Perspectives
on current developments

Regulating against the Clock

When the new administration took office January 20, its first regulatory challenge was to turn the clock back. Not to the 1950s or to the 1920s, but simply to November 4. For in the eighty-odd days since the election the departing regulators of the previous administration had launched hundreds of new federal standards, guidelines, and interpretations for everything from brussels sprouts to humpback whales.

Over a nineteen-day span in January, for instance, there were 37 percent more pages in the *Federal Register* than in a comparable period a year earlier. A three-volume, 1100-page issue of the *Register* appeared on inauguration eve. And a great many of the regulations were unusually controversial.

There were quite a few midnight activities of other sorts going on as well. There was midnight spending, especially at the agencies regarded as prime targets for abolition. The Labor Department's Comprehensive Employment and Training Act program, the Energy Department's oil price control division, and the Community Services Administration gave out millions in the final weeks to labor unions, advocacy groups, and charities. There was midnight hiring, both to beat the rumored hiring freeze and to permit political appointees to "burrow" into the civil service. There was even midnight junketing, before the new President's controls on travel took effect.

But none of these was as pervasive or important as the midnight regulations. While a few departments like Commerce and Energy abstained from the rulemaking bacchanal, most of the others joined in with abandon:

- The Architectural and Transportation Barriers Compliance Board issued standards to make new and modified federal buildings convenient for the handicapped—effective immediately and thus untouched by the Reagan regulatory freeze. The rules include detailed specifications for the width of corridors (at least five feet, so that two wheelchairs can pass each other), the thickness of carpeting, and the height of hatracks and water coolers.
- Over at the Department of Education, the interestingly named Office of Bilingual Education and Minority Languages Affairs issued final regulations on its grants to states for the education of refugee children. The good news for state governments was that "commenters overwhelmingly supported an entitlement approach" to eligibility for grants, which the department obligingly adopted. The bad news was that the usual bilingual education rules would apply, and Iowa had better start looking for math teachers fluent in Laotian.
- The Immigration and Naturalization Service set final rules revoking the temporary work permits of aliens who stay at their jobs during a strike. Justice Department lawyers had argued that aliens, like U.S. citizens, should be allowed to decide for themselves whether to strike. But INS sided with the Labor Department's view: "The rules are necessary to protect U.S. labor."
- The White House issued an executive order adding new restrictions on hazardous exports (see "International Nanny," *Regulation,* November/December 1980). Another last-minute executive order extended President Carter's thermostat controls on federal buildings.
- The Environmental Protection Agency adopted regulations prescribing the manner in which it would assess the environmental effects abroad of its actions. EPA also issued pretreatment rules for industrial waste-water dischargers that critics say will discourage joint industry/municipal waste treatment. And the agency decided that firms which dispose of hazardous waste must set aside funds sufficient to pay for regular inspections for the next thirty years.
- The Justice Department published final standards for inmate grievance procedures in

state and local prisons. These standards, which implement the Civil Rights of Institutionalized Persons Act passed last year, call for "prisoner participation" in resolving grievances and encourage (but do not require) binding arbitration of grievances by groups or individuals unconnected with the prison.

- The Interior Department's Office of Surface Mining set out rules protecting "prime farmland." This is a category of land use which, like historical building status, tends to diminish the ordinary property rights of landowners. Some owners had been trying to escape OSM's "protection" by the expedient of not farming their land. So the agency gave itself the right to look back as far as 1949, if necessary, to prove that land had been used for raising crops.

- The Labor Department was the clear winner in the midnight sweepstakes, with almost as many controversial measures as the rest of the government put together. The Occupational Safety and Health Administration issued its hotly debated noise protection rules (see "Protecting Workers' Hearing" by James C. Miller III and Thomas F. Walton, *Regulation*, September/October 1980), along with regulations affecting worker exposure to lead and cotton dust. Another last-minute OSHA proposal would require that work-place exposure to carcinogens always be set at the lowest feasible level. Still another would substantially revise electrical equipment standards. Yet another would require labeling of all hazardous chemicals used in work places. Most boldly of all, OSHA pushed through its contested "walk-around pay" rules, which require firms to pay workers for the time they spend accompanying agency inspectors on tours of factories. In this case, the agency dispensed with hearings and shortened the usual comment period to get in under the inauguration wire, even though a court had struck down its earlier walk-around pay proposal on the grounds that notice and comment had not been allowed.

