

# Reforming Western Water Policy: Markets and Regulation

Thomas J. Graff and David Yargas

**T**he American West is arid; the Southwest is a desert. In deserts and arid areas water is scarce, especially dependable supplies of quality water. For over a century our statesmen have reasoned that if settlement and agricultural development were going to take place in the American West, the hardy souls willing to venture forth into such a harsh environment deserved help from their brethren in the wetter East. Taxpayer-financed water development was their answer. Hence, the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.*; the Boulder Canyon Project Act of 1929, 43 U.S.C. §§ 617 *et seq.*; the Central Valley Project Act of 1937, 50 Stat. 844; and many other congressional enactments subsidized the construction of dams and water conveyance facilities throughout the American West. These public works, their immense scale capturing the American imagination, stored and moved water great distances to encourage the growth of western settlements and agriculture.

If ever this policy made sense in the development of the American West, however, it has proved to be counterproductive today. By any definition, the West is now settled. Indeed, by some accounts, it is now the most urbanized region in the United States. Yet in most western states, over 80 percent of the water consumed is effectively "locked up" for use in irrigation. Continuing to subsidize the use of a scarce commodity in this context—to publicly finance activities that would otherwise be unaffordable—has predictable negative consequences. These include overcapitalization, exacerbation of water shortages, misallocation of society's financial resources, and a seemingly insatiable appetite for ever-more facilities to meet increasing water demands.

From an environmental perspective, subsidized dams and diversion works have wreaked havoc on the rivers, wetlands, lakes, and estuaries of the West, with attendant adverse implications for everything from

long-term aquatic biodiversity to the reliability and quality of developed water supplies. If protection and restoration of even part of these western aquatic ecosystems is to take place, consumptive water uses and additional water development must be constrained, not expanded.

The legal mechanisms used to distribute available water supplies may be even more responsible for promoting waste and resulting water shortages than are taxpayer subsidies. As settlement spread west of the one-hundredth meridian, each of the western states developed a legal mechanism for allocating water—the prior appropriation doctrine—that was distinct from the riparian rights doctrine which the eastern states had inherited from England. In contrast to its riparian predecessor, which gave every landowner adjacent to a stream the right to divert water from that stream, under the prior appropriation doctrine, those who put water to use "first in time" are and remain "first in right." Thus, successors in right of early appropriators even today remain the beneficiaries of an antiquated hierarchy of water rights that controls the distribution of an often scarce resource—scarce, at least, for those who came later in time, or for the aquatic resources that simply got left behind.

To maintain an historic appropriative right to the use of water, the only requirement is the water must be continuously and beneficially used. "Use it or lose it" became the legal norm. Requiring a water rights holder to use the water to maintain the right, irrespective of actual current need, has proven to be a prescription for economic waste, as well as environmental degradation. Water users overconsumed a scarce resource, simply to maintain their legal rights to its use.

## *The Contemporary Waterscape*

This description of the water "problem" in the American West—characterized as much by the inefficiencies and adverse effects of subsidized water development as by the lofty promise of water development our earlier statesmen identified—would have been highly controversial just a few decades ago. Today, for the most part, it is popular wisdom. President Jimmy Carter's "hit list" of federal water projects, announced

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in the first few months of his term in office in 1977, evoked outrage from western politicians across the ideological spectrum and began his political downfall. Today, twenty years later, federal water resource agency budgets are dominated not by new projects, but by the operations and maintenance needs of existing projects, and increasingly by associated environmental mitigation and restoration spending. In California, for example, subsidies for environmental restoration (e.g., the billion-dollar Proposition 204 on California's November 1996 ballot and its counterpart \$430 million federal authorization to support the restoration of California's San Francisco Bay-Delta ecosystem) are now politically popular. Conventional water development projects, on the other hand, paid for by all taxpayers (e.g., the controversial Auburn Dam on California's American River, twice defeated on the floor of the U.S. House of Representatives by a Democratic and a Republican Congress), are now decidedly unpopular, at least with our nation's elected representatives.

