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Public Policy and Law Since Love Canal

Jon Cannon*

This article deals with what has happened since Love Canal and what is going to happen in the future. It is fun to talk about the future because, although people can debate you, nobody can prove you are wrong. So I often choose the future as a topic and find that it stimulates an interesting debate.

So what has happened since Love Canal? We have seen the blossoming of a federal environmental structure. Superfund is a part of that, certainly not the only part, and maybe not even the major part. Other federal laws, like the Resource Conservation and Recovery Act (RCRA), deal with hazardous wastes before they become environmental problems.

Since Love Canal, the history of the development of environmental laws has been one of further elaboration and specification of the applicable requirements. This process culminated with the 1990 Clean Air Act amendments, often described as the most complex regulatory legislation ever adopted. So we have had a progression of more elaborate federal statutes and greater specification or prescriptiveness of the requirements that apply under these statutes.

While these statutes were developing and coming into their full expression, there was also a growing concern that these statutes were becoming too prescriptive, overly intrusive, and inefficient. Phil Howard's book, *The Death of Common Sense*, captured this concern about environmental statutes, as well as other federal regulatory schemes.¹

That resistance or resentment, if one can characterize it that way, boiled over in the 104th Congress. Armed with the Contract with America, the new Republican leadership in the House sought major changes in the environmental regulatory regime as it then existed. This included an effort to make cost benefit analysis the dominant

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¹ PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* 26-28 (1994).

strain in environmental regulation and to moderate existing legal standards based predominately on health and environmental considerations. This was opposed by the Clinton administration, and the confrontation came to a head with the budget crisis and the government shut down early in 1996. By March 1996, the Republican majority conceded it was fighting a losing battle. Public opinion was firm in support of strong environmental regulations and standards. It was politically unwise for Republicans to persist.

So it was then, just after this confrontation had ended that I gave a lecture at Yale Law School on the future of environmental programs. I offered a quite optimistic view which I characterized as the "convergence hypothesis." The hypothesis was based on the idea that the future of environmental law in this country would be one of coming together around the issues, a convergence. What did I mean? I did not mean there would be consensus on every issue. Issues would still be debated. There would still be a diversity of views. However, the terms of the debate were likely to be narrower or at least better defined. There would be an increasing understanding, on all sides, of the legitimacy and the importance of the issues involved, as well as a broader acceptance of the framework within which those issues would be resolved.

Now, two years later, in light of what has happened since, I have an opportunity to again determine with you whether this is a description of reality or just happy thinking. The convergence hypothesis, as I expressed it, has three legs, like a three legged stool. This suggests some stability, but if you kick one leg out, then you have a problem. The three legs are: values, science, and re-invention.

Why values? One thing shown in the confrontation surrounding the Contract with America was the public's overwhelming preference for strong environmental protections. This preference reflects consensus environmental values. Studies by anthropologists have shown that there exists a set of beliefs that may be characterized as environmentalism, and it is sufficiently widely held in this country to constitute core cultural values. These common values shape our preferences on environmental questions and narrow disagreements on

particular environmental issues—although there is clearly plenty of room left for those.

The second leg of the three-legged stool of convergence is science. The more we know about issues, the less uncertainty we face. Less uncertainty creates a more limited debate and a narrower set of realistic options from which we make selections. That helps the process of decision-making. Most importantly, reducing the level of scientific uncertainty, as a result of additional scientific research, makes it difficult for people arguing policy points to clothe those points in terms of scientific debate or scientific uncertainty. The grounds for disagreement are limited as scientific understanding advances. Of course, science raises new issues as it goes—and new controversies; there is no resting place. But scientific advance does help to get some issues behind us, even as it unearths new ones.

The final leg of my three-legged stool is re-invention. The notion is that continuing efforts to re-invent environmental regulation will produce a benefit over time. These efforts will make environmental programs more responsive, more efficient, and more effective. They will do this because citizens or groups of citizens will demand it of their elected representatives and their elected representatives will demand it of agency officials. I don't suggest that this is an easy or uncomplicated process, but as we understand more about how these programs work and as we experiment with new regulatory approaches, it isn't unreasonable to expect improvements along these lines. With them we can expect even broader public support, not only for the goals of environmental protection, but also for the means by which those goals are achieved.

That is the hypothesis. You could raise a number of questions regarding the validity of this hypothesis. I want to focus on one. That is the question raised by the strength and persistence of deregulatory pressures in the environmental arena and the reluctance, as in the case of global climate change, to extend controls to emerging problems. Environmental laws continue to be seen by many at least as excessively rigid and inefficient. Yet we witness the expression of broad public support for strong environmental standards, as in the debate in the 104th Congress just discussed. What are we to make of this?

I will try to answer that question. But first, I want to address the Clinton administration's response to those pressures. The administration has responded in several ways. First, it developed its own re-invention programs to capture some of the energy generated by this resistance and turn it to positive effect. For example, it made administrative reforms in Superfund that have sped up the process and reduced friction costs. These reforms have generally been accepted as good.

The administration has also made efforts to develop market approaches to environmental regulation, building on the successful acid rain trading program in the 1990 Clean Air Act amendments. In its new regional approach to ozone reduction in the eastern United States, for example, EPA has proposed a regional plan and has invited the states to develop a regional trading program to reduce the costs of ozone reduction in that large region.

