

## ENVIRONMENTAL LEGISLATION AND POLITICAL REALITY

Governors, I'm not here to berate you. I'm not even here to plead with you. And since you were kind enough to invite me here, I'm certainly not about to sue you. I don't even intend to propose simplistic solutions to very complicated problems, nor am I going to suggest that the appointment of a committee of scientists, or lawyers, or sociologists will solve your problems. I am here though, as a poor country lawyer from the East, in an attempt to help, in whatever way I can, with the environmental crisis we all must face together.

Most of our environmental problems stem from the misguided attempts of ecological Neanderthals to control the uncontrollable. Pesticide abuse is a classic example. Throughout the history of modern agrichemical methods, agribusiness has ignored the potential value of integrated control techniques where specific chemical *bullets* are used to augment the armory of natural and biological insect controls. The indiscriminate use of broad-spectrum, long-persistent pesticides such as DDT, dieldrin, endrin, aldrin, toxaphene and heptachlor have so altered the ecology of agricultural ecosystems that total reliance on these chemicals for pest control has only created new and more resistant pest species.

Utilizing our water resources for waste disposal is still another example. Oceans, and rivers, lakes and streams are just like any other sink — they have a finite capacity for waste, after which they back up. Moreover, they fight back as algae blooms quickly decay into sulfurous miasmas. Our atmosphere is not a limitless sink into which we can pour countless tons of noxious gases and poisonous particulates. The atmosphere too has a finite capacity for waste, and not only are we reaching that limit today, but our high speed air transportation system has begun to alter our weather patterns and climatological cycles. The development of high altitude clouds from commercial jet contrails has begun to reduce the amount of incident solar radiation received by green plants on the ground.

It should be obvious that man's apparent dominion over the environment is really a license from nature with the fee yet to be paid. We should have learned from the disastrous effects of radionuclide fallout that what we sow we must also reap, yet the fallout of lead and other heavy metals, chlorinated hydrocarbons and other toxicants continues at an increasing rate. Mankind has ears, yet does not hear the warnings shouted from the environment all around. Noise is tolerated and we even have a new unit for its measure—the PNdb. The standard-makers took the noise equivalent of a four engine jet transport on take-off as the maximum sound level which a human being can tolerate and now consider any noise of less intensity even more tolerable. It has already been demonstrated that continued random awakenings can produce transient psychoses.

There is a legend that appears in the folk history of all cultures about the young man who made a pact with death in which death agreed to give him 3 warnings before he finally took the man.

After many years, as the man lay dying, he demanded death honor the bargain and give warning. Death told him that he had honored the bargain, but the man never heard the warnings hidden in the miraculous recovery, the narrow escape, and the passage of time.

We have been warned. Mankind has been given a rare choice as the result of his attempt to act as Lord and Master of the environment rather than conservatively manage its limited natural resources. We can either drown in our own sewage, die buried under our own garbage, choke to death on unbreathable air or be driven to homicide and suicide by the noise around us.

The worst offenders in the process of environmental degradation are not the ruthless entrepreneurs dedicated to wanton exploitation of our natural resources—the profiteers and abusers of the public’s air and water—but the shortsighted, allegedly public interest agencies such as the Department of Transportation and its Federal Aviation Administration, the Department of Agriculture and its Division of Pesticide Registration, the Army Corps of Engineers, The Atomic Energy Commission and the many state and regional development agencies. Their mission oriented determinations preclude any consideration of the long term ecological consequences of their decisions. While it may be true that there are no absolute verities where the environment is concerned, we must nevertheless manage our environment for the greatest good of the greatest number of people, and before this can be done, we must make a rational determination of the highest and best use of all our natural resources.

