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Peter Lehner

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NINTH ANNUAL GILBERT AND SARAH KERLIN LECTURE

Environment, Law, and Nonprofits: How NGOs Shape Our Laws, Health, and Communities

PETER LEHNER*

October 1, 2008

Thank you for that kind introduction. It's an honor to be here. Many thanks to Dean Michelle Simon, Karl Coplan, Nick Robinson, Dick Ottinger, Ann Powers, John Nolon, my friends and colleagues at Pace Environmental Law Clinic including Bobby Kennedy, Mary Beth Postman and Daniel Estrin, and the faculty and administration of the law school for inviting me here to this distinguished series.

I'm particularly grateful to Karl Coplan for inviting me. He and I were law school classmates—he did much better than I did, as any of you who know him will not be surprised to learn. But more important than his speeches or his scholarship, such as his recent article¹ on the sad erosion of standing law, and more important than his many successful cases at the clinic, including huge wins on the Shandaken Tunnel and the Ashokan Reservoir and power plant cooling water, and more than his mentoring of what must be hundreds or thousands of students, many of whom I've

* Peter Lehner is the Executive Director of Natural Resources Defense Council (NRDC). He is responsible for guiding NRDC's policy positions and advocacy strategies, supervising NRDC's litigation, and managing NRDC's six offices. Lehner previously served as chief of the Environmental Protection Bureau under New York State Attorney General Eliot Spitzer. Lehner holds an AB in philosophy from Harvard College and is a graduate of Columbia Law School, where he continues to teach environmental law.

1. Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing and the Petition Clause*, 61 ME. L. REV. (forthcoming 2009).

had the pleasure of working with; more important to me than any of this, *Karl is the real thing*.

He lives his beliefs. He breathes his convictions. He bikes, buses, and kayaks to work. He's here, not in Barcelona, at the IUCN conference because he soberly decided to forego enlarging his carbon footprint. His hand-cut and hand-printed wood block holiday cards speak as few other cards do. You at Pace are exceedingly lucky to have him here, and I'm lucky to have Karl as a friend.

I'm also honored to be giving this Kerlin Lecture. Gilbert and Sarah Kerlin were fierce protectors of open space around the Hudson River. Gilbert Kerlin founded the Riverdale Community Planning Association that rezoned the entire West Bronx to preserve three square miles of greenbelt. He's also credited with nearly single-handedly saving Wave Hill on the Hudson, a country estate home to a number of important historic figures since 1843 including Theodore Roosevelt's family, Mark Twain, conductor Arturo Toscanini, chief members of the British Delegation to the United Nations, and J.P. Morgan partner George W. Perkins. Sarah Kerlin was responsible for creating and supporting the environmental and education programs at Wave Hill. On the topic that I will speak on today, you will note the conservation of the Hudson River region plays a crucial part in the shaping of environmental law.

This lecture series opened with Carol Rose's first lecture in 2000 on property, nature and commerce. Since then you've heard Colombian Minister of the Environment Juan Maldonado speak on the ethics of sustainability, President of the University College of London Malcolm Grant on public engagement on science, Dr. Bharat Desai on international environmental governance, and last year John Cahill's talk on past as prologue to the future of environmental law in New York State. John is a remarkable man and I'm honored to follow him; I'll also look to the past for guidance in the future.

Now let me turn to the theme for tonight—the role of non-profits, or as they are more commonly known in the rest of the world, non-governmental organizations (NGOs), in shaping environmental law and in shaping our environment. Let me start with a timely observation that the role of NGOs in the environmental sphere, while not unique, is rare and is missing in other areas of U.S. law, perhaps most notably today securities and finance. We do not have organizations representing the public who have been

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watch-dogging our government's oversight of the financial markets. We don't have organizations that enforce against violators the mandates of insurance law to advance the public good, rather than just their private interests. We don't have people who know the banking system every bit as well as the bankers and the purported regulators, but who are there to speak for the public.

