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## Prohibitive Policy: Implementing the Federal Endangered Species Act by Steven Lewis Yaffee; Environmental Policy Implementation: Planning and Management Options and Their Consequences by Dean E. Mann

Berton L. Lamb

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## BOOK REVIEW

### POLICY IMPLEMENTATION: CORRECTING MISCONCEPTIONS ABOUT ENVIRONMENTAL REGULATION

*Prohibitive Policy: Implementing The Federal Endangered Species Act.* By Steven Lewis Yaffee, Cambridge, Massachusetts: MIT Press, 1982, Pp. 239.

*Environmental Policy Implementation: Planning and Management Options and Their Consequences.* By Dean E. Mann (ed.), Lexington, Massachusetts: D.C. Heath & Company, 1982, Pp. 261.

*Reviewed by Berton L. Lamb\**

Americans today are often aware of public policy issues; rarely are they well-informed about them.<sup>1</sup> While there is a flood of available information, it has been made practically inaccessible to the public because it has not been assembled into coherent and accessible form. This practical inaccessibility reflects the current reliance by policy makers and analysts on data accumulation as the primary tool of policy analysis, as opposed to data synthesis and integration. It is a reliance which affects both the public's and officials' ability to respond to environmental issues, for it has become the main stumbling block to implementing environmental policy. It has focused officials on the scientific and objective "rationality" of proposed alternatives, rather than on their political feasibility.

Both Steven Lewis Yaffee, in *Prohibitive Policy: Implementing*

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\* Dr. Lamb is a Management Analyst with the Instream Flow and Aquatic Systems Group, Western Energy and Land Use Team, U.S. Fish and Wildlife Service, Fort Collins, Colorado. Views expressed in this article do not necessarily represent the policy of the Fish and Wildlife Service, U.S. Department of the Interior.

1. Boorstin, *Informed But Ignorant*, The Denver Post, Sept. 6, 1982 at 6. See also, Lerner & Wanat, *Fuzziness and Bureaucracy*, 43 PUBLIC ADMINISTRATION REVIEW, 500-10 (1983) [hereinafter cited as Lerner & Wanat].

the *Endangered Species Act*,<sup>2</sup> and Dean E. Mann, in *Environmental Policy Implementation: Planning and Management Options and Their Consequences*,<sup>3</sup> attempt to increase our understanding of the political climate in which environmental legislation is implemented. At the heart of their analyses is a critique of a dichotomy which has long held sway in the public and official imagination: that politics ends where policy implementation begins.<sup>4</sup> Both authors attribute the difficulties that applied scientists in government have with the administrative process to scientists' inaccurate perception of politics and administration as separate functions.

Policy implementation requires applied scientists to look beyond technical alternatives and understand human, institutional, and political processes. The false expectation that politics will not invade policy implementation can lead to inappropriate tests of the adequacy of the implementation process and to inaccurate judgments of the success of policy. Both Mann and Yaffee identify the two major misconceptions that lead to implementation failures when only "objective" scientific judgement is involved. First, policy makers assume that implementors can effectively deal with both internal and system-wide policy inconsistencies, even when a policy design is intended only to resolve short-term, narrowly-defined "political" criteria. In such cases, policy makers incorrectly believe that implementing agencies will integrate the "policy pieces" through a process of negotiated adjustment. Second, policy implementors assume that politics ends with the writing of statutes and regulations, and that all that remains for them to do is to reach conclusions and take actions based on technical analyses.

These two misconceptions can result in ineffective policy implementation. Most policies cannot be written to address all possible variables and outcomes; flexibility, pragmatism, and a sense of the "political realities" are necessary to implement policy in ways

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2. S. YAFFEE, *PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT* (1982) [hereinafter cited as YAFFEE].

3. D. MANN, *ENVIRONMENTAL POLICY IMPLEMENTATION: PLANNING AND MANAGEMENT OPTIONS AND THEIR CONSEQUENCES* (1982) [hereinafter cited as MANN].

