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ENVIRONMENTAL LAW

United States Environmental Law
International Environmental Law in the U.S.

ENVIRONMENTAL LAW: UNITED STATES ENVIRONMENTAL LAW

Environmental law has grown, from a sparse set of *common-law precedents and local ordinances, to encompass a vast body of national regulatory legislation to protect human health and to preserve natural resources for future generations. Numerous federal and state agencies now implement these laws through *regulations that affect virtually every aspect of our economic lives (see ECONOMICS AND LAW). The global growth of environmental concern also is serving as a catalyst for the development of new regimes of *international law.

The Common-Law Roots of Environmental Law. While United States environmental law is now dominated by federal regulatory programs enacted during the 1970s and 1980s, its roots run deeper. For centuries common-law courts wrestled with conflicts that invariably arise when human activity interferes with the interests of others in the quality of their physical surroundings. Using doctrines of public and private nuisance, courts sought to protect communities and *property owners from the most egregious consequences of industrial activity.

Early in the seventeenth century, English courts recognized that even nontrespassory invasions of property could be actionable as nuisances. *Aldred's Case* (1611) established that even a lawful use of property, such as the construction of a pig sty, could be a nuisance if it was located next to a private home where their stench interfered with the neighbor's quiet use and enjoyment of their land. Courts adopted the Latin maxim *sic utere tuo ut alienum non laedas*, or "every man must so use his own as not to damnify another." The *sic utere* principle—that no one has the right to use their property in a manner that causes foreseeable harm to the property of others—became a universal tenet of the common law of environmental protection.

A separate branch of nuisance law, derived from the common law of crimes, deems actions that cause substantial harm to the commons (property owned by the government) to be public nuisances.

founded by John Muir and friends. In 1901, the American Scenic and Historic Preservation Society was established from state-level organizations that promoted preservation of nature and culture. The National Association of Audubon Societies for the Protection of Wild Birds and Animals was founded in 1905, uniting numerous state organizations that had been voices for conservation since 1896.

Efforts to develop the American West included a failed effort to forest the Great Plains and legislation that brought federal irrigation projects to arid lands. The Newlands Reclamation Act of 1902 dedicated money from the sale of public lands in the West to fund construction of irrigation works, altering the landscape by providing federally subsidized water to agriculture interests.

When Theodore Roosevelt assumed the presidency in 1901 upon the death of President William McKinley, the conservation movement gained an outspoken presidential champion. Roosevelt convened a national governors' conference on conservation at the White House and he pioneered the use of executive orders to protect federal lands. Beginning with his order creating the Pelican Island bird sanctuary in Florida, Roosevelt issued 53 executive orders establishing national wildlife refuges. In 1906 Congress enacted the American Antiquities Act, which authorizes the president to set aside federal lands as national monuments to preserve "features of historic, prehistoric, and scientific interest." Roosevelt used this authority to establish Devil's Tower as the first national monument. He later designated the Grand Canyon as a national monument, the first of many monuments that later became national parks.

Beginning in 1908, the Sierra Club waged an aggressive national campaign opposing construction of a dam in the Hetch Hetchy Valley, a wilderness preserve that was part of Yosemite National Park. This battle exposed sharp differences between preservationists like John Muir who wanted wilderness protected for its own sake and conservationists like Gifford Pinchot who supported conserving public lands to maximize their consumption value. While the preservationists ultimately lost the fight, their campaign gave environmental concerns national visibility. While Hetch Hetchy was flooded to provide power to San Francisco, Congress continued to create national parks, and in 1916 it established the National Park Service as part of the Department of Interior.

The Federalization of U.S. Environmental Law. Federal responsibility for environmental protection evolved gradually. In 1918 Congress adopted legislation to protect migratory birds to implement a treaty negotiated with Canada. States challenged this legislation as an infringement of their Tenth Amendment rights (see STATES' RIGHTS), but the Supreme Court upheld the law as a valid exercise of federal authority, citing the supremacy of federal law under the constitution (*Missouri* v. *Holland* (1920)).

