Environmental Law (I): Maturing Field for Lawyers and Scientists

Not a week goes by these days without news of one or another court suit to stop some real or alleged threat to the environment. One week there will be a ruling meaning—at a minimum—further delay in construction of the Trans-Alaska pipeline; the next week it will be a decision granting (or perhaps dissolving) an injunction against a public works project such as an interstate highway, a major new jetport, or perhaps a Corps of Engineers dam or navigation project; then, again, it may be news of a suit filed against construction of a nuclear power plant on Chesapeake Bay or of one demanding a critical review of plans for an entire complex of coal-burning power plants in the Southwest. The proliferation of such lawsuits, together with the fact that federal and state courts are usually giving them a respectful hearing, is the mark of "environmental law," now become a full-fledged branch of the legal profession.

Yet only 5 years ago environmental law was a fledgling movement which—although promoted evangelically by a few lawyers and environmentalists—was living hand to mouth, was lacking in proven legal strategies, and was sorely short on real courtroom victories. How is it, then, that environmental law has suddenly come of age? What have its practitioners accomplished? And what problems still beset those who would have the courts help protect and enhance environmental quality and help preserve wild areas from public and private exploitation?

There are now not less than a dozen public interest law firms or groups specializing partly or entirely in environmental law, to say nothing of several hundred lawyers across the nation who are more or less regularly participating in environmental law cases on a *pro bono publico* basis. The Environmental Defense Fund (EDF), a group which still has its headquarters on Long Island where it was formed in late 1967, was the first group organized solely for the purpose of bringing environmental lawsuits and it remains one of the more important groups in this field. In fact, one can learn much about the evolution of environmental law as a movement from a brief review of EDF's history.

The specific thing that gave rise to EDF was a local issue, albeit one that was a part of a much larger national problem—the continuing, wholesale use of persistent pesticides. Acting in his wife's name, Victor J. Yannacone, Jr., a 31-year-old Patchogue, Long Island, attorney, filed a suit in state court to stop the Suffolk County Mosquito Control Commission from spraying local marshes with DDT.

Subsequently, Yannacone became acquainted with Charles F. Wurster, a young professor of biological sciences at the State University of New York, Stony Brook, and with several other scientists and naturalists on Long Island who had knowledge of the effect of DDT on wildlife. He was to put them on the stand as expert witnesses, and, ultimately, to join with them and a few others to form EDF, this group's name suggesting a parallel with the Legal Defense Fund of the National Association for the Advancement of Colored People.

Science and the Trial Bar

The fact that EDF represented a joint undertaking between, to put it a bit grandly, academic science and the trial bar was to be significant, both symbolically and in terms of some of the results eventually obtained. Here, three points should be kept in mind. The first is that the issues with which environmental law is concerned are, in part, often technical and scientific. Second, in technical matters, judges have ever been loath to second-guess administrative agencies on questions about which those agencies can be presumed to have expert knowledge. The third point is that somewhere in the academic community there can usually be found intellectual resources bearing upon virtually any environmental problem, and often resources of a depth and quality which the agencies themselves do not possess. If governmental agencies were to be challenged in matters of technical competence, then EDF clearly represented a start in the right direction.

Charles Wurster set about to establish for EDF a Scientists Advisory Committee, which in fact was to be not really a committee but a long and growing list of scientists in a variety of disciplines willing to volunteer as expert consultants or witnesses if called. In fact, the recruiting of such volunteers was surprisingly easy because a substantial part of what might be called EDF's natural constituency was found on university campuses, where concern over the nation's steadily worsening problems of environmental degradation was high.

Furthermore, from the standpoint of letting it be known far and wide that there was indeed such a thing as environmental law, Victor Yannacone was the right man come along at the right time. By his own admission, Yannacone is not a lawyer with much taste for legal scholarship and the preparation of meticulous briefs. But no one could have been more energetic and fervent in advocating use of the courtroom for resolving environmental disputes.

