air Markup, Daily Report for Executives (BNA) No. 186, at A-4 (Sept. 28, 1987).

107. *CBO Analysis of Senate Acid Rain Bill Projects High Costs for Western and Gulf States*, Daily Report for Executives (BNA) No. 184, at A-3 (Sept. 24, 1987).

108. Senators Steve Symms from Idaho and John Warner from Virginia voted against the bill. *Senate Committee Reports Clean Air Bill, Approves Acid Rain Amendments*, Daily Report for Executives (BNA) No. 204 at A-13 (Oct. 23, 1987). The amendments were the result of negotiations hammered out between Mitchell and Senator Simpson of Wyoming, including parsing the twelve million ton reduction in sulfur dioxide emissions into three phases, eliminating the requirement that emission reductions at existing locations offset any emissions from new power plants, and allowing interstate trading of emissions in multistate utility systems. *Id. See also* Joseph A. Davis, *Major Fights on Clean Air Still Loom*, 45 CONG. Q. WKLY. 2410 (1987); Joseph A. Davis, *Senate Panel Completes Work on Overhaul of Clean Air Act*, 45 CONG. Q. WKLY. 2622 (1987). Mitchell prophesied that "none of us should delude ourselves; a long road remains ahead of us." Lynn W. Garner, *Compromise Clean Air Legislation Advances Despite Some Opposition*, The Oil Daily, Oct. 27, 1987 at 6 (noting Senator Symms' suggestion to reject the bill because of high cost for marginal gain).

109. 133 CONG. REC. S16659 (daily ed. Nov. 20, 1987) (statement by Senator Dodd in submitting the report of the Committee on Environment and Public Works).

110. Joseph A. Davis, *Hill Critics Go After EPA Plan to Relax Clean-Air Deadline*, 45 CONG. Q. WKLY. 2866 (1987).

111. *Id. See also Senate Air Bill Faces Obstacles as Sponsors Prepare for Floor Consideration*, Daily Report for Executives (BNA) No. 216, at A-8 (Nov. 10, 1987) (giving as further reasons a jurisdictional dispute among committees, the formation of a substitute bill, and Majority Leader Byrd's opposition to the acid rain provisions).

112. S. 1941, introduced by Senator Mitchell and others on December 11, extended the laying of sanctions by eight months. 133 CONG. REC. S17991 (daily ed. Dec. 11, 1987).

formed the Clean Air Bill (S. 1894) failed to make it to the Senate floor before adjournment in 1987.[113]

The last year in President Reagan's second term, 1988, would prove equally unfruitful for environmentalists who sought to amend the Clean Air Act. While the House of Representatives completed much of its work on the bill, Mitchell attacked cost criticisms on the Senate side by conceptualizing the Clean Air Act Amendments as a health bill that would save money in the long term.[114] In early 1988, tensions increased between Mitchell and Senate Majority Leader Robert Byrd, who controlled what legislation proceeded to the floor for consideration.[115] In June, Governors Mario Cuomo of New York and Richard Celeste of Ohio suggested a possible compromise for the acid rain provisions, calling for a smaller reduction of pollutants as well as provisions for cost-sharing among states.[116] In response, Mitchell announced that a bipartisan group of twenty-eight Senators would attempt to amend the measure to provide for cost-sharing and a lower goal for reductions in sulfur emissions.[117]

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113. *Senate Passes Clean Air Act Deadline Amendment, Would Leave in Place Existing EPA Sanctions*, Daily Report for Executives (BNA) No. 239, at A-1 (Dec. 15, 1987).

114. USX Corp. Chairman David M. Roderick predicted that the environmental legislation would result in a 20,000 person job loss in the steel industry alone, and the Business Roundtable set the cost at $32 to $73 billion a year. John Hartsock, States News Service, Mar. 9, 1988, *available in* LEXIS, Nexis Library, News File. Mitchell responded that "it would be more cost effective to prevent air pollution rather than to pay for the health problems and other damage caused by air pollution . . . ." *Id.* Mitchell warned Senators when the bill's defeat for the year was clear:

> Senators should recognize that doing nothing is not a cost-free option. It does not merely delay a solution. It automatically increases the costs of that solution, both in money eventually spent and in damage sustained. The direct costs to industry from damage to cash crops is a cost of doing nothing. The higher costs of technology installed later, on more sources of pollution, is a cost of doing nothing.

134 CONG. REC. S14455-56 (daily ed. Oct. 4, 1988).

115. S. 321 was ready for floor consideration in September 1987. Mitchell and other supporters threatened the use of parliamentary procedure to try to get the bill to the floor. At this point, Senator Mitchell entered the race for the position of majority leader. Representative Henry Waxman commented that "those who've tried to stop any legislation will look at a new majority leader in the Senate . . . and see that this is the year to work out acid rain." *Maneuvering Picks Up in Debate on Clean Air*, N.Y. TIMES, May 3, 1988, at 27. The article quotes a Byrd spokesman as noting that Byrd "has no plans to call up an acid rain bill." *Id.*

116. *See generally* Joseph A. Davis, *Clean Air-Proposals: No Breakthrough Yet*, 46 CONG. Q. WKLY. 1631 (1988); Philip Shabecoff, *Cuomo and Governor of Ohio Join in Proposal on Acid Rain*, N.Y. TIMES, June 6, 1988, at A-1; D.J. Hill, *NY, Ohio Offer Acid-Rain Compromise*, NEWSDAY, June 7, 1988, at 46 (pointing out that New York has been a major recipient of acid rain and Ohio a major producer); *Acid Rain; Umbrellas Go Up*, THE ECONOMIST, June 18, 1988, at 24.

117. *Senate Effort on Acid Rain Provisions May Speed Passage of Clean Air Bill*, Daily Report for Executives (BNA) No. 135 (July 14, 1988); Joseph A. Davis, *New Clean-Air Compromise Put Forth*, 46 CONG. Q. WKLY. 1988 (1988).

Mitchell sought to amend the bill by working with Majority Leader Robert Byrd, who remained sensitive to his West Virginia constituents' coal interests.[118] By late September, however, the fate of the Clean Air bill was sealed.[119] The bill died. Clean air legislation again failed to reach the floor of the Senate.[120]

In the final months before Mitchell's election to majority leader, he expressed his displeasure with the bill's failure:

> Some in our society have opposed every major environmental law ever proposed. Rather than spend $1 to prevent pollution, they have spent millions of dollars to prevent the passage of laws to reduce pollution.
>
> Their principal weapon is the exaggerated claim that if anything is required of them to prevent pollution—anything at all—the cost will be so high that whole industries will have to shut down, whole states will suffer, whole regions will decline.
>
> . . . .
>
> A few who say they support the Clean Air Act joined with many who oppose it. They remained rigid and unyielding, wholly unwilling to compromise, even when faced with the certainty that their rigidity would result in no action this year. In reality, both want to postpone action to the future, when they hope circumstances will be more favorable to their positions. I disagree, profoundly.
>
> For, in the meantime, the health of more American children will suffer, more lakes will die, more forests will wither.[121]

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118. *Secrecy Surrounds Negotiations Aimed at Clean-Air Compromise*, 46 CONG. Q. WKLY. 2603 (1988). In fact, Mitchell met with the United Mine Workers in late September. *See* Joseph A. Davis, *Mitchell Negotiating with UMW: Progress Reported in Efforts to Get Clean-Air Compromise*, 46 CONG. Q. WKLY. 2671 (1988).

119. Joseph A. Davis, *Plan Attacked on Several Fronts: Filibuster Threat Dims Hope for Clean-Air Compromise*, 46 CONG. Q. WKLY. 2722 (1988) (noting that a variety of groups were against Mitchell's negotiations with Byrd and the high sulfur coal interests).

120. In the final days of the summer, Byrd continued to refuse to bring the bill to the floor, proclaiming a desire to bring up other bills in front of Mitchell's bill. Evan Roth, States News Service, Aug. 18, 1988, *available in* LEXIS, Nexis Library, News File. It was suggested in September that Mitchell would attach the bill to any other bill that was already on the Senate calendar. Evan Roth, States News Service, Sept. 15, 1988, *available in* LEXIS, Nexis Library, News File. Mitchell still maintained that "I feel more optimistic than I've ever been that we will have a bill this year." Letta Tayler, States News Service, Sept. 16, 1988, *available in* LEXIS, Nexis Library, News File. Mitchell, however, would not support a bill that would not clean the air: "Too many of the proposals surfacing now are not more than prescriptions for continuing dirty air . . . . The Clean Air Act must not be compromised into impotence." *Id.* Three weeks later, Mitchell declared the bill dead.

