

January 1997

## Should Environmental Laws Be Integrated?

Robert M. Sussman

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>

---

### Recommended Citation

Robert M. Sussman, *Should Environmental Laws Be Integrated?*, 15 Pace Envtl. L. Rev. 57 (1997)

DOI: <https://doi.org/10.58948/0738-6206.1335>

Available at: <https://digitalcommons.pace.edu/pelr/vol15/iss1/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# Should Environmental Laws Be Integrated?

ROBERT M. SUSSMAN\*

I appreciate being here today and sharing with you my thoughts on the integration of our environmental management system. In listening to the presentations this morning, I was struck by how the concept of the generation of environmental progress was one that seemed to resonate with many of our speakers. Carol Browner<sup>1</sup> talked about a new genera-

---

\* Robert Sussman is a partner at the law firm of Latham & Watkins where his practice is focused on environmental safety and health issues, with an emphasis on emerging trends in environmental management, risk policy, cleanup issues, and toxic substances regulation. Mr. Sussman is one of the Nation's leading experts on the Toxics Substances Control Act (TSCA). His clients include major trade associations and individual companies in the chemical, petroleum, and manufacturing industries.

Mr. Sussman served as Deputy Administrator of the United States Environmental Protection Agency (EPA or Agency) from 1993-1994. As the Chief Operating Officer and Regulatory Policy Officer of the Agency, he was involved in all phases of the EPA's activities. His responsibilities at the EPA included leading development of the Administration's Superfund reauthorization proposal and chairing the EPA's Science Policy Council. At EPA, Mr. Sussman also spearheaded development of the Agency's climate change and global warming initiatives.

Mr. Sussman is currently a member of the steering committee of the Enterprise for the Environment initiative, chaired by former EPA Administrator William Ruckelshaus, and is co-chairing an action group on setting environmental goals and priorities.

Mr. Sussman is a graduate of Yale Law School where he was an editor of the Yale Law Journal, and a Phi Beta Kappa, *magna cum laude* graduate of Yale College.

1. Carol M. Browner became the Administrator of the United States EPA in January 1993. As head of the EPA, Administrator Browner is charged with protecting the Nation's air and water from harmful pollution, overseeing the disposal of garbage and hazardous waste, cleaning up contaminated sites under the Superfund law, and establishing rules for pesticide use and food safety. In her first year at the EPA, Administrator Browner launched the Agency in an important new direction by promoting a firm commitment to environmental goals, along with common sense, innovation, and flexibility in reaching those goals.

tion of environmental protection. Marion Chertow<sup>2</sup> talked about the Yale second generation project. A number of people mentioned that the Environmental Protection Agency (EPA) is now roughly twenty-five years old, and twenty-five years is roughly a generation. I hear everybody around the room saying that after twenty-five years it is time to take stock, to look back, to ask what we have accomplished in the last twenty-five years and then to look ahead to the next twenty-five years.

Let me look back, for just a second, at the last twenty-five years and emphasize that I think most people would agree that our environmental management system has been a real success story for government and our society. We have made an enormous amount of progress in the last twenty-five years. I think nobody would debate the proposition that this progress would not have come about without government intervention and the widespread changes in values and practices that government intervention has brought about.

That brings me to what I think is a very provocative and important question which is, given the successes of the last twenty-five years, why should we change our environmental

---

From 1991-1993, Administrator Browner was Secretary of the Department of Environmental Regulation for the State of Florida. There, she earned praise for building innovative partnerships to protect public health and the environment while also promoting economic growth. From 1986-1988, she worked for then Senator Lawton Chiles, now Governor of Florida. She also served as Legislative Director for then Senator Al Gore, Jr. Administrator Browner is a graduate of the University of Florida and its School of Law.

2. Marion R. Chertow is Director of the Next Generation Project at the Yale Center for Environmental Law and Policy. In this capacity she is leading a two-year effort to shape the future of environmental policy in collaboration with approximately 250 people around the country and the world. Since 1991, she has been the director of the Industrial Environmental Management program at the Yale School of Forestry and Environmental Studies and has been teaching courses in waste management, industrial ecology and business concepts for environmental managers.

