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ESSAYS AND READER COMMENTS

WILLIAM K. REILLY*

Generational Change in Environmental Law**

Colleagues, friends, it is a great honor to appear as your Law Day Guest Speaker. It is a particular pleasure to share the podium with my good friends Bob Page and Lieutenant General Hank Hatch.

As you know, we have already fought side by side on a number of difficult environmental battles—and there are more to come.

Over the past 20 years, since I first entered government as a staff member at the Council on Environmental Quality, the environmental scene has changed a great deal.

And it is still changing. In the late 1960s, rivers caught on fire. Whole cities were enshrouded by thick clouds of industrial smoke. Raw sewage was discharged into rivers. Automobiles released ten times the emissions of today's cars.

In the spring of 1970, a critical mass of citizen concern came together with a bang: April 22, the first Earth Day. The Earth Day we marked 10 days ago was the 20th Anniversary of that first important, galvanizing event.

By all accounts, by all opinion polls, by every measure we have, protection of the environment today is high on the national agenda. And it's fast becoming a matter of international concern. The problems that confront us and the kinds of solutions that we will need are very different from those of a generation ago.

Let's talk about some of the changes that are going to affect environmental law for years to come. Not only will these changes shape environmental law; they are going to affect the missions of EPA and the Army Corps of Engineers profoundly.

First, the scale of environmental problems is changing dramatically. In the late 1960s, lawyers like myself believed that environmental laws and regulations had to be strengthened and broadened.

State and local laws often were inconsistent if they existed at all. Pollution havens were notorious. States were tempted to compete for new industry by avoiding environmental laws altogether. Interstate transportation of pollution posed equity problems: states with few environmental

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regulations could ship their pollutants out of state via long-range transport by air. To make matters worse, the technical understanding needed to address those problems was often unavailable at the state level.

Faced with this situation, the country did something unprecedented during the 1970s. We passed close to a dozen major environmental laws meant to protect us in a relatively comprehensive way. For the first time in history, an industrialized, technologically advanced nation enacted sweeping federal legislation to protect human health, natural systems, and the environment nationwide.

Those efforts only faintly foreshadowed the work we have before us in the 1990s and beyond as we try to solve environmental problems on a global scale. As we face global climate change, destruction of stratospheric ozone, depletion of tropical rain forests, the political hurdles are daunting.

If we thought it was difficult to convince Democrats and Republicans, large and small states, and high and low sulfur coal areas of the need to agree on a clean air act in 1970—or for that matter in 1990—just wait until the nations of the world come together to negotiate a framework convention on climate change, which may need to consider changing the patterns of fossil fuel use.

Yet that sort of problem is exactly what we will have to face if we as a nation are to become actively engaged in managing the global environment in the years ahead. There is no precedent for this multinational cooperation—save perhaps the very important work of the United Nations Environment Programme on the Montreal Protocol in 1987. We face a huge job in trying to overcome the political, economic, religious, and cultural differences that have separated nations for centuries.

Given these problems, we absolutely cannot act unilaterally. We must bring the rest of the world along. To do that, we must demonstrate by the effectiveness of our environmental actions here at home that we deserve a leading role in global environmental protection.

The second point I want to make is that the kinds and numbers of sources that contribute to so many serious environmental problems have proliferated enormously. Back in the 1960s, our task seemed relatively straightforward. We identified some of the major contributors to pollution. The pall of smog that hung over Pittsburgh or the fire that burned on the Cuyahoga River are obvious examples. What we had to do at that time was to convince the public that pollution problems were intolerable yet solvable, that the economic cost of addressing them was affordable and worth paying.

In large part, the environmental improvements that resulted from our actions are measurable and undeniable. When talking about the environmental problems that we face as a country today, we should acknowledge

that we have come a long way. We can be proud of this. We made huge investments, and we got a lot for them. I personally think that the experience of environmental improvement in the 1970s is one of the great American success stories.

The dramatic decline in the quantity of dangerous lead in people's blood is largely attributable to the 96 percent reduction from the amount of lead in gasoline in 1970. Moreover, in every major category of air pollution except nitrogen oxides, emissions on a national basis have either leveled off or declined since 1970. Emissions of particulates are down 64 percent; sulfur oxides, down 25 percent; volatile organic compounds, down 29 percent; carbon monoxide, down 38 percent.

We have today management and tracking systems for hazardous waste that ensure that those who improperly generate, store, or dispose of hazardous waste are held responsible for their actions. The open dumping and burning of municipal solid waste—household garbage and the like—has been banned.

A whole class of pesticides that do not degrade in the environment for decades after being applied was banned; among these was DDT, the banning of which led to the return of the bald eagle and other birds.

The quality of some of the most heavily polluted waters, particularly urban rivers, has dramatically improved as a result of controls on industrial and municipal discharges. Today, compared with 1972, more than twice as many Americans—almost three quarters of the population—are served by plants which treat sewage so that the disease potential of human waste is sufficiently reduced. These plants also remove most of the nutrients in sewage which can seriously degrade bodies of water. In many areas of urban rivers, sport fish have returned.

We ought not to let the public forget these achievements because they are going to be asked to make more sacrifices in the years ahead. They need to understand that these investments have, in fact, paid off before. They will pay off again.

Reducing the pollution from so many large utility and industrial facilities in the past was one thing. We now have to face very serious environmental threats from millions of small, widely scattered, diversified sources.

