

COMPARISON OF PUBLIC PARTICIPATION OF DECISION MAKING ON
ENVIRONMENTAL ENFORCEMENT BETWEEN JAPAN AND UNITED STATES

-- ENVIRONMENTAL ENFORCEMENT AND CITIZEN PARTICIPATION

IN ENVIRONMENTAL DECISION MAKING IN THE UNITED STATES --

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In the course of my research on Japanese environmental law and policy, I have noted several areas where the Japanese and American approaches to protecting human health and the environment differ significantly. For example, Japan has a comprehensive scheme for compensating pollution victims⁽¹⁾ while the United States relies primarily on tort litigation to resolve these damage suits and has no administrative system for providing pollution victim compensation.⁽²⁾ On the other hand, the U.S. recently passed two laws dealing specifically with the problems caused by unsafe hazardous waste disposal practices⁽³⁾ and has developed an extensive program regulating hazardous waste from its creation to its ultimate disposal. While Japan has provisions in several environmental statutes which address hazardous waste management⁽⁴⁾, hazardous waste regulation is somewhat fragmented and limited in scope.

This article will discuss two other areas of difference between programs of environmental regulation in the U.S. and Japan. These two areas are: 1) environmental law enforcement and 2) citizen participation in development and implementation of environmental law and policy.

ENVIRONMENTAL LAW ENFORCEMENT

At a recent speech before the National Association of Manufacturers, Alvin Alm, Deputy Administrator of the U.S. Environmental Protection Agency (hereinafter "EPA" or the "Agency"), summarized the EPA's current enforcement program:

"Although enforcement is a key instrument of environmental policy, it is but one tool among many. As a matter of principle and of pragmatism, the Agency will apply a number of tools to the task of achieving compliance.

*The views expressed in this article are those of the author and do not represent the official position of the U.S. Environmental Protection Agency.

First, we will assure that standards we impose are achievable, and will clearly inform those subject to them what is required to achieve compliance. Second, in cooperation with the states, we will monitor performance by industry and other sectors in attaining compliance. Finally, we will--in an equitable and reasonable manner--utilize the wide range of remedies available to us. We will initiate measured enforcement actions as necessary to remove any economic incentive for noncompliance and by doing so will demonstrate to the complying majority that good citizenship is also good business." (5)

The offices of enforcement and compliance monitoring, which consist of lawyers and technical personnel, are responsible for carrying out the enforcement activities of the EPA. These activities include: 1) educating members of the regulated community about the requirements to which they are subject, 2) persuading affected parties that compliance with environmental requirements is in their own best interest, 3) providing technical assistance concerning pollution control abatement and control, 4) negotiating schedules leading to compliance where a company is in violation of environmental laws, and where these activities do not result in prompt and complete compliance, or are inappropriate to the circumstances of the case, the Agency takes judicial action. In doing this, EPA seeks to ensure that its informal enforcement remedies will be credible and effective by demonstrating its willingness to use the tool of judicial enforcement to achieve compliance with environmental standards.

EPA's office of enforcement is divided into civil and criminal programs. The civil enforcement program uses a number of legal tools in enforcing against violators of environmental laws. These tools include: warning letters, ^{administrative order} civil penalties, revocation or

Administrative Orders,

denial of permits, and injunctive authority. EPA's enforcement authority comes from the statutes it is charged with implementing. For example, several sections of the Resource Conservation and Recovery Act grant EPA ^{authority to} monitor compliance and take enforcement

authority to

action when violations are discovered. RCRA §6927 which gives EPA inspection authority states in part: "For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, such officers, employees or representatives are authorized--

- (1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;
- (2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes." (6)

RCRA §6928 entitled "Federal Enforcement" authorizes administrative orders and civil penalties. (7) RCRA §6973 grants EPA authority to request an injunction "upon receipt of evidence that the handling, storage, treatment, transportation or disposal of any solid waste

or hazardous waste may present an imminent and substantial endangerment to health or the environment...to immediately restrain any person contributing to such handling, storage, treatment, transportation, or disposal or to take such other action as may be necessary. (7)

EPA's criminal enforcement program has the responsibility for seeking criminal convictions of persons who knowingly violate environmental laws and regulations. Criminal conviction under the environmental laws can lead to the imposition of criminal penalties and imprisonment. For example, RCRA §6928 provides for fines of up to \$50,000 per day and imprisonment for up to two years for knowing violations of the hazardous waste regulations. (8)

The enforcement program for RCRA serves to illustrate the difference between EPA's civil and criminal enforcement actions. Under RCRA, persons who generate, store, treat, transport or dispose of hazardous waste must obey regulations concerning each of these activities. If a hazardous waste generator sent his waste to a facility without an EPA disposal permit, he would be strictly liable under RCRA's civil enforcement provisions regardless of whether his action was negligent or intentional. On the other hand, the generator could only be convicted under RCRA's criminal enforcement provisions if he knew that the disposal facility was not permitted and sent his waste there in spite of that knowledge.

