1 - 1

UNDERSTANDING ENVIRONMENTAL ADMINISTRATION AND LAW

Susan J. Buck

Foreword by R. W. Behan

ISLAND PRESS
Washington, D.C. • Covelo, California

751 Reading #1

CHAPTER TWO

ENVIRONMENTALISM IN THE UNITED STATES

American environmentalism is rooted in the works of philosophers such as Henry David Thoreau, preservationists like John Muir, and politically active conservationists like Theodore Roosevelt and Gifford Pinchot, but the contemporary emphasis on environmentalism as regulatory policy is of fairly recent origin. This chapter traces the growth of the environmental movement in the United States, from its beginnings in the 1960s. The keystone legislation of the thirty-year period from the sixties to the nineties is the 1969 National Environmental Policy Act (NEPA). The forces leading up to NEPA's passage and the intentions of Congress in passing it are discussed in the second section of the chapter. The third section discusses the *Calvert Cliffs* case, which set the stage for the powerful application of NEPA's environmental impact statement (EIS) provision. The fourth section takes a brief look at the Environmental Protection Agency set up in 1970. The last two sections discuss the "environmental decade" of the seventies, and the developments of the eighties.

BEGINNINGS OF THE ENVIRONMENTAL MOVEMENT

In the fall of 1962, Rachel Carson's book *Silent Spring* was published, with little fanfare. Formerly a biologist with the U.S. Fish and Wildlife Service, Carson had written wonderful, lyrical books about nature; this book took on the chemical industry in much the same way as Ralph Nader's *Unsafe at Any Speed* would take on the auto industry in 1965. The chemical industry predicted an early demise for the book: "It is fair to hope that by March or April *Silent Spring* no longer will be an interesting conversational topic."[1] The title was an act of genius, and the American imagination was caught by the vision of a spring devoid of birdsong or katydids or bullfrogs bellowing in the night. Carson's book is still an interesting conversational topic a quarter of a century later. Its effects were larger than reducing the use of pesticides or saving the bald eagle. The book was a triggering event for the entire environmental movement because it mobilized the average American. Biocide was in everyone's back yard.

There were other forces at work as well in the sixties. The Vietnam War was provoking intense controversy and conflict in American society, and the counterculture movement was prompting a romantic, back-to-nature perspective. The financial prosperity of the fifties, coupled with increasing mobility and leisure time, regenerated interest in outdoor activities. Causes were "in," and the environment, with its appeal to health and aesthetics and its underlying antibusiness philosophy, was a prime candidate to become a cause. This cause was embraced so thoroughly by the American people that it has now become one of our enduring American values, as Ronald Reagan discovered to his dismay when he misinterpreted his electoral mandate to include reduced environmental protection.

Looking back through the sixties, we can see the inexorable building of American consciousness toward the first Earth Day, in 1970. In 1963 the amended Clean Air Act authorized federal hearings on *potential* air pollution problems; in 1964 the Wilderness Act set aside tracts of land and barred them permanently from development. In 1966 the Endangered Species Preservation Act was passed. In 1968 the spectacular American Apollo space flight that circled the globe produced moving photographs of a fragile planet.

Early in 1969, a major trigger event shocked the American public into demanding immediate action to protect the environment. On January 28, Union Oil Company's Platform A began to disgorge oil. Over eleven days, 235,000 gallons of crude oil spread out, ruining forty miles of Santa Barbara's beautiful Pacific beaches. Thousands of birds and mammals died; one dramatic photograph shows an oil-soaked bird surrounded by debris and gazing in a doomed stupor over the surf. The spill became a national event, searing the public conscience with images of ruined water and pathetic, dying animals. Five months later the Cuyahoga River in Ohio caught fire. One of President Nixon's aides wrote that the political mood in Washington engendered by the public outcry could only be captured by the word *hysteria*. On January 1, 1970, President Nixon signed the National Environmental Policy Act, arguably the most important piece of environmental legislation in the century.

THE NATIONAL ENVIRONMENTAL POLICY ACT

Congress had five major objectives in passing the National Environmental Policy Act (NEPA) of 1969. These objectives were spelled out in section 2 of the act:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[2]

NATIONAL POLICY

The first purpose of NEPA was to provide a clear mandate for all federal agencies, regardless of their mission or position within the government, "to create and maintain conditions under which man and nature can exist in productive harmony." [3] There were no exemptions for any federal agency; all were expected to comply and to cooperate with other agencies.

ACTION-FORCING REQUIREMENTS

The second objective of the act was to establish action-forcing procedures for the federal agencies. It was not enough to contemplate environmental concerns; the agencies were now required to write an Environmental Impact Statement (EIS) for all federal projects and to circulate the statements to local, state, and other federal agencies for their comments. This provision was to explode into a powerful weapon for the citizen lobbies to delay or to halt numerous projects.

