

ENVIRONMENTAL LAW IN THE UNITED STATES: THE PENDULUM SWINGS

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INTRODUCTION

Prior to 1970, environmental law was a common term, and the subject was unlikely to be found in the curriculum of a law school in the United States. Activities that are now routinely viewed as causing environmental harm to the public were largely addressed through nuisance law and other private property principles of the common law. The accelerated increase in pollution after World War II, the growth of environmentalism in the 1960s, and the inadequacy of the common law system to deal large-scale environmental harms all provided impetus for the plethora of environmental laws that emerged at both the state and federal levels in the United States in the 1970s. Interestingly, in the 1990s, private property law principles are now again in the forefront in environmental law, because they are viewed by many as limiting the scope of environmental regulation.

This chapter will discuss the problems involved in protecting the environment using common law nuisance principles, review the development of and approaches to environmental legislation and regulation, and discuss the current trend to impose private property law as a limitation on environmental regulation.¹⁾

PRIVATE PROPERTY LAW AND THE ENVIRONMENT

Perhaps the most basic limitation on the use of private property is stated in the ancient maxim "*Sic utere tuo ut alienum non laedas*", which means that a landowner should not use his property in a way that harms the land of others. This principle is the basis of nuisance law (and, in many ways, it is also the basis for much of environmental law). Many commentators have noted, however, that the maxim does little to assist courts in balancing the complex issues of fairness and utility that must be considered in applying the principle.

¹⁾ In discussing such broad topics in a relatively short format, I will be often forced to rely on broad generalizations concerning areas that are quite complex in detail. I hope the reader will indulge me on this point.

In the common law, a private nuisance is the unreasonable interference with the use and enjoyment of land, and a public nuisance is an invasion of public rights. An activity can be both a private and a public nuisance. In most circumstances, the difference lies only in the scope of the harm. A private nuisance may harm only a limited number of property owners, while a public nuisance may affect a large number of people.

A widespread environmental harm, such as pollution of the air or a river, can be a public nuisance. A suit to abate a public nuisance must be brought by the government, and in most jurisdictions, private parties may not bring an action to enjoin harm to the public in general. This common law action could be used to address pollution and other environmental harms, but governments had broad discretion concerning whether to bring such a case. In the past, the social and political cost of a government action against, for example, a community's largest employer or largest taxpaying industry often discouraged cities or states from taking action. If technology did not exist that could lessen the harm, abatement of the nuisance could mean closing the industry – generally an unacceptable outcome. Also a problem was that the government itself was often the owner of the polluting dump, sewage facility or power plant. Thus, historically in the case of public nuisances, the balancing of fairness and utility was often part of the political, rather than the judicial, process.

The use of private nuisance law to abate environmental harms has been also problematic in many ways. One of the most difficult hurdles to overcome is the threshold requirement that the offending activity be “unreasonable”. An activity is generally found to be unreasonable by United States courts if: (a) the gravity of the harm outweighs the utility of the activity, or (b) the harm caused is serious and the financial burden of compensating the harm to the plaintiff and others suffering a similar harm would not make continuation of the activity infeasible.²⁾ Factors considered by the courts in determining “utility” include: (a) the social value the law placed on the activity, (b) the suitability of the activity to the locality; and (c) the impracticality of preventing or avoiding the harm.³⁾

Cases from the state of Pennsylvania near the turn of the century provide interesting commentaries on the utility of certain polluting activities. In *Pennsylvania Coal Company v. Sanderson*, 113 Pa. 126 (1886), a property owner sought damages for the pollution of a stream by runoff from a coal mine. The sulfuric acid in the stream made the water undrinkable, killed fish, and destroyed pipes. The Pennsylvania Supreme Court stated that such runoff was to be expected in the course of coal mining and that coal mining was the “natural use” of the land in that locality. The court reasoned that “(t)o encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community”. In other early

²⁾ American Law Institute, Restatement (Second) of Torts, § 826 (1977).

³⁾ American Law Institute, Restatement (Second) of Torts, § 828 (1977).

