

REGULATIONS OR PROTECTIONS: WHAT'S IN A WORD?

Lana Pollack¹

Thank you for including me in this symposium. I am honored to participate in discussions which include people with such exceptional knowledge and diverse experience.²

The International Joint Commission (IJC), created under the Boundary Waters Treaty of 1909 (Treaty), is charged with helping the United States and Canada avoid and resolve disputes between the two countries. Although the Treaty largely focuses on the levels and flow of waters that cross the international boundary, it also stipulates that neither country should pollute waters that would cause injury to the health or property of the other. The more recent Great Lakes Water Quality Agreement (Agreement) substantially expands on that early pollution prevention language, prompting a great deal of the IJC's current attention to be focused on pollution prevention and the cleanup and ecological health of the Great Lakes. The IJC does not have enforcement authority under either the Treaty or the Agreement. However, recommendations in the IJC's science based reports have led to passage of important environmental laws in both Canada and the United States.

The IJC is charged with balancing the needs of a number of identified water uses, which the Treaty explicitly enumerates as domestic and sanitary purposes, navigation, hydropower and irrigation. Over the years the Treaty also has been interpreted to include recognition of environmental, industrial, recreational, and riparian interests. In considering its decisions before issuing operating orders on cross border dams (with the concurrence of both Governments), the IJC is required to give all interested parties an opportunity to be heard. The IJC's ambitious scientific studies and long discussions invariably lead to recognition that in providing for protection of one interest, another may be inconvenienced or more seriously impacted. Frequently the obvious recommendation required for a balanced outcome will lead the IJC to recommend

¹ Chair, U.S. Section of the International Joint Commission, Washington, DC.

² This article is based on the author's keynote remarks at the Upper Great Lakes Law and Policy Symposium.

a regulation it sees as essential to protect the waters and ensure the most fair and balanced outcome.

The IJC recognizes that its science-based policy recommendations frequently lead to contentious public and political discussions about whether protections should be crafted into enforceable laws, or restricted to informed voluntary programs, sometimes referred to as best management practices (BMPs). History demonstrates that any call for additional enforceable standards will trigger charges of overregulation. Especially in recent years, those advocating anything more than a voluntary program, and proposing enforceable standards rather than aspirational goals, will usually find themselves in a defensive position. Whether or not legislation designed to protect the environment is passed into law depends substantially on how the debate and discussions are framed.

When proposals are deemed as something that will “regulate business,” or as “another regulation,” it has a slim chance of being passed into law. On the other hand, when a proposal is successfully framed and discussed as a “public health protection,” a “child health protection,” or “an essential protection” it has a substantially better chance of being passed into law. Words count, language matters. And while environmental advocates know this, they still often find themselves defending proposals that are framed as burdensome business regulations rather than as essential protections of water, air, or public health.

The shift to language that puts environmental and public health advocates on the defensive goes well beyond the regulations-are-bad and protections-are-good framing. There also has been an impactful shift away from referring respectfully to government officials as “public servants.” The more common language today is the use of the more pejorative term “government bureaucrats.” Interests generally hostile to additional environmental laws have been successful in changing the public discourse over the last three decades so that now “working for the government” makes one a bureaucrat instead of a public servant. Eliminating bureaucrats makes for a better campaign promise than eliminating public servants. And a campaign message that “We have too many regulations on business” is more attractive than “We have too many protections for safe drinking water.”

It’s not too late to reframe the political debates on environmental and public health issues. With better language choices, environmental and public health protections can be understood as what they are meant to be, protections. Nor is it too late to reframe the discussions on the role of government and the

people who serve in it. Those who are charged with enforcement, the people we now commonly refer to as regulators or bureaucrats, could just as well be recast as public servants or technical experts committed to protecting the environment and public health. Reframing the reasons for protections and the value of the people who support those protections would make a substantial difference in explaining their value to the public and politicians alike.

When I entered the political arena in the early 1970's there was substantial public demand for better environmental protections. The environmental movement of that day was fueled by burning rivers and other obvious environmental catastrophes, as well as (in the United States) energy of a broad social revolution which had been demanding reforms in civil rights, women's rights, and the end to an increasingly unpopular war. The dominant assumption of the public debates of that day was that at least on domestic issues, the government was an essential vehicle for correcting social and environmental failures.

