

INTRODUCTION

Crime Without Punishment

Common criminals – such as burglars, drug dealers, kidnappers and bank robbers – frequently find themselves behind bars for their crimes. But one group of lawbreakers – corporate polluters – rarely see the inside of a prison cell, although their crimes pose a greater threat to American lives, health and property than all the rest. Why? Because unlike ordinary criminals, mega-polluters have the wealth and political clout to elect the following:

- Presidents who appoint polluter-friendly administrators to head up the country's pollution control agencies;
- District attorneys who rarely prosecute them for their crimes;
- Sympathetic judges who give them little more than “a slap on the wrist”; and
- Lawmakers who will craft loopholes to make most of their offenses legal.

These powerful polluters routinely disgorge deadly toxins into our air, water and land. Every year their poisons kill more Americans than all murderers combined.¹ Yet these corporate criminals are seldom prosecuted, rarely fined and almost never jailed. For example:

- Air pollution claims at least 70,000 American lives annually – as many as breast and prostate cancer combined – 30,000 more than all traffic fatalities and 54,000 more than all homicides.²
- Based on EPA data, every year between 5,500 and 9,000 Americans have their lives shortened by air pollution from power plants that the Department of Justice has taken to court for violating the Clean Air

¹ In a typical year, more than 10,000 murders are committed in the United States. In 2001, 15,980 Americans were murdered. Air pollution alone claims about 70,000 American lives annually. *International Encyclopedia of Justice Studies: Chapter 4 – Survey of Criminal Justice*. http://www.iejs.com/Survey_of_CJ/CH04.htm. Fischlowitz-Roberts, Bernie. *Air Pollution Fatalities Now Exceed Traffic Fatalities by 3 to 1*, Earth Policy Institute (September 17, 2002). <http://www.earth-policy.org/Updates/Update17.htm>.

² Fischlowitz-Roberts, Bernie (September 17, 2002).

2 *Toxic Loopholes: Failures and Future Prospects for Environmental Law*

Act. These plants trigger between 107,000 and 170,000 asthma attacks annually.³

- Yet, according to the EPA's own records, dozens of the country's biggest corporate air polluters – including Ford, General Motors, Shell and Exxon – habitually violate the Clean Air Act by spewing tons of toxins into the air without paying a single penny in fines.⁴

After teaching environmental law for nearly two decades, I have come to realize that there are some serious omissions in the available textbooks on this subject. Generally, environmental law texts do a fine job of presenting the major federal environmental statutes. Some do a decent job of describing the nature and seriousness of the environmental problems these laws are meant to address. However, even the best texts rarely focus on the actual enforcement and effectiveness of our environmental laws, and none have carefully addressed the questions:

- How well are our major environmental laws working?
- What prevents them from achieving their stated goals?

These two questions cannot be answered without exposing the reader to the seamy backstage drama of influence peddling, double-dealing, institutional corruption and public deception that undermines our environmental laws and endangers the health of the people and the planet they are supposed to protect. Yet even the best texts either ignore this pernicious political drama or minimize its insidious impact by sanitizing it under the innocuous label of “policy-making.”

To improve our country's environmental law enforcement system, these two questions must be answered. In addition, these questions raise an even more vexing question regarding the possible futility of fundamentally “improving” this system. *Can any government, even one as wealthy and powerful as the United States, hope to bring our fossil fuel-powered, growth- and profit-driven, increasingly globalized economy into a sustainable, healthy relationship with the people, creatures and ecosystems of our planet?*

As we examine each of the major environmental statutes in the following chapters, the astute reader will notice an emerging pattern. All of these laws are under constant assault – directly and indirectly, openly and covertly – by the most powerful polluters they attempt to regulate. This ambush begins “in the womb,” when these embryonic laws are still bills passing through Congress. Here, before they were born, even our most promising environmental bills were deformed and crippled by toxic loopholes created by politicians seeking to please the powerful polluting industries that lavish them with favors and fund their campaigns.

³ Clean Air Task Force. *The Power to Kill: Death & Disease from Power Plants Charged with Violating the Clean Air Act* (July 2001). <http://cta.policy.net/proactive/newsroom/release.html?id=20720>.