In the decades that followed, concern for the impact of environmental conditions on human health spawned efforts to improve sewage disposal and to control smoke pollution in urban areas. Prior to the Second World World War, these concerns were regarded as the responsibility of state and local governments. Congress had adopted legislation regulating waste disposal in navigable waters in the Rivers and Harbors Act of 1899, but this law was designed to prevent obstruction of navigation rather than to protect the national environment. The federal Insecticide Act of 1910 prohibited the sale of misbranded pesticides to prevent consumer fraud rather than to control environmental risks. When deaths of workers from exposure to toxic substances grabbed national headlines, the Surgeon General convened national conferences of experts to investigate how to improve workplace safety. But it was not until the 1970s that Congress established national regulatory programs to protect public health from environmental risks.

President Franklin D. Roosevelt's New Deal programs of the 1930s laid the groundwork for the greater federal role in protecting consumer and environmental interests that Congress ultimately assumed in the 1970s. The Civilian Conservation Corps helped to restore public lands and to promote outdoor recreation. The Duck Stamp Act of 1934 provided additional funds for wildlife refuges through a federal licensing fee on hunters.

After the Second World War, the federal government assumed an active role encouraging states to adopt environmental protection measures. The Federal Water Pollution Control Act of 1948 provided federal funding to assist states in developing pollution control programs. In 1956 Congress overrode President Dwight Eisenhower's veto to launch a massive program to fund the construction of municipal sewage treatment plants. During the 1960s Congress prodded states to adopt air pollution controls in the Clean Air Act of 1963 and to develop programs to handle waste disposal problems in the Solid Waste Disposal Act of 1965.

The popularity of outdoor recreation and con-

cern over the environmental effects of toxic chemicals helped spawn a powerful national environmental movement during the 1960s. To preserve wilderness areas on public land, Congress enacted the Wilderness Act of 1964, which directed that such areas be protected to preserve their "primeval character and influence" and "natural condition" with motorized equipment, roads and commercial enterprises prohibited. In 1964 Congress also created the Land and Water Conservation Fund, funded in part by royalties from the use of public lands, which has provided critical funding for federal and state land acquisition programs.

The roots of the modern environmental movement usually are traced to the publication of Rachel Carson's work *Silent Spring* in 1962. Carson issued a stern warning about the environmental harm that could occur from a buildup of persistent toxins in the food chain as a result of pesticide use. Her warnings helped mobilize a national environmental movement. Concerned scientists formed the Environmental Defense Fund, which launched a successful campaign to have the insecticide DDT banned. Another new group, the Natural Resources Defense Council, challenged the refusal of the Federal Power Commission to consider environmental concerns when it licensed environmentally destructive power projects.

Congress responded to the burgeoning environmental movement with a remarkable burst of legislation establishing national regulatory programs. The laws adopted during the 1970s created the federal regulatory infrastructure that remains in place today. Congress first directed all federal agencies to make environmental protection an important part of their mission when it enacted the National Environmental Policy Act (NEPA). Signed into law by President Richard M. Nixon on New Year's Day 1970, NEPA requires all agencies to assess the environmental impacts of their actions before making any decisions likely to have a significant effect on the environment.

Later in 1970, Congress enacted the Clean Air Act, which requires EPA to establish uniform national, air quality standards to ensure protection of public health. It also mandated that automobile manufacturers dramatically reduce emissions from mobile sources. In 1972, Congress tackled national water pollution problems when it adopted the Federal Water Pollution Control Act, now known as the Clean Water Act. The act created a national permit program that requires all point sources of water pollution to comply with technology-based regulations for reducing pollution (see TECHNOLOGY AND LAW).

In 1973 Congress adopted the Endangered Species Act, which prohibits actions that harm species in danger of extinction. A year later it enacted the Safe Drinking Water Act, which requires EPA to set limits on levels of contaminants in water supplied by public water supply systems. In 1976 Congress adopted the Resource Conservation and Recovery Act, which required EPA to regulate the management of hazardous waste from "cradle to grave." The Toxic Substances Control Act, also enacted in 1976, gives EPA broad authority to ban or regulate any chemical substance found to pose an unreasonable risk to public health or the environment (see HEALTH LAW).

