



Spring 1987

Controversies in Environmental Policy

Channing Kury

Recommended Citation

Channing Kury, *Controversies in Environmental Policy*, 27 Nat. Resources J. 469 (1987).
Available at: <https://digitalrepository.unm.edu/nrj/vol27/iss2/9>

This Book Review is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact amywinter@unm.edu, lsloane@salud.unm.edu, sarahrk@unm.edu.

CONTROVERSIES IN ENVIRONMENTAL POLICY

Sheldon Kamieniecki, Robert O'Brien & Michael Clarke, Eds.
Albany, New York: State University of New York Press.
1986. Pp. 322. \$12.95 (paper), \$39.50 (cloth).

Controversies in Environmental Policy contains thirteen articles in six sections edited by three commentators and, considered as a whole, suffers from a "too many cooks" syndrome. If this book is designed to supplement student reading, then the complementary core reading and lectures have the burden of providing much of the intellectual rigor that several of these articles assume or, in a few cases, presume. If designed for trained professionals, this book casts ancient conflicts into current dialogue. In any case, this book would be difficult at best and misleading at worst for uninitiated novitiates. A love of political debate would aid the reader for *Controversies in Environmental Policy* is about politics even though some of the authors *vendre des canards a moitie* their politics as economics.

The first chapter, "Democratic Politics and Environmental Policy" by Dean E. Mann, discusses in a crazy quilt survey of views of the Reagan Administration and the fragmentation of the political process. In short, the Reagan Administration's soul might have been willing to vanquish environmentalism but its political body has proved to be too weak to overcome the balance created by the separation of powers between the executive and legislative branches. Ideology may be fun for politicians, political scientists, commentators and ordinary folks to debate but ideology is really not a good way to run a government.

John Baden and Dean Lueck attempt in the second chapter, "Bringing Private Management to the Public Lands: Environmental and Economic Advantages," to apply a theory that works well for the production of pushpins to the management of resources for which imperfect, if any, markets exist. Vast tracts of public resources are not marginal, fungible items and market theory has little real to say about how to manage them. Baden and Lueck seem to be more concerned with pandering to the imagery of a passing political fad than discussing the limits of their proposal. All policy proposals have limits and Baden and Lueck go well beyond the pale of microeconomics in proposing the divestment of federal lands in urban areas and eventually the larger, more remote wilderness tracts. Nothing in their polemic draws an objective distinction between the privatization of, say for the sake of argument, the federal Gateway National Recreation Area at the edge of New York City and the priva-

tization of the nonfederal but nonetheless public Triborough Bridge and Tunnel Authority, which controls four bridges and two tunnels in the New York metropolis.

Baden and Lueck seem to conclude that since there are deficiencies in governmental management that private management would at least produce a net increase in the economic yield or value of resources. This general proposition is false although some special cases might exist. A change in management from public to private would create a change in the mix of images, goods, services and resource structures. Whether efficiency, which Baden and Lueck confuse with Pareto Optimality ("the allocation of scarce resources so that no one can be made better off without making someone else worse off" [page 54]), would be increased or decreased by any such change in management is simply problematical.

The third chapter is "From Illusion to Responsibility: Rethinking Regulation of Federal Public Lands" by William C. Dennis and Randy T. Simmons. This chapter's theme is that "When authority is separated from responsibility, the vital information link between actions and effects is severed" (page 71). Dennis and Simmons then go on to say that "Even the most carefully drawn bureaucratic rules and regulations are vague, not really subject to scientific analysis, and ultimately require subjective decisions disguised with rhetoric, about due process and objective standards" (page 74). They conclude by urging privatization, more extensive charging of user fees and deregulation. "From Illusion to Responsibility" is another example of trying to overextend what might otherwise be reasonable ideas. That Dennis and Simmons transform analysis into absurdity is demonstrated by at least three propositions in their chapter.

One such transformation is their argument that "A policy area where the misapplication of scientific principles is likely to do much harm is the regulation of federal oil, gas, and coal through the leasing process" (page 74). Dennis and Simmons use as their example that "These leases contain 'diligence' clauses requiring that the resources be developed in a certain amount of time or the lease reverts to the government" (page 74). Practically all private leases contain a similar if not identical provision for reversion to the landowner because it is in the interest of the landowner, whether public or private, to place a time-frame on activities which might take place on the property and also to accelerate the landowner's cash flow if production is ever to take place. Dennis and Simmons in suggesting that useful speculation is stymied by diligence clauses in public leases fail to explain why public administrators should be precluded from a management tool used by private landowners.

