

Summer 1972

The Citizen and the Environmental Regulatory Process

William D. Ruckelshaus
Environmental Protection Agency

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Administrative Law Commons](#), and the [Environmental Law Commons](#)

Recommended Citation

Ruckelshaus, William D. (1972) "The Citizen and the Environmental Regulatory Process," *Indiana Law Journal*: Vol. 47: Iss. 4, Article 4.

Available at: <https://www.repository.law.indiana.edu/ilj/vol47/iss4/4>

This Symposium is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

THE CITIZEN AND THE ENVIRONMENTAL REGULATORY PROCESS

HON. WILLIAM D. RUCKELSHAUS†

Around the turn of the century, England's Sir Edward Grey observed that America is like a gigantic boiler: "Once the fire is lighted under it, there is no limit to the power it can generate." Environmentally, the fire has been lit. An aroused public is demanding governmental action and is initiating private projects to improve the quality of the environment. Citizens are participating in regulatory proceedings at local, state and federal levels. Both individually and collectively they have gone into the courts to battle environmentally detrimental proposals. We are, therefore, experiencing a new American Revolution, a revolution in our way of life. The era which began with the Industrial Revolution is over, and things will never be quite the same again. We are moving slowly—seemingly grudgingly at times—but inexorably into an age when social, spiritual and aesthetic values will be prized more than production and consumption.

The Environmental Protection Agency, which came into being on December 2, 1970,¹ was a major commitment to this new ethic.² It acts in the public's name to ensure that due regard is given to the environmental consequences of actions by public and private institutions. In large measure this is a regulatory role. It encompasses basic, applied, and effects research; setting and enforcing standards; monitoring effluents, and making delicate risk-benefit decisions aimed at creating the kind of environment the public desires.

Unquestionably, the public must not only be allowed to participate in environmental decision making; it should be encouraged to do so. Often the sheer weight of public opinion is sufficient to force corrections. The purpose of this article is to surface and explore ways to make citizen participation most effective.

It was once sufficient that the regulatory process produce wise and well-founded courses of action. The public, largely indifferent to regulatory activities, accepted agency actions as being for the "public convenience and necessity."³ Today, credibility gaps and cynicism make it essential

† Administrator, Environmental Protection Agency.

1. Reorg. Plan No. 3 of 1970, 84 Stat. —, 5 U.S.C.A. App. 38 (Supp. 1972).

2. See Reorg. Plan No. 3 of 1970, Message of the President, 5 U.S.C.A. App. 41 (Supp. 1972).

3. Congress has used this phrase in many of the organic acts of agencies. Its ap-

not only that decisions be wise and well-founded but also that the public know this to be true. Certitude, not faith, is *de rigueur*.

The best way to obtain this result is to involve the public actively in the regulatory process. Public participation, through the sharing of decision-making responsibilities, engenders a feeling of involvement. In addition, the citizen is given a valuable insight into the practicalities of making such decisions. A realization that most solutions require pragmatic compromises or balancing of interests usually rids the citizen of any nagging suspicion that an agency knuckled under to private interests.

In order to participate intelligently in regulatory proceedings, the citizen must first be well informed. The Administrative Conference of the United States recommended on December 7, 1971, that federal agencies provide the public with greater opportunities for meaningful participation in the regulatory process. The Conference urged agencies to go beyond the legal notice requirement (publication in the *Federal Register*) and to use the most effective means available to notify citizen groups and the public at large of pending proceedings. In addition, the Conference suggested that agencies make available to the public the materials upon which a proposed rule is based, minimize transcript charges, avoid unnecessary filing requirements and provide assistance in making all requested information available in trial-type proceedings. The Conference's recommendation is doing some good work in this problem area.⁴ EPA has already adopted many of the suggestions and is carefully studying the practicality of others.

EPA's policy is to make the fullest possible disclosure of information, without unjustifiable expense or delay, to any interested party.⁵ Whenever federal agencies propose a project which relates to the EPA Administrator's responsibilities—air or water quality, noise abatement and control, pesticide regulation, solid waste disposal, radiation criteria and standards⁶—a written proposal must be submitted to the Administrator for review.⁷ This is also true for proposed legislation and regulations. The Administrator's comments on the proposal fulfill the re-

pealing simplicity and nagging vagueness have made it one of the most troublesome phrases in administrative law.

