Environmental Law (II): A Strategic Weapon Against Degradation?

In any assessment of achievements in the new field of environmental law, perhaps the largest success that can be claimed is that many government officials are being held more accountable than ever before for their decisions. Environmental lawyers are, in effect, helping to open up the system, and by more than just a crack. A few patently undesirable government policies, such as that allowing general use of DDT, have been abandoned because somebody went to court. But the more common result of environmental lawsuits has been to bring delay in the starting of various programs and public works projects, giving citizens and elected officials an eleventh-hour chance to take a second look. Furthermore, in such matters as off-shore oil and gas leases or the development of power or water projects, the courts are now not only demanding disclosure of the rationale behind the undertaking but also a reexamination of that rationale in terms of more rigorously assessed benefits and alternatives.

These results, most of which have come within the last 5 years, have been brought about in no small part by a relatively small number of public interest lawyers. At this point, one wonders whether in the future environmental law will lead to still deeper consequences. The answer may depend to a great extent upon how much discretion the legislative branch—itself not irreproachable in representing the public interest—is willing to allow judges in reviewing the performance of large, complex, and often intransigent bureaucracies.

In an earlier article, the Environmental Defense Fund (EDF) was treated as a signal example of a public interest group practicing environmental law, and, in EDF's case, emphasizing collaboration between lawyers and scientists. Taken altogether, environmental lawyers seem to represent a young elite of the American bar—most are under 35, and many have received high academic honors. Besides the attorneys with EDF, there are those with a number of other groups that are practicing environmental law either exclusively or as a significant part of a more general public interest practice.

One such group is the Sierra Club's Legal Defense Fund (LDF), based in San Francisco (with a branch in Denver) and led by James W. Moorman, a North Carolinian and 1962 graduate of the Duke University School of Law. In August 1969 Moorman, as a staff attorney at the newly created Center for Law and Social Policy in Washington, became one of the first, if not the first, full-time environmental lawyer. It has been characteristic of the public interest law groups to call on one another for help, and, as it happened, EDF asked Moorman to represent it in litigation aimed at banning DDT. Also, EDF, together with the Wilderness Society and Friends of the Earth, had Moorman represent them in a suit to stop construction of the trans-Alaska pipeline.

EPA on Its Mettle

The DDT ban declared recently by the Environmental Protection Agency was a matter of administrative discretion, but the fact is that, as the result of court rulings obtained by Moorman for EDF, the agency was on its mettle to show that it had taken careful account of the harm done by this chemical to fish and wildlife and of its carcinogenic effect on experimental animals. Also, the recent decision by the U.S. Circuit Court of Appeals for the District of Columbia continuing (at least temporarily) the injunction against construction of the pipeline was only the latest development in the suit initiated by Moorman on behalf of EDF and the other plaintiffs.

The Sierra Club has been bringing and participating in lawsuits since the mid-1960's, but the LDF was not established as a separate entity until 1971. The LDF has only four staff attorneys, yet this group carries on a large volume of litigation, drawing upon its sizable list of volunteer attorneys to handle many of its cases. The LDF represents the Sierra Club, and other public interest clients, in cases involving the public lands, such as the ones over timber management in the Tongass National Forest in Alaska and over the proposed Disney recreational development in Mineral King Valley. It also handles cases concerned with problems such as air pollution and other threats to rural and urban environments—for instance, the proposed new Los Angeles international airport. The LDF is supported by the Sierra Club Foundation, some individual contributors, and by the Ford Foundation, with about one-fifth of the LDF budget coming from the latter source.

While Ford Foundation support has been important to the LDF and to EDF, it has been the mainstay of several other groups requiring special mention. One of these is the Center for Law and Social Policy, which, with a legal staff of 13, remains one of the largest public interest law groups. About a third of the center's cases pertain to environmental law, the most noted being the Alaska pipeline case, in which staff attorney Dennis M. Flannery is now chief counsel.

