

INTRODUCTION

EMERGING PATTERNS IN ENVIRONMENTAL POLICY: NEW ISSUES AND NEW PROBLEMS

Within the past several years, the national response to environmental problems has involved continuous legislative activity and constant resort to the powers of the judiciary in the effort to prevent further degradation of our environment. The result of the consequent proliferation of cases, legislation and administrative activity has been the formation of important and still-developing doctrines of environmental law. Only recently, however, have policy-makers—legislative, administrative and judicial—begun to recognize the necessity for shaping this emerging body of law into patterns which will directly and effectively respond to environmental concerns. This Special Issue of the *Boston College Industrial and Commercial Law Review* attempts to examine, particularly on the federal level, the more significant current legislative and administrative developments in environmental law, and to assess their implications in light of recent court decisions. As the articles which follow demonstrate, an environmental policy which encourages necessary change in existing law, or in its application, must be given vitality if we are to preserve the environment.

The emerging environmental policy has, in part, been reflected in developments surrounding the National Environmental Policy Act of 1969 (NEPA).¹ This legislation was designed to alert federal agencies to environmental dangers posed by the projects and activities under their control. At the same time, NEPA was intended to serve as an environmental safeguard on federal activity, by insuring proper administrative consideration of the environmental impacts attending matters subject to agency jurisdiction.²

During the past year, NEPA's effectiveness in achieving these objectives has been tested in the federal courts. Of the decisions handed down, the most significant, *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission*,³ involved the question of judicial review of the Commission's decision authorizing the construction of a nuclear power plant. The impact of *Calvert Cliffs'* however, is not limited to the narrow issue treated in the case—the adequacy of the Commission's investigating procedures. Rather, it extends to the entire range of activities concerning other federal agencies, and it may well

¹ 42 U.S.C. §§ 4321 et seq. (1970).

² Id. § 4322(2)(B).

³ 449 F.2d 1107 (D.C. Cir. 1971).

cause severe reverberations in the nuclear power industry. As a result, the construction of a number of nuclear power plants has already been halted,⁴ and commentators have estimated that many more may be affected.⁵ In addition, the decision has dramatized the necessity for vigorous public response to the problem of thermal pollution. This Special Issue presents a substantial review of the decision in *Calvert Cliffs*,⁶ as well as an extensive analysis of its implications. The case itself is examined in detail in a student comment, while three noted environmentalists, Professor Robert I. Reis, Mr. Bernard S. Cohen and Mr. Norman J. Landau, consider its background and trace its implications.

As noted in several of the articles which follow, without the public's vigilance the problem of thermal pollution may go unabated as the need for electric power increases. With greater frequency, the power industry will have to resort to the use of nuclear energy in order to meet a growing demand; heavier reliance on this power source will undoubtedly result in the continued thermal pollution of our precious water resources. Professor Reis, in particular, emphasizes this point in his article—Environmental Activism: Thermal Pollution—AEC and State Jurisdictional Considerations. He suggests, however, several routes which concerned citizens may take in order to alleviate at least partially this environmental hazard.

Similarly, Mr. Landau examines the regulatory and judicial developments with respect to the Atomic Energy Commission since the *Calvert Cliffs* decision. His assessment of these developments is less optimistic. Although the Commission's new regulations, issued on September 9, 1971, in response to the decision, may assuage some of the fears of environmentalists, the recent cases portend a less rigorous application of NEPA to agency procedures. Furthermore, the decisions concerning the Amchitka nuclear test, which Mr. Landau also analyzes, may impose severe restraints on the effectiveness of NEPA when issues of national security or defense surround the nuclear activity.

The article contributed by Mr. Cohen and Mrs. Warren, in contrast, deals with NEPA's general application to *all* agency activity. It advocates a new role for NEPA with respect to federal agencies, even though the decision in *Calvert Cliffs* is criticized for the court's reluctance to review the substantive decision of the AEC. The role which the two authors envision for NEPA includes the judicial review, as a matter of law, of all environmental decisions made by these agencies; in effect, they suggest making the courtroom the forum in which plans for the construction and operation of federally regulated projects would be evaluated.

⁴ See, e.g., *The Wall Street Journal*, November 23, 1971, at 44, col. 1.

⁵ *Id.*

As noted previously, NEPA constitutes only a part of the emerging national environmental policy. Specific legislation—*e.g.*, the Clean Air Amendments of 1970—has recently been addressed to the problems of air pollution. These Amendments signal a tougher congressional stance regarding industrial and automotive air pollution than that reflected in the Air Quality Act of 1967.⁶ In early water pollution legislation, the Water Pollution Control Act of 1965,⁷ Congress attempted to deal with the pervasive degradation of our water sources. The ineffectiveness of this law has clearly demonstrated the need for new legislation which both unhesitatingly and comprehensively responds to a worsening situation.

Recently, the Senate approved S. 2770, a proposal for amending the Water Pollution Control Act of 1965. Of the broad range of environmental legislation enacted or currently under congressional consideration, S. 2770, like the Clean Air Amendments of 1970, reflects a serious congressional commitment to purifying our environment. The urgency for reform in the federal water pollution abatement effort is emphasized in a brief introductory note by Senator Edmund S. Muskie. As the sponsor of S. 2770, Senator Muskie outlines the major provisions of the bill and details the purposes which it is intended to fulfill. Senator Muskie also discusses the issues to which any meaningful environmental legislation must be addressed, and the critical factors which Congress must evaluate in enacting new environmental laws. For these reasons, included in this Special Issue is a student comment which provides a comprehensive analysis of the provisions of the Senate bill, as well as a comparison between it and other legislative proposals for abating water pollution. The comment focuses on the enforcement procedures of these proposals.

Another important source of environmental policy, the National Industrial Pollution Control Council (NIPCC), an industry advisory committee created by Executive Order in 1970, is also considered in this Special Issue. Unlike judicial and legislative activity which is openly carried on before the public, the law-making function of the industry advisory committee, particularly in the area of environmental control, has received little public attention. To the dismay of environmentalists, such as Professor William H. Rodgers, Jr., NIPCC has effected a series of changes in federal environmental policy without the benefit of public scrutiny. In his article on the National Industrial Pollution Control Council, Professor Rodgers evaluates proposals for reform of the advisory committee process and offers his own recommendations for change.

⁶ 42 U.S.C. §§ 1857-8571 (1970). See Comment, The Clean Air Amendments of 1970: Better Automotive Ideas from Congress, 12 B.C. Ind. & Com. L. Rev. 571 (1971).

⁷ 33 U.S.C. § 466(a) (1970).

Although the range of topics covered in this Special Issue is broad, a common theme emerges: there is need for a new approach in both the judicial and legislative application of existing environmental law. The importance of this theme lies in the fact that significant changes in environmental law are not likely to occur so long as existing statutes and judicial precedents fail to respond to the problems of our environment.

THE EDITORS