Yannacone was ubiquitous, hurrying from here to there, filing complaints, making speeches before scientists and law students, and generally playing the role of the Billy Graham of environmental law. The time was ripe for such an evangelical effort because it was during the late 1960's that popular interest in the environment as a cause was mounting swiftly. Also, Yannacone's "sue-the-bastards" style was well designed to please a new generation of students and young faculty people who had had it up to here with the Establishment.

Yet, although EDF as well as some other groups (the Sierra Club actually had brought, or was party to, more cases than EDF) had initiated an important new line of legal action, there was a real question as to where it was all leading. EDF's suits and petitions in Michigan and Wisconsin against use of DDT and other hard pesticides had had some political effect but had not produced any permanent orders against the use of these chemicals. In the whole field of environmental law, probably the most important success anyone could point to was the ruling in *Scenic Hudson*, where the U.S. Second

Court of Appeals had in 1965 ordered the Federal Power Commission (FPC) to reconsider—in the light of esthetic values—its decision to license a pumped storage power facility at Storm King Mountain.

But, even in this case, the success was not so much that the power project might be blocked—indeed, that project is alive today and may finally be built in a modified form—as it was that the Scenic Hudson Preservation Conference had been granted *standing* to sue. In other words, it was deemed a breakthrough for the courts to have recognized the conference as a party to the FPC proceedings despite the fact that this group had made no conventional claim based on potential economic injury.

Simply to have standing to be in court is not much comfort unless one can find grounds for obtaining favorable judgments. And, in this critical regard neither EDF nor any other group bringing environmental lawsuits could, in the late 1960's, claim to have many satisfactory answers. There was the traditional law of nuisance, but, while this might sometimes be used effectively by parties directly suffering the effects of pollution from an industrial plant near their property, it lends itself poorly to efforts at coping with things such as hard pesticides and their diffuse and widespread effects. It also is difficult to apply in situations where an entire airshed or a large lake or river is polluted by emissions or effluents from numerous sources.

The strategy most favored by Yannacone was to argue that citizens have a constitutional right to protection from pollution and other environmental insults. The view that such a right can be inferred from the Constitution finds support here and there among legal scholars, but it has found little

Briefing

An Open but Shut Case

Last June President Nixon announced that the myriad advisory committees which assist the federal government would be "open to public observation." The President's order preceded, and was maybe meant to forestall, an act of Congress which said likewise that "each advisory committee meeting shall be open to the public."

The National Institutes of Health (NIH) has some 35 advisory committees meeting this month. Of the 67 days for which the committees are in session, only 14 days, or 21 percent, are fully open to the public. Of the meetings on other days, 24 percent have substantial portions open to the public, 22 percent are open briefly, and 33 percent are closed entirely.

NIH officials state that almost all the advisory meetings in question are closed for one reason, to preserve the confidentiality of grant applications. On what grounds should this suffice to close a meeting to the public?

The law as Congress wrote it (which supersedes the President's executive order) allows meetings to be closed for the same reasons as government officials may deny information to the public under the Freedom of Information Act. The Act has nine loopholes, collectively large enough to drive a truck through. According to lawyers in the Department of Health, Education, and Welfare, the two loopholes under which discussion of NIH grant applications are exempted are loophole No. 4, which protects trade secrets, and No. 6, covering "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In other words, an attorney at Health, Education, and Welfare told *Science*, the department considers a research proposal tantamount to a trade secret because, he said, it represents a scientist's stock-in-trade and his only means of deserving his salary and gaining promotion. HEW also claims that public access to grant applications would constitute an invasion of privacy because of the personal details—such as capability to perform research—that are discussed by advisory committees.

The HEW position has not yet been challenged in court. But it could run foul of court decisions holding that the exemptions of the Freedom of Information Act are to be narrowly interpreted. In a landmark case in which the Office of Science and Technology tried to suppress an uncomplimentary report on the SST, the judge ruled that the policy of the Act "requires that the disclosure requirement be construed broadly, the exemptions narrowly."