If conventional publicly subsidized water development projects are not the answer for the needs of the growing cities of the American West—and like it or not, big cities with their attendant suburban sprawl are growing in every western state—what is the answer? Conservation and wastewater reclamation in urban communities will play important roles, but given that the vast majority of the West's developed water supplies continue to be used predominantly in agricultural pursuits, the principal means to provide water for an urbanizing West must be through the reallocation—voluntary or otherwise—of existing supplies.

### *Water Reallocation: Market or Mandate?*

How these water reallocations will take place in the future is the dominant policy and legal question facing water managers and policymakers in the American West. As discussed above, the principal governmental response historically has involved subsidizing water development and maintaining a legal/regulatory regime in which the consumption of "unused" water was encouraged through the prior appropriation doctrine. In the creation of new water projects or the appropriation of "unused" supplies, there was rarely any type of public interest inquiry. It is now clear, however, that much of the water so developed came at tremendous cost to the affected aquatic resources, including a variety of species now threatened with extinction, which relied for their existence upon the once free-flowing waters and their associated habitats.

Increasingly, and most often in response to environmental claims, the western legislative, regulatory and judicial authorities have developed new legal bases for reallocating water that take into account certain "public interest" criteria. Thus, in a high-profile exam-

ple, *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419 (1983), first the California Supreme Court, and later California's State Water Resources Control Board, sharply restricted diversions by the City of Los Angeles from the streams tributary to Mono Lake. The court in *National Audubon* concluded that the state held ownership of Mono Lake in public trust for the people of California and, based on that trust relationship, had a duty to consider impacts upon the lake in allocating water rights.

Similarly, Congress and the Department of the Interior recently ordered releases from Glen Canyon Dam on the Colorado River (although not strictly a water reallocation), to improve environmental conditions in the Grand Canyon below the dam. And in 1992, as part of the landmark Central Valley Project Improvement Act (CVPIA), the 102nd Congress and President George Bush sought to protect and restore the fishery and wetland resources long damaged by the federal Central Valley Project (CVP) (still the largest water project in the world) by returning a small but significant portion of the CVP's water supplies to protect and restore those key environments. CVPIA, Pub. L. 102-575, § 3-406(b)(2). Yet, despite these examples, and a growing environmental consciousness in all of the western states, mandated reallocation of water for environmental purposes is still not a common phenomenon in the West.

Even fewer examples can be found of forced reallocations of water from one consumptive water user to another. Occasionally, however, a regulatory authority has mandated physical improvements in a water user's delivery system. In the mid-1980s, for example, prompted by landowners who complained that their lands were being flooded by the Imperial Irrigation District's (IID) "wasting" of water, a California State Water Resources Control Board decision mandated that IID improve its water consumption practices and concurrently urged the voluntary transfer of the water thus "conserved." Judicial authority reallocating water is even more difficult to find. It has been three decades since the California Supreme Court simply overrode an existing water right without compensation when, in the case of *Joslin v. Marin Municipal Water District*, 67 Cal. 2d 132 (1967), the court ruled on behalf of a local water district serving municipal customers that a gravel operation, with a prior established water right, was no longer a "reasonable use of water" and could be put out of business by the municipality's upstream storage of water.

### *Water Markets: A Key Reform for All*

For the above reasons and more, it is our view that needed water reallocations can best be accomplished through the development of water markets. Such markets would provide regionally appropriate opportunities for those who find themselves "water short" to approach those who, by law, inheritance, or otherwise,

find themselves "water rich," to work out mutually acceptable terms for the transfer of part or all of the associated water supply. In this way new and changing water needs could be met without further impact to the aquatic resources at issue.

