January 1999

Environmental Regulation - Are There Better Ways

Nicholas C. Yost

Follow this and additional works at: http://scholarship.law.berkeley.edu/elq

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/elq/vol25/iss4/2

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38SG1P

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Ecology Law Quarterly by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Environmental Regulation—Are There Better Ways?

Nicholas C. Yost*

We Americans are remarkably pragmatic in the way we do things—if it works, it's good. That method—with its creative, innovative, experience-influenced aspects as well as its chaotic, duplicative, and even irrational features—has shaped the American approach to environmental protection. Citizen action, business responsibility (and sometimes irresponsibility), community awareness, state semi-sovereignty, national uniformity, even international compatibility—all have legitimately influenced how we as a people care for the environment in which we live. And the results have, somehow, been generally beneficial. At the same time, people generally recognize that there can be still better ways of addressing our environmental challenges.

In this brief introduction to our symposium, let me make several points that I hope will be useful to bear in mind throughout the proceedings. I will start with three preliminary points and then turn to my major theme.

First, some of our answers regarding who regulates or should regulate what environmental issues flow from the environment itself. In other words, the medium delineates the concern and invites its own level of regulation.

Second, one cannot stress strongly enough that most environmental regulation in America is, despite the publicity, at the state level.

Third, let me suggest that much of the law that influences the environment in which we live is not aimed at setting standards or even at giving direction, but rather at placing tools in

---

* Partner, Sonnenschein Nath & Rosenthal. Mr. Yost served as Deputy Attorney General in charge of the Environmental Unit of the California Justice Department and as General Counsel to the Council on Environmental Quality under President Carter. Mr. Yost also chaired the Standing Committee on Environmental Law of the American Bar Association and the California State Bar's Committee on the Environment.

Copyright © 1999 by ECOLOGY LAW QUARTERLY
the hands of members of the public so that they can participate in solving their own environmental problems— as befits citizens of a democracy.

Finally, I turn to my major theme of finding better ways than the traditional command and control methodologies, recognizing at the same time that, despite their shortcomings, those means have given us a high degree of environmental protection. I will leave you then with fourteen questions to pose as part of the examination of better ways of doing things.

Let me back up now and elaborate on these points. First, in some measure, nature, in the form of the various environmental media, shapes its own regulation. This symposium will address how different environmental threats are regulated and how various forms of regulation take place at different levels of government. It is worth bearing in mind that some of those institutional divisions of authority are shaped by the environment itself.

Smell, for instance, spreads only so far. It is of great concern to people near its source, but not of much interest to those further removed. You are apt, therefore, to find your local city officials more interested in smell than the Federal Congress.

Noise too, even the loudest noise, is generally quite local in its impact, although mobile sources of noise, like aircraft and noisy manufactured items, may call for other than local regulation.

Air pollution, on the other hand, can include everything from dust stirred up at a local construction site, to the greenhouse gases that lead to global warming, to the chlorofluorocarbons which deplete the ozone layer.

Likewise, water pollution may have local or more widespread effects. Pollution deposited into a pond may affect only those living nearby, while pollutants dumped into streams from eastern Montana to western Pennsylvania may find their way down various river systems to New Orleans and the Gulf of Mexico.

We think of land as particularly local. Yet land can have a wider significance, whether it is Yosemite, which is a marvel to the world, or a watershed whose preservation affects the drinking water of seemingly remote people.

So, to reiterate, some element of environmental regulation is determined not so much by institutional decision, as by the nature of the environmental harm or amenity.

Let me turn now to my second preliminary point, that states accomplish most of the environmental regulation. To quote a
leading writer on the subject, "[e]nvironmental law happens primarily in the states."

More people deal with state environmental laws than with those enacted at the Federal level. Therefore, the vast majority of affected persons and companies interact primarily with state, rather than federal, environmental authorities.

In addition, states have traditionally been a source of innovation in environmental protection, serving as laboratories for new approaches. By way of example: California's vehicular air pollution laws preceded Federal enactments and, indeed, the Federal law today recognizes in an explicitly non-preemptive manner the stricter California standards. Similarly, Pennsylvania's surface mining law became the model for the Federal Surface Mining Conservation and Recovery Act.