In as far as a research proposal is not manifestly identical with a trade secret, the HEW position would seem to constitute a broad rather than narrow interpretation of the exemptions.

Nor does the legislative record of the Freedom of Information Act, as excerpted in the Justice Department's guidebook for getting round the act (Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act), explicitly state that grant applications are covered under the invasion of privacy exemption.

Most of the NIH advisory committees that are closed to the public this month are institute councils, not the study sections that make the primary review of grant applications. It is probably fair to say that study sections could not frankly discuss in public the merits of an individual's research application. Does the same constraint apply to the second stage type of review conducted by institute councils? NIH officials say it does: although councils do not assess the merit of every grant application, or second guess the priority scores set by the study sections, they may discuss particular proposals at a level of detail that would be inhibited by public disclosure.

NIH's arguments for closing its committees may be reasonable, and HEW's arguments may even be legally sound, but the apparent intent of President and Congress to open all advisory committees is only 21 percent fulfilled at NIH this month.—N.W.

Colorado Dallies with "Pre" Dental School

A new dental school for the University of Colorado is having a hard time cutting its first tooth. The school has been planning to admit its first students in June, but whether it will open its doors then or ever depends on a

if any support where it counts—among judges. Another somewhat radical theory advanced by some was the public trust doctrine, which holds that no land, whether public or private, can lawfully be used in ways contrary to the public interest. This theory, though recognized by courts in certain cases involving submerged lands and publicly owned lands, has never been applied to lands generally.

The severity of the legal handicaps under which EDF and other groups interested in environmental law labored was all too apparent in those situations where government itself bore all or part of the responsibility for environmental degradation. Government at all levels—federal, state, and local—is of course responsible not only for public works projects which often have serious environmental impacts but also for the licensing and regulation of many environmentally destructive private activities. How, then, was relief to be obtained from the mistaken actions of government, whether it be a matter of a misguided pest control program of the U.S. Department of Agriculture or a misplaced dam of the Army Corps of Engineers? The difficulties here were immense.

Important as it was to marshall expert testimony by academicians with impressive credentials, this in itself generally would not be enough. The rule usually followed by the courts—and still followed by most judges today—was that an action by a government administrator should be countermanded only if plainly arbitrary or capricious or not supported by "substantial evidence," which need not be evidence that is preponderant or conclusive. Environmentally, the likely consequences of a proposed government project or regulatory decision can be very bad, yet to show that the

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go or no-go decision by the Colorado legislature.

In February, a letter was actually sent to dental school faculty and staff members terminating their employment as of early March, but on 1 March they got at least a reprieve when the university regents voted to rescind the notices. The fate of the school now hinges on the legislature's willingness to finance not only the operating budget, but also the major part of a new clinic building for the school.

Key to the situation is the action of the joint budget committee of the two houses of the legislature. The panel recently asked for more information from the dental school, and sources on the committee say the dental school request is not likely to be on the committee agenda until after the middle of the month. In any case, a final decision on the state's capital construction program, in which the dental school would figure, may be a month or more away.

As a result of the suspense, no applications from students have yet been accepted, although the school does have indications of interest from some 5000 people. Dean Leslie Burrows now says a decision has been made to send out letters to applicants telling them to submit information on themselves so that the evaluation process can begin. The school has planned to provide places for 25 first-year dental students and 16 students in a program to train dental hygienists. (There are nine full-time faculty members at present.)

The cliff-hanging really began last October with President Nixon's veto of the Health, Education, and Welfare Department's appropriations bill, which included $3.8 million in federal construction funds the dental school had been counting on. The school reacted by revising its plans and coming up with a "bare bones" budget. Under the new proposal, the state is asked to provide $1.67 million to add to the $1.08 million in state money and $1 million plus in private funds already on hand to finance construction of a building housing a clinic with supporting facilities and costing about $3.8 million. The proposed dental school building, which is to be located in the university medical center in Denver, is the result of a progressive scaling down of plans from an original design that would have cost nearly four times as much and required some $7 million in federal funds to build. The operating budget for the first year would be over $980,000, of which the state is asked to pay more than $817,000.

