

# ENVIRONMENTAL LAWYERING IN THE AGE OF COLLABORATION

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## INTRODUCTION

Environmental law is changing, and those changes are driving a transformation in the character of environmental lawyering. Although the basic federal statutory background has remained static for the past decade or more,<sup>1</sup> environmental protection and natural resource management as practiced “on the ground” are now awash in innovation, reform, and reinvention.<sup>2</sup> The most significant trend is toward collaborative decision-making and integrated environmental management at local and regional ecosystem scales,<sup>3</sup> a development that has momentous consequences for the practice of environmental law.

### I. RULE-BASED LITIGATION AND ITS LIMITATIONS

The first thirty years of large-scale federal environmental law, beginning in the late 1960s and culminating in the “environmental decade” of the 1970s, were largely driven by what Dan Tarlock has

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1. Michael C. Blumm, *Twenty Years of Environmental Law: Role Reversals Between Congress and the Executive, Judicial Activism Undermining the Environment, and the Proliferation of Environmental (and Anti-Environmental) Groups*, 20 VA. ENVTL. L.J. 5, 6-8 (2001) (stating that due to political “deadlock,” Congress neither passed new environmental legislation nor amended existing statutes through most of the 1990s); Michael B. Gerrard, *Trends in the Supply and Demand for Environmental Lawyers*, 25 COLUM. J. ENVTL. L. 1, 3 (2000) (noting that no “major” new federal environmental statutes have been passed since 1990, the year that saw enactment of the Oil Pollution Act and the 1990 Clean Air Act Amendments).

2. Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61, 61 (“Reinvention is all the rage today.”).

3. EPA Ecosystem Protection Workgroup, *Toward a Place-Driven Approach: The Edgewater Consensus on an EPA Strategy for Ecosystem Protection* (draft Mar. 15, 1994) [hereinafter “Edgewater Consensus”]. In this remarkable document, senior EPA staff recommended a fundamental reorientation of environmental policy, away from narrow “program-driven” standard-setting and permitting, toward integrated, ecosystem-oriented “place-driven” approaches.

called the “‘rule of law’ litigation strategy.”<sup>4</sup> Faced with the need to invent environmental law from whole cloth, entrepreneurial public interest lawyers persuaded the courts to find and enforce new environmental protection duties on the “fiction” that to do so fell within the courts’ “traditional . . . function of enforcing, rather than creating, pre-existing rules.”<sup>5</sup> Public interest litigators enjoyed great success in this period by identifying new environmental duties in old legal standards,<sup>6</sup> and then later winning the enactment of new statutes that could either be construed strictly to find agency action *ultra vires* or read expansively to “find [enforceable] duties in broad delegations of discretion.”<sup>7</sup> Their strategy, as Tarlock ably demonstrated, turned on their ability to convince judges, the news media, and ultimately the public that judicial intervention was necessary to protect the Rule of Law itself.<sup>8</sup>

Aided by generous citizen-suit provisions written into the new environmental statutes largely for their benefit (and borrowed or implied, where necessary),<sup>9</sup> these “legal eagles”<sup>10</sup> carefully crafted an

4. A. Dan Tarlock, *The Future of Environmental “Rule of Law” Litigation*, 17 PACE ENVTL. L. REV. 237, 241 (2000).

5. *Id.*

6. *See, e.g.*, *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 614 (2d Cir. 1965) (creatively construing a provision in the Federal Power Act that required dams and reservoirs to serve “recreational purposes” as implying a duty of environmental protection). The *Scenic Hudson* case is widely regarded as a seminal event that ushered in the modern era of environmental law. *E.g.*, FRANK P. GRAD & JOEL A. MINTZ, ENVIRONMENTAL LAW 5 (4th ed. 2000) (describing *Scenic Hudson* as “[t]he first great environmental law decision”); *see also* Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases That Changed the American Landscape*, 70 TUL. L. REV. 2279 (1996) (celebrating three landmark cases in which public interest litigators convinced courts to find environmental duties in statutes where they had not previously been identified, leading to subsequent legislative codification and expansion of those duties).

7. Tarlock, *supra* note 4, at 241.

8. *Id.* at 241-42.

9. For example, the Clean Air Act Provides:

[A]ny person may commence a civil action on his own behalf—(1) against any person . . . who is alleged to have violated . . . or to be in violation of [the statute] . . . [or] (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary . . . .

Clean Air Act § 304(a), 42 U.S.C. §7604(a) (1)-(2) (1994). Most federal environmental statutes contain similar provisions. An important exception is the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. (1994). Early cases found an implied private right of action to enforce NEPA—for example, *Atchison, Topeka & Santa Fe Ry. Co. v. Callaway*, 431 F. Supp. 722, 728 (D.C.1977)—but more recently courts have permitted NEPA citizen suits to proceed only on the theory that the Administrative Procedure Act provides a private right of action for parties adversely affected by NEPA violations that amount to “final agency action.” *See, e.g.*, Pub.

image as gallant public champions, courageously going into battle against villainous corporate polluters and corrupt, conniving bureaucrats on behalf of a grateful, albeit mostly passive, populace. In no small measure, their successes in the courts spilled over into Congress and the all-important arena of public opinion, giving shape and substance to a national politics of the environment that itself reflected and reinforced their rule-oriented, litigation-flavored approach. A bipolar, winner-take-all, "white hats v. black hats" politics informed congressional and popular perceptions of the issues and ultimately found expression both in the new environmental legislation and in the subsequent rounds of litigation it engendered.<sup>11</sup>

The edifice of environmental law that emerged out of this mix reflected a characteristically rule-based and rule-bound regulatory model. It seeks to solve environmental problems (and just as importantly, to retain a critical disciplining role for public interest lawyers) by imposing and enforcing, in top-down fashion, tough binding rules aimed principally at the largest and most visible categories of corporate targets, and secondarily at federal agencies.<sup>12</sup> As a necessary corollary, it approaches complex problems by fragmentation, attempting to carve the larger puzzle into smaller pieces that can be isolated and micro-managed through categorical, command-style rules. It tends to focus regulatory effort on those aspects of environmental protection most susceptible to control by this piecemeal, rule-bound approach. Thus it typically emphasizes pollution outputs over ecological conditions, pollution control over pollution prevention, technology-based rather than environmental quality-based regulation, large sources over small ones, and piecemeal, medium-by-medium and pollutant-by-pollutant rules over integrated approaches.<sup>13</sup> It also relies primarily on fixed, highly prescriptive rules rather than flexible standards or adjustable goals and objectives. These characteristics of U.S. environmental regulation, popularly captured in the pejorative epithet "command-and-control," are widely recognized and the subject of much critical commentary. Less widely appreciated, however, is the degree to which this regulatory model arose as a direct outgrowth of the litigation strategy that dominated the environmental movement of the 1960s and

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Citizen v. Office of the U.S. Trade Representatives, 970 F.2d 916, 918 (D.C. Cir. 1992).

