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### **Author**

Futrell, J. William

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# ENVIRONMENTAL ASSESSMENT: THE NECESSARY FIRST STEP IN SUCCESSFUL ENVIRONMENTAL STRATEGIES

J. William Futrell\*

During the last twenty years, environmental law in the United States has grown from an undeveloped state to a highly developed field of law. In that development, the U.S. laws on environmental information and assessment are the most important achievements. In 1971, the Environmental Law Institute published a summary of environmental law that comprised 33 pages in the *Environmental Law Reporter*.<sup>1</sup> In 1990, the text of the statutes alone took up more than 600 pages. The *Environmental Law Reporter* has published over 5,000 federal court decisions. These decisions are paralleled by thousands of administrative decisions which are equally important to lawyers seeking to advise clients. But all this activity does not add up to a good environmental strategy. Most Americans are dissatisfied with their achievement in environmental protection. They want more. The key is environmental assessment.

Assessment is a key step to competency in any human activity. We have to begin with the end in mind if we are to achieve our goals.

Good environmental assessment promotes effective priority setting in the environmental policy making process. It is the first step in devising a good environmental strategy. A good strategy may require both long-range education and market-based incentives as well as legal approaches.

Greater analysis is required to develop a workable methodology for setting environmental priorities and designing environmental strategies. All too often, environmental professionals look only

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\* President, Environmental Law Institute.

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1. 1 *Envtl. L. Rep.* 4000, 4000-47 (1971).

to governmental regulation and fail to consider larger societal values. Good environmental assessment will analyze what government can and cannot do as well as simply analyze the environmental impact of a planned development project. The environmental assessment of the future will deal with private sector efforts and new technologies as well as bank loans and construction projects.

Good environmental assessment leads to better policy analysis, to better environmental management, and to programs that solve pressing environmental problems. National governments, state and local officials, and industry and private citizens—all must be involved.

Law is meant to serve society—to lead to the establishment of a setting in which the quality of human life can be spirited, improved, and unimpaired. Coordinating such an effort is often difficult because law and environmental policy are formed by a diverse group: legislators, agency officials, judges, attorneys, and sometimes private decision makers. Effective action depends on convening the key players in an open dialogue. In a field frequently dominated by rhetoric and adversarial positions, we need a place for open, candid debate of environmental issues among its broad constituency of federal and state officials, corporate leaders, and environmental and citizen organizations. Non-profit organizations such as our own Environmental Law Institute in the United States serve this role. We depend heavily on environmental assessment laws in our work.

In the United States, five legal arrangements are especially important for promoting environmental assessment:

1) The National Environmental Policy Act<sup>2</sup>—of great value to local and municipal governments in coordinating with federal activity and for interagency coordination at the federal level;

2) The Right-to-Know Law<sup>3</sup>—a new pollution control self-reporting requirement which is leading to major cleanup;

3) The Office of Technology Assessment—which gives Congress foresight capability on new technologies;

4) The Freedom of Information Act<sup>4</sup>—used by both business and citizen groups for specific inquiries;

5) Judicial Review—which enforces openness in the executive branch.

Self-monitoring and self-reporting is a unique feature of American environmental law. It is a key aspect of the environmental impact statement in which government agencies must make full disclosure of their intended actions and the expected consequences

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2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70a (1975).

3. Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001-50 (1986).

4. Freedom of Information Act, 5 U.S.C. § 552 (1986).

of those actions. It is a key aspect of the discharge monitoring report in the permit system of the Clean Water Act which requires industry to maintain detailed public records on its discharges. Two laws deserve special attention: The National Environmental Policy Act and the Right-to-Know law.

## I. THE NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act (NEPA) is one of the most widely spread environmental laws, having been adapted in Europe, Latin American, and Asia. The World Bank and other multinational banks require comparable environmental impact assessments. Unlike many U.S. laws, NEPA is not confrontational or based on adversarial proceedings. It facilitates coordination and communication. It has much the same appeal as the computer and xerox machine. People want to know.

NEPA presents a unique opportunity for government officials and citizens to become partners in the work of environmental protection. NEPA has been described as the Magna Carta of environmental law. A series of dramatic federal court cases in the early 1970s established the power of local citizens' groups and individual environmentalists to use NEPA to stop harmful projects and be defenders of the environment.

As important as NEPA is to environmental litigation, citizens, both environmentalists and business leaders, as well as agency employees, should look to the significant advantages the NEPA process gives them in becoming effective partners in planning. By participating early in the NEPA process, they get a seat at the table and can become full participants in the planning process. More often than not citizens and agency professionals will find themselves working together because they have found common ground.

Environmental organizations and local groups have found environmental impact statements particularly useful because the Environmental Impact Statement (EIS) includes key information about a project in one easily accessible document. NEPA has been the single most useful development in opening up federal agency decision making to local groups that do not have the budgets or staff of the national groups based in Washington to investigate projects. The EIS should be a trustworthy document because of the legal requirement to make full disclosure about the project. NEPA documents can serve as the eyes and ears of citizens and local governments who otherwise would be poorly informed. The political reality though is that all too many EISs—and Environmental Assessments (EAs)—do not live up to the promise of NEPA.

Citizens should be alert to opportunities to participate. In the United States, the NEPA process begins with the filing of a notice

to prepare an EIS followed by a series of public meetings. This is called the scoping process. The scoping process usually involves a meeting of affected federal, state, and local agency officials and interested members of the public to identify key issues that will receive in-depth treatment in the EIS. Interested parties should strive to be present at the first scoping session and at each following meeting. Many agencies seek to hold the scoping meeting in the evening and use mailing lists to generate interest. Therefore, citizens interested in planning decisions should be sure to get on the mailing list.