⁴ Coequyt, John, Richard Wiles, & Christopher Campbell. *Above the Law: How the Government Lets Major Air Polluters off the Hook*. (Environmental Working Group: May 1999).

Once born, these weakened laws are rendered into even weaker rules and regulations by a government agency whose mission of environmental protection is seriously compromised by its illicit relationship with the very polluting industries that lobbied against these laws in Congress. Industry lawyers intensively lobby the EPA to further dilute and delay the rule-making process. Often, they receive a sympathetic hearing from EPA officials who hope to one day become high-paid executives for the very polluting firms they now regulate. This “revolving door” has become so incestuous that some environmental groups have had to specialize in suing the EPA to secure court-imposed deadlines that will force the agency to promulgate and enforce its own regulations. Yet, despite this legal pressure to uphold the law, the EPA’s history of enforcement remains shamefully defective.

Success in the courts requires a judicial system not predisposed to favor corporate property rights over environmental protection. Unfortunately, because property law has a long and prominent place in American jurisprudence and environmental laws are relatively new, it has been a steep uphill battle to persuade judges to take environmental laws seriously. To make matters worse, because most states elect their judges, candidates for the bench often find themselves taking large campaign contributions from the same polluting firms they face in court. In fact, many of the worst polluters have made it part of their overall strategy to gain as much influence over the courts as possible to avoid taking responsibility for their crimes. In the words of one pro-business lobbyist:

The business community woke up in the late 1980s and realized that there are three legs to the government stool – the executive branch, the judicial branch and the legislative branch. We were playing quite well for over a decade in two of those three and decided that the judicial branch are the arbitrators of the final interpretation of all rules and regulations that are passed by the legislature. Consequently, from ‘89 to the present, [we] got involved in statewide appellate court races, most of those being supreme court races . . . the whole idea . . . is it’s easier to lobby your friends than your enemies.⁵

The arduous process of environmental lawmaking, enforcement and adjudication could be dramatically improved by a presidential administration seriously committed to cracking down on criminal polluters and protecting our natural resources. A president of this caliber could champion a green legislative agenda, steadfastly oppose efforts to insert toxic loopholes, increase the budget of the EPA, eliminate its “revolving door” with industry and appoint agency chiefs and federal judges committed to strictly enforcing our environmental laws. But this has never been the case. Those presidents who have advocated mildly pro-environmental policies have found themselves pilloried by the corporate media, industry and their political rivals as big government liberals whose anti-business policies will ruin the economy. Thus, no

⁵ *Frontline*. “Justice for Sale.” (PBS: November 23, 1999). Read Bill Moyers’ interview with Bill Cook, President of Pennsylvanians for Effective Government, a business lobby that raises money for judicial candidates. <http://www.pbs.org/wgbh/pages/frontline/shows/justice/etc/script.html>, <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/cook.html>.

administration – no matter how green its rhetoric – has ever made environmental protection a top priority.

Given the relatively low level of public knowledge, concern and activism around the environment, it would be political suicide for any president to directly confront the nation's major polluters. Only large numbers of active, concerned citizens can combat the power of money to pollute democracy. Without this broad base of organized popular support, the ultimate fate of any dedicated green politician is media invisibility coupled with ridicule and character assassination by his or her well-heeled adversaries.

This brings us back to the two questions consistently ignored by environmental policy and law texts. To transform public ignorance and apathy into the kind of citizen movement necessary to make politicians crack down on this mounting toxic crime wave, these two questions must be confronted:

- How well are our major environmental laws working?
- What prevents them from achieving their stated goals?

It is not the intent of this book to examine the effectiveness of every environmental statute on the books. Instead, attention will be focused on the central flaws in our nation's most renowned air, water, toxic control and hazardous waste cleanup statutes and the EPA's nominal record of enforcement. Because the EPA is not the only government agency charged with environmental protection, one chapter will examine the Department of Interior's effort to implement the Endangered Species Act. In doing so, it will become obvious that the nation's failure to protect the environment cannot be attributed to the EPA alone. Global environmental protection will be examined in Chapter 7. By comparing the international community's successful ratification of an ozone treaty with the faltering effort to craft an effective climate agreement, this chapter highlights the three major obstacles to negotiating environmental treaties and assesses the veracity of four rival theories of global cooperation.

