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Congressional Efforts to Eradicate Environmental Laws

GREGORY WETSTONE*

Looking back at what has been achieved in the last five and a half years since the 1990 Clean Air Act Amendments (CAAA)¹ passed—I think it is remarkable. For example, the number of areas that violate the carbon monoxide standards in the country have been reduced by seventy-five percent. That is a huge gain. Although ozone is an extremely difficult problem to deal with, the number of cities that violate the ozone non-attainment standards has been reduced by fifty percent. I do not think anyone would have expected to see this level of progress.

Under the 1990 CAAA, air toxins are being reduced by about 1.6 billion pounds per year. That is six times the level that we were able to achieve in the previous twenty years under the 1970 laws. The acid rain target for the end of 1995 has not only been met, but exceeded by two million tons.

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Before joining NRDC in January of 1995, Greg was Chief Environment Counsel at the House Energy and Commerce Committee's Health and Environment Subcommittee. Prior to joining the Committee staff, Greg was Director of the Air and Water Pollution Program at the Environmental Law Institute, where he authored a desk reference on pollution law (*AIR AND WATER POLLUTION LAW* 1980 (revised ed. 1982)) and a groundbreaking book on the acid rain problem (*ACID RAIN IN EUROPE AND NORTH AMERICA*, reprinted in German as *WELTBEDROHUNG SAUER REGAN* (1983).

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1. Clean Air Act Amendments of 1990 (CAAA), Pub. L. No. 101-549, 104 Stat. 2399 (1990).

The costs of all of these achievements have been dramatically lower than estimated. For example, the industry estimate for the tonnage costs for reducing acid rain was between \$1,000 and \$1,500 per ton. The EPA estimated it would be about \$300 a ton, but no one would take that estimate seriously. So the Act was passed under the assumption that the cost per ton was in the \$1,000 range. Allowances are now selling for about \$65 per ton. Recently, a number of articles in the *Washington Post* raised the issue of why the Clean Air Act (CAA)² was not tougher on SO₂ emissions when you look at these allowance prices.³

This is a pretty interesting question when, presently, we are seeing more and more focus on basing environmental decisions on cost/benefit assessments. What you hear is a lot of critiques about the benefits. How do you assess the benefits of reduced lead? What is a clear day worth? What are the benefits of reduced forest damage? These are exceedingly relevant questions.

But, the reality is that you also have a big problem estimating cost. Historically, initial cost estimates are wildly inflated, as evidenced by the acid rain allowance program mentioned earlier. The CAA programs to phase out chlorofluorocarbons (CFCs) provide another illustration. Since 1990, CFCs have been reduced by more than ninety-five percent with no major economic disruption. A huge fight surrounded the CFC issue in 1990. So, the fact that we have been able to see that level of progress with no disruption whatsoever and minimal economic costs is remarkable. That is not to say that everything is perfect, just that it is pretty impressive.

The general argument that we tend to hear in opposition to today's successful programs is that we need to bring more efficiency to the process. We need to introduce common sense into the decision making process. Let me be clear that the

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

3. See Dallas Burtraw, *Call It Pollution Rights, But It Works; At Last, an Innovative Environmental Policy We Can Breathe Easier Over*, WASH. POST, Mar. 31, 1996, at C3; Jessica Matthews, *Clean Sweep: Two Success Stories for the Environment*, WASH. POST, Dec. 18, 1995, at A23.

environmental community is not opposed to efficiency and common sense. However, these concepts have little to do with the legislative proposals that were introduced in Congress. Let me illustrate with some examples.

In early 1995, the Chairman of the Transportation Committee, Representative Bud Shuster (R.-Pa.), who has jurisdiction over the Clean Water Act (CWA),⁴ set up a process where he established task forces on clean water. These task forces were largely comprised of different regulated groups. Municipalities who operated sewage treatment plants worked on sewage treatment issues in the CWA. Chemical companies who deal with toxic emissions worked on changes to toxic emissions standards. Paper companies worked on effluent standards. Right on down the line, the Environmental Protection Agency (EPA) and the public interest community were not allowed to participate.

The result was a compilation of recommendations from these industry groups. Those recommendations were put into legislative language as H.R. 961. This was a fairly open process, as documented, among other places, in the *New York Times*.⁵ The bill was passed in the House of Representatives in the spring of 1995.

Likewise, in the Senate, a Committee Chairman actually had the timber companies lawyers write the provisions to the Endangered Species Act (ESA).⁶ Senator Slade Gorton (R.-Wash.) was pretty open about it, even noting that he was happy to get the free legal advice. Once again, this was all documented in the *New York Times*.⁷

We see a similar pattern in the regulatory reform legislation at the Senate Judiciary Committee. There, the Chairman set up an official briefing for the staff members on a new substitute proposal. The briefing was not given by the Committee majority staff, as expected. Rather, lawyers for a

4. Federal Water Pollution Control Act [Clean Water Act] (CWA) §§ 101-607, 33 U.S.C. §§ 1251-1387 (1994).

5. See *Bud Shuster's Dirty Water Act*, N.Y. TIMES, Apr. 2, 1995, § 4, 14.

6. Endangered Species Act (ESA) §§ 2-18, 16 U.S.C. §§ 1531-1544 (1994).

7. See William K. Stevens, *Future of Environmental Species Act in Doubt as Law Is Debated*, N.Y. TIMES, May 16, 1995, at C4.

prominent law firm representing electric utilities, oil, chemical, and tobacco companies explained the draft. This just does not look good.

This pattern is a very different process than we have seen in the past. In 1990, for example, the environmental community did not hoist the CAAA on business. This was a consensus piece of legislation that had strong bipartisan support and business support when it was enacted. It was promoted by President Bush and overwhelmingly supported across the political spectrum.

The CAA retained strong public support even as efforts were made in the 104th Congress to pass appropriations riders as a way to restrain enforcement of that law. In fact, a very long list of riders, undermining a series of important environmental laws, was attached to the budget appropriation bills, primarily through the efforts of Representative Tom DeLay (R-Tex.), the Majority Whip and the number three man in the House of Representatives. Seventeen riders essentially gave EPA funding, but barred the agency from using its funds to enforce the environmental laws which are now in the books.

The only prominent effort to revise the CAA in the 104th Congress came from Senator Faircloth (R-N.C.), who circulated the Clean Air Simplification Act. This was not merely a technical bill. It cut the heart out of the mechanisms that make the CAA work. The draft was not received well. In fact, Senator Faircloth's staff is now saying that he is not going to introduce the bill. The reality is that the Republican leadership in both the Senate and the House, as well as the business community, realize that a major re-authorization effort at this time would be a disaster.

Early in 1995, members who supported the efforts to weaken the CWA were burned by their bad environmental votes. I think that right now no one wants to repeat that debate with an attempt to alter the CAA. Broad amendments to the CAA are almost certain not to move in this Congress.

Republican pollsters are, today, telling the Republican leadership that Republicans now do not trust Republicans in

Congress on the environment. Linda Divall, who polls for Newt Gingrich (R.-Ga.) and Phil Gramm (R.-Tex.), says Republican environmental policies, at least in the Congress, are "out of sync" with mainstream America. Environmental protection has historically been of bipartisan concern. And I think, and hope, that we are going to see a real reluctance on the part of Republicans in the future to depart from this tradition in a visible way.

Unfortunately, however, I do not think we are through with the back door attacks. We have seen more in the past few weeks. So everything is not safe. However, the whistle has been blown and the public is aware.