

STATE AGENCIES PLAY KEY ROLE IN OUR CLEANER ENVIRONMENT

by

Robert E. Roberts

Thirty years ago, the establishment of the United States Environmental Protection Agency (EPA) and the passage of major environmental legislation consolidated significant environmental power in Washington D.C. For the last thirty years, however, responsibility for day-to-day administration of environmental programs has been — more or less — moving from the federal government to the States. That was, in fact, the fundamental principle that underlay most of the major environmental statutes — where States qualified, by showing resources and commitment, programs would be delegated to them to run. In the last decade, the graph line of this movement has turned sharply upward until more than 79% of the programs that *can be* delegated to the States *have been* delegated to the States, with three-quarters or more of that delegation taking place in that period. *See* R. Steven Brown, *Working for a Living: How States Implement National Environmental Laws for EPA*, ECOSTATES (Fall 2001).

There is little argument that the environment is cleaner than it was thirty years ago. While that impression relies on a limited base set of measurements and on anecdotal material, most observers agree that the air is cleaner, the water is cleaner, and waste materials are handled properly more often than used to be the case. In other words, as more programs have been delegated to the States, more environmental progress seems to have been made. Then why do we continue to argue whether States can be counted on to do what is expected in environmental programs? More often than not, the argument centers on whether States can be relied upon to carry out environmental enforcement actions.

The fact is that States already do more than 80% of the environmental enforcement actions each year and, if you count notices of violation as enforcement actions — which most members of the regulated community seem to think they are — the percentage of actions by States exceeds 90%. *See* R. Steven Brown and Valerie Green, REPORT TO CONGRESS: STATE ENVIRONMENTAL AGENCY CONTRIBUTIONS TO ENFORCEMENT AND COMPLIANCE (Environmental Council of the States: Washington) 2001.

Robert E. Roberts is the Executive Director of the Environmental Council of the States, a national non-profit, non-partisan association of state and territorial environmental commissioners. From August 1990 to January 1995, he was Secretary of the South Dakota Department of Environment and Natural Resources.

Given this record, why do some commentators persist in arguing that States will not enforce environmental requirements? There are at least three reasons.

First, we have very limited ways to measure the effect of enforcement actions, including enforcement, on environmental protection. Lacking the ability to know whether our efforts are actually protecting the environment, we measure the number of enforcement actions, the amount of fines collected, executives jailed, cases settled, etc. A side result of this inability to measure is that we cannot know, except anecdotally, whether States, or, for that matter, the federal government, are doing a good job of environmental protection. We not only lack measurements, we lack the national monitoring system which would establish a baseline from which we could — perhaps — measure our progress.

Second, no enforcement program is perfect and perceptions differ. There will always be some cases that are not properly handled, or are perceived as not being properly handled. In a country which argues loudly over court decisions and screams at referees so “blind” they didn't see the ball-carrier step out of bounds, it could hardly be any other way. No one is claiming that State programs are perfect. But, then, neither is federal enforcement perfect and — the critical point — there is *no* evidence that State programs contain more error. There will always be differences of opinion about how a particular offense should have been handled. The state enforcement agency may decide a case in a particular way and EPA, in its oversight role, may wish the case had been handled differently. Like errors, these differences of opinion will continue. And we can rely on errors receiving maximum publicity.

Third, some groups have a strong interest in precluding further environmental enforcement authority in States. Opponents of greater State authority in enforcement often come from two places. First are the national environmental groups, sometimes because they truly believe that States are incompetent or lack the will to enforce, and sometimes because it is easier to lobby one Congress than 50 State legislatures. Second are some national businesses that worry about “patchwork” requirements that might complicate their work. The business attitude sometimes is, “Just tell me what the rule is and make it nationally consistent.”

Let's look at the issue of State competence and will. Is there any evidence that States will not “race to the bottom” by developing enclaves of environmental degradation to promote economic development? There is. If the “race to the bottom” argument were accurate, would it not follow that no State *today* would have a standard higher or a rule more stringent than the federal requirement? After all, if all States must meet the federal minimum, no one should be going above that level, because to do so would damage the State's competitive position in economic development — if the “race to the bottom” argument were true. And yet almost every State has some rules more stringent than the federal standard or rules in places where the federal government has none. For example, the Council of State Governments concluded in 1999 that 80% of the States had at least one ambient air quality standard that exceeded the federal minimum. The Council of State Governments, STATE AIR POLLUTION CONTROL SURVEY, 1999. Some States are substantially more stringent in their environmental requirements than is the federal government.

Economic development is no longer smokestack chasing — it is competition to provide, among other things, a quality of life for a potential company's employees — and clean air, clean water, and proper handling of waste materials are part of the quality of life package.

Some national environmental spokesmen are quick to argue two things: first, that they represent the will of the people who demand a clean environment and, second, that if state authority in environmental protection is expanded, the environment will be left unprotected. These arguments cannot be simultaneously true. Will not the demand for a clean environment continue when States are responsible, or is it possible that some groups believe they know better than citizens what should be done? Why is it that voters know what they are doing only when they vote for federal officials, who apparently can be relied upon to do the right thing, but not when they vote for governors, state legislators, county commissioners, city council members and mayors, who will, apparently, sell them out to industry? The truth is that if state environmental agencies do

not protect the environment as their citizens wish, people will be voted out of office and new state environmental directors will be put in place.

