Spring 1973

Citizen Suits in the Environmental Field – Peril or Promise?

Roger C. Cramton
Cornell Law School, rcc10@cornell.edu

CITIZEN SUITS IN THE ENVIRONMENTAL FIELD—PERIL OR PROMISE?

Roger C. Cramton*

How shall we protect the environment? This deceptively simple question is now confronting virtually every major business in the country, every governmental agency, every legislator, and every concerned citizen. The awakening of the nation's environmental conscience within the past few years has been truly dramatic, and many who shrugged off the ecology movement as a mere passing fad have learned to their sorrow that the public will no longer tolerate disregard for the natural environment. A series of important enactments —NEPA, the Clean Air Act of 1970, the recently enacted water pollution control legislation—all testify to the federal concern with protecting the environment.

Yet, despite this extensive activity, the environmentalists continue to be unhappy with the performance of federal administrative agencies. Any fundamental change in large organizations, of course, is a slow and often frustrating process. In the meantime, pollutants continue to fill the air and waters, and unique natural resources may be irretrievably lost.

Despairing of the ability of administrative agencies to protect the environment, a number of articulate environmental spokesmen have

*Mr. Cramton was Assistant Attorney General in charge of the Office of Legal Counsel, United States Department of Justice, and before that Chairman of the Administrative Conference of the United States. The views expressed herein are those of the author and not necessarily those of the Department of Justice. A more elaborate version of this paper has been published in 2 *Ecology Law Quarterly* 407–36 (1972).

begun to assert that a different approach is needed, broad statutory authorization of citizen suits in the federal courts to defend the environment. In their view, the most expeditious and effective method of halting threats to the environment is to allow individual citizens or public interest groups to bring lawsuits directly against alleged polluters, and to empower the courts to re-examine fully on the merits all administrative decisions affecting the environment.

While these arguments deserve serious consideration, I believe that the major proposals for the creation of broad private rights to sue for purposes of environmental protection are neither philosophically sound nor carefully written. If enacted, they could ultimately prove a serious setback rather than a victory for the cause of preserving our environment.

A key premise of the broad citizen-suit proposals is the belief that regulatory agencies inevitably become captives of those whom they are supposed to regulate or of their narrow promotional missions. Even if an agency is diligently attempting to enforce its statutory mandate, the sordid realities of bureaucratic survival in a highly political atmosphere force it to compromise environmental values to an unacceptable degree. The remedy, therefore, is to shift the primary decision-making authority from the agencies to the courts, which are insulated from day-to-day political pressures and free from the "insider perspective" that results from single-minded expertise. In the process, the worn-out doctrinal baggage of ripeness, exhaustion of administrative remedies, primary jurisdiction, the substantial evidence rule, deference to administrative discretion, and similar technicalities which prevent the courts from getting at the guts of environmental problems, are also stripped away.

Like most clichés, the captive-agency argument contains a germ of truth and a high degree of misleading oversimplification. Until recent years, many administrative agencies have been ignored stepchildren, escaping the harsh scrutiny of the public eye and becoming deeply reinforced in the performance of narrow missions. As any administrator can testify, those calm days have vanished and public criticism is increasingly vocal and informed. The agencies' response, while often slow, has been significant. The possibility of real and enduring reform in public administration is probably greater now than it has been in many years.

At the least, history should caution against too ready acceptance of the courts as an alternative to the agencies. After all, it has not been long since proponents of the New Deal argued that creation of administrative agencies was necessary in order to overcome the ob-

structionist tendencies of the courts. Even in more recent times judges have occasionally proven themselves as insensitive as any bureaucrat to the needs of the environment. On a more fundamental level, however, the argument against the agencies errs because it fails to take adequate account of the comparative institutional capabilities of courts and agencies to deal with environmental problems.

I. VAGUENESS OF STANDARDS

A major shortcoming of the recent citizen-suit proposals is the extreme vagueness of the standards which they prescribe for courts to use in resolving environmental issues. In the bill that is receiving the most serious consideration by the Congress—the Hart–McGovern bill drafted by Professor Joseph Sax—any person or class of persons would be allowed to maintain an action for declaratory or equitable relief against any individual or public or private body, federal, state, or local, if he could show that the defendant's activity affected interstate commerce and had an adverse impact upon "the air, water, land, or public trust of the United States."[1] Once this negligible prima facie showing had been made, the burden would shift to the defendant, and he would be required to make a three-part showing: (1) that there is no "feasible and prudent alternative" to the activity in question; (2) that the activity is consistent with and reasonably required for the promotion of the public health, safety, and welfare; and (3) that the social and economic benefits of the activity outweigh its social and economic costs.