These and other federal environmental laws seek to prevent harm before it occurs by regulating pollutants, products, and practices that make environmental damage more likely to occur. Unlike the common law, which requires individual victims to prove what caused their particular harm, the environmental statutes authorize preventive regulation in circumstances where it would not be possible to meet the common law's requirement of individualized proof of causal injury. Except in the case of pesticides, the environmental laws require government regulators to make some threshold showing of potential for harm before substances or activities can be regulated. The Federal Insecticide, Fungicide and Rodenticide Act, adopted in 1972, places the burden on pesticide manufacturers to convince EPA that their products will not have unreasonable adverse effects before they can be marketed.

The judiciary played a major role in the development of environmental law by opening the courthouse doors to citizens seeking to require agencies to implement the new regulatory programs. In 1972 the Supreme Court ruled that environmental and aesthetic interests were no less deserving of judicial protection than economic interests for purposes of assessing whether plaintiffs had sufficient "injury in fact" to give them standing to sue (*Sierra Club* v. *Morton* (1972)). Because they contained provisions authorizing citizen suits and judicial review, the new environmental laws allowed the public to go to court repeatedly to force reluctant officials to implement the laws. The message that the new regulatory programs were to be taken seriously was delivered by the Supreme Court in 1978 when it halted construction of nearly completed dam in order to protect the snail darter, a tiny fish listed as endangered under the new Endangered Species Act (*TVA* v. *Hill* (1978)).

As agencies implemented the new regulatory programs, they faced legal challenges at every turn.

An early landmark decision upholding regulations limiting the amount of lead additives in gasoline illustrated how the new laws differed from the common law (*Ethyl Corporation* v. *EPA* (D.C. Cir. 1976)), rejecting industry arguments that lead additives could not be regulated until they had been proven to cause actual harm to individuals.

> Where a statute is precautionary in nature, the evidence difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge, the regulations designed to protect the public health, and the decision that of an expert administrator, we will not demand rigorous step-by-step proof of cause and effect.

This did not mean that regulators could act on the basis of "hunches or wild guesses," as the Supreme Court later confirmed when it required the Occupational Safety and Health Administration to assess risks and to determine that they were significant before tightening limits on worker exposure to benzene.

When Congress reauthorized the first generation of federal environmental laws during the 1980s, it strengthened their requirements, set new deadlines for agencies to implement them, and increased penalties for violators. Congress also added some new weapons to the environmental protection arsenal. In the Superfund legislation (the Comprehensive Environmental Response, Compensation and Liability Act) enacted in 1980, Congress imposed strict, joint and several *liability for cleanup costs on broad classes of parties associated with releases of hazardous substances. In 1986 Congress adopted the Emergency Planning and Community Right-to-Know Act (EPCRA), which gives citizens the right to know about the types and volumes of toxic chemicals released in the environment each year. The 1990 Clean Air Act Amendments mandated sharp reductions in sulfur dioxide emissions from power plants while creating an emissions trading program that allows companies to buy and sell emissions allowances to reduce compliance costs.

States also generated important innovations in environmental law. These include California's Proposition 65, which prohibits companies from exposing the public without warning to significant quantities of substances that cause cancer or reproductive toxicity. By placing the burden on companies to decide whether to warn or to eliminate the risk, the law avoids the need for government regulators to make difficult judgments about the significance of risks and the best means for controlling them.

Significant Themes. As environmental law matures, important patterns have become evident. First: the initial generation of federal environmental laws adopted breathtakingly ambitious goals coupled with seemingly impossible mandates directed primarily at large industries. Despite protestations that what the laws required was technologically impossible, or impossibly costly, they helped spawn the development of new technology that has greatly reduced the costs, while improving the effectiveness, of pollution controls. Although these laws generally have succeeded in controlling large point sources of pollution, nonpoint source pollution remains a significant problem.

