Legislating for clean water

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The Limits of Law: The Public Regulation of Private Pollution. By Peter C. Yeager. Cambridge University Press: 1991. Pp.369. £35, \$49.50.

In the 1970s, the US Army Corps of Engineers was about to construct a \$1.2 billion hydroelectric dam on the St John River in Maine. The river is not in a region of virgin wilderness. It is an area for potato farms and woodpulp mills. But on its steep banks, among spruce and alder, there grows a rare plant, the Furbish lousewort, named after the amateur botanist who discovered it. It is a modest plant, but under the Federal Endangered Species Act it is protected. Accordingly, in 1977 President Carter stopped further work on the dam until the future of the Furbish lousewort could be assured.

How did the US government, cradle of the military-industrial complex, come to pass a law like that, constraining our exploitation of nature, often much to our inconvenience? In *The Limits of Law*, Peter Yeager examines this question as it applies to laws to control industrial water pollution in the United States. He records in detail the growth of federal law to clean up rivers, culminating in the historic and euphoric *Federal Water Pollution Control Act Amendments* in 1972; an Act historic because it was passed by Congress in the teeth of a veto by President Nixon; euphoric because it aspired to make all rivers in the United States "fishable and swimmable" by 1985.

Yeager's detailed account is attached to a theme, namely that the drafting of anti-pollution laws, the regulations made under them, and the commitment to enforce them, were all limited by the bias of politicians, and self-interest of polluters, and latterly by the greening of public opinion. A subsidiary theme is that these limits were imposed under the influence of élites, especially large corporations, often at the expense of small business and the general public. As background to his essay, Yeager discusses how laws are made to regulate social activities like industry. He concludes that they are not the product of consensus between lawmakers and those they seek to regulate; they are the product of conflict between industrialists who want to exploit the environment and politicians who want to safeguard the interests of other voters as well as to keep the good will of industrialists. Participating on both sides of the conflict are technical experts, whose advice may set limits to the whole process, from drafting of the law to enforcement of the regulations. Supported by anecdotal evidence and some dubious regression coefficients,

Yeager gives the impression that big industry has had more than its fair share in setting limits to cushion the effects of legislation, to make the wording of some laws 'symbolic', the regulations ambivalent, and the enforcement supine.

But the constraints that limit law making and its enforcement do themselves change. Thus, for a time industrialists called the tune, but when toxic chemicals got into the drinking water, consumers joined the conflict and

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Discharge pipeline from a large pharmaceutical company.

influenced the limits more in their favour. The same law may then be reinterpreted by the officers in the field who have to enforce it. At this stage industrialists develop what Yeager quotes as 'corporate responsibility', taking a lead in pollution control to restore the confidence of the public.

All this is familiar to anyone concerned with environmental policy in Europe and Yeager does not make any fresh contribution to it. The interesting part of his book is the detailed account of the debates leading to the critical law passed in 1972 and its aftermath. Such an enterprising law needed an enterprising bureaucracy to administer it. That was to hand. The Environmental Protection Agency (EPA) had been set up in 1970. It had 6,000 employees and an initial budget of \$1.4 billion. The first task of its Water Quality Office was to get data on pollution from thousands of industrial polluters and to decide how much each of them should be allowed to discharge. Industrialists then challenged the proposed consents. By 1973 there were still over 1,100 requests for hearings pending. In its initial enthusiasm the recommended to the Justice Department that lawsuits should be launched against 200 corporations. Meanwhile, there was confusion about the way controls should be achieved.

The original recommendation was for the use of the Best Practicable Technology (BPT). But of course the word 'practicable' is a bonus for lawyers in court and there was pressure, when it was disclosed that carcinogens were among the pollutants, to abandon BPT for BAT — the Best Available Technology.

In the first flush of its activities the ugly words 'cost-benefit' were not audible in the corridors of EPA. But lobbying in Washington on the part of corporations alerted the Office of Management and Budget (OMB) to the hazards to industry of an environmental agency that was too zealous. It was suspected that OMB "often stalled the EPA's legislative proposals and testimony to Congress, giving advantages to industry..." and "might even be tampering with technical data" which supported EPA's case for stricter control.

It was President Reagan who finally sabotaged EPA's strategy. Private sector costs were to take precedence over public-sector benefits. EPA's budget was cut. Its administrator was told to submit cost-benefit statements for all regulations. This amounted to deregulation. That was in 1981 and arguably it has handicapped American environmental policy ever since. In the end it has been the courts of law which have defended EPA against the erosion of its powers. But deregulation, too, has its limits and constraints. In the 1980s there was a massive legal action brought by a group of major corporations against the

EPA, challenging its estimates of the cost of pollution control. They thought they were riding on the wave of deregulation. They were wrong: in April, 1989 the appellate court unanimously rejected their challenge, and upheld the EPA rules.

It is a reviewer's duty to issue a warning about *The Limits of Law*. Readers of books like this do not expect them to be written in polished prose. They are prepared to read, two or three times over, sentences conveying subtle and elusive ideas. But readers do expect straight reportage (which is the main material in this book) to be intelligible at first reading. Peter Yeager does not meet this expectation. His sentences sag under the sheer weight of abstract words. There are rich examples of what H. W. Fowler in *Modern English Usage* (Clarendon, 1965) called "abstractitis". It is a style of unparalleled viscosity. The effort of reading it can be compared to the effort of walking through a swamp in over-sized gum boots. It is a pity that the book is so exhausting to read, for Yeager has an interesting and important story to tell. □

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