And imagine how different things would be right now if, over the last 25 years, we'd had such voices. Voices who pushed back at what has become an almost religious faith in unregulated markets; voices who asked loudly and persuasively whether some of the claims being made were not factually baseless; voices who were part of the negotiations when rules were being established to ensure there was transparency, fairness, and accountability.

That comparison with the financial world may be the best way I can describe the role environmental NGOs have had. For in the environmental arena, while we have not made all the progress we need to have made and while we have new and daunting challenges, we have not faced a full meltdown yet. We've done an okay job of cleaning up sewage and industrial pollution; we've created parks and other protected areas; cars are cleaner and air quality has improved in many areas; we've developed recycling programs and energy efficiency standards. As I'll mention, we now face the challenge of climate change, and we have far more to do to achieve clean air and water and preserve open space and wild species. But we face these challenges knowing what to do—if we can garner the political will—and with a track record of successes and failures on which to build.

Looking *backwards*, as we'll do together in a minute, we'll see that NGOs have had a critical role in shaping U.S. environmental laws, both in drafting them, and in transforming the sterile legislative words into meaningful protections, binding judicial precedent, and effective practices. And NGOs fundamentally altered what had been a bilateral, often isolated dialogue between polluter and regulator into a trilateral and often multilateral debate that included those affected in ways other than solely their pocket book. And looking *forward*, we'll see that NGOs, and the rest of the environmental law community cannot rest on their laurels or rely on only the tried-and-true. We have new challenges that will affect the very foundations of our country, our economy, and indeed our planet. I'll offer a few thoughts on what to do.

It is fitting for this lecture that a critical step in the birth of environmental law occurred only a few miles from here in the Ker-

lins' favored area of conservation. When the Scenic Hudson Preservation Conference challenged a pump-storage facility on Storm King Mountain, only economic interests could get into court. Yet Scenic Hudson's members had other interests – "aesthetic, conservational, and recreational." In a seminal decision written in 1965 by Judge Oakes, the Second Circuit Court of Appeals held that such interests were sufficient for standing. Environmental litigation was born.

That case had another long-term ramification as well. Many of the lawyers in that case – Wall Street lawyers working largely pro bono – realized that environmental interests could not be protected by the occasional efforts of corporate lawyers; the environment needed full time environmental lawyers, experts in the field, but always representing the public. The lawyers who fought the Scenic Hudson battle—Stephan Duggan, Whitney North Seymour Jr, and David Sive—were some of the founders of NRDC, and at about the same time other environmental NGOs were also formed. So, not just environmental *litigation*, but environmental *litigators* were born.

It was in this setting that a group of about fifty people gathered, in 1969, at the Airlie House in Virginia's Shenandoah Mountains. Many of the lawyers who went on to work for NRDC, as well as for the Environmental Defense Fund and the Sierra Club Legal Defense Fund (now EarthJustice), hammered out legal approaches to defend the environment—whether to rely on the public trust, to build from common law, or to bring cases on the Fourteenth Amendment. Notables of the group, like former Vermont Governor Phillip Hoff and California Congressman Pete McCloskey, felt that in the then current political climate, new *legislation* was necessary and possible.

This was about 1970 and the time of the first Earth Day. Rachel Carson's 1962 *Silent Spring* had opened the nation's eyes to the impact of toxins. The image of the Cuyahoga River fire burned across Time Magazine. The public demanded action. And Congress, guided in large part by these new public interest environmental lawyers, responded by writing the National Environmental Policy Act, the Clean Air Act, the Clean Water Act, and other anti-pollution laws. Environmental laws, not just wilderness conservation laws. Thus, not just environmental litigation and environmental litigators, but modern environmental legislation was born.

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Each of these new pieces of legislation, and the debates that preceded them, were heavily influenced by NGOs pressing for fast action, clear and aggressive targets, health-based mandatory standards rather than cost-based aspirational goals, frequent monitoring and public availability of environmental permits and records. NRDC, for example had a huge role in drafting the 1972 Clean Water Act. NGOs largely shaped the 1990 Clean Air Act. There is a lot to be said about the role of NGOs in the legislative process, but, as others have covered that, let me focus instead on the role of NGOs in bringing the words on paper to life. Let me give just a couple of examples.

