

Earth Day And The Evolution Of Environmental Law



Law360, New York (April 21, 2014, 7:15 PM ET) -- Earth Day is important; the day, but more so the concept. Earth Day grew out of a grassroots movement to educate the American public on the need to more-carefully shepherd the planet's resources. The movement coalesced in late 1969 to early 1970 into a national environmental "teach-in," advocated by then Wisconsin Sen. Gaylord A. Nelson and a nearly simultaneous proclamation by San Francisco — itself initiated by a proposal submitted to the San Francisco Board of Supervisors by John McConnell — along with several other California municipalities, declaring in March 21, 1970, the Vernal Equinox, or the first official "Earth Day." In ensuing years, Earth Day was moved to April 22, which coincided with the national "teach-in" advocated by Sen. Nelson.

Like all good ideas, environmental stewardship became a national talking point which, with the help of eye-burning smog and the Cuyahoga River fire, turned into a full-fledged political movement. With it came a new found urgency for action and a very significant change in the legal landscape that today, 44 years later, continues to wind its way toward the goal of a "no-discharge" society, one that reuses Brownfields instead of developing its dwindling Greenfields, one that minimizes waste generation and then recycles the wastes that are generated, one that is more energy efficient and relies less on fuel sources that create transboundary emission problems. Earth Day also now embraces the notion of "sustainability," a concept that encompasses responsible environmental and energy policy.

Lawyers who concentrate their practice in the area of environmental law have since 1970 been immersed in a myriad of federal, state and local environmental laws and regulations, beginning with the National Environmental Policy Act. NEPA was enacted on Jan. 1, 1970, by President Richard M. Nixon, who, although assuredly not part of the environmental grassroots movement in San Francisco was, after all, a Californian.

NEPA was the first significant piece of federal environmental legislation aimed at establishing a national environmental policy that would force federal decision makers, and later state and even some private decision makers using federal funds, to evaluate and weigh environmental harms and benefits

associated with given projects. In effect, environmental impacts were “given a seat at the table” for the first time.

One of the primary statutory goals was “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” NEPA also established the Council on Environmental Quality, to report to the President on the environmental impact of all major federal programs. And so it was that the wee endangered snail darter achieved national fame for stopping a significant federal dam project. Although its critics say NEPA has been co-opted by nonenvironmental interests, it was tremendously successful in forcing environmental issues to the fore in major projects which rely on federal funding.

At the end of 1970, President Nixon further assured his place in the heart of the environmental movement by signing into law the Federal Clean Air Act, a “technology-forcing” statute that established a technological floor for all new “major sources” of air pollution, to initiate a slow but steady shift in the way in which manufacturing was conducted. Today, the Clean Air Act’s New Source Review and New Source Performance Standards, among others, establish a comprehensive preconstruction review process to assure that major new sources of “criteria pollutants” employ the best available control technologies on their processes to minimize or eliminate polluting emissions.

This preconstruction review process essentially prohibits a manufacturer from even placing a nonrefundable deposit on a piece of manufacturing equipment prior to obtaining preconstruction approval, called plan approval in Pennsylvania. The Clean Air Act also divided the nation into air management basins and established “ambient” air quality levels for each criteria pollutant. Long-range monitoring stations established at various points within each basin measure air quality and the results of these measurements determine whether an area is in “attainment” or “nonattainment” status with the ambient goals established for the nation’s air. If an area is in nonattainment status, it becomes even more difficult for a new or expanded air emission source to be permitted.

No less importantly, particularly for a Californian, President Nixon’s Clean Air Act also focused on mobile sources and their impact, particularly in urban areas, which although they had been the subject of federal legislation dating back to at least 1963, remained a prominent national concern. No one can seriously question the tremendous improvement in the nation’s air quality that has resulted from the stringent tailpipe standards established for our cars and trucks. While the need for tighter controls on mobile sources remains a prominent issue in the debate over cleaner air, one need only travel to a developing country to experience the stench and burning-nostril sensation that was at one time a common problem in all of our urban and suburban communities.