The rest of the department could hardly be expected to keep up with OSHA's Stakhanovite pace, but it did its best. The Office of Federal Contract Compliance Programs expanded its affirmative action rules for federal contractors, branching out into the hot new areas of "sexual harassment" and "comparable worth" and bringing unions into the enforcement process. OFCCP also issued a rule barring contractors from paying membership dues in single-sex clubs, a move especially affecting service groups such as Kiwanis and Jaycees. (Outgoing Secretary of Labor Ray Marshall turned down pleas from transition officials for deferral of the two OFCCP actions.) The Employment Standards Administration, not to be outdone, raised minimum salary levels for low-paid managerial employees such as those employed by hotels and fast-food restaurants, stiffened penalties for violations of the Davis-Bacon Act, extended prevailing-wage regulation to the timber industry, and recalculated minimum wages for aliens employed as temporary farm workers. Then it rested.

Not all of the midnight regulating can fairly be attributed to the impending change of administration. Year-end and year-beginning periods traditionally tend to provide incentives for action. Treasury officials reportedly acknowledged, for instance, that they sought to issue several regulations before January 1, when the analysis requirements of the 1980 Regulatory Flexibility Act took effect. Agencies may also have more time to perfect regulations during post-election and pre-inauguration periods when Congress is out of session. Some unpopular regulations are held back to be issued after the election, no matter who wins. And, of course, some regulations are simply required by statute or court order.

Even so, it would be naive not to discern in all this activity a substantial element of hasty effort by the defeated party to entrench personnel and policies uncongenial to the new administration. And while that may seem unsporting, it is surely not un-American. Indeed, it is among the oldest if not the best of our traditions—witness John Adams's "midnight judges" from whom the midnight regulations get their name. We may have forgotten that tradition because it has been a long time—perhaps as long as forty-eight years—since there has been such a fundamental difference between the domestic policies of the new and old administrations.

On the other hand, it is also among our traditions that the incoming administration can kick back—and can usually do so effectively. (Mr. Marbury, after all, never did get his commission.) President Reagan appears to understand this. He ordered a sixty-day freeze on pending regulations soon after he took office; many of these have already been withdrawn, probably permanently. He revoked both of the executive orders mentioned above. And the midnight regulations that are already promulgated and effective are doubtless prime candidates for early revision.

Consent of the Governors

The U.S. political system, as every schoolchild knows, rests on consent. But, unfortunately, not always the consent of the governed. Nowadays, it seems increasingly to rest on the consent of those who govern—to be exact, on the consent decrees that public officials sign with pressure groups who sue them.

Consent decrees are a well-established legal form, useful in avoiding protracted lawsuits. The traditional consent agreement, in antitrust for example, involves a quid pro quo: the government gives up its right to prosecute the alleged wrongdoer and, in exchange, gains a sweeping pledge of good behavior.

The new model consent decree is radically different. It typically results from a lawsuit filed by a private group against the government under one of the countless "agency-forcing" statutes of the past decade. More often than not the plaintiffs style themselves public interest advocates, and frequently their suit is a class action. When the consent agreement is reached, it is the government that sets out in detail how it pledges to behave in the future, and it is the private parties who forswear their right to press charges.

This new variety of consent agreement has risen to prominence only in the past few years, but it has already demonstrated the capacity to extract an amazing diversity of promises from the federal government. Some examples:

• When the Community Services Administration, an independent federal agency, found itself with $18 million in unspent fuel-aid funds in 1979, a group of federally funded "public interest" law firms sued to force distribution of the money. CSA and the plaintiffs reached a consent agreement in April 1980 to divvy up the funds by giving roughly half to various advocacy and legal services groups and half to a number of grant programs which the agency had been unable to interest Congress in funding. A grand total of $2,000 went to the eight poor persons in whose names the suit had been filed. Later, in a dramatic turnabout, the Chicago judge who had approved the decree vacated it. He explained that he had been "lulled by the appearance of an adversarial situation" into approving "an unjustified substitution of judicial fiat for legislative action."

• The Natural Resources Defense Council sued the Interior Department during the Ford administration to block coal leasing on federal lands. When the Carter administration took over, the NRDC's lawyer moved over to Interior. Soon thereafter the case was lost. Rather than pursue the appeal process, the Carter administration agreed in a consent decree to a wide range of restrictions sought by NRDC, although the judge refused one government proposal that allegedly would have given NRDC veto power over all future coal leasing. Another division of the Interior Department, the Office of Surface Mining, agreed in February 1980 to a consent agreement with four environmental groups obliging the agency to step up its enforcement efforts, consult with the environmental groups on inspection policies, and (no! anything but that!) seek more funding to support its enforcement programs.

