

ENVIRONMENT AND THE LAW

Second Edition

by Irving J. Sloan



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ENVIRONMENT AND THE LAW

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*For my son, Philip, who moves into the generation which will reap
the rewards of the quality environment the law seeks to achieve.*

PREFACE

The year 1970 marked the first year of what is likely to be characterized by historians as the Decade of the Environment. While the year may not have heralded a change in the quality of the environment, it certainly marked the beginning of a new emphasis on the environment so that change before the end of the decade is inevitable.

So monumental is the weight of concern of the public in the environment and pollution that law and legislation have emerged dealing with it to a degree almost unparalleled in legal and legislative history, given the short period of time which has passed since environmental quality has become a household word in America.

Though environmental problems are indeed old, their complexity and potential enormity are so vast that present law and legislation and methods of control are still in the early stages of their development. While a body of environmental law is indeed developing at perhaps a breath-taking pace, much of it remains tentative or at least pending. Traditional theories of law are still relevant, but for how long is questionable. This is by way of reminding the reader of this volume that he must constantly turn to the most current literature and reports before making any conclusions or taking any steps suggested by the comments and issues which appear here!

Environmental control problems are of such a nature that we cannot be strictly concerned with the law. The problems are such that their social, economic and political aspects must be considered before one can fully come to grips with the legal and administrative problems. Hence the reader will find considerable "extra-"legal discussion in these pages. Much of this, incidentally, has been drawn from The First Annual Report of the Council on Environmental Quality, Environmental Quality, transmitted to the Congress August, 1970.

For the practicing attorney there is a growing and impressive literature dealing with environmental law. Our survey here is designed, hopefully, to give the general reader some basic background of the legal aspects of the great hope and aspiration of the present decade: environmental quality.

May, 1971

Irving J. Sloan

Second Edition Note:

Since the publication of the first edition of this volume there has been a literal explosion in the field of environmental law and legislation. Updating was therefore a difficult task in a small work such as this. We have included discussions of revised statutes and have added a new chapter devoted to the Federal agencies which deal with environmental issues. Familiarity with these enforcement agencies is of crucial importance to any citizen concerned with action in the field. Indeed, the agencies can be viewed as no less important than the courts and their judiciary review function. This additional chapter should therefore prove to be useful to the reader.

Expansion and change will continue to characterize this field of law in significant ways. The present edition will, in any case, stand up long enough to make it useful for most general purposes for most general readers long enough to make its usefulness both timely and valid.

1978

Irving J. Sloan

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Chapter I

THE STRUCTURE OF FEDERAL ENVIRONMENT CONTROL

In May 1969, President Richard M. Nixon established the first organizational entity charged with taking a broad overview of environmental problems--the Cabinet-level Environmental Quality Council, chaired by the President. It was still felt, however, that the Executive Office needed an independent organization concerned exclusively with environmental problems and yet not made up of the many existing agencies. Such an organization would be free to look at the environmental problems in new ways and to propose new approaches to dealing with them. Congress enacted two related measures: the National Environmental Policy Act of 1969 and the Environmental Quality Improvement Act of 1970. The Cabinet-level Environmental Quality Council was abolished and a Domestic Council in the Executive Office of the President was established.

On January 1, 1970, President Nixon signed the National Environmental Policy Act (Public Law 91-190). That act established a national policy on the environment, placed new responsibilities on Federal agencies to take environmental factors into account in their decisionmaking, and created a Council on Environmental Quality in the Executive Office of the President.

The act charges the Council with assisting the President in preparing an annual environmental quality report and making recommendations to him on national policies for improving environmental quality. It empowers the Council to analyze conditions and trends in the quality of the environment and to conduct investigations relating to the environment. It gives the Council responsibility for appraising the effect of Federal programs and activities on environmental quality, and authorizes funds for 1970-1973.

