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United States Pollution Control Laws

PROFESSOR JEFFERY G. MILLER

Introduction by Professor Nolon:

Thank you very much, Nick. The environmental assessment process established by NEPA has been a success and was a step forward on the path of integrating environmental and economic policy, as Professor Robinson has explained. The national pollution abatement laws that were adopted in the decade after NEPA, however, operate in a very different fashion. They, too, have been very successful in a number of important respects, but have achieved less than we had hoped for because of certain flaws in their design. To analyze these laws for us, I would like to introduce another colleague, Professor Jeffery Miller, who has also travelled in Argentina. In fact, Professor Miller conducted workshops for the delegates at the Constitutional Convention who drafted the amendments to the Constitution of Argentina. He is familiar with the legal systems in Argentina and we are delighted that he could be with us today.

Professor Miller, like our Dean, received his law degree from Harvard. For a number of years, he was the Assistant Administrator of our National Environmental Protection Agency in charge of enforcement. Professor Miller is familiar with the strengths and limitations of these federal statutes. He has written a book for West Publishing Company on the Law of Hazardous Waste Management and is a senior member of our environmental law faculty. I am privileged to introduce you to Professor Jeffery Miller.

Professor Miller:

Thank you, John. I wish I were in Buenos Aires right now myself. I wish so especially because I am on sabbatical

and have no good excuse for being here on a winter day in White Plains, New York.

John has asked me to tell you about U.S. pollution control law in ten minutes, which is an impossible but necessary task. At this level of generalization, however, one can only discuss a detailed system abstractly. I will do so, and make a few points about what we found that works and what we found that does not work in our approach.

I can see three general patterns in our pollution control and waste management laws. The first pattern is that each piece of legislation tends to focus on a single problem. We have a single piece of legislation to focus on each segment of the environment. We have air pollution legislation;¹ it is 500 pages long. We have water pollution legislation,² 200 pages long. We have waste control legislation,³ and so on. We also have legislation that focuses on particular industrial sectors. For instance, we have legislation on pesticide use and manufacturing.⁴ We have legislation on the manufacture and use of specific kinds of chemicals.⁵ Thus, single issue treatment is the focus of our legislation.

The second pattern is in the standards established by our laws. We have experimented with many different kinds of standards to apply to those who produce pollution or waste. We have a tendency to establish national uniform standards for particular industrial sectors. This requires each sector to do the best job it can technologically, where it is still affordable. So, we have a best affordable technology standard. We are working toward that in most of our legislation. We will find the pollution control technology that is the best, yet still affordable for the steel industry, and apply that technological standard nationally. The same process is applied to the pulp

1. Clean Air Act, 42 U.S.C. §§ 7401-7671 (1994).

2. Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. §§ 1251-1387 (1994).

3. Solid Waste Disposal (Resource Conservation and Recovery) Act, 42 U.S.C. §§ 6901-6992 (1994).

4. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994).

5. Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994).

and paper industry and so on. This is a complex and costly undertaking.

The third pattern in our pollution control and waste management laws deals with implementation. We tend to implement these national uniform standards by issuing permits or using other methods of control. These mechanisms focus on individual sources of pollution or waste and translate national standards into requirements for a particular facility. The essential priority here is to insure that the national standards adequately protect the environment. While the standards are established at the federal governmental level, we tend to issue the individual permits, inspect for compliance, and enforce requirements through state agencies. The federal government acts as a back-up if the state does not fulfill its responsibilities. We also tend to authorize private citizens to enforce the standards in court if state and federal agencies do not.

This is a very complex and pervasive command and control scheme, occupying both levels of government, with considerable power given to the public. It has worked enormously well in cleaning up pollution from large sources, particularly those that generate air, water and hazardous waste pollution. You can see improved environmental quality all across the country over the last twenty-five years, despite enormous growth in population and industrial output over that period of time. When I started my environmental career in New England in the early 1970s, there was only one river in Maine that had a breeding season for the Atlantic Salmon. Now every major river system from Maine down to the Connecticut River, not far from New York City, has a breeding population of Atlantic Salmon, and they are very sensitive fish. We must have done enormous clean-up in our waters to secure that kind of success. This system has been very good in addressing pollution from large sources and in eliminating 95% of the pollution from those sources.

