ENVIRONMENTAL LEGISLATION AND THE PROBLEM OF COLLECTIVE ACTION

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It is much easier to understand why environmental laws are needed than it is to comprehend how they came to be adopted. Whether described as a "tragedy of the commons," a problem of externalities, or a free-rider problem, the reasons why the marketplace alone will not provide sufficient clean air, clean water, and other public goods are well understood. But while a powerful case can be made that collective action to protect the environment is in society's best interests, it is hard to understand how market failures can be redressed through a political process that itself is prone to problems of free-riders and factional influence.

Political obstacles to collective action on behalf of diffuse public interests were identified by Mancur Olson in his classic 1965 work *The Logic of Collective Action.* Olson's work questions the political feasibility of regulatory legislation that provides diffuse environmental benefits to the general public while imposing concentrated costs on well-organized industry groups. Yet shortly after Olson's landmark work was published, a veritable avalanche of public interest legislation was enacted by Congress. These laws erected a comprehensive regulatory infrastructure to protect the environment that seemingly contradicts the predictions of Olson's theory.

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^{1.} Garrett Hardin, The Tragedy of the Commons, 162 SCIENCE 1243 (1968).

^{2.} See, e.g., William J. Baumol & Wallace E. Oates, Economics, Environmental Policy and the Quality of Life 71-79 (1979).

^{3.} See, e.g., James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325 (1992). Krier questions the glib assumption that "a community plagued by noncooperation can improve its condition by cooperating," noting that the same problems of free-riders and factional influence that generate environmental problems may plague government intervention to correct them. *Id.* at 338.

^{4.} See generally Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965).

While the remarkable political forces that produced this legislation remain a subject of considerable debate, the durability of these laws hardly can be questioned now. This essay offers some observations on why they have been so durable and what implications this has for our understanding of the collective action problem. The paper begins by reviewing theories of environmental legislation, most of which have focused on the remarkable burst of federal regulatory legislation enacted by Congress during the 1970s and 1980s. It then examines some significant changes that have occurred during the 1990s as both industry and environmental interest groups have become increasingly sophisticated in their efforts to influence the legislative process. The paper then seeks to derive some lessons that can be learned from this history and it explores how they can contribute to improving the legislative process.

I. THEORIES OF ENVIRONMENTAL LEGISLATION

Despite Olson's prediction that well-organized interests groups are likely to trump more diffuse public interests, comprehensive environmental protection programs were adopted and then strengthened by Congress during the 1970s and 1980s. The decade of the 1970s began with President Nixon signing the National Environmental Policy Act (NEPA) into law on New Year's Day. This law made environmental protection part of the mission of all federal agencies who were directed to consider carefully the environmental effects of major actions in which they were involved. While NEPA changed the mission of existing federal agencies to incorporate environmental concerns, a new agency, the Environmental Protection Agency (EPA), was created by executive order in 1970 to consolidate responsibility for environmental protection in an independent agency that would not be captive to any particular industry constituency. Congress then gave EPA the responsibility for implementing the new, na-

^{5.} This is confirmed not only by the longevity of the principal federal environmental laws, but also by their ability to survive assault during the 104th Congress, which was remarkably hostile toward environmental concerns. *See* Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159, 168-170.

^{6.} See Robert V. Percival et al., Environmental Regulation: Law, Science & Policy 106-112 (2d ed. 1996).

 $^{7.\} See$ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1994).

^{8.} See id. at § 4332.

^{9.} See Reorg. Plan No. 3 of 1970, 3 C.F.R. § 1072 (1970), reprinted in 84 Stat. 2086 (1970); see also Alfred A. Marcus, Promise and Performance 20-21 (1980).

tional regulatory legislation adopted during the 1970s.¹⁰

This legislation mandated comprehensive, national regulatory programs to control air and water pollution, toxic substances and hazardous waste—the Clean Air Act,¹¹ the Clean Water Act,¹² the Safe Drinking Water Act,¹³ the Toxic Substances Control Act,¹⁴ and the Resource Conservation and Recovery Act (RCRA).¹⁵ While EPA struggled to implement these ambitious regulatory directives, Congress turned its attention to cleaning up the legacy of past contamination. In 1980, Congress created the Superfund program to remediate environmental contamination and make broad classes of parties strictly liable for the costs of cleaning up that contamination.¹⁶

This flurry of environmental legislation has received considerable academic attention from scholars seeking to understand the forces that spawned it. While its precise origins remain a subject of considerable debate, some of its roots can be traced to the broader civil rights and public interest movements of the 1960s. These movements featured charismatic leaders who helped mobilize the public to press for enactment of landmark civil rights and consumer protection legislation.¹⁷ The publication in 1962 of Rachel Carson's

^{10.} During the 1970s alone, more than twenty major federal environmental laws were enacted or substantially strengthened as Congress placed an expanding platter of regulatory responsibilities on EPA and other federal agencies. *See* Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Mp. L. Rev. 1141, 1160 (1995).

^{11.} In December, 1970, Congress adopted the modern-day version of the Clean Air Act (CAA), 42 U.S.C. §§ 7401-7642 (1994). This legislation directed EPA to identify air pollutants that threatened public health or welfare and to establish minimum, national ambient air quality standards to be attained by the states.

