Environmental law’s fragmentation and discretionary decision-making.

A critical reflection on the case of Norway.

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1. Introduction
This year, 2010, we can celebrate the 40th anniversary of environmental legislation, properly speaking, in Norway. In 1970 three major acts were adopted: The Nature Protection Act, The Water Pollution Control Act, and the Oil Pollution Prevention Act. Some years earlier a general permit system for air pollution emissions had been introduced. And a Ministry of the Environment was established in May 1972, a few weeks before the UN Conference on the Human Environment in Stockholm.

Since then there have been important environmental achievements. Major clean-up programmes in polluting industry and polluted watercourses and fjords were carried out in the 1970s and 1980s. The level of acidity in many lakes and rivers in southern Norway has decreased, and the fish are back. The number of protected areas – national parks, protected landscapes, and nature reserves - have tripled, and some 15% of mainland Norway is now protected. Since 1972 legislation aiming at protecting the environment has been considerably strengthened. In 1976 a framework act for control of products which are hazardous to the environment was adopted. In 1981 the earlier separate acts on air pollution, water and marine pollution and waste were brought together in an integrated Pollution Control Act. A new Planning and Building Act was adopted in 1985 with the aim of ensuring comprehensive spatial and land use planning throughout the entire country. In 1992 a general right to a healthy environment was included in Norway’s written constitution (Grunnloven). An act on genetically modified organisms

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1 Act of 19 June 1970 no 63.
2 Act of 26 June 1970 no 75.
4 In the Neighbour Act of 16 June 1961 no 15.
5 In addition, major parts of the islands of Svalbard (internationally better known as Spitzbergen) are protected as national parks and nature reserves.
6 Act of 11 June 1976 no 79 on the control of products and consumer services. (Lov om kontroll med produkter og forbrukertjenester (produktkontrolloven)).
7 Act of 13 March 1981 no. 6 on protection against pollution and on waste. (Lov om vern mot forurensninger og om avfall (forurensningsloven)). Thus, Norway had an integrated pollution legislation long before the Directive on Integrated Pollution Prevention and Control (originally directive EC/96/61, now directive 2008/1– IPCC-directive) was adopted by the European Community.
was introduced in 1993,\textsuperscript{9} and an act on environmental information and participation was adopted in 2003.\textsuperscript{10}

Still, many trends lead in the wrong direction. The pollution levels of hazardous substances in many rivers, lakes and fjords have not been reduced significantly and have even increased in some instances. Biodiversity has been reduced through development, and only small parts of the country are now considered as “wilderness”.\textsuperscript{11} 12Two recent reports from the Auditor General of Norway showed that Norway’s most valuable natural areas and biodiversity had been reduced through a “piecemeal” development all over the country.\textsuperscript{13}

This development in itself is not the main issue of this article. The point – and the problem – is that these trends clearly differ from the objectives of environmental policy adopted over the years by the parliament (Stortinget) and shifting governments. Norway’s seemingly ambitious and well developed environmental legislation has not been as effective as one might have expected.

Against this background, I shall take a critical look at Norway’s environmental law. I use the term “environmental law” in a broad sense, meaning all major legislation regulating activities that may have effects on the natural environment, and not only legislation with environmental protection as its main purpose. Nearly all major economic activities in society contribute to environmental problems, so that legal protection of the environment depends on principles, rules and regulations in many sectors and parts of law, and of how these are interpreted and applied.

I maintain that environmental protection in Norway suffers from three major problems related to law:

\begin{itemize}
  \item \textsuperscript{9} Act of 2 April 1993 no 38 on the production and use of genetically modified organisms. (Lov om framstilling og bruk av genmodifiserte organismer m.m. (genteknologiloven)),
  \item \textsuperscript{10} Act of 9 May 2003 no 31 on the right to environmental information and participation in public procedures in environmental cases. (Lov om rett til miljøinformasjon og deltakelse i offentlige beslutningsprosesser av betydning for miljøet (miljøinformasjonsloven)).
  \item \textsuperscript{11} In Norway’s environmental policy “wilderness” is defined as areas further away than 5 kms from infrastructure and other installations.
  \item \textsuperscript{13} Riksrevisjonens undersøkelse av myndighetenes arbeid med kartlegging og overvåking av biologisk mangfold og forvaltning av verneområder, Dokument nr. 3:12 (2005-2006) (Report from the Auditor General on the authorities work to monitor biodiversity and manage protected areas.)
  \item Riksrevisjonens undersøkelse av bærekraftig arealplanlegging og arealdisponering i Norge, Dokument nr. 3:11 (2006-2007). (Report from the Auditor General on sustainable land use planning and land management in Norway.)
\end{itemize}
First, the legislation governing the environment is *sector-based and highly fragmented*. It is fragmented horizontally between sectors as well as vertically between levels of government, and without the necessary mechanisms for coordination.

Second, the legislation is marked by *broadly formulated rules*. They provide the responsible sector authorities with wide discretion in balancing environmental concerns against sector objectives when laying down regulations and deciding individual cases. This is particularly important because the sector authorities are those primarily responsible for controlling the environmental effects of their activities, according to the principle of integration.

Third, the *principles of environmental law* laid down in important public documents on environmental policy are interpreted and applied most inconsistently, or not at all.

These problems are certainly not unique to Norway’s environmental law and are probably to some extent observed in most countries. They represent general challenges to good environmental governance and must be seen in the light of some fundamental problems in environmental law.

### 2. Some fundamental problems in environmental law

When we want to analyze environmental law in order to better understand how it works - or why it does not work as expected - we must be conscious of some deep-rooted problems in dealing with the environment through legal means. These are grounded in the very nature of environmental problems and in the special types of interests and conflicts we are faced with in this area of law. They may be described and categorized in several different ways. Here, I want in particular to highlight eight fundamental problems.

**a) Many environmental problems are invisible.** They are neither seen nor felt by human beings and are not perceived until their effects become evident. By that time it may be too late to stop the harmful developments. Many cannot be identified and understood without advanced science. In his book ”The Risk Society” the German sociologist Ulrich Beck describes these ”hidden risks” as a fundamental problem and challenge to modern society.

**b) Many environmental problems are marked by uncertainties.** Environmental problems are complex and there are often uncertainties and scientific controversies about cause-effects relationships. There is still a great lack of knowledge about how various organisms, including human beings, react to environmental change and stress, and in particular to the sum of many types of stress, in both the short term and the long term. Environmental policy and law must often address uncertainties and “moving targets”.

**c) Many environmental goods and services are public goods in the economic sense.** They are not the property of certain persons, but can be enjoyed by everybody. For example,

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ecological services do not “belong” to anybody, but they are fundamental for the functioning of nature and thus essential for human welfare and even survival. Since they are not subject to property right and do not have a real price in the market, they have at the outset a weaker legal status than property rights and easily identified economic interests.

d) Most environmental goods and services have an economic value both for individuals and for society. This is evident when pollution causes health problems or kills fish in a river, and when high noise levels reduce the value of houses along a major road. However, since most environmental goods and services are not valued in the market, it is difficult to price them correctly in decision-making. This is clearly a problem when applying legal rules that prescribe some sort of cost-benefit analysis as a basis for decision-making. It remains a problem in spite of the many efforts that are made to quantify environmental values in economic terms in a meaningful way.

e) Many environmental problems are the unacceptable cumulative effect of numerous actions and decisions that – individually - are rationally and economically efficient. At the same time, decision-making most often deals with individual cases. It is a fundamental challenge in environmental governance to take cumulative effects properly into account when decisions are taken on a case-by-case basis. The fact that many problems are the cumulative effect of numerous activities and products, which individually may be almost insignificant, generally makes it difficult to draw the line between legal and illegal acts and to establish clear responsibilities for environmental harm.

f) This problem is worsened by the fact that many environmental problems are cross-sectoral both in their causes and their effects. Activities in many different sectors work together to create the effects, and the effects in turn may affect different parts of society. At the same time institutional organization and legislation are to a large extent developed along the lines of economic sectors, and are thus too fragmented and specialized to deal consistently with the problem. Climate change and reduction of biological diversity are clear examples of this.

g) The most serious environmental problems cross administrative borders: boundaries between local communities, between counties and regions, and not least between states. The environmental effects of a certain activity may appear far away from their source. Completely different constituents may, on the one hand, get the benefits and on the other hand, incur the costs of environmental degradation. Institutions are needed that can ensure comprehensive management of the environment regardless of administrative borders.

h) Many environmental problems are long term, and future generations will be the victims. Again, climate change serves as a clear example. But future generations do not have a defined legal status either. Generally speaking, the role of law is to regulate present conflicts - between persons and interests of today. Law and legal institutions are
not well developed and only marginally equipped to regulate intergenerational conflicts and secure intergenerational justice.