10. Tom Turner, *The Legal Eagles*, AMICUS J., Winter 1988, at 25, 30.

11. See generally Houck, *supra* note 6 (tracing important environmental legislation to its roots in creative and successful litigation).

12. See MARY GRAHAM, *THE MORNING AFTER EARTH DAY: PRACTICAL ENVIRONMENTAL POLITICS* 1-2 (1999).

13. Farber, *supra* note 2, at 62-63; Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 27-35 (2001).

1970s.

The limitations of this approach are myriad. Although we have made great strides in controlling the most egregious, large-scale forms of pollution from the largest and most visible sources, our air and water remain unacceptably dirty.<sup>14</sup> Piecemeal regulatory programs impose redundant costs on administrators and regulated entities alike,<sup>15</sup> while nonetheless allowing critical problems to fall between the cracks.<sup>16</sup> Regulators, acting pursuant to congressional mandates and always under the shadow of threatened public interest litigation, churn out rule after rule but fall further and further behind the curve of known problems.<sup>17</sup> And the rules themselves, crafted in the bowels of the bureaucracy under necessarily fragmented and incomplete information, are often costly, ineffective, inflexible, underinclusive, overinclusive, at cross purposes with other fragmentary rules, or all of these simultaneously.<sup>18</sup>

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14. See Stewart, *supra* note 13; see also Edgewater Consensus, *supra* note 3, at 1 ("To date, EPA has accomplished a great deal, addressing many major sources of pollution to the nation's air, water and land," but "[r]ecently, we have realized that, even if we had perfect compliance with all our authorities, we could not assure the reversal of disturbing environmental trends.").

15. Dennis A. Rondinelli, *A New Generation of Environmental Policy: Government-Business Collaboration in Environmental Management*, 31 ENVTL. L. REP. 10891, 10891 (2001); Stewart, *supra* note 13, at 31-32.

16. By one estimate, current environmental regulations apply to only about twenty percent of the sources of environmental problems. See Rondinelli, *supra* note 15, at 10892 (citing estimate by GEORGE E. MEYER, WIS. DEP'T OF NATURAL RES., A GREEN TIER FOR GREATER ENVIRONMENTAL PROTECTION (1999)). For example, atmospheric deposition is now understood to be a major source of water pollution, accounting for twenty-five percent or more of the nitrogen in some impaired water bodies such as the Chesapeake Bay. See CHESAPEAKE BAY PROGRAM, WHAT'S NEW WITH . . . AIR QUALITY IN THE CHESAPEAKE BAY REGION IN 1998, at 1 (1999), <http://www.chesapeakebay.net>. Yet neither the Clean Air Act nor the Clean Water Act is structured to identify or address such cross-media pollution problems.

17. Rondinelli, *supra* note 15, at 10893 (citing estimates that the number of environmental regulations at the federal, state, and local levels grew from about 2,000 in the 1970s to over 100,000 by the late 1990s); Edgewater Consensus, *supra* note 3, at 1 ("[E]ven as we resolve the more obvious problems, scientists discover other environmental stresses that threaten our ecological resources and general well-being," but because EPA is caught up in fragmented, "program-driven" standard-setting and permitting, "the Agency has not paid enough attention to the overall environmental health of specific ecosystems"); see also Bruce Babbitt, Editorial, *Bush Isn't All Wrong About the Endangered Species Act*, N.Y. TIMES, Apr. 15, 2001, at 11 (stating that as the Fish & Wildlife Service struggles to keep up with court orders to prepare recovery plans for species currently listed as threatened or endangered, it has been unable to keep pace with other urgent tasks like evaluating additional candidate species for listing).

18. Daniel A. Farber, *Environmental Protection as a Learning Experience*, 27 LOY. L.A. L. REV. 791, 793-95 (1994).

## II. NEW MODELS

Regulators, regulated entities, and academic commentators alike have recognized these deficiencies and called for, or actually initiated, far-reaching reform projects that seek to overcome the limitations of environmental regulation as we have known it over the last thirty years. Recent evidence suggests that the rule enforcement model is waning.

Environmental litigation has declined. Civil and administrative enforcement actions at both the federal and state levels are down significantly.<sup>19</sup> Federal and state environmental enforcement offices are reinventing themselves as "compliance agencies," emphasizing cooperative efforts aimed at assisting the regulated community and enhancing the rate of voluntary compliance, rather than following punitive, deterrence-oriented enforcement policies.<sup>20</sup> This trend appears likely to continue, and perhaps accelerate, in the Bush era.<sup>21</sup>

Although some environmental non-governmental organizations (NGOs) predict that reduced state and federal enforcement efforts will

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19. Gerrard, *supra* note 1, at 2 (stating that federal administrative actions and civil referrals peaked in 1991, and state administrative actions and judicial referrals peaked in 1993). Reported federal and state court decisions on environmental matters have also fallen off from peaks reached in the early 1990s. *Id.* at 10. In an exception to these trends, federal criminal enforcement actions have increased in recent years, but this category represents a small fraction of all enforcement proceedings, and the increases are more than offset by declines in other categories. *See id.* at 5.

20. *See, e.g.*, EPA, OFFICE OF COMPLIANCE ASSISTANCE, COMPLIANCE ASSISTANCE ACTIVITY PLAN FISCAL YEAR 2001, EPA 305-R-01-002, at 6-7 (April 2001) (identifying 368 EPA programs and activities aimed at assisting regulated entities achieve compliance with regulatory requirements), <http://es.epa.gov/oeca/main/compasst/caplan1.pdf> (last visited Apr. 19, 2002); *see also* Peter Hutchinson & David Osborne, *Winning Compliance: Regulatory Agencies Are Trying to Make It Easier for Industries and Individuals to Voluntarily Follow the Rules*, GOV'T EXECUTIVE, June 2000, at 55; David L. Markell, *The Role of Deterrence-Based Enforcement in a "Reinvented" State/Federal Relationship: The Divide Between Theory and Reality*, 24 HARV. ENVTL. L. REV. 1 (2000); Clifford Rechtschaffen, *Competing Visions: EPA and the States Battle for the Future of Environmental Enforcement*, 30 ENVTL. L. REP. 10803 (2000); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998) [hereinafter, Rechtschaffen, *Deterrence*].