In asking for more information, the legislature's joint budget committee expressed interest in both financial questions and the state's need for dental manpower. Proponents of the school feel they have a good case since the new dental school would be the only one between Lincoln, Nebraska, and the West Coast. They also cite the scarcity of dentists in many areas of the state, the lack of openings in existing dental schools for Colorado students interested in dentistry, and the absence of opportunities for dentists in practice in Colorado to upgrade their training.

The dental school cause has been backed by the governor and the state's biggest newspapers, and the dental profession has lent solid support. Some $2 million in all has been raised from private sources, a substantial part of it from pledges from practicing dentists. However, ill luck and missed opportunities seem to have dogged the school since serious planning began in 1965. Several times, a start on construction seems to have been narrowly missed because the school had to satisfy so many masters—the medical center, the regents, the legislature, the American Dental Association's (ADA) council on dental education. Last year the school's accreditation was put in question when the council objected to the temporary location of an outpatient clinic at an Air Force base near Denver. The accreditation scare was used by opponents as a stick with which to beat the school. Plans were revised, and now, with a site visit pending, the school program seems to have ADA approval.

Those close to the school now pinpoint the loss of federal funds as the main source of current frustrations. The protracted squeeze on construction funds has prevented allocation of federal funds for what seems widely agreed to be a high-priority health manpower facility. And the veto of the HEW money bill in October has made it even harder for the financially hard-pressed Colorado legislature to appropriate funds for a new enterprise, since funds for other state programs have also been hit by the veto. So the dental school, as it awaits its fate, finds itself very much in the role of the protagonist of the old short story by Frank Stockton, "The Lady or the Tiger?"—J.W.

proposal is arbitrary is often impossible.

The fact is that, during the late 1960's, environmental lawyers had little chance of prevailing over a government agency unless, sometimes by hard scraping, they could allege that the government administrator had neglected to meet some procedural or substantive requirement of law. Critical to the outcome in *Scenic Hudson* was the fact that the Federal Power Act requires the FPC to consider how a hydropower project will affect public recreation as well as other interests. The requirements contained in certain other statutes were more explicit. For instance, the Fish and Wildlife Coordination Act of 1958 requires an agency such as the Corps of Engineers to consult the U.S. Fish and Wildlife Service on water resources projects. And Section 4(f) of the Transportation Act says that public parkland shall be used for highway rights-of-way only if there is "no feasible and prudent alternative." Unfortunately for the environmental lawyer, precious few such legal handholds were available.

Another difficulty facing EDF and other groups interested in environmental law was lack of money. In its early cases EDF depended substantially on local environmental groups to raise the funds to pay necessary expenses, although some discreet foundation support was also received. This sometimes meant considerable sacrifice on the part of academicians and others of generally modest means. Still worse, given this catch-as-catch-can method of financing, EDF's ability to carry through with protracted litigation—which in some cases amounts to legal Vietnams—was always in doubt.

The year 1970 marked the beginning of a period of major change for EDF and, in some important respects, for the field of environmental law generally. For EDF the change was to have several major aspects. Financially, EDF was coming upon green pastures, and over the next 3 years it would build a strong full-time staff of eight lawyers, six scientists, and two economists as well as a list of 700 scientists and several hundred attorneys available for special assignments.

And, while keeping its headquarters on Long Island, EDF was becoming truly national in its perspectives and its program of legal action—today there are some 80 active EDF cases, with some pending in every section of the United States. Also, to cite the most important change of all, EDF was adopting a broader and more successful legal strategy made possible in part by passage of the National Environmental Policy Act of 1969 (NEPA). This remarkable piece of legislation, principally through its Section 102 requiring environmental impact statements and an analysis of alternatives, gave EDF and other environmental law groups the legal leverage needed to bring under court review virtually any major federally built or regulated project. The requirements of NEPA are more procedural than substantive, but, as will be noted later, just to delay a controversial project of dubious merit can sometimes be enough to kill it.