Let me illustrate some of the problems which this legislation would create by posing a hypothetical situation. Assume that a city has a distillery, a toy factory, a chemical plant producing napalm for the Armed Forces, and a state penitentiary. Each burns coal for heat and uses electricity obtained from an oil-burning utility company. A citizen brings separate suits against each of them and has no difficulty making the requisite prima facie showing, inasmuch as all consumption of fossil fuels involves some air pollution. Furthermore, since the city's sewage treatment facilities are overstrained, all the defendants contribute to water pollution. Thus, the burden shifts to all four defendants to justify their activities.

First, they must show that there is "no feasible and prudent alternative." Is this inquiry limited to alternative sources of heat, power, and waste disposal or may the court consider alternatives involving

[1] S. 1032, 92d Cong., 1st. Sess. (1971).

the total cessation of the defendants' activities? If so, must the court take into consideration the environmental effects if defendants relocate elsewhere? Is it a feasible and prudent alternative to require the distillery and the toy factory to install expensive antipollution equipment when this imposes costs of production above those borne by their competitors?

Whatever alternatives the defendants adopt, short of ceasing to operate, there will be some adverse impact on the environment since all fuel consumption involves some pollution. Therefore, we move to the second branch of the inquiry, whether the defendants' activities are "consistent with and reasonably required for promotion of the public health, safety, and welfare, etc." Obviously, there is room for differences of views here. Some observers might consider the operations of the distillery as not "reasonably required for promotion of public health, safety, and welfare." Others might object to the activities of the chemical plant. Proponents of penal reform might argue that liberal probation and the institution of "halfway houses" are cheaper and preferable to maintaining penitentiaries. Even some might be found who regard toy manufacturing as a frivolous and antisocial activity. Are the merits of all these arguments and the subsidiary questions they raise to be resolved by the district court in these simultaneous lawsuits?

Let us not forget the third inquiry: Do the social and economic benefits of the activities outweigh the social and economic costs? This question seems to overlap the second considerably, but it introduces additional elements. All the enterprises generate a certain amount of employment. Displaced employees may or may not be absorbed into other jobs. Perhaps the distillery's export sales have a positive effect on our balance of payments. If the toy company is forced to cease operations, its president asserts that it will move to Taiwan. All these factors are arguably relevant to a balancing of the economic and social costs and benefits.

The plain fact that must be emphasized here is that there is no wholly "clean" source of power, and that, consequently, any activity, commercial or noncommercial, which uses power contributes its mite to air and water pollution. Yet the clear language of this bill states that a prima facie case can be made against every business activity in the country, against every owner of an automobile, against every homeowner, indeed against every user of electricity. One searches in vain for any standard of de minimis or, more significantly, for any suggestion that activities which are undertaken in compliance with applicable standards imposed by appropriate governmental bodies

should be considered reasonable per se. Thus, substantially every enterprise or activity in the country would be subject to justifying its continued existence in legal proceedings on the basis of an ad hoc, open-ended, and wholly nebulous balancing of social costs and benefits.

It seems to me that the standards contained in this legislation are no standards at all, that they offer no guidance to the tribunal as to permissible scope of the issues, the relative weights to be assigned to competing values, or the reliance to be placed on the determination of other branches of government. In the famous words of Justice Cardozo, this is "delegation running riot."

II. JUDICIAL COMPETENCE FOR ENVIRONMENTAL DECISION MAKING

But vagueness of standards is not the only problem. Any attempt to shift decision-making responsibilities to courts on matters such as I have just described is undesirable and will have harmful results, in my view, on courts, administrative agencies, and the society at large. Courts, I believe, are an inappropriate institution for the exercise of these functions.

Most environmental questions are heavily laden with social and political value judgments. They should be made by institutions that are more politically responsive and more politically responsible than courts. The examples that I have already given involve issues of employment, balance of payments, weighing the desirability of one activity as against another, and making moral and social judgments about the behavior of particular individuals or groups. These are problems in which the variety of possible solutions is vast and each possible solution may have a differing impact on differing segments of society, both immediately and in the future. There is no "right" answer to these questions in the sense of an authoritative solution based on the application of accepted general principles to particular facts, which is the function which courts are designed to perform.

Of our major institutions of government, the courts are and should be the least politically responsive. Thrusting these kinds of questions into the judicial arena can only cast doubt upon the legitimacy of the decisions made and ultimately on the legitimacy of the courts themselves.

