

## NEWS &amp; ANALYSIS

## DIALOGUE

## The Other Voice From EPA: The Role of the Headquarters Professionals' Union

by J. W. Hirzy

The Environmental Protection Agency (EPA) is a creature of the 1960s' social activism and environmental awakening. The national mood at the time demanded environmental improvement. The government responded by promising more environmentally sensitive policies, such as those articulated in the National Environmental Policy Act (NEPA):

The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation ...<sup>1</sup>

EPA was created in 1970 to oversee the government's new policies, partly by joining existing offices from other government departments. Many people then outside government joined the new agency to help achieve the national goals laid out in NEPA and to satisfy personal commitments to the same principles.

With this heady beginning and a national consensus for action, EPA set to the task of administering the new environmental laws flooding from Congress. At the outset, EPA headquarters was the center of frenetic, exhilarating, and often confused activity.

For a while in the 1970s, agency scientists had largely free rein to investigate problems and to recommend solutions to them. But it soon became apparent that political toes were being stepped on. Bureaucratic fiefdoms were threatened by unfettered investigation and the consequent regulatory jeopardy into which some industrial interests were placed.

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The ideas expressed here, as well as the principles on which the union was founded and is operated, are equally attributable to local officers Bob Carton (President, and an environmental scientist), William Coniglio (Past President, and a biologist), and Rufus Morison (Senior Vice President, and an ecologist).

1. Pub. L. No. 91-190, 42 U.S.C. §§4321-4370a (1969), ELR STAT. NEPA 001-012.

So already during the 1970s the reins began to be pulled in. Somewhere along the line a decision was made to limit the caliber and number of scientists employed by the Agency. Rule writing was emphasized over scientific investigation. In effect, the science element of EPA became not only subordinate but *subservient* to the legal element.

Among other problems of this law-over-science operating philosophy is the fundamental difference between the ethics of scientists and the ethics of lawyers. Lawyering has a much larger political element to it. As explained succinctly by former General Counsel and Deputy Administrator A. James Barnes after union-led protests over EPA's failure to pursue asbestos regulations under the Toxic Substances Control Act (TSCA),<sup>2</sup> "Lawyers generally help policymakers go where they want to go." The scientist's duty, on the other hand, is to uncover nature's secrets and publish his or her findings, irrespective of any "client's" desires.

When the elections of 1980 were over, putting in place an Administration avowedly hostile to environmental regulation, it looked like further erosion of science's role in favor of more political control at EPA was unavoidable. Anne Gorsuch, who was appointed EPA Administrator, became the public face of the EPA; John Hernandez was made Deputy Administrator, overseeing the day-to-day operation of the Agency.

The Reagan appointments were greeted with (as it turned out, well-founded) trepidation by the career staff. Letting the public in on scientific findings that indicated problems requiring regulatory response was not exactly to be a high priority of the Reagan/Gorsuch/Hernandez EPA. EPA epidemiologists were fired *en mass*. Public information staff members were let go. Enforcement activities were diminished and piecemealed into program offices. Tight new controls were placed on publication and on speaking to the press. Even lawyers were told, "If you can't serve this Administration in conscience, get out!"

Anne Gorsuch and John Hernandez set a tone of "cleansing the temple" and "us versus them." Indeed, many career employees fled along with the Democratic appointees of Jimmy Carter, fearing massive cutbacks in staff

2. 15 U.S.C. §§2601-2671, ELR STAT. TSCA 001-056.

as well as fundamental changes in Agency philosophy as part of the expected "Reagan Revolution."

### The Union Is Formed

Some of us who chose to stay were activists with organizing experience, and the need to protect ourselves through organization at headquarters was obvious. We were not looking just to cover our own personal backsides from reductions-in-force. Writings from the New Right, of which many on the Gorsuch team were leading lights, showed that open, representative government was in jeopardy along with the environment and our jobs. Effective organization with legal protections was what we clearly needed, and a labor union looked like an awfully good choice, though some sort of professional association not affiliated with labor was also considered.

A representational election had been held at EPA headquarters several years earlier, and professionals decided at that time not to join nonprofessionals in a local of the American Federation of Government Employees.<sup>3</sup> But after several months of experience with Gorsuch/Hernandez leadership and study of what protection a professional association could give us, we decided to organize a labor union for professionals at EPA headquarters.

