When the huge WTI hazardous waste incinerator began construction in East Liverpool, Ohio, the owners didn’t have all the necessary permits. Nobody was sure that the permit the landowner had not signed the permit application, a clear violation of U.S. Environmental Protection Agency’s regulations.

Nevertheless WTI’s owners began construction, gambling $140 million that U.S. Environmental Protection Agency (EPA) would wink at major violations. If EPA didn’t play along, the state of Ohio would not even look into the act. Ohio law had changed since the permit was first issued, and the incinerator was located in a place that today could not meet Ohio siting criteria. The plant is being built less than a quarter mile from an elementary school and technical experts inside and outside government have testified that large tonnages of toxic and carcinogenic pollutants will be emitted from the stack. If EPA enforced its regulations and required WTI to apply for a new permit, the $140- million project would very likely go down the tubes.

At a meeting November 12, 1991, William R. Munro, EPA’s man in charge of issuing permits for incinerators throughout the midwest, rejected citizens’ pleas to make WTI apply for a new permit. His reason: “We have to treat our constituents in a fair and equitable manner.” In other words, Munro was admitting flatly that EPA’s “constituents” are not the public whose health is at risk, but the hazardous waste facility operator whose money is at risk.

How could EPA get itself into such a condition? A long-time EPA employee, William Sanjour, answers this question in a recent publication, WHY EPA IS LIKE IT IS AND WHAT CAN BE DONE ABOUT IT.[1] Sanjour sees the problem as deeper than EPA: “…the problems with EPA are common to all regulatory agencies, both state and federal. No matter how they start out, they all seem to end up being more concerned with the interests of the parties they regulate than the interests of the public.” He says, “The great liberal dream of establishing a powerful institution to protect and perfect our lives turns out to be just the same old nightmare of corruption and abuse. The government is made up of people, and people will be people.”

But the situation is not hopeless. We just need to write our laws differently, Sanjour says: “I think the approach to effective regulatory reform lies in removing the rose colored glasses. We’ve got to deal with regulatory agencies based on what they really are and what we know about them, not what we would like them to be. Realism must replace idealism. It would be chaos to do without regulatory agencies, but it is folly to trust them.”

Sanjour offers a Baker’s dozen specific suggestions for new ways to make government (at the state or federal level) work:

HAMMER PROVISIONS. “A fine example of recognizing regulatory agencies for what they are, can be found in the legislative use of ‘hammer provisions,’ so called because a figurative hammer falls if the regulatory agency fails to perform the way the legislature intended,” Sanjour says. For example, “Frustrated by EPA’s continually missing deadlines to write regulations to protect the public from hazardous waste landfills, Congress in 1985 passed a law which would absolutely ban the landfilling of a long list of chemicals. This ‘hammer’ would fall heavily on the hazardous waste generators and hazardous waste landfill operators if EPA failed to meet its deadlines. This was tacit recognition that EPA would work more diligently to protect the people it regulates than it would to protect the public. It worked!” Sanjour says “hammer provisions” could be used much more than they are. For example, they could be used to enforce goals: “Usually goal-setting is a meaningless governmental diversion, since nothing usually happens if the goals aren’t met. The administrator of EPA and other political appointees could be appointed with the proviso that specific goals must be met, such as hazardous waste generation would be reduced by 10 percent a year, or they would lose their jobs.”

ARM THE PUBLIC WITH INFORMATION. Another powerful idea is to arm the public with information to help them take appropriate action. This approach is already embedded in some laws and regulations: food labeling for content and nutrition; the federal freedom of information act, allowing access to some government records; the Toxics Release Inventory in the federal law known as SARA Title III, requiring companies to report the quantity and quality of their chemical emissions.

This approach could be taken much further. For example in a proposed “Fisherman’s Right to Know Act” in Alabama, signs would be posted at fishing piers and fishing grounds indicating the kind, amount and the source of the chemicals expected to be found in local waters as a result of permitted discharges.

ALLOW CITIZEN SUITS WITH TREBBLE DAMAGES. Citizens with a good case against a polluter should be able to get a lawyer on a contingency basis and bring action directly against a violator without having to go through any regulatory agency. Result: the polluter pays a fine equal to three times the damages, which is split between the citizens and their lawyer. The law would thus be enforced at no cost to government.