The importance of the scoping process cannot be overestimated. This is where the environmental defenders and concerned neighbors can make significant contributions. They should prepare for the meeting and enter the process armed with data and a proactive attitude to help the agency reach the best decision for the environment. Once the draft EIS is issued, citizen groups should cooperate with each other and with community leaders in responding to the EIS. The EIS is a complex document and the time for commenting is short.

NEPA works as a coordinating device to get federal state agencies to work together. While the environmental field overall is often characterized by regulatory gridlock, NEPA has acted as a consensus-building tool to ease these impasses.

The NEPA process calls for informed citizen participation. What the NEPA process needs is not more law, but more life—more citizen participation and political follow-up. Agency officials acknowledge that environmental degradation may occur even though the NEPA process may be followed to the letter. NEPA opens up the process but it does not guarantee the best result. There is no substitute for politics. In the United States, environmental assessment has suffered during the last decade.

## II. PRIVATE SECTOR RESPONSE: PREVENTIVE ENVIRONMENTAL LAW AND RIGHT TO KNOW

The environmental laws of the 1990s will probably place more emphasis on information laws. The U.S. environmental laws of the 1970s, based on industry permitting and technical command and control regulation, differed sharply from the environmental laws of the 1980s, with its emphasis on tort law and hazardous waste clean-ups. But both models are characterized by adversarial confrontation.

A new 1990s trend involves greater emphasis on information laws. The EPS Science Advisory Board has recommended a new emphasis on better information and incentive schemes to encourage compliance with environmental laws. While affirming the necessity

of a vital enforcement effort, the U.S. EPA wants to invent new strategies that go beyond the traditional command-and-control regulation.

The U.S. emphasis on self-reporting is unique. I think it is the most distinctive feature of our environmental law.

In the wake of the environmental disaster at Bhopal, India, the U.S. Congress and a number of states enacted "Community Right to Know" laws mandating that industry regularly submit to the government data on toxic substances held or released at their facilities. This information, stored in government data banks, is available to the public on request.

The Right to Know provisions (often referred to as SARA Title III) go far beyond the Clean Water Act's<sup>5</sup> Discharge Monitoring Report. They do not go as far as the EIS, but the requirements are analogous. The reports filed under the Right to Know provisions of Title III may be as important to environmental lawyers in the pollution control field as the environmental impact statements are to lawyers in natural resource law cases.

A study by the Center for Environmental Management at Tufts University titled "Corporate Responses to SARA Title III" found that the right-to-know law has raised concerns about increased liability, new regulatory requirements, and harm to company reputations. As a result, many corporations have taken steps to voluntarily reduce toxic emissions and have attempted to improve relations with surrounding communities. EPA Administrator William Reilly has been able to use right-to-know information to convince the worst polluters to voluntarily promise to cut releases significantly.

This example of how information, when shared with the public, serves as a powerful incentive, is in step with the most recent research by psychologists and criminologists on achieving legal compliance. Scholars such as Northwestern University's Thomas Tyler and Australian theorists John Braithwaite and Phillip Pettit dissent from earlier views that emphasized general deterrence based on imposing costs that outweigh the benefits of polluting and instead stress the importance of corporate managers' aversion to shame. People obey the law because, given rules and decisions fairly arrived at, they believe it is proper to obey the law.

The new EPA leadership understands the fierce pride that the best American business leaders have in their companies. As a result, they are using information to get faster and better compliance. This information law is leading companies to conduct their own pri-

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5. Clean Water Act of 1977, 33 U.S.C. § 1251 (1984).

vate environmental assessment. They are acting to reduce pollution.

In conclusion, there are no simple blueprints for the creation of a democratic-spirited environmental protection regime. Nevertheless, the U.S. experience—along with related experiences in other countries may help to inform debate in the following areas:

1) *Environmental Impact Assessment*: As other nations evaluate the utility of the EIA approach, they might profitably consider the following questions: What projects would benefit from EIA review? Can the often-voluminous paperwork involved in these assessments be minimized? How can the EIA be drafted to insure that subsequent failure to comply with its provisions is redressed? And—perhaps most relevant to our current inquiry—how can the public participate without delaying the project?

2) *Public access to environmental data*: In regard to right-to-know laws, are these laws, specifically pertaining to environmental hazards, useful models for our colleagues overseas? What are the advantages and drawbacks of a more generic law such as the U.S. Freedom of Information Act?

3) *Safeguarding environmental values through the courts*: At the federal, state, and local levels, individuals and citizen groups in the United States enjoy a broad range of environmental “rights” that can be vindicated through the nation’s courts. The U.S. has an adversarial and litigious legal system. Some of these rights derive from common law; many others are based in statutory provisions enacted, for the most part, during the past two decades.

In weighing the judiciary’s role in addressing environmental concerns, leaders in other countries may wish to address the following questions: What are appropriate mechanisms for administrative and judicial review of environmental agency actions? What rights of citizen action can protect the public against environmental harm while minimizing uncertainty within the regulated community?

Helping decision makers agree on which questions to address first is an important step in creating good strategy. Environmental assessment can help us set these priorities. Citizen organizations such as the American Bar Association and academic centers such as the University of Hong Kong provide a much-needed forum for the exchange of information and ideas among environmental professionals around the Pacific Basin. We can all learn from each other as we face the environmental challenges of the 1990s.