While the National Environmental Policy Act (NEPA) was the model for numerous state environmental policy acts, the Council on Environmental Quality's (CEQ) NEPA Regulations in turn built on the experience of Massachusetts in adopting the requirement for "scoping" an Environmental Impact Statement (EIS) before it is prepared.

Other state laws have not been imitated at the Federal level, but may still serve as examples for other states. For instance, California's Proposition 65, concerning safe drinking water and warnings to the public about potential hazards, has been closely


2. See MCELFI SH, supra note 1; Daniel Yost, States as Environmental Laboratories: A U.S. Concept and Its Potential for EC Applications, 8 INT'L ENVTL AFF 308 (1996). Justice Brandeis' description of states serving as laboratories for social and economic experiments aptly summarizes this potential. Id. at 509. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice. Co. v. Liebmann, 285 U.S. 262, 386-87(1032) (Brandeis, J., dissenting).


watched nationally.\textsuperscript{12} New Jersey's Environmental Cleanup Responsibility Act provides for the clean-up of industrial properties upon their transfer to new owners and seeks to enlist the market to secure site remediation.\textsuperscript{13} Massachusetts has enacted legislation aimed at limiting the use of toxics in production processes, assuming that less hazardous materials entering the process will result in less hazardous substance in the waste stream at the end of the process.\textsuperscript{14} In short, the states—or at least some of them—have vigorously innovated in environmental protection to the benefit of the entire nation. This being a symposium conducted by the University of California, it is not inappropriate to quote the Ninth Circuit, "The United States may have learned more from California about the need to protect the environment than has California from the United States."\textsuperscript{15}

Why, given this rich history, have the states' roles in environmental protection been less heralded than the federal role? I would suggest at least three reasons. First, there is just too much state environmental law for any one person to fully comprehend. There are those who devote their legal careers to, for instance, the Federal Clean Air Act or its California counterpart. Expand the scope to include all environmental media as well as environmental laws that protect our natural resources and then multiply it by 50 states. The resulting volume of law and regulations is just too much to grasp; thus, it does not get written about. Second, Washington provides a convenient base for the news media, both the popular and the trade press, while national coverage of 50 state capitals does not exist on a comprehensive basis. Finally, while I have described the accomplishments of certain of our states, others quite simply lack stellar environmental records. It is for these states that the concept of a federal floor was developed and remains necessary.

A variety of relationships exist between state and federal environmental regulatory agencies and the statutes which they enforce. Sometimes independent programs may quite simply duplicate one another. The Army Corps of Engineers' wetlands program exemplifies this duplication.\textsuperscript{16} States with laws similar to the federal provision essentially perform similar duplicative reviews.\textsuperscript{17} In a number of medium-specific pollutant regulatory

\begin{itemize}
  \item \textsuperscript{12} See \textit{Cal. Health and Safety Code} § 25249.5-25249.13 (Deering 1988).
  \item \textsuperscript{14} See \textit{Mass. Gen. Laws Ann.} ch. 21[l], §§ 1-23 (West 1998).
  \item \textsuperscript{15} Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 401 (9th Cir. 1989).
  \item \textsuperscript{16} See 33 U.S.C. § 1344 (1994).
  \item \textsuperscript{17} The Corps of Engineers has begun a process of removing this duplication in
\end{itemize}
schemes, some sort of accommodation is achieved by having the federal government set certain criteria and then "delegate" authority to states meeting those standards.\(^1\)

There exist, however, legitimate needs for Federal environmental laws. Such laws ensure a "level playing field" and make it more difficult for states with low environmental standards to attract industry on the basis of leniency. A legitimate need exists for environmental regulatory roles encompassing the nation or at least regions of the nation. Issues of transboundary pollution require regional or national solutions. For example, the states of the Northeast complain of air pollution from the Ohio River valley, while the convergence of metropolitan areas at or near state borders (such as New York City) makes the need for greater than single-state environmental regulatory systems obvious. America's great waterways, such as the Mississippi river system, flow through many downstream states. Goods are manufactured and sold in interstate markets where 50 separate regulatory systems could create very real and unproductive burdens.