• In December 1977 the old Department of Health, Education, and Welfare agreed to a consent decree settling a lawsuit brought by civil rights groups. The agreement compelled HEW to double its civil rights enforcement staff by adding 898 new employees, adopt strict timetables for civil rights enforcement, and take stronger enforcement action against six state college systems.

• Most recently, on January 9, President Carter's Justice Department signed a consent decree with civil rights plaintiffs, agreeing to junk the Professional and Administrative Career Examination (PACE), the five-year-old civil service test used to screen applicants for 118 categories of mid-level federal employment. Under the agreement, which was reached over the objections of the Office of Personnel Management, PACE would be phased out and replaced by new exams tailored to each job category. If any such test displayed "adverse impact," which is Washingtonese for failing to produce the proper racial percentages, OPM would have to prove it "job-related"—a task the *Washington Post* described as almost impossible under 1978 federal guidelines. OPM also consented to use "all practicable efforts" over a nine-year remedial period to hire roughly the same percentages of minorities for PACE jobs as take the exams. The Reagan administration renegotiated this clause February 24, shortening the remedial period to five years. It also eliminated a "benchmark" or "goal" in the original agreement by which agencies could have proven good faith and relaxed their preferential hiring efforts only by achieving 20 percent minority employment.

To some observers, case histories like these simply demonstrate that government officials are so reluctant to spend, regulate, enforce, and equalize that they must be dragged into it willy-nilly by the threat of litigation. To others, the cases constitute an ongoing pattern of "sweetheart" agreements, by which agencies longing to expand their powers collude with friendly parties to lock themselves into activist policies.

Of course, it is not necessary to assume collusion to explain the attractions consent decrees hold for bureaucrats. When an agency shares the basic assumptions of its legal adversaries, it is hardly surprising that both sides find little to argue about. This, rather than collusion, will serve to explain the PACE affair. After years of imposing preferential hiring on the private sector, the Justice Department could hardly reverse field and oppose its own arguments. All of the dubious theories underlying the quota system were there—the inherently suspect nature of "adverse impact," the division of applicants into a two-valued universe of "qualified" and "unqualified" in order to finesse questions of whether the less qualified are to be preferred to the more qualified, and so forth.

Even when there is clearly an adversary proceeding the agency is likely, naturally enough, to propose that remedy which comports most closely with what it wants to do anyway. When an Alaska school district sued to block enforcement of informal guidelines on bilingual education, HEW agreed to a September 1978 consent agreement calling for it to draft formal regulations (In Brief, p. 11).

Agencies are also likely to welcome the relative freedom from political pressure that often comes with being locked into a given policy. (Sometimes, as in the CSA case, the desire to evade congressional supervision appears more than incidental.) And an additional attraction, again exemplified by the original PACE settlement, is that they will be locking in their successors as well as themselves.

It is important to isolate the distinctive evil, if there be one, of the consent decree device. To be sure, it freezes executive discretion by judicial command. But so could the final judgment, if the consent decree were not entered into—and collusion or passive encouragement can produce an adverse judgment as easily as a "sweetheart" consent decree. The difference, however, is that in the consent decree the agency may commit itself to actions well beyond those that the court would on its own initiative impose. To be sure, the court must itself approve the decree—but what it is willing to approve may go much beyond what it would be likely to frame on its own. Indeed, the consent decree may even go beyond what the court would have *power* to impose on its own. In a private suit against the government for an unlawful firing, for example, there is no doubt that the court may approve an agreement to rehire the plaintiff, even if in the absence of an agreement it would be limited to awarding money damages. The executive has, in effect, yielded its discretion and become bound by the court's approval of that agreement.

While that disposition seems fair enough in such a particularized context, it becomes offensive when executive actions of general applicability are involved. For example, without benefit of the consent decree, a court could order a federal agency to issue rules, and it could strike down particular rules already issued as inadequate—but it could not take upon itself the executive discretion to determine the precise form which required rules should take. Permitting *that* situation to be changed by consent decree (the agency and plaintiff agreeing to the precise form of a rule which, though legally required, might be framed in a number of different ways) transfers to the courts, which must thereafter approve any changes, a substantial degree of purely political judgment. The executive should not, it might be thought, be able to yield this power, even if it wishes to do so. The separation of powers is not subject to adjustment by agreement among the branches or with private parties.

