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# What is Our Clean Air Policy?

MICHAEL C. FINNEGAN\*

Introduction by Professor Nicholas Robinson:

Michael Finnegan is an extraordinary individual and we are privileged to have him here. When George Pataki appointed Mike, he said "Mike Finnegan has been my closest advisor and friend for many years. He will play a pivotal role in this administration and will be involved in every major decision of the state government." I think that what we have

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\* Michael C. Finnegan was appointed Counsel to the Governor on January 1, 1995. In this position, Mr. Finnegan is a key advisor to the Governor in all legislative, legal and policy matters.

Mr. Finnegan graduated from Siena College, where he is currently an adjunct professor, and earned his law degree from Pace University Law School. He was a former partner in the firm Plunkett and Jaffe, P.C. where he concentrated on corporate, banking and development matters. Mr. Finnegan was a founding partner in Finnegan and Mignano Associates P.C. where he specialized in real estate, public finance and environmental law.

During his first year as Counsel to the Governor, Mr. Finnegan successfully brokered the New York City Watershed Agreement by leading negotiations among state, federal and New York City governments, representatives of eight upstate counties and the environmental community to produce a landmark agreement which had eluded the parties for more than a generation.

The agreement preserves the drinking water supply for eight million New York City residents while protecting the economic and environmental concerns of Watershed residents and the environmental community.

Mr. Finnegan also oversaw the formulation and legal drafting of Governor Pataki's Clean Water/Clean Air Bond Act which will provide over \$1.5 billion to air and water enhancement and protection programs throughout the state. Mr. Finnegan took a leave of absence to serve as Executive Director and Co-Chairman of the Bond Act Campaign Committee where he orchestrated the campaign which led to the Bond Act's overwhelming approval by New York State voters. The Clean Water/Clean Air Bond Act and the New York City Watershed Agreement have been hailed as the Governor's finest environmental accomplishments.

Mr. Finnegan is well-versed in Irish politics, history and tradition and lives in Garrison, New York with his wife and their three children.

seen in the past two years is that this prophecy has in fact taken place.

The Honorable Michael C. Finnegan:

In thinking about what I should talk about when I looked at the title of the colloquium, "Directions and Corrections in Air Pollution Policy," I remembered what Professor Robinson always suggested, and that is, "go to the root of it." Go to the primary source documents, go to the legislative findings and look at the legislative history. Do not take at face value what the courts have said or how they have interpreted the statute.

So, I started thinking; what exactly is our air pollution policy? Of course, a policy cannot be found in a single statement. We need to look at various sources to determine the policy. So, I would like to start by quoting a couple of things that I have found in doing the research. This is from the legislative findings, congressional findings and the 1990 Clean Air Act Amendments (CAAA).<sup>1</sup> "Our primary goal of this act is to encourage or otherwise promote reasonable federal, state and local government actions for air pollution prevention."<sup>2</sup> President Bush, when signing the bill, said, "every American expects and deserves to breathe clean air, and as President, it is my mission to guarantee it."<sup>3</sup>

In 1993, Vice President Al Gore wrote in a report, "rather than dictating exactly which technologies industry should use to reduce pollution, the government should set standards and let the market handle the details."<sup>4</sup> President Clinton wrote later that year, "stewardship of our land is a major part of stewardship of the American dream, since the dream grew out of this very soil."<sup>5</sup> Governor Pataki wrote last year in the

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1. See Clean Air Act (CAA) §§ 101-618, 42 U.S.C. 7401-7671q (1994).

2. H.R. REP. NO. 490, 101st Cong., 1st Sess., pt. 1A.

3. William G. Rosenberg, *The New Clean Air Act of 1990: Winds of Environmental Change*, BUS. HORIZONS, Mar. 1, 1992, at 34 (quoting President George Bush statement to Congress on the Clean Air Act Amendments of 1990).

4. Mark A. Hofmann, *Businesses endorse Gore plan; Workplace safety bureaucracy to be cut*, BUS. INS. Sept. 13, 1993, at 31 (quoting Vice-President Albert Gore report on OSHA reform recommendations).

5. *Remarks by the President at 25th Anniversary of Earth Day: The Park at Concord Lighthouse*, M2 Presswire Apr. 24, 1995.

