Loyola of Los Angeles Law Review

Volume 27
Number 3 *Symposium: Twenty-Five Years of Environmental Regulation*

Article 21

4-1-1994

Experience and Lessons of Twenty-Five Years of Environmental Law: Where We Have Been and Where We Are Headed

Donald W. Stever

EXPERIENCE AND LESSONS OF TWENTY-FIVE YEARS OF ENVIRONMENTAL LAW: WHERE WE HAVE BEEN AND WHERE WE ARE HEADED

*Donald W. Stever**

I. INTRODUCTION

I will disclaim at the outset any pretense of writing a scholarly, substantive article. I have more than enough of those to my credit. This Essay will look at environmental law and its practitioners in broad, somewhat subjective, terms.

The year 1994 marks not only the twenty-fifth anniversary of environmental law in this country, but it also happens to be the twenty-fifth anniversary of my own involvement with the discipline. In the fall of 1969 I became, as a fledgling New Hampshire state assistant attorney general, counsel to and sole litigator for all of the state's environmental agencies. In those days, we were still trying to enforce water quality standards and air pollution control was a matter of enforcing the law of nuisance. It was not until two years later that there was a sufficient number of more-or-less full-time environmental lawyers in state government to enable the formation of an environmental committee of the National Association of Attorneys General.

Although there are many differences between environmental law in its early years and environmental law in 1994, two things stand out as indicative of the fundamental differences between then and now. In the United States, environmental law has become an essential, ingrained element of mainstream corporate law, and a body of environmental law is present in most of the developed nations of the world. Obviously, neither was the case twenty-five years ago, despite the lofty rhetoric at the ambitious but premature Stockholm Conference on the Environment; however, these two facts illustrate better than any others that a discipline

* Partner, Dewey Ballantine, New York. Mr. Stever heads the firm's Environmental Practice Group. He has previously been a professor of law, teaching various environmental law topics, head of two environmental litigation sections in the United States Department of Justice, and a state assistant attorney general in charge of environmental litigation. He is the author of numerous articles and several books, including the treatise, *Law of Chemical Regulation and Hazardous Waste*. He has practiced environmental law full-time since 1971.

considered important only to a few lawyers twenty-five years ago has matured into big business.

One illustrative example of the globalization of environmental law is the Environmental Law Institute's Gulf of the Aqaba Project.[1] This remarkable effort produced, during 1993, a cooperative agreement among Israel and its Arab neighbors to collaboratively address pollution problems affecting this shared resource.

In this Essay I will discuss the process by which decisions are made under the environmental laws. I will consider the institutions that play major roles in the formation and implementation of environmental policy, and will comment on the environmental legal profession as it has evolved to the present day.

II. THOUGHTS ON THE EVOLUTION OF SUBSTANTIVE ENVIRONMENTAL LAW IN THE UNITED STATES

The enactment of the National Environmental Policy Act of 1969 (NEPA)[2] was significant as the first serious legislative attempt to reorder the thought processes at work in planning and executing large government projects. Environmental impact assessment has since become a global process. It is a matter of no small interest that NEPA may ultimately be judged to have had a more profound impact on international finance than it has had on governmental and business decision making in the United States. It does not appear to have had any significant direct effect on the quality of the environment either in the United States or elsewhere.

The Clean Air Act Amendments of 1970[3] mark the beginning of the more interesting social experiment that we call environmental regulation in this country. In retrospect, federalization of the control of environmental pollution drove government deeper into the fabric of socioeconomic enterprise than any prior set of government regulatory programs, more so than all of the programs of the New Deal.

In order for a government to control human conduct successfully, particularly conduct that has heretofore been unregulated and is an in-

1. *See* ENVIRONMENTAL LAW INST., PROTECTING THE GULF OF AQABA: A REGIONAL ENVIRONMENTAL CHALLENGE (Deborah Sandler ed., 1993). The year 1994 is also the twenty-fifth anniversary of the Environmental Law Institute, a unique and important nonprofit organization for which I have been privileged to serve both as a contributing lawyer and member of the Board of Directors over the last decade.

2. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C.A. §§ 4321-4370d (West 1985 & Supp. 1993)).

3. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended in scattered sections of 42 U.S.C.).

grained component of the wealth production, those charged with setting the rules must (1) make intelligent policy choices; (2) make the rules clear and understandable; and (3) be prepared to vigorously redress failures to adhere to the new rules of conduct. If such programs are expected to cause economic dislocation or otherwise have an impact on the internal dynamics of segments of the market economy, then the nature and extent of the effect, and whether causing the effect is necessary, should be clearly understood before the course of action is undertaken.

None of the federal environmental laws enacted after 1970 and none of the programs set up to administer them have been fully successful when analyzed against the three criteria. Measured against physically ascertainable goals (such as whether the air is cleaner, the surface water purer, et cetera), our system of environmental laws comes up short in many respects. Perhaps the greatest success has been achieved in controlling the business of hazardous waste disposal. However, that success has come with a significant economic cost and with a gross misapplication of resources on the problems perceived to be associated with formerly disposed hazardous waste.

III. A SHORT LIST OF THINGS WE HAVE LEARNED AND OTHER OBSERVATIONS FROM THE LAST TWENTY-FIVE YEARS OF ENVIRONMENTAL ADMINISTRATIVE LAW

The following list is subjective. It contains, in some cases, parenthetical observations drawn from my own experience. I have attempted to draw conclusions from environmental policy enforcement, and from decision making since 1969. The list is not exhaustive, and is doubtless different in many respects from someone else's list. Some of the subjects are further elaborated upon later in the Essay, others are not.

(1) Environmental decision making at the federal level is cumbersome even without post decision judicial review.

(2) There has been more citizen participation in environmental decision making than in any other area of governmental policy making.

(3) The slow pace of environmental rule making and the heavy degree of citizen participation has not seemed to produce a substantively better body of decisions. However, the process is justifiable because it tends to move all complex government decisions toward consensus—even though consensus is rarely achieved.

(4) Too little money and too few government resources have been spent on water and air pollution.

(5) A disproportionate amount of private capital and government resources have been expended on cleaning up old hazardous waste disposal sites with little direct evidence of significant environmental benefit.

(6) Arguably, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[4] has had a more significant environmental benefit indirectly than directly. The fear of CERCLA liability by financial institutions and industrial property owners has produced a massive amount of voluntary site assessment and remedial action within the last decade. Such activity normally occurs in connection with and as a result of debt restructuring or the sale of industrial assets.

(7) The Environmental Protection Agency's (EPA) attempt at chemical product regulation under the Toxic Substances Control Act (TSCA)[5] has been an environmental failure. The program has essentially been an exercise in information gathering, paper shuffling, and enforcement for the sake of maintaining the integrity of the program. It has, however, resulted in the creation of an enormous chemical and toxicological data base, which, when properly used, is of value both to industry and government. In order to be viable, the TSCA program needs to be better focused and its goals more clearly explicated.

(8) The EPA's pesticide regulatory program has been a substantive failure, not because of any fault on the part of the EPA but because of the structure and standards contained in the governing legislation. Congress missed an opportunity to improve this program when it amended the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[6] in 1988.

(9) In general, neither the EPA nor state environmental agencies have been a particularly good judge of public health or environmental risk. They have tended to magnify programmatic responses to risks that are, at the moment, perceived as significant by Congress or the general public irrespective of the true nature of the risk when judged apolitically and in the context of sound scientific methodologies. This failure, however, seems to be an expected byproduct of our political system.

(10) Laws containing prohibitions, government permit controls, and performance or behavior norms have not proven to be universally successful in addressing problems of environmental contamination. However, as in the case of voluntary remediation in the face of an ineffective Superfund program, the presence of sometimes ineffective or misguided environmental regulatory laws has spawned creative avoidance

4. 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991).
5. 15 U.S.C §§ 2601-2671 (1988 & Supp. IV 1992).
6. 7 U.S.C. §§ 136-136y (1988 & Supp. IV 1992).

strategies that have occasionally resulted in dramatic reductions in pollution or the generation of waste.