4. Efforts by the Securities and Exchange Commission to assist in managing the environment are notable. See Sonde & Pitt, *Utilizing the Federal Securities Laws to Clear the Air! Clean the Sky! Wash the Wind!*, 16 How. L.J. 831 (1971). Regarding antitrust problems in this area, see Kirk, *The Quality of Life and the Anti Trust Laws: An EPA Perspective*, 40 ANTI TRUST L.J. 293 (1971).

5. 40 C.F.R. § 2 (1972).

6. Reorg. Plan No. 3 of 1970, § 2, 84 Stat. —, 5 U.S.C.A. App. 38 (Supp. 1972).

7. Statement on Proposed Federal Actions Affecting the Environment: Guidelines, 36 Fed. Reg. 7724 (1971) [hereinafter cited as CEQ Guidelines].

quirements of § 309 of the Clean Air Act⁸ and § 102(2)(c) of the National Environmental Policy Act⁹ (NEPA). The public may obtain copies of these comments from the Environmental Protection Agency.

Moreover, environmental impact statements filed by federal agencies, and any comments relating to them, are available to the public.¹⁰ This disclosure policy has been aggressively applied by Executive Order No. 11,514,¹¹ implementing the National Environmental Policy Act, and by guidelines issued by the Council on Environmental Quality.¹² Certain classes of confidential information are exempted by law from disclosure.¹³ However, should it be apparent that a point of issue pivots on proprietary information, it would behoove the proprietor to waive the exemption in order to avoid judicial review.

It is absolutely essential to realize that the public has a vested interest in environmental matters. Decisions regarding the continued use of pesticides, for example, are not solely within the purview of scientists. They are basic societal decisions about the kind of life people want and the risks they will accept to achieve it. Accordingly, all interested persons—farmers, environmentalists, manufacturers, consumers—must have an opportunity to be heard. EPA has guaranteed the public's right to be heard by insuring registration of comments and holding public hearings consistent with the Federal Insecticide, Fungicide and Rodenticide Act.¹⁴ On January 22, 1972, EPA published a proposed set of rules governing advisory

8. 42 U.S.C. § 1857 *et seq.* (1970).

9. 42 U.S.C. § 4332(2)(c) (1970).

10. *Id.*

11. 3 C.F.R. §§ 531, 532 (1971), 42 U.S.C. § 4321, note (1970).

12. CEQ Guidelines, *supra* note 7. The Council's revised guidelines on environmental impact statements generally require that administrative action by agencies be preceded by circulation of a draft environmental statement at least ninety days in advance and by the circulation of the final environmental statement and expert federal, state and local agency comments at least thirty days in advance.

13. 36 Fed. Reg. 23059 (1971). Records exempt from disclosure pursuant to the Freedom of Information Act, 5 U.S.C. § 552(b) (1970), are those specifically required by the executive branch to be withheld in the interests of national defense or foreign policy; those related solely to internal personnel rules and agency practices; those specifically exempted from disclosure by other statutes; trade secrets and commercial or financial information obtained from a person and privileged or confidential; interagency or intra-agency memoranda; personnel and medical files; investigatory files compiled for law enforcement purposes; records contained in or related to examination, operating, or condition reports prepared for agency use and geological information and data. See generally DEP'T OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967); Forkosch, *Freedom of Information in the United States*, 20 DEPAUL L. REV. 1 (1971); Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Uniform Regulations*, 23 AD. L. REV. 217 (1971); Symposium—*Federal Administrative Law Developments 1970—Freedom of Information*, 1971 DUKE L. REV. 164.

14. 7 U.S.C. §§ 135(b), (d) (1970).

committees and rules of practice under this Act.¹⁵ These proposed rules are consistent with decisions in *Environmental Defense Fund v. Ruckelshaus*¹⁶ and *Wellford v. Ruckelshaus*,¹⁷ which underscored the importance of bringing the public into the actual decision process and creating and preserving a record which facilitates judicial review. The proposed rules, upon adoption, not only will provide for liberal rights of intervention, presentation of evidence and proof, and preliminary conferences designed to expedite hearings by simplifying issues, but they also will broaden public hearing procedures to allow recording for subsequent radio, television or other broadcasting.