Another early environmental statute that has evolved into a major federal program is the federal Clean Water Act. Growing public awareness and concern for controlling water pollution led to enactment of the Federal Water Pollution Control Act Amendments of 1972. The defining issue for water legislation of this type was probably the Cuyahoga River in Ohio, which was so polluted it caught fire. As amended in 1977, this law became known as the Clean Water Act.

Like the Clean Air Act's ambient air quality standards, the Clean Water Act authorized the EPA to establish water-quality goals — as standards — for all navigable waters. Also, like the Clean Air Act, the Clean Water Act established a program of technical standards expressed as best available technology for all dischargers. The Clean Air Act also established a national permit program for “point source” dischargers to navigable waterways, requiring that permit writers in each case impose the more stringent of minimum technology standards or a stream-specific water quality-based effluent limitation.

Today, the program has evolved to require the establishment of “total maximum daily loads” on a pollutant-by-pollutant basis for impaired waters, despite decades of point source control failure to meet national goals for clean water. The goal is to assure that all dischargers within a given basin regulate their discharges to achieve an overall basin water quality result.

Although the federal Clean Water Act does not regulate discharges to groundwaters, such discharges are picked up by Pennsylvania's Clean Streams Law, which includes “ground waters” in its definition of “waters of the Commonwealth.” Pennsylvanians can also take pride in the fact that their Clean Streams Law, enacted in 1937, was an early forerunner of federal legislation to come decades later.

In 1976, Congress tackled the field of toxic substances and hazardous waste, enacting the Resource Conservation & Recovery Act (“RCRA”), to amend the older, anemic Solid Waste Disposal Act and the Toxic Substances Control Act, which banned the use of lead, asbestos and polychlorinated biphenyls among other substances, from widespread use in commercial and consumer products.

RCRA created a “cradle-to-grave” regulatory program for the nation's most toxic “hazardous wastes.” RCRA's stringent regulatory program was designed to give federal authorities the ability to regulate on a national level, the proliferation of dangerous disposal sites and the often sloppy management of hazardous wastes, which created serious groundwater and soil-contamination problems. Gone were the days when business managers could forget about their waste once it was picked up by a waste hauler, indeed gone were the days when business managers left selection of waste haulers, and the management of wastes, to the least trained, least educated employees. RCRA has also been one of the most prominently used criminal environmental statutes, with a particular emphasis on those who mismanage hazardous wastes.

Nearly a decade later, Congress amended RCRA with the Hazardous & Solid Waste Amendments of 1984, including a provision to tackle another growing national crisis, leaking underground storage tanks. Most states have followed suit, and today underground and aboveground storage tanks, although still leaking, also are closely regulated.

Perhaps the most talked-about and litigated-over environmental statute didn't appear on the scene until a decade after NEPA, after only the briefest of debates and deliberations before Congress. In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as Superfund.

Superfund did four important things. First, it imposed a tax on the chemical and petroleum industries to

create a national fund, the Superfund, to provide for the cleanup of the nation's worst contaminated sites, many of which were abandoned. Second, Superfund established two lists of sites, the CERCLIS List, which was a list of every site that was or even might have been the subject of hazardous substance disposal and the National Priorities List, which was the list of the nation's most-polluted sites. The EPA and state regulators then began to target those responsible for conditions at these sites. Third, Superfund created a very broad, strict, joint and several liability scheme that allowed the federal government, and sometimes private parties, to impose the cost of cleaning up contaminated sites on "the persons" responsible for their creation, including persons who "arranged for" the disposal of wastes at a site, even if the disposal activity was lawful at the time. And, fourth — which may not be last on most peoples' lists — it didn't clearly exempt lenders from liability. Lawyers and bankers then did the rest.

In many ways, the threat of lender liability created a revolution in the business world's push to self-manage environmental problems. This is because lenders, faced with potential direct environmental liability when foreclosing on environmentally-impaired property, or simply faced with environmentally-impaired security on a failing loan with no clear path to complete remediation to "restore" asset value, imposed new restrictions on their money.