121. 134 CONG. REC. S14457 (daily ed. Oct. 4, 1988). Mitchell later clarified this statement by noting that "I did not intend to criticize any of my colleagues . . . ." Michael Kranish, *Watered-down Bill on Acid Rain Dies Senator Mitchell Blasts N.E. Colleagues*, BOSTON GLOBE, Oct. 6, 1988, at 1 (correction appended). Kranish noted that "[f]or Mitchell, the long battle to amend the Clean Air Act of 1977 ended in what observers called an uncharacteristic public display of frustration." *Id.* That

When Mitchell was elected Majority Leader of the United States Senate on November 29, 1988,[122] his mood shifted from caustic to hopefully optimistic.[123] He immediately acknowledged that this massive legislative undertaking to protect and ensure clean air could not be rammed through the Senate without dissent and discussion.[124] At the same time, President Bush's inauguration ended President Reagan's effort to repeal or derail environmental laws. President Bush announced that he would present a plan for clean air legislation to the Congress early in 1989. Commentators overwhelmingly and immediately realized the increased chances for passage of clean air legislation in 1989.[125]

The committee process started out slowly but quickly picked up intensity. On April 18, 1989, the subcommittee began work on controlling air toxics. The bill called for cutting emissions of more than two hundred air toxics, a major departure from the 1977 amendments.[126] The EPA would be required to establish standards for Maximum Achievement Control Technology for these air toxics.[127] After three years for compliance, the EPA then would review health risks and penalize industries that could not meet residual risk standards imposed for these toxics. Smog provisions were formed and

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frustration was apparent: "I recognize reality. And the reality is that there will be no action on clean air legislation this year .... For seven years, I have worked to enact clean air legislation. For several months, I have tried to work out compromises that would be acceptable to the many conflicting political and regional interests involved." 134 CONG. REC. S14457 (daily ed. Oct. 4, 1988). Indeed, those conflicting interests stood as a barricade to a compromise on acid rain: "For almost a decade, the Northeast has been complaining that its lakes are dying because of acid rain caused by sulfur fumes that spew out of smokestacks of the coal-burning power generating stations in the Midwest .... It is a highly divisive conflict." Casey Bukro, *Congress' Antipollution Talk Is All Hot Air Again*, CHICAGO TRIBUNE, Oct. 30, 1988, at C-4.

122. *See supra* note 17 and accompanying text.

123. In response to a question about his continued work on acid rain, Mitchell answered, "I hope I can be more effective. I intend to continue to play an active role in the legislation and in the committee ... I'm going to keep doing the best I can to get Clean Air legislation enacted ...." Adam Pertman and Michael Kranish, *Mitchell Shows Combativeness, Caution in Interview*, BOSTON GLOBE, Dec. 4, 1988, at 20.

124. "[Passage] may not be in a way that achieves universal praise ... but I think it can be done in a way which sufficiently accommodates both concerns .... It's both a matter of equity and a matter of practicality, but I honestly believe that it can be done." National Governors Association Annual Midwinter Meeting, Federal News Service, Feb. 28, 1989.

125. A commentator pointed to Senator Mitchell's election as Majority Leader as perhaps the "single most important development" in the clean air debate since he was replacing Byrd, who had protected his state's coal industry. Evan Roth, States News Service, Dec. 21, 1988, *available in* LEXIS, Nexis Library, News File.

126. George Hager, *Clean-Air Package, Part I: Toxic Air Pollutants*, 47 CONG. Q. WKLY. 888 (1989).

127. *Id.* at 889.

advanced in September.[128] On October 19, 1989, the air toxics section of the bill was reported out of the subcommittee by an 11-0 vote.[129]

This section of the bill was substantially more strict than the President's proposal,[130] which sent the initial committee work into disarray by introducing a different version of a clean air bill to the country on June 12, 1989.[131] President Bush's bill included a two-phase reduction program for the control of acid rain, brought ninety-three cities into compliance with ozone standards by 2010, and included a two-phase reduction in toxic air pollutants.[132] The bill did not include provisions for protecting the stratospheric ozone layer; in fact, the bill completely revamped the existing ozone protection program.[133] Even though the Environment and Public Works Committee had not yet completed its own work, Mitchell attacked the President's bill. "The President's words are bold but his deeds are timid. . . . Each step forward is matched by a step backward. The Bush bill sends the message that if economics and environment are in conflict, economics wins."[134] Only three Democratic senators sponsored Bush's bill.[135] President Bush shot back at a November 7, 1989 press conference. He said that Congress was "sitting back there and carping about it . . . they sit there and argue back and forth with each other, and nothing happens."[136] The clean air de-

128. Christine C. Lawrence, *Lines Drawn in Opening Round Over Cleaning Nation's Air*, 47 CONG. Q. WKLY. 2381 (1989).

129. George Hager, *Tougher Air-Toxics Standards Get Quick Nod From Panel*, 47 CONG. Q. WKLY. 2783 (1989).

130. *Id.* For instance, the industries would have to meet a cancer-risk standard of either 1:1,000,000, or, in certain cases 1:10,000, or have to stop operating. *Id.*

131. RICHARD E. COHEN, WASHINGTON AT WORK: BACK ROOMS AND CLEAN AIR 60 (1992). Bush noted that five principles were at work in his program: marketplace power, the encouragement of local initiatives, emphasis on prevention instead of clean up, international cooperation, and strict enforcement of the provisions. *Id.*; George Hager, *Bush Sets Clean-Air Debate in Motion with New Plan*, 47 CONG. Q. WKLY. 1460 (1989).

132. H.R. 3030, 101st Cong., 1st Sess. (1989), S. 1490, 101st Cong., 1st Sess. (1989).

133. For criticism of the bill, see The Honorable Henry A. Waxman, *An Overview of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1721, 1736 (1991).

134. *President's Plan for Clean Air Act Draws More Heat*, Chemical Marketing Reporter, July 31, 1989, at 7. *See also Mitchell Says Bush's Clean Air Bill Weak, Gains Undermined by Offsetting Provisions*, Daily Report for Executives (BNA) No. 141 (July 25, 1989).

135. *Only 3 Democratic Senators Join Bush on Clean-Air Bill*, CHICAGO TRIBUNE, Aug. 4, 1989, at C2. Donald Riegle Jr. of Michigan, J. James Exon of Nebraska, and John Breaux of Louisiana were the only Democratic co-sponsors of the President's bill. The Administration blamed Senator Mitchell, and he responded that he had not cajoled any votes. *Id.*

136. The President's News Conference, George Bush, II PUB. PAPERS 1465, 1469 (1989).

bate had become partisan, and the sense that a bill would fail to pass in 1989 dominated.[137]

The Senate responded to the President's criticism. In the last days of the legislative calendar, the members of the Senate Environment and Public Works Committee pushed its own bill out of committee in an effort to avoid a partisan statement.[138] Their action was coupled with Senator Mitchell's promise to make the bill the first floor consideration of 1990. In fact, the bill was "marked up" (the process of commenting and amending) in one day so that Mitchell could bring it to the floor immediately after the recess.[139] Even so, the committee realized that the bill did not represent the entire Senate's views since different regions of the country were not represented in the committee in any meaningful way.[140] One commentator explained, "[T]he view inside the panel was that it should set the high-water mark and that it would address complaints from industry groups and make concessions, as necessary . . . ."[141]

This is exactly what happened in the next legislative session. After eight years of relative inaction concerning clean air issues, Mitchell invoked his power as majority leader and called up a comprehensive clean air bill for debate on the floor of the United States Senate.[142] Introducing the bill on January 23, 1990, he commented that "[i]t is not my intention to force the pace on this bill in a manner that would deprive any senator of the fullest possible opportunities to consider, deliberate on, debate on, ask questions about, and offer amendments to this bill."[143] Senator Mitchell con-

137. Christopher Madison, *Clean Air Plans Go Up in Smoke*, NAT'L J., Nov. 18, 1989, at 2832 (pronouncing the bill "shelved" until next year); George Hager, *Clean-Air Bill Loses Steam in Rush to Adjournment*, 47 CONG. Q. WKLY. 3045 (1989).

138. *See* George Hager, *Senate Stage is Finally Set for Clean-Air Showdown*, 47 CONG. Q. WKLY. 3145 (1989).

139. COHEN, *supra* note 131, at 80. This method engendered criticism. *See 'Stall' Tactic Charged on Clean Air Bill*, CHEMICAL MARKETING REP., Jan. 8, 1990, at 3. Mitchell and Max Baucus of Montana were criticized for rushing the bill through the committee. Mitchell responded that the committee action was done to comply with President Bush's requests. Further, a Mitchell spokesperson said that "[t]here will be significant debate and there should be [sic] Sen. Mitchell welcomes that debate." *Id.* For criticism of the current committee process, see COHEN, *supra* note 131, at 77-80; Richard E. Cohen, *Crumbling Committees*, NAT'L J., Aug. 4, 1990, at 1876.