A second group begun and supported largely by Ford Foundation money is the Natural Resources Defense Council (NRDC), with 12 regular staff attorneys, two staff scientists, and offices in New York City, Washington, and Palo Alto. The idea for NRDC originated with a few students in the Yale Law School class of 1969. Even before they had their degrees, they were approaching the Ford Foundation, and, somewhat to their surprise, the officials there were interested, although the question whether to enter so potentially controversial a field seems to have caused them much agonizing.

J. G. Speth, Jr., a member of this group and now a NRDC attorney in Washington, recalls that one thing that seemed really to give the Ford Foundation officials pause was the fact that these budding environmental lawyers lacked a board of directors. "Go forth and get a board, we were told," Speth says. It turned out that some well-known people associated with the Scenic Hudson Preservation Conference, such as David Sive, Mrs. Louis Auchincloss, James Marshall, and Stephen P. Duggan, were looking for a staff to undertake a broad, continuing program in environmental law.

"So this little marriage took place and in 1970 we got the Ford grant," Speth says, adding that, besides the Scenic Hudson people who joined the NRDC board, there were people such as Charles (*Greening of America*) Reich of Yale, René J. Dubos of Rockefeller University, George Woodwell of the Brookhaven National Laboratory, and Joshua Lederberg of Stanford. (Laurance Rockefeller and John B. Oakes, an editor of the New York *Times*, later joined the board.) Once the NRDC staff, which had ability but little experience, learned its way around the courthouse, it began making an imprint—court rulings in a few important NRDC cases I shall come to in a moment.

Still another organization that has depended largely on Ford Foundation support is the Environmental Law Institute, publisher of the *Environmental Law Reporter*, which comments upon as well as reports important court rulings. The *Reporter* has helped environmental lawyers keep up with their fast-developing field, and one of its articles is credited with providing the theory used in at least one major precedent-setting decision. The Environmental Law Institute does not litigate. The basic purpose of the institute—which, incidentally, currently has under way a National Science Foundation–supported study of federal environmental law—is to take a comprehensive view of the field and help its development conceptually. It is typical of the environmental law fraternity, where almost everyone seems to know (or at least know of) everybody else, that Frederick R. Anderson, Jr., editor in chief of the *Reporter*, is a hometown friend of James Moorman and that he and EDF's William Butler were friends at Oxford, where they both were Marshall Scholars.

Altogether, full-time public interest attorneys doing a significant amount of environmental law work number not more than about 60, counting the staffs of the previously mentioned groups, plus lawyers with groups such as two other Ford Foundation–supported organizations in the West, the Center for Law in the Public Interest in Los Angeles and Public Interest Advocates, Inc., in San Francisco, and those with Businessmen and Professional People for the Public Interest in Chicago, and with several Washington groups, including Ralph Nader's Center for Responsive Law, the firm of Berlin, Roisman, and Kessler, and the environmental law unit with the National Wildlife Federation.

(Financially, most of the public interest law groups are largely dependent on foundation support and whatever money they can scrape up from wealthy contributors. The Ford Foundation has said that it will continue its support for the public interest law groups for about 5 more years. After that, what? The merger of some groups with closely allied interests—for instance, EDF, NRDC, and LDF—is one possibility, in that overhead and the high cost of large-scale fund solicitation could be shared. This might be unnecessary, however, if the courts would begin routinely allowing recovery of attorney's fees from defendants in those cases where the public interest law groups prevail. The favorable ruling on fee recovery in *La Raza Unida v. Volpe*, a San Francisco Bay area highway case decided in 1971, is regarded as an encouraging precedent.)

NEPA Effectively Used

In surveying the field of environmental law, one must ask: Are the public interest lawyers really proving effective in an overall way, or are they simply dashing about fighting fires? To look first at the positive side of the matter, it is clear that the National Environmental Policy Act of 1969 (NEPA), requiring environmental impact statements for federally supported and regulated activities, is being effectively used to force government agencies and some corporate interests to rethink many of their policies and programs. Court challenges under NEPA have, for one thing, often served to intensify public interest in the matters in dispute.