A second example of the absurdity propounded by Dennis and Simmons is their criticism that "Land sales and exchanges are complicated by fair

market value requirements which, in effect, prohibit any sale or exchange of federal land to private parties or between governmental agencies without extensive assessment of the economic potential of the land" (page 79). Any prudent manager, whether in the public or private sectors of the economy, would always attempt to measure, even roughly if precision were not possible, the fair market value of any land to be sold or traded. To do otherwise would be an abdication of the manager's duty as the trustee for the owners. This fundamental duty, which is obvious to anybody who has ever been charged with carrying out a trust, seems to have escaped the attention of Dennis and Simmons.

The incompetency of Dennis and Simmons is further suggested by their statements that "There is the serious question of whether it is at all appropriate for people to use the power of a democratic, constitutional government to impose their values on society through the allocation of natural resources" (page 82) and "Nor can liberty be furthered by a public policy devoted to central management of the nation's natural resources" (page 82). These statements demonstrate that Dennis and Simmons have never bothered to read the United States Constitution, in particular Article IV, Section 3, Paragraph 2 which states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

Howard E. McCurdy discusses in the fourth chapter, "Environmental Protection and the New Federalism: The Sagebrush Rebellion and Beyond," the importance of participatory democracy. McCurdy is correct in stating that "Privatization reforms would substantially reduce the opportunity for public participation" (page 86) and that "None of these reforms adequately responds to the technical complexity of modern environmental problems nor to the need for increased intergovernmental cooperation" (page 86). McCurdy outlines briefly the political history of the urge for privatization and explains as well as, and perhaps more succinctly than, any other writer that the true bone of contention in the conflict between the "new federalists" and federal resource management proponents is the capture of public resources by special interests.

The fifth chapter is "Economism, Democracy and Hazardous Wastes: Some Policy Considerations" by Michael F. Sheehan who discusses the limitations of "economism," which he defines as "the belief that the economic goals and principles espoused by the neoclassical economic paradigm ought to be the major determinants of public policy" (page 110). He then outlines the statutory structure for the management of hazardous wastes and develops a seven point program for reform that

would seek to "substantially reduce the use and proliferation of hazardous materials through a conscious federal policy of source limitations and the encouragement of [recovery, recycling and reduction]" (page 125). Sheehan's seven point program is worthy of consideration by legislators and other policymakers.

Joseph P. Biniek describes accurately in the sixth chapter, "Benefit-Cost Analysis: An Evaluation," the inaccuracy of the benefit-cost analysis process. Although he refers to the documentary history of benefit-cost analysis in the federal water project establishment, Biniek fails unfortunately to make explicit for the novice that benefit-cost analysis was developed as a means to rank economically, independent of Congressional District politics, water projects as public investments. As I understand the original development of benefit-cost analysis, there was a consensus that it could sort out that this particular dam wasted less money than that levee and that as a public investment the dam project could be undertaken, notwithstanding the dubious validity of any supposed net benefits, because the local community would benefit from the infusion of funds and at least a few people preferred water skiing to white water canoeing. Aside from these practical considerations, economists through three decades of pondering and scribbling and government research contracts concluded that there was no one method to rank projects. Choices, such as the method of discount, must be made in creating the theoretical model through which a particular project would be analyzed and these choices, some of which were subtle and beyond the ken of anybody but economists, made a difference in the order of project rankings. In other words, even if the authors of benefit-cost analyses were using accurate numbers for their calculations (which is a charitable assumption), the benefit-cost ratios that were derived were inherently ambiguous. Thus, the theory of benefit-cost analysis, while highly developed, never became a particularly meaningful tool for objective analysis.