140. New England claimed five committee members, New York and New Jersey one each; four came from the West, and only one, Senator Warner, was from a coal state. COHEN, *supra* note 131, at 77.

141. *Id.* at 78.

142. Chuck Alston, *Key Players: Their Spheres of Influence Go From Heavens to Earth*, 48 CONG. Q. WKLY. 149 (1990). Alston pointed out that a major difference between the past sessions and this one was that Senator Mitchell had replaced Senator Byrd as majority leader. *Id.*

143. COHEN, *supra* note 131, at 82. Alston pointed out that "there are signs that Mitchell the majority leader has recognized the need to moderate the views of Mitchell the senator from Maine . . . ." Alston, *supra* note 142, at 149.

tinued to characterize the bill as being equally important to health as it was to the environment. Mitchell pointed out that "[i]t is important that we act not only for ourselves, but for generations to come, and not only American generations to come. I emphasize that this is a public health bill."[144] Mitchell used this conceptual framework to attack critics of this massive bill.[145] Although such a large bill normally would result in a plethora of amendments on the floor of either house of the Congress, no Senator offered any amendments at the beginning of debate.[146]

On February 1, 1990, after only brief debate on the committee bill, Majority Leader Mitchell took perhaps the most controversial and most celebrated legislative action of his tenure. Mitchell withdrew S. 1630, the committee bill, from the floor and convened closed door negotiations in his office for the next month.[147] The key players in the negotiations, in addition to the Senator, were representatives from the White House, the other committee members, and various Senators with individual concerns. Environmentalists considered the negotiations to be a disgusting example of backroom

144. *Press Conference on Clean Air Legislation*, Federal News Service, Jan. 22, 1990, *available in* LEXIS, Nexis Library, News File. Mitchell conceptualized on the global scale: "We are now coming to recognize that the greatest threat to our security and the security of people around the world lies not in armed aggression . . . [but] in the threat to survival of the human species by the global environmental crisis that is upon us." *Id.*

145. When asked if the bill would result in people with families losing their jobs, Mitchell responded that:

> [W]hat [the bill] will mean to the average American family is that they will be able to breathe healthy air, that their children's lungs will not be damaged or scarred, that they are not as likely to die prematurely as would be the case if the bill is not passed. . . . That's the principal meaning for most American families.

Id. In response to media criticism that the bill would cost too much to implement, Mitchell asked reporters, "What is the value of your child's health . . . . What is the value of your child's life?" George Hager, *Cost Becomes the Overriding Issue*, 48 CONG. Q. WKLY. 230 (1990).

146. George Hager, *Senate Takes Up Clean Air but Doesn't Get Very Far*, 48 CONG. Q. WKLY. 229 (1990). In addition, the committee felt that they would not be able to defeat a filibuster at this point. Cohen hypothesized:

> Imagine that you are George Mitchell and you must find a way out of this deadlock. After working on the subject for nearly a decade, you badly want a big clean-air bill . . . . But your Senate committee has produced a bill that inspires no debate and widespread opposition by senators preparing to file their amendments. What do you do?

COHEN, *supra* note 131, at 83.

147. I had a choice: I could insist on a vote to end the filibuster; a loss would throw the issue into confusion, a bad loss could result in no bill being passed at all. Or I could negotiate with the administration, and with individual senators who had specific objections to the bill, and try to win over enough converts to get the necessary sixty votes. I chose to negotiate. The risk of not doing so was too high.

MITCHELL, *supra* note 3, at 9. *See also* George Hager, *Senate's Clean-Air Struggle Goes Behind Closed Doors*, 48 CONG. Q. WKLY. 324 (1990).

politics.[148] The participants in Mitchell's office responded by producing results.[149] Tentative deals were made on air toxics, urban smog, and carbon dioxide emissions.[150] Strengthening the market-orientated part of the bill's acid rain title was also a compromise reached by the negotiators.[151] Negotiations ended after almost a full month of late night meetings in Senator Mitchell's office.

The negotiators emerged with a compromise.[152] While environmentalists criticized the fact that the modifications resulted in a bill less strict than the November 1989 committee bill, the sponsors noted that the bill was in fact much stronger than the administration bill originally proposed.[153] At a press conference to announce the bill, Mitchell concluded that S. 1630 "is sound and comprehensive legislation that dramatically expands and strengthens the clean air law and does it in the most cost-efficient manner possible."[154] Senator Dole, an unlikely ally for Mitchell, offered the commitment that "we'll work together to defeat any amendments which might weaken those provisions."[155] Senator Byrd offered both a statement and a concession: "I'm not a signatory. I'm still concerned about job losses and economic dislocation. But I think the package that has been brought here . . . goes a long way. I'm not going to engage in any filibuster."[156] Notwithstanding the good feelings engendered by the compromise bill, however, several Senators advanced amendments to both strengthen and weaken the bill.

The architects of the compromise bill now became its ardent defenders against harmful amendments that threatened the delicate compromise between the Senate and the Bush Administration. In its first week on the floor, several attempts to amend the bill were stopped. Nevada Senator Richard H. Bryan withdrew a proposed amendment that would have strengthened the carbon dioxide provi-

148. Environmentalists felt that their influence was diminished since they had no voice in the talks. George Hager, *Closed-Door Talks on Clean Air Anger Environmental Groups*, 48 CONG. Q. WKLY. 386 (1990). Mitchell's basic response was that he had no choice and that the talks were needed to avoid a filibuster. *Id.*

149. *See* Hager, *supra* note 147.

150. *Id. See also* George Hager, *Senate, White House Near Deal on Modified Clean-Air Bill*, 48 CONG. Q. WKLY. 584 (1990).

151. *See* John R. Loxterman, *The Acid Rain Provisions of the Clean Air Act Amendments of 1990: Environmental Responsibility or Political Necessity*, 10 TEMP. ENVTL. L & TECH. J. 201, 208 (1991).

152. 136 CONG. REC. S2077-86 (daily ed. Mar. 5, 1990). The Mitchell/Dole bill was introduced as S. 1293, 130 CONG. REC. S2031 (daily ed. Mar. 5, 1990). *See also* George Hager, *Senate-White House Deal Breaks Clean-Air Logjam*, 48 CONG. Q. WKLY. 652 (1990).

153. Hager, *supra* note 152, at 654.

154. *Senate Radio and TV Gallery Press Conference Regarding the Agreement on the Clean Air Bill*, Federal News Service, Mar. 1, 1990 (statement by Senator Mitchell), *available in* LEXIS, Nexis Library, News File.

155. *Id.* (statement by Senator Dole).

156. *Id.* (statement by Senator Byrd).

sions in the Mitchell bill.[157] New Jersey Senator Frank R. Lautenberg tried to strengthen the bill by including more stringent toxic air pollutant standards for motor vehicles; the Senate tabled his amendment by a 65-33 vote.[158] Senator Steven Symms from Idaho offered an amendment calling for community referendums before plants emitting air toxics could be shut down for health related reasons. After withdrawing his proposal for lack of votes, he then tried to amend the bill by prohibiting imports from any nation without air toxics regulations at least as strong as the United States. That amendment was tabled by an 81-16 vote.[159] Two amendments that did not violate the Mitchell/White House deal were accepted on the floor.[160]

During the week of March 19 the rush to amend the bill intensified. Senators Tim Wirth of Colorado and Pete Wilson of California offered an amendment to strengthen the bill by attempting to return some of the motor-vehicle emissions and smog provisions to the bill that had been cut in negotiations. The proposal was tabled 52-46. John Kerry, a Massachusetts Senator, lost a smog amendment when it was tabled by a 53-46 vote.[161] The fact that amendments to strengthen the bill were rejected troubled environmentalists, and Mitchell received much criticism from them for his alleged defection from their ranks.[162] Mitchell increased the stakes of considering so many amendments by predicting that, if "we do not get a clean-air bill this year, we are not going to get a clean-air bill in this century."[163] Mitchell also quickened the process: "I will do everything within my power to see we do finish it next week .... There will be

157. George Hager, *Clean-Air Deal Survives First Senate Assaults*, 48 CONG. Q. WKLY. 738, 739 (1990). Hager notes that "Mitchell persuaded [Senator] Bryan to withdraw the amendment by promising that the Senate would revisit the issue later in the year." *Id.*

158. *Id.*

159. *Id.* Rhode Island Senator John Chafee, the Republican floor manager, argued that passage of this amendment would violate the compromise reached with the White House in the Mitchell meetings. *Id.*

160. Tennessee Senator and current Vice President Al Gore amended the bill by mandating a phase out of HCFCs, alternates to CFCs. Senator John Glenn of Ohio also amended the bill to omit a provision giving sole regulatory jurisdiction of air toxics emissions to the Nuclear Regulatory Commission. *Id.*

161. *See* George Hager and Phil Kuntz, *Senate-White House Deal Survives Another Test*, 48 CONG. Q. WKLY. 900 (1990).