Let us consider the problem of pesticide contamination of the Biosphere and try to look at this particular environmental problem through your eyes for a change. There are cries throughout the country now to “Ban DDT”, and you all probably know that I have been involved in most of the litigation that has been brought throughout the country against DDT and which has probably contributed to this public hue and cry against the compound that was once hailed as the savior of mankind. With all that in mind, let me say here and now that I am opposed to any law which simply bans DDT, just as I am opposed to any law which simply bans alcoholic beverages, or cigarets or any other commodity or product now in use. You can write a law banning the use of DDT just as they wrote the constitutional amendment prohibiting the sale of alcoholic beverages – with pretty much the same results. Instead of speakeasys and the Mafia, we’ll have the Grange and bootleg DDT.

How do you draft a law that is ecologically sophisticated, environmentally relevant and politically feasible.

The Supreme Court's ruling on "one man--one vote" and even the subsequent reapportionment of many of your state legislatures have not eliminated voting blocs from the political structure of your several states. There are still Italians, Irish, Poles, Germans, Slavs, Blacks, Jews, Spaniards, Puerto Ricans, Mexicans, Teachers, Steel Workers, Miners, Farmers, Ranchers, Cattlemen, Sheepmen, Oilmen, Gasmen, City dwellers, Suburbanites, Tobacco interests, Steelmen, Miners, Industries of all kinds, public power interests, private utility companies, the highway men, the senior citizens, the teenagers, the young people, students, the middle aged, the Hawks and the Doves, the Hippies, the Yippies, the YAFs, the Conservativees, the liberals and yes, even Democrats.

All of them must be at least partially satisfied with your overall legislative program or you just won't get re-elected. And believe me, gentlemen, even scientists and conservationists are beginning to understand that a Governor is only effective while he is in the State House. The best intentioned governor in the world can do little good if he loses the next election, or cannot steer effective legislation through his state legislature.

I suppose all of you long for the good old days of conservation Remember----- Conservationists used to be Republicans---Teddy Roosevelt and all that. They even used to contribute. Remember the gold plate dinners. All they wanted were ducks in the marsh, deer in the forest, trout in the streams, salmon in the rivers, robins on the lawn, a few parks here and there, some scenic highways to get there, and a Conservation Commissioner, just so that they knew they had the ear of the governor. Ah! Those were the good old days. But today the environmentalists demand clean air and clean water--NOW.

It's very easy for Dr. Commoner to tell you about the environmental crisis and all the ecological disasters mankind faces and how it is all your fault that the country is being ruined and that it is up to you to do something about it immediately.

It's very easy for Dr. Watt to tell you that when his systems people are finished the great God in the Computer will tell Governor Reagan how to change the State of California.

The only problem is that no one elected Barry Commoner president of the United States or even Governor of his own state, and Ken Watt's computer won't tell Governor Reagan how to get his program through the legislature or even how to get re-elected.

Also, the conservationists and environmentalists conveniently forget that government action programs cost public monies and that the source of these funds depends in large measure upon the very interests whose existing activities are being challenged.

Governors, let us look at the DDT problem. A law banning the use or sale, or distribution of DDT in your state, without any further attempt at developing an ecologically sophisticated pesticide regulation program, is a bad law. It won't satisfy anyone very long, and it will permanently polarize agriculture and conservation in a way that common problems can no longer be solved by reasonable discussion. I suggest that you all profit from the DDT litigation that we have conducted for the past three years. The Courtroom is indeed an arena in which scientific opinion can be tested in the crucible of cross-examination, and the only real risk is to the combatants. And you have all learned by now lawyers are expendable.



In 1966, a citizen sought equitable relief from a toxic insult to the community ecosystem, suing not just a local mosquito commission using DDT, but 1,1,1-trichloro-2,2-bis(parachlorophenyl) ethane—DDT itself. [*Yannacone v. Dennison, et al.*, 55 Misc.2d 468, 285 Supp.2d. 531]

Finally in a New York court of equity the full weight of scientific evidence against DDT was presented to the social conscience of the community in a forum protected from the political, economic and bureaucratic pressures that for 20 years had successfully suppressed that evidence of DDT's worldwide damage to the environment. Finally, the Agrichemical-political complex was forced to put its propaganda to the test in the crucible of cross-examination.