21. Joan Lowi & Ryan Alessi, *Whitman Lauds \$3 Billion in Savings*, STAR-LEDGER (Newark, N.J.), Apr. 10, 2001 (stating that President Bush's proposed FY 2002 EPA budget calls for a reduction of \$500 million and the elimination of 223 enforcement positions at the agency); Eric Planin & Michael Grunwald, *Bush Plan Shifts Power Over Polluters to States*, WASH. POST, Apr. 10, 2001, at A3 (noting that cutbacks in both EPA and Fish & Wildlife Service enforcement budgets are accompanied by increases in grants to states for enforcement, compliance assistance, and voluntary conservation measures, reflecting the preferences of the EPA Administrator and Interior Secretary for voluntary compliance over "heavy-handed" enforcement).

lead to increased non-compliance, citizen suits under the federal statutes are also in decline.<sup>22</sup> As one commentator noted, “the low-hanging fruit . . . has already been picked” because public interest lawyers won most of the early and comparatively easy lawsuits against egregious violators.<sup>23</sup> Many regulated entities, especially the largest and most visible of them who once provided the juiciest targets for citizen-suit litigation, have now cleaned up their operations. The remaining non-compliance cases often involve either smaller targets or more difficult problems of proof, making them costlier and riskier to litigate.<sup>24</sup>

In addition, opportunities to bring citizen suits have shrunk as the result of recent court rulings on the law of standing<sup>25</sup> and rulings that have narrowed constructions of the citizen-suit provisions themselves.<sup>26</sup> The federal courts in general appear to be a less friendly arena for environmental NGOs than in the salad days of the environmental movement.<sup>27</sup>

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22. Gerrard, *supra* note 1, at 4.

23. *Id.*

24. *See id.*

25. *See* Blumm, *supra* note 1, at 11-12 (arguing that changes in standing doctrine reflect “judicial resistance to the concept” underlying citizen-suit provisions that “Congress endorsed in the 1970s: that government implementation of statutory directives needed active citizen oversight”); *see, e.g.,* Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83, 109-10 (1998) (finding that environmental plaintiffs did not have standing to bring a citizen suit for wholly past violation of Toxics Release Inventory disclosure requirements because their injury, if any, would not be redressable by any remedy the court could fashion); Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (environmental plaintiffs did not have standing to bring a citizen suit for alleged violation of the Endangered Species Act because they had failed to show they suffered a concrete “injury-in-fact” as a result of the violation).

26. *See generally* Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 66-67 (1987) (holding that Clean Water Act authorization for citizen suits against any party alleged to be in violation of the statute did not permit suit in cases of wholly past violation); Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 12 F.3d 353, 357-58 (2d Cir. 1994) (holding that a permit under the Clean Water Act’s national pollution discharge elimination system (NPDES) operated to shield the permit holder against citizen suits for discharges of pollutants not covered in the permit).

27. Blumm, *supra* note 1, at 10-12, 14-15 (stating that developments in the doctrines of takings, standing, and ripeness have made the federal courts less amenable to environmental enforcement and citizen suits); *id.* at 13-14 (noting the proliferation of well-funded “anti-environmental” groups that litigate “in the name of development” and private property rights); Tarlock, *supra* note 4, at 246 (noting that environmental NGOs now frequently encounter adverse judicial rulings, and that “Rule of law” litigation has become a two-way street, invoked by opponents of regulation as well as by its advocates). Even as it raised the barriers to standing for environmental NGOs, the Supreme Court eased standing requirements to allow landowners to bring citizen suits challenging agency actions under the Endangered Species Act. *See* Bennett v. Spear, 520 U.S. 154 (1997) (finding that the “zone of interests” test did not bar landowner’s

Many leading corporations and some whole industries have concluded that, for a variety of reasons, they would rather switch than fight.<sup>28</sup> Taking off their black hats, they are attempting not only to achieve voluntary compliance, but to get a step ahead of the regulatory curve ("beyond compliance," in the industry jargon) by re-positioning themselves as environmental champions in their own right. The leading firms are adopting ambitious voluntary performance targets and internal environmental management systems, while in many cases engaging in extensive self-reporting to document and publicize their environmental accomplishments.<sup>29</sup> In response, the EPA and state agencies are now adopting policies that seek to foster and exploit these trends.<sup>30</sup> Recently, for example, the EPA launched its Performance Track program, aimed

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standing to maintain a citizen suit based on allegedly unlawful standards and procedures used in making critical habitat determinations).

28. Rechtschaffen, *Deterrence*, *supra* note 20, at 1191-1201 (suggesting that social norms, reputational benefits, avoidance of tort liability, avoidance of the costs of litigation, and opportunities to reduce waste and gain competitive market advantages may all play a role in motivating voluntary corporate compliance with environmental laws); Rondinelli, *supra* note 15, at 10892 (describing the emergence of "beyond compliance" strategies in leading firms and industrial sectors, and arguing for reorientation of regulatory programs to accommodate and encourage these trends); cf. Neil Gunmingham & Darren Sinclair, *Towards Sustainability: Incentives for Cleaner Production*, in ENVIRONMENTAL OUTLOOK NO 3: LAW AND POLICY 76-90 (Paul Leadbeter et al. eds., 1999) (stating that leading firms are adopting "beyond compliance" strategies to minimize the cost and uncertainty of future government regulation, and to respond to market opportunities and pressures from consumers, communities, investors, lenders, insurers, retailers and suppliers).

29. Nicole Darnall et al., *Environmental Management Systems: Opportunities for Improved Environmental and Business Strategy?*, ENVTL. QUALITY MGMT., Spring 2000, at 1; Rondinelli, *supra* note 15, at 10892 (documenting successful "beyond compliance" strategies by leading firms). For a theoretical model that explains corporate self-regulation as an economically rational response to the threat of future regulation, see generally John W. Maxwell et al., *Self-Regulation and Social Welfare: The Political Economy of Corporate Environmentalism*, 43 J.L. & ECON. 583 (2000). Many firms find that raising environmental performance standards by investing in pollution-preventing technologies and processes on their own terms and in advance of regulatory requirements can be highly cost-effective in comparison with regulatory compliance, which typically involves costly, after-the-fact add-on technologies.

30. Rondinelli, *supra* note 15, at 10903-04 (describing experimental regulatory approaches seeking to encourage environmental self-management, and recommending additional policy changes to reinforce these trends); John Voorhees, *The Changing Environmental Management Scene: Federal Policy Impacts the Private and Public Sectors*, 31 ENVTL. L. REP. 10079 (2001) (describing the EPA's new Environmental Management Systems (EMS) policy, which seeks to reward firms showing superior environmental performance through the use of internal environmental management systems by offering them favorable regulatory treatment); see also Multi-State Working Group (MSWG)/EPA Pilot Implementation Workshop, Summary of ISO 14001 State Activity (Nov. 1998) (describing state pilot programs that create incentives to encourage use of EMS).

at recognizing and rewarding firms that demonstrate superior environmental performance. In exchange for employing environmental management systems and undertaking to achieve continuous improvements in specified categories of environmental performance, participating firms enjoy relaxed treatment under traditional regulatory rules.<sup>31</sup>

The Clinton Administration explicitly acknowledged the limitations of top-down rule making and enforcement as a means to solve complex environmental problems<sup>32</sup> and placed the search for alternatives squarely on the public agenda. Although some of the EPA's more visible "reinvention" efforts fizzled,<sup>33</sup> the Clinton Administration nonetheless made significant strides toward making integrated, collaborative, regional ecosystem and watershed management the centerpiece of its environmental and natural resources policy in places like the Everglades,<sup>34</sup> the Chesapeake Bay,<sup>35</sup> the San Francisco Bay-Delta,<sup>36</sup> the

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31. Daniel J. Fiorino, *Performance Track Places Trust in the Carrot Over the Stick*, ENVTL. QUALITY MGMT., Spring 2001, at 9. See generally <http://www.epa.gov/performance-track>.