Second: an essential element of the success of the environmental laws is due to their profound commitment to involving the public in the development, implementation and enforcement of regulatory policy. NEPA's environmental impact assessment requirement, which now has been emulated in more than 130 countries, gave the public an important tool for ensuring that agencies considered the environmental consequences of their actions. Because Congress incorporated citizen suit and *judicial review provisions into virtually all the federal regulatory statutes, the public repeatedly has been able to go to court to ensure that the laws are implemented and enforced.

Third: Congress sought to enlist the states in cooperative partnerships to achieve the goals of the environmental laws while respecting federalism concerns. Thus, it largely eschewed federal preemption of state regulation (except for pesticide labeling, and chemical regulation), and concentrated on providing a federally guaranteed minimum level of environmental protection, while leaving states free to adopt more stringent regulations if they chose. However, environmental regulation remains a subject of considerable friction between federal and state officials.

Fourth: because of the vast range of industries and activities they regulate, the environmental laws rely heavily on self-monitoring and self-reporting for compliance. While violations often go undetected, the laws employ criminal penalties to deter intentional violations.

Fifth: while the initial generation of environmental laws focused on prescriptive requirements (sometimes referred to as "command and control" regulation), more recent initiatives seek to change behavior through information disclosure and market-based approaches that reduce the cost of emissions reductions. EPCRA's toxics release inventory and right-to-know requirements have created a powerful tool for encouraging emissions re-

ductions, while the Clean Air Act's emissions trading program has demonstrated that substantial emissions reductions can be achieved at moderate cost.

Issues in the Twenty-First Century. Despite broad public support for the environmental laws, they remain a subject of vigorous debate. Critics of environmental regulation maintain that it is inefficient and unnecessarily costly because it often targets trivial risks while imposing excessively prescriptive requirements. EPA has found that its regulatory priorities are directed more toward risks the public considers to be significant than to the risks that concern expert risk assessors. Some argue that more environmental protection could be achieved at far lower cost if agencies were given complete freedom to set regulatory priorities while being required to base all regulations on cost-benefit analysis. Others argue that regulatory priorities should be responsive to public concerns and that greater reliance on cost-benefit analysis is a prescription for regulatory paralysis in light of the enormous uncertainties that surround efforts to estimate risks and the costs and benefits of regulation. The Supreme Court unanimously rejected industry claims that EPA should be required to set national air quality standards on the basis of cost-benefit analysis rather than a purely health-based approach (*Whitman* v. *American Trucking Associations* (2001)).

Issues of fairness are at the forefront of some current environmental policy debates. The environmental justice movement argues that environmental risks are disproportionately concentrated in poor and minority communities. Data show that members of minority groups and the poor have higher levels of lead in their blood than the rest of the population and that hazardous waste dumpsites and incinerators tend to be disproportionately located in poor and minority communities. Although there is some dispute whether undesirable land uses are sited in a discriminatory manner initially, there is little doubt that minorities and the poor are exposed to greater risks than the rest of the population. Executive Order 12,898 directs federal agencies to identify and address environmental justice problems, but vigorous debate continues over how to improve the fairness of environmental policy.

A different set of fairness issues are raised by property owners who claim that environmental regulations that significantly reduce the value of their property are *takings of their property rights for which just compensation must be paid under the Fifth Amendment to the U.S. Constitution. Regulatory takings claims generally arise when new regulatory schemes are adopted that prohibit actions that previously were legal (e.g., building on beachfront property, filling wetlands) or when conditions are discovered that subject previously unregulated property to preexisting regulations (e.g., discovering the presence of an endangered species on private property). The Supreme Court has held that regulations that deprive a property owner of all economically beneficial use of land are regulatory takings unless the restrictions prohibit actions that would be common law nuisances (*Lucas* v. *South Carolina Coastal Council* (1992)). Although environmental regulations now are frequently challenged as takings, situations where regulations deny property owners all economically beneficial use of their land are relatively rare. Federal environmental regulation continues to raise significant issues concerning the appropriate division of power between federal and state governments. EPA relies heavily on states to help administer and enforce federal regulatory programs, but there are important constitutional limits on federal authority, as the Supreme Court has emphasized. The Supreme Court has held that Congress cannot simply require the states to regulate in a certain manner because such "commandeering" of state legislative choices impermissibly infringes the states' Tenth Amendment rights (*New York* v. *United States* (1992)). However, Congress can condition the receipt of federal funds on state agreement to regulate in a certain manner and it can give the states a choice of regulating in accordance with federal standards or having state law preempted by federal regulation. While these are the means the federal environmental laws typically employ to enlist states in the administration and enforcement of federal programs, state officials maintain that they should be given greater freedom to make regulatory choices.