In many cases, lenders required pretransactional site assessments and environmental studies designed to identify environmental problems led to a refusal to lend money where the security being offered was environmentally impaired. Businesses soon found that money was harder to come by without a "cleaner" environmental record. Another indirect effect of the lender liability concerns was the abandonment of many more properties, and the push by the business sector to develop new facilities on pristine landscapes, avoiding the older industrial corridors, which despite their attractiveness from an access to workforce and transportation infrastructure basis were environmentally impaired and therefore of little or no value to prospective lenders. This indirect effect has spawned today's Brownfields/Greenfields initiative. Thus, Superfund's lender liability provisions almost single-handedly changed the dialog and debate over environmental remediation.

They also did so, in no small measure, because the threat of Superfund liability highlighted another problem: the absence of national or state cleanup standards (i.e., the age-old question: How clean is "clean?"). Because Superfund required hazardous substance contamination to be cleaned up without correspondingly establishing a cleanup standard, the Superfund lawyer's early experience often included the following statement to clients: "I don't care how much you pay me, I cannot offer an opinion on when you can stop spending money on the cleanup."

But the absence of cleanup standards, and the problem that created for regulators and remediators alike, focused the public debate on "risk-based" cleanups, which in some ways moved the decision making out of the hands of regulators, whose mission seemed to be the removal of all contamination to pre-Jurassic Period conditions, and placed it into the hands of scientists.

It should be duly noted that many regulators consider themselves scientists and many scientists remain critical of the "risk assessment" field. It was at this point in the process that many states — Pennsylvania

included — developed their own cleanup standards and put them together with Brownfields legislation designed to remove the “unlimited liability” barrier to the purchase and redevelopment of older industrial sites. Pennsylvania enacted the Land Recycling & Environmental Remediation Standards Act (“Act 2”), which defined how clean is clean and established a process for remediating sites.

In the process, the Pennsylvania's General Assembly put back in the hands of engineers and business people, with guidance from counsel of course, the ability to define environmental problems, both in terms of their physical and scheduling impacts on a prospective projects but, more importantly, in terms of their cost. Act 2 also provides tangible liability protection to persons who voluntarily remediate environmental problems in accordance with the act and takes much of the mystery out of the remedial process. Less uncertainty makes for a better lending environment.

Of course, lenders and the drive to preserve Greenfields through redevelopment of “Brownfields,” now subsumed within Pennsylvania’s Growing Greener Initiative, have both gotten a boost through amendments to Superfund, with the 2002 passage of the Small Business Liability Relief and Brownfields Revitalization Act.

In 1990, in the wake of the Exxon Valdez spill, Congress revamped the scheme of ship owner liability with passage of the Oil Pollution Act of 1990 (“OPA”). We got to see OPA in action late last year when the hull of the Athos I was pierced by an uncharted object in a presumed safe federal anchorage on the Delaware River, causing the release of more than 200,000 gallons of a heavy crude oil. As contemplated by OPA, the ship owner as well as federal and state authorities responded immediately to avert an even greater environmental impact.

There are a myriad of other state and federal laws, too numerous to mention all here, that also found their way into the regulatory framework we think of today as “environmental law.” As the environmental movement has grown, and it has grown since May 21, 1970, so has the nature and direction of the public debate on environmental stewardship of the Earth’s resources, and the role of government and private citizens in the task. The debate has also gone global, as evidenced by the Kyoto and Montreal protocols, despite however errant some major Western nations might be in refusing to adopt them.

Although Earth Day is inching toward middle-age, and the significance of that one day has been diluted by every other “This Day” and “That Day” to hit our increasingly jammed calendars, the momentum created by the movement has not ebbed — it has grown.

Today, Earth Day is a placeholder for the idea that we can do better in managing our environment. In the legal community, it reminds us that we need to continue to advance the body of environmental law toward the goal of a cleaner environment.

—By Timothy J. Bergère, Montgomery McCracken Walker & Rhoads LLP

Timothy Bergère is a partner in Montgomery McCracken Walker & Rhoads' Philadelphia office, where he is chairman of the firm's environmental law practice group.

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