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SUMMARY NOTES - Next Generation Regulatory Framework – Breaking the Logjam*

Wednesday, 10 April 2013, 3:30 – 4:45 pm

Reforming in the Clean Air Act—William F. Pedersen

Pedersen discussed the need to reform the Clean Air Act (CAA) and what should be deleted from and added to the Act. Pedersen's suggestions revolved around two main themes. The first was the need for environmental statutes that were simpler, but do not sacrifice protection. The second was sorting out the allocation for enforcement responsibility between the federal and state governments.

While the CAA has been successful at reducing around fifty percent of air pollutants, Pedersen believes that further results are unlikely without changes in to the Act. This is due to two misunderstandings about air pollution.

The first is the myth that all air pollutants have safe levels. According to Pedersen, there are pollutants, specifically fine particulates that have a one-to-one relationship with harm. There is no level at which these pollutants will not be harmful to the environment and human health. Pedersen suggests that, rather than attempting to maintain a safe level for these pollutants, it would be better to just continue reducing their levels so long as it is cost-effective and practical. The addition of a cost-benefit test to the CAA would help to determine when this point is.

The second misunderstanding is that air pollution is a local problem. Air pollution cannot be spot treated due to the very nature of the air itself. Pollution moves from state to state and even internationally. The CAA currently requires every state to have a plan to deal with their pollution, but this will not help in the instances where pollution comes from across state lines. Pedersen suggests that the federal government must do more to create a national control scheme, especially for fine particulate pollution, which is a national problem. CAA amendments are needed to create such a scheme. Pedersen suggests that designing this system would be fairly easy as only a few fine particulates need to be controlled. He suggests a national cap and trade system for these pollutants as a simple fix.

A national cap and trade scheme to reduce air pollutants would allow some parts of the CAA to be scaled back or deleted, such as state implementation plans (SIP) and national ambient air quality standards (NAAQS). Some object to the reduction of the CAA over concerns of leaving some pollutants uncapped and hot spots. Pedersen claims that the pollutants left uncapped will be those that are least dangerous or are not cost-effective to regulate. He also points out that hot spots may not exist, and if they do, are best regulated at the local level. This is one concern that is best dealt with by the states. Pedersen does advocate for backstop provisions to allow the federal government to step in and act.

Finally, Pedersen argues for a national cap and trade system to reduce greenhouse gases. He claims that having such a system in place for carbon makes it crazy to not have another program for conventional pollutants. This would be more effective and allow for greater deduction of pollutants overall. It would encourage replacement with nonpolluting technology and designing this technology together would be more efficient. Although it is expensive reform, it is worth it, according to Pedersen.

Clean Water Act—Jonathan Z. Cannon

John Cannon discussed the accomplishments and shortfalls of the Clean Water Act (CWA). One of the main overarching themes was the relationship between the federal and state governments and the roles of each. The Act focuses on restoring the biological, chemical and physical integrity of the waters. It aims to achieve the goal of fishable, swimmable waters. The CWA has been successful in establishing technology based affluent limitations to reduce pollution, and has gone even further with water quality standards. Many waters, however, still have not been meeting to goal of fishable and swimmable.

Cannon suggests the main reason that the CWA has not been able to reach its goals is the acts inability to reach nonpoint source discharges. These sources are not regulated for three reasons. First, it is politically difficult to pass any legislation on this topic. Most nonpoint source pollution comes from farming, and agriculture interests are politically powerful. Second, the sources are diffused. It is often difficult and impractical for the EPA or states to regulate these sources. You cannot point to a single polluter to fix the problem. Third, there are technological limitations to effectively creating and administering a regime to deal with these problems.

There are some ways to fix and reduce these problems. The first suggestion is to change the law and create new requirements. This would mean telling farmers what to do in order to reduce pollution. As stated before, this is very politically unattractive and elected officials are not likely to try to pass this kind of legislation through. Another suggestion is to subsidize farmers to fix the problem. This is feasible and would be the most cost-effective measure. There are already some provisions for this under the farm bill. The drawback to this is that the additional money need to reduce pollution to meet water quality standards is two to three times are much as there is currently. In the current economic state this is not likely to be a priority.

There are arguments that these issues should be dealt with at the state level. This would be fine except for interstate waters. States are more likely to push the problem off to someone else when interstate waters are affected. Cannon says that there is already a process existing in the CWA that can be used for cooperation between the EPA and states on this issue. Total daily maximum loads (TMDLs) can be used to set target goals for interstate waters that the states and EPA can work together to achieve. Once a TMDL is set a conversation can begin on how to actually achieve it.