The Council's ability to perform its functions was significantly strengthened by the Environmental Quality Improvement Act of 1970 (Public Law 91-224), which was passed as Title II of the Water Quality Improvement Act of 1970. This act created a new Office

of Environmental Quality, which provides staff support to the Council. The Chairman of the Council of Environmental Quality serves as its Director and the activities of the Council and Office are meshed into one entity. The Environmental Quality Improvement Act also added to the responsibilities of the Council and the Office. It specified that they should review monitoring, evaluate the effects of technology, and assist Federal agencies in the development of environmental standards.

On March 5, 1970, the President issued Executive Order 11514. Together with the two public laws, it empowers the Council to recommend to the President and to Federal agencies priorities in environmental programs. Under the order and the acts, the Council will also promote the development and use of indices and monitoring systems and advise and assist the President and the agencies in achieving international environmental cooperation--under the foreign policy guidance of the Department of State. Taken together, the legislation and the Executive Order provide a broad charter for the Council. They also provide a mandate for reform in the way Federal agencies make environmental decisions --from initial planning to implementation.

The National Environmental Policy Act of 1969 (NEPA) will probably prove to be the most important piece of environmental legislation ever written. It requires Federal agencies to take several significant steps. One is to include in every recommendation or report on legislation and on other major Federal actions significantly affecting the quality of the environment a detailed statement concerning the environmental impact of the action, adverse impacts that cannot be avoided, alternatives to the proposed action, the relationship between short- and long-term uses, and any irreversible commitment of resources involved. The detailed statements will include the comments of State and local environmental agencies as well as appropriate Federal agencies with environmental expertise. The statements will then be made available to the Council on Environmental Quality, the President and the public.

Executive Order 11514 further requires that Federal agencies continually monitor their own activities to enhance environmental quality. The order also requires that the agencies provide for timely public information and hearings, where appropriate, on Federal plans and programs with potential environmental impact.

On April 30, 1970, the Council on Environmental Quality issued Interim Guidelines for the preparation of environmental statements, requiring each Federal agency to establish internal procedures for implementing this provision of the act. The Council's Interim Guidelines, published in the Federal Register, will be reviewed and revised as necessary.

In addition to its immediate impact within the Federal establishment, the provision of the law requiring detailed environmental statements has been the subject of litigation in several lawsuits and administrative proceedings. In one instance, a Federal court blocked a Federal loan to develop a wildlife habitat into a golf course pending submission of the required environmental analysis. In another, the Corps of Engineers was enjoined from removing the ground cover along a river in Arizona.

The environmental statements required of the agencies add a vital step to the decisionmaking process. Federal agencies are now required to consider explicitly the environmental implications of their actions. Such considerations will permit Federal, State and local agencies and other Federal agencies having an interest in the environment to review the environmental implications of a Federal project before the project is undertaken. The Federal government need no longer be in the position of trying to repair damage to the environment after the damage has been done because the relevant factors were not considered at the time of the decision.

The courts have indicated that they intend to follow the Congressional mandate to interpret Federal policies, regulations and statutes in accordance with the statutory national policy of protecting environmental quality. In one case the court commented strongly on the importance of construing the provisions of the National Environmental Policy Act in favor of the environment:

The Congress has expressed in strong and clear language their concern over what we are doing to our environment. In the language of the statute, Congress has recognized the 'critical importance of restoring and maintaining environmental quality' It is hard to imagine a clearer or stronger mandate to the courts.

On the strength of this interpretation of NEPA, the court granted a stay pending appeal to prevent the Farmers Home Administration from expanding funds on a construction project whose environmental effects had not been considered under the provisions of NEPA. The court noted the case would become moot if the stay were denied, because construction damage could not be undone. It also found that the plaintiff had a reasonable chance of success in its injunction action and that the plaintiff's allegations of possible environmental ill effects were sufficient. In another case, the court granted a preliminary injunction forbidding the Secretary of the Interior from issuing a permit for the construction of the trans-Alaska pipeline and access road, in part, because he did not comply with the requirements of NEPA.