Multinational and global environmental issues are gaining increased recognition. Ozone depletion, climate change, endangered species' protection, and marine resources are some of the matters which have attracted international attention and cooperation. For many of these issues a federal spokesperson for America's interests has advantages over a multiplicity of voices, although this opportunity for international cooperation also presents potential threats to the environmental protection enactments of our states and local governments.

Third, much of the development of environmental law has not been a process of promulgating answers, but of providing tools. That approach, after all, is appropriate in a democracy. Public involvement laws provide opportunities to interested persons to participate in their governance. It has been said that if you give a person a fish, you feed her for a day. If you teach a person to fish, you feed her for a lifetime. Much of environ-

\(^1\) See, for example, Clean Water Act § 402 (National Pollutant Discharge Elimination System). 33 U.S.C. § 1342 (1944). Such "delegations" have often been accompanied by mandates to the states, sometimes without providing the funds to implement them. This issue of "unfunded mandates" has been a sore subject for states. See Yost, States as Environmental Laboratories, supra note 2, at 316-317. The observation is sometimes made that this practice is not really "delegation" in that states may be acting under their own police power rather than under Congressionally delegated Commerce Clause power. See McELFISH, supra note 1, at 6-3.
ARE THERE BETTER WAYS?

Environmental legislation teaches people "to fish" and provides them with the tools to take part in protecting their environment. By way of example:

- The NEPA, the California Environmental Quality Act (CEQA), and various other state environmental policy acts all include an opportunity for the public to comment on draft environmental impact statements or reports in which the government agency is outlining the environmental effects of proposed actions. These laws likewise compel the agency, in its final statement or report, to respond to each of those public comments.

- The Emergency Planning and Community Right-to-Know Act provides for a so-called Toxic Release Inventory, whereby specified industries must report their total release of toxic pollutants into all media on a yearly basis. That listing has enabled citizens in the community to know what is being released into their environment and permitted national organizations to make comparisons of different companies' environmental records.

- The citizen suit provisions of many environmental statutes have authorized citizens to sue both those alleged to be violating the laws and the government agencies that have failed to adhere to statutory duties.

- Most of the major environmental statutes provide attorney fees to successful citizen plaintiffs. The Equal Access to Justice Act further makes provision for attorneys' fees to citizens in many matters not otherwise covered by the fee shifting provisions of those citizen suit authorizations.

- Generally, the Administrative Procedure Act's (APA) notice and comment provisions allow public participation in rule-making.

21. See Yost, supra note 8.
• Absent a specific statutory exception, the Freedom of Information Act and its state analogues permit public access to public records.28

• Similarly, the Government in the Sunshine Act allows the public access to most meetings of multimember headed agencies.29

• On a more experimental level, the APA has been amended to allow "negotiated rulemaking," also known as regulatory negotiations or "reg neg" in the vernacular.30 In short, the stakeholders in a rulemaking, including business, environmentalists, and state governments, are provided a forum to see if they can negotiate the terms of regulations to serve all of their needs, rather than fighting with one another over those terms.

Let me now pass to my major theme of finding better ways to protect our environment. One of the wisest observers of, and participants in, our environmental protection systems, Terry Davies of Resources for the Future, recently made a comment the significance of which is both accurate and sad. In his words:

The flagship environmental program of the Clinton administration in the 1996 election was "Project XL"—a set of initiatives designed to circumvent the inflexibility of existing pollution control laws. If the showcase project of a pro-environment administration is designed to help get around the environmental laws, then something is wrong with those laws and the programs that implement them.31

As this quote implies, there has been an enormous amount of thought given in the last several years to how better to structure our systems of environmental protection. That thought, however, has not yet coalesced into a consensus as to what steps should be taken. That said, analysis to date has illuminated criteria that can help us devise improved means of environmental management. As we explore better ways of doing things, let me suggest 14 questions to serve as benchmarks for evaluating change:32

---

32. Many of these suggestions came out of the author's experience in serving on California's Unified Environmental Statute Commission (1994-1997). See CAL. ENVTL. PROTECTION AGENCY, UNIFYING ENVIRONMENTAL PROTECTION IN CALIFORNIA (1997), (particularly the appended report of the "Brass Ring" Subcommittee, which the author chaired). This document is also available on the internet at
1. Does the approach *preserve and enhance* the environment? This question may be obvious, but it is, after all, the purpose of environmental laws.