162. A *Congressional Quarterly* correspondent noted that "the environment lobby is dominated by purists, and they have made it clear they do not think much of the Mitchell-Dole-White House compromise. The Wirth-Wilson amendment was their main shot at shoring up the bill...." Phil Kuntz, *The 'Super Tuesday' of Clean Air... Nothing but a Quirky Footnote*, 48 CONG. Q. WKLY. 902, 903 (1990). Cohen concluded that Mitchell was disappointed that some of his environmental allies in the Senate were opposing him, but that "he considered his dilemma the price of the leadership, both in title and in fact, that he was providing." Cohen, *supra* note 131, at 96.

163. Hager and Kuntz, *supra* note 161.

votes on Monday. There may be all-night sessions, and if we haven't finished the bill by the weekend, there will be weekend sessions—Saturday, Sunday, whatever time is necessary."[164]

Senator Byrd ultimately represented the last major hurdle for S. 1630 in the Senate. While Byrd agreed not to engage in a filibuster of the bill, he had not agreed to support the bill either. Now he advanced an amendment to authorize $500 million to give three years of job-loss benefits to coal miners losing work as a result of the Clean Air Act Amendments. For Byrd, this was an expression of his continued effort to extract some measure of security for the coal miners he had protected by keeping clean air legislation off the Senate floor during his tenure as Senate Majority Leader.[165] Byrd's amendment was critical for Mitchell because its passage meant sure defeat, via a presidential veto, of the acid rain bill Mitchell had championed since 1981. Mitchell argued that the proposed amendment discriminated "against all workers who are not coal miners. It provides an inequitable level of benefits based upon that discrimination. It establishes a new system of compensation that is unique and without precedent . . . ."[166] On March 29, the Byrd amendment was narrowly defeated 50-49.[167]

On April 3 the Senate passed the modified S. 1630 by an 89-11 vote.[168] On the eve of the vote, Mitchell characterized his approach as centered on compromise even though he had received criticism from both industry and environmentalists.

> We've had 13 years of speeches on the subject. In the meantime, the air in many American cities has gotten worse, and the question is do we want to continue to make state-

164. *Id.*

165. "Byrd's persistent pleas for support and his efforts to show his state's downtrodden coal miners that he was still their champion was at least as much a plea for his continued influence in a Senate where he was no longer the formal Democratic leader." Cohen, *supra* note 131, at 96.

166. 136 CONG. REC. S3486 (daily ed. Mar. 29, 1990) (statement of Senator Mitchell speaking against the Byrd amendment). Senator Dole added:

> We already have benefits in place. . . . [T]he bottom line is [that] this is just not fair. It is inequitable. So we are going to single out some who are displaced because of pollution control efforts.
>
> What about those workers displaced by other causes like increased competition, shifting tastes, changing economic trends? They do not get these super benefits. They get the basic benefit, $164 a week average. That is it.

136 CONG. REC. S3484 (daily ed. Mar. 29, 1990) (statement of Senator Dole against the Byrd amendment).

167. *See* Phil Kuntz and George Hager, *Showdown on Clean-Air Bill: Senate Says 'No' to Byrd*, 48 CONG. Q. WKLY. 983 (1990). Byrd had counted on Senator Biden's support. When Biden's name was called on the roll, he was ushered into the cloakroom, where John Sununu, President Bush's Chief of Staff, informed Biden that passage of the Byrd amendment would result in a Bush veto. Biden voted against the amendment. COHEN, *supra* note 131, at 97.

168. *See* COHEN, *supra* note 131, at 98.

> ments, or do we want to make law? And I chose the course of coming up with a bill and I believe it's the right course and think we will have a good bill before this year is out.[169]

Mitchell also ardently defended himself against the environmental purists' attacks:

> I'm a principal author of the bill that came out of the committee. I wrote a lot of it, I voted for it. I'm the one who brought it to the Senate floor and so I know what's in it. That was my first choice, but we didn't have the votes to pass it. . . . The environmental organizations know that. . . . There is a difference between the best and strongest bill in the abstract and the best and strongest bill that can become law. Now I think this bill that we're going to pass is the best and strongest bill that can become law and I'm pleased with the result even though it is not precisely as I would have done if I were king for a day . . . .[170]

Commentators overwhelmingly praised Mitchell for his tireless work in forging this bill's passage through the Senate.[171]

The Senate-House conference followed separate passage of the bill in each house. Senator Mitchell appointed the Senate conferees,[172] and all the conference members were also members of the Senate Environment Committee. Even though the differences between the House and Senate bill were not substantial, the conference proceeded at an exceedingly slow pace,[173] and worry spread that the conferees could not finish their work before the end of the legislative session.[174] On August 3 the conferees agreed to phase

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169. *MacNeil-Lehrer Newshour* (PBS television broadcast, Apr. 2, 1990) (interview with Senator Mitchell).

170. *Id.*

171. *See, e.g.*, Janet Hook, *Big Win for Majority Leader Marks His Rite of Passage*, 48 CONG. Q. WKLY. 1045 (1990); George Hager, *Clean Air: War About Over In Both House and Senate*, 48 CONG. Q. WKLY. 1057 (1990); David Broder, *Courage Made the Clean Air Bill a Reality*, CHICAGO TRIBUNE, Apr. 11, 1990, at C18 ("[I]t was George Mitchell who showed that he can make a deal—and make it stick—for the benefit of millions of Americans . . . ."); Richard E. Cohen, *Leading the Senate on Clean Air Bill*, NAT'L J., Mar. 31, 1990, at 797 (noting that "Mitchell has overseen almost every detail in the measure."); Gloria Borger, *Mitchell Clears the Air*, U.S. NEWS & WORLD REP., Apr. 9, 1990, at 28 ("With that victory, Mitchell the politician will vault into the realm of the legislator . . . .").

172. Mitchell, Montana Senator Max Baucus, Rhode Island Senator John Chafee, Minnesota Senator Dave Durenberger, Senator Daniel Patrick Moynihan of New York, Senator Quentin Burdick of North Dakota, and Wyoming Senator Alan K. Simpson served as the Senate Conferees. *See Clean Air Act Amendments*, 1990 U.S.C.C.A.N. 3385, 3887; COHEN, *supra* note 131, at 153.

173. George Hager, *Cannons of the Conference Room Draw Clean Air Battle Lines*, 48 CONG. Q. WKLY. 2291 (1990); *see* George Hager, *Conferees in Holding Pattern over Clean Air Proposals*, 48 CONG. Q. WKLY. 2399 (1990).

174. Lynn Garner, *Passage of Clean Air Act This Year is Uncertain*, THE OIL DAILY, Aug. 27, 1990, at B4 (noting that "it will take something of a miracle to get the job done before the adjournment target date of Oct. 5."). *See also* Alyson Pytte,

out ozone-depleting chlorofluorocarbons (CFCs).[175] On September 10 the conferees reached a compromise on urban smog provisions in the bill.[176] One month later they reached agreement on motor vehicle emissions and fuel provisions.[177] By October 17 the conferees had reached agreement on industrial toxic air emissions.[178] The rest of the conference finished early in the morning of the October 22, 1990, deadline date. Ironically, the final conference bill, agreed upon early in the morning of October 22 with the Bush Administration's approval, contained money to aid displaced coal workers. The Senate approved the conference bill 89-10,[179] the House passed it by a 401-25 vote.[180]

The final conference bill was environmentally stronger than the bill passed by the Senate because the deal between the Bush Administration and Senator Mitchell extended only to the Senate vote. The deal did not constrain the conferees. Thus, the House conferees were free to argue that some of the more stringent provisions should be reinserted in the conference bill to replace the compromise Senate provisions.[181] Consequently, the conference's final product was stronger in several substantive respects than the bill passed in the Senate.[182]

This was a shining moment for Senator Mitchell as the leader of the Senate, one that defined his method of making law. Armed with considerable power as the majority leader, he eschewed authoritarian control in favor of debate and sought consensus while lending a guiding hand to push for passage of the legislation. Passing a compromise law made more sense to Mitchell than passing no law at all. Though a staunch Democrat, he sided with the Republican Minority Leader and a Republican President to protect the bill from poten-

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Clean Air Stuck in Conference Over Automobile Provisions, 48 CONG. Q. WKLY. 3108 (1990).