She was previously president of the Connecticut Resources Recovery Authority, a statewide bonding agency where she oversaw the development and construction of more than \$750 million of infrastructure projects. She has testified on waste management issues before committees of the U.S. Senate and the House of Representatives, serves on numerous boards, and chairs the Corporate Environmental Leadership Seminar at Yale, which is a two-week executive course about environmental management and policy.

management system? To borrow a phrase – if it isn't broken, why fix it? I think that is the question that many people have been asking during the tumultuous regulatory reform debate of the last three years. The people in Congress, particularly Democrats, environmental groups, and even ordinary citizens are saying this system is working for us. Why do we need to change, and if we change it, is that going to do more harm than good? I think that is the central question and I think those who are proponents of change, and I certainly am one, need to make the case for change. We need to make the case for why changing our system will be an added plus for the environment and for our society.

Now, my answer to this question is that we really have no choice but to change because if we do not, the system of law and policy that has served us so well for the last twenty-five years will become obsolete. In other words, if we do not change, the law of diminishing returns will take hold. What do I mean by the law of diminishing returns? I mean that we will see a steadily declining rate of environmental progress in this country and the strides that we make will require ever-increasing transaction costs, paperwork, and bureaucracy. In other words, we will see less and less in the way of environmental results and more and more in the way of unnecessary litigation costs and hassle. I would submit that this is too big of a price for our environmental management system to pay. Therefore, I think that we need to change so that this system that has served us so well in the past can continue to serve us successfully in the future.

What are the areas where we need to improve? We have been discussing these areas all morning. Let me try to tip off what I think are the areas of improvement that are most important. Let me emphasize that we do need to be as explicit as we can about what improvements we want to make and why they are important. That is why we need to start with what is wrong with the existing system and how we can make it better.

First, we have developed a habit over the last twenty-five years of measuring progress by quantifying what I would call programmatic outputs. We measure the success of our envi-

ronmental protection system by calculating the number of rules we are issuing, the number of permits we are issuing, and the fines that we are collecting. This comforts us and makes us feel that we are doing a good job. But in many cases it has no direct relationship to environmental improvement, and we are not measuring what we really need to be measuring, which are environmental outcomes.

Related to that, I think we do a very poor job of measuring environmental trends and conditions. We do not do a good job in benchmarking the state of the environment. We do not do a good job providing authoritative information on environmental trends by telling the Nation whether or not the environment is improving and where the problem areas are. We have woefully under-invested in those types of tools. We do a very poor job of communicating our environmental goals to the public in a simple and understandable way to which people can relate in their day-to-day lives. One reason I think there has been so much resistance to the EPA, and in some cases so much anger at the EPA as a bureaucracy, is that we have done a very bad job of explaining both the relationship between the day-to-day program implementation which is very complex, bureaucratic and often impenetrable, and the core environmental values about which we really care. We also organize our programs in silos which are media specific, and as a result of that, our waste program does not talk to our air program, and our air program does not talk to our water program. Therefore, we do not identify the types of cross-media problems and cross-media solutions that we must have. The absence of a cross-media caucus has another, I think, very invidious consequence. We have permitting requirements, paperwork requirements, and reporting and record keeping requirements which are needlessly complex because they are media specific and they are not coordinated across media the way they should be.

We also do not do a good job in anticipating the problems we will face ten or fifteen years down the road and in developing the science, the monitoring tools, and the control technology that we are going to need when the time comes to face those problems. I think that the current debate over the pro-

posed revisions for the EPA's air quality standards for ozone and small particles is an excellent example of this. Five or ten years ago, if you asked anybody about the health effects of small particles, you would have probably gotten a blank stare. If you asked researchers within the EPA, the government, and the university community what environmental issues are important and need attention, very few people would have said small particles. Yet, here we are in 1997, and we are hearing that exposure to small particles is the number one environmental issue in this country and that we need to invest millions of dollars to solve it. Why were we not talking about this issue five or ten years ago when we had the ability to invest in the science, the monitoring techniques, and the control technology that we do not have today now that the problem is upon us?