And government should aid the citizens. Sanjour says, “In a very real sense victims of industrial poisoning who bring toxic tort suits (such as the damages caused by chemicals) are really doing the government’s job, therefore it seems reasonable that the law should require that government assist the public in bringing tort suits by such measures as making its own experts and test facilities available at cost and giving technical assistance grants for legal fees.”

CITIZEN ENFORCEMENT. The general principle that Sanjour is promoting is this: “I would like to see laws passed which would give the public a lot more direct power to implement the law and not just limited to the courts. For example, in the case of EPA-regulated facilities, when dozens of citizens see black smoke coming out of a plant and smell horrible odors or are coated with soot or see illegal discharges into a stream, that should be sufficient basis for an enforcement action. It should not be necessary to call a bureaucrat from out of town who shows up long after the incident is over and then only after notifying the plant that he is coming. A simple sentence should be attached to law, which says: ‘Any violation witnessed and sworn to by any person over 18 years old and mentally competent, shall have the same status as if it were witnessed by an official government inspector.” This could be initiated at the state level. In addition, private Attorney General Acts could allow individuals to bring criminal actions before local grand juries, Sanjour says.

TAKE AWAY MUCH OF EPA’S DISCRETION. Regulations should be modeled on the traffic ticket. You violate the law, a cop writes you a ticket. You can either pay the fine or tell it to the judge. Congress has given the EPA administrator discretion to write and enforce rules as he or she wishes. The result is literally thousands of pages of regulations giving EPA wide latitude in negotiating settlements with crooks. Congress should treat the EPA administrator more like a traffic cop-- less discretion to negotiate with criminals.

LIABILITY. Liability should be strict, meaning that no showing of negligence is necessary and that required proof of cause and effect is minimal. And liability should be joint and several, meaning each liable party is potentially responsible for the entire situation. This is the way liability works in the Superfund law, where “These provisions are so effective that industry and their insurance companies have spent millions to try to get rid of them. They would prefer that funds for cleanup be pooled and paid out on a ‘no fault’ basis. There’s nothing like strict liability to convert a capitalist into a socialist.... The fear of liability is a much greater incentive for industry to do the right thing than the fear of EPA,” Sanjour says.
BAD BOY LAWS. It's simple and clear: Government should not be allowed to do business with crooks. (See RHWN #288.)

THE REVOLVING DOOR. "It should be perfectly clear that a person cannot serve the public faithfully in a regulatory agency if he views the agency as a stepping stone to a better paying job with the people he regulates." Sanjour says, "I would propose a law to restrict political appointees and senior executive service personnel from accepting any form of direct or indirect compensation from any person regulated by their agency for a period of five years after they left government service, and this would include lawyers."

CONFLICT OF INTEREST. Sanjour points out that EPA has no legislative mandate to provide waste disposal capacity for industry, yet "Every administrator of EPA has felt it his duty to tell the public that they are terrible people if they don't let some get-rich-quick huckster build a landfill or incinerator in their backyard." The WTI incinerator is a perfect example. It's as if the administrator of the Food and Drug Administration (FDA) were hawking cigarettes. Sanjour's remedy: Congress can pass a one-sentence law which says, "No regulatory agency may spend appropriated funds to promote, or to advocate the use of products or services which it regulates."

REWARD WHISTLE BLOWERS. "Congress ought to consider not merely protecting whistle blowers but rewarding them. When a whistle blower's charges prove correct, he should be given a promotion and a cash reward in proportion to the importance of the revelation, with a maximum of say $100,000. This would greatly increase the number of whistle blowers and decrease the amount of waste, fraud and abuse."

LET CITIZENS SUE GOVERNMENT OFFICIALS. Congress should "open government officials up to civil suits for damages caused by the failure to do their duty."

AWARD FINES TO GRASS-ROOTS GROUPS. "A portion of the fines collected in environmental suits could be turned over to grass-roots environmental organizations instead of it all going to the treasury." Polluters now pay fines as a routine cost of doing business, but if they knew their fines were funding their adversaries, paying a fine would take on new meaning. And of course this would give citizens new incentive to ferret out violations.

--Peter Montague

[1] William Sanjour, WHY EPA IS LIKE IT IS AND WHAT CAN BE DONE ABOUT IT. (Annapolis, Md.: Environmental Research Foundation, 1992); $15 from E.R.F., P.O. Box 5036, Annapolis, MD 21403-5036; phone (410) 263-1584.

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