EPA's criminal enforcement program was formed in October 1982, and consists of criminal attorneys and special agents who investigate criminal violations of environmental laws in such areas as toxic waste dumping. Recently, the criminal investigators were given police powers, including the right to carry guns, conduct searches and make arrests. (9) Agents in EPA's criminal program are drawn from agencies such as the Federal Bureau of Investigation, the Bureau of Alcohol, Tobacco, and Firearms, as well as metropolitan police forces. About one-half of all criminal investigations involve violations of toxic waste transportation and disposal laws but the agents also investigate criminal violations of other environmental statutes including those concerning pesticides and air quality.

Criminal enforcement cases are handled by attorneys in EPA's national headquarters in Washington, D.C. and in its ten regional offices. The special agents who serve as criminal investigators work at the National Enforcement Investigation Center in Denver, Colorado, along with engineers, hydrologists, and chemists. The purpose of the National Enforcement Investigation Center (hereinafter "NEIC") is to gather evidence which can be used to enforce all the laws that EPA administers. (10)

The structure and function of American environmental enforcement programs are based on the view of environmental officials that there is a need for an active, aggressive enforcement program in the U.S. As F. Henry Habicht, II, Assistant Attorney General, Lands and Natural Resources Division, U.S. Department of Justice recently stated: "the evidence, unfortunately, demonstrates that without an active enforcement program reliance upon voluntary action alone will not result in compliance with environmental statutes." (11)

CITIZEN PARTICIPATION IN ENVIRONMENTAL DECISIONMAKING

U.S. laws granting citizens the right to participate in environmental decisionmaking take many forms. In some cases, these laws allow citizens access to government information. Other laws grant citizens the right to sue the government or violators of federal environmental laws to require compliance. Still others provide financial assistance for court costs and attorney fees when a citizen has successfully challenged government action or inaction. All of these provisions are premised on the notions that the government will behave more responsibly if it knows someone is watching and that the citizens of a democracy have the right to participate in government decisionmaking.

In this article, legal authorities granting U.S. citizens, and in some cases, U.S. residents, the right to participate in federal government actions affecting human health and the environment are discussed.

The National Environmental Policy Act

The National Environmental Policy Act of 1969 (hereinafter "NEPA"),⁽¹³⁾ the first in a series of major environmental laws enacted in the 1970's, established a national policy for the environment. Title I of NEPA declares that "it is the continuing policy of the federal government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means and measures...to create and maintain conditions under which man and nature can exist in productive harmony..."⁽¹⁴⁾ To aid in implementation of this policy, the Congress directed that all federal agencies include in proposals for major federal actions significantly affecting the quality of the human environment, a detailed statement on:

- 1) the environmental impact of the proposed action,
- 2) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- 3) alternatives to the proposed action,
- 4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- 5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.⁽¹⁵⁾

If a federal agency proposes to undertake a major project significantly affecting the environment and either fails to prepare the statement or prepares an inadequate statement, a citizen may sue the agency to require it to do so. Since the enactment of NEPA, the most frequent allegation in lawsuits based on the statute is that an agency failed to prepare an environmental impact statement for a major federal action which would significantly affect the environment. Allegations that the statement was inadequate were the next most frequent.⁽¹⁶⁾

Administrative Procedure Act

The Administrative Procedure Act⁽¹⁷⁾ sets forth ^{operating} procedures for federal agencies, including rules on promulgation of regulations, adjudication of disputes with the agency in an administrative setting, and holding hearings. The APA also grants persons suffering a legal wrong because of an agency action the right to sue the agency⁽¹⁸⁾ and allows a person to petition⁽¹⁹⁾ for the issuance, amendment, or repeal of a regulation.

Perhaps most importantly, the APA requires agencies to publish notice of proposed rulemaking in the Federal Register stating the time, place, nature of the rulemaking, and a description of the subjects and issues involved. After this notice, the agency must give interested persons an opportunity to participate in the rule-making through submission of written data, views or arguments.⁽²⁰⁾ If the statute which is the legal authority for the rulemaking requires a hearing and a decision concerning the contents of the rule to be made on the basis of the agency record, the APA determines the procedures for the hearing.