(11) I have observed that government regulatory personnel find it particularly difficult to negotiate or accept creative solutions to compliance or pollution problems. This difficulty appears to be related to two things: (a) a slavish adherence to the notion that all regulated entities should be more or less treated alike; and (b) what seems to be a need to follow the "cookbook." This may be a result of the decline in the overall experience level of regulatory agency personnel as private sector opportunities for government-trained environmental professionals increased, particularly for engineers. As a practitioner who represents industry, I would much rather deal with very experienced, very well-trained, expert government adversaries. The omnipresent threat of congressional "oversight"—read, political embarrassment—has also tended to promote the "cookbook approach," that is, the application of environmental standards or enforcement policies in a way that treats truly disparate circumstances as though they were the same.

IV. ENVIRONMENTAL DECISION MAKING

Because the federal environmental laws were originally structured as command and control laws,[7] the approach taken by administrative agencies charged with developing programs is the critical element of the system. The basic decision-making framework is one in which administrative agencies make the critical judgments and provide notice to the public, affording limited opportunity for comment.[8] The enormous and difficult rule-making obligations imposed by the major environmental laws enacted between 1970 and 1976 were bound to, and in fact did, affect the shape of administrative law.

Administrative agencies had been issuing legislative rules and adjudicative orders consistently since the 1950s. Those activities had been relatively noncontroversial, at least in the sense that the citizen movement was less organized and sophisticated than the environmental movement which actively participated in rule making and had the money and public backing to challenge agency decisions. The massive outpouring of rules by the EPA between 1972 and 1982 threatened economic repercus-

7. Command and control statutes, which have their modern origin in the New Deal legislation of the 1930s and 1940s, generally announce the formation of a program in rather undetailed terms—the "command"—and delegate to an administrative agency the task of putting flesh on the skeleton, essentially both creating specific policy and implementing it—the "control".

8. *See* Administrative Procedure Act, 5 U.S.C. §§ 551-576, 701-706 (1988).

sions of sufficient magnitude to alter the competitive landscape of major segments of American industry. By the same token those rules would spell the success or failure of each environmental program, because substantive—that is, political—guidance provided by Congress in the original Clean Air Act,[9] the Federal Water Pollution Control Act,[10] and the Resource Conservation and Recovery Act of 1976 (RCRA)[11] was limited and not particularly clear. The stakes for all interested sides of the policy issues were huge.

Although they did not have to do so, the rule writers at the EPA chose to create an entirely new vocabulary of jargon by inventing a veritable torrent of acronyms.[12] It is not surprising, therefore, though I continue to think it unfortunate,[13] that the federal judiciary chose largely to demur when asked by the challengers to the first and second round of environmental regulations to carefully consider the substance of what the EPA had done. The Supreme Court's *Chevron* decision,[14] the last in a series of administrative law decisions by the Court on environmental rules, largely rendered efforts to attack the reasonableness or substantive soundness of the EPA's rules futile. In retrospect, the *Chevron* decision could result in long-term reduction of the quality of executive environmental policy making because it allows Agency decisions based on poor logic and questionable assumptions to withstand legal challenge, so long as the Agency followed the correct procedures.

Of course the EPA, and for that matter state agencies as well, often make soundly reasoned, credible policy and technical decisions. Nonetheless, not all of the important environmental decisions have been well thought out, and in some cases the economic cost of some of the mistakes to the private sector has been very high. Moreover, I cannot help but think that some of the poorer policy decisions made by the Agency over the years might have been better if the Agency's management knew that its decisions would be subjected to meaningful substantive judicial scrutiny—that it would not only have to meet the standard of not acting

9. 42 U.S.C. §§ 7401-7671q (1988 & Supp. III 1991).

10. 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993).

11. 42 U.S.C.A. §§ 6901-6992k (West 1983 & Supp. 1993).

12. Mastery of these acronyms quickly became a de facto credential for any practitioner claiming to be an environmental lawyer. Attendance by an uninitiated novice at the Keystone Conference on Environmental Law would present the hapless individual with an incomprehensible cacophony of acronyms and technobabble.

13. Donald W. Stever, Jr., *Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation—Thoughts on Varying Judicial Application of the Rule*, 6 W. NEW ENG. L. REV. 35 (1983).

14. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

arbitrarily, but also that its decisions would be premised on scientific opinion and supported by the factual record.