Of course, it is not only the cities and suburbs of the West that seek more water for consumptive purposes. The agricultural sector also has a growing need for water in several regions of the West, for select purposes; yet in most areas, plentiful and reliable water supplies are difficult to find, or are already controlled by others. Is the tax-paying public ready to finance more conventional and environmentally damaging water projects to address these "unmet" agricultural needs? Unlikely. Again, water markets will play a key role.

Finally, as previously noted, many of the rivers and streams of the West have been substantially diminished by water development projects, as have once-vast wetland systems, terminal lakes such as Mono Lake in California and Pyramid Lake in Nevada, and estuaries such as the San Francisco Bay-Delta in California and the Colorado River Delta in Mexico. They, too—or more accurately, those who seek to represent their interests—are calling for the reallocation of water to meet environmental restoration objectives. In California, the emerging dedication of significant federal, state, and even user-based ecosystem restoration has given environmentalists a crucial role as major advocates (if not participants) in the evolving market for water. Examples include the Central Valley Project Improvement Act Restoration Fund, Pub. L. 102-575 § 3407 (1992); the Safe, Clean, Reliable Water Supply Act, CAL. WATER CODE §§ 78500-78702 (West 1997); and the Principles for Agreement on Bay-Delta Standards Between the State of California and the Federal Government, Category III (Dec. 15, 1994). In these cases, however, the goal is generally to reduce—rather than simply to transfer among consumptive users—out-of-stream demands by acquiring and redeveloping developed water supplies to improve instream flows and wetland supplies.

### *Market-based Incentives*

Water uses that have a low marginal value relative to other municipal and industrial or higher-value agricultural uses give rise to potential water markets. If a water rights holder realizes that the water he or she controls could be worth more to others than using such water herself, the rights holder is likely to consid-

er selling a portion of that supply, so long as the underlying legal right remains secure. In most western states, market-based water transfers are now expressly protected as a recognized beneficial use of water. A variety of other factors can all play important roles in motivating a decision to sell one's water right, or at least the right to use one's water supply under certain conditions. These factors include instability in agricultural markets and prices, farm debt and foreclosure problems, the cost of college education or retirement, the expense of long-term drainage or other farm-level

investments, or simply a desire to diversify one's business and investment portfolio.

While there are important legal bases for regulatory and judicial intervention to reallocate scarce water supplies without compensation to the historic rights holders (supported by "modern" visions of the preferred uses for those supplies), public policy is increasingly turning to the marketplace—to voluntary, compensated transfers—as the preferred means to bring about desired water reallocations.

Perhaps the highest profile example of this trend is the trade of conservation investments for water that was negotiated in 1989 by the Metropolitan Water District of

Southern California (MWD), the largest urban-area wholesaler of water in the West, serving more than 15 million people, and the IID, the largest irrigation district in California with priority claims to the vast majority of the state's Colorado River entitlement. See STAVINS TRADING CONSERVATION INVESTMENTS FOR WATER (1983); and Boronkay and Abbott, *Water Conflicts in the Western United States*, in STUDIES IN CONFLICT AND TERRORISM, 20:137-166 (1997). In that transfer, IID gave MWD a long-term but not permanent right to divert over 100,000 acre-feet (AF) of water annually (enough to satisfy the current requirements of perhaps 1 million urban residents) in exchange for MWD's investment in over \$100 million in water conservation and ancillary water works in California's Imperial Valley.

Trading conservation investments for water with IID is not, however, MWD's only prominent successful water transfer arrangement. MWD also purchased water from the State Water Bank during the California drought of the early 1990s, has negotiated an agreement with the Palo Verde Irrigation District to temporarily follow agricultural land when MWD is facing water shortages, and has even developed a pilot program in cooperation with Arizona water interests to store excess MWD water in an Arizona groundwater "bank."