For many broad environmental issues, Congress is the most appropriate institution to establish policy. For less sweeping issues administrative agencies, acting in a quasi-legislative capacity, seem preferable

to the courts. An administrative agency is not only more amenable to oversight by elected officials of the Executive branch and Congress, it is also more capable of employing a wide variety of procedures which can assure that affected interests have an opportunity to communicate their desires and the information they possess.

If this basically political process is functioning properly, it is unwise to invite the courts to revise or reject the agency's determination. Once the legislative or administrative process has produced definite rules and standards, of course, it is wholly appropriate to involve the courts in the review and enforcement of those standards, perhaps through the mechanism of citizen suits. But new judicial remedies should be tailored to the particular problem rather than created wholesale.

The courts are ill-equipped, in my view, to handle questions which involve planning, which are complex and interrelated, and which require specialized knowledge in a number of fields, as well as vast resources for study and investigation. Determining the feasibility of numerous alternatives, performing elaborate cost-benefit analyses—these are tasks which judicial training and judicial procedures are not adapted to perform.

Nor can courts match the capability of the Executive branch to subdivide complex problems into manageable units for staff analysis, to investigate various alternatives in a systematic manner, and to provide procedures which are keyed to the subject matter of the dispute in question. Moreover, the administrative process provides greater opportunity for meaningful public participation than courtroom litigation in which participation is limited to the named parties. Furthermore, an agency responsible for administering a particular program is in a much better position than an individual United States district judge to determine which environmental questions are of high priority and therefore deserve expedited treatment or increased commitment of resources.

While a lawsuit may quickly stop a project or preserve the status quo, it provides only a slow and cumbersome method of resolving the merits of an environmental problem. Courts, as basically passive institutions, must depend largely on the parties' diligence in prosecuting claims, and their effectiveness in requiring affirmative action on the part of either agencies or private persons is subject to serious question.

In essence, the problem of competency goes beyond the question of what results are achievable in particular cases to the broader roles which courts and agencies have been assigned in our system of govern-

ment. Congress has given federal agencies the task of planning, making proposals, allocating resources, and undertaking projects—in short, of initiating action. These tasks are alien to the courts and largely incompatible with the use of judicial procedures. The necessary impartiality and passive nature of the courts seem inherently in conflict with the mission-oriented approach of environmental decision making.

III. NEED FOR CONSISTENCY AND PLANNING

Any evaluation of citizen-suit proposals in the environmental field should also take account of the Balkanization of federal law that now exists in many areas. The Supreme Court of the United States, which is largely absorbed in the resolution of vast constitutional controversies, has only limited time to guide lower federal courts in the interpretation of questions of federal law. Conflicts of authority between the circuits on many significant questions of federal law often persist for a number of years. The increase in the number of judges on the various courts of appeals has also made it more difficult for some of these courts to resolve intracircuit conflicts through the use of en banc rehearings. Many knowledgeable observers believe that the uniformity and stability of federal law have been gravely impaired by the growth of the number of appeals and the lengthening of the time required for the authoritative resolution of important questions of federal law.

Vesting authority in United States district courts to decide the broadest environmental issues would decentralize the decision-making process and provide potential plaintiffs with enormous opportunities for potential forum shopping. It is well-known that the attitudes and views of individual federal judges on issues of this character are highly variable.

Thus, a predictable consequence of the enactment of citizen-suit legislation would be a decline in the uniformity and stability of federal policies in the environmental field. The Army Corps of Engineers might be enjoined from pursuing a project in Missouri on grounds that a Florida district court had held should not stand in the way of a Florida project. Competing companies attacked for air or water pollution in an air shed or water basin might be confronted with differing requirements which would advantage one company and prejudice the other.

Resolution of uncertainties and conflicting decisions would be an expensive and time-consuming process. Placing the decision of environmental matters in federal district courts, especially when combined with the vague standards involved, would multiply the chances for

inconsistency and conflict and slow the process for resolving conflicts even further at a time when uniform national and regional environmental policies are badly needed.

Judicial intervention in environmental matters through citizen suits would also have adverse effects on administrative responsibility and performance. Under the leading bill, compliance with federal regulations is not a defense but is admissible only as evidence that there is no feasible and prudent alternative to the activity under attack. Hence, every administrative regulation would be subject to de novo inquiry, apparently even when the rule has been upheld as valid by a court of appeals in the normal course of judicial review. Judicial displacement of regulatory standards violates the common-sense principle that private parties have a right to rely on established agency rules in structuring their transactions and activities.