1900s cases involving the pollution from the city of Pittsburgh's steel mills and coke furnaces, the courts found that the smoke and fumes were indicators of prosperity from which the plaintiffs as well as the community benefitted, and that the plaintiffs lived in the area to take advantage of the benefits of industry. Pollution was viewed as a by-product of progress and prosperity. "Trifling" harm to individuals could not be allowed to impede such progress. Considerations of what we now call sustainable development were largely irrelevant in a country that seemed to have virtually unlimited land and natural resources.

Private nuisance actions also encounter more basic problems in a modern industrialized society. When sources of pollution are numerous, it is often difficult to link damage to a particular source. In addition, while the total pollution to an area might be quite substantial, individual damages may not justify the cost of legal action.

Even in situations where a private nuisance can be established, in most United States jurisdictions, abatement through an injunction is not a required remedy. An injunction is a discretionary equitable remedy, available when legal remedies are inadequate. To apply an equitable remedy, judges must *again* employ a balancing test, balancing the harm to the polluter and the victims and considering the effects of the injunction on the public. The court may decide to award only monetary damages if the harm to the polluter and the community is disproportionate to the harm to the damaged landowner. If a polluter is merely required to compensate a small number of injured landowners, the polluter is often internalizing only a small portion of the cost of pollution. The broader effects of the pollution on the environment and larger issues, like intergenerational equity, go unaddressed.

The inadequacies of private nuisance law to deal with widespread environmental harms are numerous, but this is not to suggest that there no longer exists a role for private nuisance in environmental protection. In spite of its limitations, private nuisance has remained a viable cause of action for over four centuries because of its adaptability. In the case of environmental harms this adaptability has been particularly important in allowing it to deal with wide variety of environmental harms and to incorporate changing public attitudes about the environment, better understanding of the effects of pollution, and development of technology. With new understanding of the scope and gravity of environmental harms and development of technologies to control pollution, the balancing required by nuisance analysis is much more often found to require abatement that benefits the environment as well as individual landowners.

THE EMERGENCE OF PUBLIC ENVIRONMENTAL LAW

In the post-World War II period in the United States, pollution increased dramatically, and dramatic events, like rivers catching on fire and major oil well blowouts, focused public attention on the state of the environment. During the 1960s and climaxing with Earth Day in 1970, growing public support

for protection of the environment was creating pressure for environmental legislation at the federal level. Existing state regulation was ineffective, it was argued, because states were competing for polluting industries and were engaged in a "race to the bottom" in protection of the environment.

The call for federal standards and regulation resulted in an "outburst" of legislation in the 1970s that was significant not only because of the number of the laws, but also because of the new approaches to deal with the problems of the environment and the inadequacy of existing law. These laws fell into three categories: 1. environmental and risk assessment laws; 2. liability statutes; and 3. pollution control laws. Environmental and risk assessment laws, such as the National Environmental Policy Act, have been characterized as "attempts to extend the horizons of short-term thinking and to pere more deeply into the consequences of technological undertakings". Liability statutes, most of them based on strict liability, attempted to provide social accountability and to assure that the costs of pollution and environmental degradation are internalized by the polluter.⁴⁾

The federal pollution control statutes of the 1970s departed substantially from common law nuisance theory by rejecting "reasonableness" and even economic or technological feasibility as relevant to the issue of abatement. Instead, regulation was based on health and environmental quality standards and use of the best technology available. Where use of the best technology would not assure protection of health or environmental quality, the Congress was clear that its intent was to force the development of better technology or the closure or scaling back of the noncomplying industry. Where application of the best technology provided little or no additional benefit for health or the environment, it was still required because a showing of damage or harm was no longer necessary for control. Some incentives in the form of tax credits and loans were available for industries to meet the mandated requirements, but command-and-control was the basic regulatory tool.

The successes of United States environmental legislation are renowned, but the problems encountered have been myriad. At the forefront were problems related to the insufficiency of EPA resources to meet its mission. Legislation had directed the Environmental Protection Agency (EPA) to eliminate all water pollution and all risk from air pollution, protect ground water from hazardous wastes, establish drinking water standards, and register all pesticides. By 1985 the EPA had met fewer than 15% of the deadlines set by Congress and more than 80% of the major regulations were challenged in court.