4. The notion of a politics/administration dichotomy rests on the separation of powers set forth in the United States Constitution. Early writers who promoted this view are: F. TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1917); PAPERS ON THE SCIENCE OF ADMINISTRATION (L. Gulick & L. Urwick ed. 1937). See also Rosenbloom, *Public Administration Theory and the Separation of Powers*, 43 *PUBLIC ADMINISTRATION REVIEW* 219-226 (1983).

that overcome design shortcomings. Unfortunately, applied scientists with the requisite technical expertise to implement environmental regulation also frequently possess professionally ingrained expectations that their agency should only collect, analyze, and report facts and act according to established routines.<sup>5</sup> They are focused on the "rationality" of policy, not on its feasibility. Not, that is, on its technical and political attainability, a criterion which *Environmental Policy Implementation* contributor Marcus argues should replace rationality as the primary criterion of policy choice.<sup>6</sup> The result is intra-agency struggles over political versus technical decisions. Because the connection between political and technological decision-making is not well-understood, the bargaining required to implement loosely constructed statutes becomes frustrating to most technical experts and misunderstood by the general public.

Even tightly-written policies require bargaining and compromise in their implementation. For example, seemingly straightforward decisions, such as whether or not a species is endangered or a chemical is toxic, can become extremely political when persons with an economic interest in the decision attempt to affect its outcome. More subtle political factors can also be involved, such as competition among scientists with different research programs, the incompatibility of available methodologies, and the relative influence of the applied scientists involved in selecting the technological options.

### *Prohibitive Policy*

The connection between technological and political decision-making in policy implementation is nowhere less understood—by both the public and experts—than in the area of prohibitive policy. The term "prohibitive policy" refers to formal policy statements (e.g. statutes) which are absolutely prescriptive. Such statements set forth both policy goals and their means of implementation, leaving administrators little apparent room for discretion in implementation. Yaffee's thesis is that even prohibitive

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5. For a discussion of the resistance to change which arises because of these expectations, see C. FRANKEL, *HIGH ON FOGGY BOTTOM* (1969); F.C. MOSHER & J. E. HARR, *PROGRAMMING SYSTEMS AND FOREIGN AFFAIRS LEADERSHIP: AN ATTEMPTED INNOVATION* (1973).

6. A. Marcus, *Converting Thought to Action: The Use of Economic Incentives to Reduce Pollution*, in MANN, *supra* note 3, at 182-3.

policy is executed through a political process—that of inter- and intra-agency bargaining and compromise.<sup>7</sup>

The common wisdom runs counter to Yaffee's thesis. Indeed, environmentalists often work hard to develop statutes which are as restrictive and unambiguous as possible. They do so to ensure that there is very little room for interpretation. A prohibitive policy statement such as the Endangered Species Act is specifically designed to disallow certain actions. It is commonly believed that such a policy is strict, even hidebound. Yaffee describes prohibitive policy as follows:

Not only does it prescribe the goals or ends of social policy, but it appears to define the means to reach the ends without allowing for alternative (perhaps innovative or more cost-effective) approaches to the same goals.<sup>8</sup>

Nevertheless, Yaffee argues that it is wrong to assume that prohibitive policy is intended to be strictly implemented. He also argues that the outcome of such policy is not, in fact, prohibitive.<sup>9</sup> By implication, Yaffee reasons that all environmental policy administration has both substantive and political aspects. The essential truth for him is that environmental policy implementation is more political than technological. He makes two points. First, "uncertainty is rampant throughout these decisions, even when they appear to be based on science." Second, implementing policy is like marketing: "the medium of exchange in this marketplace is power, and the mode of interaction is negotiation."<sup>10</sup>

Put another way, it is within the political parts of the administrative process that environmental policy implementation problems are resolved. Yaffee argues that policy improvements should be focused on administrative coordination and on planning processes within the federal bureaucracy. They must lead to effective management routines, efficient inter-agency conflict resolution patterns, and increased political skill for mid-level managers. Such improvements in the agency decision-making process will be increasingly important in light of the frequency of judicial review.<sup>11</sup>

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7. YAFFEE, *supra* note 4.

8. *Id.* at 1.

9. *Id.* at 5.

10. *Id.* at 7.

11. Zimmerman, *Anatomy of Environmental Regulation*, J. OF URB. PLAN. & DEV. 17102 (1982).

Indeed, it is litigation challenging policy implementation decisions which reveal the misconceptions of policy execution. The adversary process illuminates the fact that implementation should be more than a technical process. Sometimes such a revelation leads to the design of policy so that administrative discretion is limited. The importance of Yaffee's argument is that the political nature of implementation cannot be fully overcome by such limitations. Rather, he seems to be saying that good policy should be tightly written but should recognize the struggles involved in administrative processes.