Let me identify one other area where we are falling short in a significant way. We focus too much attention on traditional stationary source control and do not address the more intractable and politically sensitive challenges of non-point pollution, energy utilization, suburban sprawl, and poor transportation planning, even though, in my judgment and I think in the judgment of many other people, these are the real drivers of our serious environmental problems in today's world.

So, I think the case can be made that we need to improve our system to address the fundamental weaknesses. If we do not do it, we are going to have a system that is increasingly unworkable and incapable of meeting the challenges that lie ahead.

The difficult question, which is the question that we have been debating all morning, is how do we create a better system? How do we move from where we are today to where we want to be ten, fifteen or twenty-five years from now? There are a number of different schools of thought on this.

The first is that we should evolve within the constraints of existing laws. Existing laws are flexible, and we have not fully realized the flexibility that they have to offer. The EPA, and other agencies, should concentrate on using the discre-

tion that they have to experiment with innovating new technologies. In this way we can evolve towards a better system.

I frankly do not agree with this approach. I think that in many respects, the problems that we face today are the result of having statutes that are extraordinarily prescriptive, that are overloaded with mandates and deadlines, that tie the agency's hands and give the agency very little real discretion with which to work. I do not think we can unlock the creativity that we want in our system simply by continuing to innovate within the constraints of existing law.

That brings me to the second option that some have advocated. Under this school of thought, we would basically leap from the system that we have today to a totally new system. We would sunset the laws that are now in place and we would replace them with comprehensive, extensive, cross-media environmental statutes. I think that this is an intellectually exciting option. It is certainly an option that may be viable over the long term but I do not think it is a viable option over the short term. Both industry and government have made large investments in understanding and learning to operate within the existing legal framework and they are going to be very unwilling to unlearn what it has taken so much time to learn. Moreover, Congress, environmental groups, industry, and other stakeholders have devoted countless hours and shed an enormous amount of blood to craft existing laws and will instinctively resist the concept of simply extinguishing those laws and replacing them with something new.

So, if it is not a viable option to continue to innovate within existing law, but it is not a viable option to adopt a comprehensive statute, then what should we be doing? That brings me to the third option, which is the option of what I would call an integrating statute. Now, what do I mean by an integrating statute? An integrating statute is a law that makes crosscutting improvements in our existing laws but does not eliminate or replace them. It creates flexibility. It creates flexibility in the existing laws' rigid mechanisms in order to manage programs more flexibly and effectively but it does not undo or alter any of the laws which are now in place.

Why is this a good idea? Ideally, an integrating statute gives us the ability to evolve to a new environmental management system, but to do so in an orderly way which avoids the disruption and confusion and very high transition costs of moving immediately toward a new unified environmental statute. In other words, it gives us what I think is so important in American society – the ability to make change in a way that is creative but cautious, which is evolutionary rather than revolutionary, which allows people to move ahead together rather than pitting them against each other. It gets us where we want to go without upheaval and deep division. I think we have seen that in the environmental management arena, there is an enormous potential for deep division and polarization. If that continues, we will not go forward at all. So we have to find a way to move forward which is incremental and evolutionary. I believe that an integrating statute can move us down that road.

What might be in this integrating statute? It would include a number of mechanisms that we have been talking about this morning. Those mechanisms would sit on top of our existing laws, not replace our existing laws. What would some of those mechanisms be? The first is a new framework for setting environmental goals and milestones. Under this new framework, we would try to be more disciplined in identifying the key long term environmental goals that we want to achieve. We would try to be more disciplined in how we are going to measure whether we are achieving those goals. We would also be more realistic and disciplined in setting short term targets for environmental improvement which are achievable, which we can work towards, which are not idealistic and speculative, and which we can use to benchmark our progress. I think a system like that allows us to bridge the gap between aspirational goals, that is the long term environmental improvements that we want to achieve based on good science, based on ecological integrity and based on the prevention of significant adverse human effects. To bridge the gap between those long term goals, which I think we all instinctively feel that we need, and performance targets for the near term which are credible, which are realistic, which do



take cost into account, which take feasibility into account and allow us to escape from the trap of setting very ambitious goals as we have done under the Clean Air Act and which we as a society have lacked the political will to meet. If we do have an integrating statute, one thing we need is a new discipline of setting goal milestones and measuring to see whether the targets we set are being achieved.

