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LEGISLATION AND THE ENVIRONMENT: INDIVIDUAL RIGHTS AND GOVERNMENT ACCOUNTABILITY

Richard L. Ottinger†

I

INTRODUCTION: THE CORNUCOPIA SYNDROME IN THE LAW

The relationship between man and his environment, never entirely comfortable, has now reached a critical point. Modern technology and an exploding population enable man to set in motion forces that threaten the quality of his life, perhaps his survival. There is growing evidence that our existing social institutions, especially our legal institutions, are inadequate to come to grips with the problem.

The American concept of environmental law appears to be founded on a world view as outdated as the Ptolemaic theory of the universe. Just as Ptolemy saw the earth as the center of the solar system, this concept envisions man as the center, and perhaps the purpose, of the universe. Man is viewed as living at the open end of a natural horn of plenty, with the right, and possibly the obligation, to exploit all natural resources and to develop and use the bounty of this earth as fully as he is able.

Complementing this world view is modern man's unshakeable faith in his ability to conquer nature and control his environment. As Arnold Toynbee warned, the consequence of such faith may be that technology, not man, will be the real victor. Toynbee's glum view is borne out by the growing number of conflicts between technological development and efforts to keep the environment livable.

Recent public concern with the pollution threat has generated a rash of suggested solutions. Within the past year councils, agencies, advisory commissions, and billion-dollar programs have been urged upon us. Reorganizations and reorderings of priorities have been called for. The question remains, however, whether this welter of proposals squarely attacks the real problem—the fact that all of our institutions are rooted in the notions of inexhaustible supply and limitless ability to repair. The answer can be found only by examining specific conflicts

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between technology and environment and analyzing the way our institutions attempt to resolve them.

II

ENVIRONMENTAL CRISIS: THE NATURAL CONSEQUENCE OF FAILURE TO DEVELOP A SANE NATIONAL POLICY

The recent near-catastrophe at the mouth of New York Harbor¹ is a classic example of the problems caused by our "horn of plenty" notions and of the inadequacy of existing laws and institutions to resolve the resulting environmental conflicts. For nearly forty years municipalities in New Jersey and New York have dumped sewage sludge in the coastal waters five miles southeast of Ambrose Light. The area is about twelve miles from the New Jersey beaches to the west and the same distance from the New York beaches to the north. Dredge spoil and industrial waste are dumped at a site about five miles west of the sewage sludge area. Partly as a result of the population explosion, the volume of sewage sludge to be disposed of is now nearly five million cubic yards annually. Accelerated industrialization and construction in the metropolitan area have raised the amount of dredge spoil to a staggering six million tons a year. Much of this spoil is heavily loaded with petro-chemical wastes and contains deadly heavy metals such as copper, lead, chromium, and mercury. It is also contaminated with hard pesticides, whose environmental impact has only recently begun to be understood. Adding to the cumulative burden is the nearly incredible *400 billion gallons* of sewage dumped into the Hudson River each year, which floats slowly out of the mouth of New York Harbor into the affected area around Ambrose Light.

At some point the total burden of filth became too great for the natural cleansing power of the ocean. The result is a "Dead Sea,"² a twenty square-mile area at the mouth of New York Harbor totally devoid of significant marine life. The area lacks sufficient oxygen to support fish. Not even sea worms, which tolerate most forms of pollution, can live there. Samples taken from the bottom show a black, foul-smelling gook as dead and as hostile to life as the surface of the moon.

There seems to be no immediate danger to human life from the "Dead Sea" itself, unless some unfortunate mariner should fall into it. It has not yet gotten close enough to the beaches to threaten bathers,

¹ Hereinafter sometimes referred to as New York Bight.

² NEWSWEEK, Feb. 23, 1970, at 86.

and, since fish and shellfish do not live within its confines, there is little direct danger of contaminated food. At the periphery, however, concentrations of bacterial and viral contamination drift unpredictably into areas where shellfish *are* harvested. More serious still are the effects of the heavy metals and the hard pesticides absorbed by drifting microbiota around the spoil area. As these organisms are eaten by fish, the toxic material enters the marine food chain.