2. Does the approach set *performance standards* for industry, enlisting companies' creativity in solving environmental problems rather than micromanaging through traditional command and control? Industry asserts it can do the job better and cheaper if only rigid constraints are removed.

3. Does the approach create incentives, not only to comply with static requirements, but to go *beyond compliance*, ensuring *continuous improvement*? This approach would appeal to the environmental community, ensuring, as it does, the opportunity to provide for bettering the environment rather than just meeting traditional standards.

4. Does it foster ways to turn *environmental liabilities into assets*? A decade ago many looked on contaminated urban sites as liabilities—places to be gotten rid of or ignored. Today we have come to view some properties as "brownfields," sites to be cleaned up and restored to productive use.

5. Does the approach foster *collaboration* in environmental problem solving rather than effort-consuming antagonisms? Fighting problems together, rather than fighting each other, can be both rewarding and productive.

6. Does the approach make rational the *State-Federal* role such that one, not both, is overseeing a particular private sector activity? Good reasons often exist for a particular environmental regulatory system. There are rarely good reasons for two such systems that perform duplicative functions.

7. Is the approach to solving environmental problems *integrated or unified* so that it truly solves environmental problems rather than chasing them to another medium? This may be the most pervasive institutional deficiency in

current schemes of environmental regulation. For example, in California we have institutional mechanisms that have brought us a high degree of environmental protection, but which could not have been designed more pointedly to address only single medium pollution. We have an Air Resources Board, which regulates mobile sources of air pollution; air pollution control districts which address stationary sources; a state and regional water boards, which regulate water pollution; a Department of Toxic Substances Control, which regulates hazardous waste, and so on. In all, these are an exceptionally highly regarded set of agencies, but as single purpose as you can get. No agency is charged with looking at the environment as a whole. The California Environmental Protection Agency is superimposed above the state agencies, but it is not empowered tell the single purpose agencies what to do. What is done in one environmental medium has its impacts in other media, but we continue to regulate on a single-medium basis. For instance,

- The threats to the clarity of Lake Tahoe come not so much from activities in the lake as from those on the land near the lake.\(^33\)
- 80-90 percent of the PCBs in the Great Lakes are due to air deposition.\(^34\)
- At one point in time, Philadelphia's own wastewater treatment plant was the city's biggest source of air pollution.\(^35\)
- Water quality in the San Francisco Bay is in large part a function of decisions regarding the allocation of water resources.\(^36\)

8. Does the system foster the setting of priorities among environmental problems, targeting the most important ones, with degree of risk being the primary scale?

9. Do pollution control technologies actually control pollution rather than shifting it to another medium? One EPA study showed that a typical waste water treatment plant controlled only half of the toxic substances that went into it, finding that "of the remaining 50 percent, 30 percent went to the land in the form of sludge, 40 percent volatil-
ized and become air pollutants, and the remaining 30 percent were discharged back into the water.\(^{37}\)

10. Does the approach prevent pollution rather than cleaning it up later? This is, after all, how we avoid the Superfund and the Resource Conservation and Recovery Act corrective action problems of the future.

11. Does what is proposed reduce the cost of pollution control?

12. Does the approach distribute the costs and benefits of environmental protection fairly, keeping in mind the set of issues we now call “Environmental Justice”?

13. Does the approach foster the identification of overlooked environmental problems? Nobody used to ask what happened to the sulfur oxides and nitrogen oxides that were transported long distances, because they were not air pollutants in the vicinity of the source. That contributed to the acid rain problem. Further, nobody used to ask what happened to CFCs when they were released because they were not in anybody’s jurisdiction. That led to the stratospheric ozone problem.

14. Does the approach foster accountability and simplicity? Is it something that people can understand?

We are in a time of change. Our existing systems of environmental protection have given us a high quality environment. But there is, at the same time, a widely shared consensus that there can be better ways of doing things; means of protecting our environment which are at once more productive and efficient and which also hold the promise of advancing the goal of environmental protection. I would suggest that sensitivity to the 14 questions posed above will lead to sounder, more broadly accepted, and still more successful approaches to environmental law, guided by our American tradition of pragmatism.

---

37. See id. at A-10 to A-11.