



Meeting the Future

A Research Agenda for Sustainability

May 18-20, 2005 • Washington, DC

Sustainability Research Agenda and Links to Policy
and Regulatory Issues Panel:

**Can sustainability be achieved within current
regulatory frameworks?**

Prof. E. Donald Elliott

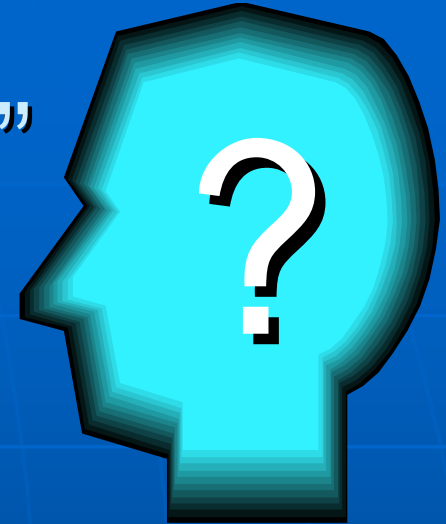
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“What is the Question?”

-- Gertrud Stein



- Can sustainability be achieved within current regulatory frameworks?

Yes

- Can current regulatory frameworks be improved (optimized) to better promote sustainability?

Yes

Few US Laws Identify Sustainability as an Explicit Goal

- (b) ... it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may --
1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
 2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
 3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
 4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
 5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
 6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources."

National Environmental Policy Act of 1969,
§101(b), 42 USC §4331(b)

US Agencies Have Broad Discretion to Adapt Statues by Interpretation



Chevron v. NRDC, 467 U.S. 837 (1984).

I-Did Congress decide this exact issue?

II-If not, implied delegation- defer to agency construction if reasonable.

Goals of Many US Laws *Correlate* with Sustainability

- “The purposes of this subchapter are—
(1) to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”

CAA §101(b)(1), 42 USC
§7401(b)(1)



US Laws Only Rarely *Prohibit* Sustainable Approaches

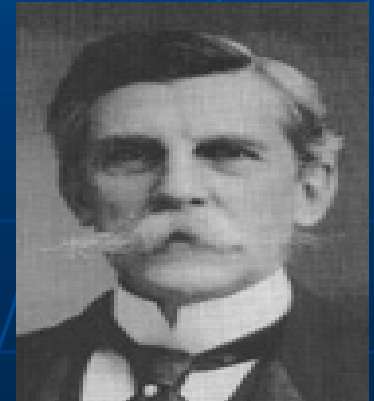


- Performance Standards
 - Flexible compliance options
- But some do mandate specific solutions
 - RCRA BDATs
 - Distillery prohibited from recycling alcohol waste as boiler fuel
- Some prohibit consideration of relevant factors
 - Clean Air Act §109 (economics)
 - *Whitman v. American Trucking Assn.*, 531 U.S. 457 (2001).

Lodestar Approach

- “Still it is true that a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words.”

-- Oliver Wendell Holmes Jr.,
The Path Of The Law,
10 HARVARD L. REV. 457 (1897).



Make Sustainability a Stated Goal of US Environmental Laws

- “It is time to conform U.S. environmental laws to the worldwide goal of sustainable development. The true end of environmental laws is not merely to ‘clean up’ air, water, and waste, but to ‘respond to the needs of the present without compromising the capacity of future generations to satisfy their needs.’”
- “Debate will be more productive around a shared goal of sustainable development than if we continue to battle over controversial intermediate objectives such as cost-benefit analysis and the precautionary principle.”

E. Donald Elliott, Declare SD Goal Of U.S. Enviro Laws, [The Environmental Forum](#), July/August 2003.

E. Donald Elliott and Mohamed Tarifi, Integrating Sustainable Development Into U.S. Law and Business, 33 [Envir.L.Rptr](#) 10170 (Feb 2003).

A Modest Proposal ...

A Soft Super-Mandate for EPA Cabinet Status Legislation:

“In interpreting and applying any law relating to the environment, all portions of the federal government shall consider that it is the policy of the United States to promote sustainable development.”



Would It Make a Difference?

- Prof Dan Esty opposes; would “weaken” environmental protection
- Facilitate international conversation and convergence
- New Source Review (NSR) policy thru the lens of sustainable development
 - Short term goal: BACT on more plants
 - Incentive not to update old (dirtier and less efficient) plants