The act stipulated that the social sciences were to be integrated into the decision processes; no longer were the relatively simple physical data sufficient. This provision has not been fully utilized. For example, a model social impact assessment was performed on the proposed Chief Joseph Dam. In considering the impact that an influx of several hundred unmarried construction workers would have on the recreation demands and social patterns in a rural town with a population of less than two thousand, the Army Corps of Engineers analysts wrote that "patterns of adult entertainment of new citizens may be somewhat different" from those of the original residents.[4] This is certainly an understatement.

Other action-forcing requirements were that agencies must consider qualitative information, must protect the global environment where consistent with the foreign policy of the United States, and must deliberately seek the least damaging alternatives. This latter provision was to cause some difficulties during the first Reagan administration. One of Reagan's first acts as president was to issue Executive Order 12291, which mandates cost-benefit analyses on all proposed federal regulations, in effect giving the Office of Management and Budget the authority to delay implementation of regulations that were not the most cost-effective. Since this raises conflicts with clear Congressional expectations of environmental protection, which is often *not* the least costly way to accomplish goals, Reagan's Executive Order faced a rare legal challenge, and the question of its validity was still before the courts in 1990.

COUNCIL ON ENVIRONMENTAL QUALITY

Another objective of NEPA was to create the Council on Environmental Quality (CEQ). This council, consisting of three members appointed by the president subject to Senate confirmation, has statutory obligations to collect data and to make an annual report to the president. Reagan tried to abolish the CEQ early in his first administration but was thwarted by the statutory requirement that a council must be appointed. He contented himself with cutting the council's budget by 62 percent, thus reducing both its staff and its reports.

ENVIRONMENTAL QUALITY REPORT

Just as the CEQ must report annually to the president, the president must send to the Congress an annual Environmental Quality Report which sets out:

> (1) the status and condition of the major natural, manmade, or altered environmental classes of the Nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment; (2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation; (3) the adequacy of available natural resources for fulfilling human and economic requirements of the Nation in the light of expected population pressure; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local government, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation.[5]

Clearly, the Council on Environmental Quality has a substantial role to play in providing the substance of this report.

DEVELOPMENT OF INFORMATION

The federal government, and especially the CEQ, is to foster the development of information on and indices of environmental quality. This is not as simple as it might sound. For example, Maryland and Virginia have shorelines on the Chesapeake Bay. Several fisheries stocks migrate between the two states (and sometimes into federal waters). Both states have sophisticated biological data collection systems, but the two systems are not statistically compatible. The data collected in Virginia measures slightly different variables at different times in the life cycles or in the calendar than does the data collected in Maryland. However, statistical packages are being developed to integrate the data sets. The Chesapeake Bay problem is relatively simple, involving only one (admittedly large and varied) body of water and two state governments. Other problems are more complex. Some are simply not amenable to even the most cooperative of efforts. For example, the ecological systems associated with water supplies vary so extensively across several thousand miles of territory that no single data set can adequately describe them.

Of the five objectives of NEPA, the most impact has come from the first two: the universal federal mandate to be concerned for the environment, and the action-forcing procedures exemplified by the EIS requirement. The first court decision to examine the underlying intent of NEPA was the *Calvert Cliffs* case.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

THE ENVIRONMENTAL DECADE

The seventies have been called the environmental decade. Major pieces of legislation were put into place during the ten-year period between NEPA and the first Reagan administration. In 1970 the Resource Recovery Act (Solid Waste Disposal Act) was passed, the Clean Air Act Amendment was enacted, and the EPA was established. April 22, 1970, was Earth Day, celebrated by millions of Americans, who were also celebrating the apparent end to our involvement in Vietnam. In 1971 Barry Commoner published *The Closing Circle*, and the Alaska Native Claims Settlement Act authorized federal nomination of "national interest lands." In 1972 the Federal Water Pollution Control Act, the Federal Environmental Pesticide Control Act, the Ocean Dumping Act, and the Coastal Zone Management Act were all passed. After this, legislation was refined rather than initiated; the most impressive legislative achievement was the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund).

Nonlegislative landmarks included the United Nations Conference on the Human Environment, which led to the United Nations Environmental Programme, and the publication of *The Limits to Growth* by the Club of Rome and *Small Is Beautiful* by the English economist E. F. Schumacher. However, the environmental accomplishments of the seventies were overshadowed by the tragedies of Love Canal and Three Mile Island.

In October 1973, the Organization of Petroleum Exporting Countries (OPEC) voted to cut its oil production by 5 percent; the Saudis halted their oil exports to the United States, threatening to maintain their embargo until the Nixon administration changed its pro-Israeli stance. Fuel prices at the gas pump shot up, and Americans old enough to be driving in 1973 remember long lines and quotas on gasoline. The "crisis" continued in one form or another through the Ford and Carter administrations; even when petroleum products were reasonably plentiful, the fear of a recurrence drove federal energy policy. Reagan was committed to deregulation even in energy policy, believing that a free market and regulatory relief would be most beneficial for the beleaguered energy industry. This brought his administration in direct conflict with environmentalists as federal lands and the outer continental shelf were opened, or proposed for opening, for exploration.