An additional protection is, in fact, EPA oversight. And environmental group oversight. And news media oversight. And citizen oversight. It isn't as if state environmental agencies operate in a vacuum, free to take whatever actions occur to them.

There are six major advantages to state management of environmental programs.

First, the world has changed. We are moving from a small universe of big environmental dischargers to a huge universe of small dischargers. The greatest threats to the environment no longer come from discharge pipes and smokestacks — the “point sources” of pollution — but from “non-point sources,” the thousands or hundreds of thousands of photo shops, garages, farms and ranches, suburban homeowners fertilizing their lawns, etc. If anything is clear in this discussion, it should be that this type of regulation cannot be done by a centralized, command-and-control, permit writing system. It can only be done through compliance assistance, extensive compliance education, and a customer approach to persons who in the vast majority of cases don't even know what the results of their actions are or what is required of them. It is a new world, with new requirements, which must include a new approach. And it is one that can much better be administered from the state capitol than from the national capitol.

Second, state government and local government are closer, more accessible, and more knowledgeable about where you live and what your problems may be. If the compliance assistance programs described in the previous paragraph are to succeed, they must be administered locally. The people who ask state and local government for help are not faceless. They are not “consumers” to be protected, “clients” to be serviced, or integers in a digital analysis. They are real people. Right here. Outside our windows. They seek understanding of complicated rules and assistance in complying with them.

Third, state governments are apt to respond more quickly to program faults than is the federal government — because they are apt to find out about them sooner. Local people know what is happening in their communities. They are the first affected by environmental practices. It is no reflection on the United States Environmental Protection Agency to say that by the time officials there learn of environmental impacts in Rapid City, South Dakota, more damage will usually have been done than if we rely on officials and citizens in that city, in Pennington County, and in the state capitol to know what is happening.

Fourth, state governments have shouldered the burden of funding the programs that have been delegated, as federal spending has remained relatively static or declined. For example, in 1986, EPA funds to states represented 41% of total state spending on the environment, but in 2000 EPA funding was only 24% of total state spending. And this latter figure marked an increase from 1996, when EPA's portion of total state spending descended to 20% of total spending. EPA funding of States was actually 4% less in 2000 than in 1986 in unadjusted dollars. The lesson is that all the increased spending during that fourteen year period came from state general funds, or fees, or other sources — not from EPA. R. Steven Brown, *States Put Their Money Where Their Environment Is*, ECOSTATES, Spr. 2001.

In a similar manner, States have hired the necessary staff to take on all these new responsibilities. In 1986, the state agencies expended about 38,000 work—years, but by 1996 that effort had increased to about 61,000 work—years, almost a 60 percent increase. As a general rule, the number continues to expand. *Id.*

Fifth, States and EPA negotiated two agreements which, if properly used, can greatly improve environmental protection and, in fact, have already begun to do so. The first agreement is the National Environmental Performance Partnership System (NEPPS) agreement, under which States and EPA can, on a voluntary basis, negotiate annual agreements dividing the environmental job they share. These Performance Partnership Agreements (PPAs) form the basis for the following year's work, help to prevent wasteful

duplication and assure that all areas are covered. States and EPA can also negotiate Performance Partnership Grants (PPGs) giving state officials some authority to redirect federal funds to areas of local significance. PPGs help solve the perennial problem of "air money," "water money," and other kinds of restricted funding which may not match the local landscape.

States and EPA also negotiated an agreement on innovation. Prior to this agreement, if you had an innovative idea, you had to both convince EPA that it was a good idea, *and* find your way through the agency. The innovations agreement blazes the path through the agency, outlining how such ideas will be handled, in what time limits, by whom, etc. By October 2001, States had submitted more than fifty proposals to EPA Regions, of which one third had been approved and were being implemented.

Sixth, and finally, "environmental protection" has taken on an expanded meaning, in which the Departments of Energy and Defense operate larger environmental programs, perhaps, than does EPA — and the Departments of Interior and Agriculture are increasingly active players in this field. The Supreme Court hears cases on the relationship between the Clean Air Act and the Americans with Disabilities Act, or about how environmental actions may constitute violations of the Civil Rights Act. And the World Trade Organization tries to distinguish between environmental protection requirements and restraint of trade limitation. And truly global environmental issues begin to occupy great amounts of time.

In such a situation, operation of clean air, clean water, and proper handling of waste programs will increasingly be in the hands of state and local governments, while EPA tries to address the sweeping issues raised by the expansion of environmental protection to encompass some aspect of almost every national public policy action.

So, here's our situation.

- America created an environmental protection system that provided for delegation of programs to the States — and that has happened in almost 4 of 5 cases.
- The federal government did not fund those programs to correspond with their expansion and to adjust to changing economic circumstances — but the States did.
- More people were needed to carry out expanded environmental programs — so States hired them.
- States assumed more of the enforcement role, until 90% of the enforcement actions were carried out by States.
- States became the major innovators in environmental protection.¹
- And the environment got cleaner.

On that record, we need to move beyond the argument about States protecting the environment, and get on with the job that the American people want done, and that States, working in partnership with EPA, have performed so well.

¹ECOS has published compilations of state environmental agency innovations for the last four years. The latest was published in June 2001 and contains 220 pages of such innovations. The report is available online at www.ecos.org.