32. See, e.g., INTERAGENCY ECOSYSTEM MGMT. TASK FORCE, 1 THE ECOSYSTEM APPROACH: HEALTHY ECOSYSTEMS AND SUSTAINABLE ECONOMIES (1995); OFFICE OF THE VICE PRESIDENT, IMPROVING ENVIRONMENTAL MANAGEMENT: ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW: ENV02: DEVELOP CROSS-AGENCY ECOSYSTEM PLANNING AND MANAGEMENT IMPROVE ENVIRONMENTAL PERFORMANCE AT FEDERAL BUILDINGS AND FACILITIES (1993), <http://govinfo.library.unt.edu/npr/library/reports/env.html>; Edgewater Consensus, *supra* note 3, at 1 (acknowledging that EPA's fragmentary, rule-based approach has failed to ensure the overall environmental health of ecosystems, and recommending an integrated, collaborative, ecosystem-oriented approach); see also Norman L. Christensen et al., *The Report of the Ecological Society of America Committee on the Scientific Basis for Ecosystem Management*, 6 ECOLOGICAL APPLICATIONS 665, 688-89 (1996).

33. Rondinelli, *supra* note 15, at 10896-97 (concluding that EPA's highly touted "reinvention" programs like the Common Sense Initiative, Project XL, and a variety of industry "partnership" programs were "limited . . . in scope and impact"); see also U.S. GEN. ACCOUNTING OFFICE, REGULATORY REINVENTION: EPA'S COMMON SENSE INITIATIVE NEEDS AN IMPROVED OPERATING FRAMEWORK AND PROGRESS MEASURES, GAO/RCED-97-164 (1997).

34. Stephen S. Light et al., *The Everglades: Evolution of Management in a Turbulent Ecosystem*, in BARRIERS AND BRIDGES TO THE RENEWAL OF ECOSYSTEMS AND INSTITUTIONS 103 (Lance H. Gunderson et al. eds., 1995) [hereinafter BARRIERS AND BRIDGES]; Richard J. Ansson, Jr., *Ecosystem Management & Our National Parks: Will Ecosystem Management Become the Guiding Theory for Our National Parks in the 21st Century?*, 7 U. BALT. J. ENVTL. L. 87, 90-91 (2000). See generally *Rescuing an Endangered Ecosystem—The Journey to Restore America's Everglades*, at <http://www.evergladesplan.org> (last visited Feb. 17, 2002) (comprehensive information source on the South Florida/Everglades restoration plan). The South Florida ecosystem restoration project is a joint effort of the Florida Department of Environmental Protection, the South Florida Water Management District, the Army Corps of Engineers, the Department of the Interior, the EPA, other state and federal agencies,

Southern California Coastal Sage Scrub region,<sup>37</sup> the old growth forests<sup>38</sup> and river basins<sup>39</sup> of the Pacific Northwest, and public lands and critical

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and private and nonprofit participants. *Id.* It seeks to restore ecosystem health in the Everglades and associated ecosystems while also ensuring adequate public drinking water supplies and flood control by re-engineering water diversions, reducing non-point source pollution, restoring degraded habitats, and managing the hydrology of this region, where water flows are the principal defining characteristic of the landscape. *Id.*

35. Jon Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 379, 394-98 (2000); Robert Costanza & Jack Greer, *The Chesapeake Bay and Its Watershed: A Model for Sustainable Ecosystem Management?*, in BARRIERS AND BRIDGES, *supra* note 34, at 169. See generally *Chesapeake Bay Program-America's Premier Watershed Restoration Partnership*, at <http://www.chesapeakebay.net> (last visited Feb. 17, 2002) (comprehensive information source on the Chesapeake Bay Program). Although the Chesapeake Bay Program has been in existence since the early 1980s and its historical roots predate the EPA itself, it has gained new prominence as a model of integrated watershed management.

36. See generally Patrick Wright, *Fixing the Delta: the CALFED Bay-Delta Program and Water Policy Under the Davis Administration*, 31 GOLDEN GATE U. L. REV. 331 (2001); *CALFED Bay-Delta Program*, at <http://calfed.ca.gov> (last visited Feb. 17, 2001) (comprehensive information source on the CALFED Bay-Delta Program). The Bay-Delta program is an ambitious collaborative effort by federal and state agencies aimed at integrated management and ecological restoration of the San Francisco Bay/Sacramento-San Joaquin Delta estuary system. Wright, *supra*, at 336-37. The Sacramento and San Joaquin Rivers are the principal tributaries of the San Francisco Bay. *Id.* at 333. They also supply drinking water to some twenty million water-starved Californians as far away as San Diego, as well as irrigation water for the rich agricultural region of the Central Valley. *Id.* at 333. State-federal cooperation was formalized in 1994 with the signing of a Framework Agreement creating CALFED, a hybrid state-federal institution involving the Department of the Interior, the EPA, the Department of Agriculture, the National Marine Fisheries Service, the Army Corps of Engineers, and corresponding state agencies. *Id.* at 336-37.

37. Marc J. Ebbin, *Is the Southern California Approach to Conservation Succeeding?*, 24 ECOLOGY L.Q. 695, 696-98 (1997) (describing the emergence of landscape-scale, multi-party, multiple-species Habitat Conservation/Natural Community Conservation Plans in Southern California); Steve Johnson, *Natural Community Conservation Planning: A Targeted Approach to Endangered Species Conservation*, Speech at West-Northwest Symposium (Mar. 1, 1997), in 4 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 135, 136-37 (1998); Douglas P. Wheeler, *An Ecosystem Approach to Species Protection*, NAT. RESOURCES & ENV'T, Winter 1996, at 7, 7-8.

38. FOREST SERV., U.S. DEP'T OF AGRIC., 1997 NORTHWEST FOREST PLAN, AN ECOSYSTEM MANAGEMENT APPROACH: WATERSHEDS, COMMUNITIES, AND PEOPLE 8 (1997); Rebecca W. Watson, *Ecosystem Management in the Northwest: "Is Everybody Happy?"*, NAT. RESOURCES & ENV'T, Winter 2000, at 173, 173-75; Lauren M. Rule, Note, *Enforcing Ecosystem Management Under the Northwest Forest Plan: The Judicial Role*, 12 FORDHAM ENVTL. L.J. 211, 214-15 (2000).