^{12.} In October, 1972 Congress approved the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1994), which has become known as the Clean Water Act. This statute transformed what had been a federal research and financial assistance program into a comprehensive, national regulatory program to control water pollution. The law banned all unpermitted discharges of pollutants into surface waters, and it imposed technology-based effluent limits to be implemented through a national permit program.

^{13.} In 1974, Congress enacted the Safe Drinking Water Act (SDWA), which requires EPA to establish national regulations to control hazards to public health from contaminants in public water supplies. *See* 42 U.S.C. §§ 300f - 300j-26 (1994).

^{14.} In 1976 Congress enacted the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 601-2629 (1994), which authorizes EPA to regulate virtually any chemical substance that may present an unreasonable risk to human health or the environment.

^{15.} In 1976 Congress enacted the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1994), which requires EPA to establish minimum national standards for management of hazardous waste from "cradle to grave," including a permit program for facilities that treat, store or dispose of hazardous waste.

^{16.} See Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1994).

^{17.} See Robert L. Rabin, Federal Regulation in Historical Perspective, 38 STAN. L. REV.

Silent Spring is widely viewed as the single most influential force in galvanizing the modern environmental movement into a force for political action. Historian Samuel Hays argues that the massive economic and social transformations that followed World War II produced fundamental changes in public values and preferences that forced environmental concerns to the top of the political agenda. The late 1960s witnessed an unprecedented groundswell of grassroots support for environmental concerns, as reflected in the nation's celebration of the First Earth Day on April 22, 1970. The combination of these forces created a political climate extremely favorable towards environmental legislation. ²⁰

National interest groups appeared on the scene to press for stronger environmental legislation. Many of these groups were born out of concern for particular issues, but soon blossomed into large national organizations pursuing broad environmental agendas. These included the Environmental Defense Fund, formed in 1967 by a group of scientists alarmed about the long-term environment consequences of DDT,²¹ and the Natural Resources Defense Council, formed by former lawyers disturbed by a proposal to build a massive pumped storage facility at Storm King Mountain.²²

This was not the first time that national groups had sought to influence federal policy on behalf of the environment. The Sierra Club, which had been founded in 1892, played a major role in bitter battles over the fate of public lands early in the twentieth century.²³ But the new political activism by environmentalists was fundamentally different from the sporadic involvement of the older conservation groups.²⁴ It represented a permanent commitment to influence federal policy at every stage of the legislative and regulatory process.

The transformation of environmental organizations into potent, national political forces was fueled by a surge in their membership,

^{1189, 1281-82 (1986).}

^{18.} See, e.g., Philip Shabecoff, A Fierce Green Fire (1993).

^{19.} See Samuel P. Hays, Beauty, Health, and Permanence: Environmental Politics in the United States, 1955-1985, at 2-5 (1987).

^{20.} Historian Theodore White writes that in 1970 the environment "had swollen into the favorite sacred issue of all politicians, all TV networks, all writers, all good-willed people of any party." Theodore H. White, The Making of the President 1972 45 (1973).

^{21.} EDF's early efforts to get a hearing for its case against DDT are chronicled in Thomas R. Dunlap, DDT: Scientists, Citizens, and Public Policy (1981).

^{22.} The Storm King controversy and the formation of NRDC are described in JOHN CRONIN & ROBERT F. KENNEDY, JR., THE RIVERKEEPERS (1997).

^{23.} See Roderick Nash, Wilderness and the American Mind (1982).

^{24.} See generally HAYS, supra note 19.

which provided critical financial backing. It is estimated that in 1960 there were 150,000 members of environmental groups with a total budget of less than \$20 million.²⁵ By the end of the 1980s, eight million people contributed more than \$500 million to 100 national environmental groups.²⁶ Foundations also played a significant role. The Ford Foundation provided important seed money for the public interest law movement that helped some national environmental groups during their formative years.²⁷

Scholars puzzle over the sources of the tremendous growth in national environmental groups, particularly because it seems so inconsistent with the predictions of Olson's theory. Some argue that individuals became more altruistic as the rise of environmental values in the consciousness of the American populace simply increased the willingness of individuals to contribute to such groups, despite the free rider problem.²⁸ Others note that the potential benefits of collective action increased as environmental problems became more severe.²⁹

An even more promising explanation is that as the prospects for success in achieving dramatic breakthroughs in environmental protection increased, individuals perceived that their active support of environmental causes really could make a difference and that free riding could doom prospects for historic gains.³⁰ The early victories of the environmental movement attracted new adherents and encouraged political entrepreneurs to seek popular support by promoting environmental legislation even before national groups became powerful brokers of citizen interests.³¹

^{25.} See Ronald G. Shaiko, Voices and Echoes for the Environment: Public Interest Representations in the 1990s and Beyond 58 (1997) (unpublished manuscript, on file with author).

^{26.} See id. at 58-59. See also, e.g., PETER BORRELLI, Environmentalism at a Crossroads, in Crossroads: Environmental Priorities for the Future 3 (Peter Borrelli ed., 1988).

^{27.} See generally FORD FOUNDATION, THE PUBLIC INTEREST LAW FIRM: NEW VOICES FOR NEW CONSTITUENCIES (1973).

^{28.} See David B. Spence, Paradox Lost: Logic, Morality, and the Foundations of Environmental Law in the 21st Century, 20 COLUM. J. ENVTL. L. 145, 169 (1995).

