ESSAYS

LINKING OUR LAND AND OUR LIBERTY

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1. INTRODUCTION

America’s first generation of environmental statutes is now a quarter of a century old. Since 1970, legislation at the federal level has been responsible for significant progress in the quality of our air, land, and water. Paradoxically, our experience with environmental policy includes these achievements, as well as a legacy of questions about the costs and effectiveness of these policies. While such policies may have served us well as a prosperous country just beginning — and well equipped — to grapple with the pursuit of environmental values in the public arena, this special issue of the University of Pennsylvania Journal of International Economic Law arrives at an appropriate moment as we seek to reevaluate how we can best pursue and realize such values at the “second generation” stage of environmental policy. As we move toward this next stage, policy makers have seemingly been left with a irreconcilable choice between two competing environmental policy visions.

One vision places environmental values above all others and continues to pursue such values in a “command and control” way. This model requires the promulgation of regulations at the federal level, which, in turn, translates into uniform compliance at every level of society. The other vision, pursued by “free-market environmentalists” believes that decentralized tools such as user fees, incentives, and markets can solve environmental problems better than centralized tools such as subsidies, bureaucracy, and

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regulation.

The command and control, environmental compliance model assumes that individual choices are generally opposed to environmental stewardship goals and that, therefore, those decisions should be made at the highest level and imposed uniformly on the largest possible population. This vision emphasizes the necessity of a national — even international — outlook.

The second model — the "free market" — contends that the problem lies in the general assumption among environmental policy makers that environmental problems require governmental control, and that environmental problems result from a failure to integrate environmental resources into the market. Personal freedom and respect for property rights are principal tenets of this vision. By encouraging a more efficient use of resources, responsible stewardship, and technological innovation, the free market would provide the basis for a superior approach to environmental policy.

Clearly, these two views have tended to polarize the debate as we move to the next generation of environmental policy. This has led us to a situation where every example of environmental neglect exposed by proponents of the first model is countered by examples of bureaucratic intrusiveness, economic cost, or excessive regulation by proponents of the second vision.

2. FEDERAL WETLAND POLICY

Federal wetlands policy is an example of how the model of top down, command and control compliance with federal regulation can fail to serve the goals of environmental protection, the imperative of personal freedom, and the principle of property ownership.

Many concerned environmentalists will note the dramatic loss of America’s wetlands. Yet over the last decade the convergence of two little known wetland trends has resulted in the achievement of the stated national goal of "no net loss" of wetlands. Indeed, some recent studies indicate that the goal has not only been met but exceeded. Wetland loss due to agricultural conversion, formerly the number one source of wetland loss, has slowed to a trickle. Also during the last decade, wetland restoration has exploded. What was once a few thousand experimental acres nationwide has become hundreds of thousands of acres a year.

As part of the most recent National Resources Inventory
"NRI"), the U.S. Department of Agriculture's Natural Resource and Conservation Service surveyed wetlands across the country to document their status and trends. According to the NRI, the annual gross loss of wetlands between the 1982 and 1992 period was 156,000 acres a year. Average annual agricultural losses were 31,000 acres per year, urban losses were 89,000 acres per year, and other losses were 37,000 acres per year. The authors of the NRI wetlands survey point out that by the end of the period, agricultural losses had likely slowed even further to an estimated 15,000 acres per year. If these trends hold steady, it is probable that the United States lost roughly 141,000 acres of wetlands in 1995.

Beginning in the mid-1980s the federal government began several non-regulatory programs designed to restore wetlands. Wetland restoration is defined as the reestablishment of wetland hydrology and wetland vegetation to lands which had previously been drained, typically for agricultural purposes. Wetland restoration is distinct from both creation — building a wetland where none has ever existed — and enhancement — improving the functioning of an existing wetland. The first programs to begin wide scale restoration were the North American Waterfowl Management Plan and the Partners For Wildlife Program, both operated by the U.S. Fish and Wildlife Service. In the early 1990s, the Department of Agriculture began restoring wetlands under the wetland reserve program. In 1995:

- the Partners For Wildlife Program restored 48,000 acres;
- the North American Waterfowl Management Plan restored 42,000 acres; and
- the Wetland Reserve Program enrolled 118,000 acres.