Three years later, at Madison, Wisconsin, Dr. Harry W. Hays, Director of the Pesticides Registration Division of the U.S. Department of Agriculture testified:

"If the data appear to us... to be adequate... the product is registered. We look at the data, but we don't do it analytically. We don't check it by the laboratory method." At last Americans were told that the Department of Agriculture relies entirely on data furnished by pesticide manufacturers and does not conduct any test on its own.

The incredible lack of concern for the safety of the American people became apparent on further cross-examination when Dr. Hays admitted that if a pesticide was checked at all, it was checked by an entomologist only for its effectiveness against the target insect and not for its effects on beneficial insects or fish and wildlife. "We don't assume that the intended use will cause any damage," he explained.

Moreover, Dr. Hays further admitted that although he has personal knowledge of scientific studies showing damage to fish and wildlife from DDT, USDA is "not doing anything" about possible environmental hazards from the pesticide. (Dr. Hays proudly stated, however, that the Department of Agriculture is completely responsible for the registration of pesticides and for determining whether they may be shipped in interstate commerce. He reluctantly admitted that the public has no access to USDA records of pesticide registration.)

Only in an adversary judicial proceeding was it finally demonstrated that the United States Department of Agriculture is really serving the Agri-chemical industry and not the American people.

It has long been obvious that the existing pesticide regulation laws inadequate, and the initial reaction of conservationists all over the country is to demand conservationist representation on the Pesticide Control Boards that are now almost wholly dominated by agricultural interests. Again—you make me the boss and all will be well!

In 1968, we began to search for a way to write a pesticide control law that would be essentially immune to the makeup of the body administering that law. A law that would protect the environment whether the board administering it was made up entirely of farmers or entirely of bird-watchers. A law that would insure maximum agricultural production over the long term, at minimum cost to the farmer and with minimum disturbance to the environment.

The key to such a law is in the criteria for administrative action. Write the criteria for administrative judgment into the law so that the determination of the administrative bodies could be later tested in a Court of law, if necessary, against some kind of objective standard.

The conservationists would have us prohibit the use of any material that killed anything other than target insect organisms. This of course would reduce insect control methods to certain specific biological control processes, the flyswatter and the hammer and the block. Totally inadequate for the feeding of all who are hungry.

Again the DDT lawsuits furnished the answer. Economic entomologists supplied by the Industry Task Force For DDT of the National Agricultural Chemicals Association told us about the damage from insects and experts from Governor Reagan's University of California told us about biological controls and indicated that the ultimate control would be an intergrated combination of biological controls and selected chemical controls. Finally it became obvious that that the key definitions for any pesticide control law were three:

economic threshold

pest

and control

Our definitions were definitions that each vested interest –Agriculture, Chemical Company and Environmentalist– could live with.–Grumble as they might, they are acceptable. And acceptability is the hallmark of politically successful legislation.

The next important element of pesticide legislation is the information requirement. Again we must satisfy both the farmers and the bird watchers.

First to encourage national standards, the applicant for registration – and we can assume that this will be the chemical company manufacturing the product rather than any individual user–must demonstrate compliance with the registration procedures of the United States Department of Agriculture and then, in order to protect the environment, the applicant must furnish

(2) Reliable scientific data showing:

(a) The amount of pesticide, determinable in units of treatment concentration for specific methods of application, required to reduce pest populations to or below the economic threshold.

(b) The ecological characteristics of the pesticide in the environment, particularly its:

1. chemical stability (persistence)
2. mobility
3. solubility characteristics
4. effect on non-target organisms

Immediately there will be a hue and cry as to the difficulty of furnishing this information, but again, the model law places the burden on those most able to pay—the agricultural chemical industry itself, and imposes a duty of continued disclosure.

Now even if these companies do contribute, directly or indirectly to your election, they still cannot produce the number of actual votes that a good pesticide law, satisfying a majority of agricultural and conservation interests will produce. As a wise old political mentor in my home town told me a long time ago, "People still vote, even when they vote for machines."

Finally, no law is complete without a safety valve, that provision in the law that makes it acceptable to all parties—the provision for judicial review on citizen demand or industry demand.

