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Science and Technology for Sustainability Program*

Incorporating Sustainability in the U.S. Environmental Protection Agency

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My Charge (from Marina and Bernie)

- How can the EPA decision-making process rooted for more than two decades in the risk assessment/risk management paradigm be integrated into a new sustainability framework?
 - History of Risk (at EPA....)
 - Current Status of Risk Paradigm at USEPA: A Tool for Setting Priorities
 - Strengths of the Risk Paradigm: Opportunities for Improvement?
- What is the history of risk at EPA and how was that paradigm integrated into EPA (as perhaps one model on how to integrate a broader sustainability paradigm at EPA)
- What are the strengths of the risk approach as well as the opportunities for improvement?

EPA's Mission Has Evolved

“EPA’s 35-year history shows steady progression of programs and policies from ‘pollution control to pollution prevention to sustainability.’”



-- Sustainability Research Strategy, U.S. Environmental Protection Agency, Office Of Research and Development (External Review Draft, May 2006) p.1

Agencies Have Broad Discretion to Adapt Statutes by Interpretation

Chevron v. NRDC, 467 U.S. 837 (1984).



I-Did Congress decide this exact issue?

II-If not, implied delegation- defer to agency construction if reasonable.

Chevron changed conception of statutes

- From a comprehensive instruction manual to be interpreted by courts, to
- A policy space within which agencies have broad discretion if Congress did not decide the issue
 - Risk and cost as factors to weigh in discretionary decisions where not precluded by statute

E. Donald Elliott, Chevron Matters: How the Chevron Doctrine Re-Defined the Roles of Congress, Courts and Agencies in Environmental Law, 16 VILL. ENVTL. L.J. 1 (Spring 2005).

Confirmed by *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. ____, 129 S. Ct. 1498 (2009).

Less Successful in Setting Risk-Based Priorities

- SAB Reducing Risk report (1990)
 - U.S. Environmental Protection Agency Science Advisory Board, Reducing Risk: Setting Priorities and Strategies for Environmental Protection SAB-EC-90-021 (September, 1990).
- Strategic planning and budgeting process
- Statutory deadlines
- Early Information Needs

Stated Goals of Many US Environmental Laws **Correlate Generally** *with Sustainability*

- “The purposes of this subchapter are—(1) to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”

CAA §101(b)(1), 42 USC §7401(b)(1)



US Laws Only Rarely Prohibit Sustainable Approaches



- In general, Performance Standards
 - Flexible compliance options
- But some do mandate specific technology solutions
 - RCRA BDATs
 - Distillery prohibited from recycling alcohol waste as boiler fuel
- Some prohibit consideration of certain relevant factors
 - Clean Air Act §109 (economics)
 - *Whitman v. American Trucking Assn.*, 531 U.S. 457 (2001).
- Some create perverse incentives
 - Clean Air Act §111, 179
 - more stringent controls on newer, more efficient plants
 - CAFE – Prius-buyer subsidizes SUV-buyer

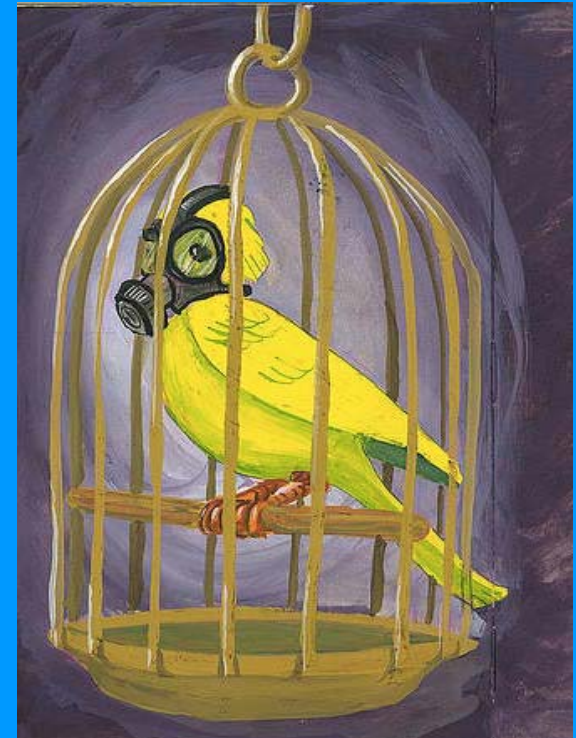
Therefore, EPA Could Use Chevron Discretion to Promote Sustainability

- “In Chevron, the Supreme Court reformed the law making system by moving a substantial portion of the power to construe statutes to the Executive Branch. **Chevron rendered the legal system more adaptable and more capable of undergoing substantial policy changes without the benefit of legislation.** One might even speculate that the increased ability of the law-making system to adapt to new conditions without legislation may in turn help to account for the relative paucity of significant environmental legislation since 1990. Historically, most environmental legislation followed in the wake of a crisis, but legislation is less necessary today because of the Executive Branch’s post-Chevron powers to update and adapt existing legislation to meet emerging problems.”

