Editorial

STOPPING THE PENDULUM

A quarter century after the founding of the U.S. Environmental Protection Agency (EPA), the system it administers needs a new national consensus to repair it. Before that, however, we must stop the continuous swings of political and rhetorical excess that have caused much of the damage.

Twenty-five years represents much of a working lifetime. Those of us who have been in the environmental protection business in one way or another for at least that long, or longer, should be able to recognize certain repeating patterns. We recognize, as perhaps the newer members of Congress do not, that the current rhetorical excess is yet another phase in a dismaying pattern. The anti-environmental push of the nineties is prompted by the pro-environmental excess of the late eighties, which was prompted by the anti-environmental excess of the early eighties, which was prompted by the pro-environmental excess of the seventies, which was prompted... Why go on? The pattern is quite clear. The new Congress may believe that it is the vanguard of a permanent change in attitude toward regulation, but unless the past is no longer prologue, the pendulum will swing back, and we will see a new era of pro-environmental movement in the future.

What is wrong with this picture? Are not such changes in emphasis part of the fabric of democracy? Yes, but in the case of environmental policy, these violent swings have had an unusually devastating—perhaps a uniquely devastating—effect on the executive agency entrusted to carry out whatever environmental policy the nation says it wants. The Environmental Protection Agency is now staggering under the assault of its enemies—while still gravely wounded from the gifts of its “friends.” That is a deliberate exaggeration: Much like the Internal Revenue Service, the EPA has no friends. I can find no coherent, politically potent constituency devoted to making sure that the agency can make the best possible decisions and carry them out effectively.

Currently, some members of Congress seek to stop the EPA from doing what previous Congresses have mandated it to do by refusing to give it the funds to act. That is a little like cheering the launch of an airplane bound from New York to Los Angeles while only giving it the gas to reach Chicago and then decrying the crash as further evidence of pilot ineptitude. And we wonder why trust in the EPA has eroded.

The impact of all this on the agency is devastating. The EPA suffers from battered agency syndrome. Domestically, it is hesitant, not sufficiently empowered by Congress to set and pursue meaningful priorities, deluged in paper and lawsuits, and pulled on a dozen different vectors by an ill-assorted and antiquated set of statutes. Internationally, it does not occupy the position it should in global environmental debates as the representative of the largest industrial nation, one with an enviable track record of environmental improvement. In short, it is an agency paralyzed by the conflict between its statutory mandate and sound public policy, and a public debate that erroneously depicts the social choices in apocalyptic terms.

This is why I do not wish to join the rhetorical firing line on either side, neither to slash at the EPA for doing what Congress told it to do, nor to argue for increased resources and for a last-ditch defense on behalf of the current array of legislation and regulation. Instead, I would like for us to rise above the smoky battlefield and discuss, in the relative quiet of the upper, cleaner air, what is really wrong with the American environmental system and what to do about it.

The first step, as in all recovery programs, is to end the denial and admit that the system is broken, severely broken, broken beyond hope of any easy repair. Repairing it is going to take serious effort—hard, hard work—by a great many people, over an extended period of time. Despite the current rhetoric, there is no simple fix, no silver bullet, just the opportunity to do a lot of good for our environment and, by example, to the environment of the rest of the world.

Once we acknowledge that, we can dismiss the straw man problems that those simple fixes are supposed to address, and penetrate to the underlying actual defects. The currently prevailing myth, of course, is that the EPA’s problems are essentially bureaucratic. “A bureaucracy run amuck” is how it is usually put. And the illustrative text is the EPA horror story, usually featuring an arrogant bureaucrat from the nest of vipers inside the Beltway making some hardworking honest fellow out in the pure heartland of America do something utterly stupid. To accept this view, we must imagine the apocryphal bureaucrat wandering freely through fields of policy and musing, “What can I do today that will really drive them up the wall?” Naturally, this view leads to the conclusion that if you can tie up the EPA, strip it of resources, burden it with even more legal challenges, you will have gone far toward solving the problem.