Finally, the conclusion assesses the prospects for using laws and international treaties to achieve environmental protection and ecological sustainability within the confines of a factious domestic and global political economy dedicated to maximize economic growth and national power.

I

The EPA – Policing or Protecting Polluters?

Before 1970, America's few environmental laws were hardly worth the trees sacrificed to write them, and no single agency was charged with their enforcement. Over the ensuing decade, this situation changed. Congress passed 27 major environmental laws, and President Nixon created a single federal agency – the Environmental Protection Agency (EPA) – whose sole mission was environmental protection. This dramatic government action was a direct response to widespread public concern and unrelenting, intrepid grassroots activism.

Ignited by media coverage of several sensational environmental calamities and the obviously deteriorating condition of the country's land, air and water, public alarm was adeptly mobilized by a growing army of environmental activists schooled in the civil rights, women's liberation and anti-war movements. Groups such as Greenpeace, Friends of the Earth and the Sierra Club channeled public concern into a powerful ecology movement that compelled politicians to elevate environmental protection to a front-burner issue for the first time in American history.

The ecology movement insisted that the federal government must shoulder responsibility for defending the environment. Environmentalists argued that because pollution ignored state boundaries, and individual states lacked the resources and political will to confront powerful polluters, it was primarily Washington's job to police the polluters and set nationwide goals and standards for all states to follow. In addition, they believed that national standards would prevent a "race-to-the-bottom" between states hoping to attract business by offering the most lax environmental standards.

Once the EPA was established, and tough-sounding laws were passed, many Americans let down their guard. While environmental concern remained high, people figured they could rest easy now that the federal pollution police were watching out for their safety. So when industry continued to discreetly discharge noxious toxins into communities around the country, most folks barely noticed. They figured *if it were dangerous, the government wouldn't allow it*. The environmental movement lost steam. The established environmental organizations became content with beltway lobbying and direct mail memberships. Many people stopped asking questions, speaking out or taking action.

But their complacency proved to be premature. Soon communities, towns and neighborhoods across the country, from Anniston (Alabama) and Times Beach

6 *Toxic Loopholes: Failures and Future Prospects for Environmental Law*

(Missouri) to Calvert City (Kentucky) and Overland Park (Colorado), discovered that industrial polluters, hazardous waste dumps and toxic waste incinerators had poisoned them. Their faith in government was shaken. However, once the truth was out, they figured the EPA would come to their defense, put a stop to the pollution, clean up their neighborhoods and bring the polluters to justice.

To their shock and dismay, EPA officials were either condescending and indifferent or openly antagonistic to their pleas for help and justice. Neighborhood associations that believed they could count on the EPA to investigate and prosecute criminal polluters were stunned to realize they had to gather their own health and environmental data and hire their own experts, while agency officials concealed or denied them access to the same information collected at taxpayers' expense.

Often, community groups had to raise money and hire lawyers to sue the EPA into action. Once in court, they found themselves up against a battery of government attorneys paid for with their tax dollars. Even when compelled into action by judges or bad publicity, it was very unusual for the EPA to crack down on environmental lawbreakers. Stiff punishments were seldom imposed on corporate polluters, and they were rarely forced to adequately decontaminate the communities they poisoned or redress the suffering they caused.

The aftermath of their harrowing ordeal left many victims of environmental crime disillusioned, outraged and baffled. Why had the agency whose mission is environmental protection treated *them* like adversaries instead of the polluters? Whose side was the law on, anyway? A brief review of the EPA's history sheds a revealing light on these questions.

