Restructuring Environmental Law
by Adam Babich

Beginning with enactment of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and continuing through the Hazardous and Solid Waste Amendments of 1984 (HSWA) and the Superfund Amendments and Reauthorization Act of 1986 (SARA), Congress has been engaged for almost a decade in a fundamental restructuring of environmental law. For years, legal scholars asserted that traditional regulatory mechanisms were inadequate to control pollution and, by 1980, environmental disasters such as Love Canal and toxic contamination of the James River convinced Congress that a new approach was needed. The resulting legislation heralds a shift in the primary focus of environmental law from prospective regulation to retroactive liability. New, liability-based statutes hold those involved in polluting activities responsible for resulting environmental damage without regard to individual degrees of fault or whether the damage was caused by actions that were legal when taken. The effect of these laws is to shift much of the responsibility for planning for a dangerous and uncertain environmental future to that segment of society most capable of finding innovative and efficient solutions—the private sector. Regardless of its perceived fairness, if carried through this approach will result in a quantum leap in the effectiveness of environmental laws.

The Limits of Prospective Regulation

Most federal environmental laws, originally enacted during the 1970s, rely on a system of “command and control” regulation. Under these laws, government agencies attempt to control pollution by issuing detailed regulations and permits that prescribe the manner in which regulated parties generate, transport, store, dispose of, and release dangerous chemicals. Command and control regulation presupposes the government’s ability to: (1) identify and prioritize environmental problems; (2) develop regulations that provide technically workable and politically acceptable solutions; and (3) enforce those regulations effectively. Unfortunately, in the area of environmental regulation, none of these presuppositions has proved true. The reasons for this failure are many, but most are related to the enormous scope and complexity of environmental problems and the resulting scientific and political uncertainties.

When faced with complex environmental issues, the huge bureaucracy of the U.S. Environmental Protection Agency (EPA) is more capable of responding to political pressures than of anticipating problems, setting priorities, or developing practical solutions. For example, despite congressional enactment in 1976 of an ambitious hazardous waste law, EPA did not even begin significant regulation of hazardous waste until four years later, when it was required to do so by court order. Similarly, as highlighted by its continued difficulties in reauthorizing the Clean Air Act, Congress is too cumbersome an institution to respond to complex, and sometimes poorly understood, threats of environmental harm with timely and effective legislation. Even when EPA and Congress have acted, powerful economic interests such as the oil and mining industries have demonstrated their ability to convince both institutions to grant broad exemptions from environmental laws, taking vast amounts of dangerous substances out of the regulatory system.

Issues of EPA and congressional competence aside, full regulation of the staggering number of potentially harmful chemicals in use and development is not a realistic possibility. Indeed, assessing the danger that even a single chemical poses to public health and the environment is a formidable task, clouded by scientific uncertainty. Once risks are assessed, regulators face the equally difficult job of determining how much danger to the public and environment to tolerate. Setting an “acceptable” level of risk involves the scientifically, legally, and politically complex task of balancing—implicitly or explicitly—public health and welfare considerations against the economic price of risk reduction. Once finally made, these regulatory decisions generally are questionable enough to allow special interests to tie up implementation and enforcement in months, if not years, of litigation. Enforcement is further complicated by inadequate provisions for monitoring of toxic waste and—as amply demonstrated by EPA during the early years of the Reagan administration—by the vagaries of politics.

The greatest weakness of command and control regulation is that it fails to provide incentives for polluters to police themselves and one another. Given the practical limitations of government regulation, environmental laws must encourage the private sector to anticipate and minimize potential environmental and public health hazards in order to be effective. Instead, under the command and control system, the regulated community’s sole responsibility

5. This was the Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6991; ELR Stat. RCRA 001-046.
9. Even when Congress has enacted stringent requirements for monitoring discharges into the environment, EPA's implementation of those requirements has been only half-hearted. See, e.g., Bethlehem Steel Corp. et al. v. United States Environmental Protection Agency, 782 F.2d 645, 664, 665, 16 ELR 20268, 20278 (7th Cir. 1986) (Swygert, J., concurring in part and dissenting in part).
is to comply with governmental edicts. If a practice is not specifically forbidden by a statute or regulation, industry may engage in that practice with impunity. The risk that environmental hazards have escaped scientific scrutiny and regulatory control is thus borne by the public. Command and control regulation leaves the task of planning ahead to steer society through complex environmental problems solely to a government bureaucracy that simply is not up to the job.