Even though the EPA was far behind the implementation schedules of the original legislation, by the 1980s the agency was encountering strong opposition from industry and from within the government to the volumes of command - and - control regulations. Regulatory reformers within the government had a goal of "less government" and lessening the regulatory burden on industry. Industry

⁴⁾ William H. Rodgers, Jr., *Environmental Law*, p. 61 (West Publishing Co., 2nd ed. 1994).

objected to the amount of regulation, but even more strongly to the inefficiency of regulation. Command-and-control regulation, in general, and best available technology regulation, in particular, were under attack, and proposals for alternative approaches began to emerge.

Best available technology regulation is subject to valid criticisms. It does not consider the differences in costs of reducing pollutants by different industries, discourages the development of new technologies that will further reduce pollution, and provides no incentives for more cost-effective approaches to pollution reduction. The method seems to encourage litigation to postpone or weaken controls which many argue is a misdirection of resources. Finally, it does not take account of the location of the industry and the difference in the effects of pollution at different sites. If a discharge has no discernible effect on the environment, there are no external costs to internalize and the use of best available technology is wasteful.

Numerous economic incentive schemes have been proposed as alternatives to command-and-control regulation. The table below summarizes the positive and negative aspects of different approaches to environmental regulation.

Comparison of Uniform National Regulatory Approaches with Incentive-based Approaches to Regulation

	Pros	Cons
<i>Uniform national regulation</i>	Arguably easier to establish Assures protection of health Precludes relocation to avoid control	Ignores differences in marginal costs Provides no incentive to reduce emissions beyond maximum permitted level
<i>Effluent charges</i>	Creates incentives for discharges to reduce emissions in the most cost-effective manner Provides funds to cover social costs of pollution	No guarantee that protective levels of control will be achieved Difficult to determine socially efficient level of such charges
<i>Marketable permits</i>	Creates incentives for discharges to reduce emissions in the most cost-effective manner Overall allowable level of pollution can be determined in advance allocation of permit rights	Can result in less equitable distributions of pollutants Some believe it is unfair to permit by polluters to profit from sale of rights to pollute
<i>Deposit-refund schemes</i>	Reduces incentives for illegal dumping	Administrative costs of collecting and refunding deposits reduces attractiveness
<i>Subsidies for investment in pollution controls</i>	Assists small and less profitable firms in bearing the costs of compliance	Penalizes firms that already have invested in compliance technology Redistributes income from taxpayers to polluting activity

Source: Percival, Miller, Schroeder & Leape, *Environmental Regulation: Law, Science, and Policy*, p. 175 (Little, Brown and Co., 1992)

Although economic incentive approaches to environmental protection continue to be debated, such approaches are beginning to be incorporated into programs. The EPA first used incentive-based regulation in its emissions offset policy for

nonattainment areas and then in its “bubble policy” for multi-source facilities. The 1990 Clean Air Act Amendments also created a program for marketable pollution allowances for sulfur dioxide, an ubiquitous industrial pollutant causing acid rain, that has not been effectively controlled under previous regulation. There are some indications that the market is allowing undesirable geographic concentrations of pollution rights, but it may be too early to judge the effectiveness of this strategy to reduce sulfur dioxide pollution in the long term. Incentive-based approaches remain largely experimental at this point, but there continues to be great pressure to move in this direction.

Environmental legislation was not just a phenomenon at the federal level. State and local governments also passed significant environmental legislation during the 1970s and 1980s. Some of this legislation was required by federal environmental laws, but much of the legislation was in direct response to the environmental movement. Significantly, many state environmental laws imposed more stringent standards laws, and as the regulatory reform movement took hold at the federal level, state law has gained more importance for environmental protection. Local governments also developed considerable expertise in environmental protection, passing local environmental assessment and protection ordinances and incorporating stringent environmental standards in traditional planning and zoning authorities.⁵⁾

Criticism of state and local regulation has raised issues that go beyond the regulatory reform arguments directed at federal laws. Most federal regulation is directed at large industries, while a large proportion of state and local laws affect small businesses and individual landowners as well. To this regulated public, costly environmental regulations are not just a part of the cost of doing business that can be readily passed on to consumers.⁶⁾ For this group, environmental regulations have direct effects on what many people view as fundamental rights to make a living or to use one’s property. The most pervasive issue in this area of environmental law has become not how to regulate, but whether government can regulate without compensating for economic loss to the value of property.