175. George Hager, *Compromise on CFCs 1st Step in Slow-Moving Conference*, 48 CONG. Q. WKLY. 2507 (1990). The Senate agreed to the House provision granting a two-year moratorium on local and state level design requirements for appliances. They also forged the middle road for a date to phase out methyl chloroform, setting a 2002 deadline. *Id.*

176. Alyson Pytte, *Conferees Reach Agreement on Urban Smog Provision*, 48 CONG. Q. WKLY. 2903 (1990). The Senate accepted the House provisions, which imposed pollution limitations further into suburbs and rural areas and covered more industries than the Senate version. *Id.*

177. Alyson Pytte, *Clean Air Conferees Agree on Motor Vehicles, Fuels*, 48 CONG. Q. WKLY. 3407 (1990).

178. Alyson Pytte, *Clean Air Conferees Agree on Industrial Emissions*, 48 CONG. Q. WKLY. 3496 (1990).

179. 135 CONG. REC. S17434 (daily ed. Oct. 27, 1990).

180. COHEN, *supra* note 131, at 166.

181. *See* Waxman, *supra* note 133, at 1739. Senator Waxman noted that "key Senators from the Environment and Public Works Committee were free to pursue the strongest environmental bill possible at Conference." *Id.*

182. *See id.* at 1739-42.

tially deal-breaking amendments that would have altered the compromise clean air bill and jeopardized its passage. Mitchell remained steadfast:

> Has compromise now fled the Senate? Are we unable as a body to reach agreement on legislation that, without dispute, substantially and dramatically strengthens and improves current law? Do we now measure every proposal in the Senate . . . [by] some abstract standard of perfection that each senator is now free to offer on his or her own? That is a prescription for deadlock.[183]

B. The Provisions of the Clean Air Act Amendments of 1990

This section presents a brief overview of the 1990 Clean Air Act Amendments themselves as ultimately enacted. The 1990 Amendments represent a substantial change from previous Clean Air Act provisions. The original Clean Air Act became law in 1970.[184] Substantive amendments followed in 1977.[185] The 1990 amendments[186] are grafted onto this structure. They are divided by title into four substantive subjects: attainment of air quality standards, motor vehicle emission and fuel provisions, toxic air pollutants, and the new acid rain provisions.

Title I is aimed at meeting National Ambient Air Quality Standards (NAAQS).[187] These standards are set by the EPA.[188] States are primarily responsible for preparing State Implementation Plans (SIPs) to achieve these standards.[189] The EPA then reviews each SIP.[190] To enhance these NAAQS provisions, the Clean Air Act

183. Broder, *supra* note 171.

184. Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970).

185. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977).

186. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

187. For an extensive overview of Title I, see The Honorable Henry A. Waxman et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990: Bringing Blue Skies Back to America's Cities*, 21 ENVTL. L. 1843, 1848 (1991) (concluding that "Title I revises almost every aspect of the NAAQS program to reflect insights gained in twenty years of experience . . . .").

188. 42 U.S.C. § 7409(b) (1988 & Supp. 1993). The administrator must set attainment and maintenance standards that are "requisite to protect the public health." *Id.* For the meaning of this standard see American Petroleum Inst. v. Costle, 665 F.2d 1176 (D.C. Cir. 1981), *cert. denied sub nom.* American Petroleum Inst. v. Gorsuch, 455 U.S. 1034 (1982).

189. 42 U.S.C. § 7410(a)(1)-(2) (1988 & Supp. V 1993). *See* National Steel Corp., Great Lakes Steel Div. v. Gorsuch, 700 F.2d 314 (6th Cir. 1983) (noting that the EPA's role in establishing implementation plans is secondary). Sometimes, however, the Administrator must step in to promulgate a Federal implementation plan for a specific state. 42 U.S.C. § 7410(c) (1988 & Supp. V 1993).

190. *Cf.* Environmental Defense Fund v. Thomas, 870 F.2d 892 (2d Cir. 1989) (noting that the court had jurisdiction to compel the EPA Administration to take some formal action in regard to the NAAQS Program).

Amendments of 1990 enacted new programs to deal with nonattainment of standards regulating ozone, carbon monoxide, and small particulate matter emissions.[191] The ozone provisions call for stringent measures to deal with Volatile Organic Compounds (VOCs) and nitrogen oxide emissions and set various time requirements depending on the severity of the ozone problem in a given area.[192] A graduated control program is created for all ozone nonattainment areas so that areas of more serious classifications are subject to the more severe control measures.[193] The amendments also set up a new program establishing interstate ozone transport regions to deal with regional ozone problems.[194] The Clean Air Act Amendments improved upon existing law by focusing on nitrogen oxide control.[195] Carbon monoxide levels in "moderate" and "serious" areas must attain the defined standards by 1996 and 2001, respectively.[196] Finally, small particulate matter nonattainment standards must be met in "moderate" areas by 1995 and in "serious" nonattainment areas by 2002, unless the EPA reclassifies areas as needing more time to reach attainment.[197] Such areas may be given five extra years to reach attainment under certain extreme conditions.[198]

Title II regulates car, truck, and general mobile source pollution by revising the motor vehicle control program.[199] Specifically, conventional vehicles have tighter controls, gasoline and diesel fuel must be cleaned, cleaner fuel must be promoted, and emission standards for non-road vehicles must now be instituted.[200] Stricter tailpipe standards are set into two tiers for conventional vehicles.[201] Cleaner fuel is promoted by mandating reductions in fuel volatility, adding cleaning detergents, phasing out leaded gasoline, and the de-

191. 42 U.S.C. §§ 7511-7513(b) (Supp. V 1993).

192. *Id.* § 7511(a). The Act defines five levels of ozone severity: marginal, moderate, serious, severe, and extreme. *Id.* For a discussion about what determines categorization in each classification, see Robert J. Kafin, *Revisions Broaden the Impact; Clean Air Act*, NAT'L. L. J., Dec. 24, 1990, at 15.

193. 42 U.S.C. § 7511(a) (Supp. V 1993).

194. *Id.* § 7511a. Only one interstate ozone transport region is actually created in the 1990 amendments; it stretches from the Capitol to Maine. 42 U.S.C. § 7511c (Supp. 1993).

195. 42 U.S.C. § 7511a(f) (Supp. V 1993). *See also* Waxman, *supra* note 133, at 1761-63; Waxman, *supra* note 187, at 1885-87.

196. 42 U.S.C. § 7512 (Supp. V 1993).

197. *Id.* § 7513(b)-(f).

198. *Id.* § 7513(e).

199. *See generally* The Honorable Henry A. Waxman et al., *Cars, Fuels, and Clean Air: A Review of Title II of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 1947 (1991).

200. *See* Waxman, *supra* note 133, at 1769; Waxman, *supra* note 199, at 1949.

201. 42 U.S.C. § 7521(g) (Supp. V 1993) (setting the Tier I standards). For specific Tier I standards, see Waxman, *supra* note 199, at 1957-58. Tier II standards are codified at 42 U.S.C. § 7521(i) (Supp. V 1993). *See also* Waxman, *supra* note 199, at 1958-60.

sulfurization of diesel fuel.[202] Representative Henry Waxman noted that "a new generation of super-clean vehicles is needed in the most heavily polluted cities if we are to provide a long term solution to our smog problems."[203] Lastly, the amendments command the EPA to research and implement emissions controls for off-road vehicles such as construction equipment and trains.[204]

Title III controls hazardous air pollutants.[205] The provisions that were passed establish controls for source and area emissions. One hundred eighty-nine substances are now defined in this title as hazardous air pollutants.[206] Maximum Achievable Control Technology is used to reduce emissions from the named substances under this title.[207] After these standards are implemented by the EPA, residual risks are addressed by directing the Administrator to inform Congress about probable risks remaining after Title III is fully in place.[208] The 1990 Amendments seek to control accidental releases of hazardous air pollutants, such as the one in Bhopal, India, with provision "for prevention, detection, and response to accidental releases."[209] The 1990 Title III amendments also provide added protection in such areas as coastal water,[210] radionuclides,[211] incinerator emissions,[212] and coke ovens.[213]

Title IV deals with acid rain and is the centerpiece of the Clean Air Amendments of 1990. Title IV seeks to "reduce the adverse effects of acid deposition through reductions in annual emissions of sulfur dioxide of ten million tons from 1980 emissions levels, and, in combination with other provisions of this chapter, of nitrogen oxides emissions of approximately two million tons from 1980 emission

202. 42 U.S.C. § 7545 (Supp. V 1993). *See* Waxman, *supra* note 199, at 1972-1991 for an extended discussion on the new fuel requirements.

203. Waxman, *supra* note 133, at 1771. To this end, the amendments set high standards for emissions. *See* 42 U.S.C. § 7583 (Supp. V 1993). *See also* Waxman, *supra* note 199, at 1993-2001.