Of course, MWD has also been involved in several

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proposed highly publicized water transfer failures. Of these, the most notable recent example was a complex four-way transaction, originally sponsored by Secretary of the Interior Bruce Babbitt, in which the Southern Nevada Water Authority (SNWA) (serving Las Vegas) and MWD intended to share the costs of lining the U.S.-controlled All-American Canal, thus preventing annual seepage losses of over 50,000 AF of water. This would have also indirectly benefited two Native American bands. MWD and SNWA planned to divide the saved water in proportion to their financial investment. As it turned out, however, this proposed transaction spurred protests from a variety of interests in all seven Colorado River Basin states and in the Republic of Mexico as well. The Mexicans objected because they are presently pumping the water that is being "lost" to seepage in the All-American Canal. Other water users in the basin objected because they saw the transaction as reallocating Colorado River supplies in a manner inconsistent with the current "Law of the River." Within a few months of its announcement, the proposal was unceremoniously withdrawn in response to California Governor Pete Wilson's admonishment of MWD for seeking to "usurp" his authority by attempting to reallocate a portion of California's entitlement of Colorado River water to Nevada.

### *Expanding Water Markets: Underlying Implications*

The history of large-scale water transfer proposals, involving the MWD in particular, has been characterized at least as much by high-profile failures and by controversies, as it has by successful ventures. Why? The remainder of this article explores some of the most important underlying issues and comments on their implications for expanding water markets more generally throughout the American West.

An important problem that has arisen in conjunction with the MWD-IID conservation transfer is an increase of more than 300,000 AF in IID's annual Colorado River diversions at exactly the same time that MWD has been paying for investments to conserve within (and ultimately to transfer from) IID up to 100,000 AF annually. This situation points to the need for a quantified water-use baseline as the foundation upon which specific water transfers are based. Otherwise, transfers are simply to be used as a back-door means to increase total systemwide depletions. The baseline issue, which appears in somewhat different forms in virtually every western watershed, could eventually require the comprehensive adjudication of the entire western waterscape, including both ground and surface water supplies. It is, therefore, possibly the most vexing, and yet among the most important, of all potential water marketing problems.

### *Third-Party Concerns*

Also impeding the transfer of water in some circumstances are potential "third-party impacts" that occur as water is shifted from one region of the economy to another, as well as from one watershed to another. Third-party impacts are typically defined to include any and all potential adverse impacts external to the water transfer itself. They range from the interests of other water rights holders to distantly related link to the associated support and services economy. Although the third-party impacts of other kinds of resource reallocations generally go uncompensated in our market-based policy, water has a strong history of communal ownership (a water rights holder does not own water, but only a right to the use of water under specified conditions), that has led to some important legal protections for third parties. In some cases, these protections will provide benefits to parties making legitimate claims for recognition of their interest in a particular transaction. In others, questionable third-party claims will be raised in an effort to thwart transfers providing substantial public benefits. Indeed, as noted above, water markets in which the environment (the West's most substantially impacted "third party" of conventional water development) can participate and benefit may be the key to resolving a host of problems caused, above all, by dams, diversions, and depletions. To this end, third-party accommodations relating, for example, to the Imperial Valley's Salton Sea and the IID's farm-worker community, should ideally be addressed not simply in conjunction with market-based transfers but more directly and affirmatively in conjunction with the baseline water use, storage, power generation, and other components of water development whose benefits have not been equitably shared in the past.

### *Wheeling and Restructuring*

A powerful force which will likely be advocating water transfer reforms in the future, with substantial economic and political clout, are the renowned Bass brothers of Texas, who in the last few years purchased substantial interests in Imperial Valley farmland. In the summer of 1997, the brothers then exchanged the farmland for a significant share of a large international water resources firm, the U.S. Filter Corporation. The Bass brothers are also key proponents of a proposed sale by IID of up to 200,000 AF of water annually to the San Diego County Water Authority, MWD's largest customer. The IID-San Diego deal is presently in jeopardy largely because MWD has used its status as the owner of the Colorado River Aqueduct—the only facility currently available for conveyance of the water San Diego wishes to purchase from IID—to essentially block the transfer by announcing prohibitively high transportation or "wheeling" charges for use of that facility and the rest of

its distribution and storage network. The contestants in litigation prompted by MWD's effort to judicially validate its rates for "wheeling" service are offering widely divergent interpretations of the California law which sought to define which costs are appropriate to recover in a wheeling transaction.

