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The Not So Fine Print of Environmental Law

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THE NOT SO FINE PRINT OF ENVIRONMENTAL LAW

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In the twenty-five years that I have been studying, practicing, teaching, and writing about environmental law, one development strikes me as more significant than any other: Environmental law has been transformed from a discipline of broad phrases into a realm dominated by fine print. I well remember sitting in Professor Louis Jaffe's class, discussing such vague concepts as "reasonable man," "prudent and feasible alternative," "abnormally dangerous activity," "suitability to the locality," "intentional invasion," "reasonable use," "gravity of harm," and "utility of conduct." These malleable phrases were the hallmark of the first Earth Day's environmental law.

Today, introductory environmental law courses build on the foundational recognition that a regime of broad phrases fails adequately to address modern environmental problems. The solution, as everyone knows, has been fine print—particularized wording crafted by legislatures and administrative agencies. As one who has published and regularly supplements two multivolume treatises (on air pollution and hazardous waste), I can attest that the quantity of minutely detailed language in modern environmental law beggars description. The Clean Air Act's[1] comparison to the tax code is legendary. And the federal hazardous waste regulations defy the comprehension of any one person.

In some ways, the increasingly detailed codification of environmental law is a healthy and a natural development. As polluters find ways to wiggle out of existing obligations, regulators find it necessary to tighten the screws with ever more detailed directives. And as foot-dragging bureaucrats fail to carry out the broadly worded mandates of legislatures, legislators find it necessary to hem the agencies in with ever more specific

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1. 42 U.S.C. §§ 7401-7671q (1988 & Supp. III 1991).

instructions. Much modern environmental law is comprised of fine—meaning excellent—print.

Unfortunately, however, much environmental law today is "fine print" in the pejorative sense. The dictionary defines "fine print" as "something . . . presented in a deliberately ambiguous or cryptic manner."[2] But the phrase conjures up more than this definition would suggest. To the layperson, "fine print" has three attributes: (1) It is hidden and difficult to detect; (2) it has been crafted by someone who seeks to use it to his or her advantage; and (3) it leads to unexpected outcomes. The point of this Essay is that much modern environmental law consists of this not so fine print. Two illustrations should suffice.

I. A HAZARDOUS WASTE LOOPHOLE

We take our first example from the law of hazardous waste. Over the past fifteen years, the Environmental Protection Agency (EPA) has devised an elaborate definition of the term "hazardous waste"—the dreaded label that determines whether a material is subject to the complex regulatory requirements of Subtitle C of the Resource Conservation and Recovery Act of 1976 (RCRA).[3] These requirements are so onerous and so costly that potentially regulated entities do everything in their power to avoid the hazardous waste designation.

When Congress set the definitional process in motion, it instructed the Agency to define hazardous wastes in two ways: (1) by specifying characteristics (or attributes) that, when present, would make any solid waste material a hazardous waste; and (2) by affirmatively listing specified materials as hazardous wastes. After a false start, in which the EPA proposed to enumerate approximately one dozen characteristics, the Agency settled on only four: ignitability, corrosivity, reactivity, and an extraordinarily narrow attribute of toxicity. As a result, carcinogens, mutagens, infectious agents, radioactive materials, and most toxic materials will be hazardous wastes only if the EPA has taken the laborious steps of discovering and listing them. I have called this regulatory approach the "listing preference," because the EPA has preferred to list carcinogens, for example, rather than to define carcinogenicity as a characteristic of hazardous waste.

One consequence of the listing preference, of course, is that the wording of the EPA's hazardous waste lists has become critically important. Not surprisingly, given the stakes involved, the hazardous waste

2. AMERICAN HERITAGE ELECTRONIC DICTIONARY (1992).
3. 42 U.S.C.A. §§ 6921-6939(e) (West 1983 & Supp. 1993).

lists involve some of the finest print in all of environmental law. We focus, here, on one aspect of the fine print, which I have called the "sole active ingredient formulation loophole." To understand its significance, we must retrace our steps a bit and focus on the nature of one portion of the hazardous waste lists: the lists of commercial chemical products.

In the commercial chemical product lists, the EPA has enumerated almost 350 dangerous chemical compounds—ordinarily traded as valuable commodities in commerce—that are hazardous wastes when, and if, they become solid wastes. The lists include well-known materials (benzene, carbon tetrachloride, chloroform, mercury, sulfuric acid, and vinyl chloride) and materials with names that only a chemist could love (3,6-Pyridazinedione, 1,2-dihydro-). They also include—in a separate list of "acutely hazardous" chemical compounds—substances that are used as pesticides and that are deadly in even small amounts (aldrin, endrin, and parathion). It is surely a good development that these things have been listed. After all, if any materials are hazardous wastes when discarded, these substances fit the bill.