204. 42 U.S.C. § 7547 (Supp. V 1993). *See also* Waxman, *supra* note 199, at 2011-16.

205. For an extensive review of Title III, see Waxman, *supra* note 133, at 1772-89.

206. 42 U.S.C. § 7412(b)(1) (Supp. V 1993).

207. *Id.* § 7412(d)(2). Waxman, *supra* note 133, at 1775.

208. 42 U.S.C. § 7412(b). The Administrator must do this by 1996. Then the Administrator must recommend legislation to address the remaining risks. *Id.*

209. Waxman, *supra* note 133, at 1783. *See* 42 U.S.C. § 7412(r) (Supp. V 1993). Under this section, the Administrator must create a list of more than 100 substances that would cause serious adverse effects to the environment and human health if an accidental release actually occurred. *Id.* § 7412(r)(3).

210. *Id.* § 7412(m).

211. *Id.* § 7412(d)(9). *See* Waxman, *supra* note 133, at 1785-86.

212. 42 U.S.C. § 7429 (Supp. V 1993).

213. *Id.* § 7412(d)(8). *See* Waxman, *supra* note 133, at 1788-89.

levels . . . ."[214] Two programs effectuate this goal. First, the Clean Air Act Amendments of 1990 depart from the command and control method of environmental regulation by establishing a market-based allowance program to reduce sulfur dioxide from utility sources.[215] Second, an upper limit is placed on industrial sulfur dioxide emissions.[216] Nitrogen oxides from stationary sources are controlled three ways. First, they are controlled in ozone nonattainment areas and transport regions.[217] Second, in small particulate nonattainment areas, nitrogen oxides are controlled as the precursor to small particulate matter pollution.[218] Third, emissions from coal fired utility plants are controlled.[219]

The amendments' acid rain provisions have been criticized by some Senators. In the minority statements of the Senate Report, Senator Steve Symms summarized the National Acid Precipitation Association Program reports mandated by the 1980 Act and argued that Congress should have waited for further findings before acting since many of the results were speculative.[220] Senator Byrd continued to cast doubt on the acid rain provisions: "I am concerned that . . . reality may very well diverge from theory, and the cost-saving and cost-sharing potential of this bold new regulatory approach may never be realized."[221] Finally, commentators are concerned about the EPA's ability to complete a regulatory scheme for such a massive law.[222]

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214. 42 U.S.C. § 7651(b) (Supp. V 1993). For Congressional findings, see *id.* at § 7651(a). For an in-depth analysis of this section, see S. REP. No. 101-228, 101st Cong., 2d Sess. 261-346 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3685-3729.

215. For an extensive discussion of the allowance trading program, see Larry B. Parker et al., *Clean Air Act Allowance Trading*, 21 ENVTL. L. 2021 (1991). *See also* Norman W. Fichthorn, *Command-and-Control vs. The Market: The Potential Effects of Other Clean Air Act Requirements on Acid Rain Compliance*, 21 ENVTL. L. 2069 (1991).

216. 42 U.S.C. § 7651e (Supp. V 1993).

217. *Id.* § 7511a(f).

218. *Id.* § 7513a(e).

219. *Id.* § 7651(f). For a review of all three of these methods of reducing nitrogen oxides, see Waxman, *supra* note 133, at 1797-99.

220. *See* S. REP. No. 101-228, 101st Cong., 2d Sess. 415 (1990) (minority views of Senator Symms), *reprinted in* 1991 U.S.C.C.A.N. 3385, 3796-3866. *See also* 136 CONG. REC. S3245-3248 (daily ed. Mar. 27, 1990) (summary of NAPAP reports).

221. U.S. Senator Robert C. Byrd, *The Clean Air Act Amendments of 1990: An Innovative, but Uncertain Approach to Acid Rain Control*, 93 W. VA. L. REV. 477, 488-89 (1991). Byrd reiterated his Senate floor argument:

> An equally important issue is that of equity . . . . It is my contention that the emissions reduction requirement of the law unfairly require that a disproportionate share of the overall ten million ton reduction in emissions be achieved by the utility sector and, in particular, by utilities in those states that have traditionally relied most on the use of high-sulfur coal.

Id. at 491.

222. Warren H. Husband, Comment, *New Approaches and New Polluters: The Practical Impact of the Clean Air Act Amendments of 1990*, 19 FLA. ST. U. L. REV.

Three additional titles comprise the balance of the Clean Air Act Amendments of 1990. Title V expands the permit system for stationary sources by requiring all major sources to get permits from state agencies.[223] Title VI phases out the production of CFCs, halons, methyl chloroform, and carbon tetrachloride by the year 2002.[224] A second round of substitutes for these chemicals, including hydrochlorofluorocarbons (HCFCS), are phased out on a later schedule.[225] This title also imposes recycling, use, and labeling provisions on both levels of chemical classifications.[226] Title VII provides for more stringent penalties for violations.[227] The EPA can now assess civil fines up to $200,000.[228] In addition, some violations completed with knowledge are now considered felonies.[229]

IV. MITCHELL AS SENATOR FROM MAINE: THE OIL POLLUTION ACT OF 1990

A. Passing Oil Liability Legislation

In the midst of clean air proceedings in 1989, the oil tanker *Exxon Valdez* ran aground and dumped approximately eleven million gallons of crude oil into Alaska's Prince William Sound.[230] The event galvanized Congress into passing the Oil Pollution Act of 1990.[231] This section documents the proceedings leading to the passage of the Oil Pollution Act (OPA) of 1990. It explains the conflicts over international protocols and the possible preemption of state oil liability and compensation statutes. Those conflicts reveal two impor-

861 (1992) (noting that EPA faces a mammoth task in implementing these regulations).

223. 42 U.S.C. § 7661a (Supp. V 1993). For an extensive review of Title V, see Timothy L. Williamson, *Fitting Title V into the Clean Air Act: Implementing the New Operating Permit Program*, 21 ENVTL. L. 2085 (1991).

224. 42 U.S.C. § 7671c(b) (Supp. V 1993). For a review of Title VI, see Steven J. Shimberg, *Stratospheric Ozone and Climate Protection: Domestic Legislation and the International Process*, 21 ENVTL. L. 2175 (1991).

225. 42 U.S.C § 7671d (Supp. V 1993).

226. *Id.* § 7671g.

227. *See generally* Michael S. Alushin, *Enforcement of the Clean Air Act Amendments of 1990*, 21 ENVTL. L. 2217 (1991); David T. Buente, *Citizen Suits and the Clean Air Act Amendments of 1990: Closing the Enforcement Loop*, 21 ENVTL. L. 2233 (1991); James Miskiewicz and John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After the 1990 Amendments*, 9 PACE ENVTL. L. REV. 281 (1992).

228. 42 U.S.C. § 7413(d)(1) (Supp. V 1993).

229. *Id.* § 7413(c)(1).

230. Over a year later the National Oceanic and Atmospheric Administration noted that from 250,000 to 1.3 million gallons of oil were still in the environment in Alaska. Casey Bukro, *Cleanup Worse Than Oil Spill, Experts Say*, CHI. TRIB., Sept. 17, 1990, at C1.

231. Within the next few months more spills also occurred in Rhode Island, the Delaware River, and the Houston Ship Channel. *See* S. Rep. No. 94, 101st Cong., 2d Sess. 2, *reprinted in* 1990 U.S.C.C.A.N. 722-23 [hereinafter, "OPA Legislative History"].

tant characteristics of Majority Leader Mitchell's developing stature. First, his resolve in protecting his own state from federal preemption was unwavering. Second, Mitchell was able to achieve quick passage of a piece of legislation that had languished in Washington for fifteen years.

Congress had failed to legislate any comprehensive laws protecting the American coasts from oil spills despite fifteen years of effort. The critical conflict centered on whether or not the new federal law would preempt state oil pollution and compensation statutes. Mitchell's position on this issue was entrenched. He repeatedly blocked legislation in the Senate because he objected to the elimination of state oil liability laws.[232] His position protected Maine, which had passed some of the toughest oil pollution laws in the country.

Mitchell criticized President Bush, however, for executive inaction surrounding the Prince William spill[233] and in April 1989 introduced S. 686.[234] The bill required the federal government to take rapid action to clean up oil spills if they were not being handled in a prompt and effective manner by the responsible companies. Mitchell's bill set up a national fund to pay up to $500 million for damages and cleanup costs from an oil spill. Finally, Mitchell's bill did not preempt state oil pollution statutes or compensation funds.[235]

During this time the other half of Congress was not sitting silent on oil pollution. On May 24, 1989, the House Merchant Marine and Fisheries Committee's Subcommittee on the Coast Guard and Navigation passed H.R. 1645 by a 14-9 vote.[236] The House bill differed significantly from Mitchell's measure in that it barred state laws per-

232. *See* The Honorable George J. Mitchell, *Preservation of State and Federal Authority under the Oil Pollution Act of 1990*, 21 ENVTL. L. 237 (1991) (arguing that the adoption of international protocols would harm states by overriding their authority to enact tougher laws). "In the view of some House bill proponents, Mitchell has almost single-handedly scuttled new oil-spill liability legislation over his insistence that existing state laws, such as Maine's no-limit liability statute, not be preempted by federal law." George Hager, *Deadlock Likely to Continue on Oil-Spill Liability Law*, 47 CONG. Q. WKLY. 1183 (1989).