State of the State message, "our vision is a New York that has room for both a sound economic growth and strong environmental protection."<sup>6</sup> The architect of the so-called devolution revolution, Newt Gingrich, wrote last year that "the last sixty years have seen so much centralization in Washington that the best that we can do at this point is shift power back to the state capitals, and yes, our ultimate goal is to move power beyond our state capitals."<sup>7</sup>

So, I would suggest that some place in the mix of all of those words is really the root of our air pollution policy. It involves devolution, it involves the things that President Bush spoke about, and Vice President Al Gore had written about, and so on and so forth. What, then, have been the directions and corrections over the past six years in that policy? Clearly, the struggle to clean and preserve the nation's air has taken a form that I am sure would even surprise the architects of that legislation six years ago. Some are important and, I think, for the purposes of this colloquium, worth noting as we approach the twenty-first century.

First, there is now a recognition among policy makers that environmental protection and economic development are not mutually exclusive. Always ahead of his time, almost 100 years ago, Teddy Roosevelt put it this way: "conservation and business policies are really two sides of the same policy."<sup>8</sup> Second, more authority has clearly been devolved to the states and, in some instances, even to the local governments during the course of the last six years. Third, there is a growing recognition that air pollution problems, like so many other environmental problems, know no political boundaries. Therefore, I would suggest that neither should be the solution. Fourth, something that will affect policy in the future, is that regulations are becoming more science-based, and they are the key to finding publicly-based solutions to envi-

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6. Governor George E. Pataki, State of the State Message to the Legislature (Jan. 4, 1995).

7. Speaker of the House Newt Gingrich, Address to the Republican National Convention (Jan. 1995).

8. 16 THEODORE ROOSEVELT, THE WORKS OF THEODORE ROOSEVELT 146 (Nat'l ed. 1926).

ronmental problems which do not, in and of themselves, needlessly adversely affect economic opportunities. Finally, I would note, particularly over the course of the past eighteen months, that the politics of environmental protection have become particularly potent. So, what I would like to do is expand on each of these points a little bit.

The statement that good economic development can result from good environmental protection is, in my opinion, axiomatic. Teddy Roosevelt had it right, they really are two sides to the same policy. For too long, we have heard the shrinking voices of those in public service and in the private sector arguing that environmental protection stagnates economic development. They have been proven wrong. Consider, for example, the city of Tulsa, Oklahoma, which had the difficulty of attracting new businesses in a non-attainment area. The short end to it is that the city developed its own strategy to address this problem. But clean air is not just a public health issue, as some have argued, and it is certainly not just an environmental issue, as others have argued. It is a public policy issue. Clean air makes good economic sense as well as good environmental sense. Sound air pollution strategy should be a component of any successful plan to create and preserve jobs.

Recent polls clearly demonstrate that the public is unwilling to have environmental laws weakened or repealed. In fact, a recent republican poll found that while fifty-nine percent of Americans believe that there is too much government regulation, only twenty-one percent felt that there is too much environmental regulation.<sup>9</sup> Furthermore, thirty-six percent said that the environmental regulations did not go far enough in protecting clean air, water and food.<sup>10</sup> The juxtaposition of those poll results is really astounding and is something that policy makers and politicians nationwide, if they have not taken note of, will certainly take note of in the months and years ahead.

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9. On file with Speaker.

10. On file with Speaker.

Furthermore, another recent poll found three out of four Americans support even stronger efforts than we currently have.<sup>11</sup> These include stronger regulations to protect our water, air and food sources. Job opportunities do not have to come at the expense of a clean environment. In fact, recent evidence indicates that companies making a commitment towards environmental protection also perform well for their stockholders.<sup>12</sup> A recent survey of the Investor Responsibility Research Center (IRRC) concluded that “a growing number of corporations and investors are betting that environmental performance is predictive of future financial performance.”<sup>13</sup> This is especially true, the IRRC concluded, in environmentally sensitive fields like petroleum and paper production.<sup>14</sup>

A second major change that has affected the air pollution problem over the past six years is the so-called “devolution revolution.” But, clearly, the states are beginning to make air quality decisions that, six years ago, the supporters and drafters of the CAA amendments would have looked upon with marvel. While clean air policy has always been developed at the federal level, the implementation of these policies has been left largely to the states. That is true, but what has happened recently is that the centralized planning process that was always involved in the transference for implementing the policy to the states, has become, in a sense, decentralized. Over the last two years, the Environmental Protection Agency (EPA), has become more and more willing to let state and local government officials develop new strategies for correcting contaminated air. This is partially due to the so-called “conservative tide” in Congress, but it is clear that the Clinton administration has taken a different position. It has participated directly with state and local governments in developing their own policies. In any event, across the country, cities and states have begun developing their own unique solutions to air pollution problems. Again, I refer back to

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11. On file with Speaker.