Yet as different as may be our "feel" for the two situations just described, it is difficult to distinguish them in theory. In truth, the decision to hire or not to hire a particular employee is, if anything, a more distinctive instance of purely executive power than the decision to issue rules in a particular form. And in the rulemaking case, if the consent decree stems from a class-action suit where the plaintiffs represent all persons affected by the rule, it seems impossible to distinguish the two cases on even narrow technical grounds.

Of course, even if general principles of the Constitution do not suggest a remedy, Congress presumably can. But to come right down to it, it is not at all clear what that remedy might be. Legislation could presumably forbid the executive from entering into consent decrees in suits against the government; or from including in those decrees any provisions that the courts lack independent power to impose; or, more narrowly still, from including in the decrees any such provisions that are of general applicability. These cures, however, might be worse than the disease. Consent arrangements *do* save the wasted time and expense of litigation, and it seems likely (suits involving friendly plaintiffs being the exception) that they usually result in lesser constraint upon executive discretion than would the anticipated adverse judgment. Stupidity, and even malevolence, in government cannot be eliminated entirely except by eliminating government itself. Perhaps all that can be done with respect to the consent decree problem is to require the approval of a high-level executive officer—the attorney general, for example—before consent decrees, or certain types of them, can be concluded.

Congress will be holding hearings on this issue. They should be of considerable interest.

Radio Deregulation: Stay Tuned

On February 24 the Federal Communications Commission released the details of its decision to deregulate several important aspects of radio broadcasting. The commission's six-to-one decision is a victory for economic sense and First Amendment values over paternalist instincts, and it should lift a substantial regulatory burden from thousands of radio stations nationwide. But it also illustrates some of the limits to what a reform-minded commission can accomplish without help from Congress. Indeed, in some important respects it may inadvertently make things worse.

The FCC acted in four areas:

News and public affairs programming. The commission had been using guidelines of 8 percent nonentertainment programming for AM stations and 6 percent for FM stations; licensees were automatically scrutinized at renewal time if they fell short. But in the aggregate stations were already broadcasting much more nonentertainment programming than that. The commission accordingly replaced the guidelines with a generalized rule that a station must discuss issues of concern to its local community. And in selecting those issues, station operators will be permitted to consider the offerings of competing stations. They may direct their issue coverage at a narrow audience if they can "reasonably rely" on other local stations to "address the issues confronting the other segments of the community." What reasonable reliance is, and whether a station has devoted to community issues "more or better programming than that which would be considered 'minimal' " (a sine qua non for facile license renewal) will be decided in an ad hoc commission review if the station's license renewal is challenged.

Ascertainment requirements. The commission also eliminated the requirement that stations formally ascertain community concerns by sending out employees to interview "community leaders." This procedure has been variously described as a "charade" and a "ritual dance." In some communities the stations' chosen partners in this bizarre rite—the annually pestered "community leaders"—will welcome the end of ascertainment requirements almost as much as the stations themselves. Stations will instead have to maintain in their public files a list of five to ten community issues that they have addressed in the past year, giving examples of relevant programming and explaining how they identified their public's concern for those issues.

Commercialization. The commission lifted its restrictions on advertising, citing the Supreme Court's recent extension of at least partial First Amendment protection to commercial speech. It also noted, with becoming modesty, that market forces "appear more effective in curbing advertising excesses than our own rules." The commission had been allowing eighteen minutes of commercials per hour in general and up to twenty minutes in certain peak periods. A staff survey found, however, that only a tenth of the stations sampled aired eighteen minutes or more of commercials in even one hour of air time, and most never reached fifteen minutes per hour. In large markets, competition for listeners limits commercial content, while in small markets, there is usually too little demand for commercial time or too much competitive pressure from distant signals. Eliminating the guidelines will therefore rarely affect commercial air time; it will, however, allow licensees to experiment with "classified ad" or "flea market of the air" formats where advertisements are themselves the attraction for listeners.

Logging. In view of its other actions, the commission eliminated its requirement that stations keep a log of every hour of broadcast time. The General Accounting Office has estimated that radio broadcasters spend over 18 million hours a year on logging. Since informal logging is good business practice, however, not all of this paperwork will disappear.