In 1971, the Calvert Cliffs Coordinating Committee brought suit under NEPA against the Atomic Energy Commission. That case converted what was thought of by the agency as a “paper tiger” into a major tool to get better decisions that strengthened the ability of NGOs to influence regulation. The requirement of environmental consideration “to the fullest extent possible” was no longer an escape hatch, but a mandate to set the highest standard for agencies. Tony Roisman, then a staff attorney at NRDC recalls of this era, “Government couldn’t write a passable EIS. You could stop almost anything. Injunctions flowed like water from the courts.” NEPA thus went from a vague hope to a major negotiating tool, shifting the balance of power between future polluters and the public. (This by the way continues to today – next week NRDC will be arguing a NEPA case in the U.S. Supreme Court.)²

In the same year the Citizens to Protect Overton Park challenged the decision of the Federal Department of Transportation to build a freeway through a public park in Memphis. The citizens sued, arguing that the law prohibited DOT from putting the road through the park unless all other options were truly infeasible. The DOT brushed off this feasibility analysis. The Supreme Court reversed the decision of the DOT and said that Congress meant what it said. The Court transformed Section 4(f) of the federal transportation law from mere aspiration to a law with teeth and, as you all know, also established a framework of review to be used in future decisions. This case would only have been brought by an NGO.

The following year, 1972, in the *Sierra Club v. Morton* challenge to a ski resort in the Sierras, the Supreme Court ruled against the Sierra Club, but in so doing clearly laid out exactly

2. *Winter v. Natural Resource Defense Council, Inc.*, 129 S.Ct. 365 (2008).

what NGOs needed to do to get into court in the future: prove themselves or their members to be among those who would be injured by the challenged action. In his dissent to the majority opinion, Justice William O. Douglas noted the importance of this voice for the public, “[B]efore these priceless bits of Americana are forever lost. . . , the voice of the existing beneficiaries of these environmental wonders should be heard.”

Similarly, when utilities figured out how to get around the regulations of the original Clean Air Act—by building their smokestacks higher, thereby pushing the pollutants higher into the atmosphere and dispersing them but also creating acid rain—NGOs, not EPA, pushed back. In 1974, NRDC sued the Tennessee Valley Authority, the largest violator, and ensured that the goal of the statute—cleaner air—was actually achieved. That win eliminated over one million tons of pollutants, and led to one of the largest sulfur dioxide cleanup programs in United States history.

And when, despite the Clean Air Act’s mandate about ambient air quality standards for pollutants contributing to endangerment of public health, and despite ample evidence of the impact of lead on children’s health and IQ, EPA did nothing, it was NGOs who gave life to the Act. In 1978 NRDC sued EPA to promulgate a National Ambient Air Quality Standard (NAAQS) for lead and also rules for controlling lead emissions in car exhaust. Thus, it was litigation and relentless pressure by NGOs that finally resulted in the phase-out of lead from gasoline. The result: in 1976 the average level of lead in the typical American was 12.8 micrograms/liter. By 1988 that level dramatically dropped to 2.8. And as NGOs continue to keep lead from other household substances, that level continues to drop.

And consider the Clean Water Act. It requires dischargers to have permits and to monitor their discharges. By comparing the reports to the permits, it is fairly easy to find violations. But polluters weren’t used to the law and many did not take it seriously. The governments did not take it seriously either. So NGOs used the citizen suit provision to enforce the law against violators. Riverkeeper, often represented by the Pace Environmental Litigation Clinic, brought hundreds of cases to clean up this region. At one point, NRDC alone had more Clean Water Act enforcement cases than all of the Department of Justice. And look at the case law—it’s almost all in cases brought by NGOs.

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All these efforts required attributes that only the environmental NGOs possessed. They required a level of expertise in the science, the law—both the legislation and its regulations, and the reality of what was happening on the ground. This level of expertise is very hard for individuals, usually with other jobs or occupations, to obtain. These cases also require a dedication to the public interest, not to short-term political expedience, administrative turf, or corporate profits. And they required constant vigilance.