The standard against which most federal and state agency rule-making decisions are judged is that the agency has "considered" all relevant issues presented to it, and that it has not acted out of whim or fancy. This does not promote scientifically defensible decisions. Scientific judgment lies at the heart of many environmental decisions; however, the EPA often is not presented with or cannot develop adequate data. Allowing the EPA to predicate decisions on questionable science enables the Agency to make decisions where it might otherwise face decisional gridlock.

The courts have been particularly unwilling to hold the EPA to a rigorous standard of proof on the issue of scientific judgment. This reluctance has periodically produced suggestions that a technologically literate "science court" be set up to address environmental issues. This idea was last raised seriously (and dismissed) during the late 1970s, but I suspect that it may be ready for a revival. As a government lawyer in the 1970s, I was opposed to the idea. Now I am beginning to think that it might be worth a try. My hesitation is primarily due to my experience before Atomic Safety and Licensing Boards during the latter years of nuclear power plant licensing. These panels were established on the model of marrying substantive and legal expertise into a three-member panel consisting of a lawyer and two scientists. In the contested licensing cases I participated in or observed, the caliber of decision making by those boards did not seem to be better than could have been done by a competent judge or judicial officer.

There are many examples of environmental agencies' successful reliance on limited data and poor science. Such reliance is sometimes necessary because the governing statute required a decision in too short a time, and there was simply an absence of good data on either side of the issue. One such example, which I have often mentioned, was the EPA's decision to suspend, on an emergency basis, the pesticide registrations of two herbicides during the height of the dioxin hysteria in the late 1970s. The Agency based its ruling on seriously flawed epidemiological studies, concluding that exposure of pregnant women to the chemicals was a causal factor in spontaneous first trimester abortions. The federal court upheld the EPA's action solely on the basis of the presumption of correctness given to the EPA's decisions.[15] The EPA, in its subsequent administrative cancellation hearings, abandoned the spontaneous abortion theory,

15. Dow Chem. Co. v. Blum, 469 F. Supp. 892 (E.D. Mich. 1979).

and relied instead on the premise that exposure to the chemicals could cause cancer, based on European epidemiological research on male railroad workers.

Our system of judicial review has produced a rather odd situation in which, at the federal standard-setting level at least, the EPA's decisions, even its substantively sound ones, tend to be overturned for what often amount to insignificant procedural blunders. Likewise, EPA decisions are rarely overturned because they are wrong, even when they *are* wrong. During my years in the Department of Justice, I recall telling newly hired lawyers that "if your adversary has to argue the substance of our client's rule, you will win."

The usual argument in favor of reliance on limited data and questionable scientific judgment is that an agency should be able to err on the side of conservatism in the interest of preserving the public health. While this argument has merit when an agency is making intelligent, informed choices between competing sets of qualified scientific opinion, it cannot credibly be asserted to justify ineptitude or blind reliance on patently bad science simply because there is nothing in the literature proving the negative.

The virtual retreat of the judicial branch from actively overseeing executive branch formulation of environmental policy during the 1970s was counterbalanced during the 1980s by a stunning turnabout. Congress went from enacting its traditional broad, command-type legislation to enacting highly detailed control-type legislation.[16]

For example, the very specific performance criteria for landfills and surface impoundments contained in The Hazardous and Solid Waste Amendments of 1984 (HSWA)[17] and the detailed requirements regulating hazardous air pollutants contained in the Clean Air Act Amendments of 1990[18] are a radical departure from the old ways of determining standards. They were not, however, premised upon the application of better science or more rational policy decisions than the earlier decisions made by the EPA in formulating its first round of RCRA regulations.

The HSWA "land ban" essentially represented a political decision to eliminate the use of landfills as the primary technology employed for the disposal of hazardous waste. One economic consequence of this decision was a profound economic restructuring of the waste management industry, a result that does not appear to have been considered by Congress

16. *See supra* note 7 and accompanying text for a discussion of command and control statutes.

17. Pub. L. No. 98-616, 98 Stat. 3221 (codified in scattered sections of 42 U.S.C.A.).

18. Pub. L. No. 101-549, 104 Stat. 2399 (codified in scattered sections of 42 U.S.C.).

when it enacted HSWA. It is entirely possible that similar unforeseen economic effects will result from the Clean Air Act Amendments. Congress's trend during the 1980s to adopt specific environmental standards by legislative fiat approximates the way that European governments tend to make decisions.