The FCC accumulated an impressive record to support all these actions, even commissioning an economic model of the broadcasting industry. In part the changes were based on shifts in the marketplace. When the Communications Act of 1934 was enacted there were fewer than 600 radio stations, compared to nearly 9,000 today, with many more in the offing. FM service has now achieved full competitive parity with AM. Also, there has been a marked growth in networks, both general and specialized, commercial and noncommercial. In large markets, stations increasingly program to attract specialized audiences rather than fractional shares of the general audience.

For whatever reasons, it is clear that the FCC need no longer treat news and public affairs as the audio equivalent of cod liver oil, to be forced on reluctant listeners for their own good. The public demand for information has seen to that.

What was perhaps most surprising about the deregulation proceeding was the amount of opposition to the actions the commission ultimately took: nearly 20,000 negative comments, including dozens from groups which, to judge from their names at least, specialize in promoting government control of media content. Most of these comments seemed ideologically based: Douglas Fraser of the United Auto Workers, for example, asked why the commission should lift its guidelines if stations were just going to do what those guidelines prescribed anyway (presumably appealing to the principle that action should not be voluntary if it can, with no discernible difference, be coerced). Some of the groups, however, had more commercial interests at stake—notably, producers of so-called public service announcements who fear the loss of a captive market for their product. Though stations were not technically obliged to carry such announcements even before deregulation, their doing so was one of the elements considered in toting up public-interest goodie-points —and if simply meeting listener desires were to be made the Big Goodie, well, Lord knows where it might all lead!

The opponents represent one of the two conflicting strains of thought that have characterized broadcast regulation since its start, the view that stations are a sort of public utility in the field of ideas. The commission itself appears headed toward the opposite view, that the broadcast spectrum is an economic resource to be allocated by market means like any other. In fact it repeatedly cites the economist's argument that the spectrum is limited only in the same sense that waterfront property is limited. (Broadcasters who are aware of what California and other states have done to coastal property rights are probably eager to disavow this analogy.) One commissioner, Anne P. Jones, has already declared that she is inclined to "eliminate all nontechnical regulation of radio."

The regulatory approach of the existing statute manages to combine, and thereby to compromise, both viewpoints. It gives the FCC a broad mandate to force broadcasters to serve the "public interest"—a public utility concept that in this context would seem to require supervision of program content. On the other hand, it specifically precludes the FCC from exercising any censorship. The conflict has been papered over by the expedient of generally asserting content control not on a program-by-program basis, but through the massive and sporadic sanction (or, more accurately, threat-

In Brief–

Bilingual Education Lives. In one of its first and most widely noted deregulatory moves, the new administration shelved a Carter administration proposal formally requiring bilingual education in public schools. Knowledgeable observers, however, are predicting that the move will make little if any difference. The reason is that the withdrawal leaves in place a large body of "subregulatory guidance"—policy memos from mid-level administrators, informal (but binding) guidelines, and the like—which local educators may well find even more onerous than the Carter proposal would have been.

Subregulatory guidance is to regulation what off-budget items are to federal spending. It constitutes, in effect, an invisible appendix to the *Federal Register*, compiled without the procedural safeguards of formal rulemaking.

In the bilingual case, subregulatory guidance grew by gradual accretions during the seventies, picking up momentum from the Supreme Court's 1974 *Lau* decision, which made possible HEW's 1975 "Report on *Lau* Remedies." The latter, a triumph of subregulatory guidance, was used to extract "compliance agreements" from some 500 school districts (see "Bilingual Education," *Regulation*, November/December 1980). Details have varied from one agreement to another, but the trend, especially of late, has been to make it virtually impossible to meet *Lau* obligations without bilingual education. Those agreements will remain in force, and presumably new ones will be added, unless the department decides to alter its policies. As of this writing, it has not.

Some advocates of compulsory bilingualism are noting approvingly that the stringent 1975 report was issued by the old Office of Education, whose commissioner strongly supported its conclusions. That commissioner was Terrel H. Bell, now secretary of education in the Reagan administration.

Road Map for the Back-Seat Drivers. The auto factories of Detroit may be idle and cold, but the auto regulators of Washington are a-hum with activity. A compendium of their current doings is to be found in the *Automobile Calendar*, an agenda of recent and upcoming auto regulations published by the U.S. Regulatory Council in January. Immediately labeled a "hit list" for the Reagan administration and a "wish list" for fans of government activism, the calendar is the first volume in a projected series that will compile all the major current federal initiatives affecting particular industries.