Chapter II

FEDERAL AGENCIES DEALING WITH THE ENVIRONMENT

COUNCIL ON ENVIRONMENTAL QUALITY

The National Environmental Policy Act, mainly noted for implementing federal policy through environmental impact statements on major projects that significantly affect the quality of human environment, established the Council on Environmental Quality in the Executive Office of The President. It is composed of three members appointed by the President with the advice and consent of The Senate. The Chairman of the Council, designated by the President, is charged with an obligation to

*** assist and advise the President of policies and programs of the Federal Government affecting environmental quality by [among other things]
*** assisting in coordinating among the Federal departments and agencies those programs and activities which affect, protect, and improve environmental quality.

The full-time staff in 1974 consisted of 51 members, representing a wide range of disciplines. Since C.E.Q. is within the President's Executive Office, its role has not been that of a strong independent environmental ombudsman -- it voiced strong support for the S.S.T., for example. The Council has authorized six annual reports on environmental quality and a broad range of legislative proposals.

C.E.Q. has issued Guidelines for the preparation of environmental impact statements to federal agencies and has supplemented them with memoranda to agency heads and general counsels. Since its staff is small, C.E.Q. cannot review all impact statements in detail but it does work informally with personnel of developmental agencies to obtain modifications in certain projects. The courts have generally voiced

strong support for the Council's Guidelines. In *Environmental Defense Fund v. Corps of Engineers*, Judge Eisele said that C.E.Q.'s interpretation of NEPA could not be ignored except for the "strongest reasons," but judicial support is not unanimous. Public controversy was not deemed sufficient to qualify a project as a "major federal action" in *Hanly v. Kleindienst* despite the C.E.Q. recommendation and in *Greene County Planning Board v. F.P.C.* the Guidelines were said to be merely advisory.

OFFICE OF MANAGEMENT AND BUDGET

OMB, situated in the Executive Office of the President along with CEQ, has the potential to exert a positive impact on environmental policy. To date it has shown no enthusiasm for the task, however. This is unfortunate because it has the clout to "veto" environmentally harmful proposals by cutting them out of the budget.

The normal function of OMB is to impose the president's will on the annual budget requests submitted by the federal agencies. In addition it promotes coordination, efficiency, and good management procedures within the bureaucracy. Perhaps the reason it has failed to take an active role in assessing environmental projects is its lack of expertise in this area; its task of managing the economy is a sufficiently demanding one alone. If this is true OMB may be one of the few government offices to decline an expansion of its jurisdiction when the opportunity presented itself. However, its "Quality of Life Review" -- the circulation to federal agencies of proposed regulations on the environment and other matters -- evidences an unsympathetic interest in this field. In fact, CEQ responded by communicating directly with agency heads and general counsels through memoranda, as mentioned earlier, because it feared that the OMB review process would weaken its Guidelines.

ENVIRONMENTAL PROTECTION AGENCY

EPA was created through an executive reorganization plan designed to consolidate certain Federal Government environmental activities into a single agency. The plan was sent by the President to Congress on July 9, 1970, and EPA was established as an independent Agency in the Executive Branch on December 2, 1970.

EPA was formed by amalgamating 15 components from 5 departments and independent agencies. Water quality responsibilities were transferred from the Interior Department (the Federal Water Quality Administration) and the Department of Health, Education, and Welfare (the Bureau of Water Hygiene). Other activities transferred from HEW included the National Air Control Administration and the Bureau of Solid Waste Management.

In addition, EPA acquired the Department of Agriculture's authority to register pesticides and to regulate their use; the Food and Drug Administration's authority to set tolerance levels for pesticides which occur in or on food and to monitor compliance with those limits; and a portion of the Department of Interior's pesticides research program.

EPA and the Nuclear Regulatory Commission divide responsibilities with respect to standard setting and guidance for radiation exposure. EPA is responsible for issuing generally applicable standards for the protection of the environment from all sources of radiation, including ambient standards for the total amount of radiation from all facilities in the uranium fuel cycle. The Nuclear Regulatory Commission is responsible for developing, implementing and enforcing standards for individual nuclear facilities.