EPA shares with the states the responsibility of adopting and enforcing environmental standards.¹⁸ This relationship obviously is rather delicate. Should EPA be required to go into a state with an enforcement action it would be, in essence, declaring that the state had not done its job. EPA must insure that federal standards are applied uniformly in all states.¹⁹ Indeed, EPA could hardly ignore states which did little or nothing to enforce pollution standards to the detriment of industries located in states which stringently enforced the laws.

Perhaps public involvement is demonstrated most dramatically when states decide, on the basis of public analysis and discussion, to posit standards more stringent than the federal ones. Philosophically, the people of any state have the right to make such a decision. However, there may be some instances where an overriding national concern would militate for a uniform, national response. In such cases, the inherent right of the states must be balanced against the national need.

The Clean Air Amendments of 1970²⁰ have provided the citizen with a strong weapon in his battle to control pollution. Under § 304,²¹ citizens may sue any person, including the United States, government agencies (to the extent permitted by the Constitution) and the EPA Administrator, if he is performing a nondiscretionary duty imposed by the Act.²² Public participation in enforcement is significant because the

15. 37 Fed. Reg. 1059 (1972).

16. 439 F.2d 584 (D.C. Cir. 1971).

17. 439 F.2d 598 (D.C. Cir. 1971).

18. 42 U.S.C. § 4321 (1970).

19. Ruckelshaus, *The Citizen's Role in Environmental Protection*, 21 FED. INS. COUNSELORS Q. 60 (1971).

20. 42 U.S.C. § 1857 *et seq.* (1970).

21. 42 U.S.C. § 1857h-2 (1970).

22. Citizen actions cannot be filed if abatement actions are being prosecuted diligently in court, but any interested party may intervene.

citizen suit pressures polluters to work toward correcting problems to avoid costly litigation.²³

The Clean Air Amendments also provide for citizen participation in the development of national primary (health) and secondary (welfare) ambient air quality standards for each pollutant for which air quality criteria have been issued. Before EPA can set such standards, however, pollution sources throughout the country must be inventoried, hearings must be held and a control plan must be developed which includes necessary controls and emissions requirements for sources, land use, traffic patterns and monitoring programs. These plans must be designed to effectuate air quality standards within three years.²⁴ Public participation is crucial at this level of planning and development, for it will be here that states and communities must make economic and social decisions concerning their future growth. What citizens do today to achieve a clean air goal will be reflected in their future community.

Revitalization of the long-neglected Federal Refuse Act of 1899²⁵ provides another avenue for citizen participation.²⁶ A permit program to regulate the discharge of industrial wastes into lakes and rivers has been structured through the Act. Permits are to be issued by the Army Corps of Engineers after review by the Corps and the EPA.²⁷ This permit pro-

23. Section 304 of the Amendments [42 U.S.C. § 1857h-2 (1970)] does not authorize a "class action," but rather a private action by any citizen acting on his own behalf. See generally Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126; Miller & Borchers, *Private Lawsuits and Air Pollution Control*, 56 A.B.A.J. 465 (1970).

Section 113 of the Act authorizes EPA to issue a thirty-day notice to any violator of a state's implementation plan for national air quality standards. The Announcement by the EPA on Mar. 8, 1972 that a notice had been issued to the Delmarva Power and Light Co. in Delaware City, Delaware, for violating the Clean Air Act of 1970 marked the first formal enforcement action taken under § 113. As provided by the Act, failure to comply with the notice subjects Delmarva to an order compelling compliance, and failure to comply with the order potentially subjects the company to a fine of 25,000 dollars per day and a civil injunction in an action prosecuted by the Justice Department.

It has been estimated that by 1977 the direct national costs of controlling air pollution may reach 12.3 billion dollars annually. The value of the benefits achieved by this control will exceed 14.2 billion dollars a year. See EPA, *THE ECONOMICS OF CLEAN AIR* (1972); EPA, *PROGRESS IN THE PREVENTION AND CONTROL OF AIR POLLUTION* (1972).

