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ENVIRONMENTAL REVIEW AND ECONOMIC DEVELOPMENT: A MODEST PROPOSAL

*Howard Goldman**

I had a dream.

One day I was summoned to the White House to meet with the President and senior economic advisers.

"Sit down Mr. Goldman, and thank you for coming to see us on such short notice. Let me get right to the point. As you know, this country is experiencing an increasingly serious foreign trade imbalance, and we are quite concerned that this imbalance will get substantially worse. At some point in the not too distant future, it will become untenable."

"Mr. President," I interjected, "with all due respect, I'm not an economist or even a corporate lawyer. I am involved with environmental and development-related matters, primarily in New York City. Why are you telling me this?"

"Because, Mr. Goldman, we think you can help. You are, of course, familiar with the concept of environmental review, whereby discretionary actions of government agencies must formally take into account environmental, as well as social and economic, considerations?"

"Of course, Mr. President. But I fail to see what environmental review has to do with the United States' balance of trade."

"Let me take it from here, Mr. President," said the Secretary of Commerce. "You see, Mr. Goldman, some of the 'think tank types' have come up with an idea for creating a level playing field for the world's economy. In a nutshell, we propose to export strict environmental review requirements to the trading nations of the world, thereby retarding their economic development and allowing us to compete fairly. We have summoned you so that we can hear your thoughts on how to best structure such requirements. Specifically, we would like to know what the essential elements of a comprehensive environmental review process would be. Don't worry about how such

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a process would get implemented — that's our problem." The Secretary of Commerce glanced at the Director of the CIA.

I took a deep breath. This was the moment I had been waiting for all my life. All of my hard work — law school, government practice, private practice, PLI seminars — was about to pay off.

"All right. But before I start, I must warn you that things are even worse than you may suspect. The environmentalists have already targeted the adoption of foreign trade agreements by the United States as actions subject to environmental review. A lawsuit was recently brought to force the U.S. Trade Representative's Office to prepare environmental impact statements ("EIS") for two trade agreements currently being negotiated in the Uruguay Round of the General Agreement on Tariffs and Trade and the North American free trade agreement discussions.¹ The plaintiffs argued that the United States Trade Representative is a federal agency subject to the National Environmental Policy Act ("NEPA").² NEPA, according to the plaintiffs, requires an EIS for major federal actions that may significantly affect the quality of the environment, and before any trade agreements are submitted to Congress for its approval. While the suit was dismissed by the federal district court for lack of standing, it is being appealed.³ I'm sorry to say that the plaintiffs have a good argument under NEPA."

A sickly silence descended upon the room. "Then we truly don't have a moment to lose," muttered the President. "If trade agreements are subjected to environmental review requirements, then they can be delayed indefinitely as environmental impact statements are prepared and challenged. Hell, many of the countries we do business with won't even exist by the time the agreements are through the process."

"I'm afraid that's true," I said. "Let's get to work. The basic elements of a comprehensive environmental review process, guaranteed to retard any economy, can be based on the law currently in effect in New York State and New York City. These laws are known respectively as the State Environmental Quality Review ("SEQR")⁴ and the

1. *Public Citizen v. Office of the U.S. Trade Representative*, 782 F. Supp. 139 (D.D.C. 1992).

2. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1989 & Supp. 1991).

3. *North American Free Trade Agreement: Election Could Affect Timing*, DAILY REP. FOR EXECUTIVES, Jan. 15, 1992, at S-8.

4. N.Y. ENVTL. CONSERV. LAW §§ 8-0107 to -0117 (McKinney 1984 & Supp. 1992). SEQR is implemented statewide through regulations promulgated by New York

City Environmental Quality Review ("CEQR")."⁵

The Vice President interjected. "That would be Article 8 of the New York State Environmental Conservation Law, adopted in 1975, and, let me see, New York City Mayoral Executive Order No. 91 of 1977, as recently modified by the New York City Planning Commission Rules of Procedure. As I recall, SEQR was modeled on the National Environmental Policy Act, although stricter in some respects, and CEQR is a local regulation implementing SEQR in the City of New York."

"Quite right, sir, and very impressive without notes. New York State and City have, perhaps, the strictest environmental review process of any state and municipality in the nation. In our fifteen years of experience with these regulations, SEQR and CEQR have wreaked considerable havoc on economic development."

"Well," said the President, "tell us how such a process would work."

"Yes sir. The basic concept of any environmental review process is to require special, almost reverential treatment of environmental issues. You have all heard it before — mankind is the steward of the earth, life is a seamless web, we are on a lifeboat floating in a vast sea of nothingness, blah blah blah. While this may be well intentioned, the trick is to coopt these concepts so that they apply equally to all issues, no matter how mundane or political."

"Therefore, the term 'environment' must be defined as broadly as possible. Under CEQR and SEQR, the environment includes not only air, water, flora and fauna, but 'community and neighborhood character,' 'patterns of population concentration, distribution and growth,' and 'objects of historic and aesthetic significance.'⁶ As long as the definition is sufficiently open-ended, no one can ever be sure what constitutes an environmental issue, as opposed to a social, economic or political issue. Creative plaintiffs can always find a connection to the environment. With New York courts going so far as to conclude that 'secondary residential displacement' is an environmental impact under SEQR,⁷ the scope of environmental review is theoretically infinite."

"Once the definition of environment is broad enough to include vir-

State Department of Environmental Conservation. N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (1991).

5. New York, N.Y., Exec. Order No. 91 (Aug. 24, 1977); NEW YORK, N.Y., RULES OF PROCEDURE FOR CITY ENVIRONMENTAL QUALITY REVIEW ch. 5 (June 26, 1991).