This means that in a matter of great controversy the issues will be settled in Court. And since our courts are non-political, and all of you governors have a policy of non-interference in judicial matters, whatever the courts decide, you will have done your best, and you will have done it in the highest and best political spirit of non-partisan government. In other words, whatever the court decides, its not your fault.

The model law provides for a speedy, summary appeal for industry through familiar administrative review channels, while the citizen is afforded a declaratory judgment procedure and provision is made to protect the industry from harassment or frivolous litigation.

Governors, it is now time to talk about interstate cooperation. Environmental protection in the long run will involve inter-state cooperation and to a certain extent regional planning. I am aware that you are all competing for the tax revenue of industry. I am well aware that the art of industrial piracy, even when euphemistically referred to as industrial relocation threatens every state that attempts to enforce pollution control laws.

There are some industries that are captives of the States in which they are located, and there are some states that are captives of their principal industries. Let us consider first the states which own their industries.

I saw the open burning of wood dust from logging operations in Oregon, and I heard the people explain that they could not pass a law prohibiting such open burning or the timber industry would move away. Yes indeed, I am sure that the giant timber companies—the Paul Bunyan's of Wall Street, would pick up their douglas fir forests from the slopes of our West Coast Mountains and move to Kansas. Sure they would. The same way, the aluminum companies would move away from the cheap electric power of the major federal hydroelectric installations. The same way the corn farmers would leave



Kansas, Nebraska and Iowa. Nonsense! These industries will stay where they are and they will spread the cost of pollution control over the entire market for their product just as they have spread the cost of all social legislation affecting their industry-- social security, unemployment insurance, workmen's compensation, disability benefits. Isn't it a lot simpler to have the cost paid by the consumer as a small increase in price at the market level, rather than with a large increase in federal taxes and encouragement for the ever expanding federal bureaucracy?

Gentlemen, learn from the history of my ancestors, who two thousand years ago ruled the world. Italy, blessed with seaports, a center of world trade, stood still, while the rest of the world passed by. The city states of Italy refused to deal with regional problems on a cooperative basis. They competed for what should have been national treasure, and no nation was built until, awash in the backwaters of time, where they had fallen from the heights of empire, power and culture, they turned to a monarch and they a dictator.

Our Federal system can only survive if the states contribute their fair share to the development of the nation. Clean air and clean water are regional problems. They are also political problems. If we are to have air fit to breath and water safe to drink, it will depend on the skills and talents of those of you who have reached the highest political office in your state.

Gentlemen, I don't berate you, I salute you. However you did it, you did it. You have succeeded in man's highest endeavor, you have accepted the greatest challenge of mankind, the government of your fellow men. You have successfully practiced the noblest art of man, the art of politics, the art of the possible. You have been chosen by the people of your states to lead, and you were chosen because you were able to satisfy a majority of the Italians, Irish, Poles, Germans, Slavs, Blacks, Jews, Spaniards, Puerto Ricans, Mexicans, Teachers, Steel Workers, Miners, Farmers, Ranchers, Cattlemen, Sheepmen, Oilmen, Gasmen, City dwellers, Suburbanites, Tobacco interests, Steelmen, Miners, Industries of all kinds public power interests, private utility companies, the highway men, the senior citizens, the teenagers, the young people, students, the middle aged, the Hawks and the Doves, the Hippies, the Yippies, the YAFs, the liberals and yes, even Democrats.

You have the skills, yes, the genius necessary to meet the environmental crisis facing the nation today. Unfortunately, the ways of Congress are too slow and the problems too specific to the several regional ecological systems of our country for solution in the marble halls of Washington. The war against environmental degradation will be fought in the states and the victory will be won in your state houses and in the lonely backrooms in which decisions are made. In the last analysis, you may literally choke on those decisions, but, with the grace of God, and by the political intuition that has made you each Governor, together with the support of all those who helped make you each a Governor, the environmental crisis can be met successfully. It is up to you Governors. God bless each of you and God help all of us.