I had not intended to talk about CERCLA, but I will do so briefly. CERCLA epitomizes the very worst of government policy making. The program was flawed from the start. The criteria and procedure for including sites on the CERCLA National Priority List were poorly designed, and resulted in the expenditure of hundreds of millions of dollars on old landfills that simply did not warrant such treatment. The process probably overlooked many serious problem areas while allowing, for example, states such as New Jersey to include old sanitary landfills as priority sites, presumably because the state hoped federal funds would be available to effectuate final closure.

Even more troublesome is the EPA's inability to establish meaningful clean-up standards, and to make the hard, intelligent decisions necessary to avoid needless expenditures when the facts do not warrant them. Lack of experience and fear of political disfavor created an atmosphere of "be conservative to the extreme and you will not be faulted," thereby assuring that money will, in the end, be spent.

CERCLA and its implementation were byproducts of the public concerns of the day. Much environmental decision making has, unfortunately, been reactive. A scientific report captures the fancy of popular media, moving elected representatives to believe that they must address the issue legislatively in order to show their constituency that it is being well served. Executive branch appointees behave in a similar fashion. The flurry of activity involving asbestos and radon gas during the 1980s is a good example of reactive policy making. This activity consumed a great deal of energy and money, and involved perceived risks that are generally viewed, in retrospect, to have been overblown.

I do not intend to overstate the case. The EPA and state environmental agencies have made a number of intelligent, courageous decisions, and I am not one to argue that every regulatory decision that is expensive or with which industry disagrees is wrong. I believe the EPA has made many correct, though expensive, decisions, particularly in its implementation of the Federal Water Pollution Control Act.

I also do not mean to imply that the private sector uniformly behaves rationally and with wisdom and good judgment. Unfortunately, as environmental law has become big business, it has attracted newcomers whose lack of adequate grounding in the policies and history of envi-

ronmental programs produces frustrating and unproductive interactions with agency personnel. The legal profession is no exception. I recall a recent meeting with a state air pollution engineer in which, after a discussion concerning a fine point, the engineer expressed relief at being able to have a useful discussion about the subject, complaining that the "last five lawyers" she had to deal with had no idea what the regulations were all about.

My final comment on the substantive evolution of environmental law is one with which I doubt anyone will disagree. Statutory environmental law has "evolved" from the simple to the complex, from the straightforward to the labyrinthine and arcane. Not only are our environmental statutes among the most complex legislation, but the body of administrative regulations is sufficiently full of nuances and unstated premises that in many cases what is written does not necessarily mean what it appears to say.

V. THE EVOLUTION OF THE ENVIRONMENTAL BAR

When lawyers refer to themselves as "environmental lawyers," what, precisely, does that mean? Does it mean that this person can and does handle any and all matters that arguably fall within the body of law that we call environmental law? One aspect of the maturation of the subject area is that, almost certainly, that will not be the case.

Until 1980 those of us who called ourselves environmental lawyers were people with similar backgrounds or experiences and, for the most part, similar skills. To be sure, some of us had expertise others did not have in unique areas like nuclear regulatory law and mining reclamation law. But by and large, we were all basically grounded in government regulatory law and, for some of us, litigation, and we learned our trade as air and water lawyers. When solid waste regulation came along in the late 1970s, the skills were transferable because the concepts were essentially the same.

Also, before 1980 there were more full-time environmental lawyers working for federal and state governments than in the private sector. Most corporations did not have an environmental lawyer in the general counsel's office, and except for a comparatively small number of law firms, mostly in Washington, D.C., the private bar did not recognize environmental law as a money-making field of practice.

That all began to change after 1980. Two factors coincided to shift the balance of the profession to the private sector. First was the exodus of a large number of highly skilled environmental lawyers and engineers into the private sector at the beginning of the Reagan Administration.

This phenomenon was less the product of a distaste for Reagan's politics than a realization by industry and its service providers that the environmental programs that were built up in the 1970s were (a) not going away, and (b) not straightforward, thus they needed legal advice to assure compliance. The second primary motivating factor was the passage of CERCLA. Without a doubt, CERCLA created an environmental industry almost overnight. The specter of unlimited liability spurred businesses to spend money on environmental lawyers almost without limitation throughout the 1980s.