By the end of the 1970s, the environmental movement was dizzy with success. Ecology activists were elated; finally, the federal government had assumed primary responsibility for the condition of the country's environment. President Nixon and Congress had empowered a specific agency with the authority to enforce a new and growing arsenal of tough-talking environmental laws for the first time in history. This groundbreaking achievement fundamentally elevated the status and political nexus of environmental policy-making. The country's environmental powers were now amassed under a single agency instead of being diluted and dispersed across 50 states and a gaggle of disparate bureaucracies.¹

Did Nixon's historic decision to consolidate environmental authority under a single agency mean he was a champion of the environment? Hardly. For Nixon, creating the EPA was little more than a political makeover devised by his chief

¹ The EPA was cobbled together from programs previously administered by three departments, three bureaus, three agencies, two councils, one commission, one service and several small offices. The Federal Water Quality Administration and all of its pesticide programs were moved from the Interior Department to the EPA. From the Department of Health Education and Welfare, the EPA assumed control over the National Air Pollution Control Administration, the Food & Drug Administration's pesticide research, the Bureau of Solid Waste Management, the Bureau of Water Hygiene and parts of the Bureau of Radiological Health. The Department of Agriculture's Research Service relinquished its pesticide activities to the EPA, while the Atomic Energy Commission and the Federal Radiation Council gave up their radiation criteria and standards programs. Also, the Council on Environmental Quality, created early in 1970, transferred its ecological research to the new agency.

domestic advisor, John Erlichman, to lift his sagging environmental reputation before the upcoming election. By 1970, protecting nature had become a make-or-break “hot button” issue. In April, 20 million people participated in the first Earth Day; *Time* magazine named the environment “Issue of the Year”; and its sister publication, *Life*, designated the 1970s “The Environmental Decade.”

At the time, Nixon’s primary rival was the front-running Democratic contender for the presidential nomination, Senator Edmond Muskie from Maine. An enthusiastic proponent of Earth Day, Muskie was known on the hill as “Mr. Clean” for his strong environmental record. As chairman of the Senate Public Works Committee on Air and Water Pollution, Muskie sponsored some of nation’s toughest new environmental laws, including the newly revised Clean Air Act (CAA).

Erlichman warned Nixon that unless he quickly revamped his dreary environmental image, the issue could sink any prospects for reelection. Referring to recommendations offered by a recent presidential report,² Erlichman told the president:

You know, there’s this idea in it. Pretty easy, sounds like. You take a bunch of water pollution stuff that’s currently housed over in the Department of Interior; some air pollution stuff that’s in Health, Education and Welfare; some radiation stuff over in the Atomic Energy Commission . . . Lump them all together, call it the Environmental Protection Agency. Won’t cost a cent because we’re already doing all this stuff. You just lump it all together and suddenly you’re a player.³

Although creating the EPA was politically expedient, Nixon was never enthused about the mission of the agency he sired. Immediately after his reelection, Nixon held the first of the few conversations he ever had with his newly appointed EPA chief, William Ruckelshaus. Ruckelshaus recalled that he had just begun to brief the president on his plans for the new agency when Nixon interrupted him saying, “You better watch out for those crazy enviros, Bill! They’re a bunch of commie pinko queers!”⁴

Thus, from its inception, the primary purpose of the EPA was never environmental protection. Instead, the EPA was, first and foremost, a political vehicle – the president’s way of demonstrating his supposed concern for the environment. Unfortunately, this is the way presidents have used the EPA ever since.

Every presidential administration favors a handful of “front-burner issues,” which are usually national security and foreign affairs, the economy and the budget and perhaps one or two others. These top-drawer issues are the ones he plans to act on. Barring any unforeseen crises, they are expected to dominate the administration’s political focus and become the center of national attention. Then there are “back-burner issues.” On these issues, the president does not expect action and performance – he wants peace and quiet. Instead of being at the center of national attention,

² The President’s Advisory Council on Executive Organization headed by Roy Ash made the recommendation.

³ Quoted in: Hayes, Dennis. “Earth Day 2000: End Global Warming,” *TIMELINE* No. 50 (March/April 2000 – email edition). <http://www.globalcommunity.org/cgpub/50/50.htm>.

⁴ Quoted in: Davis, Derva. *When Smoke Ran Like Water*. (NY: Basic Books), 2002: 95.

these issues are supposed to stay off the evening news and fade quietly into the background.

Regardless of party affiliation, presidents prefer the environment to remain a back-burner issue. They bring environmental issues up to the front burner only when they have little choice. The crises at Three Mile Island and Love Canal forced President Carter to put the environment on the front burner. But even then, the goal was to handle each crisis as quickly as possible in order to return it to the back burner where it belonged.