In fact, the image of the agency as an overweening bureaucracy is miscast. If anything, it is an underweening bureaucracy. Any senior EPA official will tell you that the agency has the resources to do not much more than ten percent of the things Congress has charged it to do. In addition, they are not empowered to allocate that ten percent to ensure a wise expenditure of the public treasure. The people who run the EPA are not so much executives as prisoners of the stringent legislative mandates and court decisions that have been laid down like archaeological strata for the past quarter-century.

Having said that, it is also fair to say that we should not be surprised if, having been given “mission impossible,” having been whipped both for doing things and for not doing things, having been prevented from using their judgment like ordinary folks do, the people of the EPA get insensitive, thick-skinned, and defensive. This is the origin of many of the “horror stories.” I have traveled to the Hill with senior EPA officials and listened to members of Congress rail away about the unreasonable things foisted upon their constituents. Often, the complaints were justified, and when I asked these agency officials privately what they thought about the congressional la-

---

ments, the response was usually something like, “That’s just the role he’s forced to play; he’s been going on like that for years” or “It goes with the territory.” Frequently, there was little sense that this expression of congressional outrage was a problem to be solved by the application of intelligence, cooperation, and creativity. It was like a game with crazy rules that nobody was allowed to win. No wonder that EPA representatives occasionally act like the Red Queen when they venture beyond the Beltway to try to do all the impossible things that Congress has told them to do in some dozen massive, separate, and uncoordinated statutes. This in not an attempt to excuse irrational behavior but an effort to understand its root causes.

How have we come to this impasse? The EPA was launched on a huge wave of public enthusiasm. Its programs have had an enormous and beneficial effect on all our lives. The gross pollution we were all worried about 25 years ago is either a memory or under reasonable social control. Why is the EPA now the agency everyone loves to hate? There are four reasons: three built into the very core of the EPA, and one that results from the peculiarities of our times.

First is the belief that pollution is not just a problem to be worked out by society using rational means, but a form of evil. In the early days of environmentalism this idea was plausible to many of the people drafting the initial set of laws. Industry at that time did not take environmental degradation seriously, and the result was considerable bad faith—lies, cheating, and so on. Now, however, things have changed. Nearly all major industrial leaders know that environmentalism is here to stay, and so firms wish to avoid charges that they are insensitive polluters, just as they wish to avoid defects in quality. The customers do not like it, and business now realizes that paying attention to the environmental impact of technology or processes benefits the bottom line; environmental protection has become a permanent factor to be weighed by corporate America.

In addition, the most significant threats to our environment now seem to lie, not with major industrial sites, but in the habits of ordinary Americans: We like to drive big, powerful cars, use a lot of electricity, generate a lot of waste, enjoy cheap food, live in grassy suburbs, and collectively send pollution in massive amounts to often distant waterways and airsheds.

The laws, and the enforcement policies that follow them, are still looking for that evil polluter, and in the same place—major facilities. Since the relative threat from these has decreased, the EPA is ever more like the drunk looking for his keys under the lamppost. More effort, more irritation, less achievement to show—and looking awkward at the same time.

This phenomenon is directly related to the second major flaw—the commitment to perfection built into the language of our major statutes. In addition to the mistaken belief that absolute safety is both possible and affordable, the theory was that if standards were set extremely high, sometimes on scant scientific evidence, and an extremely tight time frame was set to achieve those standards, the result would be constant pressure on industry and on the EPA to make continuous improvements. The nation was committed to a kind of pie-in-the-sky at some future date, a date extended further and further as inevitably the EPA missed nearly every deadline set for it. Each time a new generation of clean technology came into use, the response from the EPA had to be, “That’s great—now do some more,” whether that “more” made any sense or not.

It can be argued that the present system has produced significant environmental benefits. It has; the environment is a good deal less toxic than it once was. But look at the cost. Even though the environment has improved, a sense of failure pervades the agency and the environmental community. In fact, that failure was foreordained by the promise of an unattainable future. In addition, pursuit of perfection inevitably leads to the pursuit of trivialities, which yields more of those famous horror stories. The business of environmental protection devolves into an endless debate about arcane scientific procedures—one in a million or one in a billion. The important moral force of the EPA is frittered away, and still we cannot summon the energy to deal with real environmental problems. We cannot direct our attention outward to help the global problems crying out for assistance from the most powerful nation on earth. I do not believe this was our goal in 1970.

