# 42. Environmental Protection

***Congress should***

- eliminate federal subsidies that exacerbate environmental damage;
- restore federal common-law causes of action for interstate discharges;
- repeal the Endangered Species Act and replace it with a federal biological trust fund;
- repeal the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund);
- amend the Clean Water Act to devolve regulatory authority for intrastate discharges to state and local governments, replace command-and-control technology dictates with general facility performance standards for interstate discharges, and eliminate all federal funding for water and sewage treatment programs;
- repeal all regulatory programs directed at wetlands preservation spawned by section 404 of the Clean Water Act;
- repeal the Clean Air Act save for those elements dealing with stratospheric ozone and vehicular emissions;
- repeal the Resource Conservation and Recovery Act; and
- eliminate standing for citizen enforcement suits not based on a showing of harm.

## *The Poverty of Environmental Politics*

The political terrain on which the environmental debate is conducted today is defined almost entirely by the central premises of the environmental left. The green lobby maintains that ecological resources are by definition public property, or commons, that must be centrally planned and

stewarded by bureaucratic agents lest they be recklessly despoiled by industry. Moreover, central planners must not only have nearly complete veto power over private actions that might affect the environment; they must also be empowered to stipulate how much pollution is acceptable and exactly how each business is to go about controlling emissions and even, in some circumstances, how products are manufactured. The inescapable differences among millions of pollution sinks, environmental carrying capacities, and manufacturing processes are inevitably blurred and ''averaged'' in one-size-fits-all regulations that—while not always efficient or environmentally optimal—at least have the virtue of requiring fewer than a million regulators.

It is on that intellectual terrain that environmental reform is debated. More moderate environmental groups and most business lobbyists accept that terrain but suggest the replacement of command and control by more flexible, market-oriented regulations that allow businesses more options for controlling pollution but retain limitations on overall discharges.

Some businesses and political conservatives go further, arguing that state and local governments should be provided waivers to adjust permissible pollution levels to accurately reflect local geography, environmental carrying capacities, and unique industrial circumstances. They also maintain that regulatory stewardship of the ecological commons does not occur in a vacuum and that the economic cost of various protection strategies must be part of the environmental policy equation.

And then, of course, there are the never-ending arguments about whether pollutant x or phenomenon y truly presents a human health or ecological threat so great that government regulation is necessary. Unfortunately, political muscle, not scientific evidence, more often than not settles those sorts of debates.

The need for environmental regulatory reform is hard to ignore. The United States has invested almost $2 trillion in environmental protection over the past 30 years and will likely spend more on the environment than on national defense by the presidential election of 2000. Although environmental regulations now cost the average American household at least $2,000 annually, those costs are hidden from the taxpayer. The damage environmental regulations do to the economy is akin to the slow accretion of cholesterol in the arteries: difficult to detect but, over the long run, deadly to the body. The costs of environmental regulation are built into the prices we pay for virtually everything in the marketplace, responsible for slower productivity gains than would otherwise occur, not-

insignificant barriers to market entry, an obstacle to industrial innovation, and a frequent cause of staggering economic waste.

All of this might be tolerable were the benefits of environmental regulation as significant as the costs, but a large body of evidence has accumulated to show that, with a very few exceptions, the costs of environmental regulation swamp the benefits.

### *An Alternative Agenda for Reform*

While both the moderate and the conservative proposals for reform have drawn considerable support from academics and policy analysts on both the left and the right, they are but reforms at the margins of the status quo. In truth, the fundamental premises of the environmental debate in Washington today are faulty. Rather than fine-tune the agenda of the environmental left, serious reformers should be guided by the following ideas.

**Five ''Brownest'' Programs in the Budget**

- Agricultural subsidies are responsible for excessive pesticide, fungicide, and herbicide use with corresponding increases in non-point-source pollution.
- Sugar import quotas, tariffs, and price support loans sustain a domestic sugar industry that might not otherwise exist; the destruction of the Everglades is the ecological result.
- Electricity subsidies via the power marketing administrations and the Tennessee Valley Authority artificially boost demand for energy and thereby are responsible for millions of tons of low-level radioactive waste and the disappearance of wild rivers in the West.
- Irrigation subsidies and socialized water-management programs have done incalculable damage to western habitat while artificially promoting uneconomic agriculture with all the attendant environmental consequences.
- Federal construction grant projects—such as river maintenance, flood control, and agricultural reclamation undertakings of the Army Corps of Engineers—allow uneconomic projects to go forward and cause an array of serious environmental problems.