But the meaning of the commercial chemical product lists is controlled by two aspects of the fine print, which I call the "enumerated form principle" and its "mere ingredient corollary." Under these rules, a listed chemical substance (such as parathion) is a hazardous waste only if it appears in one of the forms enumerated on the list (for example, a "commercial chemical product"); parathion is not a hazardous waste if it is merely an ingredient in a nonenumerated form (for example, a bucket of waste materials ejected from a manufacturing operation), even if it is the predominant ingredient.

As we delve deeper into the fine print, we discover that the most important enumerated form—"commercial chemical product"—is itself defined to include only: (1) the pure grade of the listed chemical compound (and any technical grades that are essentially pure); and (2) "formulations in which the chemical is the sole active ingredient."[4] Thus, if parathion is sold in commerce in its pure (or technically pure) form, that material is a hazardous waste when, and if, it becomes a solid waste. But pure compounds are seldom traded in commerce. Instead, they are sold in "formulations," in which they have been mixed with other materials to form useful commodities, such as the pesticides available at lawn and garden stores. Thus, the fine print of the commercial chemical product lists provides that a pesticide formulation containing parathion, for example, will not be a hazardous waste unless parathion is the *sole* active

4. 40 C.F.R. § 261.33(d) cmt. (1992).

ingredient. Indeed, if a formulation contains two active ingredients (parathion and aldrin), *each* of which appears on the list of commercial chemical products, the formulation will bizarrely escape hazardous waste status. Why? Because neither deadly substance is the sole active ingredient!

It does not take a rocket scientist to recognize that the sole active ingredient limitation is a loophole of irresistible beauty to the manufacturers and formulators of pesticides and other products containing the listed commercial chemical product ingredients. One of my students sent me a calendar page, setting forth the Second Rule of Environmental Protection: "The most efficient way to dispose of toxic waste is to reclassify the waste as non-toxic." Indeed. In this instance, the fine print requires only that the manufacturer or formulator devise a product so that it contains more than one active ingredient. Not surprisingly, my unscientific survey of household pesticide products bears this out; the products invariably list more than one active ingredient. Moreover, at least some products list as their second (and only additional) active ingredient "petroleum distillate," even though the EPA noted, when it first developed this harebrained scheme, that petroleum distillate solvents are classic *inert* ingredients. To make matters even worse, the EPA has no control over such manipulative labeling, because its regulations fail to define the magical—"all we need is two of these"—phrase "active ingredient."

The issue here is not whether parathion-laced products will end up in municipal solid waste landfills, thereafter leaching into the groundwater after being discarded by individual homeowners. The trickle of household hazardous wastes forming the flood of such substances arriving at municipal landfills is, indeed, a disturbing problem, but that problem arises from a separate Subtitle C exclusion for household wastes; even sole active ingredient parathion formulations (if there were any such oddities) would be exempt from hazardous waste regulation when discarded by households. Rather, the sole active ingredient formulation loophole is important because of what it says to the manufacturers, formulators, and others who are not end users of dangerous chemical products. As long as they take advantage of the loophole, these actors are free under RCRA Subtitle C to discard tons of poisonous chemicals—for example, materials defectively formulated, damaged in transit, produced in amounts exceeding demand, or outliving their shelf lives—without any more care than would be taken in discarding banana peels.

The sole active ingredient formulation loophole is fine print in the pejorative sense: (1) It is hidden in the convoluted clauses of the EPA's hazardous waste regulations; (2) its peculiar nature suggests the finger-

prints of the regulated industry; and (3) it eliminates from the RCRA Subtitle C regulatory program deadly materials that one would assume, by glancing at the commercial chemical product lists, are listed hazardous wastes being carefully shepherded from cradle to grave. As a result, the vast majority of supposedly listed commercial chemical products are not listed hazardous wastes at all.

II. A Clean Air Scam

Our second example comes from the Clean Air Act's nonattainment program just prior to the 1990 amendments, specifically its innovative offset trading scheme. We can understand the fine print, however, only after being introduced to the big picture. The core of the Clean Air Act has been its attempt to control six ubiquitous "criteria pollutants" by establishing uniform National Ambient Air Quality Standards (NAAQS). The state and federal governments are then supposed to pursue a partnership in limiting the emissions of these pollutants and their precursors, so that compliance with the NAAQS is eventually achieved. The state contribution to this effort must be set forth in a State Implementation Plan (SIP). The widespread failure to achieve these ambient standards in so-called nonattainment areas has led to the nonattainment program.