The impossible mission of pursuing perfection leads directly to the third quandary—the devolution of all important environmental decisions to the courts. It is well known that nearly every major EPA decision ends up in the judicial system, one result of the determination of the early drafters of our legislation, who were no surprise here—environmental lawyers, to allow the most liberal provisions for citizen suits. The result has been that most of the environmental protections actually (rather than theoretically) put into place are the result not of the deliberations of scientists, engineers, elected representatives, or responsible appointed officials, but of consent decrees handed down by judges. A grim irony or poetic justice, depending on your point of view, is the current proposal by the majorities in the House and Senate to allow even more opportunities to block action by way of lawsuit, this time favoring those who would stop agency action.

I hope I don’t offend when I note that when we lawyers get involved, things tend to slow down a bit. That means both that environmental improvement is delayed, sometimes indefinitely, and that all involved in these drawn-out proceedings face crippling, costly uncertainties. The transaction costs of any environmental progress under these conditions are often an appreciable fraction of the costs of the substantive environmental remedies. Superfund is the exemplar here, a program designed to clean up abandoned dumps that somehow was transformed into a program in which the only people allowed to clean up are the consultants and the litigators.

Yes, we built this system that moved America toward a cleaner environment, but the system is now broken and must be repaired—in some cases, in the teeth of the immediate interests of many reading this article. That’s one reason why repair will be incredibly hard.

The fourth reason is that peculiar quality of our times, the nearly steady erosion of trust in all public institutions. People don’t trust government—business don’t trust business either. At the epicenter of this institutional hell of mistrust is the EPA. This is largely because advocates for addressing our environmental problems, and their allies in Congress, feared for the implementation of their program in the event of a hostile administration, and their antidote was to write stringent mandates, restrictions, and timetables into the statutes. Tying the administrator’s hands in this way, however, does not necessarily advance substantive environmental goals; paradoxically, it may even retard them. Promising unachievable perfection simply assures trust-eroding failure. And, of course, now we have a Congress that has so far shown itself unwilling to do the hard work necessary for meaningful reform. Instead, it is intent on further snarling a system it sees as an example of liberalism gone wild.

I do not think universally applied risk assessment or cost
benefit analysis or refusing to fund mandates from previous Congresses that this Congress does not like will pass and be signed by the president. Nor do I believe the Congress could override a veto of these approaches to reform. I believe the result will be gridlock. In fact, we may already have reached it.

We have to assume that at some time in the future—probably when this current version of gridlock is more apparent—we will be able to deal seriously with the reform we all recognize is needed. What would that reform look like?

First of all it would have to be **effective**. It must be able to address those problems identified by a consensus of knowledge and research as the worst environmental risks. This requires an administrative structure capable of marshaling resources to address those problems, in whatever media they occur, and the discretion and flexibility to allocate those resources effectively. This means that Congress must re-turn to its constitutional role of setting national policy and providing vigorous oversight, and leave the EPA to get on with implementing that policy, free of direct supervision from 535 administrators.

Second, reform has to produce **efficiency**. It has to provide the maximum reduction of risk to human health and the environment per dollar invested in controls or incentives. This implies, first, a vast simplification of environmental rule making. We cannot go on with a system in which the physical volume of the paper necessary to establish a permit approaches the physical volume of the waste to be controlled. Also, some finite, well understood limits should be established for what our society is prepared to pay for a certain level of environmental health, together with some reasonable relationship between the price paid and the ultimate result. In other words, environmentalism has to leave the realm of quasi-religion and take its place among the realities of the state, along with national security, social welfare, health, and justice—pretty good company, by the way.

