NIMBY: Learning from the 13th Century

It's hard to open a newspaper these days without spilling your coffee. Take, for instance, the item that appeared in newspapers on April 9th in which federal environment minister Sergio Marchi announced he wants to replace the regulatory approach to environmental protection with a new scheme in which industries will negotiate "covenants" with communities to reduce pollution by a certain amount over a set number of years. At the end of the period, the industry would be held accountable for its performance. Industries will be "asked" to take this approach, but, if the promises aren't kept, Marchi says "don't expect me to give [them] any excuses, any comfort".

Though the constitutionality and enforceability of this idea is highly questionable, it's only the federal manifestation of a trend that's sweeping the land: that is, government wants to turn what were originally voluntary environmental programs into mandatory activities.

A good example is an initiative from the Pollution Prevention and Pesticide Management Branch of B.C. Environment. A glossy colour brochure extols the virtues of a planning process designed to "assist B.C. companies in obtaining a P2 environmental authorization for their major industrial facilities". Carefully re-read and think about the last seven words of that sentence! Though presented as government-industry cooperation, what's really happening is that the very ISO 14000 programs which industry developed as a "carrot" and benchmark of its own progress are being appropriated by government and turned into a regulation-like "stick". To paraphrase Lenin, has industry been sold just enough rope to hang itself?

It may well be so. The provinces and feds are being supported in this by judicial activism. In finding Prospec Chemicals Ltd. guilty of unlawfully discharging carbon disulfide, an Alberta court recently sentenced the company to the cruel and unusual punishment of (brace yourself)...implementing an ISO 14000 environmental management system. The scotch glasses in Bay Street boardrooms are still rattling!

In Alberta, Ontario and New Brunswick, dramatic public restructuring exercises are under way. So, there's a lot of talk about how to protect the environment as government backs out of the command-and-control regulatory approach it can no longer afford. (Hence, Sergio Marchi's plan.)

Which leads us to an idea that's been around for, oh, say, seven or eight hundred years, but which is seldom heard in the policy chit-chat of Canada's environmental elite: property rights.

Property. Rights. Spoken separately, everyone likes them. Mention them together, and prepare to branded as Genghis Khan's executioner or (worse) a Newt Gingrich Republican. Environmentalists still think property rights are just an excuse for land owners to do whatever they want: poaching, paving and polluting.

This is dead wrong. Ironically, the environmental regulations that activists are keen to preserve were, for the most part, introduced in Canada to *permit* pollution, and the last quarter century has seen the steady erosion of property rights in favour of centralized government control. Now that the government is too broke to control everything, it's floundering about, calling for various "volunteer-to-be-good-or-else" schemes. With the nanny state down for the count, it's time to re-acquaint ourselves with property rights.

Property rights is part of the common law, an ancient unwritten code expressed through case history and first introduced in the mid-13th Century to protect land owners from the rapacious acts of robber barons and feudal kings. Essentially, property rights means that one's activities must not create a nuisance or otherwise "trespass" on the right of neighbours to the quiet enjoyment of their property. It's a "live and let live" philosophy invented by the middle class and hated by tyrants (or environment department managers).

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Trespasses can include any infringement to the quality of air, water or soil, or any excessive noise, smoke, dust or odours. An individual or group can sue a polluter in court and be awarded an injunction or damages if they can prove their property rights have been violated. Historically, mills and plants commonly could not discharge effluent that in any way compromised the health or character of the water shared by river-bank dwellers (who have so-called "riparian" rights). Even a project which had other public benefits could not violate sacred property rights. The problem is, unless they're worded otherwise, statutes and regulations override property rights.

Another big no-no in property rights is expropriation without just compensation. In the U.S., this concept even extends to issues of public risk perception. Injunctions and damages have been awarded to owners whose lands accomodate the passage of nuclear waste, pipelines and power wires, since property prices may erode or personal anxiety may increase even in the absence of measurable physical harm.

With ministries set to streamline approval for landfills, incinerators and other projects, it's time to recognize that there's at least one legitimate aspect to the Not-In-My-Back-Yard syndrome (NIMBY). The public has screamed for years that governments neither recognize its concerns nor reliably protect its interests. Government is slowly starting to acknowledge its failure, and to cede control to the local level. So, why not go all the way? Statutes and regulations could be re-written to say "nothing here is meant to legalize the violation of anyone's property rights". As they used to say, an armed society is a polite society. Armed with their historic rights, individuals and communities will negotiate projects into or out of existence with nary a government official in sight.

A compelling argument in favour of property rights is presented in Elizabeth Brubaker's Property Rights in the Defence of Nature, *published by Environment Probe. To order a copy, call 416-964-9223.*