39. Dianne K. Conway & Daniel S. Evans, *Salmon on the Brink: The Imperative of Integrating Environmental Standards and Review on an Ecosystem Scale*, 23 SEATTLE U. L. REV. 977, 979-80 (2000); Watson, *supra* note 38, at 175-76. See generally Michael C. Blumin, *The Amphibious Salmon: The Evolution of Ecosystem Management in the Columbia River Basin*, 24 ECOLOGY L.Q. 653, 675-76 (1997); John M. Volkman,

watersheds more generally.<sup>40</sup> While some individuals question the environmental bona fides of the new Bush Administration,<sup>41</sup> there is little doubt that the trend toward collaborative approaches will continue,<sup>42</sup> albeit possibly with more sympathy for regulated industries and landowners and less enthusiasm for insisting on environmentally beneficial outcomes.<sup>43</sup>

These trends are no longer at the margins of environmental policy. They represent a seismic shift, leading one commentator to suggest that the era in which "Rule of Law" litigation defined environmental law may be winding down.<sup>44</sup> Although no one is predicting the disappearance of environmental litigation in its entirety, quite plainly it is no longer the dynamic, driving force behind the progressive development of environmental law that it was in the first decades of the environmental movement.

Litigation or the threat of litigation may sometimes be a deal-breaker, blocking creative and collaborative problem-solving processes

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*How Do You Learn From a River? Managing Uncertainty in Species Conservation Policy*, 74 WASH. L. REV. 719 (1999).

40. 65 Fed. Reg. 62566 (Oct. 18, 2000); COMM. OF SCIENTISTS, U.S. DEP'T OF AGRIC., SUSTAINING THE PEOPLE'S LANDS: RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY (1999) (recommending integrated ecosystem management and collaborative planning as the foundation of national forest and grassland management in the twenty-first century); OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, WATERSHED APPROACH FRAMEWORK (1996); Bruce Babbitt, *Restoring Our Natural Heritage*, NATURAL RESOURCES & ENV'T, Winter 2000, at 147; Cannon, *supra* note 35; George Frampton, *Ecosystem Management in the Clinton Administration*, 7 DUKE ENVTL. L. & POL'Y F. 39, 39-42 (1996).

41. *See, e.g.*, Michael Grunwald & Mike Allen, *Conservation Program Reductions Draw Fire*, WASH. POST, June 21, 2001, at A1 (reporting that despite Bush's pledge of "full funding" for the Land & Water Conservation Fund and increased grants to states, environmentalists decry corresponding cuts in a broad range of federal environmental and conservation programs, fearing a shift away from conservation toward recreation).

42. *See, e.g.*, Secretary of the Interior Gale Norton, Remarks at the North American Wildlife and Natural Resource Conference (Mar. 19, 2001), <http://www.doi.gov/news/010319.html> (last visited Feb. 13, 2002) (emphasizing the critical role of collaboration among federal agencies, states, private landowners, academic experts, and conservation organizations in natural resource management).

43. Elizabeth Shogren, *Norton Seeks to Halt Grizzly Plan*, L.A. TIMES, June 21, 2001, at A13 (citing opposition among ranchers and elected officials, Interior Secretary Gale Norton decided to stop a grizzly bear reintroduction plan developed through a collaborative process involving environmentalists, landowners, business groups, and local officials).

44. Tarlock, *supra* note 4, at 269-70 ("The conduct of large-scale landscape management experiments does not eliminate the need for the fundamental objective of 'rule of law' litigation or agency accountability, but the importance of such litigation will decline over time.").

if potential participants calculate that negotiated outcomes can be struck down in the courts, so that the game is not worth the candle.<sup>45</sup> In other cases, however, litigation or the threat of litigation may play an important and constructive background role in creating incentives for parties to participate in the kinds of collaborative processes I describe here, and in policing the outer boundaries of agreements already reached.

The Southern California multi-species, multi-party Habitat Conservation Plans, for example, were inspired in large measure by the desire to avoid enforcement of § 9 of the Endangered Species Act, which prohibits the “take” of listed wildlife species by adversely modifying their habitat.<sup>46</sup> Strict application of this rule threatened to shut down real estate development in fast-growing San Diego and Orange Counties, where urban sprawl had already reduced the native coastal sage scrub to fragmentary remnants, creating powerful incentives for landowners, developers, and local officials to seek an agreement that authorized future development, while reducing adverse effects on the ecosystem.<sup>47</sup>

Similarly, ambitious watershed restoration planning efforts now underway in the Columbia Basin and other rivers of the Pacific Northwest that provide habitat for declining salmon species is driven by the desire to avoid Endangered Species Act enforcement and related litigation.<sup>48</sup> The Everglades ecosystem restoration project grew out of a settlement of the federal government’s lawsuit against the State of Florida, based on water quality concerns.<sup>49</sup> The Northwest Forest Plan was developed in an effort to extricate federal agencies from protracted

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45. *See id.* at 262-70.

46. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 691 (1995) (upholding 50 C.F.R. § 17.3 (1994), a Department of the Interior regulation interpreting prohibited “take” of listed wildlife species to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering”).

47. *Ebbin*, *supra* note 37, at 702-03 (describing landowners’ incentives to avoid strict application of the Endangered Species Act); *Johnson*, *supra* note 37, at 136 (stating that the coastal sage scrub had been reduced to about ten or fifteen percent of its original range).

48. Christine O. Gregoire & Robert K. Costello, *The Take and Give of ESA Administration: The Need for Creative Solutions in the Face of Expanding Regulatory Proscriptions*, 74 WASH. L. REV. 697, 712, 719 (1999).

49. *See, e.g.*, Keith W. Rizzardi, *Alligators & Litigators: A Recent History of Everglades Regulation and Litigation*, FLA. B. J., Mar. 2001, at 18, 22; Alfred R. Light, *Ecosystem Management in the Everglades*, NAT. RESOURCES & ENV’T, Winter 2000, at 166, 168. *But see* Alfred R. Light, *The Myth of Everglades Settlement*, 11 ST. THOMAS L. REV. 55, 75 (1998) (arguing that the “settlement” did not settle the underlying disputes, and was only one in a much larger series of events leading in the direction of coordinated efforts of ecosystem management).

litigation under the Endangered Species Act, National Environmental Policy Act, and the National Forest Management Act over the fate of the northern spotted owl,<sup>50</sup> and subsequent litigation has arguably been necessary to keep the Forest Service and the Bureau of Land Management on track with commitments they made under that plan.<sup>51</sup> Moreover, Clean Water Act § 303(d) total maximum daily load (TMDL) litigation,<sup>52</sup> or the desire to avoid such litigation, may help propel collaborative watershed planning in a number of impaired water bodies.<sup>53</sup>

The crucial distinction between these and earlier cases, however, is that plaintiffs no longer look to judicially imposed remedies—or to simple enforcement of a pre-established rule—to resolve the underlying environmental problem.<sup>54</sup> Instead, all parties recognize that litigation and judicially imposed remedies are likely to be so costly and inefficient

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50. See Rule, *supra* note 38, at 217-22 (describing the process by which the Northwest Forest Plan was created).

51. *Id.* at 249-52 (showing that litigation and judicial enforcement was necessary to prevent backsliding by federal agencies from ecosystem management commitments made under the Northwest Forest Plan).