### *Congress Should Follow the First Rule of Medicine: ''First, Do No Harm''*

The biggest and worst polluter in America is the federal government, which subsidizes a host of activities that arguably cause more environmental damage than all the actors in the ''unfettered'' free market.

It makes no sense for the federal government to subsidize environmental destruction on one hand while establishing laws, regulations, and vast bureaucracies to mitigate it on the other. Reconsidering those subsidies would help not only the environment but the economy as well.

### *The ''Greenest'' Political Agenda Is Economic Growth*

There are a number of reasons why economic growth is perhaps the most important of all environmental policies. First, it takes a healthy, growing economy to afford the pollution control technologies and weather the economic dislocations necessitated by environmental protection. A poorer nation, for example, could scarcely have afforded the nearly $200 billion this nation has spent on sewage treatment plants over the past 30 years.

Second, growing consumer demand for environmental goods (parks; recreational facilities; land for hunting, fishing, hiking; urban air and water quality) is largely responsible for the improving quantity and quality of both public and private ecological resources. Virtually all analysts agree that, for the vast majority of consumers, environmental amenities are ''luxury goods'' that are in greatest demand in the wealthiest societies. Economic growth is thus indirectly responsible for improving environmental quality in that it creates the conditions necessary for increased demand for (and the corresponding increase in supply of) environmental quality.

Third, advances in technology, production methods, and manufacturing practices—both a cause and a consequence of economic growth—have historically resulted in less, not more, pollution. Even advances in nonenvironmental technologies and industries have indirectly resulted in more efficient resource consumption and less pollution.

Finally, there is a strong correlation between personal wealth and health, as almost all analysts now agree. Education and income are the most important factors in determining how long a person will live. Since most federal environmental laws are concerned, not with ecological protection per se, but with protecting human health from ostensibly dangerous pollutants, particularly expensive environmental regulations can do more harm than good by lowering living standards below what they otherwise might

be, which, in turn, increases health risks. Several economists have estimated, in fact, that each $7.5 million in regulatory costs results in one additional ''statistical'' death, a finding that was adopted several years ago by the U.S. Court of Appeals for the District of Columbia in *UAW v. OSHA.* Even if that conclusion is off by an order of magnitude, it still calls into question a great deal of the federal regulatory code.

### *Local and Regional Pollution Problems Are Properly the Province of Local and State Officials*

Most federal environmental regulations address discharges that affect localities, not interstate regions or the nation as a whole. The principle of subsidiarity—one of the foundations of this nation's political architecture—suggests that local problems are best dealt with by local officials, regional problems by state officials, and national problems by federal officials. The U.S. Constitution largely codifies that principle by placing limits on the reach of federal power (see Chapter 3), and the Supreme Court finally seems inclined, after a 60-year hiatus, to limit the reach of federal regulatory power to those areas that substantially affect interstate commerce.

There are not only good constitutional reasons to question the centralized regulation of local pollution; there are good practical reasons as well. Environmental problems differ in each community, and each community ought to have the flexibility to set its own priorities when allocating resources for ecological and public health protection in the interests of addressing the most serious local problems first. There is much to be said for a policy that begins with the argument that the costs and benefits of regulations ought to be judged by the people directly paying those costs and consuming those benefits.

Moreover, there is an incalculable value in regulatory competition. Allowing states—the ''laboratories of democracy''—to experiment with a multiplicity of regulatory philosophies and structures will allow us to discover more efficient and effective regulatory regimes than those advocated by the stultified regulatory monopoly in Washington. ''Letting a thousand regulatory experiments bloom'' would be a wise and progressive fiscal and environmental policy, as well as a valuable exercise of the admonition to ''think globally, act locally.''

This environmental principle is a sharp departure from the status quo and accounts for most of the bold reforms recommended at the beginning of this chapter. Superfund addresses the contamination of soil and nearby

groundwater aquifers, quintessentially local matters. Many sections of the Clean Water and Clean Air Acts are concerned with protecting local and regional pollution sheds or discharges that are more appropriately addressed by workplace safety standards. Water and sewage treatment grants subsidize expenditures that should be paid for by local taxpayers (or consumers of private services) and encourage unnecessarily large, uneconomic, and inefficient facilities. The Resource Conservation and Recovery Act imposes a mind-numbing command-and-control regimen to oversee the production, use, and disposal of hazardous wastes, the effects of which are almost entirely localized.