12. On file with Speaker.

13. Investor Responsibility Research Center, Corporate Environmental Profiles Directory 1995.

14. *Id.*

Tulsa, which took the lead in dealing with its own ozone problems. The city was having significant difficulty attracting new businesses into a non-attainment area. So, to combat the problem, rather than waiting for the federal government or the state of Oklahoma to develop a solution, the city developed its own attainment program. On hot days, when ozone is a particular problem, Tulsa and the surrounding counties provide free bus service into the city. They encourage employees to engage in carpooling through incentives. Additionally, they have placed restrictions on the use of lawnmowers.

Butte, Montana, did a similar thing with regard to stoves, when they attached a \$30 surcharge to the water bill of anyone having a wood-burning or coal-burning stove in their home. And, there have been other examples.

As a result of what Tulsa did, in cooperation with Oklahoma, the EPA designated it the first flexible attainment region in the country. This designation allows the local government to develop its own ozone control measures. Another example of this flowing down in authority can be found in the southern California coast air quality management district which developed a NO<sub>x</sub> and SO<sub>2</sub> trading program that reduces emissions in Los Angeles by using market-based credits and incentives. These pollution control programs evidence that devolution, even onto local governments, can work and is likely to have long-lasting implications for air pollution policy.

A third change is the growing recognition that air pollution is a regional issue. The 1990 CAAA created the Ozone Transport Commission (OTC), consisting of twelve North-eastern states and the District of Columbia, to examine air quality issues. Congress realized that pollution problems cannot be differentiated along state and other political boundaries. The OTC has acknowledged that pollution generated in Pittsburgh, Alexandria and Washington, D.C. has migrated up the coast to Philadelphia, New York City and Boston. The recognition of the regional nature of these air pollution problems has spawned a voluntary group called the Ozone Transport Advisory Group (OTAG), in which New

York is about to begin participating. It is comprised of thirty-seven states, who, on a strictly voluntary basis, look at the long-term effects of transported pollutants. Consequently, there is increasing recognition that what has occurred in the Midwest states has a direct and adverse effect on the Adirondacks in the form of acid rain. In fact, just last week, New York commenced legal action against the EPA, because of their unwillingness to enforce certain emissions standards against certain Midwestern plants that were emitting what ultimately became particulate matters in the Adirondacks. But when our town, city, county and state boundaries were established, no heed was paid to the atmospheric, scientific and transport pollution issues that must be addressed on a regional basis. This is something that we considered an important component of the Watershed agreement. I think it will be a large part of what ultimately becomes the debate over air quality and air pollution in the future. I think just as Watershed has become a commonly used word, that Airshed will as well.

Additionally, we have seen a move toward more science-based, non-generic regulations as a result of increasingly better science. We no longer need to attack all environmental problems with generic regulations. In short, better monitoring, better modeling and better testing can make for better regulations, more public confidence and, hopefully, a cleaner environment. This, too, played an important part in our recently obtained Watershed agreement. The monitoring and testing program, for which we are currently seeking funding from Washington, became an important part of holding the Watershed Coalition together. Those who were in the regulating community began to see that with state of the art monitoring and testing, we no longer need the sort of blanket regulation region that regulates certain people or certain landowners in the Watershed region. Rather, through monitoring and testing, we can identify the real cause of the pollution.

In addition, people are watching. The public is carefully attending to what we do in developing environmental policy, at the national, state and local level. Clearly, they are con-



cerned that we develop a regulatory scheme that does not do violence to economic opportunities. New regulations need not do violence to economic opportunities, provided that they are science-based and a result of the careful monitoring and testing programs for which we now have the scientific capability to develop.

Also, I would note that we must be careful in developing new policy - air pollution policy in particular - to make sure that the regulations are rational and appear fair. I would compare that with the centralized inspection and maintenance program (I&M), that the state of New York was considering up until a few months ago. Time and again, the argument advanced by both citizens and by legislators throughout the state was that the centralized testing program could not work. It was difficult to argue with a citizen or legislator from Long Island. They would simply say that if you have ever driven on the Long Island Expressway, or if you have ever tried driving someplace on Long Island on a weekday or a Saturday, you know that thirteen centralized testing centers could not work properly. They were right. As a result, we had to abandon that policy in the state. I believe we have developed a better program.