Regardless of the limits of command and control regulation, the environmental statutes of the 1970s did lead to some limited improvements. Moreover, current regulatory programs, however flawed, are the result of years of legislative and administrative effort and constitute a system familiar to the regulated community, environmentalists, lawyers, and politicians. Not surprisingly, rather than attempting a massive overhaul of this system, Congress chose, in its environmental initiatives of the 1980s, to open up a second front creating a parallel, liability-based system that operates independently of the regulatory system but enhances its effectiveness.

The Role of Strict, Joint, and Several Liability

The liability-based statutes of the 1980s reflect a policy choice by Congress that the damages and cleanup costs resulting from environmental pollution should be borne by those responsible for the pollution, not the taxpayers. Thus, Congress imposed strict, joint and several, and retroactive liability for toxic contamination on broad categories of "responsible parties," including past and current owners and operators of pollution sources and toxic waste sites, generators of toxic waste, and those who transported waste to contaminated sites. Furthermore, Congress authorized all citizens—in addition to EPA, states, and local governments—to enforce important provisions of the law and to obtain reimbursement from responsible parties for investigation, cleanup, and litigation costs, including attorneys fees.10

Under strict liability statutes, responsible parties are liable for environmental contamination regardless of individual degrees of fault. In other words, it is unnecessary to prove that the parties negligently or intentionally caused the contamination in order to force cleanup and recover damages. The doctrine of joint and several liability holds each responsible party at a contaminated site individually liable for the entire cleanup and the entire amount of damages. Joint and several liability simplifies enforcement by making proof of each responsible party’s specific contribution to the problem unnecessary. In most cases in which there are several responsible parties, such proof would be scientifically impossible, since pollution can rarely be traced back to its original source. Congress provided liable parties with legal recourse against one another to ensure that each pays its fair share of cleanup costs and damages.

Creating Incentives to Clean Up

Strict, joint, and several liability directly threatens the profits of the countless businesses involved with polluting activities. The effect is to increase private investment in the environment to a much greater extent than could otherwise be achieved. Simply stated, when pollution threatens profits, businesses invest in reducing that threat until they judge it to be outweighed by the cost of taking further precautions. In the short run, much of that investment consists of paying lawyers to find loopholes in the law and lobbyists to seek legislative changes. As it becomes clear that Congress and the courts will not weaken the laws, however, the focus inevitably shifts to investment in more socially beneficial projects, such as early identification and management of pollution problems and minimization of toxic waste.11

Because the new environmental laws impose liability, regardless of fault, on broad categories of parties, including owners of contaminated property, those parties must police not only their own conduct but that of their peers. For example, a landowner—or a lender with an interest in property—may be liable for pollution caused by a tenant, borrower, or even a prior owner. Thus, an increasing number of landowners, lenders, real estate buyers, and others with interests in property now insist on environmental audits to identify pollution problems before, during, and after business transactions. When necessary, these parties are bringing private enforcement actions to obtain cleanups and to recover their investigatory and cleanup costs. Private cleanup and enforcement actions allow responsible parties to avoid liability to EPA and the public by cleaning up problems at the expense of other, more “culpable” parties. Thus, strict, joint, and several liability provisions inspire more toxic waste cleanups than could be achieved by the government bureaucracy acting alone.

Retroactive Liability

Polluters must now assume that practices that currently are unregulated may lead to future liability. With its environmental legislation of the 1980s, Congress demonstrated a willingness to impose liability retroactively for pollution that was legal when it was caused. Thus, even industries that have convinced Congress to exempt them from requirements of today’s regulatory and liability statutes—for example, the oil and gas industry—would be well-advised to minimize the environmental damage they cause. Their exemptions may not last forever. To avoid future liability, all potential polluters must analyze their practices carefully to anticipate and avoid problems that otherwise might arise. By raising the specter of retroactive liability, Congress has provided industry with a powerful motive for environmental planning and risk reduction.