Yaffee supports his argument by reporting on the problems and progress in implementing the Endangered Species Act of 1977.<sup>12</sup> This discussion is especially pertinent since the Act is frequently under consideration for amendment. Yaffee finds that the Act has been shaped by some type of political process throughout its history. Of course, its passage was the result of the legislative political process, but Yaffee also finds administrative political struggles in all phases of its implementation. He asserts that the Act is an example of prohibitive policy which has been administered non-prohibitively—that is, through compromise.

Yaffee argues that most assumptions about the effects of prohibitive policy on implementation are incorrect. Technological choices, enforcement, and rulemaking are not made less discretionary by prohibitive policy. Indeed, environmental policy, however framed, is characterized by:

discretionary judgements . . . about what species to review in what order, which experts to talk with, what data to believe, what degree of regulation to propose, what external interests to consider, and what regulatory exceptions to allow.<sup>13</sup>

Yaffee's discussion of the implementation of the Endangered Species Act proves illuminating. The task of listing endangered species is enormous: it would take one person many years to complete the necessary research on a single given species. A team of scientists might complete the research on one species in a year. But of the 198 employees in the Endangered Species program in 1978, only eight were assigned to listing. Most of the others were involved in interagency consultation—the "squeak-

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12. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (16 U.S.C. §§ 1531-1543).

13. YAFFEE, *supra* note 7, at 70.

ing wheel" of the program.<sup>14</sup> This demonstrates that the program depends for its success on resolving political struggles between agencies rather than technical problems.

Furthermore, implementation was subject to *intra*-agency bargaining.<sup>15</sup> All those species which are in fact endangered cannot be listed because of time and resource constraints. Setting priorities among species is determined by the relative influence of: 1) distinct professional groups acting within the agency; 2) different interest groups—such as ones composed of scientists, developers, or environmentalists—who lobby the administrators; 3) individuals in professional networks who are consulted for information on different species.

Finally, in the Endangered Species program even purely "scientific" decisions are negotiated:

Negotiation was facilitated by a hierarchical administrative network in which scientific expertise was concentrated at lower levels and management and political skills at higher levels. Goals, rewards, and agendas varied throughout this network, forming a dynamic system with significant pressures to resolve controversies at the lowest possible internal level. The success of this system at building compromise suggests that even when policies are prohibitive the context of implementation provides a vehicle for the balancing of social costs.<sup>16</sup>

Yaffee concludes that the guidance offered by the Act and its legislative history are not sufficient to explain agency behavior. A better understanding of how a policy is implemented would include analysis of "internal forces," such as conflicting organizational goals and bureaucratic and scientific conservatism, which generally resist change and slow implementation.<sup>17</sup> In addition, the administrative structure which executes the Endangered Species Act is under constant external pressure to alter its emphasis, products, and rate of action.<sup>18</sup> According to Yaffee:

These pressures commonly come from internal advocates, interest groups, the media, and legislative and judicial sources. The dynamic interaction between these external pressures and internal characteristics in large measure de-

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14. *Id.* at 71.

15. *Id.* at 72-74.

16. *Id.* at 86-87.

17. *Id.* at 147.

18. See generally Struck, *Special Species: Interior Creates New Category*, Salt Lake Tribune, Sept. 16, 1982, at 8, col. 5.

termines the outcome of implementation regardless of the fact that it was presumably clearly specified by a prohibitive statute.<sup>19</sup>

Understanding this dynamic is necessary for the effective writing and execution of environmental policy. The false dichotomy between politics and administration has been discussed in the professional literature for a generation,<sup>20</sup> but it still apparently guides scientists, policy-makers and the public.

### *Environmental Policy Implementation*

Like Yaffee, Mann recognizes that many applied scientists in the federal bureaucracy still believe that policy implementation is a fairly simple technical matter. He observes that there is:

too much dependence on technology that might or might not prove efficacious; and too little realization that policy space is being so densely occupied that the success of any one policy inevitably depends to some extent—and often to a crucial extent—on the performance of . . . some other agency. The result is often failure . . .<sup>21</sup>

Mann's collection teaches that there is a great deal of fact-gathering and analytical calculation involved in designing and implementing environmental policy, but very little emphasis on understanding outcomes. In his introduction, Mann explains in detail three factors developed by Daniel Mazmanian and Paul Sabatier to explain the success of policy implementation outcomes:<sup>22</sup>

- 1) The tractability of the problem which a policy is intended to solve;
- 2) The ability of the statute to favorably structure the implementation process; and
- 3) The effect of various political variables on the support for statutory objectives.