In some cases, not all enrolled or reported acres are returned to wetland status. For example, approximately ten percent of the acres enrolled in the Wetland Reserve Program remain as buffer uplands. Despite this small percentage of enrolled uplands, these three wetland programs restored at least 187,000 acres of wetlands — well in excess of the 141,000 acres of wetland converted to other uses every year.

Given the current success of wetland restoration programs and the decline of wetland losses, there is little doubt the nation as a whole has exceeded its expectation of no-net-loss. In addition,
wetland restoration programs appear to be a cost effective approach to achieving national wetland policy goals.

Current wetlands policy fails to take into account the reasons for the decrease in wetlands loss. As technology has advanced, farmers have been able to re-farm existing farmland, thus the need to convert wetlands into farmlands has decreased. Further, as demand for new farmlands decreased so did their cost. Wetlands conversion became expensive by comparison and, thus, less desirable. The assumptions upon which our wetlands policy was formulated were flawed in three ways.

First, environmental policy makers assumed individual choices would not benefit resource conservation — but they did. Individuals made choices about what they could afford and what was cost-effective and many farm owners decided wetlands conversion was too expensive.

Second, the assumptions ignored the role market factors could play in wetlands protection. In other words, wetlands protection did not need to be the overriding goal in order to be realized.

Third, the policy is regulated in a top-down, centrally controlled manner, which makes it extremely inefficient. The body charged with oversight, the Army Corps of Engineers, does not have, nor is ever likely to have, the resources to police the entire country. The 1,150 full-time equivalent employees in the Corps of Engineers regulatory division only have the resources to identify approximately 15% of wetlands losses. When compared with voluntary programs such as the Wetlands Reserve Program or the North American Waterfowl Management Plan, the Corps of Engineers 404 mitigation program is five times more expensive per acre of wetland protected and end up protecting fewer wetlands than the other voluntary programs.

3. CONFLICTS BETWEEN STATE AND FEDERAL GOVERNMENT

The competing visions of environmental progress have occasionally led to conflict between the federal government on one hand and state or local governments on the other. In concept, many of our environmental statutes are intended to be implemented and enforced by state and local governments. The Clean Air Act, the Clean Water Act, and Superfund all provide a significant role for smaller units of government. Too often, however, state and local governments often find their power usurped by Environmental Protection Agency ("EPA") rule-
Each of the federal government’s principal environmental statutes is accompanied by volumes of detailed rulemakings and guidance giving direction from EPA to states and communities on how the law is to be implemented. Rather than promoting flexibility and innovation on the local level, these mandates frequently limit states and local governments to a single course of action.

A case in point is the controversy surrounding the EPA’s centralized emissions testing requirements for automobile inspection and maintenance programs. The underlying goal of the policy is to reduce a highly localized problem, automobile emissions, and it would seem uniquely suited to innovative local approaches. The EPA, however, imposed a one-size-fits-all, top-down regulatory approach which severely restricts local innovation.

The 1990 Amendments to the Clean Air Act requires states to establish a centralized test and repair program unless states could demonstrate that a decentralized program could be equally effective. As promulgated by the EPA, the rules ensured that states would never have a chance to show that a decentralized program could work as well. Under EPA rules, states attempting to use a decentralized program would be arbitrarily limited to half of the emissions reductions credits of a centralized program. Since this requirement would mean that states would have to achieve costly and difficult emissions reductions in other areas to compensate, the EPA’s rulemaking virtually guaranteed that states would use only the EPA approved emissions testing program. Only after a few renegade states bucked the EPA’s mandate did most state air regulators begin to contemplate instituting a decentralized program; nevertheless, it took legislative action by Congress to remove the fifty percent limitation on credits to finally open the door to state flexibility and innovation.

In this case, the goals of both the federal government and the states was identical: to reduce the general contribution to air pollution by vehicles. And yet the attempt to reach this goal became exceedingly costly — both in terms of dollars and in terms of lost trust between the proponents of the competing visions.

4. FREE MARKET SOLUTIONS

Americans want a safer, cleaner, healthier environment. They want the magnificent beauty of our land preserved for future
generations. But they also want a strong, growing economy. Reconciling the latter goal with the former is where the conflict between the two models most often originates.