These NGOs were critical not just at the first decade of environmental law, but throughout our recent history. Take a story from the last forty-eight hours in Congress before passing the 1990 Clean Air Act amendments. Three NRDC lawyers knew the statute inside and out, and were keeping a close eye on the negotiated drafts. It was ten o'clock on a Friday night when the other side dropped what they called "technical amendments." At first glance it seemed to be highly-detailed, inconsequential editorial corrections. But David Hawkins, our Director of Air and Energy read it again. He caught a semi-colon inserted into a paragraph of 45 words. That semi-colon changed the entire meaning of the paragraph, expanding the eligibility for power plants to delay compliance. He called Congressional allies and they put that semi-colon in its grave. Imagine the level of expertise it takes to remove a semi-colon at 10pm on a Friday night.

Here's another example. In the 2007 Energy Act, there is a provision that will require lighting to be 25% more efficient by 2012 and 75% more efficient by 2020, effectively banning inefficient incandescent bulbs. This will save consumers billions of dollars and eliminate millions of tons of carbon dioxide pollution. It was also negotiated by NRDC and industry, and then was adopted almost verbatim by Congress. This followed a long-line of similar energy efficiency laws dating back to the 1970s negotiated by NGOs and industry and adopted by Congress.

And the work of environmental NGOs continues to the present. In the last eight years, for example, the Bush Administration has waged an unprecedented war on the environment. This is a non-partisan statement; this is simple fact. Environmental NGOs, very often NRDC and EarthJustice, but others as well, sometimes accompanied by other entities such as states, have had repeatedly to sue EPA and other federal agencies to overturn efforts to promulgate new regulations weakening the Clean Air Act, the Clean Water Act, the Endangered Species Act, and a host of

other statutes. I've been personally involved on many of these challenges so it's tempting to go into them in more detail, but I'll spare you. Suffice it to say that, despite the deference usually paid to EPA in such cases (more on that later), we usually won. And as a direct result, millions of people will breathe cleaner air, enjoy healthier water, and have opportunities to be refreshed by real wild places.

This role of environmental NGOs is crucial and must continue in the future. The 2008 Climate Security Act that would cap CO₂ pollution and require emitters to purchase allowances for their CO₂ emissions, for example, was heavily influenced by NRDC as well as other NGOs. Without the NGOs, the bill would have looked very, very different, if existed at all. The cap would be higher, there would be fewer interim caps, there would be more allowances given away for free to polluters, fewer incentives for energy efficiency or clean energy. It's not just that NGOs represented the public interest, but that they had the scientific, technical, legal and political expertise to make their voice persuasive. The bill did not pass Congress, but it will soon—a carbon cap must become law very soon or we are all in deep trouble—and when it does, it will show the role and importance of environmental NGOs.

The same is true at the state level. The RGGI, the Regional Greenhouse Gas Initiative, recently created the first CO₂ auction in the U.S. It just announced that it brought in \$38.6 million in revenue. Not bad for the first week. The RGGI also was heavily influenced by NGOs. And on the other side of the country, Governor Schwarznegger just signed a law actually sponsored by NRDC and another NGO—that sort of thing can happen in California—establishing incentives for alternative transportation, green buildings and Smart Growth.

And the same important role of environmental NGOs can be seen at this local level as well. Hundreds of smaller local NGOs, often using legal tools created and refined by the larger national NGOs, have worked to clean up thousands of local streams or protects parks and forests. These local NGOs, while independent of the larger national ones I'm discussing, often followed the model and cultural trend set by larger groups. (And the larger NGOs, of course, benefit from the local knowledge and enthusiasm of the smaller groups.)

This quick review of the role of NGOs has now brought us to the present. So where are we now and what does the future hold? How can we learn from both the successes and the failures to im-

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prove environmental law, and thus our environment, in the years to come?

We ask this question at a time when, despite about 40 years of work, more than 150 million Americans still breathe unhealthy air³; when about half our *assessed* waters are not fishable or swimmable (incidentally, this statistic is skewed by the fact that more than half of our national waters are yet to be assessed⁴), and when over 1,000 species remain on the Endangered Species List.