^{29.} See Christopher H. Schroeder, Rational Choice Versus Republican Moment Explanations for Environmental Laws, 1969-73, 9 DUKE ENVTL. L. & POL'Y F. 29, 45-47 (1998).

^{30.} See id. at 47-49. It has been observed that public opinion occasionally "cascades" by shifting dramatically in response to events that change public perceptions of what is possible or desirable. See Cass R. Sunstein, Endogenous Preferences, Environmental Law, 12 J. LEGAL STUD. 217, 240 (1993). A similar phenomenon appears to have occurred recently with respect to public opinion toward smoking as a result of revelations concerning the behavior of the tobacco industry. See James E. Davis, Face-Off: Smoking and Health, USA TODAY, Jan. 10, 1989 at 8A.

^{31.} See E. Donald Elliott et al., Toward a Theory of Statutory Evolution: The Federaliza-

Dan Farber describes the enactment of the federal environmental laws as occurring during extraordinary "republican moments" when public pressure generated by events like Earth Day, Love Canal or Three Mile Island made environmental issues particularly salient with the public and their elected representatives. While conceding that episodic saliency is "a politically important phenomenon," Dick Stewart maintains that it cannot account for the breadth or persistence of federal environmental regulation. Stewart concludes, "as a result of historical, cultural, and political contingencies that have yet to be fully or satisfactorily explained," the American public simply views "environmental quality as an important national good that transcends individual or local interest. Yet he remains puzzled by how this demand has been used so effectively to trump organized economic interests.

William Rodgers, Jr., suggests that an explanation may be that environmental laws are less effective at trumping these interests than appears at first glance.³⁶ He maintains that legislators garner public support by voting for stringent-sounding legislation, while burying subtle provisions in the laws that make it easier for their targets to deflect regulation.³⁷ While there is considerable truth in his observations, the initial generation of environmental laws also incorporated citizen suit provisions that allowed individuals to sue to force agencies to implement the laws.³⁸ Congress also has amended the laws in response to public frustration over the slow pace of their implementation. For example, Congress repeatedly adds statutory deadlines for agency action and sometimes includes specific sanctions for inaction, such as the "hammer" provisions in the Hazardous and Solid Waste Amendments of 1984.³⁹

tion of Environmental Law, 1 J.L. ECON. & ORG. 313, 338 (1985).

- 34. Id. at 210.
- 35. See id. at 213.

- 37. See id.
- 38. See, e.g., 42 U.S.C. § 7604 (1994) (Clean Air Act citizen suit provision).
- 39. These provided that all land disposal of hazardous waste would be banned by certain dates unless specific determinations were made that certain levels of treatment were sufficient to avoid future environmental problems. *See* 42 U.S.C. § 6924 (1994).

^{32.} See Daniel A. Farber, Politics and Procedure in Environmental Law, 8 J.L. ECON. & ORG. 59, 66-67 (1992).

^{33.} Richard B. Stewart, *Environmental Quality as a National Good in a Federal State*, 1997 U. CHI. LEGAL F. 199, 202-203.

^{36.} See William H. Rodgers, Jr., The Lesson of the Owl and the Crows: The Role of Deception in the Evolution of the Environmental Statutes, 4 J. LAND USE & ENVTL. L. 377, 378 (1989)

Finally, some have argued that the environmental laws *are* consistent with Olson's theory because they primarily promote rentseeking by environmental elites who seek to pursue their own special interests to the detriment of the larger public. 40 While certain specific provisions of the environmental laws provide economic advantages to particular groups, this is hardly surprising 41 and cannot come close to explaining the political dynamics that generated the vast infrastructure of existing environmental law. 42

II. INTEREST GROUPS AND ENVIRONMENTAL LEGISLATION: THEN AND NOW

As noted above, one remarkable aspect of the major federal environmental laws is that they were enacted while the national environmental movement was in its infancy. Indeed, some have argued that the stringency of these laws is explained in part by the absence of powerful, national interest groups serving as brokers for environmental interests who could have been forced to make compromises. That situation has changed dramatically as both environmental and industry groups have become more professional and sophisticated in lobbying and mobilizing their members to influence the legislative process.

My own experiences as a young lawyer for the Environmental Defense Fund (EDF) in the early 1980s illustrate some of these changes. When I started working at EDF in 1981, the organization's D.C. office was located in a run-down, poorly heated townhouse. The lawyers and scientists on the staff had scant secretarial support and I was paid a salary substantially lower than I had received as a judicial clerk. Half of the organization's annual budget came from contributions from our 45,000 individual members who were charged annual membership dues of \$20.

While EDF did not have elegant surroundings, I was amazed by the instant credibility I seemed to have acquired once I started

^{40.} See generally William Tucker, Progress and Privilege: America in the Age of Environmentalism (1982); Environmental Politics: Public Costs, Private Rewards (Michael S. Greve & Fred L. Smith, Jr. eds., 1992).

^{41.} Indeed, many of the provisions most frequently criticized on these grounds may be explained on alternative grounds as well. *See* Sunstein, *supra* note 30, at 231-233.

^{42.} See Stewart, supra note 33, at 202.

^{43.} See Elliott et al., supra note 31, at 338.

^{44.} I worked as a staff attorney for the Environmental Defense Fund from 1981-1987.