It is possible to close down contaminated shellfish harvesting areas if they are discovered in time. Because fish are vastly more mobile, however, once the non-biodegradable poisons and other contaminants have entered the food chain, there is no practical way of controlling the effect. Fishermen hundreds of miles from the "Dead Sea" area may already be marketing dangerously contaminated food fish; in fact, bluefish have been caught far up the Hudson River with advanced fin rot contracted around the "Dead Sea."

Waste disposal practices capable of creating a lifeless region are, in themselves, so serious as to warrant immediate action. But a change has occurred recently that makes the crisis even more severe: the "Dead Sea" has started to spread rapidly. An environmental chain reaction has been started. This development carries with it serious new threats to public health, to economically important Atlantic coastal fisheries, and to the last remaining public beaches of New York City. Should the area continue to spread so that it touches both the New York and the New Jersey beaches, the dead water will form a barrier which will keep fish from entering and leaving the Hudson, a barrier as effective as a dam built across the mouth of the river. The valuable anadromous fish—sturgeon, shad, striped bass—that live in the ocean but can breed only in the fresh waters of the Hudson will be denied access to their breeding ground. It will at the same time close off access to marine shoals, and the equally valuable coastal fish that live wholly in the ocean, but depend upon the coastal areas for food and sanctuary, will be deprived of a key element of their environment.

Instead of questioning the adequacy of existing laws and institutions, it is tempting to search for villains who, but for dereliction of duty, should have prevented this environmental catastrophe. Among possible targets of blame are the U.S. Army Corps of Engineers, the Interior Department, the Food and Drug Administration, state and local governments, and the Congress.

The U.S. Army Corps of Engineers has primary responsibility for the coastal waters involved, and it is under the authority of the Corps that the dumping is carried out. But however negligent the Corps may

have been in the past, it was that agency, prodded by scientists at the U.S. Marine Laboratory at Sandy Hook, New Jersey, that commissioned the study revealing the extent and nature of the disaster. Although the Corps failed to make immediately public the report that followed the study, it lacked clear legislative authority to act.

State and local governments do most of the dumping and, at the same time, are responsible for the protection of public health and the beaches. But they had no way of knowing that long-accepted practices of dumping waste in the ocean had suddenly become a threat to the environment. For example, New York Mayor Lindsay's first intimation that New York beaches were endangered was the release of the Corps report in February 1970.³ There is, to date, no effective "early warning system" for environmental disasters.⁴

The Food and Drug Administration, exercising its duty to protect consumers from contaminated foods, urged the closing of shellfish harvesting areas within a six-mile radius of the area. FDA officials hesitated to take more positive measures, however, since the pollution had spread beyond the twelve-mile limit and they were unsure of their authority.

Congress, of course, has the primary responsibility to lay down the policies under which the Corps and other federal agencies operate. There are at least four federal laws designed to avert the type of ecological catastrophe that occurred in New York Bight:

(1) The Fish and Wildlife Coordination Act⁵ in effect prevents the Corps from authorizing projects affecting water development until it has coordinated its plans with the Department of the Interior. Its purpose is to assure that all possible steps will be taken to prevent damage either to fish and wildlife or their natural habitat.

(2) The Endangered Species Act⁶ vests very specific responsibilities in the Interior Department and the Army Corps of Engineers to provide for the protection of species of fish and wildlife in danger of extinction as a result of developmental projects.

(3) The Estuarine Act⁷ directs the Interior Department to survey estuarine areas in coastal regions to determine the impact of developmental projects and to recommend measures needed to preserve such areas and the fish and wildlife that inhabit them.

³ The report was released by the author on February 7, 1970. *See* N.Y. Times, Feb. 8, 1970, § 1, at 1, col. 1.

⁴ Such a system is currently receiving serious consideration. *See* NEWSWEEK, Feb. 23, 1970, at 87.

⁵ 16 U.S.C. §§ 661-68 (1964).

⁶ *Id.* §§ 668aa-ee (Supp. IV, 1969).

⁷ *Id.* §§ 1221-26.

(4) Finally, the Hudson River Compact Act⁸ specifically directs the Corps of Engineers to consult with the Secretary of the Interior concerning any project that might adversely affect the natural resources of the Hudson River which flows into the New York Bight area.