Among the reasons for choosing a labor union over a professional association were the provisions of the Civil Service Reform Act that laid out specific rights and operating ground rules for federal labor organizations and their bargaining unit members. In the Act, Congress declared that collective bargaining for federal employees is in the national interest. And we viewed the implicit relationships established in the Act among labor organizations, the Congress, and the public as providing a whole new dimension for public service activism.

We met with representatives from several national unions. We were struck by the fact that the National Treasury Employees Union (NTEU) represented only non-defense workers. NTEU thus had a clear path for strong lobbying on behalf of domestic programs when they conflicted with defense programs; none of its locals would be pitted one against another in terms of appropriations. However, NTEU is controlled rather tightly by its national office; locals have less autonomy than in some other unions. But we would be creating a "nontraditional" labor union, requiring flexibility and autonomy for our local. So we chose affiliation with the more decentralized National Federation of Federal Employees (NFFE).

Ten of us at EPA obtained a charter from the NFFE national office as Local 2050 in 1983. The local spent much effort in defining itself by developing a statement of purpose, in which we made plain our commitment to foster and protect the community of interests of EPA's professionals, to open communications, and to achieve EPA's missions. We communicated these principles to our colleagues and then, under terms of the Civil Service Reform Act, we obtained signatures of over 30 percent of them on a petition to the Federal Labor Relations Authority ask-

ing for a representational election. The election was held in June 1984 and, by a startling majority of 91 percent, NFFE was chosen by EPA professionals as their exclusive bargaining agent.

The ease with which we were able to gather petition signatures and the size of the election victory showed not only the staff's agreement with the union local's statement of purpose but also the atmosphere at EPA at that time. We had just passed through the purge of the Gorsuch group by a new Administrator, William Ruckelshaus. The "us versus them" philosophy was fresh in mind and the need to lock in permanent protection was clear. We adopted Ruckelshaus's observation about EPA's need to conduct its business as though it were "in a fishbowl" as the guiding concept of our local, and we named our newsletter "Inside the Fishbowl." Who could argue with an operating philosophy like that? From such a source? In a Republican Administration? Following the Gorsuch debacle?

### The Union's Accomplishments

#### *Asbestos*

It wasn't long before we faced the first test of our commitment to EPA's mission and of our willingness and ability to act. By mid 1984, EPA's decade-long effort to ban many asbestos-containing products culminated in draft rules under TSCA §6 to ban certain products and to phase down asbestos production and importation. The rules cleared all levels of agency review, including General Counsel review of possible use of TSCA §9 to "refer" the risk control efforts to the Occupational Safety and Health Administration and the Consumer Product Safety Commission. Use of §9 was ruled out as insufficiently protective. With the review completed, the rules went to the Office of Management and Budget (OMB) for clearance in the late summer of 1984. Bill Ruckelshaus presciently resigned at the end of the year.

At a February 1985 press conference, EPA announced that TSCA §9 would be used after all to keep EPA from acting. Rumors of OMB pressure were seemingly everywhere. The branch chief in charge of the rules stormed into my office after the press conference demanding to know what the union was going to do about this "double cross."

We did two things: first, we talked with friends on the Hill; second, we circulated, delivered, and published a petition and open letter to Administrator Lee Thomas describing OMB's back-door attempt to subvert the rules. Within days, Congress had halted the §9 referral, subpoenaed documents, and started an investigation. The investigation ultimately resulted in severe congressional criticism of EPA's and OMB's actions and a memorandum from OMB promising new OMB procedures.<sup>4</sup> The memorandum specified that no off-the-record meetings would be held by OMB and that EPA would be invited to all

3. Under the Civil Service Reform Act, a "professional employee" serves in a job requiring a specific course of study in an institution of higher learning. Typical "professionals" include chemists, toxicologists, and lawyers, for example. "Nonprofessional employees" includes everyone else except management employees.

4. Memorandum from Wendy L. Gramm to Heads of Departments and Agencies Subject to Executive Order Nos. 12291 and 12498 (June 13, 1986) (entitled "Additional Procedures Concerning OIRA Reviews Under Executive Order Nos. 12291 and 12498"). This Memorandum has been updated. See "Administrative Agreement Outlining Procedures Governing OIRA Review of Regulations Under Executive Order Nos. 12291 and 12498," *reprinted in* 135 CONG. REC. E3925 (daily ed. Nov. 17, 1989).

meetings scheduled between OMB and parties interested in EPA rules under review.

We in the union and all EPA employees felt some satisfaction because of our part in this improvement in government operations.