Presidents avoid appointing activist EPA chiefs – administrators who will increase awareness of the ominous environmental crises confronting us and lead the effort to overcome them. Why? Because there is little the EPA can do about these crises without stepping on some very influential toes.

No president has encouraged the EPA to write stiff regulations to prevent global warming and improve air quality because the powerful oil, coal and auto industries would line up against him claiming his policies will cause an energy crisis and economic recession. No president wants the EPA to dramatically reduce the level of toxins and carcinogens in our nation's waterways or carefully test and restrict the use of pesticides and other dangerous chemicals because powerful chemical companies and agribusiness interests would go on the warpath against "heavy-handed government over-regulation."

Presidents and presidential candidates who dare to pay more than lip service to environmental protection find powerful polluters lining up to support their rivals. For example, Al Gore's light green image was not appreciated by the major chemical, oil, coal, timber and mining industries. They favored the toxic Texan with more than 90 percent of their campaign contributions. This allowed the Bush campaign to outspend Gore 10 to 1.⁵

Presidents who don't wish to court political suicide are careful not to become too serious about their efforts to protect the environment. Instead, they appoint EPA chiefs who know how to avoid stepping on powerful toes while keeping serious environmental problems off the front pages and milking any small efforts on behalf of Mother Nature for as much positive press as possible.

It is hard to exaggerate the impact of presidential leadership over the agency's enthusiasm for fighting environmental crime. The EPA's enforcement record is heavily influenced by the messages it receives from the top. David A. Ullrich, an experienced and respected former EPA regional manager, explained:

The people [at EPA] who work on enforcement are very, very sensitive to signals about what they are doing. Because enforcement has always been, and will always be, controversial and contentious, it is very critical that the people working on it have entirely clear signals that enforcement is important, that compliance with

⁵ PEER. "Polluters Get Big on Bush on the Campaign Money Trail," *The Toxic Texas Tour* (November 1995). http://www.txpeer.org/Bush/Polluters_Bet_On_Bush.html; Case, David. "Grumbling About Gore," TomPaine.com. <http://www.tompaine.com/feature2.cfm/ID/3845>.

environmental laws is important and that the people who do the work will be supported. Those signals have to come from the top.⁶

Yet, according to veteran EPA officer, William Sanjour, the consistent message from the top is this: *keep the environment on the back burner – don't make waves!* Sanjour believes this directive, set by every president and his appointed EPA chiefs, fosters a bureaucratic culture of “procrastination, obfuscation and coming up with superficially plausible reasons for accomplishing nothing.”⁷

Does this mean that the EPA is a monolithic government agency staffed from top to bottom by “do-little” bureaucrats motivated only by narrow self-promotion? On the contrary, some EPA officials joined the agency with the idealistic goal of devoting their careers to improving the environment. Indeed, this dwindling number of agency “enviros” has been the EPA’s conscience over the years. William Sanjour was one of these endangered species of enviros who worked tirelessly to compel the EPA to reform itself and fulfill its mission. By building alliances with environmental organizations, community activists, sympathetic politicians and journalists, enviros have blown the whistle on agency conflicts of interest, corruption and deceit, and have championed the ongoing struggle to make the EPA do its job.

However, instead of being rewarded for their efforts, EPA whistleblowers have been demoted, fired, harassed, threatened and even put under surveillance by their bosses. For example, Reagan’s EPA chief, Anne Burford, tried to silence agency whistleblower, Hugh Kaufman, with surveillance photos of him entering a hotel room accompanied by a brunette. The effort backfired when the brunette turned out to be his wife.⁸

Unlike the shrinking faction of enviros and whistleblowers within the EPA, most agency employees are either apathetic get-alongs or ambitious careerists. Careerists know that maintaining a tranquil, nonconfrontational relationship with the polluting industries they regulate is the key to pleasing their superiors and advancing their careers. This polluter-friendly orientation helps many EPA regulators land lucrative industry jobs when they leave the agency. In addition, a polluter-tolerant attitude facilitates promotion within a bureaucratic hierarchy run by presidential appointees whose job security depends on keeping the environment out of the spotlight and avoiding confrontations with powerful polluters.