The problems of benefit-cost analysis became even more compounded when it became a requirement in the evaluation of the Environmental Protection Agency's regulatory programs on which Biniek's evaluation focuses. While there are benefits and costs to regulatory programs and, I suppose, a regulation might be analogous to a dam, there are at least two important distinctions that need to be recognized. First, the costs of pollution regulations are by-and-large incurred as private, not public, expenditures. The significance of this distinction is that, while the deficiencies of benefit-cost analysis are largely irrelevant to the government's freedom to use the public fisc as a vehicle to provide welfare payments under the guise of encouraging economic development, pollution regulations do not have as direct purposes the infusion of funds into local

communities or the serving as tools of macroeconomic adjustment. The historic rationale for benefit-cost analysis is simply inappropriate for the evaluation of pollution regulations. Secondly, with the divorce of the method from its rationale of sorting projects and the marriage of benefit-cost analysis to the evaluation of governmental programs in absolute rather than relative terms, the focus of the analysis moved from moderately defensible conclusions to even less defensible assertions. The ambiguous ranking of projects using an arbitrary, or amorphous at best, calculus may have some worth, but the value generated by that calculus for one program has virtually no meaning at all. Perhaps the drafters of benefit-cost analyses should append to their reports a statement, much like the disclaimer at the end of many cinema films, to the effect that any resemblance to reality is coincidental.

The seventh chapter, "EPA's Successes and Failures" by Alfred A. Marcus, has a muddled discussion of the economics of pollution abatement but contains some useful insights into the politics of the Environmental Protection Agency. Marcus attempts to argue the superiority of so-called cost-effective methods as contrasted with direct regulation. Although significant analytical arguments in support of Marcus' preference exist, he fails to marshal them effectively. He even erroneously defines "efficiency" as "the greatest good for the greatest number" (page 153). The problem with Marcus' economics is that he provides no analytical structure on which to coordinate the diverse and sometimes conclusionary data and observations that he presents. This weakness in intellectual rigor is a reflection of the inartfulness of the public debate regarding the economic consequences of pollution control. The policy process, which works reasonably well but needs to work even better, can succeed notwithstanding various technical failings. An important clue is provided by Marcus' summary of the public opinion poll literature which reveals very strong public support for pollution control even in the face of adverse economic consequences. This seeming paradox is one of the limits of partial economic analysis that might otherwise masquerade as completely holistic political economics and is an important premise upon which the Environmental Protection Agency can advance the public welfare.

Steven A. Cohen claims to argue in the eighth chapter, "EPA: A Qualified Success," that the Environmental Protection Agency "has made a significant positive contribution to the protection of environmental quality in the United States" (page 174). He notes that Congress has supported the agency through expanding its statutory mandate but without providing for commensurate staff and funding. He reports that "the air is significantly cleaner today than it was in 1970" (page 184) and that many Clean Air Act state implementation plan revisions were late or never submitted

and then he concludes that "Taken as a whole the EPA's air quality programs made a significant positive contribution to the protection of environmental quality in the 1970s" (page 185). Cohen's implicit syllogism does not conform to standard logic. His analysis of water quality, however, appears to be reasonable in concluding that "the EPA has made strides toward halting increased water pollution" (page 187). In regards to hazardous wastes, Cohen claims that because the agency developed the Superfund legislation that the agency's performance has been "positive and significant" (page 189) even though the agency has, by Cohen's own report, been unable to implement either the Resource Conservation and Recovery Act or the Superfund legislation (Comprehensive Environmental Response, Compensation, and Liability Act of 1980). Thus, he deems the Environmental Protection Agency a "qualified success" from "late 1970" to "21 January, 1981" (page 189). Cohen goes on to review briefly the budget cuts, reorganization and procedural changes, and other policy changes during the time that Anne Gorsuch-Burford was the agency's administrator. As to whether the Environmental Protection Agency has, in fact, made "a significant positive contribution to the protection of environmental quality in the United States" (page 174) will remain a mystery to any reader whose sole source is Cohen's "EPA: A Qualified Success."

Thomas G. Ingersoll and Bradley R. Brockbank address "The Role of Economic Incentives in Environmental Policy" in the ninth chapter and explain in ordinary language the growth of environmental regulation and the inability of economic markets to be the premier vehicle for that regulation. Ingersoll and Brockbank do allow that "The market system . . . can be a very useful mechanism for allocating market goods and free goods within the limits determined by an ecologically sound policy process" (page 214) that relies on scientific research to produce standards which would serve as limits to marketable permits for pollution discharges. These authors suggest also that the Superfund is an appropriately fundamental change in the way that the federal government has been dealing with the hazardous waste pollution of multiple resources and that the federal agencies need to break down bureaucratic barriers to the derivation of policy based on "sound ecological principles" (page 220). They urge in their conclusion that "Our environmental policies must ultimately be guided by ecological realities and we must devote an increasing share of available financial and scientific resources to the determination of those realities" (page 220).