No one will dispute that free markets remain our best mechanism for economic growth. Free market environmentalism contends that environmental policy can take into account, and itself be integrated into, free market policies for several reasons. First, a prosperous nation is more likely to have the time and the resources to protect the environment. Second, the principles of free-market economics can impose a much-needed discipline on environmental policies using cost/benefit analysis and considering the needs and choices of individuals and communities. The marketplace is where citizens can most clearly and honestly express their preferences, needs and goals. Third, an environmental policy which assumes free-market mechanisms is one which is implicitly dynamic rather than static. It has the capability of responding to societal changes as expressed in the marketplace, unlike a policy formulated in isolation from the marketplace. Finally, and perhaps most importantly, a more efficient environmental policy can not only respond to the demands of the marketplace, it can enter into it.

For example, the emissions trading program for sulfur dioxide that was added to the 1990 Clean Air Act Amendments has proven to be much more successful than even its strongest proponents could have hoped. Although many environmentalists fought against its inclusion because of fears that sale of the emissions credits would amount to a "right to pollute," the program has led to a fifty percent reduction in annual sulfur dioxide emissions at roughly a third of the cost of the earlier, rigid regulatory approach. The results clearly demonstrate that linking environmental objectives with economic incentives can spur innovation and unleash dynamic forces to achieve environmental policy goals more efficiently than command and control-style regulations.

5. IMPLICATIONS FOR LAWMAKERS

In writing environmental legislation, Congress has too often side-stepped policy confrontations by passing responsibility for crafting specific regulations onto the agencies. This approach has enabled legislators to pass popular bills, but it also cedes broad authority to regulators. In effect, our most sweeping environ-
mental laws are now being written by unelected bureaucrats in federal departments and agencies. Perhaps the single most controversial environmental issue of 1997 will be the proposed revision of the National Ambient Air Quality Standards under the Clean Air Act. This revision does not involve a change in the law. Rather, the EPA has proposed toughening the air quality standards as part of its periodic administrative review. These proposed standards will impose daunting new requirements and costs on businesses and communities around the country — and all without a single vote of Congress.

There is a basic Constitutional question at issue here: Should agencies have the power to make wholesale revision to laws without Congressional involvement? In an effort to reassert our Constitutional authority to write laws, legislation was passed in 1996 to provide for Congressional review of significant regulations. Most troubling about the current situation, however, is that the fundamental presumption of lawmaking has been inverted. Agencies are writing significant revisions to laws which Congress may only consider blocking or accepting. In the polarized politically-charged atmosphere of Washington, this inevitably becomes a choice "for" or "against" the environment — an inflexible situation which tends to thwart compromise.

6. CONCLUSION

The environmental problems which face both our nation and the world will likely not continue to be solved by a static command and control regulatory policy, whether that policy is implemented nationally or internationally. What our remaining environmental problems require is a dynamic solution in which the federal government plays a leadership role in establishing "next generation" environmental policy. But in formulating this policy, we must be careful to incorporate the same fundamental principles that shaped our democracy. Instead of a choice between the two dominant models of environmental policy, I believe that a shared vision is the most likely — and most appropriate — road to take.

Present environmental polices often promote an adversarial framework. The current centralized, top-down, one-size-fits-all approach is often restrictive, inefficient, and ineffective. The federal government should not abdicate its responsibility to lead environmental policy; rather, it should lead with an approach that
would promote greater flexibility, improved efficiency, and increased effectiveness.

America’s bountiful natural resources are as much a part of our legacy as are our proud philosophical and institutional traditions. It is my belief that protection of our nation’s environment can be directly linked to such a heritage. Our environmental policies should be formulated within the same philosophical context as our democracy was conceived. A variety of public policy goals have been successfully pursued through those same principles and values that have shaped our country. It is only logical that they should define the policies that protect those resources which contribute so greatly to our nation’s very identity and prosperity. Once we agree to accept a shared vision of appropriate federal leadership and respect for American principles we will begin to solve environmental problems differently, and I would argue, more usefully and more cost effectively.