Organizationally, EPA is headed by an Administrator, who is supported by a Deputy Administrator and five Assistant Administrators. Three of the Assistant Administrators are responsible for "functionalized" activities, i.e., activities which cut across all programs. The activities are: planning and management; enforcement; and research. The remaining program activities have been grouped under the two other Assistant Administrators on a media or pollutant basis, e.g., water pollution, air pollution, solid waste, etc. The activities carried out by these offices are primarily policy development, standards and criteria development, and support and evaluation of regional activities.

EPA has made major progress in the decentralization of its operating programs. It has established regional offices in conformance with the standard Federal regional boundaries and has assigned major responsibilities for carrying out EPA programs and policies to the regional offices. This includes the authority to implement and enforce standards, to conduct monitoring and surveillance programs, and to provide technical and financial assistance to state and local governments.

ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION

Creation and Purpose

The Energy Research and Development Administration (ERDA) was established under the Energy Reorganization Act of 1974 to bring together federal activities in energy research and development and assure coordinated and effective development of all energy sources. The main theme of this act was to alleviate the schizophrenia that plagued the AEC, divided as it was into pro-development and pro-safety constituencies. Congress, in authorizing ERDA, stated as a national goal: " * * * effective action to develop, and increase the efficiency and reliability of use of, all energy sources to meet the needs of present and future generations, to increase the productivity of the national economy and strengthen its position in regard to international trade, to make the Nation self-sufficient in energy, to advance the goals of restoring, protecting and enhancing environmental quality, and to assure public health and safety." ERDA officially began this task on January 19, 1975, under Executive Order 11834.

Organization

The ERDA legislation sets up an Administrator, a Deputy Administrator and six Assistant Administrators to direct the agency. The Administrator and Deputy are appointed to the President with the advice and consent of the Senate. The Act requires that they have a background of training and experience especially suitable for managing a wide range of energy R & D programs. The Administrator is responsible for R & D programs involving all energy sources. This includes such things as demonstration of commercial feasibility and practical application of fossil, nuclear, solar, and geothermal energy, and the demonstration of methods to reduce energy consumption and improve energy use efficiency. The Administrator also has a coordinating role with respect to energy conservation and development programs of other government agencies and private industry.

Energy Transfer

ERDA's capability for carrying out broad-based programs

is based on R & D programs and personnel transferred from other Federal agencies. These include:

From the Department of the Interior: Fossil fuel energy research and development programs such as those conducted by the Bureau of Mines energy centers; and including offshore drilling technology, oil shale production techniques, oil and gas secondary and tertiary recovery, and conservation; also the Office of Coal Research (OCR) programs, including coal liquefaction and gasification, and research on underground electric power transmission.

From the National Science Foundation (NSF): Solar, including wind and ocean thermal, and geothermal energy efforts.

From AEC: Nuclear fission and fusion R & D, nuclear weapons activities, uranium enrichment, physical, biomedical and environmental research, including waste management, and AEC's programs in geothermal and solar energy, electrical transmission and storage, and underground coal gasification.

From the Environmental Protection Agency (EPA): New automotive power systems, and alternate fuels.

NUCLEAR REGULATORY COMMISSION

Program Components

The major program components of the Commission consist of the Office of Nuclear Reactor Regulation, the Office of Nuclear Material Safety and Safeguards, and the Office of Nuclear Regulatory Research, which were created by the Energy Reorganization Act of 1974, plus the Commission-created Office of Standards Development and Office of Inspection and Enforcement.

Executive Director for Operations

The Executive Director for Operations is the coordinating and directive agent below the Commission for the effective performance of the Commission's day-to-day operational and administrative activities. He coordinates and directs the operating and administrative units in behalf of the Commission, and is responsible for coordinating the development of policy options generated by the directors of the program offices.