The standard objection—that state and local governments are incapable of protecting the environment—is more fable than fact. As demonstrated by both Robert Crandall of the Brookings Institution and David Schoenbrod, New York Law School professor and cofounder of the Natural Resources Defense Council, federalization of environmental protection actually slowed progress in pollution abatement and continues to provide suboptimal environmental protection. Regulatory historian Indur Goklany likewise found that environmental regulations—whether at the local, state, or federal level—have typically put into place emissions limits that were already being met by advances in technology; they made ''illegal'' pollution that was already disappearing. And New York University law professor Richard Revesz has convincingly demolished the idea that states are prone to engage in a ''race to the [regulatory] bottom.'' On the contrary, Goklany finds that states engage in a ''race to the top'' in the quality of life. When America was a poorer nation, that meant a race to adopt policies friendly to economic growth. Now that America is far wealthier, quality-of-life issues are defined by other, nonmaterial amenities, such as environmental quality.

### *Privatizing the Environmental Commons Is Preferable to Socializing It*

Pollution should be thought of as a kind of trespass—the disposal of one's garbage or waste on the property of another. The fundamental premise of (both left and right) environmentalism is that it is the legislature's role to determine to what extent such trespass should be allowed, and it is the executive branch's job to enforce limitations on trespass. The implicit (and often explicit) assumption of modern environmentalism is that environmental property (air, water, and even land) is really public property, and the trespass that occurs is a trespass against society as a

whole. Accordingly, remedies for those trespasses are matters of political, not private, concern.

Yet environmental resources can be owned by private parties. For example, the legal mechanics of private groundwater rights are conceptually no more difficult than the existing legal mechanics protecting private oil field rights. In England private organizations such as fishing clubs actually own stretches of rivers and streams. And the right to ownership of air above one's property is frequently legally recognized. Use of chemical ''tracers'' in pollution discharges (an increasingly common practice in various studies) allows even difficult-to-detect emissions to be ''branded'' or ''fingerprinted'' and thus traced back to their sources.

An alternative environmental paradigm would hold that, if pollution is essentially a trespass upon private property, the private property owner, not governmental agents, should determine what is or is not acceptable and under what circumstances (or contractual arrangements) such trespass is to be allowed. Disputes should be brought to civil courts, not politicized legislatures or bureaucratic agencies, for adjudication.

Pollution problems caused by discharges from multiple sources (which would make problematic the straight application of trespass law) have often been controlled by the ''condominium'' model of property ownership. For example, German communities currently maintain private associations for protecting the Ruhr, Wupper, and Emscher Rivers; polluters are required to hold shares in those associations and are assessed costs for maintaining water quality. That regime has worked admirably in terms of both economic efficiency and environmental quality.

While common-law environmental policies, like all pollution control strategies, are primarily matters for local and state officials, not the federal government, to adopt when appropriate, Congress must affirmatively act in order to allow this paradigm shift to occur. Numerous courts have held that regulatory standards preempt common-law actions since they implicitly ''nationalize'' (and thus remove from the realm of private tort action) resources that would otherwise be left to private parties to police. Repealing federal regulatory standards would remove what is, perhaps, the chief obstacle confronting states and localities interested in shifting from a regulatory to a common-law environmental paradigm.

When confronting pollution problems that cross regional boundaries, Congress should explicitly restore common-law causes of action for interstate discharges, remove regulatory controls when private actions appear to provide a reasonable alternative, and eliminate standing for citizen

enforcement suits not based on a showing of harm. By doing so, Congress would demonstrate to the states the viability of the common-law approach while vastly improving the economic and ecological consequences of environmental protection.

Carl Pope, president of the Sierra Club, believes that this sort of approach ''would yield restrictions on pollution more stringent than those embodied in any current federal and state pollution laws.'' That's certainly true if a pollutant is truly harmful or a significant nuisance, since individuals, not governmental authorities, would have the final say over how much pollution they were willing to tolerate on their property or persons. It would also have the benefit of allowing an array of voluntary contractual relationships between polluter and polluted, internalize the cost of pollution, and minimize the transactions costs and inefficiencies caused by politicized rulemaking.

### *Pollution Is Most Efficiently Controlled by Businesspeople, Not Centralized Regulators*

Command-and-control regulations, which require regulators to determine exactly which technologies and what manufacturing methods are to be adopted for pollution control in every single facility in the nation, place on public officials informational requirements that are impossible to meet in the real world. Every facility is different. Every air and water shed has different carrying capacities for different pollutants. By necessity, central regulators must issue variations on ''one-size-fits-all'' standards since there simply isn't enough manpower or expertise to carefully weigh the most efficient mandates for each plant in each pollution shed.