At the top of agency’s careerist hierarchy are the program honchos ensconced in the EPA’s Washington, DC headquarters. Many of these top-level politicians are presidential appointees. The regulations and programs they promulgate must fall within the parameters of the law, stand up to judicial review, weather Congressional oversight and satisfy the White House. In addition, program honchos are subject to

⁶ Mintz, Joel A. “Treading Water: A Preliminary Assessment of EPA Enforcement During the Bush II Administration,” *Environmental Law Review* (October 2004): 34.

⁷ Sanjour, William. “In Name Only,” *Sierra Magazine* (September/October 1992). <http://pwp.lincs.net/sanjour/Sierra.htm#hammer>.

⁸ “EPA Chief Harassing Whistleblowers,” *Rachel’s Hazardous Waste News* #254 (October 9, 1991). <http://www.ejnet.org/rachel/rhwn254.htm>.

unrelenting, direct and indirect lobbying pressure to go easy on the powerful polluting interests their policies will affect.

Of course, the nation's major environmental groups seek to influence the program honchos' policy-making process as well. But a sense of perspective is important here. The combined lobbying power of all major environmental organizations on Capitol Hill is approximately 80 lobbyists. The nine largest polluting industries have more than 80 lobbyists apiece.⁹ Thus, unless these environmental groups can muster vast public support and garner sympathetic media attention for their cause, any behind-the-scenes lobbying effort will be dominated by powerful polluters.

Program honchos are continually courted and seduced by the promise of lucrative future positions with the polluting corporations they regulate. For example, after stepping down from his position as the EPA's second chief administrator, Russell Train took a position on the board of directors of Union Carbide; Lee Thomas, EPA chief from 1985 to 1989, became executive vice president of Georgia Pacific; and DuPont put William Reilly on its board of directors after he resigned as head of the agency in 1993.¹⁰

The EPA's first boss, William Ruckelshaus, was the quintessential master of the agency's revolving door with industry. After leaving the EPA in 1973, Ruckelshaus became senior vice president and director of Weyerhaeuser – the giant timber and paper products corporation. Meanwhile, his law firm (Ruckelshaus, Beveridge Fairbanks & Diamond) was hired by the Society of the Plastics Industry (SPI) to defend dangerous chemicals like vinyl chloride from adverse publicity and the increasing regulatory initiatives of Congress, EPA, Occupational Safety and Health Administration (OSHA) and the Food and Drug Administration (FDA).¹¹

In the mid-1970s, the chemical and plastics industry was aggressively defending itself from mounting scientific evidence that vinyl chloride was responsible for causing angiosarcoma. Consumer groups were calling for a ban on vinyl chloride as a spray can propellant; Clairol pulled 100,000 cans of hair spray from store shelves and the EPA issued a rare "Emergency Suspension Order" for all pesticide sprays containing vinyl chloride for use in homes and other enclosed areas.¹² With Ruckelshaus's experience, reputation and high-level contacts inside the White

⁹ Atmosphere Alliance. *Life Support: A Citizens' Guide to Solving the Atmosphere Crisis*. (Olympia, WA: Earth Island Institute), 1995: 19. See also: "Tools for the Rollback – \$\$ and Lobbyists," US-PIRG. <http://www.pirg.org/reports/enviro/super25/page4.htm>.

¹⁰ A more extensive analysis of the EPA's revolving door can be found at: http://www.sourcewatch.org/index.php?title=EPA%27s_Revolving_Door. For a more detailed list of EPA program honchos who have taken lucrative positions in the waste management industry see: "EPA's Revolving Door," by William Sanjour. <http://pwp.lincs.net/sanjour/Revolving.htm>. Finally, the report, *From Bureaucrats to Fat Cats* by the Environmental Working Group provides information on the revolving door between the pesticide industry and the program honchos in the EPA's pesticide program. <http://www.ewg.org/reports/fatcats/fatcats.html>.

¹¹ Markowitz, Gerald & David Rosner. *Deceit and Denial: The Deadly Politics of Industrial Pollution*. (Berkeley, CA: University of California Press), 2002: 210.

¹² Markowitz, Gerald & David Rosner, 2002: 208–9.