Meanwhile, various parties to the MWD-IID-San Diego controversy have also engaged in an all-out public relations war to condemn each other's positions. MWD has attacked the "windfall profits" which it believes the Bass brothers and their IID colleagues will reap from the San Diego transaction, while San Diego and the Bass brothers have railed against the "communist-style" control exerted by the MWD monopolists. How the dust will settle from this high-profile battle is unclear. Will it help lead the western water industry to embrace the kind of large-scale, market-based transactions that will be needed to meet California's water needs into the twenty-first century? Might it even lead to a more comprehensive "restructuring" of that industry analogous to the market-oriented restructuring (and acceleration of competition) that has recently characterized other sectors of our social and economic infrastructure, including aviation, natural gas, telecommunications, and electricity?

For the moment, it seems clear that meaningful reforms in the water transfer arena—stimulated in part by the above proposals—have the potential to create a much more active water market in Southern California, one in which individual landowners within IID could have control over the sale or lease of individual portions of the IID's total supply, with appropriate restrictions designed to meet broader public environmental and social objectives. Reform also holds the potential to create a future in which current MWD customers would be free to buy independent allotments directly from IID customers on a permanent or temporary basis, as a hedge against drought or uncertainty of supply from other sources. Such reform would also necessarily entail a clarification of the state's wheeling policy (discussed above) so that MWD's conveyance facilities could be used at a reasonable charge. By precedent and otherwise, these and related reforms could significantly reduce the dominant control that major water agencies (including both MWD and IID) currently play in both the purchase and sale of water to individual users. These reforms could ultimately lessen MWD's (and/or its customers') reliance on imported supplies from Northern California since there would simply be more water available within Southern California to solve

Southern California's problems and would have other regional implications as well (e.g., lessening the threat that some parties feel from prospective water transfers by removing the aggregated financial power that any one agency might exhibit).

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Continued efforts to reform both federal and state water transfer laws may yet bear fruit both in expediting additional worthwhile transfers and in protecting the legitimate interests of those who are affected by the changes in water use occasioned by a water transfer. Thus, for example, the CVPIA not only dedicated a portion of the Central Valley Project's annual supply to environmental restoration purposes, but also authorized and encouraged the voluntary transfer by individual water users of water stored by the CVP to purchasers anywhere within the State of California. At the same time, it reduced federal subsidies to the CVP's water and power customers, dedicating the incremental revenues thus generated to a restoration fund, a principal

purpose of which is the market-based acquisition of supplemental water for wetland and in-stream protection and restoration.

### *California's "Model Act"— Toward Restructuring?*

While the United States and individual states, such as Arizona, Nevada, and Utah, have all recently made significant strides in encouraging water markets, the California legislature of late has lagged, unable to build on a series of laws it passed in the 1980s that generally repealed the "use it or lose it" aspects of the prior appropriation doctrine. In an effort to break this gridlock in California, a consortium of business groups, spearheaded by a retired CEO of the Bank of America, Richard Rosenberg, has sponsored the so-called Model Water Transfer Act (Model Act), intended to spur a vibrant water market within the state. That proposal, however, has been stifled by legislative leaders and traditional water interests who are either resistant to change or who believe that popular water transfer reform should be linked to less popular water project facility authorizations.

One proposed change in early drafts of the Model Act was vehemently opposed by water districts and agencies and yet is essential for a fully functioning water market to develop: granting to water users the freedom to transfer their water-use entitlements. Many

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Rehnquist observed, when writing the strong nondelegation concurrence in *Benzene*. "The decision whether the law of diminishing returns should have any place in the regulation of toxic substances is quintessentially one-of-legislative policy." 448 U.S. at 86.