Thus, Mann's introduction lends support to Yaffee's thesis: it doesn't matter whether a statute develops a prohibitive policy or

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19. YAFFEE, *supra* note 7, at 148.

20. This issue has been long discussed and was fairly well settled by 1949. *See generally* D. WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF PUBLIC ADMINISTRATION* (1948).

21. MANN, *supra* note 3, at 1; *see also* A. WILDAVSKY, *THE ART AND CRAFT OF POLICY ANALYSIS* (1979).

22. "The Implementation of Public Policy: A Framework of Analysis," 8 *POLICY STUDIES JOURNAL* 538-60 (1980).



gives an agency absolute regulatory authority. Statutes requiring only consultation among agencies achieve as much success on some problems as do prohibitive policies, and sometimes more. In judging the quality of a given policy and its likelihood of success, the public and agency experts must understand the political environment in which it is to be implemented. Mann observes that:

The achievement of the goals of environmental protection . . . depend on sound assumptions about the behaviour of individuals, groups . . . and public institutions. Environmental policy may fall far short of its goals if the premises about motivations, incentives, and constraints are improperly structured into the decision-making system.<sup>23</sup>

The theme in most of the articles in *Environmental Policy Implementation* is that of Mann's introduction to the collection. Technical issues in policy implementation are usually less complex than the political and institutional problems of policy implementation. The many pressures from constituents, scientists, and politicians mean that even choices of technology, technological approach, or expert recommendations are bargained over inside an agency before they are forwarded to higher administrative levels. Article author James L. Regen, for instance, reports that:

Attempts to implement RARE II [a wilderness planning program] reveal that efforts to treat it as a comprehensive mechanism for policy choice isolated from the ongoing national debate over energy-involvement trade-offs have been unsuccessful.<sup>24</sup>

As Regen points out, the unfortunate result is that the RARE II experience may be falsely interpreted as proof that comprehensive planning techniques do not work. Instead, RARE II should teach us that comprehensive planning methods need to be applied with an awareness of their political context.

Supporting this point, article author Donald C. Cell argues that policy failure in the pollution control area is often caused by "a standard regulatory approach [that] has been applied to different pollution situations indiscriminately."<sup>25</sup> That is, standardized policies or responses make sense in general but are often irrational

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23. MANN, *supra* note 3, at 11.

24. J. Regen, *Equity Issues and Wilderness Preservation: Policy Implications for the Energy-Environment Tangle*, in MANN, *supra* note 3, at 74.

25. D. Cell, *Charges to Control Aircraft Noise*, in MANN, *supra* note 3, at 169.

in particular situations. In some situations, routine and standard agency approaches obscure the needed intuitive understanding of environmental issues. Based on this perspective, the proper criterion for assessment of policy implementation clearly seems to be one of feasibility.

Like Yaffee, the contributors to Mann's collection seem to agree that the successful implementation of environmental policy depends on many factors, including constant attention to the political elements of the implementation process. No matter what the nature of a particular statute or regulation, implementation is ultimately negotiated. Moreover, narrowly designed solutions often cause unanticipated conflicts, since they do not take into account the numbers of competing environmental problems and policies which impinge upon one another. The misconception is that personal and agency behavior can be ignored in favor of concentration on data analysis. Both *Prohibitive Policy* and *Managing Environmental Policy* argue for knowledgeable policy design which takes into account these factors.

#### CONCLUSION

Because most regulatory decisions are negotiated, those who make or execute policy should understand more than the technical data underlying their proposed alternatives. Given the complexity of policy and the interconnected nature of outcomes, a knowledge of how the regulatory process really works is essential. As R.D. Behn has observed in "Policy Analysis and Policy Politics," there are two principal players in policy-making—the analysts and the politicians.<sup>26</sup> Unless the analysts, such as the technicians and applied scientists working within the Executive Branch, are willing to stand by as their carefully-crafted alternatives are discarded to placate various constituencies, they must improve their knowledge of the political part of the game.<sup>27</sup> For as Yaffee argues, even prohibitive policy—which would seem to be the kind of policy least subject to political influence in its implementation—is implemented by bargaining and compromise. While the point that analysts must understand the political nature of the implementation process has often been made, Mann's collection and Yaffee's book are valuable contributions to this perennially important topic.

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26. Behn, *Policy Analysis and Policy Politics*, POLICY ANALYSIS 199 (Spring, 1981).

27. *Id.* at 226.