Freedom of Information Act

The Freedom of Information Act⁽²¹⁾ requires federal government agencies to make available to any person all staff opinions, including concurring and dissenting opinions, made during adjudication of a case, statements of policy and interpretations which have been adopted by the agency^{and} are not published in the Federal Register, and administrative staff manuals that affect a member of the public. In addition, an agency must comply with a request for any record which is not explicitly exempted from disclosure if the requesting party reasonably describes the records (so the agency knows what is being requested) and follows the rules concerning the form of the request.

Government in the Sunshine Act

The Government in the Sunshine Act⁽²²⁾ requires federal agencies to make a public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Meetings can be closed to the public, but the vote of the members requesting that the meeting be closed must be taken and the reasons for closing the meeting must be one of those ^{reasons} listed in the law.

Citizen Suit Provisions

The tools available for enforcing federal environmental statutes in the 1960's were both burdensome and lacking in effectiveness. As Americans grew more interested in environmental protection, their awareness of the lack of effective enforcement tools and inadequate federal and state enforcement programs also increased. This awareness and the resulting dissatisfaction led directly to the improvement of federal enforcement remedies and the creation of citizen suit provisions.⁽²³⁾

Citizen suits were created as an answer to the government's failure to enforce, whether this failure was caused by a lack of desire or a lack of ability and resources. The U.S. Congress believed that the availability of these suits would provide an incentive for government enforcement, and if the incentive were not effective, it would provide an alternative means of enforcement.

The first citizen suit provision was §7604 of the Clean Air Act.⁽²⁴⁾ All environmental statutes⁽²⁵⁾ except the Federal Insecticide, Fungicide, and Rodenticide Act⁽²⁶⁾ have citizen suit provisions modeled after the Clean Air Act provision. The provisions authorize "any person" to commence suit to enforce the requirements of the laws against "any person" alleged to violate them or to require the government to perform a mandatory duty under the laws. No lawsuit may be commenced unless 60 days notice has been given to EPA (or the State, where the state has the primary responsibility for implementation) and the alleged violator. There are exceptions to the notice requirements where violations of hazardous pollutant or new source standards are alleged. A lawsuit may not be brought if EPA (or the state) has commenced and is diligently prosecuting an enforcement action to require compliance. The person giving notice has the right to intervene in any government enforcement action in federal court.

¶ Although the citizen suit provision was designed to allow private enforcement of the environmental law against polluting violators, its most famous uses have been in cases against EPA for its failures to implement the laws in a timely and complete manner. EPA programs to implement the Clean Water Act and the Clean Air Act have been greatly influenced by lawsuits brought by national environmental organizations.

The citizen suit provisions also allow the court to award costs of bringing the suit, including reasonable attorney fees and expert witness fees, to any party. To discourage unjustified litigation brought to obtain the costs of the lawsuit, the provisions allow award of these costs to any party "as appropriate".⁽²⁷⁾

The overall effect of these provisions is difficult to judge. However, a former head of EPA's enforcement program, Jeffrey G. Miller, recently commented, "Indeed, it appears that during the present dearth of government enforcement, private enforcement of traditional environmental laws is more frequent than EPA enforcement...citizen suits have become more than an occasionally used safety valve."

Under the Clean Water Act they are now the dominantly used judicial enforcement mechanism."⁽²⁸⁾

Equal Access to Justice Act

In the 1970's, many businesspeople testifying at Congressional hearings told of serious financial setbacks, including bankruptcy, caused by government prosecutions which were eventually found to be unjustified. In 1980, Congress responded to these concerns by passing the Equal Access to Justice Act.⁽²⁹⁾ This act allows certain prevailing parties in suits by the U.S. Government to recovery attorney fees from the government in civil and administrative proceedings. To avoid payment of these costs the government must show that its position was substantially justified.

CONCLUSION

The U. S. Congress has granted federal agencies, particularly EPA, strong enforcement powers. These grants of authority reflect the view of American lawmakers that voluntary compliance will not be achieved without the threat of judicial action. At the same time, Congress granted private persons the right to enforce environmental laws and require certain government actions. The "citizen suit" provisions have enabled private persons to exert great influence over the development of environmental standards and regulations and to take an active role in the enforcement of environmental laws.

FOOTNOTES

¹ Pollution-Related Health Damage Compensation Law, Law No. 111, October 5, 1973.