Each law, however, is tempered with vague and hedging phrases. Some direct, for example, that steps to prevent damage should be taken only "insofar as possible." Others extend agency responsibilities regarding protection of resources only "insofar as is practical and consistent with the primary purpose of such bureaus, agencies and services."

On the surface, the Interior Department seems most blameworthy for the ecological destruction in New York Bight. It is the agency vested with most of our environmental preservation responsibilities and, in theory, had clear obligations under the four acts discussed above. In practice, however, the vagueness of these laws dilute Interior's role to that of adviser. Furthermore, the Interior Department is by design a truly schizoid agency. Despite its environmental responsibilities, however tenuous they may be, the agency is also the biggest developer and exploiter of natural resources in the United States. Among other things, it is the largest single producer of electric power, a licensor of offshore drilling, and a dam builder and developer second only, perhaps, to the Corps of Engineers. It is not surprising, therefore, that Interior's concern for environmental protection is overshadowed by its obligations to the opposition.

It is evident that fault for the disaster of New York Bight lies not in any agency but in our own failure to set a clear social policy for environmental protection. In all of the governmental mechanisms that played a role in the development of the condition of New York Bight, nowhere is there clear authority for deciding an issue in favor of action to preserve the environment. We accept such protection only when it is consistent with development and exploitation. When, as is almost always the case, it conflicts with development and exploitation or would impose higher costs upon developers and exploiters, environment has clearly been a secondary concern.⁹ In order to prevent the occurrence of increasingly more serious environmental disasters, a new statement

⁸ Act of Sept. 26, 1966, §§ 1-5, 80 Stat. 847.

⁹ This is highlighted by the Corps of Engineers's defense of its failure to release the report on the conditions of New York Bight. Corp officials pointed out that the alternatives to dumping at the contaminated site would impose what they thought would be prohibitive costs on the municipalities and industries that were dumping.

of national purpose is needed, one that states clearly and forcefully that restoring and preserving the quality of our environment is one of our prime national goals.

III

THE INADEQUACY OF STATUTORY SOLUTION: NEED FOR CONSTITUTIONAL AMENDMENT

Recent attempts have been made to reorder national priorities. The National Environmental Policy Act¹⁰ enacted in this last session of Congress, for example, purported to do just that, but it suffers from indecisiveness. Although it sets forth a bold statement of environmental policy, the Act provides little or no mechanism for enforcing that policy.

In the end, there is serious question whether an effective change in our priorities can ever be achieved by statute alone; what is enacted by statute can be changed by statute. The controversy surrounding the Three Sisters Bridge, proposed to be built over the Potomac River in Washington, D.C., is illustrative. The bridge is warmly supported by the highway lobby, but it is opposed by virtually every citizens' group that would be affected, including Washington's main urban planning body. The opposition protests that the construction would destroy a beautiful and historic recreation site and would unnecessarily disrupt settled communities.

In the Department of Transportation Act of 1966,¹¹ Congress endeavored to provide a mechanism for resolving the growing number of conflicts between highway construction and environmental protection. It created standards and procedures to assure that future highway planning, design, and construction would be consistent with environmental preservation. When the highway lobby desired to circumvent those procedures in the case of the Three Sisters Bridge, however, this was easily accomplished. Congress merely adopted a provision in a highway appropriation bill authorizing the construction "[n]otwithstanding any other provision of law."¹²

In addition to the ease with which statutory protections can be evaded, there is another danger inherent in continuing to attack the problem solely through legislation. Widely publicized new legislation gives the appearance of action without the substance. It lulls the public into a false confidence that something is being done.

¹⁰ 42 U.S.C.A. §§ 4321-47 (Supp. March 1970).

¹¹ 49 U.S.C. §§ 1651-56 (Supp. IV, 1969).

¹² Federal-Aid Highway Act of 1968, § 23(a), 82 Stat. 827.

Probably only an amendment to the Constitution, guaranteeing to each citizen a wholesome and unimpaired environment, can overcome these inadequacies.¹³ Such a provision of the Constitution would have been meaningless to those attending the Constitutional Convention in Philadelphia almost 200 years ago. As recently as five years ago it might have seemed extreme. Today, however, the threats to our environment and to our survival are as real as were the dangers to free speech and free assembly to the Constitutional Convention.