### Fluoride

Within a few months of press stories on the union's role in the asbestos matter, we were approached by an outside scientist concerned about EPA's proposal to raise the recommended maximum contaminant level (RMCL) drinking water standard for fluoride. The RMCL is scientifically mandated, as opposed to the maximum contaminant level (MCL), which takes cost and other feasibility factors into account.<sup>5</sup> An EPA staff scientist had also called us to express concern for what he thought was an unethically high proposed RMCL. "The Agency is saying it's OK to have teeth that look like you've been chewing on rocks and tar balls—getting moderate to severe dental fluorosis—it's only a cosmetic effect," this employee complained.

We asked the outside scientist to give a seminar for EPA staff on fluoride in early 1985. After hearing the disturbing issues raised at the seminar, we asked the Agency to arrange a like seminar by those who prepared the Technical Support Document for the new, more lenient proposed RMCL. We wanted to see both sides of the issues raised by the first seminar. The Agency refused to put on that seminar and defended the Technical Support Document (prepared by a contractor and not reviewed by any EPA staff member expert in fluoride health effects) as having been put together properly. "Put together properly" in Agency parlance meant put together in any old way, followed by notice-and-comment in the *Federal Register*. In the science community, by contrast, proper preparation means use only of primary literature, followed by peer review.

After a futile, year-long struggle to get open debate on the merits of the Support Document, on the full range of risks of fluoride exposures, and on the process by which such documents are prepared, the union was forced to challenge the Agency's decision to promulgate the new standard in court. The Natural Resources Defense Council filed suit against EPA over the standard,<sup>6</sup> and the union filed a petition to join as an *amicus*. The District of Columbia Circuit Court of Appeals denied our petition to file as *amicus*, making light of the fluoride controversy during oral arguments. But that is not the end of the story. We continued to expose the tactics of the pro-fluoridation power block inside and outside government. This power block's tactics included making personal attacks on the integrity and qualifications of opponents, suppressing data and public debate on health risks from fluoride exposures, and using "spokesperson science." A journalist took our material as a start, did extensive research on her own, and published a special report on fluoride in the news weekly of the American Chemical Society, *Chemical and Engineering News*.<sup>7</sup> As a result of the article (which stimulated great

interest in the scientific community) and continued probing by the union and other journalists and scientists, the Agency is re-opening the fluoride case, and the union has been asked by management to propose a process that assures impartiality for the new assessment.

### Indoor Air Pollution

More recently, we have been addressing a serious indoor air pollution problem at EPA headquarters, one that we have found we share with much of the public. Several hundred EPA employees were made sick by new carpeting installed in 1987 and 1988. About 20 of these employees have acquired multiple chemical sensitivity from their exposures. The Agency for nearly two years denied the connection between the carpet and employee illness, but on September 15, 1989, EPA's Director of Environmental Safety and Health admitted that the "newly manufactured carpet clearly caused the initial illnesses," and the Agency is now starting to remove it.

The union began its work on clean air long before the "carpet crisis," concluding a clean air contract with EPA in July 1987, but the spate of multiple chemical sensitivity cases appearing during 1988 put a whole new light on our efforts. National media covered our story, and we were then flooded with letters and phone calls from people telling us of similar problems in their homes and offices.

Even as we were calling on the Department of Labor, filing a grievance under our collective bargaining agreement, and organizing affected workers into a Committee of Poisoned Employees, we used our scientific training to assess data collected by EPA and the union. This assessment included information obtained from complaining citizens and from industry groups, and we published it at the Society for Risk Analysis meeting in October 1989. This assessment is being used as the support document for a petition the union has filed under TSCA §21, asking the Agency to regulate the level of the chemical that caused EPA employees to get sick. The union believes that the suffering of our fellow workers, terrible and life-altering as multiple chemical sensitivity is, can be used to benefit our fellow citizens by getting action quickly on this problem.

EPA and the Consumer Product Safety Commission have a joint investigation under way on the issue of carpet/4-phenylcyclohexene (4-PC), the chemical involved, but given that it took EPA from 1973 until 1989 to regulate asbestos under TSCA, there is little reason for optimism that 4-PC will be regulated before the turn of the century by the "regular" process.

### EPA's Unionized Future

What these three examples of our union's activism point out is that there is enough technical competence—and plenty of will—to do the job of protecting the environment and public health at EPA. What is lacking is a managerial concept that properly brings that competence and that will to bear on problems. (This is not to say that there is no room for improvement in the composition and operation of the professional community of EPA—there is, plenty!) The recent experience of the "carpet crisis" has taught management the wisdom of listening to its professionals and of incorporating their suggestions more meaningfully into crucial decisions. As I write this, the unions and

5. In 1986 amendments to the Safe Drinking Water Act, RMCLs became "MCL goals." See generally Gray, *The Safe Drinking Water Act of 1986: Now A Tougher Act to Follow*, 16 ELR 10338 (1986).