Measured by the D.C. Circuit opinions in *Lead Industries* and *PM10*, all of these bells and whistles would probably pass muster. Measured by the standards of the Supreme Court opinions in *Benzene* and *Cotton Dust*, as amplified by *UAW v. OSHA*, this approach would *not* pass muster. If one could apply *Benzene* to the PM/ozone rule through the nondelegation doctrine, clear grounds exist to overturn EPA's rule.

The nondelegation argument, in its simplest form, runs as follows, using the three-part analysis of *UAW v. OSHA*. First, neither the ozone nor PM rule address a "significant risk." As to ozone, EPA admits that the "vast majority" of areas will reach attainment under the application of current controls, plus the OTAG NO<sub>x</sub> transport recommendations, which are also implementation of current law. As for the very few areas that might have to do more than current regulations require, CASAC could identify no "bright line" of increased incremental benefit that would result from a tightening. This is not surprising, since the only ozone precursor EPA plans to regulate under the old or new standard is NO<sub>x</sub>, which EPA only recently said it had no basis to regulate further as a separate NAAQS pollutant. There are, in short, much scientific data all denying the existence of a significant risk, and considerable evidence suggesting serious side effects or substitution risks.

As to PM<sub>2.5</sub>, the elimination from the record of the Six City and ACS long-term studies means there is *no* science or other evidence supporting a long- or short-term PM<sub>2.5</sub> standard. As in the case of ozone and NO<sub>x</sub>, EPA just recently found it had no basis to change the separate SO<sub>2</sub> NAAQS from existing levels. As in *Benzene*, where the Court ruled the ample 10ppm data irrelevant to support a 1ppm rule, so here the ample PM<sub>10</sub> and TSP data should be irrelevant to a PM<sub>2.5</sub> rule.

Second, under *Cotton Dust*, no cost constraint derives from *Lead Industries* to apply to PM/ozone as the court found in *Cotton Dust* under the rubric of

"technological and economic feasibility." To be sure, the OSH Act refers to these concepts while the CAA is silent; but that does not save the CAA—it only makes the case worse for EPA's assertion of unlimited discretion. The cost-effectiveness requirement of UMRA might satisfy *Cotton Dust*, but EPA has chosen to ignore that requirement.

Finally, with respect to *UAW v. OSHA*, EPA appears to be able to roam freely between doing nothing—which is what EPA has proposed initially—and going all the way down to background levels (and thus also indirectly producing dramatic CO<sub>2</sub> reductions not specifically authorized by Congress). It has arbitrarily preselected which pollutant precursors it intends to regulate, and which it intends to protect (including those from farming operations). It is true that EPA has set a \$10,000 per ton limit to control costs. But that figure, the preselection of precursors, and the farm exclusion, not having been based on any intelligible principle in the statute, are subject to change at any time (especially in response to an NRDC lawsuit) and appear to discriminate for the farmer and against the car owner and utility customer. EPA thus appears to be playing favorites on the basis of nothing more than political expediency—which is the fundamental nondelegation red flag identified in Rehnquist's concurrence in *Benzene* and the opinion in *UAW v. OSHA*.

It is, of course, difficult to predict whether Congress will pass the generic Levin-Thompson legislation or whether the courts will revive the nondelegation doctrine in connection with the PM/ozone rules. Either approach would operate to begin to impose significant, publicly accountable rules on the exercise of agency discretion. Absent adoption of either approach, Congress will be called upon with perhaps greater frequency to deal with onerous regulatory reforms on a statute-by-statute basis. There is obviously nothing wrong with a statute-by-statute approach. But it would be desirable if, in addition, Congress or the Supreme Court could establish an overall consistent and unified framework for guiding agency discretion. 23