CERCLA generated not only the phenomenon of "the CERCLA lawyer," but the fear factor associated with the potential for direct "lender liability" transmogrified even the most eager and bullish banker in the otherwise heady lending climate of the mid-1980s into a nervous and reluctant lender when industrial property was involved. Hence, the "due diligence" environmental lawyer was born.

Thus, by 1985 or so we saw the emergence of three distinctly different environmental bars. There was the original regulatory-litigation bar, the CERCLA bar, and the due diligence bar. As I have mentioned, I believe that the former are primarily lawyers who have more or less the same grounding in the subject matter.

It was relatively easy to practice CERCLA law. Some have said that all you had to do was master a few acronyms, get used to traveling, and say a few intelligent things at the potentially responsible party (PRP) meetings you attended. There was also plenty of opportunity to participate in multiparty CERCLA groups with little risk of embarrassment due to lack of regulatory knowledge. After all, the rules were simple: joint and several strict liability, and thus the private sector always pays. CERCLA provided a golden opportunity for a labor lawyer, general litigator, antitrust lawyer, et cetera, to become an "environmental lawyer."

I suspect that by 1990, CERCLA lawyers accounted for at least fifty percent of those lawyers who called themselves environmental lawyers. As has been said recently of bankruptcy practice, they have had "a few good years," and may have a few more. But the CERCLA gravy train may be slowing down, and it must eventually sputter to a halt. However, unlike bankruptcy practice, which enjoys a cyclical "few good years," when the Superfund phenomenon is over, it will be over for good. The experience gained by most lawyers whose principal activity has been handling CERCLA cases for individual clients is not readily transferable

into other areas of environmental law.[19] CERCLA, even after its amendment in 1986, is a simple law. It is not an environmental regulatory law, and it may well be easier for most CERCLA lawyers to find something totally different to do after CERCLA than to move into an environmental regulatory practice.

Because there were not enough trained environmental lawyers around to fill all of the corporate due diligence slots that opened up in law firms during the 1980s, a similar pattern of career changing occurred in that subdiscipline. Corporate and banking lawyers were encouraged to become environmental due diligence specialists. It was perceived that clients would not be comfortable unless an environmental lawyer blessed the deal. If a firm could not find an experienced environmental lawyer[20] it would make one by designating an associate or young partner as the firm's environmental lawyer or would hire a young lawyer from an environmental agency, assuming incorrectly that all government environmental lawyers receive well-rounded, solid training in environmental law.[21] It turns out that this was—and continues to be—a dangerous practice, both for law firms and clients.

Unlike CERCLA practice, where there is usually comfort (albeit not strength) in numbers, an environmental corporate lawyer gives individual advice to an individual client whose exposure can be substantial if the advice turns out to be wrong. Part of my own practice has involved mergers and acquisitions and bank financing; therefore, I have been able to observe this subset of environmental practitioners. Two observations stand out. It is relatively easy for a bright lawyer to obtain a superficial working knowledge of a broad range of environmental laws. Thus, if one believes that merely determining whether an acquisition target or the bank's customer has obtained all of the necessary environmental permits is adequate, with the help of a good engineering consultant this veneer of knowledge would be sufficient. That, however, is not enough. A rapidly obtained superficial understanding of environmental law will not provide even the smartest individual with adequate tools to evaluate whether the target or customer has problems that will result in significant noncompliance one, two, or five years down the road. Nor will it provide a basis

19. I do not include lawyers whose practice has largely been that of "common counsel" in litigated cases. That activity amounts to handling complex litigation, a skill in its own right.

20. Even today, there is a lack of understanding, particularly among older corporate practitioners, of what environmental lawyers do.

21. Although this was true during the early years of our profession, it is not true today. A young lawyer hired by an EPA regional office, for example, might spend three years handling the same, very narrow, range of matters, such as polychlorinated biphenyl (PCB) cases under TSCA or CERCLA in one state.

for determining if the target or customer will be financially prepared in the future to meet a regulatory obligation which is unclear on the face of the written regulations. These are issues that corporate due diligence lawyers have tended to ignore.