And most importantly, we ask this question about how to improve environmental law when we—not just you and I, not just New Yorkers, not just Americans, but all humans—face the unprecedented and urgent challenge of climate change. We know that increasing fossil fuel CO₂ emissions, coupled with increasing deforestation, is increasing average temperatures, increasing both floods and droughts, acidifying the oceans and raising sea levels. We know that warming trends trigger geophysical feedback loops that amplify the magnitude of warming and cooling, accelerating those processes even faster and potentially irrevocably. Can we act in time?

We do not, really—despite the efforts of NGOs—have a great record of acting in time. NGOs and others pushed for a Clean Water Act for years, but did not get it until the Cuyahoga River caught fire for the tenth time and it was widely covered by Time Magazine. NGOs pushed for years to address toxic releases, but we did not get Superfund written until after Love Canal. NGOs spoke of the risk of oil spills for years, but we did not get the Oil Pollution Act until after Exxon Valdez. Can we act now on the climate crisis or will it take more Katrinas? More droughts and wild fires? Another heat wave like the one that killed tens of thousands in Europe? Millions of environmental refugees? I don't know; I hope not.

But we cannot only hope. We must act. So we must soberly look at the role of NGOs and at environmental law and see if there are systemic changes that can and should be used to make us more effective. And while there are surely many changes needed, I will offer my thoughts on a few changes we might all consider,

3. Natural Resources Defense Counsel: Five Dangerous Pollutants in the Air You Breathe, <http://www.nrdc.org/health/effects/fairpoll.asp> (last visited Jan. 19, 2009).

4. Scorecard: Water Quality – A National Overview, http://www.scorecard.org/env-releases/def/water_gen.html (last visited Jan. 19, 2009).

changes both as to what to do with existing law and how to shape new laws.

First, we must really enforce existing laws. When laws are ignored or only half-enforced we cheat ourselves out of what we fought for and what Congress has given the public. And real enforcement has three components. First, we must be able to bring the cases. This today largely means we need to reverse the erosion of access to the courts, which has been led for years by Justice you-know-who. We need to reexamine and find a way to restructure our understanding of public interest standing. I won't go into this issue because others have, but I suggest that NGOs, together with law professors, need to make access to courts an issue in judicial confirmations and to develop a long-term constitution-based strategy to take back the courts.

The second component of better enforcement is that we must bring the cases. Right now, the most violations are, frankly, ignored. There just aren't enough enforcement resources. The law clearly mandates, for example, that there should be no raw sewer discharges, but thousands of municipalities across the country have sewer systems that, at least at times, discharge raw sewage. The fix is expensive for taxpayers so enforcement is lax. Non-enforcement continues to hide uncalculated costs like the increased sickness, lost recreation, and diminished quality of life exacerbated by raw sewage. Increased enforcement would bring attention, and thus eventually money, to the need to upgrade our aging and deteriorating infrastructure.

Similarly, the Clean Air Act's New Source Review (NSR) program mandates that upgraded power plants, refineries, and factories install state-of-the art pollution controls. These controls would avoid many of the 20,000 premature deaths each year and reduce hundreds of thousands of hospital visits every year. (Those are the EPA's numbers, not mine.) But the NSR program was largely ignored by the federal and state governments. Indeed, non-enforcement was such the norm, that when the government (in part due to NGO pressure) began enforcing the NSR program, industry cried unfairness, even persuading the media and the new President to take seriously the notion that aggressive law enforcement is unfair. When non-enforcement almost becomes a right, we have a sad state of affairs. Every lawyer, whomever they represent, should support compliance with the laws we have.

And the third component of better enforcement is that we must insist on giving meaning to all parts of the law, looking at

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the longer-term and the broader deterrent effect. This often means making polluters pay the full penalties the law provides for. Right now penalties are almost always cheaper than cleanup so a polluter's incentives to comply are nonexistent. It's almost always cheaper to wait to until they're caught. Then the good companies that comply have to compete in the market against the violators who may have lower costs. That's not fair to those who follow the law.

