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THE EPA'S POSITION: A RATIONAL APPROACH
TO LAND DEVELOPMENT

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LET ME BEGIN my discussion by stating a basic position and making some distinctions in the use of terms. Preliminarily, I will take the position, as does the Environmental Protection Agency (EPA), that environmental control is clearly a guide for, and not a roadblock to, land development. The EPA is not a no-growth agency, nor am I an advocate of the no-growth viewpoint. While this should be obvious to anyone who is familiar with our work, it may not be so to others.

Confusion about the EPA's position arises in several ways. There are, to be sure, many people who fervently wish that environmental control were a barrier to development and who wish that the EPA were against growth. As a general rule, however, wishing does not make it so. Furthermore, in cases where environmental control does constitute a genuine roadblock to a *specific* development project, it is often in the self-interest of the developer to make it appear that the roadblock is a universal one. Thus, if a particular housing development is stymied by an environmental constraint, one hears charges that environmental controls are preventing the industry — by implication, the whole industry — from meeting the people's desperate housing needs. One must be on guard against this kind of generalization and look at the specifics of each case. Finally, there are planners, developers, and builders who take the view that *anything* which complicates their job is an unacceptable roadblock. I will freely acknowledge that environmental control has created complications for land development, and has made more work for the people engaged in these activities. As always seems to happen, however, our most successful and progressive private developers and builders have found these new responsibilities not only manageable but even beneficial. They have recognized that proper attention to environmental constraints can make for developments that are more economical, more aesthetically pleasing, more durable, and, in the end, more salable.

I will return to these points below, but I would here like to make several observations about the fundamental nature of the environment-development dilemma and attempt to relate those ideas to the traditional structure of federal environmental law — a body of law which

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has always operated on the principle of establishing a framework within which the private sector can exercise its creativity.

The most fundamental principle with which we are dealing is one we have come to recognize only in recent years; that is, that the environment poses genuine, natural constraints on human activities. This thought, in the most global sense, is embodied in the concept of "spaceship earth" — the idea that the world, like a space capsule, is finite with respect to both the amount of available resources and its ability to assimilate wastes. In a more practical, day-to-day sense, we have begun to recognize natural environmental constraints on human activities within particular regions or at particular sites. Let me give several illustrations.

In the three decades since the Second World War, the Washington, D.C., area has undergone extremely rapid growth in both population and economic activity. During this time, the development of facilities for handling sewage wastes has lagged years behind the actual increases in the amounts of these wastes. Now, of course, we have a serious problem because we must do more than simply catch-up. We are faced with a very clear environmental constraint on the further development of the area, namely, the water quality and water quantity of the Potomac Estuary. The Potomac Estuary is tidal, which means that any wastes dumped into it are sloshed back and forth instead of flowing neatly in one direction. Moreover, the Potomac itself has wide variations of flow, and at times of low flow the supply of water flowing in from upstream does not match the amount required of the estuary to meet the area's human needs. This is a very complex situation, and it poses very difficult problems. Wastes cannot be dumped into the estuary haphazardly because a certain minimal water quality is required to support the area's water supply needs. Shipping the wastes out of the area is equally infeasible, however, because that would reduce still further the amount of fresh water flowing into the estuary, thereby compounding the quality and quantity problems. For the short term, the overall situation limits development strictly, in accordance with available sewage treatment capacity. For the intermediate term, there will still be a limitation based upon the availability of the technology required to provide adequate levels of treatment for the large quantities of wastes discharged into this limited body of water. For the longer term, the only way further growth can safely occur is through the development of large-scale external sources of water supply, with all its attendant controversy and environmental risk, and through the application of new technology; perhaps even the direct recycling of

purified sewage wastes as water supply without the intermediate step of passing through the estuary.

I have described an immediate and, I believe, rather obvious environmental constraint posed by water quality. A similar constraint — in this instance on air quality — is found in the Los Angeles Basin, where the topographic and meteorological circumstances pose an absolute upper limit on the amount of air pollution that can occur without resultant human disaster. Another obvious case of environmental constraint was underscored by Hurricane Agnes; that is, that predictable disaster will ensue if we persist in developing areas that are prone to flooding.