Both common sense and experience tell us that individual plant managers are better equipped to discover the most efficient ways to control pollution at their facilities than are Environmental Protection Agency technicians and consultants. That is the case, not only because those managers have more direct knowledge of their facilities and the technology of production, but because competition forces cost minimization, and even the most dedicated EPA official isn't going to lie awake nights searching for new solutions to pollution control problems.

Economist Tom Tietenberg reports that empirical studies show that ''performance-based'' standards—those that require regulators simply to decide how much pollution can be allowed from a facility and leave it to the facility to meet that standard in whatever way it desires—result in uniformly lower control costs. A 1990 joint Amoco-EPA study of a

Yorktown, Virginia, oil refinery, for instance, found that federal environmental standards could be met at 20 percent of current costs if the refinery were allowed to adopt alternatives to EPA mandates.

Wherever common-law remedies for interregional pollution problems seem problematic because of transactions costs, performance-based regulation should be substituted for the current command-and-control regime.

### *Land Is Better Managed by Private Owners Than by Government Bureaucrats*

Fully 29 percent of all land in the United States—662 million acres—are owned by the federal government, and 95 percent of those acres are under the control of either the Department of the Interior or the Department of Agriculture. Those holdings are concentrated in 11 western states. For example, 82 percent of Nevada, 68 percent of Alaska, 64 percent of Utah, 63 percent of Idaho, 61 percent of California, 49 percent of Wyoming, and 48 percent of Oregon are owned by the federal government.

The federal government also owns a vast estate of commercially marketed resources: 50 percent of the nation's soft-wood timber, 12 percent of grazing lands, and 30 percent of all coal reserves. Approximately 30 percent of the nation's coal production; 6 to 7 percent of domestic gas and oil production; and 90 percent of copper, 80 percent of silver, and almost 100 percent of all nickel production are from federal lands.

That state of affairs is far more disturbing than most observers realize. First, as University of Colorado law professor Dale Oesterle observes, ''The federal ownership of large amounts of land, much of it with significant commodity producing potential, puts the federal government at the core of our national market system, affecting the price in nationally significant markets and a myriad of down-stream products.'' Indeed, the federal government owns a very large slice of the country's means of production, which fundamentally subverts the free-market system.

Second, the federal government is an extremely poor manager of resources. The cost of its grazing, timber, and water management programs greatly exceeds the commercial revenues. As virtually all ecologists (both liberals and conservatives) concede, the federal government has been a horrible steward of environmental resources. Rampant subsidies for both commercial and recreational industries have distorted markets (sometimes dramatically) and done great harm to the ecosystems of the West.

Finally, when politicians are charged with allocating public resources, a ferocious political tug of war over who gets what is inevitable. Given

the hundreds of thousands of jobs that are dependent on the outcome (and the millions of people who rely on those resources for recreational and aesthetic pursuits), it should be no surprise that political ''losers'' are tempted to take matters into their own hands and settle them by violent means if necessary.

Minor adjustments in resource management of public lands gingerly address the symptoms without getting at the disease: public ownership. Most Americans believe that private individuals—not the government—should own land whenever possible and simply have no idea that the federal government owns such a vast estate. Congress should stop the obsessive fine-tuning of socialist resource management plans and launch serious hearings designed to draw attention to the well-documented crisis of federal land mismanagement. Once serious, concerted effort has been made to highlight the problems of socialist land management, Congress should begin drafting divestment plans to rectify the situation.

### *Property Regulated for Species or Ecosystem Protection Is Being Taken for a Public Purpose and the Owners Should Be Compensated*

As Chapter 30 argues, compensating property owners for takings meant to secure public goods such as endangered species or habitat is a simple matter of fairness and constitutional justice. But protecting property rights is also a necessary prerequisite for ecological protection. Property owners who expect to experience economic losses if their property is identified as ecologically important are tempted to destroy that habitat or species population before public officials become aware of its existence. Numerous analysts, from people at the National Wilderness Institute to ecological economist Randal O'Toole, conclude that the ''shoot, shovel, and shut up'' dynamic largely explains why the Endangered Species Act has failed to either stabilize listed populations or return a single species to health.

The ESA, which restrains private property owners from certain uses of their land in order to secure the ''public good'' of species protection, should thus be repealed since it provides no compensation to landowners for public takings. Instead, a federal biological trust should be established that would be funded out of general revenues at whatever level Congress found appropriate. The trust fund would be used to purchase conservation easements (in a voluntary and noncoercive fashion) from private landowners in order to protect the habitat of endangered species.