E. Donald Elliott, Chevron Matters: How the Chevron Doctrine Re-Defined the Roles of Congress, Courts and Agencies in Environmental Law, 16 Vill. Envtl. L.J. 1 (Spring 2005).

Sustainability Should Supplement, NOT Supplant, the Risk Paradigm

- Risk to Human Health Often Correlates with Sustainability
 - Sentinel/Canary in Coal Mine
- Political Support
- Benefits of Quantification
 - Develop of sustainability indices
 - Trade-offs
 - Discount rates
- Exceptions:
 - Overuse of Scarce Resources
 - Obligations to Future Generations



First Best: Enact Sustainable Development as a Lodestar Goal for Environmental Statutes

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“It is time to conform U.S. environmental laws to the worldwide goal of sustainable development. The true end of environmental laws is not merely to ‘clean up’ air, water, and waste, but to ‘respond to the needs of the present without compromising the capacity of future generations to satisfy their needs.’”

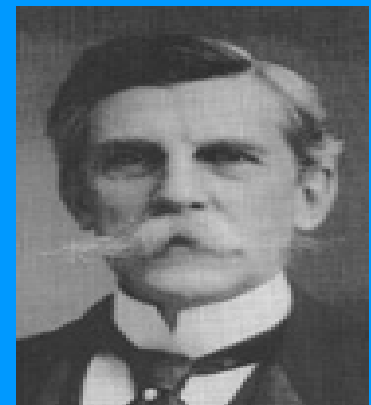


Lodestar Approach



- “Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.”

-- Oliver Wendell Holmes Jr.,
The Path Of The Law,
10 HARVARD L. REV. 457 (1897).



First Best: Enact Sustainability as Stated Goal of US Environmental Laws

- **“Debate will be more productive around a shared goal of sustainable development than if we continue to battle over controversial intermediate objectives such as cost-benefit analysis and the precautionary principle.”**
- E. Donald Elliott, Declare SD Goal Of U.S. Enviro Laws, The Environmental Forum, July/August 2003.
- E. Donald Elliott and Mohamed Tarifi, Integrating Sustainable Development Into U.S. Law and Business, 33 Envir.L.Rptr 10170 (Feb 2003).

BUT

Paralysis on Capitol Hill?



- No significant environmental legislation since 1990's
 - Clean Air Act (1990)
 - Food Quality Protection Act (1996)
- No interest group coalition lobbying or political contributions for sustainable development
 - Future generations are a classic “discrete and insular minority” unable to represent themselves in political process
- A “good government” issue

NEPA Comes Closest to Endorsing Sustainability (1992) as a Policy Goal

- (b) ... it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --
1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
 2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
 3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
 4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
 5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
 6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.”

National Environmental Policy Act of 1969

§101(b), 42 USC §4331(b)

A Modest Proposal: Repeal EPA's Exemption from NEPA

- ◆ Some statutes and court decisions exempt EPA from NEPA's EIS requirements on grounds of “functional equivalence” *see, e.g. Alabama ex rel. Siegelman v. EPA*, 911 F.2d 499, 505 (11th Cir. 1990).
 - Only agency NOT required to consider sustainability
 - Programmatic “stovepipes”/Tunnel vision
- **Controlling pollution in one medium ≠ “functional equivalent” of sustainability**
 - E.g. distillery prohibited by RCRA from recycling alcohol waste as boiler fuel

A MORE MODEST PROPOSAL: Read NEPA's Policy into EPA Statutes?

- NEPA declares sustainable development as the environmental policy of the United States
 - without using the words “sustainable development” which were not yet invented
- EPA could adopt NEPA’s statement of national environmental policy goals as a guide to its exercise of *Chevron* discretion (to extent not otherwise prohibited by law)

A MORE Modest Proposal ...

The President (or EPA Administrator) Could Direct:

- ◆ “In interpreting and applying laws relating to the environment, EPA shall take into account, to the maximum extent permitted by law, that it is the policy of the United States to promote sustainable development.”
- ◆ Voluntary “NEPA-like” analysis of Sustainability for Major Rules/Initiatives