At 392 pages it is a hefty tome. We expect that its main value will be as an authoritative reference book—like the Baseball Almanac or the Guinness Book of World Records—for use in the trivia contests by which unemployed Hamtramck auto workers while away the time. Which is more burdensome, environmental or safety regulation? At 140 pages, the former is the clear champ; safety regulation can muster a mere 109. Which federal auto task force has the most agency members? Why, the Automotive Inspection, Maintenance, and Repair Interagency Coordinating Committee — which has a roster described as "DOT/ DOE / DOL / EPA / GSA / FTC / USOCA." How did the auto safety regulators stretch their authority to justify requiring theft protection devices for cars? Simple: stolen cars are more likely to get into accidents than unstolen ones.

Bulky as it is, the calendar by no means gives a full picture of the industry's current regulatory burden. Unaccountably, the Occupational Safety and Health Administration escapes mention, although its noise and lead standards will impose heavy costs on auto manufacturers.

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ened sanction) of license nonrenewal, where the immediate connection between a particular content crime and the Communications Act punishment is less apparent. This approach has won for the industry the least desirable features of both the public utility and the free market systems—the subservience of the one combined with the unpredictability of the other.

The annual rite of "community ascertainment," for all its silliness, was an attempt by the FCC to shift the focus of its regulatory gaze away from content and toward the procedures by which content is determined. In that context, the commission judged that its requirements could at one and the same time be more precise and less intrusive upon journalistic judgment. Replacement of that absurd but at least predictable system with vaguer tests addressed directly to content itself unquestionably increases the broadcasters' administrative freedom (they need no longer conduct the ascertainments). But that comes at the cost of greater unpredictability—and perhaps (it remains to be seen) greater intrusion into editorial practices. How, indeed, *is* the broadcaster to demonstrate, when its license renewal is challenged by community groups, that it has covered those issues of local concern that the "public interest" demands? How will the FCC identify those issues (after the fact) now that the ascertainment files are not conclusive? And how is the broadcaster to establish "reasonable reliance" on other stations? In short, the broadcasters may find their new-found freedom a questionable gift—since it is in fact not freedom from obligation, but only freedom from specification of what that obligation might be.

In their totality, the FCC's new rules seem an improvement. That they are not entirely satisfactory is the fault not of the commission but of a Federal Communications Act that imposes a generalized public interest obligation instead of specifying particular public duties. Under that law, it is not clear that the commission could have gone any further than it did. Indeed, it is not obvious that even the changes it made will survive the expected court challenge from pro-regulation groups. Until the Supreme Court struck it down March 24, a D. C. circuit court ruling had prevented the FCC from leaving even *entertainment* content to market forces. (The case concerned a classical music station that sought to change to a rock music format.) And it is far from clear that the Court will extend its holding into the news area. The only real solution is to revise the 1934 act.

On a Clear Day You Could Pay Forever

Those who ask why U.S. policy makers have embraced "zero-risk" or "zero-effects" environmental goals, instead of a more sensible cost-benefit approach, are used to having their question met by another question: How can we put a price tag on human health? What if the damage is irreversible? What if we are unsure what the effects of the pollution are? And, anyway, what consolation is it to those innocent individuals who suffer the effects of pollution that their misfortune is "balanced" by some increment to the general welfare?

If only there were some test case, some carefully delimited issue, where such vexing questions would not apply! Such an issue would have to involve a type of environmental deterioration that occasioned no health effects, was easily and completely reversible, had straightforward and easily understood consequences, and—perhaps most difficult of all—spread its ill effects very thinly across the entire society. On such an issue—the *reductio ad absurdum* of the zero-effects approach—even the most addicted absolutist would have to concede the usefulness of cost-benefit analysis.

Cease to hope so. For precisely such a case is presented by the visibility standards for air quality in national parks and wilderness areas promulgated last December by the Environmental Protection Agency. And the absurd appears to be the law.

The visibility rules originated in one of the less noted provisions of the 1977 Amendments to the Clean Air Act. It provides for an ambitious "national goal" of ending all traceable emissions that "may reasonably be anticipated to cause or contribute to any impairment of visibility" in most of what are called mandatory class I (highest air quality) areas, including most national parks and wilderness areas. EPA and the state implementation plans it negotiates must make "reasonable progress" toward ending what EPA terms "humanly detectable" visibility impairment.