² For a further discussion of this problem, see: Campbell, Laura; "Compensation of Victims of Exposure to Toxic Substances in the United States"; Journal of Research on Environmental Disruption; Volume 13, No.4: Spring 1984

³ These laws are: The Resource Conservation and Recovery Act, 42 U.S.C. §§6901-6987; and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9657.

⁴ The most important Japanese laws concerning hazardous waste disposal are: The Waste Disposal and Public Cleansing Law, Law No.43, 1983; and The Marine Pollution Prevention Law, Law No. 41, 1980.

⁵ Address of the Honorable Alvin L. Alm, Deputy Assistant Administrator, U.S.E.P.A., before the National Association of Manufacturers, Environmental Quality Committee, New York City, October 26, 1983.

- ⁶ 42 U.S.C. §6927(a).
- ⁷ 42 U.S.C. §6928(a)-(c), (g).
- ⁸ 42 U.S.C. §69~~7~~3(a).
- ⁹ 42 U.S.C. §6928(d). The criminal penalties which may be imposed and the length of imprisonment which may be ordered under this section vary depending on the nature of the criminal act.
- ¹⁰ "EPA Criminal Unit Gets Police Powers with Right to Arms: Move to Grant Special Agents Law-Enforcement Rights Comes After Long Debate"; Meier, Barry; The Wall Street Journal ; May 3, 1984; p.12
- ¹¹ For a more detailed discussion of the National Enforcement Investigation Center's organization and function, see: "EPA Sleuths on the Trail"; Tejada, Susan; EPA Journal; p. 12; March 1984.
- ¹² "Justice Cracks Down on Environmental Crimes"; Habicht, F. Henry, II; EPA Journal; p. 16; March 1984.
- ¹³ The National Environmental Policy Act, 42 U.S.C. §§4321-4361.
- ¹⁴ NEPA.
- ¹⁵ NEPA.
- ¹⁶ "Environmental Review Process (NEPA)"; Environmental Quality 1982; 13th Annual Report of the Council on Environmental Quality ; U.S. Government Printing Office.
- ¹⁷ The Administrative Procedure Act, 5 U.S.C. §§500-576.
- ¹⁸ 5 U.S.C. §702.
- ¹⁹ 5 U.S.C. §553(e).
- ²⁰ 5 U.S.C. §553(a).
- ²¹ The Freedom of Information Act, 5 U.S.C. §552. The Freedom of Information Act is actually part of the Administrative Procedure Act, but it is commonly referred to separately.

- 22 The Government in the Sunshine Act, 5 U.S.C. §552b. The Government in the Sunshine Act is actually part of the Administrative Procedure Act, but it is commonly referred to separately.
- 23 For an excellent and detailed discussion of the development and use of citizen suit provisions, see: Miller, Jeffrey G.; "Private Enforcement of Federal Pollution Control Laws: Part I"; Environmental Law Reporter; October 1983; 13, ELR 10309
- 24 The Clean Air Act, 42 U.S.C. §7604.
- 25 The Clean Water Act, 33 U.S.C. §1365; Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §1415(g); Noise Control Act, 42 U.S.C. §4911; Endangered Species Act, 16 U.S.C. §1540(g); Deepwater Port Act, 33 U.S.C. 1515; Resource Conservation and Recovery Act, 42 U.S.C. §6972; Toxic Substances Control Act, 15 U.S.C. §2619; Safe Drinking Water Act, 42 U.S.C. §300j-8; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1270; and Outer Continental Shelf Lands Act, 43 U.S.C. §1349(a).
- 26 The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§135-136y. It is not clear why FIFRA is the only environmental law without a citizen suit provision but the most likely explanation lies in the fact that all other environmental statutes are under the jurisdiction of the Senate Environment and Public Works Committee and the House Commerce and Transportation Committee. FIFRA is under the jurisdiction of the more conservative Agriculture Committees in both the Senate and the House of Representatives.
- 27 A recent Supreme Court decision in Ruckelshaus v. Sierra Club found that it is never "appropriate" for a court to award attorneys fees to a party that has lost on the merits. See: "The Supreme Court Limits Fee Awards in Unsuccessful Environmental Suits"; Environmental Law Reporter; September 1983; 13 ELR 10244. Also see case at 13, ELR 20664
- 28 Miller, Jeffrey G.; "Private Enforcement of Federal Pollution Control Laws"; 13 ELR 10309.
- 29 The Equal Access to Justice Act, 28 U.S.C. §2412.