There is also a tendency to recycle the same language over and over for representations and warranties, covenants, and environmental indemnities. One of the first telephone calls I received from a corporate partner at a firm I had just joined was a request to send up "the standard environmental language" for an asset purchase. There was consternation on the other end of the conversation when I told my new partner that there was no such thing as standard environmental language, and that if I was to be useful to our client, I needed to understand the business of the entity to be acquired and the key elements of the deal.

So far as I am aware, the basic outline for environmental provisions in bank credit agreements was developed during the mid-1980s from early language put together by my former partner, Jim Cahan. I have subsequently seen that language appear in deal papers generated by lawyers all over the United States. Interestingly, we did not assume at the time that this was a "one size fits all" exercise, but, lawyers being lawyers, there have been many attempts at applying it that way. I am now beginning to see new transactions in which the environmental terms negotiated in the early and mid-1980s in prior deals are coming to light, and there are a few instances of litigation involving the adequacy of environmental due diligence. I am repeatedly amazed at the persistence of naive approaches to identifying and addressing environmental liabilities taken in transactions that closed even after 1990. I suspect that there are more than a few financial time bombs sitting in the closing binders of many deals of the 1980s.

VI. WHERE ARE WE HEADED?

Perhaps what I have liked most about my career as an environmental lawyer is that I have never been bored. I have never had to say, "It's going to be like this for the next twenty years, this is what we do and it will always be this way." The field has changed too fast for that, and its increasing complexity has presented sufficient intellectual challenges to keep even the most restless of us intrigued.

Where are we headed? We might see the contained globalization of environmental law. Whether lawyers, as opposed to engineers or accountants, will play a significant role in places like Europe, Asia, and South America is an interesting question. Whether we like to admit it or not, all good environmental lawyers engage in a little bit of armchair

engineering, and all environmental engineers practice law without a license. This situation is not unlike the relationship of tax lawyers and accountants, and the way environmental policy is implemented in other societies will in some cases favor participation by lawyers and in others it will not.

We may see the demise of CERCLA as we know it. We may see a resurgence of air and water pollution work. The trend toward private litigation over contaminated property may continue. Some of us may become specialized management consultants, helping corporations implement ambitious environmental, health, and safety programs. Our profession may continue to balkanize into subspecialties. The center of gravity, which had shifted from Washington, D.C. by 1982, may continue to move toward the states except for federal-centered programs. Finally, it will be interesting to see if the federal air and water pollution rule-making initiatives of the 1990s experience the same degree of appellate litigation that occurred in connection with the rule makings of the 1970s.

Industry in this country is significantly more astute and sophisticated about environmental compliance today than it was twenty-five, or even fifteen, years ago. Every major corporation employs a significant number of environmental professionals. It is fair to assume that at least some of the fights over EPA rules that followed the 1972[22] and 1977[23] water pollution laws and the Clean Air Act Amendments of 1977[24] were the result of unsophisticated and, in some cases, unfounded concerns about the impact of those rules. Mistakes like that are not likely to be made by industry today. The disputes that we are now seeing between government and industry are more subtle, and sometimes involve highly sophisticated contrary interpretations of data and longer-term analysis of economic or social impacts. Thus, to the extent that there will be litigation over environmental policy in the future, it is likely to be about very difficult issues.

The balance of technical environmental knowledge seems to have shifted over the last quarter century from government toward industry. With that shift there has also been a shift in the fundamental corporate attitude toward environmental regulation in at least some of the major industry groups from how not to comply to how to do better than what is

22. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended in scattered sections of 33 U.S.C.A.).

23. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified as amended at 33 U.S.C.A. §§ 1251-1387 (West 1986 & Supp. 1993)).

24. Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

required. This factor will undoubtedly affect the future development of environmental law in some way.

Finally, the greatest question of all remains unanswered. After spending trillions of dollars, creating a large environmental protection industry, and writing tens of thousands of pages of legislation, have we significantly improved the natural environment? Have we stopped the degradation of the air and the water? Have we received value for our expenditures? And will all of it matter if we cannot affect what the Brazilians, the Peruvians, and the Chinese do with their resources, and consequently to the air and oceans?