24. 42 U.S.C. § 1857c-4 *et seq.* (1970). However, under certain circumstances a two-year extension may be granted for the attainment of the standards. 42 U.S.C. § 1857c-5(e) (1970).

25. Ch. 425, § 13, 30 Stat. 1152, *as amended*, 30 U.S.C. §§ 401-15 (1970).

26. The regulations promulgated for the Refuse Program are found in 36 Fed. Reg. 6564 (1971). See Rodgers, *Industrial Water Pollution and the Refuse Act: A Second for Water Quality*, 119 U. PA. L. REV. 761 (1971).

27. At this writing, an injunction prohibits the issuance of a permit unless EPA has prepared an environmental impact statement on the permit request. NEPA requires federal agencies to file environmental impact statements on any action which significantly affects the quality of the human environment. 42 U.S.C. § 4332(c) (i) (1970).

gram will rely heavily on citizen awareness and participation for sustained success. The concerned citizen can assist the program by reporting polluters who discharge without permits or violate permit terms; by broadly assisting state and local authorities in submitting evidence; by working for better water quality standards, especially since permits will be conditioned to meet applicable standards; expressing opinions at public forums and through the news media and by joining organized citizen groups for a unified bloc of support in furthering environmental goals.²⁸

Again, the public hearing is one of the best ways for the citizen to participate in the regulatory process. It not only supplies the regulator with the evidence and views of the citizen but is an excellent educational experience for the citizen himself. Public hearings can make it possible for complex, and often controversial, programs to operate in an atmosphere of understanding, trust and cooperation.²⁹ For maximum results, the public must have adequate notice of hearing schedules, and the hearings themselves must be conducted with complete candor.

The Administrative Procedure Act³⁰ also plays a vital role in facilitating the citizen's participation in regulatory matters. An agency is generally required to give advance notice of proposed rulemaking in the *Federal Register* and to allow from thirty to 120 days for interested parties to comment on the agency's proposal. These comments must be considered before final action is taken. Any individual may petition for the issuance, amendment or repeal of a rule.³¹ Agency failure to act on such a petition has been held an "agency action" reviewable in court.³²

The cause of citizen participation at an early level of decision making was also greatly advanced by the Internal Revenue Service's decision confirming the nonprofit tax status of public interest litigating groups³³ and and by the landmark decision by Judge (now Chief Justice) Burger in *Office of Communication of United Church of Christ v. FCC*³⁴ stressing

EPA and the Council on Environmental Quality have asked Congress to amend the Act to exempt EPA from the impact statement requirement.

28. Among the publications available to interested citizens are: SUBCOMM. ON CONSERVATION & NATURAL RESOURCES OF THE COMMON GOV'T OP'NS, 91ST CONG., 2D SESS., OUTLINE OF CITIZEN ACTION TO ASSIST THE FEDERAL GOVERNMENT TO ENFORCE THE 1899 REFUSE ACT (Comm. Print 1970); SUBCOMM. ON CONSERVATION & NATURAL RESOURCES OF THE COMM. ON GOV'T OP'NS, 91ST CONG., 2D SESS., GUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTERS OF THE NATION'S WATERWAYS (Comm. Print 1970). See generally Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734 (1970).

29. 36 Fed. Reg. 6564 (1971); 36 Fed. Reg. 8563 (1971).

30. 5 U.S.C. §§ 551-59, 701-06 (1970).

31. 5 U.S.C. § 553(e) (1970).

32. 5 U.S.C. § 551(13) (1970).

33. Rev. Proc. 71-39, 1971 INT. REV. BULL. No. 48, at 30.

34. 359 F.2d 994 (D.C. Cir. 1966).

the need for federal agencies to recognize public or noneconomic interest group values in their proceedings.

In summary, a system of opportunity for citizen participation in federal environmental decisions is providing de facto what has been termed "the most advanced Environmental Ombudsman system in the world."³⁵ It is, therefore, up to the citizens to avail themselves of these constructive opportunities.