The Agency has also experimented with environmental contracting, as in Project XL. Although probably the Agency's most famous (or notorious, depending on your point of view) re-invention initiative, XL is just one example of EPA's offer to work with industry groups, industry sectors, or individual companies to reach environmental results that are more cost-effective using a partnership approach.

Finally, the Agency has focused on voluntary programs and right-to-know programs, like the Toxic Release Inventory, which rely on information to drive corporate behavior in environmentally beneficial ways. The more the affected public knows about the quality of its environment and impacts on its environment, the more effective it is likely to be in communicating its desires through the political process, through the market, and through direct communication with company officials. A second type of agency response to deregulatory pressure has been more reactive. The response has been simply to back away from the implementation of some environmental measures that have proven to be highly controversial. For example, there was a requirement in the 1990 Clean Air Act amendments that in certain ozone non-attainment areas employers of a certain size could be required to submit plans for reducing vehicle use by their employees.

It was unpopular among those affected by it, and there was resistance to its implementation. The EPA said, "Wait a second. We're not going to risk the Clean Air Act over this provision. We will simply announce that we're not going to implement it." And the EPA did. Congress later deleted the provision.

There was a similar problem with centralized inspections and maintenance to deal with air emissions from cars, again under the Clean Air Act. Inspection and maintenance programs are designed to ensure that cars are running properly and the emissions control devices are operating properly to reduce air emissions. The Agency, following the terms of the Clean Air Act, imposed enhanced inspection and maintenance programs in areas requiring centralized test-only facilities. People were asked to drive their cars to those central facilities. Once again, there was public resistance in the areas affected. The EPA had to adjust accordingly, and has backed off its insistence on having these facilities.

What does this mean—this scurrying to find less onerous approaches, this backing off under pressure? Is it the kind of testing, adjustment and refinement that one would hope for and would expect to find in a healthy regulatory system? Or does it suggest some underlying contradiction that signals weakness and instability? Instead of real convergence around the issues, are we just trying to have it both ways, steadfastly embracing environmental goals for which—when we come right down to it—we are unwilling to pay? Are we, as Richard Lazarus' has suggested, schizophrenic? My answer is no—not necessarily. Clearly there is a tension between our aspirations and our willingness to sacrifice to meet those aspirations, but that tension is not inherently pathological and indeed can be managed productively.

Professor Dwyer has explored the phenomenon of symbolic environmental legislation—provisions that direct the Agency to set controls at levels that Congress knows are not economically or technically feasible and that Congress does not intend to be applied as written. But Congress espouses these standards to take credit for being environmental, while thrusting on the Agency and others the difficulty of implementing them. This view of (some) environmental

legislation is consistent with the schizophrenia diagnosis. To heal ourselves, the message is, we should amend these standards to allow EPA explicitly to consider cost and feasibility in its decisions. In short, to stop kidding ourselves and adjust our goals.

Perhaps that would be good to do; for some standards—I think of the Delaney clause—it has proved to be necessary. But, except in unusual cases, it may require more than the political system is capable of. And even without statutory changes, the Agency has shown success, under some of its most unsparing legal mandates, in managing the tension between our aspirations and real-world constraints. The Clean Air Act includes a provision that governs the setting of ambient air quality standards. This section requires that EPA set ambient standards that protect human health and the environment, with an adequate margin of safety and without regard to cost or feasibility of implementation. In 1997, EPA revised the ambient air standards for ozone and set new standards for fine particulate matter. These standards will require tighter air emission controls in many areas of the country, and they were vigorously opposed by some industry and state and local interests and by members of Congress responsive to those interests. The Agency did not attempt to dilute the purity of the legal standard prohibiting consideration of cost and feasibility; in fact, it insisted on preserving that purity. At the same time, it adopted a plan for putting the new ambient standards into effect that extended the schedule for implementation and otherwise reduced the economic impact. This plan was adopted by the President at the same time the new standards were adopted. The standards showed strong support in the polls and have withstood threats by some in Congress to overturn them.

This episode typifies the Agency's approach in the Clinton era, defined by "strong adherence to environmental goals" and the use of "flexibility" in the means to achieve those goals. How far can that be taken? Regulation can always be improved, streamlined, and made more cost-effective. In fact, one way of vindicating aspirational goals is to refine compliance techniques so that what may seem to be economically or technically infeasible becomes possible through developments in technology and more cost-effective implementing

measures. That's the re-invention leg of convergence that I talked about earlier. But "flexibility" may also mean that the goals themselves are being compromised—that we genuflect in their direction while embracing policies that have no real chance to achieve them.

I was interested in the comments of Mr. Jennings earlier. He said that environmental programs are a strategic asset for corporations, so we can expect more corporations to have environmental programs because it is in their own interest to do so. However, he also said that some sort of regulation seems inevitable and necessary.

At what point does flexibility undermine, rather than support, environmental goals? If we cannot resolve to fully implement our goals, shouldn't we admit that our goals are really less ambitious than we might once have thought? These questions are difficult to answer because the relationship between goals and implementation is not a simple one. We are engaged in a constant dialectic between aspiration and implementation, a constant testing of what we say we want in our saintlier moments against what we are actually willing to pay for. I think this dialectic will continue to be played out with a lot of energy in the coming years. But the field over which that dialectic plays will be limited by the factors I mentioned earlier—values, science and re-invention.