233. "Twelve days ago, the President publicly acknowledged that Exxon's efforts, standing alone, are not enough to clean up the oil spill .... It is distressing that the administration took two weeks to come to that conclusion." *The Oil Spill in Prince William Sound, Alaska: Hearing of the Senate Environmental Protection Subcommittee of The Senate Environment and Public Works Committee*, Apr. 9, 1989 (statement by Senator Mitchell), *available in* LEXIS, Nexis Library, Federal and State News File. Mitchell argued that the "federal government must ensure that there is a prompt and effective response to large oil spills...." *Id. See also* Michael Kranish, *In shift, Mitchell Hits Bush on Issues*, BOSTON GLOBE, May 19, 1989, at 1.

234. 135 CONG. REC. S3239, 3241 (daily ed. Apr. 4, 1989) (statement by Senator Mitchell).

235. *Id.*

236. *House Panel Votes Oil Spill Liability Bill, Adopts Amendment to Pre-empt State Laws*, Daily Report for Executives (BNA) No. 101 (May 26, 1989).

taining to damages and removal costs. The House committee quickly reported their bill out of committee on June 21.[237]

The Senate Environment and Public Works Committee passed Mitchell's bill unanimously just before the August recess. The bill left state laws intact and did not adopt any international protocols on oil liability. Mitchell did not change his position on preemption: "I am convinced that this is the right position. The Alaska spill reinforces my conviction. No legislation that preempts state laws or blocks full use of state courts is or will be acceptable to me."[238] Howard M. Metzenbaum, a Senator from Ohio, amended the bill on the Senate floor to double the liability limit.

Knowing Mitchell's stance, members of the House battled among themselves on the preemption issue. The argument for preemption was, in part, that unlimited liability was not acceptable. Insurance costs, some House members argued, would either increase or actually cause insurance to be unavailable to oil companies. The Senate disagreed, claiming that "these claims are totally unfounded. Even in the seventeen states without liability limits, oil shipping and producing companies are not refusing to do business."[239] Finally, on November 8, 1989, the House departed from their precedent by voting 279-143 not to preempt state laws.[240] That same day the House also voted 213-207 to approve an amendment by California Congressman George Miller, which subjected spillers to unlimited liability for simple negligence. In a rare procedural moment the House reversed itself a day later 197-185 and ultimately defeated that amendment. The House bill then passed by a 375-5 vote.[241]

The House-Senate conference centered on three central issues. With the preemption issue resolved, Mitchell moved to stop inclusion of international protocols for liability and compensation of oil spill victims.[242] Mitchell argued that federal and state laws offered more stringent liability standards than the liability standards ap-

237. For a discussion of the House provisions, see The Honorable Walter B. Jones, *Oil Spill Compensation and Liability Legislation: When Good Things Don't Happen to Good Bills*, 19 ENVTL. L. REP. 10333, 10337 (1989) (noting that "it would be foolish to believe that the bill that passes the House will face smooth sailing in the Senate"); Robert P. Hey, *Congress Tackles Oil-Spill Bill*, CHRISTIAN SCIENCE MONITOR, June 29, 1989, at 7. ("The unknown: Will the Senate and its new majority leader agree this time to a preemptive bill like the one now steaming through the House? Five times since 1975 the Senate has refused to approve the idea.").

238. 135 CONG. REC. S9692 (daily ed. Aug. 3, 1989).

239. *See* OPA Legislative History, *supra* note 231, at 728.

240. George Hager, *Tough Oil-Spill Measure Rides Atop Environmental Wave*, 47 CONG. Q. WKLY. 3043 (1989) (concluding that the "House was driven toward a much tougher oil-spill bill than it had ever passed by widespread fury over the March 24 spill by the supertanker *Exxon Valdez*").

241. *Id.* at 3043-44.

242. For Mitchell's arguments against the international protocols, see generally Mitchell, *supra* note 232.

proved in the international protocols.[243] The House bill, which included the protocols, rested on an assumption that terrible damage would result from oil spills by foreign vessels. Mitchell argued that this was merely another version of the preemption issue. Further, it usurped the Senate's power to ratify treaties.[244] After losing a vote on a proposed amendment in conference, the House conferees dropped the international protocols from the bill.[245]

Now, two side issues emerged. On July 12 the conferees agreed to require all United States tankers to have double hulls by the year 2010, allowing a three-stage phaseout process for single-hulled ships.[246] Finally, Walter Jones, a Congressman from North Carolina, offered a proposed amendment to extend a moratorium on gas exploration and gas and oil drilling off the North Carolina coast. That amendment was tacked on to the bill.[247]

On August 2 the Senate passed House Resolution 1465, the conference measure, by a 99-0 vote.[248] A proposed fight over Jones' amendment never materialized on the House floor, and the bill passed on August 4 by a 360-0 vote.[249] President Bush signed the bill on August 18, 1994.

B. Provisions of the Oil Pollution Act of 1990

The Oil Pollution Act of 1990[250] is comprehensive in scope. It combines several earlier, disparate statutes that existed in a confus-

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243. *Id.* at 243. Using the *Exxon Valdez* incident as an example, Mitchell noted that under the protocols, the liability limit would be sixty million dollars unless Exxon acted "recklessly, knowing that an eleven million gallon oil spill and ecological catastrophe would result." *Id. See* Phil Kuntz, *Oil Spill Liability Negotiators Find Another Sticking Point*, 48 CONG. Q. WKLY. 1261 (1990). Mitchell claimed that under state laws, "Exxon would have been strictly liable for all cleanup costs and damages incurred as a result of its spill . . . estimated at approximately $2 billion." *Id.* at 1262.

244. Kuntz, *supra* note 243, at 1261.

245. Phil Kuntz, *Oil-Spill Conferees Break Logjam*, 48 CONG. Q. WKLY. 2042 (1990). After passage of the bill, Mitchell noted:

> Enactment of the OPA was not a rejection of United States participation in an international oil pollution regime . . . . Instead, the action . . . was a clear statement that any international accords must ensure that our full federal system, which has been preserved and enhanced under the OPA, is not prevented from providing the degree of environmental protection sought by the American people.

Mitchell, *supra* note 232, at 251.

246. Phil Kuntz, *Oil-Spill Conferees Near End with Deal on Double Hulls*, 48 CONG. Q. WKLY. 2215 (1990).

247. The amendment is located at 33 U.S.C. § 2753 (Supp. 1992).

248. Phil Kuntz, *Oil Pollution Cleanup Bill Is Set for Final Hurdle*, 48 CONG. Q. WKLY. 2504 (1990).

249. *Oil-Spill Bill Cleared*, 48 CONG. Q. WKLY. 2590 (1990).

250. Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990) (codified at 33 U.S.C. §§ 2701-2761 (1992)) (amending the Trans-Alaska Pipeline System Re-

ing amalgam. In fact, much of it grows out of, and integrates, the Clean Water Act. Earlier work had been done on oil pollution legislation during the decade; however, that work did not result in concrete legislation until this Act passed in 1990. Earlier schemes had been viewed as incomplete and unable to provide full compensation for oil spill damages.[251]

Funds provided by several previous statutes now are collected under the Oil Spill Liability Trust Fund.[252] The purpose of the Act and Fund is "to provide ready and complete compensation for any party suffering damages from discharges of oil or hazardous substances."[253] The Fund will be used for immediate cleanup, damage compensation, and removal, as well as other costs.[254] It is intended to assure "compensation of victims regardless of the liability of the spiller."[255] Up to one billion dollars can be used for each incident implicating the provisions of the Oil Pollution Act.[256] Further, under the National Contingency Plan, states are allowed to collect $250,000 from the Fund immediately after a spill occurs.[257] The cost for these withdrawals from the fund are spread to all oil users by establishing a five cent-per-barrel tax on all domestic and imported oil.[258]

The Act establishes the elements of liability for "responsible parties."[259] Removal costs for a spill can be collected by the government, states, or any other party, as long as the collection is consistent with the OPA's contingency plan.[260] The scope of permissible recoveries is wide and includes loss of natural resources, real and personal property damage, loss of subsistence use, lost revenues by the federal or state governments, lost profits, loss or im-

form Act of 1990, 43 U.S.C. §§ 1651-1655 (1988), and the Oil Spill Liability Trust Fund, 26 U.S.C. § 9509 (Supp. 1990)).