^{45.} EDF Forced to Raise Dues, 11 EDF Letter 1 (Jan. 1980) (visited Nov. 30, 1998) http://www.edf.org/pubs/EDF-Letter/1980/Jan/k_dues.html>.

working for the organization. Two weeks after joining EDF, I found myself in a New York hearing room cross-examining high-level corporate officers from five of the state's seven investor-owned electric utilities. When major environmental news was made, reporters from the national newsmedia often would call to ask EDF staff for reactions. In this environment, it was extremely important to stay well informed on the substance of policy issues.

It was well understood that the organization's legal, economic, and scientific expertise was the ultimate source of its influence in the policy arena. As a result, EDF staff were extremely conscientious in seeking to ensure that the policy positions they advocated were the product of the best law and science available. I was convinced that this made me a more effective advocate because the policy positions I was advocating were backed by sound science and economics.⁴⁷

When working to craft federal environmental legislation, EDF's primary asset was its ability to provide credible scientific and technical information to congressional staff. While it had regional offices, EDF did not have any local chapters. The organization communicated with its members through a quarterly newsletter. Occasionally, when important environmental legislation was under consideration in Congress, EDF's quarterly newsletter urged members to write their Congresspersons. EDF had no staff with particular expertise in legislative lobbying. When working to influence environmental legislation, the scientists, lawyers and economists with expertise on the particular issues addressed by the legislation would be the same staff who would deal with members of Congress and their staff.

Although many people perceive environmentalists as advocates for a well-defined, rather unified agenda of policy preferences, ⁴⁹ my experience at EDF taught me that the environmental movement in-

^{46.} New York Public Service Commission, Case No. 28059, Proceeding to Inquire into the Financial and Economic Cost Implications of Constructing the Nine Mile Point Unit No. 2 Nuclear Station. See DAVID ROE, DYNAMOS AND VIRGINS 210-214 (1984) (recounting EDF's actions against the nuclear power industry).

^{47.} One illustration of this was EDF's effort to persuade EPA to perform a cost-benefit analysis of eliminating lead additives from gasoline. When the agency ultimately conducted such an analysis, it demonstrated quite powerfully the net benefits of lead phaseout. *See* R. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 562-67 (2d ed. 1996)

^{48.} See, e.g., Hazardous Waste Legislative Alert, 15 EDF Letter (visited Nov. 30, 1998), http://www.edf.org/pubs/EDF-Letter/1984/Jun/K_hazwaste.html>.

^{49.} See, e.g., MICHAEL S. GREVE, THE DEMISE OF ENVIRONMENTALISM IN AMERICAN LAW 1-6 (1996) (describing "environmentalism" as a threat to property rights and freedom of contract).

stead is remarkably diverse. EDF attempted to coordinate its lobbying efforts with other environmental organizations, particularly when major national legislation was under consideration. However, each organization had different subject areas of expertise and their views on appropriate policies and strategies for achieving them often were quite divergent. This is illustrated by a little-noticed incident that occurred in 1984 during work on reauthorization of the federal hazardous waste statute, known as the Resource Conservation and Recovery Act (RCRA).⁵⁰

EDF had a special interest in RCRA reauthorization because the organization focused a great deal of effort on working to improve the management of hazardous waste. After EPA was slow to issue regulations implementing the 1976 law, EDF brought a series of law-suits that forced EPA to speed up the implementation process. As a result, the organization's lawyers and scientists took the lead during the 98th Congress in working on RCRA reauthorization. The Republican Party, which was viewed as less sympathetic to environmental concerns, had a majority in the Senate, while the Democrats controlled the House. Given the high level of public support for environmental concerns, and the reaction to the EPA scandals involving Rita Lavelle and Anne Gorsuch Burford, EDF was confident that its objectives would be achieved so long as the RCRA reauthorization legislation came to a floor vote in each chamber.

In 1983, RCRA reauthorization bills had been reported out of the House Energy and Commerce Committee and the Senate Environment and Public Works Committee.⁵⁴ In 1984 the Senate, after some delays, approved separate RCRA bills, leaving the conference committee as the only remaining obstacle. However, the House Democratic leadership then announced that it would attach a bill reauthorizing the Superfund program to the RCRA bill and send them together to a conference committee. EDF was convinced that this

^{50.} See 42 U.S.C. § 6901 - 6992k (1994).

^{51.} See, e.g., Illinois v. Costle, 9 Envtl. L. Rep. (Envtl. L. Inst.) 20,243 (D.D.C. 1979); Environmental Defense Fund, Inc.v. Gorsuch, 713 F.2d 802 (D.C. Cir. 1983).

^{52.} See Congress Passes Improved RCRA Bill, 15 EDF Letter 1 (visited Nov. 30, 1998), http://www.edf.org/pubs/EDF-Letter/1984/Dec/b_rcra.html>.

^{53.} In 1983 EPA Administrator Anne Gorsuch Burford resigned under fire and Assistant EPA Administrator Rita Lavelle was convicted of perjury and obstruction of justice as a result of an investigation of charges that EPA had manipulated remediation efforts at Superfund sites for political purposes. *See* JONATHAN LASH, A SEASON OF SPOILS: THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT 66-67, 80-81 (1984).

^{54.} See H.R. 2867, 98th Cong. (1983); S. 757, 98th Cong. (1983).

tactic would doom the RCRA legislation. The ostensible purpose of this linkage was to highlight the Senate Republican leadership's failure to vote on Superfund reauthorization legislation. However, EDF perceived it as a political stunt designed to create a campaign issue for the Democrats by enabling them to blame the Republicans for the seemingly inevitable defeat of RCRA reauthorization that it would produce.