Third, the system must better reflect the **essential democratic values of our society**. The day is past when a dozen or so youngish people can sit in a windowless room in Waterside Mall and, after a year or so, in the last stages of exhaustion, emerge with a set of absolute commands for a major economic sector. We need a system that reflects the real choices of the American people for the levels of protection they desire locally for local problems, and that builds upon the basic good sense of communities in balancing their environmental and other social values. Needless to say, no one can be allowed to clean up by loading pollution on to a neighbor, and so the new system has to be carefully designed to be consistent with regional, national, and global environmental goals.

Finally, the system has to be **fair**. It cannot impose an undue burden of either risk or expense on any one portion of the population or allow the transfer of risk from one place to another without fully informed consent. It cannot, for example, expect private landowners to carry the full cost of species protection, nor can it expect farm workers or people living near industrial plants to suffer inordinate risks for the economic benefit of the general population.

Obviously, no petty adjustment of the current set of laws can easily achieve these objectives. The nation needs a new, single, unified environmental statute supervised by a single authorizing committee and a single appropriations committee in each house of Congress, not the 12 laws and 70 committees we now have. I am fully aware of the political difficulty of achieving this nirvana, but it is no more vaulted in aspiration than zero cancer risk with a margin of safety below that—an impossible assignment the EPA has labored with for decades.

How to get there is, of course, the problem. The kind of rhetoric we are seeing now on both sides of the debate will not help, nor will the careless budget slashing in which the current Congress is indulging. It almost seems as if many members of Congress believe that environmental protection is nothing but an aspect of liberalism, and since liberalism is discredited, we can happily return to converting every environmental value we have left into ready cash. In my view, like some of the Democratic Congresses of the past, the Republican Congress is too often promising more than can be delivered and thereby contributing to the very lack of trust in government that got them elected in the first place.

A partial answer is slowly emerging from local experiences in this country and from the experience of some other nations. It involves a new consensus process, in which all the significant stakeholders are brought together to hammer out a solution to a set of environmental problems. This approach is particularly applicable to problems confined to specific geographic regions. The critical thing about such a process, and the only way to make it work, is that all participants have to understand that the process is the entire and exclusive theater for decisions; therefore, Congress and other legislative bodies have to mandate the process. There will be no appeal and no way to weasel out of the deal. This is critical; no consensus process can survive the idea that one of the parties can get everything it wants, without compromise, in some other forum.

A process of this type has been used successfully by the state of Washington in working through the competing interests of timber companies, environmentalists, Indian tribes, and local communities regarding the cut of timber on state lands. On a larger scale, the Netherlands now runs its entire environmental program out of consensus groups covering every major industry and district. Industries can meet national guidelines in almost any way they choose, but they have to play the game. The Dutch call the national plans developed through such processes government–industry ‘‘covenants.’’ They also call them ‘‘coercive voluntary agreements.’’

Whether such a process would work here in a big, mostly empty country with a more libertarian tradition is an open question. But somehow we have to get past this situation in which the EPA is out there in the boat and everyone else is in on the shore jeering as the ship struggles to stay afloat. Somehow, we have to use whatever civic consciousness and sense of community we have left to bring all the interests into the same boat. If the EPA sinks, we all get pulled under.

Many people do not believe this; a cottage industry is writing books and articles stating that many of our environmental concerns are a lot of hooey. If that is true, why do we need an effective EPA? My answer to that is the same as it has been for a number of years. Our efforts at environmental improvement in the United States are not about controlling a few chemicals or saving a few species. More than five billion people on this globe, who are living in under-developed nations want to live as well as we do materially. And, they are going to try to get there. If they all travel the same road we did, wastefully, scattering pollution, unduly impacting our natural resource base, then we are all in a world of trouble.

Suppose somehow, magically, the global development process takes place without causing all the terrible things to happen to the environment that some predict. Well, I for one, would be delighted if that were the case. Meanwhile, you can call me a
conservative old Republican, but I do not care to bet the future of the country, the planet, and the free institutions we have worked so hard to preserve on that scenario. We need to take the prudent steps necessary to bring the major global problems under control, and we need to lead the world in that effort. To do that we need effective, efficient, and fair governmental institutions, including a strong EPA. We must begin the hard work of fixing our environmental protection system, or suffer the incalculable consequences of our failure.