Perhaps the best way to envision nonattainment is to consider the diagram in figure 1. If we consider the Y axis to represent increasing ambient air concentrations of a pollutant and the X axis to represent the passage of time, a nonattainment area is one for which existing ambient concentrations of a given criteria pollutant exceed the relevant NAAQS. The nonattainment program has been designed systematically to reduce the ambient air concentrations of the pollutant through time, to assure eventual attainment with the NAAQS by an extended deadline.

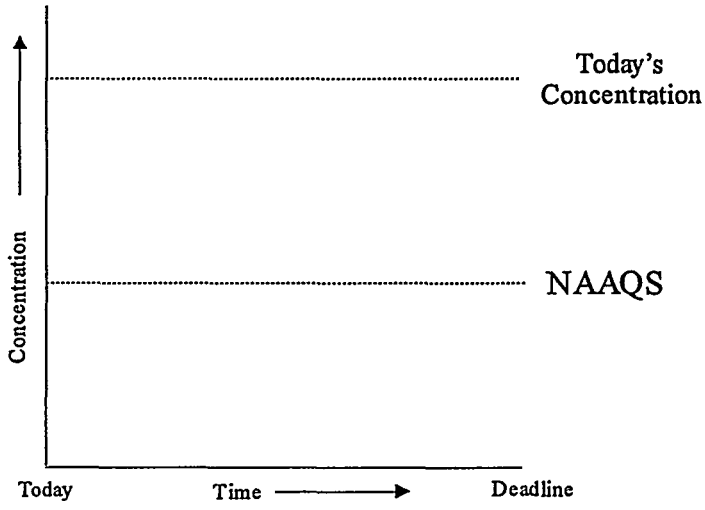

FIGURE 1

The nonattainment program is extraordinarily complicated, but we are concerned here only with its mechanism for blending industrial growth into nonattainment areas. The problem is a critical and seemingly intractable one—how can desperately needed industrial growth (with its associated jobs) be blended into an area in which the existing air pollution is excessive? Won't any new industrial development simply make the air worse? The answer given by the EPA and ratified by Congress is straightforward: We will allow industrial growth only if we have created room for new emissions by "retiring" old ones in an amount sufficient to assure that "reasonable further progress" toward attainment is achieved.

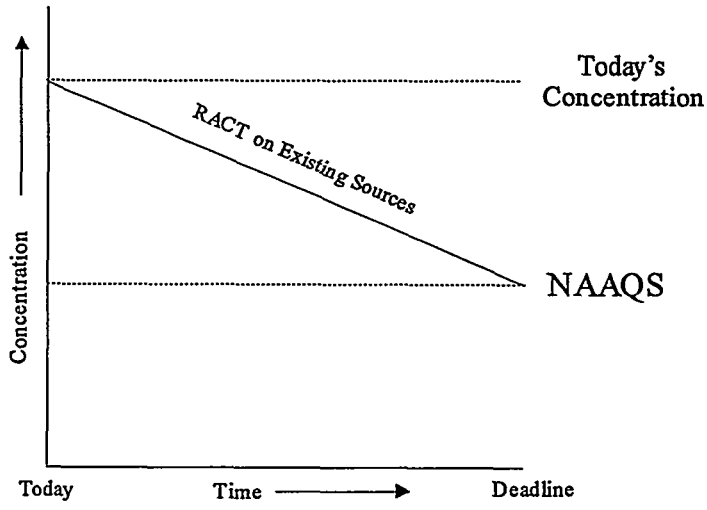

FIGURE 2

The Clean Air Act envisions two ways in which such reasonable further progress might be secured. First, states with nonattainment areas were directed to revise their implementation plans to impose tougher, technology-based standards—known as "reasonably available control technology" (RACT)—on *existing* sources. Assuming for a moment that attainment was to be achieved solely through the imposition of RACT on existing sources, the progress from nonattainment to attainment is depicted diagrammatically in figure 2. If RACT achieved only the results depicted in that diagram, of course, there would be no room for new industrial development. Existing facilities could continue to operate and the NAAQS would be met, but industrial growth would cease.

How then could growth come about? The second aspect of the Clean Air Act's nonattainment scheme provides two submechanisms. First, the Act has recognized that RACT requirements might be so stringent that the imposition of these controls on existing sources would create extra room for new sources—a windfall vaguely referred to in the statute as an "allowance" and which we call a "growth allowance." This possibility—that existing sources would, in effect, be ordered to "move over" and make room for new facilities—is depicted in figure 3 on the next page.