Given the political potency of the oil industry, the conservation groups would have had no chance of stopping construction of the trans-Alaska pipeline had they not gone to court. Because they did go, and were able to invoke NEPA, they have made the Nixon Administration, the oil companies, and the public think in a more sophisticated manner about alternatives, such as the possibility of a pipeline across Canada (*Science*, 9 March). Also, by pressing for and eventually obtaining an injunction against further construction of the Cross Florida Barge Canal, environmentalists influenced the White House in its decision to terminate (*Science*, 29 January 1971) this Corps of Engineers project, which was regarded dubiously even by the Secretary of the Army's office.

For a company faced with frustrating delays in carrying out its plans, time can be big money, and the environmental lawyers have in some cases taken advantage of this to bring about negotiations in the public interest. A good illustration is the settlement reached in the case involving the $150-million facility to be built at Cove Point on Chesapeake Bay by the Columbia LNG Corporation, which will be importing liquefied natural gas from Algeria. The Sierra Club and the Maryland Conservation Council brought suit against the company's initial plan, which was to acquire a 1100-acre bay-side site and build a pipeline on a pier extending a mile out into the bay. The suit was dropped, however, after the company agreed to lay the pipeline under water and dedicate 600 acres to open space through scenic easements, with a mile of beach to be leased to the state for $1 per year. Several state and federal agencies had responsibilities in the matter, but it remained for the environmental groups to defend the bay environment.

The Cove Point settlement points up the fact that by no means is all of the effective work in environmental law done inside the courtroom. The public interest lawyers often seek to influence decisions through discussions with government officials and through participation in formal administrative proceedings.

Yet, significant though the achievements of environmental law have been, it is not clear whether environmental litigation will turn out to be a strategic weapon in the war against environmental deterioration or one useful mainly for tactical aims. Thus far, relatively few projects or policies deemed environmentally destructive have been definitely stopped or overturned. And most of the preliminary injunctions granted by courts under NEPA probably will be dissolved once the judges have become satisfied that adequate environmental impact statements are in hand. The courts have been moving, little by little, to define the obligations which government agencies have, under NEPA and other statutes, but no one yet knows how meaningful those rulings will be for the long term.

NEPA has been commonly regarded, even by its original congressional sponsor (Senator Henry M. Jackson of

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Washington), as a statute mandating systematic analysis of environmental impact and full public disclosure, but not one establishing substantive standards by which a proposed project or policy may be declared unlawful. Under this interpretation, once an agency has complied with NEPA's procedural requirements, its final decisions cannot be challenged, except under the usual rule that administrative decisions cannot be arbitrary. This interpretation now appears to have been modified but not overturned.

In *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission,* the U.S. Circuit Court of Appeals for the District of Columbia held that agencies must make a "finely tuned and 'systematic' balancing analysis" in resolving conflict among environmental, economic, and social values. This ruling would seem to establish a subtle but possibly significant new standard for judging whether an agency's decision-making has been arbitrary or not. (Anthony Z. Roisman, of Berlin, Roisman, and Kessler, was chief counsel for the plaintiffs in this important precedent-setting case.)

The *Calvert Cliffs* ruling was in fact cited in the opinion last November by the Eighth Circuit Court of Appeals in the Cossatot River case, involving a challenge by EDF against a Corps of Engineers dam project in Arkansas. In an immediate sense, EDF came out a loser, for the court held that the Corps had complied with NEPA and that construction of the dam should not be stopped. But, to EDF's satisfaction, the court did emphasize that NEPA prescribes a policy—for example, among the several stated objectives of the act, there is one calling for an environment "support[ing] diversity and variety of individual choice"—as well as a procedure. The intent of NEPA, the court indicated, is not to fill government archives with futile impact studies.