Enhancing the Regulatory System

To reconcile its new, liability-based approach with existing regulatory programs, Congress carved an exception to liability under CERCLA for “federally permitted releases” of hazardous substances.12 Under this exception, polluters are not liable for contamination authorized by permits issued under federal, and some state, environmental laws.


The provision encourages polluters to obtain and comply with permits, enhancing the effectiveness of the regulatory system. It also provides an incentive for those who discharge currently unregulated substances to encourage government regulation and provide information aid in the setting of standards and the issuance of permits. However, CERCLA’s federally permitted release exception to liability could work significantly better. Currently, a permit based on inadequate or even false information might, arguably, insulate a polluter from liability. If the exception applied only to pollution for which the government had issued a permit after considering all potential environmental harm, polluters would be motivated to provide complete, accurate, and detailed information to government regulators during the permitting process.

Continuing the Restructuring

Because current liability-based statutes hold polluters responsible for cleanup costs and damage to natural resources, but not damage to the health of individuals, the law creates an incentive for minimizing some risks of environmental contamination but not others. For example, pollution of groundwater or soils with heavy metals is discouraged, since such pollution is long-lasting and expensive to clean up. However, there is no similar deterrent to pollution of air with toxic chemicals, which—although dangerous to human health—may disperse quickly in the atmosphere and not require expensive cleanup. If polluters faced a realistic threat of liability for injuries to public health, they would be motivated to minimize a greater variety of pollution problems.

The common law tort system, currently governing most injuries to individuals, is not well-suited to problems of toxic pollution and, thus, fails to provide a credible threat of liability. Indeed, many of the injuries caused by exposure to toxic waste such as increased risk of cancer or birth defects are not recognized by the common law of many jurisdictions. By the time a victim of toxic contamination actually develops cancer or has a child with a birth defect, years or decades may have passed, making recovery of damages extremely difficult. Often, it is scientifically impossible to prove that the cancer or birth defect was caused by a particular chemical or a particular pollution incident. Thus, in order to provide an effective deterrent to polluters, victims’ legal remedies for toxic torts must be expanded and the burden of proof simplified.

Congress should create a legal remedy for those who suffer an increased risk of cancer, birth defects, or other injuries due to exposure to toxic chemicals. The pollution victim’s burden of proof must be set at a level that people who suffer such increased risks can scientifically and practically achieve. Once a person who has been exposed to dangerous pollutants makes a showing of an increased risk of harm, it should be the polluter’s burden to show that the jury should not award damages. The polluter is in the best position to monitor and analyze its toxic waste to rebut potential victims’ claims of increased risk and to reduce exposures in the first place. By making polluters liable for injuries to public health, and adjusting the requirements of proof appropriately, Congress can motivate polluters to study and control the risks posed by their activities.

Conclusion

Lately, industry representatives have contended that the strict, joint and several, and retroactive liability provisions of modern environmental laws are unfair and should be limited or abolished. These special interests argue that EPA should conduct toxic waste cleanups as a huge public works program, despite the enormous waste, inefficiencies, and cost to taxpayers that inevitably would result. In contrast, current laws impose liability for toxic waste on those industries which, generally, have profited from the problem’s creation. These liability-based statutes embody a basic principle of American jurisprudence—long part of the common law tort system—that liability for harm should be assigned to those in the best position to prevent the harm from occurring. In the long run, because problems of environmental pollution profoundly threaten the economic well-being and quality of life in every segment of society, the “fairest” solution is that which works best, most quickly, and least expensively.

The use of liability-based statutes to motivate the private sector to focus its energy, competence, and creativity on environmental issues is one of the most promising developments in the history of environmental law. Leaders of both political parties should endorse the continued application of strict, joint and several, and retroactive liability to achieve real progress in environmental protection. America needs to expand its liability-based environmental laws, not abandon them.