6. N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984 & Supp. 1992).

7. *Chinese Staff and Workers Ass'n, et al. v. City of New York, et al.*, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (1986).

tually anything, the next step is to make sure that the environment receives special treatment under the law whenever a governmental decision is made. For example, the process should require a 'hard look' at environmental impacts, but never define what a hard look is.⁸ It should demand 'strict procedural compliance.'⁹ Force the party proposing to do something to prove that there will be no 'significant' environmental impacts; and never define the term 'significant.'¹⁰ In addition, the process should require that less environmentally harmful alternatives be chosen over proposed actions.¹¹ Since no one can know with any certainty what the environment is, this means that every issue must receive special treatment."

"Now, do not make the mistake that New York made, and exclude 'ministerial' government actions from environmental review.¹² All government actions, such as the issuance of a building permit that requires the interpretation of various code provisions, arguably involve the exercise of some discretion. Thus, all governmental decisions should be subjected to environmental review requirements. Make sure that each and every decision is subject to a formal review process, and that each time a proposal changes, the environmental review begins anew."

"Perhaps most importantly, encourage the participation of lawyers at every stage of the environmental review process. Lawyers, of course, should draft the enabling statute so that it is sufficiently vague and subject to interpretation. Lawyers should also draft the regulations which further confuse the statute. Litigation should be encouraged, with broad standing and a generous statute of limitations. Under no circumstances should the losing party ever have to pay the expenses of the winning party, because this would discourage frivolous litigation. Provide for multiple levels of appeal for losing plaintiffs."

"Do not limit the length or complexity of environmental impact statements. At one time in New York, we believed that the bigger the environmental impact statement, the more weight the courts would afford to it."

8. See *H.O.M.E.S. v. New York State Urban Dev. Corp.*, 69 A.D.2d 222, 232, 418 N.Y.S.2d 827, 832 (4th Dept. 1979).

9. See *Rye Town/King Civic Ass'n v. Town of Rye*, 82 A.D.2d 474, 444 N.Y.S.2d 67 (2d Dept. 1981).

10. An EIS must be prepared on any action "which may have a significant effect on the environment." N.Y. ENVTL. CONSERV. LAW § 8-0109(2) (McKinney 1984 & Supp. 1992).

11. See N.Y. COMP. CODES R. & REGS. tit. 6, § 617.9(c)(3) (1991).

12. N.Y. ENVTL. CONSERV. LAW § 8-0105(5)(ii) (McKinney 1984 & Supp. 1992).

"This theory, however, has been discredited by the discovery that no judge or law clerk has ever read an environmental impact statement or any portion thereof. They merely read the pleadings which describe the contents of the statement. Thus, the more that is contained in the environmental impact statement, the more opportunity there is for the plaintiffs to raise issues and arguments in their pleadings. The defendants must respond to these issues in the answer, as must the plaintiffs in their reply, and again in the defendants' sur-reply. This will assuredly lead to strange and unpredictable judicial opinions, as it has in New York City."

The Vice President spoke up. "Like that 42nd Street Development Project case where the court found that the effects of construction in Times Square had not been adequately analyzed for possible effects on the water tunnel deep in bedrock underneath Sixth Avenue?¹³ Or the recent federal case regarding the New York Coliseum where the court found that because the City might not meet its Clean Air Act deadlines some years hence, the project 'might' be enjoined?¹⁴ That sure did a number on that project."

"Precisely, Mr. Vice President. And don't forget the recent New York State Supreme Court decision regarding new zoning regulations.¹⁵ The state supreme court stated that the Board of Estimate's amending of two zoning regulations was subject to environmental review. After analyzing the amendments, the appellate court annulled the regulations because it found inadequate environmental review on the part of the New York City."¹⁶

"Now, I must point out that most cases challenging actions on environmental grounds fail on appeal. However, this misses the point. Projects can be killed merely by delay. In a real estate context, for example, options and financing commitments may expire, carrying costs mount up, and the entire market may change from the time the project was conceived. It is no secret that all that many environmental plaintiffs hope for is to delay a project long enough for it to die."

"So, to continue, do not establish meaningful time limits for the environmental review process. Hopefully the process will take months for the smallest of development proposals and years for the

13. *Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 494 N.E.2d 429, 503 N.Y.S.2d 298 (1986).

14. *Coalition Against Columbus Center, et al. v. City of New York, et al.*, 769 F. Supp. 478 (S.D.N.Y. 1991).

15. *People for Westpride, Inc. v. Board of Estimate of the City of New York*, No. 42753 (New York County Dec. 19, 1990), *rev'd*, 165 A.D.2d 555, 568 N.Y.S.2d 732 (1st Dept. 1991).

16. *Id.*

important ones. If necessary, provide the appearance of time limits by limiting the period of formal review. However, never limit the period of informal review which precedes the period of formal review. Of course, once a matter gets into the court system, it can be held up for years."

"Mr. Goldman, I'm going to stop you here," said the President. "I think we've all heard enough to know that, if it can ever be implemented, this plan is exactly what we need. On behalf of the entire nation, I thank you." The President stood up.

"Mr. President, if I might, I have one more suggestion. . ."

"Shoot, son" said the President.

"As I said before, the participation of lawyers in all stages of the environmental review process is key. I would therefore suggest that you consider issuing an emergency Executive Order drafting all of the lawyers throughout the United States who claim to be environmental lawyers, and send them overseas for several years to teach other nations about environmental review. This would not only slow things down over there, but with fewer environmental lawyers here, the economy might pick up a bit."

As smiles appeared on the faces of the men and women around the room, I knew that it was time for me to leave. And start packing.