Reducing these threats is going to be a much more difficult job because the sources of many of our worst pollution problems today can be found in our homes, neighborhoods, and small businesses.

For example, ground-level ozone pollution—smog—is caused by millions of automobiles, paint shops, bakeries, and print shops. The reality is that the individuals in these cars and companies do not believe that they are contributing seriously to the pollution problems of our major cities.

But they are. To control this pollution is going to require actions at the local level, actions that the federal government would have a very difficult time defining or implementing.

In Los Angeles, the local air quality control board is proposing to do away with drive-in restaurants and drive-in banks as part of its ozone control plan. Can you imagine the federal government, a Republican administration's environmental protection agency, even one run by a crazed tree-hugger, trying to get away with such a thing?

Yet, that is exactly what they are proposing in southern California.

Another good example is pollution of estuaries. There are literally millions of small, decentralized sources of pollution along the coast itself and millions more located well inland. Lawn fertilizers and backyard garden insecticides used in Brattleboro, Vermont, end up contributing pollution to Long Island Sound. Farm and ranch fertilizers, pesticides, and herbicides, used outside Bismarck, North Dakota, end up as part of our problem in the Gulf of Mexico.

Oil and gas residues washed off the streets of Twin Falls, Idaho, end up in the Pacific Ocean. And there are many more examples like these.

In all of these cases, I think our national response is going to require the coordinated efforts of federal, state, and local governments, of businesses, of individuals. There remains a major task of environmental education, of building the environmental ethic, and of changing personal choices and behavior in fundamental ways.

My third point is that our approaches and our strategies are going to have to change to keep up with our understanding of the problems. Our educational efforts, for instance, are going to have to be increasingly sophisticated. The kinds of techniques that worked for us in the 1970s, as important as they are in addressing the major sources of obvious pollutants, are likely to be less useful in making further progress.

I hope that in the future we are more successful in educating the public about risk so that they are less susceptible to fear, more capable of making the kinds of decisions that we expect informed citizens to make.

What we all want is to be reassured that the people making the decisions have our own interests and values at heart and can be trusted. I take as one of my principle responsibilities, and one of the things that I hope to accomplish, is the creation of that kind of public trust in our regulatory programs.

If we can keep regulatory disagreements on a more scientific plane, the public will be much more willing to learn from the issues and then make up their own minds.

Another new strategy that we must develop is the concept of pollution prevention. Where once our efforts were focused on handling what came

out at the end of the pipe, today we are striving to eliminate waste before it is generated.

We must find ways to reduce the amount of waste going into our landfills since half of them will be filled—and closed—in the next five years. This means, for example, a much greater commitment to recycling so that paper, aluminum, and glass do not end up in our dumps. In fact, we need to look across our production processes and our everyday lives at ways to short circuit the trip to the landfill and to reduce the generation of waste.

All this means that we must think about environmental law in a somewhat different way in the 1990s than we did in the 1960s. As I look back on my own experience, I was trained to understand systems so as to perceive their vulnerabilities, the places at which they were susceptible to manipulation, and then to try to intervene in those systems and alter them to serve a specific interest. Environmental lawyers in the 1970s wrote a long list of laws to protect the environment, pollutant by pollutant, facility by facility, medium by medium.

Taken together, those laws are somewhat inconsistent, sometimes even conflicting. They give us little idea of the relative seriousness of the different environmental problems they were meant to solve. They move pollution around from air to water, or water to land and back again.

So I would hope that society takes a fresh look at environmental law, and more broadly at environmental protection, thinking in terms of systems, incentives, and multimedia approaches.

We should not ask the question: How do I get that pollutant out of the air? But rather: Where is the most efficient place to intervene in the system, across the spectrum of air, water, and land, to remove the threat to human health and the environment?

In a very real sense, we approach the decade of decision on the environment. We are very determined to make a difference, to make our moment count, and to prepare the country for the next century.

We need to move the environment from the margins of public policy where it has always been, and in my experience where it is in every other country of the world, and move it into the mainstream, both as a matter of domestic policy and foreign affairs.

The corps has a central role to play in developing this new generation of environmental law and the new culture of environmental protection. Assistant Secretary Page and Lieutenant General Hatch have set the Corps on this course—and I salute their leadership and direction.

I want to highlight in particular the recent EPA/Army Corps of Engineers Memorandum of Agreement on Wetlands. After five years of inter-agency debate, we now have consistent guidance for our two agen-

cies as we work together to administer the section 404 provisions of the Clean Water Act. And I look forward to the development of a broader administration policy on "no net loss" wetlands.

More generally, Secretary Cheney has committed the entire defense department to redoubled emphasis on protecting the environment. Just two weeks ago, I signed with Secretary Cheney a new EPA/DOD cooperative agreement focused on environmental cleanup of Chesapeake Bay.

Our joint Superfund work with the Corps is another example of the growing EPA/DOD collaboration in the battle against pollution.

The renewed commitment of your agency to environmental protection is of great importance.

As President Bush recently noted: "Global stewardship is our shared responsibility and our shared opportunity. We must manage the earth's natural resources in ways that assure the sustainability of humanity on this planet and in ways that maximize our potential for growth and opportunity for all."

It is hard to lay out the challenge we face—at EPA, at the corps, and across America—more clearly. It is a challenge we face together. With the leadership of Bob Page, Lieutenant General Hatch, Secretary Cheney, and others here, I have confidence we will rise to the occasion. Thank you.