All of these are rather simple cases; the solutions are always far more complex. For example, in Washington, D.C., if ways are ultimately found to circumvent the immediate water quality restraints on development, further obstacles may well materialize. That area already has serious air quality problems, most of which are related to vehicular traffic. Further development following the pattern of the last 20 or 30 years could worsen these problems, especially if the progress of recent years in reducing emissions from new cars is slowed or halted.

We are basically talking about some kind of ultimate "carrying capacity": the ability of a given region to support human populations and their activities on a sustained basis. We can see specific constraints in certain regions where the limits of this carrying capacity even now are being approached or infringed upon, and we are just beginning to perceive some of the more indirect constraints. This discussion is necessarily qualified since one must recognize that we are only beginning to explore this concept of "carrying capacity" or environmental constraint, and that we are but at the threshold of years, perhaps even decades, of discussion and debate about how to define the various constraints. So far, we have clear indications in only a few areas: air quality, where we can define fairly well the ranges of some pollutants within which human health and welfare are protected; water quality, where we can identify the parameters of the levels of impurities which may exist while still yielding water that is safe to drink, safe for swimming, and adequate to support normal ranges of aquatic life; flood plains, where we can reasonably define the hazards of development; and soon, perhaps, noise, where we have begun to identify the health effects which flow therefrom. As for any overall "carrying capacity," I would be forced to admit that we merely do not know the subject well enough at this point to define it more clearly.

Moreover, the tolerable levels of human activity in a given area are determined not only by the natural constraints of the regional

environment, but also by the availability of technology to adapt human activity to those constraints. There would seem to be no absolute limit on growth in the District of Columbia area, for example, if adequate technology can be developed to purify wastes, reduce water supply demands on the Potomac Estuary, provide a transportation system that would not degrade air quality, and deal with still further constraints that will undoubtedly emerge as each of these obstacles is surmounted. A simple example is found in the fiberglass insulation industry where water quality constraints no longer pose a barrier to industrial expansion. That industry has perfected a practical technology to completely recycle its liquid wastes. This does not mean the industry can now expand forever since, ecologically speaking, it still has to cope with such constraints as air quality, water supply, and raw materials supply. The point is simply that carefully applied technology can overcome most environmental constraints.

Nowhere is the effect of technology more apparent than in the EPA's own program to finance the construction of sewage treatment facilities. The multimillion-dollar sewage treatment plant, fed by regional networks of big trunk sewer lines, was once viewed as the panacea for the nation's water pollution. According to the thinking prevalent several years ago, all one had to do was build enough large regional sewage plants and all rivers would be clean enough to swim in by 1980.

This theory has encountered some very practical snags. For one thing, sewage treatment facilities produce large quantities of sludge. The more sewage treated and the higher the degree of treatment, the more sludge produced. The City of Philadelphia's current problems with its ocean dumping program demonstrate some of the problems of sludge disposal. While the sludge contains valuable nutrients that could be used for agricultural purposes, there are still the problems created by the contamination of much of the sludge with toxic metals, and by poor public understanding and acceptance of sludge transport and land application.

Moreover, sewage treatment plants with excess capacities will accelerate growth in suburban areas because developers tend to go where sewer capacity is already available. Unless such accelerated growth is well planned and controlled, it can produce air and water pollution problems that may be worse than the original problems the sewage facility was designed to solve. Whether one likes it or not, the

issue of sewage facilities is becoming a major battleground in land use in the 1970's. There are three parties to this conflict:

1) The growth crowd — people who favor growth at almost any environmental price for the sake of economic betterment. This group commonly includes some shortsighted local officials and many old-style, freewheeling developers.

2) Planned growth or planned development advocates — those officials, land developers and planners, still in the minority, who believe that growth has to accommodate real social needs and existing environmental constraints.