The emotional basis of these guidelines is easy to understand. The very subject of pollution in national parks summons up images of foul smokestacks looming over the rim of the Grand Canyon—upwind. It happens, however, that the real subject covered by the legislation, and hence the real problem that it poses, is a good deal broader than this. The visibility rules could eventually affect not only energy production and other economic development in the West, but the whole range of industry in every section of the country.

To begin with, national parks and other protected areas now dot most U.S. states. The visibility standards apply to 156 areas in thirty-six states. Part of the problem is a federal policy that has been cynically described as "putting a national park in every congressional district." Even where local residents have been opposed, as was the case when the Redwood National Park was expanded in 1978, the park and forest services have been eager to expand their holdings. The newest trend is for local anti-development activists to enlist the two agencies to fight their zoning battles for them—as in the proposal to convert to national park lands most of the Santa Monica Mountains, which run through the middle of the city of Los Angeles.

Added to the geographical scope of the park lands themselves are the "integral vistas," which are also included in the class I protected areas. These are locations that do not themselves lie within the parks, but form parts of scenic vistas which provide enjoyment to park visitors. Federal land managers are to choose these vistas, EPA having turned down a proposal that would have allowed state officials to do the choosing.

But the greatest potential for economic dislocation lies not in the geographic distribution of the target areas that are to be preserved from "any impairment of visibility," but in the even broader geographic distribution of the potential sources of impairment. New Jersey officials once calculated that hydrocarbon emissions from the state's large chemical complexes had their maximum effect on pollution two states away, in Derby, Connecticut. Currently EPA is regulating emission sources whose "plumes" drift directly and traceably into a park area; but eventually, when its monitoring and control techniques become more sophisticated, it also intends to regulate "regional haze" and "urban plumes" which affect the parks and vistas.

It should not be imagined that only noxious pollutants will be covered. The visibility requirements of the Clean Air Act are over and above the health-based air quality rules, which also contain a zero-effects goal. Although EPA, in response to a specific inquiry, has exempted water vapor (a concession, perhaps, to the intractable phenomenon of clouds), it is cracking down on dust—reasonably enough, since that does significantly affect visibility.

New power plants, factories, and other new emission sources have been covered since the program's inception, while preexisting sources will come under retrofit requirements when the newly promulgated rules go into effect. EPA believes, however, that for the time being few if any existing plants will have to install additional equipment.

But the long-range implications of the regulations were serious enough to draw criticism from quite a few interested groups, including not only utilities and industries but also state governments and even President Carter's Department of Energy. The regulations also quickly attracted the attention of the Reagan administration. While the visibility rules were promulgated in December, they were not "midnight" regulations hastily issued to preempt the new administration. EPA was acting under a court deadline, imposed in a suit to compel issuance of implementing regulations brought by the Friends of the Earth. (The latter, of course, is not some Elvish League from the *Lord of the Rings*, but an environmental group more reminiscent of the lawyers in *Bleak House.*) Moreover, EPA revised the rules somewhat to take into account some of the points raised by the incoming administration and included conciliatory language that suggested a willingness to soften some of the harsher aspects of enforcement.

The fault here, it would appear, does not lie primarily with EPA. Although some further softening of the regulations might be permitted by the Clean Air Act, there is little the new administration by itself can do to remedy the basic problem. For while the Clean Air Act requires EPA to consider economic and other factors in deciding how to achieve reasonable progress toward zero visibility effects, it does not permit the agency to use such factors to reevaluate the logic of the zero-effects goal itself. The act's only concession to rationality on this score is its failure to set a deadline for achieving the fabled goal. This may leave room for some administrative discretion; but presumably the courts (which have been particularly zealous in the area of environmental regulation) will require EPA to continue the statutorily required "reasonable progress" toward its unreasonable goal.

This appears to be one of those areas in which regulatory reform cannot be achieved without legislative action. That action should, at a minimum, include an explicit acknowledgment that the value of visibility in (and from) the national parks is (1) not uniform as to place (Yosemite versus Carlsbad Caverns versus the Great Smoky Mountains), (2) not uniform as to season (tourists do not flock to the northwest coast in winter for the view) and, most simple and important of all, (3) not infinite. The costs of regulation in this case have not yet been impossibly high. But when the regulations expand toward the zero-effects goal for such protected areas as the San Gabriel Wilderness Area—which overlooks Los Angeles —the crunch is likely to come. Having treated the costs of visibility obstruction once as implicitly zero (back in the days before regulation), and then as implicitly infinite (under the zero-effects standard), Congress may want to consider something in between.