The other national environmental organizations refused to object to linkage because they did not want to alienate any of the Democratic leadership, who they viewed as their allies on most environmental issues. But EDF was militantly non-partisan, and the organization believed it was time to blow the whistle when its supposed allies on Capitol Hill were jeopardizing enactment of important environmental legislation for distinctly partisan ends. Letters were distributed to all members of Congress on behalf of EDF denouncing "linkage" as a terrible idea that would result in the defeat of the RCRA legislation. EDF's opposition quickly helped kill "linkage" by making it difficult for the Democrats to portray it as a proenvironment move. RCRA then went to a conference committee, and the legislation that became the Hazardous and Solid Waste Amendments of 1984 was enacted by both chambers.⁵⁵

While somewhat unusual, this incident illustrates that the environmental movement is not a monolithic entity. Disagreements between national groups, and in particular between national and grassroots organizations, are part of the landscape of environmental politics. Some of these disagreements, as with the RCRA linkage issue, reflect differences in judgment concerning appropriate strategies for achieving common ends. Others reflect differences in priorities and occasional turf battles between groups. For opposing linkage, EDF was denounced by other environmental groups and by some prominent members of the House Democratic leadership, including one member who vowed never to work with us again. Ultimately, however, the incident did not irreparably damage EDF's ability to work with the proponents of linkage on other environmental issues.

In the years since I left EDF, the environmental movement has become considerably larger and more professional. EDF has grown from 50,000 members in 1987 to more than 300,000.⁵⁶ Its annual

^{55.} See Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3224 (codified as amended in scattered sections of 42 U.S.C.).

^{56.} See EDF, 1997 Annual Report (visited Nov. 30, 1998), http://www.edf.org/pubs/AnnualReport/1997/>.

budget has increased from \$6 million then to \$25 million today. The organization's Washington D.C. office is now in a modern high-rise office building that resembles the offices of any modern corporate law firm. EDF now employs staff who specialize in lobbying Congress. While the organization still communicates with its members by newsletter, it also has a stunning World-Wide Web site that it uses to attract new supporters. Rather than relying solely on appeals to altruism, EDF also seeks to recruit new members by offering them premiums, such as calendars or book bags for joining.

Similar stories could be told about most of the other national environmental organizations. They now have become permanent, institutional presences who are active whenever environmental legislation is considered. Many employ former congressional staffers to work on environmental legislation and use the latest communications technology to rally public support for their causes.

Environmental groups have become far more sophisticated in their efforts to influence legislation, in part out of necessity as the political climate has become less favorable to their interests and their opponents have become more professional in their own lobbying efforts. With the dawn of the 104th Congress, there has been a sharp escalation in partisan conflict over environmental issues. Aggressive lobbying by conservative nonprofit groups who support property rights and the "wise use" movement has helped change the legislative agenda in a manner that has put environmentalists on the defensive.⁵⁷

Yet even a more hostile Congress has been largely unable to roll back environmental legislation. Faced with a president threatening to veto anti-environmental legislation, the legislative process has been mired in gridlock. Deponents of environmental regulation have focused their legislative efforts on attempts to add riders to appropriations bills that temporarily restrict the ability of federal agencies to implement the laws. They also have succeeded in winning enactment of legislation requiring that agencies give greater consideration to the interests of small businesses when issuing environ-

^{57.} See PERCIVAL ET AL., supra note 6, at 113.

^{58.} See Tom Wicker, A Political Conversion, 13 ENVTL. F., Mar.-Apr. 1996, at 26, 28.

^{59.} See generally Bud Ward, Why Quick Scores are Unlikley In 105th, 14 ${\tt ENVTL}\ F.$, May-June 1997, at 6 .

^{60.} For example, in appropriations legislation that became law in 1995, Congress imposed a temporary freeze on the listing of new endangered species and required the U.S. Forest Service to increase timber harvests on federal lands. Emergency Supplemental Appropriations and Recissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104-6, 109 Stat. 73.

mental regulations.⁶¹ Both strategies reflect the increasing sophistication of representatives of the regulated community. It is not surprising that environmental groups have responded by devoting more resources of their own to efforts to influence legislation.

III. ENVIRONMENTAL LEGISLATION: SOME LESSONS

Rich lessons can be learned from the last three decades of experience with enactment of federal regulatory legislation to protect the environment. Four of these lessons are sketched below.

A. Legislative Gridlock And The Need For A "Trigger" Event

The immediate impetus for enactment of most of the major federal environmental laws was some significant set of events that attracted national media attention and thrust a particular issue into the political forefront.⁶² The Clean Air Act was enacted in the midst of an extraordinary political frenzy in support of the environment after the first Earth Day. 63 A trigger for enactment of the Clean Water Act in 1972 was a series of lawsuits that revived the long-dormant qui tam provisions of the 1899 Refuse Act, leaving industrial polluters vulnerable to liability in the absence of a national program granting permits for discharges to surface waters. 64 The public panic that followed the discovery of toxic contamination in a residential neighborhood called Love Canal was a powerful catalyst for the enactment of the Superfund legislation. ⁶⁵ The tragic chemical leak that killed thousands of people in Bhopal, India in December 1984 triggered enactment of the Emergency Planning and Community Right-to-Know Act (EPCRA), which requires companies to disclose to the public

^{61.} As part of the extension of the federal debt limit in March 1996, Congress adopted the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), P.L. 104-121.