Contrast that example with what happened in Texas, where motorists had the option and convenience of either having their emissions tested centrally every two years or annually at their local service center. That is exactly the kind of approach that we think works. In addition, Maryland has developed a program with the two largest utilities who have voluntarily agreed to put their entire fleet onto centralized testing on an annual basis to demonstrate that it is not an inconvenience. Some of you might know that the Pataki Administration advanced our own decentralized I&M program, particularly downstate. As a result, we think we will have over 1000 testing centers to ensure that people have the ability to test their cars, to ensure that we have a better opportunity for compliance.

The public is smart. The public will support our efforts to achieve a cleaner environment and cleaner air, but it will continually resist regulations that do not make sense. The

public is willing to put their trust in regulations, as long as those regulations are based on science and common sense. A recent EPA report indicated how important this testing program could be, particularly when it highlighted that fifty-six percent of our air pollution is a result of motor vehicle emissions.<sup>15</sup>

Today's colloquium topic, directions and corrections in air pollution policy, requires that we account not just for the changes that have occurred over the past six years, but also account for the policy changes that we should strive to achieve as we enter the twenty-first century. We must press for expansion of mass transit alternatives to motor vehicles.

Governor Pataki has proposed some new initiatives, such as encouraging the Port Authority to sell the World Trade Center, so that the proceeds of the sale could be used to develop a railway from midtown Manhattan to lower Manhattan. We have also spoken about the need to continue our effort to develop a high speed rail system in this state. We must continue to develop an inspection and maintenance program that is rational and fair and applies to more than passenger cars and light duty trucks. I am happy to tell you that we are working on a program bill in my office that will expand the inspection and maintenance program to include heavy trucks and buses. It is my hope that we can release that legislation in the coming weeks. Likewise, we must continue to search for alternatives to gasoline-powered engines. We must promote promising new technologies that will look to alternative sources of fuel for automobiles. These include gasoline-powered vehicles and electric-powered vehicles. The Governor has been an advocate of establishing a viable electric car industry, here in New York, that will provide reliable and efficient transportation to consumers at a reasonable cost with a much reduced impact on our natural resources. Despite the recent policy reversal in California, New York remains firmly committed to the technology-forcing policy mandating sales of electric vehicles. Again, we view this, in New York State, not just as good environmental policy, but as

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15. On file with Speaker.

a good job creation policy. If we can foster that industry here in New York, if we can be the leaders in the development of electric cars, we can provide for cleaner air and more job opportunities in the state.

We must also make air quality improvement a much more important part of our land planning policies. We must recognize that our lifestyles have an affect on the environment and air pollution. Our policies have to reflect that. We need to design new communities in a way that minimizes automobile traffic and maximizes mass transit opportunities to help improve air quality. We must develop new ways of thinking and new ways of planning.

In conclusion, I would note that states have all clamored for the ability to regulate themselves and get Washington off their backs. But, in the case of the 1990 CAAA, and the changes that have occurred over the past six years, particularly devolution, states must be mindful that they should not become the barking dog chasing the car. What exactly do they do when they catch the car? That remains largely untested. Also note that the states and, to some extent local governments, have for years used EPA as the whipping boy, the bad enforcer, the promulgator of regulations that no one wants to see enforced. In the age of devolution, the states are going to have to step up to the plate and take more responsibility for those programs. This is an untested part of the devolution revolution, and it is also an untested part of the whole states' rights movement. There is an old Irish saying that my uncle who was a farmer in Ireland used to say: "[w]e do not inherit the land from our parents, but we borrow it from our children." I would like to think that the Pataki Administration's environmental policy, as it evolves, is crafted with that quote in mind. There is no doubt that we must improve air quality if we are to leave our resources in the same or better shape for our children and our grandchildren. What is needed is, in fact, new ways and new strategies to solve some old problems and some new problems. Now that the states and local governments are becoming more involved in CAA implementation and enforcement, we must look beyond the year 2000. We must think of our policy choices specifically in

view of a driving public which contributes to more than half of the air pollution. We must always remember that we have not just borrowed the land from our children, that we have, indeed, borrowed the air from them as well.