ENVIRONMENTAL ACTION IN THE EIGHTIES

With many of Reagan's policies, what was perhaps bad for the environment was good for the environmental movement. During the seventies, environmental concerns became routinized, and the dramatic events of the sixties faded from public memory. The scandals of the Reagan administration in the EPA, and the lightning-rod activities of Reagan's secretary of the interior, James Watt, reignited general public concern.

Arguably the best thing that could have happened to the environmental movement was Reagan's appointment of Anne Gorsuch (later Burford) to head the EPA and of James Watt to be Secretary of Interior. Brilliant in their own ways, neither Gorsuch nor Watt was sympathetic to the conservation, preservation, and regulation ideologies of the environmental establishment. Warning bells were sounded when Reagan discovered killer trees robbing us of our oxygen. Watt explained during his Senate confirmation hearings that conservation was necessary only for one more generation, until the Second Coming, and he changed the buffalo on the Interior Department stationery to face right instead of left. "Good science" was the excuse used to delay environmental decisions. Even in the mid-eighties the Reagan administration was refusing to acknowledge the damage done on this continent by acid rain, pending further scientific investigations. During Burford's administration the EPA became politicized, or at least it was perceived to be politicized, causing damage to its effectiveness with both the regulated industries and the Congress, neither of which now trusted its findings or accepted its decisions.

Despite these problems, several important pieces of legislation were passed or renewed during Reagan's tenure. In 1986, Superfund was reauthorized in the Superfund Amendment and Reauthorization Act (SARA). SARA did more than simply continue the 1980 Superfund legislation. It added, among other provisions, a community right to know, which has caught the attention—and conscience—not only of communities but also of the businesses within the communities. Now local communities must be informed of the location, nature, and volume of all hazardous materials within their jurisdiction. Many corporations had simply never bothered to assemble this information, and at least one, DuPont, was so horrified at its aggregate data that it initiated a nationwide chemical reduction program. The focus of SARA expanded from simply cleanup to include the protection and management of natural resources. The new requirements for natural-resource trustees included, for the first time, payment for habitat destruction and for indirect damage to natural resources. This expanded focus requires unprecedented cooperation between the regulatory agencies and the resource-management agencies at both the federal and the state level.

Reagan's heir in the White House, George Bush, promised to be the environmental president. The early signs were encouraging. He appointed William Reilly, president of the World Wildlife Fund and Conservation Foundation, to be head of the EPA. Bush's choice of Michael Deland, former director of EPA's Region I office in Boston, as chairman of the CEQ was widely supported in the environmental communities. However, Bush's other nominations to environmental positions were less well received. For example, James Cason, Bush's nominee to head the Forest Service, was not confirmed by the Senate because of charges he was biased toward mining and oil interests.

In his efforts to promote environmentalism, Bush was partly hampered by budget concerns; perhaps for this reason he has so far done little to prove that his proenvironment campaign position was more than just rhetoric. With the federal deficit perceived by the majority of Americans as the most severe problem facing the country, and with energy sources increasingly uncertain, generous environmental budgets are unlikely. Only modest budget increases have been projected for the Bush administration, and the machinations of the "Hundred and Worst" Congress in resolving the budget crisis of 1990 were not encouraging. The federal government responded slowly to the *Exxon Valdez* spill off the coast of Alaska in March 1989, and the administration was obstructive during the initial phases of setting up an international conference on global warming. The old Reagan specter of "good science" reappeared during discussions of global warming, the depletion of the ozone layer, and acid rain.

Reagan's New Federalism continued the policy of federal environmental decisions being implemented by the states, and as the states face economic disasters, environmental enforcement may suffer as well. As a good conservative, Bush favored market solutions to environmental problems, and thus encountered opposition to new programs from the largely Democratic Congress. Although he seemed to prefer regulatory reform over deregulation (one might argue that not much remained to deregulate, leaving only reform as an alternative anyway), budgetary constraints inhibited the flexibility of either the president or the Congress to commit needed resources even if desired.

Suggested Reading

Anderson, Frederick. *NEPA in the Courts: A Legal Analysis of the National Environmental Policy Act.* Baltimore: Johns Hopkins University Press for Resources for the Future, 1973. An excellent discussion of the purposes behind NEPA and of its impact in the first three years after passage.

Lash, Jonathan, Katherine Gillman, and David Sheridan. *A Season of Spoils.* New York: Pantheon, 1984. Subtitled *The Reagan Administration's Attack on the Environment,* this book exposes the excesses of the first Reagan administration. While it is certainly biased in its interpretations of the facts, the research is solid. The book is entertaining as well as informative.

Nash, Roderick. *American Environmentalism: Readings in Conservation History.* 3rd ed. New York: McGraw-Hill, 1990. A superb collection of original documents in American conservation history, with clear introductory comments. Be sure to get the third edition, as the first two are not edited as crisply.

Vogel, David. "The Politics of the Environment, 1970–1987: A Big Agenda." *Wilson Quarterly* 11 (no. 4, Autumn 1987): pp. 51–68. A graceful summary of the political influences on major environmental actions during the seventies and eighties.