52. Clean Water Act § 303(d) requires states to set “total maximum daily loads” (TMDLs) limiting pollutant loadings into water-quality impaired lakes or river segments, and to allocate those loads among pollutant sources. This provision was largely ignored by the states, and for many years the EPA took the position that the statute authorized it to act only if states submitted inadequate TMDLs but gave it no authority to intervene if states failed to act at all. See Oliver A. Houck, *TMDLs, Are We There Yet?: The Long Road Toward Water Quality-Based Regulation Under the Clean Water Act*, 27 ENVTL. L. REP. 10391, 10392 (1997). More recently, however, NGO-sponsored litigation has forced the EPA to enforce the statutory requirements. See *id.*; see, e.g., *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 998 (7th Cir. 1984) (holding that “prolonged failure” of a state to submit TMDLs constituted “constructive submission” of an inadequate TMDL, triggering mandatory duty on the part of EPA to act); *Idaho Sportsmen’s Coalition v. Browner*, 951 F. Supp. 962, 964 (W.D. Wash. 1996); *Sierra Club v. Hankinson*, 939 F. Supp. 872, 873 (N.D. Ga. 1996); *Ala. Ctr. for the Env’t v. Reilly*, 796 F. Supp. 1374, 1381 (W.D. Wash. 1992), *aff’d sub nom.* *Ala. Ctr. for the Env’t v. Browner*, 20 F.3d 981 (9th Cir. 1994).

53. Robert W. Adler, *Controlling Nonpoint Source Water Pollution: Is Help on the Way (From the Courts or EPA)?*, 31 ENVTL. L. REP. 10270 (2001); Jory Ruggiero, *Toward a Law of the Land: The Clean Water Act as a Federal Mandate for the Implementation of an Ecosystem Approach to Land Management*, 20 PUB. LAND & RESOURCES L. REV. 31, 32 (1999).

54. See William H. Rodgers, Jr., *Deception, Self-Deception, and Myth: Evaluating Long-Term Environmental Settlements*, 29 U. RICH. L. REV. 567, 579 (1995) (arguing that even the most celebrated “settlements” of environmental litigation did not “settle” the complex underlying environmental problems they were intended to solve, because all “suffer from *representation* deficiencies that mean some interests will be left out; *prediction* shortcomings that distort social and environmental realities; *validation* lapses that immunize happy assumptions from the tests of time; and *direction* difficulties that can send future events along unsavory trajectories that are difficult to undo”).

that they are willing to invest considerable resources in finding alternative, mutually acceptable solutions. In short, the background legal rules operate as a set of “penalty default” provisions,<sup>55</sup> and litigation seeking to enforce those rules is deployed as a punitive threat, the “nuclear option” in a larger, highly complex negotiating strategy. This suggests, however, that what is ultimately doing the work in these cases is not the particular rule invoked, nor even the litigation per se, but more broadly the coercive power of the state to impose and enforce penalties (or penalty-like compulsory processes) against non-cooperators. It is not at all clear that continued reliance on maladroit rules that only inadvertently provide incentives to cooperate is the best or most effective way to deploy the state’s coercive powers in aid of collaborative solutions. For the moment, however, it appears to suffice.

### III. IMPLICATIONS FOR LAW AND LAWYERING

The changes outlined here are not merely questions of tone and style, shifting from a tough, confrontational attitude to a more cooperative one, or from enforcement to non-enforcement. The very nature of environmental decision-making is being transformed, as the deep limitations of a system based on centrally prescribed rules—the rule-bound regulatory model—come to be more fully appreciated. In its place is rising a new, pragmatic, collaborative, and experimentalist approach to governance that aspires to integrated and holistic management of ecosystems, understood as complex dynamic systems.<sup>56</sup>

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55. The “penalty default” notion is borrowed from contract theory. A penalty default rule is one that is designed to give one or more parties an incentive to contract around it, in favor of an arrangement better tailored to their own circumstances. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 91 (1989).

Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer. In contrast to the received wisdom, penalty defaults are purposefully set at what the parties would *not* want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts).

*Id.* (emphasis added). In the regulatory context, then, a penalty default provision would be one that imposes a punitive outcome (e.g., strict enforcement of the Endangered Species Act’s “no take” rule) unless the regulated party came forward with an environmentally superior alternative (e.g., a regional multi-species, multi-landowner habitat conservation plan).

56. See generally U.S. DEP’T OF AGRIC., *supra* note 40; Norman L. Christensen et al., *The Report of the Ecological Society of America Committee on the Scientific Basis for Ecosystem Management*, 6 *ECOLOGICAL APPLICATIONS* 665, 668 (1996); Pamela Matson, *Environmental Challenges for the Twenty-First Century: Interacting Challenges and Integrative Solutions*, 27 *ECOLOGY L.Q.* 1179, 1180-81 (2001) (arguing that

Because each ecosystem is in crucial respects unique, uniform “cookie-cutter” rules are unlikely to succeed. The new model, therefore, emphasizes locally or regionally tailored solutions within broader structures of coordination and public accountability.

Accepting that ecosystems are extraordinarily complex and dynamic, and our understanding of them inescapably limited, provisional, and rife with uncertainties, the new approach embraces continuous experimentation, provisional policymaking, new learning, and dynamic, adaptive response mechanisms.<sup>57</sup> These challenges are typically addressed through hybrid public-private governance structures that feature broad information sharing, systematic monitoring of environmental conditions and stressors, and collaborative problem-solving among parties representing diverse interests at multiple, nested spatial scales, from the immediately local (e.g., the landowner) to the national or even international.<sup>58</sup>

Some environmental NGOs have enthusiastically joined this bandwagon.<sup>59</sup> Yet for many NGOs, and especially for the lawyers who tend to dominate them, these approaches are seen as cause for alarm. They fear that flexible and provisional policy approaches are an open invitation to backsliding, that collaborative processes are subject to

environmental management must be simultaneously broadly integrative and place-specific, taking account of innumerable human interactions with dynamic natural systems in the context of particular places and populations).

57. NAT'L RESEARCH COUNCIL, RESTORATION OF AQUATIC ECOSYSTEMS: SCIENCE, TECHNOLOGY, AND PUBLIC POLICY 357 (1992).

Adaptive planning and management involve a decision-making process based on trial, monitoring, and feedback. Rather than developing a fixed goal and an inflexible plan to achieve the goal, adaptive management recognizes the imperfect knowledge of interdependencies existing within and among natural and social systems, which requires plans to be modified as . . . knowledge improves.

Daniel F. Luecke, *An Environmental Perspective on Large Ecosystem Restoration Processes and the Role of the Market, Litigation, and Regulation*, 42 ARIZ. L. REV. 395, 396-97 (2000) (stating that ecosystem restoration processes are “by their very nature” experimental, adaptive, and iterative, emphasizing monitoring, assessment, and evaluation protocols that lead to periodic revision of goals and implementation plans and re-specification of the models upon which they are based).

58. Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. L. 973, 977-78 (1995); Cannon, *supra* note 35, at 379 (“Collaborative, place-based initiatives are a central feature of the efforts by the United States Environmental Protection Agency and other federal agencies to reinvent environmental programs.”).