Most nonattainment areas could not possibly find sufficient room for growth merely by imposing RACT on existing sources. Accordingly, the nonattainment program has authorized a second mechanism: the offset program. Pursuant to this system, a new source may obtain permission

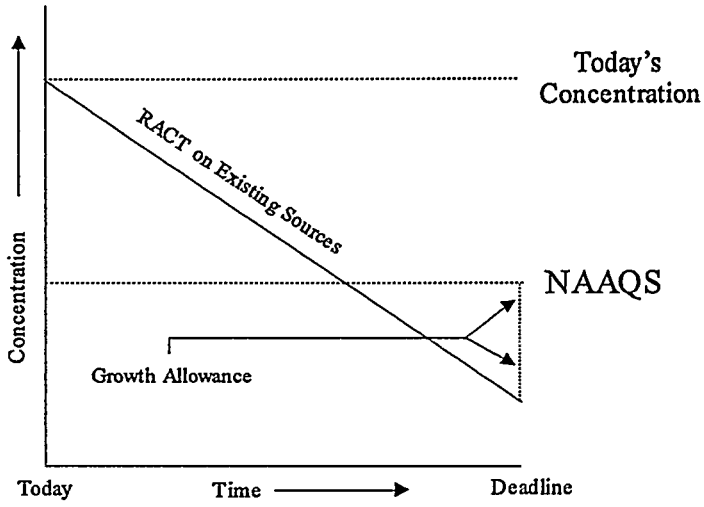

FIGURE 3

to increase emissions of a nonattaining pollutant as long as it has obtained sufficient emission reductions (offsets) from existing sources to assure reasonable further progress toward nonattainment. The basic notion is that the new facility will obtain—frequently through market transactions—and "retire" *more* existing source pollution than would be generated by its planned entry into the airshed. This possibility is depicted in figure 4.

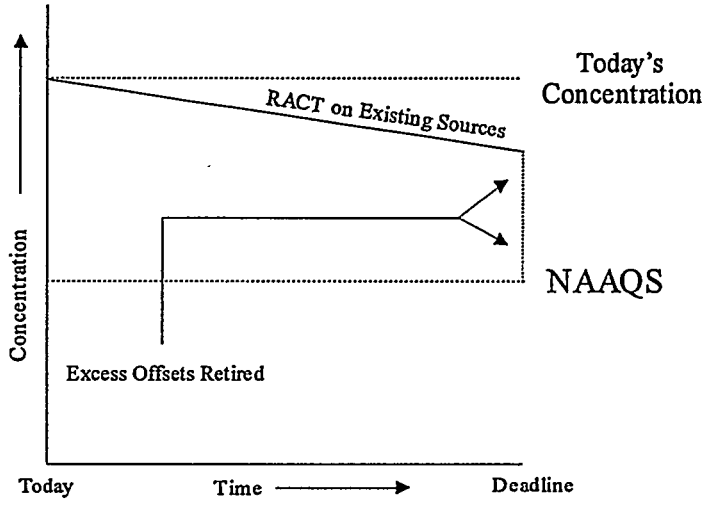

FIGURE 4

The "offset program" is one of the most brilliant innovations in modern environmental law. Teachers and scholars love to discuss it, and rightly so, because it cleverly harnesses market transactions to resolve the implacable problem of growth in nonattainment areas. "Pollution for Sale" reads the syllabus, and the class marvels at this shining example of marketplace magic. Unfortunately, the offset program has been a hollow charade, gutted by its fine print. Before we can understand this, we must consider the role of the "offset ratio" in the Clean Air Act's nonattainment program.

The offset program can succeed in bringing about compliance by the attainment deadline only if the ratio of retired to newly generated emissions is sufficiently great to bring about the necessary reductions in ambient air concentrations. The central importance of offset ratios to reasonable further progress may be demonstrated by a crude illustration.

Assume that the ambient air quality of an area is so much in excess of the NAAQS for a given pollutant that it is necessary to "retire" 5000 tons of emissions per year by the attainment deadline. If a new source desiring to emit 300 tons per year of the nonattaining pollutant were to obtain an offsetting emission reduction of a mere 300 tons from an existing facility, the ratio of new to old emissions would be 1:1, and there would be no progress of any kind toward attainment. On the other hand, if the new source were to obtain an offsetting emission reduction of 5300 tons per year from a single source, the ratio would be 5300:300, and attainment would be achieved through a single offset transaction, retiring the offending 5000 tons per year of excessive emissions in one fell swoop.