^{62.} To be sure, there are exceptions to this "rule." For example, the initial RCRA legislation has been considered to be a bit of an orphan because it seemingly got lost in the frenzied debate over toxic chemicals that produced the Toxic Substances Control Act. See BRUCE A. WILLIAMS & ALBERT R. MATHENY, DEMOCRACY, DIALOGUE AND ENVIRONMENTAL DISPUTES 99 (1995).

^{63.} As historian Theodore White describes the political climate in 1970, "the environment[al] cause had swollen into the favorite sacred issue of all politicians, all TV networks, all good-willed people of any party." Theodore White, The Making of the President 45 (1973).

^{64.} See Comment, Discharging New Wine into Old Wineskins: The Metamorphosis of the Rivers and Harbors Act of 1899, 33 U. PITT. L. REV. 483 (1972).

 $^{65.\ \} See$ Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.).

annually the volumes of their releases of toxic chemicals.⁶⁶ In similar fashion, the Exxon Valdez oil spill broke years of legislative gridlock and produced the enactment of the Oil Pollution Act of 1990.⁶⁷

While the initial generation of federal environmental laws was adopted by Congress with overwhelming, bipartisan support, contemporary conflicts over environmental legislation frequently are partisan and intense. The result often is legislative gridlock even when there is general agreement that laws need to be updated and reformed. Regional conflicts over who would bear the costs of acid rain control stalled the enactment of new clean air legislation for more than a decade. Conflicts over federal preemption of state law stalled the enactment of federal oil pollution control legislation for almost as long. The Superfund legislation continues to languish in gridlock. On many environmental issues, there is now a perception that either environmental or industry interests are capable of blocking legislation. Indeed, the prospects for legislative success now often turn on the fate of consensus-building projects.

Recent history suggests that consensus legislation can be adopted when some set of external events forces both environmental and industry groups to seek common ground. For example, when a federal court decision confronted the agricultural and chemical industries with the unpleasant prospect of having the tolerances for scores of widely used pesticides revoked, they joined the environmental community in negotiating consensus pesticide reform legislation adopted unanimously in The Food Quality Protection Act of 1996. When it became apparent that existing regulatory mandates would place an impossible burden on localities and EPA, groups representing state and local officials, environmentalists, and industry were able to agree on reform legislation. Although the legislation relaxed some mandates, it also improved the process by which contaminant levels

 $^{66.\,}$ The Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. $\S\S$ 11001-11050.

 $^{67.\} See$ Pub. L. No. 101-380, 104 Stat. 484 (Codified as amended in scattered sections of 33 U.S.C.).

^{68.} See Percival et al., supra note 6, at 824-825.

^{69.} See id. at 140.

^{70.} See, e.g., Rena I. Steinzor, The Reauthorization of Superfund: Can the Deal of the Century Be Saved? 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,016 (1995).

^{71.} Because it had such broad support from EPA, environmental and industry groups, the Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 passed unanimously in the House on July 23, 1996 and in the Senate on the following day. $See\ 142\ Cong.\ Rec.\ H8148-01\ (daily\ ed.\ July\ 23,\ 1996).$

were set and increased public access to information about contaminants in drinking water.⁷²

In 1996, an election year "greening" of the 104th Congress, which previously had been more hostile to environmental concerns, confirmed the strength of public support for environmental regulation and the prospects for adopting consensus reform legislation. While the struggle between environmentalists and those seeking to relax or repeal the laws is likely to continue, significant legislation is likely to be enacted only when some "trigger" event makes an issue politically salient. When this occurs, the legislation that is enacted usually is the product of long-planted seeds that burst into bloom when outside events trigger unusually intense demand for legislative action.

B. The Diversity Of The Environmental Movement

Environmental concerns are represented by diverse interests who often disagree. Disagreements over the best strategy for promoting common goals occur with some frequency, though usually they are not as intense as those that produced the split discussed above over the RCRA/CERCLA linkage proposal. The environmental movement has become increasingly diverse in recent years with the growth of grassroots organizations and the rise of the environmental justice movement. Efforts to portray the environmental movement as the product of rent-seeking, anti-growth elitists⁷⁶ are founded on wildly distorted stereotypes.⁷⁷

^{72.} The Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613. This legislation was approved unanimously in the Senate and by a 392-30 margin in the House. See 142 Cong. Rec. S9785-02 (daily ed. Aug. 2, 1996); 142 Cong. Rec. H9865-01 (daily ed. Aug. 2, 1996). See also Robert M. Sussman, Formula for Success, Envtl. F., Jan./Feb. 1997, at 22, 22-23.

^{73.} See Wicker, supra note 58, at 26.

^{74.} See John H. Cushman, Jr., G.O.P. Backing Off From Tough Stand Over Environment, N.Y. TIMES, Jan. 26, 1996, at A1; The Environmental Counterattack, N.Y. TIMES, Feb. 5, 1996, at A14.

^{75.} See Timothy Noah, Both Parties Paint Themselves Green, but Trend Of Looser Environmental Rules Is Seen Continuing, Wall St. J., Sept. 9, 1996, at A18. See also Sharon Buccino et al., Gathering Storm: Coming Environmental Battles in the 105th Congress, in 1998 ALI-ABA COURSE OF STUDY ON ENVIRONMENTAL LAW 3.