59. Karen A. Poiani et al., *Biodiversity Conservation at Multiple Scales: Functional Sites, Landscapes, and Networks*, BIOSCIENCE, Feb. 2000, at 133 (describing the science-driven evolution of The Nature Conservancy’s strategy from protection of small, isolated sites to a focus on larger landscape and regional-scale “functional conservation areas,” an approach requiring cooperation with a variety of government agencies and private landowners).

“capture” by industry groups, and that local citizens will be insufficiently attentive to environmental concerns, inadequately informed, or otherwise overmatched by industry participants.<sup>60</sup> They fear that their own participation in collaborative processes will lead to “co-optation,” weakening the resolve and perhaps undercutting the legal capacity of environmental NGOs to play the role of disciplinarian and enforcer.<sup>61</sup> Some fear that by shifting environmental decision-making to local and regional fora, the new “devolved” approach to ecosystem management will reduce the capacity of Washington-centered NGOs to influence policy outcomes at the regulatory center.

More fundamentally, however, one suspects that much of the uneasiness expressed by environmental NGOs reflects simple culture shock—an understandable discomfort with the starkly unfamiliar terrain on which environmental decision-making is now conducted, and the equally unfamiliar shape of the decisions that emerge from that process. Lawyers, after all, dominate these organizations. Lawyers, as a general matter, tend to like rules. They like their rules to be optimal, uniform, and timeless, or at least, clear, strict, and enforceable. These values and preferences are deeply ingrained in our legal culture, especially in those parts of the legal profession that have seen success from rule-based approaches, and perhaps nowhere more so than among the generation of litigators who built the house of contemporary environmental law with litigation as their primary tool.

Collaborative ecosystem management, by contrast, is typically messy, elaborate, cumbersome, ad hoc, non-uniform, and defiantly unconventional. Lines of authority and divisions of responsibility are often neither formal nor transparent. Institutional boundaries are fluid and permeable, if institutions can be discerned at all. Roles, identities, and allegiances become blurred in a jumble of hybrid public-private, national-and-local, inter-agency governance arrangements. Indeed, in some cases, “institutions” may exist more as “virtual institutions” than as clearly demarcated institutional entities in their own right. Within the Chesapeake Bay Program, for example, leading players include officials from a wide variety of federal and state agencies whose official job titles

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60. Jacqueline Savitz, *Compensating Citizens*, in BEYOND BACKYARD ENVIRONMENTALISM 65, 67-68 (Joshua Cohen & Joel Rogers eds., 2000); Michael McCloskey, *The Skeptic: Collaboration Has Its Limits*, HIGH COUNTRY NEWS, May 13, 1996, <http://www.hcn.org> (last visited Feb. 21, 2002).

61. Lee P. Breckenridge, *Nonprofit Environmental Organizations and the Restructuring of Institutions for Ecosystem Management*, 25 ECOLOGY L.Q. 692, 695-706 (1999) (stating that while collaborative ecosystem management creates novel opportunities for NGOs to exercise influence over environmental decision-making, participation in collaborative processes may also tend to erode NGOs' autonomy and distinctive identity); McCloskey, *supra* note 60.

and duties are those defined by reference to their home agencies, but who also simultaneously wear a semi-official Chesapeake Bay Program hat.<sup>62</sup> Their efforts on behalf of the Chesapeake Bay Program may define much, or even all, of the real content of their work, and inspire a collective allegiance to an overarching set of goals, objectives, and strategies that together may constitute as significant a constraint on the exercise of discretionary duties as any rule or policy of their home agencies.

Rules, where they exist, tend to be provisional and therefore always renegotiable<sup>63</sup> and may not be enforceable through the familiar channels of formal, compulsory processes, including courts. This may sound singularly unpromising, especially to lawyers accustomed to policing relatively sharp-edged rules and lines of authority. It is hard to see where accountability comes from when the lines of authority become so blurred that no single party can be identified as THE authoritative decision-maker. It violates our deep-seated sense of order, and it may even appear incompatible with "the Rule of Law as a law of rules," to borrow Justice Scalia's felicitous (if shortsighted) phrase.<sup>64</sup>

Yet despite these objections, there are good reasons to think that the new model—the "post-rule enforcement" model of environmental governance—has taken on a life of its own and is here to stay, at least for a while. Although much was accomplished through the earlier rule-bound approach, it no longer appears capable of generating solutions to the mind-numbingly complex problems that remain. Even its staunchest proponents freely admit that their position is largely a defensive and reactive one, as they seek to safeguard the accomplishments of the past against what they regard as a risky, unproven, and possibly dangerous

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62. Cannon, *supra* note 35, at 394-98 (describing a complex web of institutional arrangements that comprise the Chesapeake Bay Program); Costanza & Greer, *supra* note 35, at 195-203 (describing co-evolution of institutional arrangements, management strategies, and changing conceptions of the nature of the Chesapeake Bay ecosystem and its problems).

63. Tarlock, *supra* note 4, at 257-59 (stating that under new ecological paradigms, ecosystems are understood as complex, dynamic systems that do not necessarily tend toward equilibrium; consequently, "[a]t best, ecosystems can be managed rather than restored or preserved, and management will be a series of calculated risky experiments" rather than fixed rules).

64. Compare Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing that the rule of law demands, insofar as is practicable, clear rules of general applicability rather than indefinite and discretionary standards), with Tarlock, *supra* note 4, at 254-59 (arguing that ecosystem management demands decentralized decision-making structures and provisional and adaptive policy approaches fundamentally incompatible with conventional notions of the "rule of law").

set of experimental alternatives.<sup>65</sup> Lacking much in the way of a positive program, they are reduced to a series of rearguard holding actions and blocking maneuvers, at which they have proven adept in the past and to which a rule-based litigation strategy may be uniquely well suited.

At a minimum, however, we can expect widespread experimentation with the new model to continue into the foreseeable future, over the sometimes strenuous objections and dilatory tactics of the rule enforcement camp. Yet even as they engage in these guerilla tactics, many environmental NGOs will also feel that they have no choice but to participate in collaborative processes, where the key decisions shaping our environmental future will be made.

#### IV. NEW ROLES FOR LAWYERS: DEMANDING NEW SKILLS AND OLD

What is the role, then, for lawyers in the construction of the new, post-rule model of environmental regulation? Without question, lawyers are being called upon to serve as advisors and advocates for a variety of clients—industries, landowners, environmental NGOs, and government agencies—in the new collaborative governance processes. Leaders of the New York City Environmental Bar report that they spend an increasingly large fraction of their time representing their corporate clients in a variety of non-adversarial collaborative or “stakeholder” processes, and their pro bono practice increasingly consists of representing nonprofit clients in virtually identical processes.<sup>66</sup> Although their prior training and experience may not fully equip them to serve these unconventional roles, they nonetheless bring to the task indispensable skills that few other professionals can match. They are skilled in the arts of oral and written advocacy and negotiation, attentive to detail, accustomed to examining complex problems from many angles of vision and devising creative solutions, capable of identifying and avoiding (or, where necessary, creating) ambiguity, alert to the downside risks of legal and financial liability, and knowledgeable about and adept at maneuvering through the complex legal, institutional, and political terrain within which decisions are made. They are also skilled at refining generalized policy formulations into more precise operational

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65. See generally Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ENVTL. L. REP. 10909 (2000) (arguing that experiments in “civic environmentalism” will lead to the elimination of the “safety net” of federal regulation, and “rollbacks” instead of “rolling rules”).