Take an NSR example. After decade-long battle, NRDC, EPA, New York and several other states and environmental organizations, reached a deal over American Electric Power's violations of the Clean Air Act's NSR requirements. In the settlement, AEP agreed to install almost \$4.5 billion of pollution controls that should have been installed a decade ago, to pay \$15 million dollars in civil penalties, and to pay \$60 million dollars in environmental mitigation projects. \$75 million sounds like a lot. However, in the same year, AEP's revenues exceeded \$13 billion. That's nearly 200 times the penalties and projects. More importantly, however, AEP's violations allowed it to delay the installation of \$4.5 billion of controls for a decade. That delay was worth hundreds of millions of dollars to AEP. Indeed, the penalty of \$15 million is less than the time-value of that \$4.5 billion for four weeks. Given this, the current situation makes it almost economically irrational to comply with the law.

Perhaps we need to conduct a study that demonstrates that penalties, discounted by the risk of actually getting caught, do not come close to recovering the benefit of non-compliance. With that study should come a strong call for much higher penalties in reality, not just on paper. That would start to create financial incentives for, not against, compliance. It would shift the advantage to those who do comply, creating a real "market-based" approach in the process.

In addition to enforcing the laws, we need to change how we implement them, moving from what could be called the "pollution principle" to the "precautionary principle." This shift should occur at both the administrative and judicial stages of environmental law.

Let me give you two examples of what I mean. Under the Clean Water Act, water pollution permit hearings can drag on for months or more. Rather than allowing permits to be set at protective levels when the data are uncertain, regulated entities are able to insist on extensive risk analysis that over-taxes available re-

sources. This has created a process so time-consuming and so expensive for governments that permit administrators have learned to err in favor of the polluter in the hopes of avoiding litigation. So, when there is doubt as to the amount of stress a system can take—pollution in a stream, grazing or timbering on land, or the like—the default ends up being to allow as much pollution as doubt allows. That gets the permits out faster and is more likely to avoid litigation. Thus, if it is uncertain whether a stream can assimilate 2 or 5 parts per million (ppm) of a pollutant, the government permit writers generally believe they must allow more pollution. I've seen this personally many times; good people being pushed by real pressures to reduce public protections more than they believe appropriate. Polluters have so intimidated those who set effluent or emission standards, that now there is effectively a right to pollute unless proven otherwise.

This is backwards. To solve it, we need to change the burden of proof when it comes to pollution and environmental harm. The history of the common law indicates no presumption of a right to harm others. Thus, the default in case of uncertainty should be towards less, not more pollution. The burden of proof at every stage should be on the polluter, not the public; the presumption should be public health.

Another example is in the judicial realm. When an agency action—a regulation for example—is challenged, the standard of review courts must follow is established by the Supreme Court's decision in *Chevron v. NRDC*. That standard—which I'm sure you know all too well—is entirely procedural and devoid of any substantive direction. But I would argue that the standard of review should not ignore substance if Congress didn't. The Congressional preference expressed in most environmental statutes is not neutral; it is for public health protection over private profit. And it should affect the deference courts give agencies.

Let me explain. The *Chevron* decision created the two-part test that states that if the statute is ambiguous, courts should consider that as an invitation from Congress to the agency to "fill the gaps." But *how* the agency fills the gap—in a way consistent or inconsistent with congressional interest should matter. The *Chevron* approach fails to recognize and give any weight to the *substantive* intent of Congress.

Yes, deference should be given to agency actions, but agency actions should be in congruence with the overall purpose and goals of the statute. A decision favoring clean air, for example,

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should be reviewed more deferentially under the Clean Air Act than should a procedurally equivalent decision that reduced air quality because the Clean Air Act in many ways shows that Congress wanted clean air and knew the trade offs that would take. Any uncertainty or ambiguity in a Clean Water Act permit decision that imposed more stringent discharge limits to protect water purity should be reviewed with greater deference than one that allowed higher pollution levels, because such greater deference would give more meaning to, for example, the Act's zero-discharge or fishable and swimmable goals. Substance would join procedure as a guide to the standard of review.