PRIVATE PROPERTY LAW AND THE ENVIRONMENT REVISITED

In the United States, the confiscation of private property by the government is constrained by the requirement in the Fifth Amendment of the

⁵⁾ The emergence of environmental permitting requirements at local, state and federal levels, often with the same or similar standards, has led to much criticism, because of the time and cost involved. This has led to a call for yet another type of regulatory reform – regulatory efficiency through “one-stop” permitting.

⁶⁾ Some federal regulations also fall in this category, most notably, wetlands protection under the Clean Water Act.

U.S. Constitution, the so-called Takings Clause, that property may not be taken for public purposes without just compensation. Until the 1920s, this provision had been invoked only when the government physically appropriated property, it was presumed that a legitimate exercise of the police power to protect public health, safety or welfare could not trigger the compensation requirement even if it substantially affected the value of property. However, in the twentieth century, government began using the police power much more expansively in controlling the use of property. In *Pennsylvania Coal Co. v. Mahon*, 360 U.S. 293 (1922), the U.S. Supreme Court first recognized the doctrine of “regulatory taking” – the notion that a regulation can “go too far” in diminishing the value of property and require compensation under the Fifth Amendment. The opinion gave little guidance, however, as to when a regulation goes “too far”.

Regulatory takings cases during the last few decades have largely depended on the facts of the individual cases and have grappled with concept of how far is too far. While no rule has emerged, balancing factors have been identified that consider such issues as the extent of interference with the property as a whole, the nature and extent of the public harm that is being prevented, whether the owner is left with viable economic uses of the property, whether the owner received any reciprocal benefits from the regulation, and the extent to which the regulation interfered with reasonable, investment-backed expectations. As the protection of the environment became more important, greater effects on the use and value of private land could be justified under this balancing.

The factual finding of a trial court, that a South Carolina beach protection statute had made certain beachfront property “valueless” because the owner could not build a house on it, provided the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the opportunity to carve out a *per se* rule for “too far” in such circumstances. But rather than stopping at the proposition that a regulation that takes all economic value of property requires compensation, the Supreme Court created an exception to it so-called *per se* rule: Even a total taking of value is not compensable if the regulation prevents a *common law nuisance*. And so the venerable law of nuisance once more becomes a major element in environmental law.

In *Lucas*, the Supreme Court referred to the Restatement (Second) of Torts’ analysis of nuisance law (discussed at the beginning of this chapter) to identify factors relevant to the so-called “total taking” analysis. The Court also stated that “changed circumstances or new knowledge may make what was previously permissible no longer so”, adding a factor of adaptability (and additional uncertainty) to the analysis. In comparing the balancing factors for finding a nuisance to the previous balancing test the Court had applied in taking cases, one finds that the tests are strikingly similar. What then is the real difference in “total taking” analysis? First, it rejects the basic principle that legislative pronouncements have a presumption of legitimacy. Second, it shifts the burden of proof to the government to justify its regulation as an application of nuisance law. This is

a deviation from the general proposition that applicants for environmental permits must carry the burden of showing that their activities will not harm the environment. Finally, it substitutes the judgment of the court for the judgment of the legislature in balancing public welfare and private rights.

It has been argued that the *Lucas* case will have little effect on environmental regulation, because there are so few situations where the owner can establish that all economic value of the property has been lost (including, many argue, the *Lucas* property). This is not completely true in the case of wetlands regulation where the denial of the right to fill in a wetland may easily render it valueless to the owner. The case pervasively rejects the notion that land has value in its natural state. In addition, there are indications that lower courts are not limiting the application of *Lucas* analysis to "total taking" cases and are often shifting the burden to the government to justify on nuisance principles regulation that results in less than total diminution of the value of the property.