The Supreme Court's revival of constitutional limits on federal regulatory authority has raised some questions concerning the limits of federal environmental regulation. The Court has held that an intrastate activity must "substantially affect" interstate commerce before Congress can use its commerce clause powers to regulate it directly (*United States* v. *Lopez* (1995)). When commercial activities are regulated, the Court assesses the cumulative impact of individual activities on interstate commerce. Because most activities regulated by the federal environmental laws involve commercial activities (e.g., emissions from an industrial facility), there is little question concerning Congress's authority to regulate them. However,

when environmental laws restrict arguably noncommercial activities (e.g., the killing of an endangered species or the filling of a wetland on private land), courts have to determine whether the environmental consequences of the activities (e.g., loss of biodiversity, reduction of migratory bird habitat) have sufficient effects on interstate commerce to justify federal regulation. Controversy persists over federal management of natural resources on public lands. After shifting away from its initial focus on unbridled development, federal policy now seeks to promote "multiple uses" of vast tracts of federal land. This understandably had fostered conflict as federal officials seek to balance the competing demands of ranchers and farmers, timber and mining companies, fishers, hunters, hikers, and other recreational users. Environmentalists argue that mining, timber, and grazing interests have overexploited public lands due to government subsidies. Communities dependent on such industries fiercely resist efforts to tighten environmental standards or to charge market prices for access to resources on public lands. The intensity of these conflicts is illustrated by the response of some of the more radical groups on both sides. Some loggers have defied court orders and bulldozed illegal roads on federal property. Members of some groups like Earth First! have chained themselves to trees or have placed spikes in them to make it hazardous to cut, a practice dubbed "ecotage" in Edward Abbey's novel *The Monkey Wrench Gang.*

A final set of issues involves the future of efforts to combat global environmental problems and the impact of globalization on domestic environmental law. International agreements have enabled the nations of the world to halt trade in endangered species and to phase out chemicals destroying the earth's protective ozone layer. But the problems of global warming and climate change are proving to be far more difficult to combat. Efforts to restrict emissions of greenhouse gases contributing to global warming and climate change raise far more difficult political problems because they involve a much broader and more diffuse set of emission sources and sinks. Global trade liberalization has generated opposition from some environmentalists who fear that it will undermine domestic environmental standards that may be considered unfair trade practices by the World Trade Organization if they are deemed to operate in a discriminatory manner.

[*See also* Energy and Natural Resources Law]

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—Robert V. Percival

ENVIRONMENTAL LAW: INTERNATIONAL ENVIRONMENTAL LAW IN THE UNITED STATES

International environmental law (IEL) is primarily a branch of public *international law, a body of law created by nation-states to govern problems that arise between nations. IEL endeavors to control global, regional, and interstate pollution, and the depletion of natural resources within a framework of sustainable development. Sustainable development may be defined as economic and social growth that does not damage the environment, yet meets the present generation's needs without incapacitating future generations.

Environmental problems, whether arising from air and water pollution, land use, or the extraction and use of natural resources and minerals, are experienced by almost all nations. Environmental abuses produce similar biophysical reactions wherever they occur, and thus have given rise to analogous preventive, mitigative, and remedial controls in various regions of the world.

The geopolitical ramifications of environmental problems are new to the international arena. However, nations have coped with similar internal environmental problems with various domestic laws and policies for years. These national environmental laws address problems arising from toxic and hazardous substances, land use, air and water pollution, conservation of resources, and nuclear power.