6. See *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 812 F.2d 721, 17 ELR 20418 (1987).

7. Hileman, *Fluoridation of Water*, CHEMICAL & ENGINEERING NEWS, Aug. 1, 1988, at 26.

management are crafting a charter for a new labor-management organization that will exercise significant managerial authority over the work environment at EPA. The unions envision this development as bringing a much greater degree of democracy—and ultimately efficiency—to the EPA workplace. Once democracy's value in workplace decisionmaking is clear, the way will be open for its expansion into more program-oriented arenas.

What does the appearance of this nontraditional labor organization mean for the future of EPA's operations? There has been a significant—perhaps revolutionary—change at EPA by the establishment of a labor organization dedicated to protecting the environment and its bargaining unit members. This labor organization establishes new relationships with the administration, Congress, and citizens that will affect how environmental matters are dealt with in the future. The process of managing environmental affairs can be much more professional and nonpartisan if these new relationships are nurtured and brought together appropriately.

### *The Appropriate Role of Professional Staff*

We civil service professionals recognize that our form of government gives Congress and the Executive the power to make and faithfully execute laws, and it gives courts the authority to interpret them. As professional staff, our role is to advise the constitutionally mandated branches in matters of our professional competence. If the Congress, the Executive, or the courts choose to ignore our advice, that is their right, and the citizens can take corrective action, if they choose, at the polls.

By creating and protecting an independent voice of professionalism, a voice that cannot be distorted or silenced or intimidated, our union in a unique way makes it easier for citizens to assess how well or how poorly the federal government is carrying out their wishes. If, over the next few years, the EPA union can show sustained and growing effectiveness, other unions in other segments of government can do it too.

If those in elective or appointive office recognize the long-term value of having sworn-to-duty independent, ethical, and competent professional staff, and if the public takes advantage of the open avenues of communication with this professional community, the contention and distrust that have so marked the relationship between government and the environmental movement can be softened, perhaps markedly. The union, as an independent advocate of environmental professional excellence, can serve as a bridge, a builder of trust in government.

In testimony in 1989 on cabinet status for EPA, in its contribution to the Blueprint for the Environment project, and in its comments to Administrator William Reilly on Future Risk (a long-range plan for research and develop-

ment in EPA), the union pointed out that reorganizing EPA, giving it cabinet rank, or shifting research emphasis among programs will have but limited effect on how well the Agency can meet public expectations. Without a major change in the professional work environment at EPA, the same old issue of trust—of who are those faceless bureaucrats of unknown competence in EPA really working for?—will bedevil the Agency's efforts to meet the challenges it faces.

### *More Participatory Government Is More Effective Government*

Unless EPA, acting as a highly visible example, can trust its professional employees to participate more fully in decisions that affect their work environment, we will never solve the problems of rain forest destruction, ozone layer erosion, groundwater pollution, acid deposition, toxics-induced loss of immune function, and scores of other serious environmental health problems facing us, no matter how high on the Agency's action agenda we place them. The potential for contention is just too high. If you doubt, just look at where we stand today on all those issues: nowhere close to solutions. We frankly believe that EPA can and will provide just that example.

If we as a society choose to look at the implications of professionally competent analyses of environmental problems as too frightening, preferring instead to listen to the blandishments of the unlimited development and band-aid-as-environmental-fix schools, the program our union is advocating will only buy delay, not a solution. There is no escape.

History teaches that we can succeed. For World War II, as a nation we organized ourselves into an efficient social entity with clear goals and we set about accomplishing them in a rational, professional way. We recognized a clear and present danger and we went to work to overcome it. We can do the same today, facing another awful set of consequences if we fail.

At all levels of society we must organize to become efficient users of our resources, to make recycling and energy conservation a way of life, the way we did in the 1940s. We cannot continue to throw away the products of our industry, creating mountains of trash that have to be put into the ground, ocean, or air as toxic gases and incinerator ash. We must learn to live in harmony and equilibrium with each other and with the Earth. Local, state, and federal governments, private organizations, and individuals must marshal the will and the resources to confront the task. It can and must be done unless we are prepared to abandon this planet. It means cooperation on a revolutionary scale. Perhaps EPA's new administration and its new union can help show the way.