66. Personal communication with D. Evan van Hook, Partner, Sidley, Austin, Brown & Wood, and chair of the Environmental Law Committee, Association of the Bar of the City of New York.

instruments.

What they may lack, however, is the breadth of vision, knowledge, and experience to engage in genuine, constructive, open-ended problem solving of the kind typically needed to resolve such complex environmental challenges as managing watersheds or ecosystems. Their legal training, experience, and the legal culture of which they are a part may incline them toward fixed, rule-based solutions or, alternatively, toward split-the-difference, least common denominator negotiated settlements.<sup>67</sup> These settlements may turn out to be no solution at all, but rather impediments to the truly creative problem-solving processes that are needed to move forward experimentally and provisionally under conditions of complexity and uncertainty.

In part, perhaps, this is a question of time and experience. Collaborative environmental decision-making processes are relatively new, and lawyers are new to these processes. Eventually, we might expect that savvy lawyers will begin to acquire and synthesize the necessary skills and lessons of experience, and in a competitive market the most skilled and successful should eventually win out over the less capable. But it is also a question of self-definition and legal culture. There is a critical function to be played by the academy and by successful practitioners in reconceptualizing the role of the environmental lawyer, from the sword-wielding, rule-enforcing, crusading public interest litigator of yesterday, to the creative, flexible, interdisciplinary, and visionary problem-solver of tomorrow. Role models, mentors, writers, and teachers are needed to help guide practitioners, law students, and legal academics through this new landscape, and to shape their understanding of the possibilities and perils they face in the emerging era of collaborative environmentalism.<sup>68</sup>

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67. There is some tendency in the literature to conflate collaborative decision-making processes with negotiated rule-making and other forms of alternative dispute resolution (ADR). See, e.g., Cary Coglianese, *The Limits of Consensus: The Environmental Protection System in Transition: Toward a More Desirable Future*, 41 ENV'T 28 (1999). In my view however, they are distinct phenomena. Typically, negotiated rule-making and ADR more generally involve one-time bargaining from fixed interests toward fixed, split-the-difference outcomes. Collaborative decision-making processes of the kind described here are typically much more open-ended, continuous, and experimental, involving agreed but provisional measures to address ongoing complex problems, explicitly with the recognition that the decision-making process will continue and subsequent adjustments will be made in light of experience and new learning.

68. To that end, Columbia Law School recently launched a new course in Stakeholder Environmental Decision-Making, taught by Katherine Adams and Evan van Hook, two experienced practitioners at Sidley, Austin, Brown & Wood. The course combines academics with a hands-on, practical engagement in collaborative decision-making processes on behalf of the instructors' pro bono clients. A course description is

The primacy of lawyers in these processes should not be taken for granted. Lawyers will have their chance to make a contribution, but they also risk marginalization if they fail to produce value-added services for their private, public, or nonprofit clients. Increasingly, environmental lawyers find themselves competing with consultants, accountants, engineering firms, and others. In the view of one leading practitioner, “[t]his threat stems in large part from the nature of . . . a field where many of the rules embody complex scientific and engineering concepts and vocabularies. In such a context it is often difficult to tell where the practice of law ends and the practice of other professions begins.”<sup>69</sup>

While this statement was made about environmental law practice generally, nowhere is it more true than in the complex, interdisciplinary, collaborative environment of ecosystem management, where lawyers may be suspect as potential obstructionists, or simply as excess baggage, if they fail to make a constructive collaborative contribution. Lawyers must learn to be effective interdisciplinary team players, working side-by-side with other professionals, understanding and incorporating their unique contributions, while bringing to bear the best skills that their own training and experience have to offer in solving problems so complex that they do not lend themselves to resolution by the mere application of the rules laid down.

Law and lawyers should be neither irrelevant nor merely incidental to this new order. As effective advocates and advisors to their clients, and as architects and builders of new institutional arrangements, lawyers can play a critical role in moving collaborative decision-making toward success. Law and lawyers can be helpful, for example, in defining and policing a minimum level of procedural regularity, so as to reduce opportunities for interest-group capture, to enhance opportunities for genuine democratic participation, and to reduce manipulation of fluid and thus far largely unstructured processes by cynical agency officials or self-interested rent-seekers of any stripe.<sup>70</sup> Lawyers bring to the table

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available on the Columbia Law School website, [http://www.law.columbia.edu/academics/curriculum\\_2001\\_2002/courses\\_2001\\_2002/6668.htm](http://www.law.columbia.edu/academics/curriculum_2001_2002/courses_2001_2002/6668.htm) (last visited Apr. 16, 2002).

69. Gerrard, *supra* note 1, at 6.

70. *Cf.* Farber, *supra* note 2, at 72-76 (questioning the “workability, transparency, and accountability of the new governance structures” given the possibility of capture by local economic interests and concerns as to whether “public interest” participants would be truly representative and capable of acting constructively). These concerns apparently led Farber to a tentative rejection of the collaborative model in favor of a “simpler” bilateral bargaining approach involving government and regulated entities. *Id.* at 79-80. But merely by identifying some possible pitfalls, Farber has not

considerable expertise in questions of regulatory design and the architecture of successful institutions and processes. Careful and thoughtful attention to the structures and processes of accountability and public participation is necessary if collaborative ecosystem management is to become a durable and productive part of the institutional landscape—something more than a disparate series of slapped-together, ad hoc arrangements, and more than the buzzwords into which it could easily degenerate.

Moreover, a great deal of work remains to be done at the macro-institutional scale, as we try to move from a series of discrete local experiments to a larger and more robust coordinated system of collaborative ecosystem governance institutions, without losing the local, participatory, and experimental flavor that appears to be so critical to their success. Linkages among local experiments, central monitoring, systematic efforts to learn from and diffuse the most successful models (and to learn from the failures), and larger structures and mechanisms of accountability to the public at large are generally not well-developed at this stage.<sup>71</sup> These, too, are questions of institutional design in which lawyers are well suited to play a leading role.

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established that the approach is unworkable in principle, and indeed the many instances in which the collaborative model seems to be working in practice strongly suggest that these pathologies can be avoided. The challenge, a familiar one for lawyers, is to design adequate procedural safeguards to minimize the risk of their occurrence and/or to mitigate the damage should they arise.

71. See, e.g., Bradley C. Karkkainen et al., *After Backyard Environmentalism: Toward a Performance-Based Regime of Environmental Regulation*, 44 AM. BEHAV. SCIENTIST 692, 704 (2000) (arguing that the rapidly growing system of Habitat Conservation Plans (HCPs) suffers from a lack of overall coordination, resulting in little learning from local experience and weak diffusion of successful approaches).