CONCLUSION

With a strong public sentiment driving the environmental movement through the 1970s, environmental and land use regulation exploded. Much of the impetus of the environmental movement was the science that provided a great deal of new information about the effects of pollution and the way ecological systems function. This new information formed the basis for extensive schemes at the federal and state levels for pollution control, protection of endangered and other species, protection of wetlands and other habitat, and regulation of hazardous and toxic materials. Since that time, the amount of regulation has continued to escalate, but the strong public consensus supporting environmental regulation has eroded. Although science has continued to generate information, the nature of science has not always provided industries and land owners a degree of certainty concerning the negative effects of their activities or sufficient evidence that the effects are proportionate to the degree of control or the restriction on property uses. Many maintain that regulatory methods are wasteful, inefficient and unimaginative. Others report that permits are often denied with "boilerplate" language providing little explanation of the proposed activities' negative effects or alternatives that might be practical. A very vocal portion of the population now view regulators as unrestrained and unaccountable.

Courts and legislators have also exhibited this loss of confidence and actual mistrust of environmental regulators. Over forty states have considered property rights acts and more than a dozen states have enacted such legislation. These acts range from requiring "takings impact analysis" of regulations to requiring compensation for any regulation that reduces property values below a certain amount. The *Lucas* case also is perhaps best explained in terms of mistrust of environmental regulators and response to perceived government abuse rather than as limiting the scope of uncompensated police power regulation to antiquated

private property notions of nuisance. Another line of U.S. Supreme Court takings cases requiring a substantial connection and proportionality between a regulation and the public purpose supporting the regulation seems to reinforce the interpretation that judicial system also wants regulators to demonstrate more accountability.

It is appropriate to close this chapter with the views of Professor Joseph L. Sax, one of the United States' most respected environmental scholars. Professor Sax expresses grave concern with the current approach the Supreme Court is taking to address perceived government excesses as misconceiving the dynamic and adaptive nature of property rights in our society. He does, however, conclude that in the case of regulations that deprive an owner of all economic value, heightened judicial scrutiny is justified.

Such a rule of thumb would single out those owners who bear the heaviest private burden of the new ecological era. Such scrutiny would put regulators on notice that they too should seek adaptive solutions to avoid excessive regulation of private uses. Just how much judicial scrutiny such a standard would entail and what burden of justification on regulating governments the standard would impose are questions to which answers can evolve. Instead of responding by freezing outdated conceptions of property, as does the Lucas majority, by using a crabbed definition of property and its corresponding categorical rules, courts could respond with flexibility to government excess and to the pains unfair regulations inflict on landowners.⁷⁾

PRÁVNÍ OCHRANA ŽIVOTNÍHO PROSTŘEDÍ: KYVADLO JE V POHYBU

Resumé

Příspěvek se zaměřuje na diskusi o problémech souvisejících s ochranou životního prostředí na základě tradičních principů ochrany vlastnického práva, na revizi vývoje a přístupů k právu životního prostředí a rovněž na současné trendy jeho oslabování přijímáním zákonů k ochraně soukromého vlastnictví.

Odklon od tradičních přístupů, založených na ochraně vlastnického práva, v sedmdesátých letech tohoto století, byl způsoben zejména významným nárůstem rozsahu a následků znečištění životního prostředí. Silný tlak veřejného mínění, podporovaný poznatky vědy o vlivech znečištění na životní prostředí, vedl k přijetí velkého množství právních předpisů jak na úrovni jednotlivých států unie, tak na úrovni federální a ke vzniku nového způsobu ochrany životního prostředí, označovaného jako „command and control system“.

Devadesátá léta přinášejí opačný trend způsobený tentokrát narůstajícími pochybnostmi o efektivnosti zmíněného systému, o rozsahu regulace a rovněž klesající podporou ze strany veřejného mínění. Důsledkem je větší důraz zákonodárců v jednotlivých státech a soudů na ochranu soukromého vlastnictví před neodůvodněnými dopady práva životního prostředí. Začíná se výrazně prosazovat analýza jejich dopadů na soukromé vlastnictví a v případech, kdy dochází k omezení vlastnického práva, se vyžadují příslušné kompenzace.

Klíčová slova: ochrana životního prostředí, vlastnické právo, veřejnoprávní regulace.