Declaring this new right as a matter of constitutional principle is the kind of national statement of policy that might clarify our present ambivalence. It would provide badly needed guidance to the federal agencies and would also provide the most effective environmental protection within our power. Most important, the process of amending the Constitution would give the people of the United States the opportunity to register their affirmation of such a new public policy.

IV

THE IMMEDIATE ROLE OF THE INDIVIDUAL IN ENVIRONMENTAL DETERMINATION: THE ELEMENT OF ACCOUNTABILITY

If amending the Constitution is the ultimate answer, it is certainly not the immediate one. The process is neither easy nor quick, since a drastic change in national priorities requires extensive debate. Several important actions should be taken in the interim.

First, Congress should coordinate existing environmental responsibilities. If one characteristic stands out in the crisis of New York Bight, it is the utter confusion of practically everyone involved. Too many governmental bodies had some responsibility and some authority, but no one had enough of either.¹⁴ Coordination, therefore, should take precedence over adding new programs, which may only serve further to confuse responsibility. It may be politically unfeasible to disturb the present allocation of power, but Congress should at least vest all existing advisory authority in a single agency. Similar consolidation at the state and local levels is advisable.

¹³ The author was among a group that proposed such an amendment in 1968. H.R. Res. 1321, 90th Cong., 2d Sess. (1968). [The Editors].

¹⁴ At the same time that the experts at the U.S. Marine Laboratory were discovering the magnitude of the problem, the Federal Water Pollution Control Administration, the agency charged with cleaning up our waters, was approving construction of four sewage outfall pipes into the coastal waters. One of these pipes would have the capacity to dump an additional seven billion gallons of raw sewage into the waters less than two miles from the contaminated area. Clearly, the left hand did not know what the right hand was doing.

Second, an element of accountability must be built into the bureaucratic structure. If the fishermen and other concerned citizens who early objected to the dumping in the waters of New York Bight had been able to make themselves heard, the entire problem might have been avoided. They were frustrated, however, by the uncertain scope of each agency's responsibility and the vagueness of agency powers. These factors combine to make much agency action, or inaction, unchallengeable.¹⁵

Lack of accountability can be remedied by adding to each federal program an agency obligation of environmental protection sufficiently clear to permit judicial review of agency action.¹⁶ Even then, however, the cost of bringing an action will be a serious obstacle to effective challenge.¹⁷ To overcome this barrier, federal aid should be made available for any action in which a federal judge holds that an issue worthy of consideration by the court is presented. Natural resources are common property, and interested citizens and groups should not be forced to assume a substantial financial burden to protect them.

In the final analysis, the best hope for preserving a livable environment is to entrust its protection to the individual.¹⁸ Growing interest among our youth and a new willingness to work for legal and institutional changes are encouraging developments, and they come not a moment too soon. As the crisis of New York Bight shows, our resources are finite and in danger of being exhausted. The horn of plenty is no longer an appropriate symbol of the environment.

¹⁵ Unfortunately, the recent trend is away from agency accountability rather than towards it. The Air Quality Act (42 U.S.C. §§ 1857-571 (Supp. IV, 1969)) and the Clean Waters Restoration Act (80 Stat. 1246 (1966) (codified in scattered sections of 33 U.S.C.)), for example, give the federal agencies affected greater discretionary power and make their actions less accessible to citizen challenge than formerly.

¹⁶ See, e.g., § 16(c)(4) of the Proposed Aviation Facilities Expansion Act: "It is hereby declared to be national policy that airport development projects authorized pursuant to this [Act] shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation." H.R. 14465, 91st Cong., 2d Sess. (1969).

¹⁷ The *Storm King Mountain* case (*Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966)), for example, is reputed to have cost citizens' groups nearly half a million dollars, and the issue is still unresolved.

¹⁸ For an extended analysis of the reasons underlying this conclusion, see Porter, *Everyone Wants to Save the Environment But No One Knows Quite What to Do*, 3 THE CENTER MAGAZINE, March 1970, at 35.