251. Michele Straube, *Is Full Compensation Possible for the Damages Resulting from the Exxon Valdez Oil Spill*, 19 ENVTL. L. REP. 10338, 10350 (1989) (suggesting the comprehensive oil spill "legislation has the potential to close loopholes and correct inconsistencies in current legislation"). *See also* OPA Legislative History, *supra* note 231, at 725.

252. 26 U.S.C. § 9509 (Supp. II 1990).

253. OPA Legislative History, *supra* note 231, at 731.

254. For a full list, see *Id.*

255. *Id.* at 727.

256. 26 U.S.C. § 9509(c)(2)(A)(i) (Supp. II 1990).

257. 33 U.S.C. § 2712(d)(1) (Supp. II 1990). The President is required to prepare and publish a National Contingency Plan that will "provide for the efficient, coordinated, and effective action to minimize damage from oil and hazardous substance discharges . . . ." *Id.* § 1321(d)(2).

258. 26 U.S.C. § 4611(c)(2)(B) (Supp. II 1990).

259. 33 U.S.C. § 2702(a) (Supp. II 1990). A "responsible party" includes "any person owning, operating, or demise chartering the vessel." *Id.* § 2701(32)(A). The definition also includes provisions for onshore and offshore facilities, deepwater ports, pipelines, and any of the above that may be abandoned. *Id.*

260. *Id.* § 2702(b)(2).

pairment of earning capacity, and costs associated with public services during the clean-up stage.[261]

Liability limits were extended considerably. Vessel owners are subject to liability that is eight times greater than those under the previous statutory scheme in the Clean Water Act.[262] If a vessel exceeds 3000 gross tons, the liability limit for each incident in which it is involved is $1200 per gross ton, with a cap of $10 million, whichever is greater.[263] A cap of $2 million exists if the vessel is less than 3000 gross tons.[264] Offshore facilities are now subject to the full cost of cleanup plus added liability to an amount of $75 million.[265]

The Act's liability limits do not apply in some areas. For instance, the provisions do not apply in the case of gross negligence, willful misconduct, or violations of safety regulations.[266] Failure to report a spill can result in a waiver of liability limits.[267] Some defenses are available. No liability exists if the discharge or substantial threat of discharge was caused solely by an act of God, an act of war, or an act or omission of a third party.[268]

Thanks to Mitchell's insistence, the Oil Pollution Act does not preempt any state oil spill compensation laws.[269] The Act protects a state's ability to enact laws stricter than the federal standards.[270] For instance, in Maine, oil facilities and vessels must be licensed, and a fund is available to deal with cleanup costs. Maine's law requires that parties to the spill reimburse the money used from the Fund for the state's cleanup.[271] Congress recognized the vitality of these funds. The Environment and Public Works Committee report concluded that "[p]reemption of State funds would make the States wholly dependent on the Federal funds and response system. The

261. *Id.* § 2702(b).

262. *Id.* § 2704(a)(1). Different limits are set depending on the size of the vessel. For a discussion of the previous liability scheme under the Clean Water Act, see Straube, *supra* note 251; Michael J. Uda, *The Oil Pollution Act of 1990: Is There a Bright Future Beyond Valdez?*, 10 VA. ENVTL. L.J. 403, 405 (1991).

263. 33 U.S.C. § 2704(a)(1) (Supp. II 1990).

264. *Id.*

265. *Id.* § 2704(a)(3).

266. *Id.* §§ 2704(c)(1)(A)-(B). A Senate report noted that "[a] limit on liability is clearly of benefit to an owner or operator subject to the provisions of this legislation. Such a benefit should not be conferred, however . . . where compliance perhaps could have prevented or mitigated the effects of an oilspill." OPA Legislative History, *supra* note 231, at 735-36.

267. 33 U.S.C. § 2704(c)(2)(A) (Supp. II 1990).

268. *Id.* §§ 2703(a)(1)-(3).

269. *Id.* § 2718(a).

270. As of 1990, 24 states had oil pollution laws that dealt with cleanup and damages. OPA Legislative History, *supra* note 231, at 728. The Committee noted that they "chose not to impose, arbitrarily, the constraints of the Federal regime on the States while at the same time preempting their rights to their own laws." *Id.*

271. ME. REV. ST. ANN. tit. 38 § 552 (1989 & Supp. 1991).

result might be a decrease in the degree of protection from oil spill damage, rather than an increase."[272]

The Oil Pollution Act also did not adopt any international protocols.[273] Although the United States played an active role in developing two protocols in London in 1984, the Senate did not ratify them.[274] Congress decided that the protocols' standards were too low to be consistent with the needs of the United States. President Bush criticized this view,[275] and some commentators have agreed with him.[276] One commentator suggests that the United States' failure to ratify the protocols may result in one set of standards for the world and another for the United States, which would be governed by the Oil Pollution Act of 1990.[277]

Finally, the Oil Pollution Act of 1990 changed the authority granted to the President during an oil spill crisis. President Bush was criticized for the lack of a quick executive response after the *Exxon Valdez* spill.[278] The Act grants authority to the President to require private parties to clean up spills.[279] Also, the President does not have to wait to see if the private party will have the capability to clean up the spill before the federal government intervenes.[280]

V. CONCLUSION

Maine Senator George Mitchell's environmental successes include the Water Quality Act of 1987, the Clean Air Act Amendments of 1990, and the Oil Pollution Act of 1990, all complex and lengthy regulatory enactments. They are the product of varied political and legislative strategies. The passage of clean water reauthorization required votes to overcome two separate vetoes by the Reagan Administration. The Clean Air Act Amendments of 1990 necessitated a level and quality of compromise unmatched in the previous decade. The passage of the Oil Pollution Act of 1990 marked both the end to a long Congressional squabble over the in-

272. OPA Legislative History, *supra* note 231, at 728-29.

273. For a thorough discussion of the making of the protocols, see Michael A. Donaldson, *The Oil Pollution Act of 1990: Reaction and Response*, 3 VILL. ENVTL. L.J. 283, 301-05 (1992).

274. *Id.* at 302.

275. George Bush, *Statement on Signing the Oil Pollution Act of 1990*, II PUB. PAPERS 1144 (1990). "Our failure to ratify the Protocols may weaken long-standing U.S. Leadership in the development of international maritime standards." *Id.*

276. Daniel Kopec and H. Philip Peterson, Note, *Crude Legislation: Liability and Compensation under the Oil Pollution Act of 1990*, 23 RUTGERS L.J. 597, 631 (1992) (arguing that "[t]he problems associated with the lower liability and compensation limits . . . are not insurmountable").

277. Donaldson, *supra* note 273, at 318 (citations omitted). He also suggested that the rest of the world might try to emulate this act. *Id.*

278. *See supra* note 233. *See also* Uda, *supra* note 262, at 416.

279. 33 U.S.C. § 1321(e) (Supp. II 1990). *See also* Uda, *supra* note 262, at 425.

280. 33 U.S.C. § 1321(c) (Supp. II 1990).

terrelationship of state and federal law and a quick decisive response to a national disaster. These laws each have a profound effect on the quality of the United States' environment.

Senator Mitchell's efforts were indispensable to the passage of all three pieces of legislation. When the need was for forceful rhetoric, Mitchell provided it with the thoughtfulness and deliberateness of a federal judge. When compromise was needed, Mitchell was the consummate politician, whose power of persuasion and sense of fairness secured votes for all three bills. Mitchell, of course, was not the sole actor in this drama. He was, however, one of the most involved, knowledgeable, and respected members of Congress taking part in the debate to secure adequate environmental protection laws for the United States.

His approach as majority leader was unlike the approaches of majority leaders in the past. Upon reaching the pinnacle of power in the Senate after only eight years as a member, he dispersed that power to the Senate's members. By encouraging participation and debate, Mitchell as Majority Leader enacted laws representing true bipartisan efforts. All three pieces of environmental legislation reviewed in this Comment passed by wide margins. All three were enacted, however, only after lengthy committee work that resulted in compromises between diverse party, regional, and personal interests and beliefs. Some of the floor fights were bruising, and Mitchell sometimes received harsh criticism from those he sought to serve.

These three Acts represent the result of Mitchell's beliefs, his skill, and his work. Title IV of the Clean Air Act Amendments of 1990 has given acid rain the attention that its damage to our environment has warranted since the early 1980s. Maine's unlimited liability law for oil spills remains intact due to Mitchell's passionate defense of states' rights. The Water Quality Act of 1987 made important strides to deal with non-point source pollution. Senator Mitchell has left a worthy legacy.

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