More significantly, it could seriously undermine agency efforts to encourage voluntary compliance with rules of general applicability. Since regulated firms would gain no real protection by virtue of compliance with regulations and would have considerable difficulty predicting what kinds of conduct would be prohibited under the vague standards to be applied in either citizen suits, they would have little to lose by waiting for litigation. And, since one polluting activity is often a substitute for another—for example, strip mining of coal *versus* oil spills from offshore drilling—the likelihood of guerrilla warfare in the courts by competing industries against each other and against federal agencies should not be overlooked.

Some of the most sweeping changes contemplated by the citizen-suit legislation are contained in the provisions which deal with judicial review of administrative action. The basic thrust is to open agency action affecting the environment to not only the traditional judicial scrutiny for compliance with applicable law, support by substantial evidence and lack of administrative arbitrariness, but also to full de novo examination on the merits. Such an approach is justified only if existing doctrines of judicial review do not afford the courts sufficient latitude to prevent the agencies from taking action that is unlawful or environmentally unwise.

Recent experience, particularly in the area of judicial enforcement of NEPA, suggests that this argument is unfounded. In general, the courts have been very willing, perhaps excessively so in some cases, to find that agencies have failed to consider enough alternatives or that they have given insufficient weight to environmental factors.

The prospect of de novo review may also have hidden costs in its effects on agency decision making. Administrators can hardly be ex-

pected to perform with a high degree of care and responsibility if their work is merely a rehearsal for the real decisional process in the courts. The impact of this shift in authority upon agency morale and recruitment efforts may be subtle and gradual, but it could be quite substantial in the long run.

Moreover, the judicial review to be available in citizen suits is not meshed in any way with that available under the existing law of judicial review. The legislation apparently is designed to overlap these existing review provisions insofar as environmental issues are concerned. The existing structure for judicial review, however, would remain in effect for all nonenvironmental issues. Thus, portions of the same case could be pending in different sections of the country and at different levels of the judicial system since many federal statutes provide for judicial review in the courts of appeals rather than in the United States district courts. The inefficiencies, difficulties, and delays which could result from this bifurcation are obvious.

IV. THE PROPER ROLE OF THE COURTS IN SAFEGUARDING THE ENVIRONMENT

The many serious defects in the current citizen-suit bills should not be allowed to obscure the fact that courts can continue to play a vital role in the effort to safeguard the environment, and that a number of reforms can be made which would enhance the ability of citizen groups to assist the courts in performing this task. In the area of judicial review of administrative action, the environmentalists' long battle to obtain standing to sue seems to be largely won with the recognition in the *Mineral King* case that any threat to a citizen's scenic, cultural, historic, or environmental interest constitutes a sufficient injury to confer standing.[2] Similarly, the doctrine of sovereign immunity, which elsewhere is occasionally applied to block judicial review of federal administrative action, has not stood in the way of judicial scrutiny of environmental claims. The difficult problem of administrative discretion is receiving attention and attempts will undoubtedly be made to develop more precise guidelines to structure and control discretion. On the whole, however, the law of judicial review is working well, and fundamental changes are neither necessary nor desirable.

More extensive changes are being made in the area of citizen suits directly against alleged polluters. The Clean Air Act of 1970, the

[2]Sierra Club v. Morton, 405 U.S. 727 (1972).

water pollution control bills passed by the House and Senate, and the pesticide legislation currently being considered by the Congress, all provide that citizens can bring actions directly against those who are allegedly violating federal standards. While it is still too early to determine the practical efficacy of these provisions and their relationship to federal enforcement programs, they seem to be a sound approach to the perennial problem of inadequate enforcement resources. Another significant expansion in the role of citizen litigation to protect the environment was the Supreme Court's recent declaration of a federal common-law right to abate multistate pollution.[3] This common-law action, which is designed to operate in the interstices of existing environmental statutes and be guided by their principles, should prove a valuable supplement to existing enforcement programs. Finally, the concept of an implied right of private action under antipollution statutes such as the Rivers and Harbors Act of 1899 seems capable of further development at the instance of enterprising litigants.

On the whole, then, there are numerous and growing opportunities for citizen litigation to protect the environment, and the public interest lawsuit will doubtless remain an essential facet of the total effort to reverse the destruction of our natural heritage.

But courts and lawsuits cannot do the whole job, or even the major portion of it. The drama of courtroom conflict and the exhilaration of clear-cut victories may be emotionally satisfying, but they cannot substitute for the hard work of amassing detailed factual data, organizing informed public support for environmental causes, and helping to make the necessary trade-offs and interest balancing through participation in legislatures, planning councils, and administrative agencies. If the environment is to be protected, the major effort must be made in these arenas.

---

[3]Illinois v. Milwaukee, 406 U.S. 91 (1972).