We cannot avoid this question of deference. Some may argue that the uncertainty regarding the science, the economics, or the effectiveness of a chosen path demonstrates that rulemaking should be delayed until greater certainty is obtained. But, we cannot fail to act as we wait for "the Godot of scientific certainty" because such inaction is itself action—usually allowing more pollution. That's why Congress often puts deadlines on regulatory programs. So there is uncertainty and the question is how to deal with it.

My suggestion today is simple: We should learn from the past and change the way we implement environmental laws to default to, or prefer, public health over private pollution. This is not only good policy, I'd argue, but it is exactly what Congress intended.

In most statutes, Congress has indicated the position to which we should default. Congress wants us to have a bias towards protection. Yet in reality we don't. The Clean Air Act talks about setting healthy levels with "margins of safety." The Clean Water Act has different systems overlaying each other to ensure full protection. CERCLA is a remedial statute to be read broadly.

NEPA is more than just a mandate for EISs, it establishes a "national policy" to consider environmental impacts in all decision making and "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." RCRA ensures that hazardous wastes can't be buried out of sight and out of mind, its mandate apply without regard to site-specific demonstration of harm. The Endangered Species Act has a zero extinction policy. Needless to say, one could write long briefs on Congressional intent.

Our failure over the last 40 years has been to enforce and interpret our environmental laws too atomistically and not wholistically, to view each case as separate when in reality, as John Muir

wrote in July 1869, “When we try to pick out anything by itself, we find it hitched to everything else in the Universe.” Just as those opposing environmental protections have been able to infuse the entire system with the bias of the primacy of private profit, NGOs and their allies must seek to change the systemic bias of our laws, our public laws, to one of public benefit and inter-connectedness.

The third and last major change NGOs should consider, in addition to changing how we enforce and how we implement our laws, is changing how we shape our laws and their relation to the market. Simply put, for too long, environmental protections have had to swim against the swift current of private profit. We impose pollution mandates, but don’t address the market in which polluters act. Penalty provisions that aim to take away the benefit of non-compliance, and natural resources damage provisions address the larger market a bit, but, as noted, they are not fully enforced or implemented and thus don’t change the overall flow. So now, with minor exceptions, pollution control mandates run against private profit.

We need to flip that; we need to shape our laws so that *both* legal mandates and private interest are aligned as much as possible. Of course, the main way we do that is to put a price on pollution, but we can also do that with more public disclosure and increasing consumer pressure. The price signal should encourage private actors to reduce pollution. I’m not suggesting, as some do, that we replace the current Clean Air Act and Clean Water Act and other laws with a cap-and-auction system, but rather that we use a wide array of economic tools to bolster our legal mandates. We need *both* specific pollution mandates and market incentives.

If we require better and more truthful information about the true costs of wasted energy, for example, energy efficiency standards will be more easily adopted, implemented and followed. Put a price on pollution, for example, by beefing up the natural resource damages provisions so they apply more generally and in almost all cases—and you’ll probably find less violation of permits. Put a price on all the types of pollution and make the polluter pay for every bit that is discharged, even pollution within permit limits, and the dialogue over permit limits will change dramatically. Again, the answer is both, not either alone.

As to climate change, there are both price and non-price barriers to clean and efficient energy. Thus, we must put a price on carbon through a cap-and-auction system or a tax. But we must

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also develop efficiency and renewable energy standards, provide financial incentives from auction revenues and take other steps.

As a result of practicing environmental law for almost 25 years, I've come to think that real change requires at least two or three laws mandating the change. Polluters too easily ignore or find ways around any one law. To achieve our environmental goals, the reality of the last decade shows that we need more information and disclosure, more facility specific pollution limits, more ambient environmental targets, and more positive market support. It's not either/or, but both/and.

The challenge of climate change is that we cannot wait. We cannot fail. And cannot be satisfied with "we tried our best." We'll need all the tools we have. We—NGOs, government, academia, and industry—must learn from the successes and failures of our past and be ever more effective.

Thank you.