Defining "reasonable further progress" requires a SIP's drafters (and the EPA, when it reviews the SIP) to select a retirement ratio that falls somewhere in between these extremes—great enough to assure attainment by the NAAQS deadline, but small enough to induce pollutant trading. Unfortunately, there is no way to accurately select the genuinely necessary offset ratio without knowing in advance *how many* trading transactions will occur between the present time and the compliance deadline. If only one transaction (at the illustrative size) will occur, the ratio must, indeed, be the impossible one of 5300:300. If 100 transactions of similar magnitude will take place, the ratio need only be 350:300, because each of the 100 offsets will retire 50 tons per year, resulting in a total retirement of the necessary 5000 tons. If only fifty transactions of this magnitude will occur, the ratio must be 400:300 (retiring 100 tons per transaction) and so forth.

Moreover, because only "major stationary sources" are subject to the nonattainment program and therefore required to obtain a permit,

unregulated growth from minor facilities may well eat up any reasonable further progress provided by the combined operation of the RACT emissions limitations and the offsets. Two variables are therefore essential to the success of the offset program: (1) the number of facilities escaping the requirement altogether because of the major stationary source definition; and (2) the offset trading ratio.[5]

Notwithstanding the critical importance of the offset retirement ratio to the success of the nonattainment program, the ratio itself has been buried in the finest of print. In a lengthy appendix to its regulations governing approval of state implementation plans, the Agency declared: "As long as the emission offset is greater than one-for-one . . . EPA does not intend to question a reviewing authority's judgment as to what constitutes reasonable progress . . . ."[6] To continue our illustration, therefore, a feeble 1.1:1 ratio satisfying this policy would be met by a retirement of 330 tons per year, in exchange for the new emissions of 300 tons. If attainment could not be met without retiring a total of 5000 tons, acceptance of this ratio meant that more than 165 transactions of similar size must occur to achieve compliance with the NAAQS, an occurrence that everyone knew to be preposterous. Moreover, because the regulatory appendix indicated that *any* ratio greater than 1:1 would pass EPA muster, even the absurd ratio of 1.01:1 would do!

Like the sole active ingredient formulation loophole, the pre-1990 offset retirement ratio was fine print in the pejorative sense: (1) It was buried in an obscure appendix to the EPA's SIP-approval regulations; (2) it favored the developmental interests from which it undoubtedly sprang; and (3) it eviscerated an innovative pollutant trading program of great promise, altering its outcome. Indeed, the offset ratio scam guaranteed that air quality in nonattainment areas would almost surely get worse, rather than better, notwithstanding the glorious trappings of the offset program.

III. So What?

The point of these two examples is that a new age of what I would call "microenvironmental law" is upon us—an age in which the minutiae of environmental statutes and regulations have become extraordinarily important. Nothing comparable to these examples could have occurred

5. The 1990 amendments tinker extensively with these two attributes of the nonattainment program, but the offset retirement ratios are still surprisingly low, ranging from 1.1:1 (moderate ozone nonattainment areas) to 1.5:1 (Los Angeles)—a number that may be cranked back down to 1.2:1 if certain conditions are met.

6. 40 C.F.R. pt. 51 app. S. pt. IV.E (1992).

twenty-five years ago, yet these illustrations are all too typical today. Moreover, only a dreamer of the tax simplification variety would suggest that this field will become a less complex and more broadly demarcated discipline in the coming decades. The fine print is here to stay. As a result, modern environmental law is seldom what it appears to be.

The rise of microenvironmental law has profound ramifications for persons who study, practice, and implement this law, as well as those who seek to shape and reform its content. Students must be forced to confront the likelihood that their initial understanding of each environmental control scheme is misleading, because the scheme will be shown to be vastly different once the fine print has been explored. Practitioners must likewise shed their simplistic first impressions. Those representing regulated entities will doubtless search for and exploit the fine print; after all, that is why the print was created in the first place. Others, representing regulators and environmental advocacy groups, must attack the regulations with the tenacity of gardeners, seeking and rooting out whatever weeds lie within their reach.

Ultimately, however, the task of clarifying microenvironmental law will fall disproportionately on the shoulders of the academy. Environmental law scholars must continue to bring all of their analytic powers to bear on what has become a truly frightening tangle of materials, illuminating the fine print and flushing it out for public scrutiny. What is needed is the patient and thoughtful exposure of more minutiae, not less. In the end, there is no other way. If we fail to plumb the fine print, we deceive ourselves, and the real environmental law will surge along, hidden behind a facade that we all too simplistically embrace.