When I was first elected to the Michigan Senate in the early 1980's, I learned how dependent I would be on the expertise of civil servants who had deep expertise in several fields. I realized that without substantial unbiased professional assistance I couldn't possibly know all I needed to sponsor new legislation or to cast informed votes on the broad sweep of issues that came before the Senate. I also quickly recognized the respect in which the Michigan Department of Natural Resources (DNR) was held, at home in Michigan and among other conservation departments nationally. The DNR at that time was responsible for conservation of Michigan's vast public lands, as well as for the environmental issues that have since been split off to a newer Department of Environmental Quality (DEQ). At that time public servants were reasonably well paid, recognized as professionals, and attracted talented, young graduates with a commitment to protecting and cleaning up the Great Lakes. But much has changed.

Splitting the DNR into two departments made it easier to undermine and underfund the "regulatory" (or protective) responsibilities assigned to the new DEQ. The new department was a convenient whipping boy, a target of those who argued that the loss of jobs in the old industrial states were due to the regulations that were most closely identified as being the work of the DEQ. (It would have been harder to castigate the DNR, as that department was so closely identified with Michigan's beloved state parks.)

The shift of responsibilities from a respected DNR to a disliked DEQ is but one factor in the development of the preventable water disaster that has beset

over 100,000 residents of Flint, Michigan. There were other social, political, and economic reasons that led to the poisoning of Flint's population through their drinking water.

As a city that had lost a substantial part of its auto industry tax base, Flint did not have tax revenue to meet the rising costs of water it was purchasing from the Detroit system. For their part, Detroit had also lost much of its tax base and needed to capture the true costs of providing water to communities throughout southeast Michigan. Additionally, both cities were further impoverished by the loss of most of the revenue-sharing previously provided by the State, as well as by the loss of federal support that in an earlier period helped pay for many essential services.

To make matters worse, both cities were under control of state appointed emergency financial managers, both of whom put a premium on balancing budgets rather than providing essential services. Flint made what was meant to be a temporary switch to Flint River water without sufficiently taking into account the water-lead chemistry and critical need for anti-corrosion treatment. Unfortunately, this occurred after responsibility for protecting clean drinking water had been removed from the respected DNR and assigned to a DEQ whose culture had been negatively impacted by the chronic complaints of "too many regulations." EPA, whose full role in this is not entirely clear to me, was also being defunded, losing staff and accused of being too aggressive on the regulatory front.

One puzzling, and perhaps encouraging observation, is that the response to Flint's water catastrophe has been broad and intense. National media has continued to cover it as the disaster that it is. On the other hand, a decade ago a similar lead contaminated drinking water situation in Washington, D.C. did not generate the national outrage that we see in response to Flint. Nor did decades of lead poisoning of half a million U.S. children and a substantial number of Canadian children -- from old paint mostly in low cost housing -- prompt Congress to provide anything close to adequate funding to avoid another generation of lead-poisoned children. Even as more people (beyond Flint) have turned to drinking bottled water, the public in the Great Lakes still expects its water to be plentiful, clean, and cheap.

A culture which has been convinced that essential environmental protections are nothing more than unnecessary, burdensome regulations is a culture that will soon find itself without any protections. If we are to restore a

culture where politicians of both parties accept their responsibilities to protect the environment and public health, we are going to have to reject the framing of every debate as one that is about regulating business.

I think we can begin by checking our own language – appropriately referring to environmental and public health protections rather than confining ourselves to a debate on the merits of how many unwelcome business regulations are tolerable. Every time you are about to use the word regulation, see if you can substitute the word protection. I think you’ll find that in most instances that switch is an easy and natural one. With a change in language and a reframing of our debates, we will be more likely to have fewer Flints and better outcomes.

I am going to close with a story about my dad. He dropped out of high school by economic necessity and established a small town grocery and butcher shop in the 1930’s. I used to go watch him on Tuesdays at the local auction where farmers would bring their steers. He would buy a few head and haul them in his truck to the slaughter house behind his store. It was a small operation. By the late 1950’s when I was observing, I noted that on the day they slaughtered there was always an extra guy from the Department of Agriculture. He was assigned to watch my father’s operation to ensure it was sanitary and protective of public health. Week after week, month after month, and year after year, my dad grouched about the man from the State. Close to the end of his life, I had a conversation with my dad in which I asked whether the man from the State did any good. My dad paused for a long quiet moment, and then he said, “Not at all. Not one damn bit.” But then after another pause and with just the hint of a smile he said, “But my competition up the road is no longer putting sawdust in his hotdogs.” The lesson was clear. Good guys do not need to be told what to do, but there is always somebody out there from whom we all need the protection that only good enforceable laws can provide.