^{76.} See, e.g., C. Boyden Gray, Obstacles to Regulatory Reform, 1997 U. CHI. LEGAL F. 1,

^{77.} See Zach Willey, Progress and Privilege, 11 ECOLOGY L. Q. 95, 95 (1983) (book review).

To be sure, environmental organizations are making increasing efforts to coordinate their activities to avoid duplication of their efforts and to take advantage of their respective areas of expertise. However, as these groups have matured into established political forces, they more often are coming into direct conflict over policy issues, as illustrated by the split within the environmental community over approval of the North American Free Trade Agreement. Divergences in priorities and differences in strategy between national organizations and local grassroots groups have become particularly pronounced in recent years.

As Shep Melnick and Paul Portney observed at the Cummings Colloquium on Environmental Law, 79 industry groups also are not monolithic in their positions on environmental policy issues and their approaches to lobbying. Indeed, the interests of individual members of large trade associations may differ so dramatically that it becomes impossible for the larger organization to take a position on an issue. One important implication of this lesson is that industry/environmental coalitions may be possible, particularly where mutual distrust has been diminished by the success of such previous efforts. When EDF and the McDonalds Corporation announced a joint project to review the latter's waste generation and disposal practices, EDF was denounced by some other environmental organizations and even picketed by them. 80 Yet the project proved remarkably successful in convincing McDonalds that it could save money by adopting more environmentally benign policies.81 Some large industrial concerns are now breaking ranks with the industry coalition formed to oppose ratification of the Kyoto Protocol to the Global Climate Change Convention.82 This may create new opportunities for productive future collaboration between industry groups and environmental interests.

^{78.} See Six Environmental Organizations Back NAFTA, Denounce Opponents, INSIDE U.S. TRADE (Sept. 17, 1993) http://www.insidetrade.com/sec-cgi/>.

^{79.} R. Shep Melnick & Paul Portney, Addresses at the Third Annual Cummings Colloquium on Environmental Law – The Rents of Nature: Special Interests and the Puzzle of Environmental Legislation (Mar. 26-27, 1998) [hereinafter Cummings Colloquium].

^{80.} See Rose Gutfeld, Big Mac Joins With Big Critic To Cut Trash, WALL St. J., Aug. 2, 1990, at B1.

^{81.} See, e.g., John Holusha, Packaging and Public Image: McDonalds Fills a Big Order, N.Y. Times, Nov. 2, 1990; Paul Leavitt, McDonalds Announces Environmental Plan That Could Eliminate 4/5 of its Trash, USA TODAY, April 17, 1991; McDonalds, EDF Launch Buy-Recycled and Save Campaign with Ad Council, RECYCLING TODAY, FEB. 1, 1995.

^{82.} See Martha M. Hamilton, Shell Leaves Coalition That Opposes Global Warming Treaty, WASH. POST, April 22, 1998, at C13.

C. The Importance Of Procedural Innovations & Learning By Doing

A third lesson from the history of environmental regulation is the importance of procedural innovations. The initial generation of these innovations—citizen suit provisions, rights of access to information, attorney-fee shifting provisions, expanded rights to judicial review—were designed to give previously underrepresented interests more voice in the policymaking process. NEPA's environmental impact statement (EIS) requirement helped transform federal agencies from within as agencies that formerly did not view environmental protection as part of their official mission had to hire staff with environmental expertise. 83 The requirement that alternatives be considered in the EIS process helped provide new opportunities for concerned citizens to influence agency decisions.⁸⁴ As the judiciary became more involved in reviewing agency decisions and requiring officials to perform non-discretionary duties, citizen groups acquired new tools for ensuring that agencies were more responsive to the environmental concerns.8

When it reauthorized and updated the first generation of national environmental legislation, Congress refined the regulatory strategies it initially had employed. The citizen suit provision contained in the 1970 Clean Air Act became the model for citizen suit provisions inserted into nearly all of the other federal environmental The Clean Water Act's national permit system, which erected an infrastructure for controlling water pollution through effluent standards, also was an important innovation.86 The Act's flat prohibition of unpermitted discharges and the requirement that permittees file discharge monitoring reports greatly facilitated citizen enforcement efforts. This permit program served as the model for the permit program added to the Clean Air Act in Title V of the 1990 Amendments.⁸⁷ In similar fashion, NEPA provided valuable lessons concerning the potential power of information and analysis requirements that were not lost on Congress when it adopted the Emergency Planning and Community Right-to-Know Act. 88

Now that the power of procedural requirements for influencing policy outcomes is widely understood, it is easy to understand why

^{83.} See PERCIVAL ET AL., supra note 6, at 1178-81.

^{84.} See id.

^{85.} See id.

^{86.} See National Pollutant Discharge Elimination System, 33 U.S.C. § 1342 (1994).

^{87.} See 42 U.S.C. § 7601 (1994).