## Western Water Policy

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water users receive their water through a chain of distributors who hold the actual water rights, and with whom the users have either a contractual or a customer-type relationship. Thus, in many cases, water district boards now have effective control over the transfer of water by any of their customers, with the customer holding an equity interest at best in the water they historically have used. However, water agencies generally have been unwilling to give up their power

over water rights, no matter how inefficient the water uses within their control may be. In an effort to avoid controversy, the Model Act dropped its support for user-initiated transfers. This was done even as the principal author conceded in a lengthy accompanying report that this deletion would perpetuate the fundamental contradiction of existing law under which financial incentives that are intended to motivate water users to conserve and transfer water remain separate

from the authority to decide whether the transfers may in fact occur. Brian E. Gray, *The Shape of Transfers to Come: A Model Water Transfer Act for California*, 4 WEST-NORTHWEST 23 (1996).

As the millennium approaches, it is remarkable that the western water establishment has resisted reform so effectively that major changes in water allocation law,

regulation, and practice are still anomalies. The old legal and political paradigms continue with much of their prior force. But change, however painful, is occurring; and continued reforms, reflecting both an increasing environmental concern and the greater society's belief in markets as the best means to allocate scarce resources, are inevitable.

## NSR Reform

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the associated delay. Given the narrow window available to take advantage of many opportunities in a competitive market, even a three- to six-month delay is sufficient to kill a project or have it moved to another location with more favorable regulations.

EPA's major concern with expanding the scope of pre-permit activity is a belief that it might compromise permitting authorities' discretion when making permitting decisions. By the time a company selects a site and designs the plant, however, it has already committed significant resources to the project. Further, the business is under great pressure to initiate construction. Allowing a source to marginally increase its investment and its risk of stranding the investment by proceeding further down the construction path without a permit should result in little additional pressure on the permitting authority. Most sophisticated companies knowledgeably evaluate such risk and will rarely proceed where there is a likelihood of a permitting problem. Additionally, as pre-construction activities increase, it is the permittee who loses negotiating leverage, not the agency. This resulting additional leverage on the part of the permitting authority would certainly serve as a more than adequate countervailing force to any increased pressure that the authority may feel to permit the activity.

To offer true reform, EPA should allow a company to engage in any preliminary activity as long as it does not operate the emitting equipment. If major NSR were

changed in this way, states would likely modify minor NSR programs to allow the same relief. The resulting time savings would help U.S. industry remain competitive with the rest of the world.

It appears that some people believe that the level of burden imposed by an environmental program is equivalent to the level of environmental protection obtained. Therefore, reducing regulatory burden will result in less environmental protection. Yet, if industry is burdened by a requirement that adds no environmental value, leaving the burden in place over time will not benefit society and may even harm public health or welfare. In the short term, imposing such burdens is a misallocation of resources, that, if properly allocated, would have benefited society. Also, companies subject to such regulations will be less competitive in the global marketplace and may eventually have to cease inefficient operations. While often overlooked in the costs of compliance tallied during regulatory development, the societal effects of a plant shut-down can be severe. Indeed, as the Pennsylvania Chapter of the American Lung Association noted recently in its comments on EPA's proposed new ozone and particulate matter standards, unemployment is also a health issue. To maintain the current level of economic growth and societal protections, federal, state, and local government must be more aggressive in making real reductions in the current administrative burden placed on industry. A good target would be true NSR reform.

## Three Points

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at their disposal the tools to respond rapidly to crises.

An important step toward effective response to emergencies is information. As the Vice President recognized in his reinvention efforts, information about the condition of the environment is "needed to ensure that programs are achieving the desired results."

Reinventing Environmental Regulation, National Performance Review at 35. A key component of this

information gathering is the availability of the information to the public. "Government, businesses, and citizens need information about prevailing and projected environmental conditions and trends." *Id.* at 13.

Against challenge by the chemical industry we recently succeeded in protecting the availability of environmental information to the public. *Troy Corporation v. Browner*, 924 F. Supp. 1193 (D.D.C.