Although IEL deals primarily with nations, this situation has been attenuated by an emerging global civil society consisting of groups and par-

ticipants who fall outside government entities. This civil society encompasses political parties and interest groups that include both for-profit and not-for-profit groups. Labor unions, professional associations, chambers of commerce, ethical and religious groups, and nongovernmental organizations (NGOs) all participate. Consequently, while the international community historically consisted only of nations, its embrace now extends to a nascent global civil society.

While IEL is rooted in the experience of national legislation, the formal legal sources of IEL are found in international law. They consist primarily of *treaties. A treaty is an agreement entered into between states, and typically does not enter into force unless it is ratified, and deposits of such ratifications reach the minimum number stipulated in the treaty. For example, the 1992 Convention on Biological Diversity requires 30 ratifications, and the 1997 Kyoto Protocol requires 55 parties accounting for a large percentage of carbon dioxide emissions. Most multilateral IEL treaties have been adopted within the last twenty-five years.

The formidable corpus of treaties includes those dealing with global warming and biodiversity in addition to toxic and hazardous substances, such as the 1989 Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal. They address pollution of varying kinds. These antipollution treaties deal with land based pollution (1982 United Nations Convention on the Law of the Sea), air pollution (1979 Convention on Long Range Transboundary Air Pollution), and water pollution (1997 Convention on the Law of the Non-Navigational Uses of International Watercourses). Other treaties deal with the conservation of resources (1980 Convention on the Conservation of Antarctic Marine Resources), and nuclear power (1994 Convention on Nuclear Safety). Another source of IEL is customary law. This refers largely to unwritten law inferred from the conduct of states undertaken in the belief that they were bound to do so by law.

The acceptance of a legal obligation in a treaty or in customary law is typically the first step in responding to an environmental challenge. A nation agrees to implement the treaty when it accepts its obligations. Such implementation first involves the state but then grows to embrace a cluster of other actors including corporations, individuals, and agencies whose behavior must now change to conform with IEL. The monitoring of state action to implement a treaty is undertaken typically through government reporting to and review by the international agency set up under the treaty. IEL implementation may also involve domestic measures to ensure that nations actually take steps to achieve treaty objectives. In practice, implementation has typically been confined to the first process, but the growth of an international "civil society," and the increasing power of NGOs, have resulted in accelerated scrutiny of the actual effectiveness of domestic measures taken to implement a treaty. For example, the 1993 North American Agreement on Environmental Cooperation allows NGOs and private parties to vindicate environmental rights.

In addressing global environmental problems the control of ozone pollution has become the most successful chapter of IEL for a number of socioeconomic reasons. These include the limited economic impact of the pollutant, the small number of states involved, and the fact that ozone producers, such as the United States, have found substitutes for it. Climate change or global warming and biodiversity have proven more difficult to address. The United States has not ratified the Convention on Biological Diversity or the Kyoto Protocol, calling for reductions in carbon dioxide by industrial countries.

Overall, while remaining a tributary of international law, IEL possesses its own characteristics. Its uniqueness arises as much from its relatively communal subject matter, the environment, as well as the substantial influence of domestic environmental law.

• Lakshman Guruswamy and Brent Hendricks, *International Environmental Law in a Nutshell*, 1997. Lakshman Guruswamy et al., *Supplement of Basic Documents to International Environmental Law and World Order*, 2d ed., 1999.

—Lakshman Guruswamy

ENVIRONMENTAL PROTECTION AGENCY. *See* Environmental Law; Regulation.

EPA. *See* Environmental Law; Regulation.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION. *See* Discrimination; Regulation.

EQUAL PROTECTION. The idea that all persons are equal before the law is a central tenet of American constitutional democracy. Traceable to the classical writings of Aristotle and social contract theorists such as John Locke, the equality principle is embodied in the Declaration of Independence and is implicit in a number of provisions of the United States *Constitution. This fundamental principle is stated explicitly in Section 1 of the *Fourteenth Amendment, which provides, among other things, that no state shall "deny to any person within its jurisdiction the equal protection of