^{88.} See PERCIVAL ET AL., supra note 6, at 647.

proposed "regulatory reform" legislation has become a perennial battleground. The regulated community's push for sweeping legislation to impose new analysis requirements on agencies and to create new avenues for challenging regulations demonstrates that the environmentalists are not the only interests who appreciate how important procedural innovations can be. Sweeping "reform" efforts are likely to be greeted by suspicion, even when couched in procedural terms, for fear that they may alter the balance of power between the regulated community and the beneficiaries of regulation. This suggests that more modest experiments with regulatory innovation may be necessary before consensus can be achieved on more sweeping changes in procedures.89 Experience with EPA's Project XL and the marketable emissions allowances created by Title IV of the Clean Air Act Amendments of 1990 may illustrate the importance of "learning by doing" as a means for facilitating the future adoption of broader scale reforms.90

D. Visibility As The Cure For Special Interest Deals

A final lesson is that the public interest generally wins when a spotlight is shining on the legislative process, as Greg Wetstone suggested at the Cummings Colloquium on Environmental Law. Increasing the public visibility of the legislative process can help expose and ultimately kill special interest deals. A recent illustration of this phenomenon is Congress's swift repeal of legislation giving the tobacco industry a \$50 billion tax credit for settling liability claims. This windfall quietly and anonymously had been buried in omnibus budget legislation that was enacted into law. When exposed, the provision was so politically unpopular that no member of Congress was willing to claim authorship. An effort to have Lake Champlain

^{89.} See Robert V. Percival, Regulatory Evolution and the Future of Environmental Policy, 1997 U. CHI. LEGAL F. 159, 160 (exploring the theme in more detail).

^{90.} Title IV of the 1990 Clean Air Act Amendments, 42 U.S.C. § 7651 (1994), creates marketable permits for companies who need to reduce their emissions of sulfur dioxide or nitrogen oxides. The law establishes an overall cap on levels of those emissions. To encourage emissions reductions to be made in the most efficient manner possible, companies are permitted to buy and sell emissions allowances.

^{91.} Greg Wetstone, Remarks at the Cummings Colloquium, *supra* note 79.

^{92.} See Ceci Connolly & John E. Yang, Like Senate, House Votes to Repeal \$50 Billion Tax Break for Tobacco Firms, WASH. POST, Sept. 18, 1997, at A7.

^{93.} See id.

considered to be one of the Great Lakes met a similar fate after the public reacted negatively when the legislation was publicized.⁹⁴

One reason why congressional oversight hearings have been so widely employed is their ability to shine light on activities within the executive branch that are unpopular when publicized. Oversight hearings that helped expose the actions of Office of Management and Budget's regulatory review program during the Reagan Administration and the Bush Administration's Competitiveness Council helped EPA move forward with regulatory proposals that had been blocked in secrecy.⁹⁵

The fact that the rulemaking process generally is far less visible than the legislative process may help explain why it is far easier for special interests to wield influence when agencies make decisions concerning implementation of legislation. As Paul Portney noted at the Cummings Colloquium on Environmental Law, agencies are even more important than Congress in shaping environmental policy because they are delegated the responsibility to issue the rules that carry out the legislation. Efforts to make the rulemaking process more visible to the public could be a valuable antidote to rent-seeking behavior by the regulated community.

In recent years, industry groups have devoted more resources to create groups that look like grassroots coalitions to assist them in their lobbying efforts. Advertising campaigns seeking to influence public opinion on environmental issues also are being used more frequently. Industry-funded groups now regularly churn out scientific-looking analyses attacking EPA policies. The fact that these efforts have been remarkably unsuccessful, suggests that the ability of the regulated community to manipulate public opinion is rather limited when the facts simply do not support the positions they advocate.

^{94.} See Al Kamen, Break Out the Champlain, WASH. POST, Mar. 25, 1998, at A19.

^{95.} See A Case Study of Interference in Environmental Protection Agency Rulemaking by the Office of Management and Budget: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. Energy and Commerce, 99th Cong. 1 (1985).

^{96.} Paul Portney, Address at the Cummings Colloquium, supra note 79.

^{97.} See Cronin & Kennedy, supra note 22.

^{98.} See Clouding the Issue: The Politics of Clean Air, The NAT'L VOTER, Sept.-Oct. 1997, at 6.

^{99.} See id.

IV. CONCLUSION

While the forces that have produced national environmental legislation are complex, public support for these laws remains extraordinarily durable. This legislation generally represents a triumph of diffuse public interests over the concentrated interests of the regulated community, contrary to Mancur Olson's prediction. Federal regulatory programs to protect the environment are now well defended by national environmental groups who have developed well-funded, sophisticated lobbying operations that are influential in the legislative process.

This experience suggests that free rider problems can be overcome particularly when public support for an issue reaches a critical mass that convinces diffuse interests that they have a genuine possibility of success in the legislative process. Former student protesters may now be active primarily through their checkbooks, but they have kept the public interest movement alive and well even if new incentives—premiums, magazines, backpacks—are needed to attract them to public interest causes. Continued innovations in communications technology, such as the internet and the World-Wide Web, may make it even easier for public interest groups to mobilize public support for diffuse interests in future legislative battles.

In recent years both industry groups and public interest organizations have become more sophisticated in their efforts to influence legislation. It has proven much easier for either set of interests to block legislation than to win enactment of new environmental statutes. However, an increasing diversity of interest within both the environmental movement and the regulated community is blurring old battle lines and creating opportunities for unusual coalitions to be formed on certain issues. In the future, environmental legislation more frequently may be a product of coalition-building efforts incorporating diverse environmental and industry interests, in a sharp departure from the pattern that prevailed when the initial generation of environmental laws were enacted during the 1970s.