The courts have repeatedly stated that they are institutionally ill-equipped to answer technical and political questions on environmental management. The New York Court of Appeals recently observed:

[I]t seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. . . .³⁶

In *Ohio v. Wyandotte Chemical Corp.*,³⁷ the Supreme Court reached a similar conclusion. Mr. Justice Harlan, writing for the majority, stated:

[T]his court has found even the simplest of interstate pollution cases an extremely awkward vehicle to manage. . . . [T]his case is an extraordinarily complex one. . . . Its successful resolution would require primarily skills of fact finding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which the Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity. . . .³⁸

In order to attack pollution effectively, three basic strategies must

35. Statement of Timothy Atkeson, General Counsel, Council on Environmental Quality, before the Subcomm. on Merchant Marine & Fisheries of the House Comm. on Com., June 9, 1971; cf., Note, *Enforcing Environmental Policy: The Environmental Ombudsman*, 56 CORNELL L.Q. 847 (1971).

36. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 879, 309 N.Y.S.2d 312 (1970).

37. 401 U.S. 493 (1971). See generally K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, SUPPLEMENT § 22.00 et seq. (1970).

38. 401 U.S. at 504-05.

be developed: careful policy-making by the Congress; implementation of congressional policies by agencies capable of sustained development; and application by agencies of the necessary technical expertise. In this way the balancing of environmental values against other economic and social values will be in the hands of representatives ultimately responsible to the wishes and directives of the electorate. Wider use and development of citizen suit provisions, such as listed in the Clean Air Act amendments, would complement federal and state enforcement efforts without displacing the policy-making functions of the legislative and executive branches.

It has been argued that administrative agencies are sluggish or unresponsive in executing congressional policy.³⁹ Yet, more positive results can be obtained by legislative reform of the outmoded administrative procedures and by the election and appointment of more responsible administrators than by forcing environmental problems into the courts.⁴⁰

The legislative and executive branches possess superior institutional advantages—including responsiveness to the electorate's value preferences, broad information gathering capacity, specialized expertise and capacity for sustained follow-through—that make them generally better equipped than the judiciary to make and implement basic environmental policy decisions. Congress can, for example, impose statutory deadlines for promulgating regulatory standards—as was done in the Clean Air Amendments of 1970—and authorize citizen suits to enforce deadlines. The Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe*⁴¹ clearly indicates that the courts will diligently apply procedural safeguards designed to protect federal environmental policies.

The Environmental Protection Agency is not unique in its efforts to enhance the regulatory process through creative citizen involvement. As has been shown, the federal system itself provides for as much citizen input as possible, particularly in environmental matters. EPA, being a new agency, is better able to try new approaches to citizen participation. And, as is readily apparent from the news media, it can also claim a high level of public interest in its activities. To maintain its momentum, however, EPA must continue to translate public interest into effective action programs.

39. J. SAX, DEFENDING THE ENVIRONMENT (1970). See generally Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069 (1971); Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

40. See Mr. Chief Justice Burger's address, *The State of the Judiciary—1970*, 56 A.B.A.J. 929 (1970). He observes that the federal court system has a limited purpose and should not be burdened with all of the problems of pollution. Local problems should be handled by state courts familiar with local conditions. *Id.* at 932-33.

41. 401 U.S. 402 (1971).

Society owes a debt to those who sounded the environmental call to action. They are, for the most part, sincere, dedicated and fair-minded advocates of environmental responsibility. As in any movement, there are some whose zeal overreaches facts, but the environmental movement is largely a coalition of citizens who are out to save themselves from the bondage of Babylon and not to bring down the walls of Jericho. It is as wrong to write off environmental groups as extreme and hysterical as it is to view industry as a monolith dragging its feet to preserve profit. Portraying the environmental issue as "polluters vs. the people" or "bird-and-bunny people vs. defenders of the American way" leads to polarization, not progress.

The real significance of the environmental debate lies not in the specifics or disposition of particular cases but in the fact that the debate itself occurred. In a democracy the basic value judgments on the quality of life rest with the citizen. In environmental matters, the citizen can be heard and is acting effectively.