Also, a 1971 ruling by the Circuit Court of Appeals for the District of Columbia in *NRDC v. Morton,* substantially upheld NRDC's contention that the Department of the Interior's impact statement on a scheduled (but later canceled) sale of 80 oil and gas leases on the Gulf of Mexico continental shelf was inadequate. NRDC had argued that a wide range of alternatives to the sale—varying from increases in oil imports to the gasification of coal and the development of solar energy—should have been thoroughly discussed. The court agreed, at least with respect to alternatives possible in the near future.

A February ruling by a federal district judge in another NRDC suit—this one opposing a small watershed (or stream channelization) project on Chicod Creek in North Carolina—was also encouraging to environmentalists. The judge, in part citing *Calvert Cliffs,* continued to enjoin construction of the project, finding that the impact statement failed to consider a number of pertinent factors, including the *cumulative* impact of such relatively small undertakings on the regional environment. Another ruling counted as significant by environmentalists was the recent one by a district judge in the case brought by the Sierra Club against the Trinity River project in Texas. There, the judge held, among other things, that the Corps of Engineers' benefit-cost analysis procedures were deficient because environmentally related benefits were counted while environmentally related "costs" were ignored.

Nonetheless, instances where the federal courts block a project or policy on its merits are expected to be rare, and many environmental lawyers want Congress to declare that each person is "entitled by right" to a quality environment and to establish a few basic criteria by which the courts can determine when that right is being infringed. A bill to accomplish this has been pending for a year or so in the Senate Commerce Committee's subcommittee on the environment which is chaired by Senator Philip A. Hart of Michigan.

As now written, the Hart bill would allow the courts to enjoin any activity, private or governmental, if the "environmental and economic costs . . . exceed the benefits" or if the purpose of the activity can be achieved in a more environmentally acceptable and no less socially beneficial manner. Private activities in compliance with standards and permits issued under the federal air and water pollution control acts would not be subject to these tests. *But* policies and decisions of all federal agencies, including the Environmental Protection Agency (EPA), would be subject to the tests insofar as they are discretionary and not arrived at through compliance with specific congressional directives. (The "citizens suit" provisions of the existing air and water pollution acts apply largely to enforcement of policies and regulations that are *nondiscretionary.*)

The Hart bill is similar in thrust to the Michigan Environmental Protection Act of 1970 and to measures enacted in Connecticut, Minnesota, and Massachusetts. It is strong stuff and it will face strong opposition, with, in all likelihood, Senator Jackson and Senator Edmund S. Muskie of Maine, the fathers of NEPA and EPA, respectively, probably among its foes, which already include Nixon Administration officials. At this point the groups that have gone on record in favor of the bill are principally environmental law and conservation organizations, although the measure has been endorsed by a few groups such as the Americans for Democratic Action, the League of Women Voters, and the Federation of American Scientists.

If enacted, the Hart bill would, in effect, represent an extension of the public trust doctrine, making the use of all resources (not merely submerged tidal lands) subject to a test in the public interest to be administered by either state or federal courts. Beyond doubt, environmentalists will be taking a risk if judges are allowed to second-guess the legislative and executive branches on the merits of environmental issues. As some recent opinions show, some judges exude the sentiments of a Thoreau while others think more like the manager of a copper smelter.

Yet the opinions of most judges are appealable, and Congress itself can set limits on judicial discretion. What Congress cannot do is to legislate comprehensively on all of the nation's important environmental questions. The whole vast problem of land use regulation is, for example, one in which the Congress probably will not legislate in any but the broadest fashion. But Congress cannot safely leave those problems on which it does not legislate in a detailed way to the largely unchecked discretion of federal and state bureaucracies. If a fail-safe is to be found to protect environmental values, it may have to be the judiciary, coaxed by a new breed of environmental attorneys.

—LUTHER J. CARTER

Erratum: A story on the Office of Technology Assessment (*Science,* 2 March) incorrectly identified the following: Richard Carpenter, executive director, Environmental Studies Board of the National Academy of Sciences and National Academy of Engineering; Steven Ebbin, senior staff scientist, Program of Policy Studies in Science and Technology, George Washington University; and Walter Hahn, acting chief, Science Policy Research Division, Congressional Research Service.