The second key objective we need is to provide the EPA with tools for increasing flexibility and reducing costs in complying with existing pollution control requirements. I think everybody is talking the talk on this issue but not everybody is walking the walk. The fact of the matter is that if we really want to reduce costs and if we really want to increase flexibility, we have to be looking at some of our poor environmental performance tools (like permitting, record keeping and reporting emission control requirements) and we have to ask ourselves what we can do in those areas to reduce costs and paper work. I think if we put our minds to it, we can identify several things that would be practically useful and beneficial that we can do in the short term.

The third key objective of statutory integration, and maybe the most important, should be to encourage the non-traditional tool for boosting environmental performance that we are going to need for the future. To me, this is the biggest challenge and the biggest opportunity which is – how do you boost environmental performance outside the cumbersome command and control machinery that is in place today? I think that there are enormous opportunities to do this if we seize some of the new concepts that are emerging and we build on them. For example, we need to be encouraging companies to look comprehensively at their plants and other products to see how they can reduce waste generation, increase energy efficiency, improve recycling and reduce raw material inputs. Many companies are doing this right now. But we need to create a discipline, methodology and structure of rewards and incentives so that this is an accepted tool that becomes imbedded in our regulatory system.

Similarly, we should be encouraging a system of standardized indicators which the corporate community can use

to track and report environmental performance trends. If you read annual corporate environmental reports, you will see that many companies are collecting this type of data right now, but we need a set of commonly accepted matrices in which we have confidence so that we can compare across companies, so that we can encourage companies that are behind the learning curve, so that we can collect information, so that we can build a database that we can use to judge how well we are doing as a society in meeting our sustainability targets.

Finally, I think we need to face up to the intractable problems which we have done a very poor job in facing. Examples of such problems are: non-point source pollution, urban sprawl, poor transportation planning, poor land use, and underutilization of center city areas which should be redeveloped. We need to explicitly acknowledge that these are very big environmental problems. They may in fact be bigger and more important than the stationary source problems that have received so much attention. Then we need to develop some decision-making and policy-making models that we can use to address these problems on a national, regional, and local basis. I do not have a definitive answer here, but I do believe that the model of watershed protection or ecosystem protection, whatever you want to call it, that model has a great deal of promise. We need to ask ourselves how we can encourage collaborative planning at the local level in a very creative and innovative way under the framework of national environmental values and goals which make it legitimate for stakeholders in a local area to address issues like growth, agricultural runoff, and highway congestion.

Those are three broad themes for an integrating statute. Let me now return to the question that everybody has been asking today. What is it going to take for change to occur in the real world, in the political world where people argue endlessly and often do not agree? I will say that right now, the various players in the political process are unsure whether they will gain or lose if our environmental management system changes significantly, so they are holding back and waiting for others to make the first move. Thus, we have the

dance where industry points its fingers at the agency, environmental groups point their fingers at industry, the EPA points its finger at the states, states point their fingers at the EPA and it goes around and around. Nobody is putting anything on the table because everybody is afraid of losing. That is the vicious cycle that we need to break and that is not going to be easy. Despite all the talk about collaboration and partnership that we are hearing today, we are functioning right now in a very poisonous atmosphere of distrust, animosity, and polarization, and there is not a lot of good will upon which to build. Change – that is the major challenge that we have to meet to move forward.

We need some new alliances. We need environmental groups to see benefits in building alliances with industry and the states. Above all, we need greater trust so that people have some confidence that if they work together, they are not going to get stabbed in the back at the end of the day. Creating this trust will be very difficult and hard work, but in the end we really have no choice because a continuation of the status quo will ultimately be far worse.

Thank you.