Our system has not been as effective in addressing the last 5% of the pollution from large sources, because that gets enormously expensive and can be very restrictive. It has also missed some other problems. It has not addressed, at all, half

of the pollution in the country. It has addressed the pollution coming from large sources but not pollution coming, cumulatively, from small sources. It has not addressed pollution in the runoff from our agricultural lands, the pollution caused by traffic congestion because of poor urban planning, and so on. And, it tends to focus efforts for additional pollution control on large industrial sources because that is where we have been very successful. We have continued to concentrate our federal efforts on large sources instead of looking at other important sources of pollution which have been ignored to date.

There are some conceptual problems and some institutional problems which explain this and which must be addressed if we are to have a better system. I would address these issues if I were designing a system again myself or were suggesting it for someone else. The first conceptual problem I would identify is that we have forgotten the first law of ecology in designing our system of ecological protection. The first law of ecology, of course, is that everything affects everything else. So, if we have air pollution legislation that focuses only on taking pollutants out of a smoke stack and nothing else, it is no wonder that the pollution that gets taken out of the smokestack ends up, in disposal, polluting water or soil or plant life or something else other than the air. This occurs because air pollution legislation is only concerned with removing pollution from the smoke stack. By failing to have a unitary approach, we have tended to push problems from one part of the environment to the other.

Due to these single-focused statutes, we have also created conflicts and overlapping regulation at times, and we have completely failed to address some very important problems. Several of our statutes, for instance, address different kinds of sources of groundwater pollution, but there is no comprehensive control of groundwater pollution. While the air and surface water have been getting cleaner, groundwater has been getting dirtier over the last twenty-five years. The lack of a unitary system has created inefficiencies and has caused us not to address important problems.

We also have overlooked the fact that most of the smaller sources of pollution that we have not addressed are connected

with land use decisions. Where we build the shopping center and how we develop residentially affects the amount of air pollution and the location of air pollution we get from automobiles. And, without taking those concerns into account, we cannot solve our urban air pollution problems. The same kinds of considerations also affect polluted water running off into our surface waterways from small development all over the landscape. We cannot ultimately clean up our waterways without addressing the pollution from farmers' fields and from our own backyards.

We have avoided addressing these problems because our ethic is that the federal government has no place in land use decisions, and that these are local decisions. Thus, we have left half of the pollution problem to local decisions which usually are made without any regard to any of these kinds of environmental considerations. If I were redesigning our system, obviously, I would design a system that took a unitary approach and addressed all the environmental problems from particular facilities and within particular geographical areas. Such a system would prioritize those problems and spend our money on non-frivolous problems. It would ensure that the requirements we place on a particular pollution source are consistent. Such a system would ensure that the whole environment would be protected, not just particular sectors of it.

Finally, I would couple that system with a consideration of land use, since there is such an obvious limit to how much pollution can be eliminated by focusing only on large sources. I would not have the federal government making land use decisions everywhere in the country, but I would have the federal government seriously encouraging states and regions to have land use controls. These controls would assure environmental protection and interstate consistency in treating land use matters. This type of a comprehensive system would also allow us to ensure that local land use decisions are made in a manner that allows waste disposal and cleanup to occur locally by providing incentives and allowances to such localities.

These ideas only touch on what we have done, what has worked, and what is missing, and simply charts a general direction for making this system a more unitary and comprehensive one. This way, our legal system can ensure that we consider all the effects we are having on our ecosystems, and ensure that we have a chance to reduce the full scope of pollution activities in the nation.

I hope that this gives you some ideas to think about as you go about your very important task of developing the environmental protection scheme in Argentina and its provinces. Thank you.