William & Mary Environmental Law and Policy Review

Volume 6 (1981)
Issue 2 Environmental Practice News

Article 2

May 1981

Environmental Law Conference Looks at the Direction in which Current Environmental Laws Are Headed

W. Henry Lawrence

Environmental Law Conference Looks at the Direction in which Current Environmental Laws Are Headed

The 11th annual ALI-ABA Course of Study on Environmental Law was held in Washington, D.C., in early February. Cosponsors of the Conference were the Environmental Law Institute and the Smithsonian Institute. The keynote speaker, Henry L. Diamond, a partner in the law firm of Beveridge, Fairbanks, and Diamond, stated in his opening remarks to the group of more than 500 participants, that never before had so many environmental law people been gathered in one setting.

The three-day conference included instruction in, and discussion of, environmental law topics, such as Hazardous Wastes and Toxic Substances Laws, Clean Water and Clean Air Acts, NEPA, Energy Law, Citizen Suits, and Historic Preservation. The study sessions were led by panels of attorneys from both private practice and government agencies. Included in the study sessions were comments on current problems under existing environmental laws, and predictions of the directions in which the laws are headed.

Diamond listed several items, which he considered high on the environmental agenda for the near future. The CAA is the most pressing item since it comes up for renewal this year. Chief concerns with the CAA are the stringent health standards on which the NAAQS are based, the provisions for state control, economic impacts of the Act, and the increasing problem of acid rain. Another item of concern is the CWA, where the current issues are the allocation of money for POTWs, "second round" NPDES permits, and increasing state powers. Other items high on the agenda include the future of public lands and growth policies, the global environment, the interrelation of environmental concerns with energy concerns, and the effective implementation of existing programs. A renewal of old conservation techniques, such as "wise land use" and "land husbandry" is also on the agenda.

Jeffrey G. Miller, an attorney with EPA, discussed the federal laws for controlling existing hazardous waste sites, noting that RCRA is not aimed at past activities, but addresses primarily sites created after its adoption. EPA will control and clean up the possibly 1,200 to 2,000 dangerous existing dumps through resort to the new Superfund and also by reliance on the emergency "imminent hazard" provisions in existing environmental statutes.

Frank P. Grad, Professor of Law at Columbia University, described the thrust of the Toxic Substances Control Act as attempting to control toxic pollutants prior to their production, and to alleviate the problem of toxics regulation under the other statutes. TSCA regulates the manufacture and distribution of new products through an inventory and testing of new chemicals prior to production.

The CAA was addressed by William Lewis, who presented several preliminary conclusions of the National Commission on Air Quality. He suggested, that the health based standards upon which air quality standards are determined should be maintained at a level to protect all elements of the population, including sensitive indivi-

duals. In attainment areas, Class I increments should be maintained, but Class II and III should be eliminated. He stated that the offset provisions for nonattainment areas may not be as successful as hoped, since offsets are often purchased from insolvent companies.

John R. Quarles, Jr., an attorney with Morgan, Lewis, and Bockius, presented several industry solutions to CAA problems. Class II and III should be eliminated and NSPS should be concentrated on in all attainment areas. Class I increments are effective in protecting national parks and monuments, and should be continued. The ban on construction in nonattainment areas should be lifted, to allow replacement of old plants with newer, more efficient plants. Quarles stressed that NAAQS should be made as realistic as possible and avoid excessive margins of safety.

The current EPA enforcement strategy under the CAA is to ensure NSPS are met, and to retrofit plants in nonattainment areas. Angus MacBeth, an attorney with the Department of Justice, commented on the history of CAA enforcement, noting a present shift in emphasis away from simply checking, to ensure control equipment was installed to now inspecting to ensure, that the equipment is being operated and maintained properly.

Most environmental statutes provide for enforcement by private citizen suits. However, in the last twenty-four months, there have only been twenty such suits. Ross Sandler, with National Resources Defense Council, stated that there are two theories, upon which these suits are normally based. One is to force the government to follow and enforce nondiscretionary duties, which are mandated by statute. The second theory is, to get an injunction compelling compliance with existing permits. One reason there are very few of these suits, is that it is hard to detect permit noncompliance and difficult to determine what action an agency is taking.

Jeffrey G. Miller discussed the Clean Water Act, highlighting the state permitting programs (NPDES) and enforcement strategies, such as discharge monitoring reports (DMR), scheduled repairs and modifications, and inspecting by private contractors. He noted that one of the problems with industry-based effluent guidelines is, that many industries are a combination of processes and require adoption of special effluent guidelines. The future focus under the CWA will include pretreatment standards and POTWs, more efficient operation and maintenance of control equipment, and an increased use of criminal sanctions for false reporting and intentional discharges without permits. Miller predicted that, in addition to these areas, new legislation will address the zero discharge goal in an attempt to make it more realistic and replace Section 311 with an Oil Superfund.

Historic Preservation Law was addressed by Nicholas A. Robinson, Professor of Law at Pace University, who indicated that this was an effective way to protect landmarks and to prevent development in historic areas. Private lands may be regulated either by historic district legislation and zoning laws applicable to entire communities, or by landmark laws applicable only to selected parcels. Both types of regulation have been upheld as valid exercises of police power. See Penn Central Transportation Co. v. NYC, 438 U.S. 104 (1978).

W.H.L.