This can already be seen in the context of the Chesapeake Bay. There is a state committee program in place to monitor TMDLs in the bay that is overseen by the EPA. This plan has worked effectively largely due to the fact that each state has an investment in reaching the overall goal. TMDLs are allocated throughout the affected communities, with the states working to create local benefits for compliance. The EPA works in cooperation with the states in this program by setting goals and reviewing the plans together. The EPA role is oversight and coordination, with all the action being taken at the state level. While this is proving effective, some claim that the EPA does not have this authority and some litigation has already begun to end this coordination. Cannon states, however, that this has still been an important experiment in federal and state cooperation and that the states need the federal government involved.

Questions:

1. In terms of the CWA, don't we already have a lot in place? Are states really still involved?
    a. Regional versus national level is not an easy relationship but we need to find solutions, not fight authority. We have seen an effective process in high visibility watersheds where states have a goal. If states aren't invested and the EPA doesn't have authority, however, you cannot find solutions or take action.
2. SIPs is necessary from federalism standpoint not a scientific standpoint; states wouldn't have gone along with statutory schemes without having key role. Thoughts?
    a. CAA: don't think federalism is a problem. States were originally facing a CAA that said EPA could tell them the goal but not how to get there. We need a common operating system. Could be ways to make it work—rules don't prescribe ability of state to do less but do for doing more.
    b. CWA: Its not politically feasible for the federal government to take on. Even having states take on what they do in CAA wont work politically for the CWA. Can only work by using EPAs leverage through TMDLs and more likely to happen in regional setting.
3. Mississippi River Pollution
    a. EPA could set nutrient WQ and TMDLs if they had political drive, but states wont want too and EPA will still have authority issues
4. Appearance of failure in CAA comes from the fact that the standards keep dropping to keep up with the decrease in pollution—progress is being made.
5. One size doesn't fit all in standards—if we embrace EPA authority, how will national standard fit all regions?
    a. Need cooperation between the federal level and state level.
    b. DEQ state prospective: don't want a race to the bottom, some national standards but operationally more power in the states is necessary.
6. Using the TMDL as leverage to address NPS, how do you do it without permitting system? How do you implement it?
    a. You could adopt CAA SIPs mechanism. Under EPA now TMDL are divided into load and waste load allocations so there is a goal for NPS, then under §303 load allocation becomes part of state plan. EPA can ask the state to provide reasonable assurances that they have a plan and can talk to them about plan. Can think about grant funding, etc. as an incentive, even though you cant tell states what to do.
7. Problems with agricultural runoff:
        i. Tragedy of the Commons. So many different ways to farm, types of crops, and changes in year to year on farms make sit difficult to have any one size fits all fix.
    b. Has EPA looked at working with state agricultural departments/industries?
        i. Some efforts but maybe not strong. Coastal management act does have this but its effectiveness unknown. Figuring out how to tailor for each farm situation is very difficult—only can be determined by each farmer.
8. Efforts at the state level to spend money to incentivize farmers and concentrate it
    a. Political problems with moving money around but it makes sense. DEQ picking 6 most effective BMPs and pushing those—if farmers meet guidelines they get a safe harbor, there is some money from state and farm bill. Some subscribership issues—may not have a willing taker.
9. CAA: cost benefit analysis with standard setting process—protocols?
    a. Some people upset about analysis that supports mercury rule—trivial problem but EPA explicit that you have to do it. But the way you control mercury is to control particulates—benefits of the rule aren't about mercury. Allegations that it's a shell game—using it to control things they wouldn't otherwise be able to control.

b. Are the benefits from PM2.5 control too good to be true?
    i. Been around for over 20 years and cited, examined, etc. and have gotten stronger. In addition to health benefits there are other benefits such as visibility protection. There is no mechanism as to how it happens though.

10. State moving to local in VA in permitting—will this continue/expand? Funding issues at local level—can be more effective but seems like it will be piled on. DEQ theory is that three statutes that are interconnected makes the integration much more effective at the local level; but the timeline will be long because of funding, expertise, etc. States don't know what to anticipate—set up for failure? If its not effective at state level how will it be effective at local level.
11. Comment: If no political will for help from fed is the regulatory process getting ahead of society?
12. In many ways what has been successful in VA for TMDLs has been to do a lot of nutrient control. Has rendered obsolete large percent of permitting. TMDL program feeds what bill presented in argument

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*Note: the views of the Environment Virginia Symposium panelists are those of the individuals who participated. They do not reflect the policies or positions of the Virginia Military Institute.