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ENVIRONMENTAL LAW COMES OF AGE

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Environmental law is everywhere. It helps govern the redevelopment of our inner cities, the control of our suburban expansion, the preservation of our natural resources and the protection of our wetlands. No other area of the law has become so pervasive so quickly.

Before the 1970s, environmental law as we know it did not exist. There was no Clean Air or Clean Water Act, no Endangered Species Act, and no detailed regulations governing the cleanup of contaminated sites. Early environmental regulations dealt less with protection of the environment than with our need to get rid of garbage (the Solid Waste Disposal Act of 1965) or keep garbage from obstructing our waterways (the Rivers and Harbors Act of 1899). Disputes arising out of environmental contamination typically were governed by common law principles of trespass and nuisance. These principles often were woefully inadequate. The prevailing view was that pollution was a sign of prosperity.

Addressing the obvious nuisance resulting from a continuously burning "gob pile," the waste by-product resulting from coal mining, Pennsylvania Supreme Court Justice Michael A. Musmanno, denying an attempt to extinguish the gob pile, stated:

> Much of our economic distress is due to the fact that there is not enough smoke in Pittsburgh and the Pittsburgh District. The metropolis that earned the sobriquet of the "smokey city" has not been living up to these vaporous laurels…. While smoke… is objectionable…, it is not without its connotational beauty as it rises in clouds from smoke stacks of furnaces and ovens (and even gob fires) telling the world that the fires of prosperity are burning…

Versailles Borough v. McKeesport Coal & Coke Co., 83 Pittsburgh Legal Journal 379 (1935). But we have learned more about pollution from industrial activities, and the effects of pollution on both the health of individuals and the environment generally. Even Judge Musmanno came to understand the importance of controlling pollution. Twenty years after citing the "vaporous laurels" of a smoking gob fire, the Judge praised the "scientific progress in the development of smoke-consuming devices, added to the use of smokeless fuel" and noted that, as a result of these improvements "Pittsburgh's skies have cleared, its progress has been phenomenal and the bread of its workers is whiter, cleaner and sweeter." *Waschak v. Moffat*, 379 Pa. 441 (1954).

Prior to the 1960s, laws addressing "environmental issues" generally concerned property rights. Industry had a "right" to use its property (including industrial facilities) to make a profit. This was weighed against an individual's "right" to the "use and enjoyment" of his or her property. Courts gave little consideration to the protection of the environment for the benefit of the public.

By the mid-1960s, it became clear that the common law protection of property rights was insufficient to protect our environment. Air quality in the nation's industrial corridors was deteriorating, and it was difficult, if not impossible to "pinpoint" the cause. While unregulated industrial releases were partly to blame, so was our nation's appetite for fossil fuels. Our nation's rivers and bays were slowly "dying" as a result of industrial releases and agricultural runoff. The "property rights" associated with the ambient atmosphere and public bodies of water were murky at best, and did not provide a legal framework for eliminating, or even significantly reducing, pollution.

Then there was "Earth Day." On April 22, 1970 an estimated 20 million Americans took to the streets to demonstrate for a healthy, sustainable environment. Republicans and Democrats fought to gain the "upper hand" on the environmental issue. The first Earth Day was followed

by the creation of the United States Environmental Protection Agency ("EPA"). Over the next ten years, Congress enacted numerous major environmental statutes, including the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, to arrest the release of contaminants into our environment. The new laws reflected a paradigm shift. Instead of focusing on "property rights," the laws focused on the active protection of the environment for the environment's sake. The Endangered Species Act reflected society's conclusion that we should protect certain species (such as Spotted Owls and Snail Darters) not because of their economic value, but because of the intrinsic value of biological diversity.

A more insidious catalyst for environmental laws came with the discovery of toxic waste dumps. Between 1942 and 1953, Hooker Chemicals, at a site near Niagara Falls, buried 22,000 tons of industrial waste. The waste was covered with a layer of clay, an accepted industry standard. The land was sold and subdivided for residential use and neighborhood schools. By 1970, the toxic chemicals had broken through the clay barrier, and seeped into household basements. Local residents suffered elevated rates of miscarriages, birth defects, epilepsy and liver ailments.

By 1978, the New York Commissioner of Health declared the area an emergency, and ordered the relocation of all families with young children. "Love Canal" was born. *See United States v. Hooker Chemicals & Plastic Corp.*, 850 F. Supp. 993 (W.D.N.Y. 1994). Love Canal was only the tip of the iceberg. The EPA ultimately identified over 33,000 potentially hazardous waste sites for evaluation. Over 1,200 of these sites were included on the "National Priorities List," reserved for sites posing the greatest risk to both human health and the environment. The identification of these hazardous waste sites resulted in the passages of two bodies of new law.

The Comprehensive Environmental Response, Compensation and Liability Act or "CERCLA" dealt with abandoned and inactive waste sites where hazardous substance could be

released into the environment. CERCLA set up a funding and liability program to insure that such sites were cleaned, and created the "Superfund" which allowed the federal government to help finance cleanups of some of the worst sites. CERCLA addressed problems of the past when the disposal of hazardous waste was unregulated and industry simply applied the prevailing "standard" in disposing of toxic materials. CERCLA dealt with "Love Canal" and similar historically contaminated sites, such as the Pneumo Abex lead foundry site in Portsmouth.

The Resource Conservation and Recovery Act, or "RCRA," was passed to make certain that there were no more "Love Canals." RCRA established a "cradle to grave" system that regulates hazardous waste from its generation point, through its transportation, and ultimately to its final disposal. The law and its accompanying regulations are rigorous and strictly enforced. Violations carry stiff penalties. Anyone generating hazardous waste bears the full responsibility for the proper disposal of such waste.

The growth in environmental laws and regulations has not been without its critics. Some claim that the environmental bureaucracy created at the federal and state level is filled with "environmentalists" with an agenda that ignores the realities of the industrial world. Others contend that the "evils" that prompted the explosion in environmental laws have been overstated by the EPA's scientific community for the purpose of furthering an agenda. All agree, however, that environmental laws are necessary to arrest pollution generally and to control hazardous wastes.

The debate is no longer over whether we need environmental laws, but over the form that the laws should take. The heated debate in the "wetlands" arena is an example. This debate sets the rights of property owners against the need to preserve the nation's diminishing wetlands. Few would argue that the environmental laws should not be used to protect the pristine wetlands we see from the Pungo Ferry Bridge. But many property owners challenge the government's

designation as “wetlands” the thousands of acres in Hampton Roads that are only periodically “wet” and, in their opinion, serve no useful purpose but to harbor snakes and mosquitoes. These debates will continue and environmental law will further mature as it seeks a “balance” between competing interests of our society. Environmental law has come of age.

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