3) Zero-growth advocates — those who simply oppose new development, sometimes out of sincere belief and sometimes, unfortunately, out of the same motives that supported exclusionary zoning, which was invalidated by the courts as a discriminatory practice.

I have already said that EPA is not an advocate of the zero-growth view, and it should be evident that we do not advocate growth at any price. The federal government must support the concept of planned growth, using environmental realities as guides. I would say that the primary vehicle for this approach is the National Environmental Policy Act (NEPA).¹ With NEPA, Congress made abundantly clear its intention to *guide* our nation's growth, impliedly spurning a no-growth or slow-growth policy.

The most important operative provision of NEPA is section 102(2)(C),² which requires that a responsible federal official, before taking any action significantly affecting the quality of the environment, must first set forth a detailed statement of the anticipated impact of the proposed action. The law even stipulates, to a degree, what such a statement shall contain.³ It is most significant, especially in the context of this symposium, that there is a statutory mandate to discuss the possible alternatives to a proposed action. This suggests that the law's

1. 42 U.S.C. §§ 4321 *et seq.* (1970).

2. *Id.* § 4332(2)(C).

3. NEPA provides in pertinent part that agencies shall:

(C) include in every recommendation or report . . . , a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,
 (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
 (iii) alternatives to the proposed action,
 (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
 (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be

framers clearly intended that NEPA should be used to guide responsible officials toward the best possible accommodation between the imperatives of environmental protection and other basic human needs. Naturally, a law so sweeping in its coverage has created problems of adjustment, both on the part of federal officials who may view it as an obstacle to the accomplishment of their missions, and on the part of zero-growth enthusiasts who may in fact want to use NEPA, or any other available tool, as a weapon against development. Instead, NEPA should be viewed as another mechanism by which conflicting views on growth and development may be reconciled, albeit not to their proponents' complete satisfaction. It is a tool by which public discussion and debate can be focused on environmental issues.

I am pleased to see, where state and local governments have adopted NEPA-type legislation and applied it to development, that the same basic principles have been applied in most cases: the proponent of a project is required to come to grips with the project's environmental consequences, but the final decision on whether to proceed is not predetermined. The emphasis is, as it should be, upon accommodation and modification to reduce the environmental impact of needed projects, rather than on flat yes-no determinations. NEPA can and should be applied in this spirit, and that certainly is the way we try to apply it in those cases where land development issues enter into our administrative decisions on sewage treatment facilities.

"All right," one might say, "even if NEPA is more a guide than a roadblock, what about the other federal regulatory statutes?" I hark back here to my initial discussion of the concept of natural environmental constraints. The federal air and water pollution laws set out a framework for identifying genuine environmental constraints, and, most importantly, for allowing a free play of human creativity within those constraints. Thus, under the Clean Air Act⁴ the EPA sets certain ambient-air quality standards designed to protect human health and welfare. Left to the states and the citizenry is the task of defining precisely how these standards shall be attained and maintained. We do something similar under the Federal Water Pollution Control Act.⁵ Our policy is, in effect, that while the public good requires certain environmental constraints to be recognized and respected, it is not for us to dictate precisely how this will be done.⁶

4. *Id.* § 1857.

5. 33 U.S.C. §§ 1151 *et seq.* (1970).

6. However, there is one qualification to this point: The laws require that if the states and private parties do not find or agree upon ways to come to terms with the environmental standards, then the EPA, as the responsible agency, cannot allow the matter to drop. Therefore, in the last few months we found ourselves in the https://digitalcommons.villanova.edu/vlr/vol19/iss5/art3 regulations to attain air quality goals at the local level.

I have laid out here the EPA's basic philosophy and approach to enforcing environmental controls. Finally, to return to the original question posed by this symposium, it seems clear to me that the federal approach to environmental control is one which encourages the recognition of environmental constraints as guides to land development. If the planner, developer, or builder is willing to expend the extra effort to master the basic principles of environmental planning and to apply them throughout the whole range of his work, there need be no conflict between ecology and growth.