All of the changes affecting EDF were occurring more or less simultaneously and must be thought of together, for each reinforced the others. The matter of strong financial support was of course critical. By 1970, the Ford Foundation had begun to commit itself squarely to the cause of environmental law, and its grants were to make up from 15 to 20 percent of EDF's budget over the next 3 years while EDF was developing a strong independent base of financial support.

Direct Mail Solicitation

At the beginning of 1970 EDF had not yet begun to tap the possibilities for building up a large list of contributors. But that spring it set up a small office in New York City to begin direct mail solicitations, and the results were gratifying. By the end of the year, EDF had a list of 11,000 contributors and by the end of 1972 the list would increase to more than 36,000, with some 1.3 million solicitations mailed out in 1972. Gifts of between $15 and $250 were specifically encouraged, but on two occasions persons previously unknown to EDF sent in checks for $5,000 (checks for $500 or $1,000 have been fairly common).

With contributions and foundation support taken together, EDF would have available some $678,000 for its 1972 budget year, not counting $260,000 spent on solicitations. Given its expanding financial resources, EDF was, from 1970 on, itself bearing all of the expenses of its lawsuits. Just how important this could be can be seen from the fact that the cost to EDF of the still continuing litigation involving the Corps of Engineers' Cross Florida Barge Canal project had amounted to more than $50,000 by mid-1972, some 3 years after the suit was initiated.

Yannacone and EDF parted company in the fall of 1969 (*Science*, 26 December 1969), for reasons which for the most part are not germane to our story, and EDF hired Edward Lee Rogers, formerly a tax attorney at the U.S. Department of Justice to replace him as general counsel. Interest in environmental law, and in the practice of public interest law generally, was sufficiently high among recent law school graduates that Rogers and Roderick A. Cameron, EDF's executive director, had no trouble recruiting staff for the Long Island office and for new EDF offices to be opened in Washington and Berkeley. William A. Butler, who had been editor of the Yale *Law Review* and had a Ph.D. in Government from Harvard, was hired to open the Washington office.

(It occasionally is said, sometimes by people who should know better, that the environmental lawyer is the contemporary version of the ambulance chaser. Whatever it is that such lawyers are seeking, it is not primarily money. Salaries for most public interest lawyers in Washington range between $12,000 and $20,000, and it seems that no one is paid more than $28,000. If anyone is making a really large income from an environmental practice, it is the attorney who represents private industry.)

Staff scientists have been recruited—for the most part among new Ph.D.'s—to work with the attorneys in pinpointing legal issues and preparing briefs and petitions. The scientists and lawyers work as a society of equals, with no one assigned to direct the work of others. Specialization of course develops along the lines of the staff scientists' training. For instance, Lucile F. Adamson, who received a Ph.D. in physiological chemistry from Berkeley in 1956 and who has since had extensive research experience at Harvard Medical School and other institutions, came to EDF's Washington office last year and has been working with Scott Lang, a staff attorney, on environmental health issues.

On 9 March, Adamson and Lang sent to the Environmental Protection Agency (EPA) EDF's formal comments on EPA's proposed regulations governing airborne lead, saying that EPA had failed to consider evidence

that experimental animals exposed to atmospheric lead—at concentrations comparable to those experienced by humans—have shown markedly decreased resistance to bacterial infection. Keeping in touch with current research on such matters is an important part of the staff scientists' work. Charles Wurster, who still heads EDF's Scientists Advisory Committee, observes that "EDF is just not going to put itself in a position where the best scientists are on the other side. In a sense, a public interest organization such as EDF has no position of its own. It seeks out the most competent position it can find."