The virtue of such a system is that landowners would have incentives rather than disincentives to protect species habitat, and the ''ranching''

of endangered species for commercial purposes would be allowed. The ESA prohibits such practices out of a misguided belief that any commercial use of an endangered species inevitably contributes to its decline. Yet the experience of the African elephant and other threatened species belies that concern and strongly suggests that, if private parties are allowed to own and trade animals as commodities, commercial demand is a critical component of population protection.

Similarly, section 404 of the Clean Water Act—the provision that ostensibly empowers the EPA to regulate wetlands—should be repealed. Like the ESA, it takes otherwise inoffensive uses of private property for a public purpose and provides disincentives for wetland conservation. Protection of wetlands habitat should be left to the federal biological trust fund.

### *Environmental Regulations Should Be Approved by Congress before Taking Legal Effect*

See Chapter 9 for discussion of this idea.

## *Translating Ideas into Action*

The arguments laid out above are readily applicable to the most pressing environmental policy questions before the 106th Congress, and the agenda suggested at the beginning of the chapter will allow market liberals to both free the economy from unnecessary regulatory costs and improve environmental protection.

Yet the question arises, How politically viable is such an agenda, particularly given the perceived public backlash against milder reforms forwarded in the 104th Congress? First of all, it should be noted that, if even the slightest deregulatory action is going to be characterized as ''gutting environmental protection'' by the left, then only by dropping the entire subject—or adopting the green agenda—can congressional reformers escape such accusations. Second, if any positive reform is destined to be characterized in such extreme terms, then public opposition to dramatic reform will be no greater than public opposition to milder reform.

That said, the agenda laid out in this chapter has many more selling points than the milder reform agenda of the 104th Congress. Completely replacing one regulatory practice with another forces a more honest discussion of policy alternatives than do reforms that adjust the status quo at the margins.

Second, polls indicate that the American people are intuitively sympathetic to the agenda laid out above. According to a survey conducted by the Polling Company of 1,000 voters,

- 75 percent believe Congress should be required to approve newly written federal regulations before they are enacted;
- 67 percent support a ''first, do no harm'' federal environmental agenda;
- 65 percent believe state or local governments would do a better job of environmental protection than the federal government;
- 64 percent support compensating landowners when environmental regulation prevents them from using their property;
- 49 percent support a nonregulatory, incentive-based approach to endangered species conservation; and
- 45 percent support a nonregulatory, incentive-based approach to wetlands conservation.

Those findings are consistent with the findings of the few other surveys that have been conducted on these subjects. It's certainly true that most Americans consider themselves environmentalists and support policies to protect the environment. Yet it's clear from both surveys and voting behavior that Americans are not at all convinced that big, centralized, regulatory government is the best way to keep America green. They are right.

#### *Suggested Readings*

Beckerman, Wilfred. *Through Green-Colored Glasses: Environmentalism Reconsidered.* Washington: Cato Institute, 1996.

Butler, Henry, and Jonathan Macey. *Using Federalism to Improve Environmental Policy.* Washington: American Enterprise Institute, 1996.

Crandall, Robert. *Controlling Industrial Pollution: The Economics and Politics of Clean Air.* Washington: Brookings Institution, 1983.

Goklany, Indur. ''The Federal Role in Improving Air Quality in the United States.'' Paper presented at the American Society for Environmental History Conference on Government, Science, and the Environment, Baltimore, Md., March 6–9, 1997.

Greve, Michael. *The Demise of Environmentalism in American Law.* Washington: American Enterprise Institute, 1996.

Hill, Peter, and Roger Meiners, eds. *Who Owns the Environment?* Lanham, Md.: Rowman & Littlefield, 1998.

Nelson, Roger. *Public Lands and Private Rights: The Failure of Scientific Management.* Lanham, Md.: Rowman & Littlefield, 1995.

Revesz, Richard. ''The Race to the Bottom: A Response to Critics.'' *Minnesota Law Review,* no. 535 (1997).

———. ''Rehabilitating Interstate Competition: Rethinking the Race to the Bottom Rationale for Federal Environmental Regulation.'' *New York University Law Review* 67 (1992).

Schoenbrod, David. ''Time for the Federal Environmental Aristocracy to Give Up Power.'' Center for the Study of American Business Policy Study no. 144, February 1998.

Stewart, Richard. ''Controlling Environmental Risks through Economic Incentives.'' *Columbia Journal of Environmental Law* 13, no. 2 (1988).

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