Benjamin Walter and Malcolm Getz examine the "Social and Economic Effects of Toxic Waste Disposal" in the tenth chapter. Their focus is on the practical impact of the Resource Conservation and Recovery Act as

implemented by the Environmental Protection Agency. Hazardous, including toxic, waste is defined in useful, even colorful, terms and the bureaucratic politics underlying the classification of wastes are simply described. Walter and Getz outline the mechanics of off-site waste disposal and, after a questionable digression into product price effects, describe in clear language the difficulties that waste disposal firms face in acquiring land for their proposed disposal facilities.

Chapter eleven, Mark E. Kann's "Environmental Democracy in the United States," is an unpersuasive diatribe aimed at Kann's *bete noire*, something he labels "Big Business." The lack of intellectual rigor is indicated by two examples: the first admittedly trivial but perhaps indicative of Kann's preference for believing something that he would like to believe regardless of whether it is true and the second example is a statement of his theme that would be important if it were true but which Kann never supports in any objectively meaningful way. The first example is that Kann implies erroneously that the National Environmental Policy Act [NEPA] was the result of pressure from "millions of Americans" in the "1970s" (page 257). NEPA was, in fact, enacted in 1969 as the product of Congressional policymaking uninspired by any outstanding popular demand. The second and more important example is Kann's statement that "A long history of corporate neglect of the environment and a more recent history of corporate opposition to environmental protection provide the major explanation for today's environmental crisis" (page 259). The reader can search in vain throughout Kann's article for any analytical measure that sorts out the degrees of contribution to environmental degradation. "Big Business" can certainly be criticized in analytical terms towards some useful conclusion but Kann chooses instead to create a corporate ideologist as a strawman to be lanced with Kann's rhetoric.

Henry C. Kenski and Helen M. Ingram assess in chapter twelve "The Reagan Administration and Environmental Regulation: The Constraint of the Political Market." After reviewing the history of federal air and water pollution legislation and evaluating the current state of the environment, Kenski and Ingram note that Ronald Reagan, whether as Governor of California or as President, has tended to take the lead provided by his political appointees and advisers. His Presidential administration has persistently ignored to its own detriment the popular support for environmental protection and has through budget cuts greatly reduced the number of enforcement actions taken by the Environmental Protection Agency. These authors believe that "serious damage has been done in the area of environmental regulation" (page 293) due in part to the Reagan Administration's preference of dogma over conciliation.

The concluding chapter, "Political Philosophy, Pragmatic Politics, and Environmental Decision Making," is by the book's editors, Sheldon Kamieniecki, Robert O'Brien and Michael Clarke. After summarizing the previous twelve chapters, the editors suggest that "the long-term trend will likely be towards increasing regulation" (page 305). They make four additional predictions, the first three of which they succinctly restate before concluding with their fourth prediction that goes beyond the scope of the preceding chapters.

Their first prediction is that the Environmental Protection Agency will become "somewhat more activist" (page 306) partly because "there is substantial public pressure to strengthen" the agency (page 306). Secondly, the Reagan Administration's attempt to transfer environmental responsibilities to state and local governments "is unlikely to be a lasting change" (page 306). "Third, despite extensive reservations concerning the use of cost-benefit analysis as an effective device in environmental decision making, it is likely, in the absence of generally agreed-upon alternatives, to continue to be used" (pages 306-7). Kamieniecki, O'Brien and Clarke therefore "expect that a somewhat less politicized EPA working in a more centralized policymaking system will be employing decisionmaking models of questionable validity" (page 307). Their fourth prediction is that: "The recognition that environmental problems are both national and international causes of concern will be slow in coming. However, the internationalization of environmental problems is inevitable, and it will reflect the fact that we all live in a single biosphere" (page 307).

CHANNING KURY
Attorney-at-Law