A succeeding article will discuss some of the more important results that have come from environmental law, as practiced by EDF and by certain other important groups such as the Natural Resources Defense Council, the Center for Law and Social Policy, and the Sierra Club's Legal Defense Fund. Environmental law has shown promise in enforcing the will of Congress, making government administrators explain their actions, providing a form of "technology assessment," and demanding a searching and honest analysis of such politically charged questions as energy policy. Environmental law has indeed come a long way, but, as I shall point out, there remain many uncertainties—which Congress may ultimately have to resolve—as to how much farther it can and should go.—LUTHER J. CARTER

Institute for Advanced Study: Einstein Is a Hard Act to Follow

A dispute over the appointment of Robert N. Bellah, a Berkeley sociologist, to a permanent post at the Institute for Advanced Study at Princeton, N.J., has developed into one of the bitterest fights in the institute's recent history. Involved in the issue is the stewardship of the director, Carl Kaysen, and, according to some, the survival of the institute itself.

The institute—which consists of four divisions that resemble academic departments and has about 150 visiting scholars and 26 permanent faculty—is known as one of the leading intellectual centers in the world. Founded in 1930 and having housed such giants as Albert Einstein (1933–1946) and John von Neumann (1933–1957), the institute was responsible for moving the world center of thought, particularly in mathematics, from Germany to the United States in the 1930's. From 1947 to 1967 its director was J. Robert Oppenheimer. Its mathematics department is still cited as the world's best.

One of the undercurrents of the fight over Bellah, whose opponents say he is second-rate, is whether the institute can maintain its high standard; there are some submerged feelings on both sides that it risks going into a decline. Kaysen, the director, says that Bellah and the new program in social sciences, which already has a full professor and visiting members, must be protected if it is to grow, thrive, and move the institute into a new era. In fact, the so-called "Bellah affair" has provoked overt academic tribal warfare, with the pure mathematicians among those most hostile to Bellah (one of them is no longer speaking to the sociology professor) and economist Kaysen and the social sciences school defending him.

Bellah is a Ford professor of sociology and comparative studies at the University of California at Berkeley, and a specialist in Japanese religion and social change, and what he terms American civil religion. This year he has been a visiting member of the program in social sciences at the institute.

At one time all faculty voted on every prospective new permanent member, but since the latter part of Oppenheimer's tenure, schools with three or more permanent members have selected their own colleagues. Other parts of the procedure—circulating the writings and biography of the candidate throughout the institute, and the director's forwarding a nominee's name to the Board of Trustees for approval—have been carried out on a pro forma basis. When Kaysen sought his first appointment in the new social sciences program, Clifford Geertz, then of the University of Chicago, a new procedure was devised since there were no existing faculty in the school: an outside ad hoc committee reviewed Geertz's credentials, and a vote of the faculty was taken on an "advisory" basis. Geertz was unanimously approved. For Bellah, then, a similar procedure was followed: an external ad hoc committee of five* reviewed Bellah's credentials and, on 15 January, the faculty, having read some of his writings and solicited outside opinions individually, met to vote in their advisory capacity.

When the vote was taken Bellah was disapproved by a margin of 13 to 8 with 3 absentions. Kaysen subsequently announced that he planned to forward Bellah's nomination to the trustees anyway. One of those who had voted for Bellah, Stephen Adler, a physicist, then initiated a motion that the faculty wished the director *not* to forward Bellah's name. The motion carried by a margin of 14 to 6. Nonetheless, at a meeting of the trustees on 20 January, Kaysen placed Bellah's name in nomination, and the trustees approved him, thus putting him on the faculty.

Kaysen's pressing for Bellah's appointment despite the two votes has led to a loud and bitter outcry from some segments of the faculty, principally from some in mathematics and history, that their prerogatives have been thrown to the winds. Five faculty members made impassioned speeches at a subsequent meeting of the trustees: after an awkward silence, they just left. One trustee, Robert Solow of M.I.T., said later that he felt embarrassed and couldn't think of anything to say, but that he was surprised at the impassioned

* Edward Shils, professor of sociology, University of Chicago; Robert K. Merton, Giddings professor of sociology, Columbia University; Stanley Cavell, Walter M. Cabot professsor of esthetics, Harvard University; Edwin O. Reischauer, university professor, Harvard University; and Joseph M. Kitagawa, professor of Far Eastern languages and civilizations, University of Chicago.