Both individually and together, these factors represent profound challenges for environmental policy and law. They are particularly important when legislation is fragmented and offers the authorities broad discretionary power to balance environmental concerns and other social goals and considerations. Agreed objectives of environmental policy often become illusory when they are weighed against objectives of economic growth, employment, increased production of food, energy and goods, improved transport, and against such principles as cost-effectiveness and “local self rule”. It may, of course, be argued that this is simply the result of conscious political choices and political priorities. However, I will maintain that it is partly a result of the way environmental law – the framework for the execution of policy - is construed.

3. The problem of discretionary legislation.
When I lecture on Norway’s environmental law, I say in fact very little about the actual protection of Norway’s environment. I talk about principles of environmental law, institutions, what can be decided and regulated, the conditions that may be laid down in a pollution permit, the procedures that are to be followed in land use planning, and so on. “On paper” it all looks well developed and adequate. However, I say little about “the real thing”: To what extent is the environment actually protected, both legally and in fact? To answer this question, I have to explain how the authorities apply the legislation and hence the environmental policy.

This is mainly due to the fact that many of the key substantive provisions and rules are quite general or formed in an open style; they leave much discretion to the executive in the application of the provision. They either explicitly or implicitly prescribe a general balancing between the various interests when decisions are taken. This is the case, for example, for control of pollution from major stationary sources. The key section in the Pollution Control Act states that when deciding on an application for a pollution permit, the authority must “consider the effects of the pollution together with other inconveniences and benefits of the activity”.15 The key provision in the Energy Act16 simply states that production or transmission of energy requires a permit,17 and the objective of the act is to ensure energy production that is “rational” for society. According to the Aquaculture act, an installation for aquaculture requires a permit, which may be granted if it is environmentally “justifiable”.18 Also, the legal framework for spatial and land use planning in the Planning and Building Act, which i.a. is decisive for major infrastructure developments, provides the planning authority with very broad discretionary power.

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15 Section 11 in the Pollution Control Act.
16 Act of 29 June 1990 no 50 on the production, transmission, sale, distribution and use of energy. (Lov om produksjon, omforming, overføring, omsetning, fordeling og bruk av energi m.m. (energiloven)).
17 Section 3-1.
18 Act of 17 June 2005 no 79 on aquaculture (lov om akvakultur (akvakulturloven)), section 4 and section 6 first para.
The legislation establishes institutions, systems, and procedural rules, and it lays down certain general objectives and principles to be observed. But when it comes to the actual protection of the environment, the legal core is neither very precise nor very “hard”.

There are similar problems also with legislation that at first sight may seem quite precise in terms of content and substance. For example, Norway has a quite progressive Act on Right to Environmental Information. It implements the “Aarhus Convention”\(^\text{19}\) and goes even further in some respects. It goes quite far in providing the public with the right of insight into environmental effects of both public and private activities. But a close look reveals that the rules nevertheless leave important areas to the discretion of the authority or the private firm in question to decide whether information has to be given or not. This at least creates the basis for pretending in the individual case that the public does not have a right to get the information it asks for. This in itself makes it difficult for the public to avail themselves of their rights. A recent evaluation showed that after four years in force the act is scarcely known even by the public authorities and industry, and it is hardly applied.

This leads to the issue of procedural rules. We find quite precise procedural rules in Norwegian environmental law. This is particularly important since the substantial rules are vague. They ensure transparency, public participation, and environmental impact assessments (EIA).\(^\text{20}\) But the final outcome, how an EIA is used and to what extent its results are actually taken into account when the substantial decision is made, depends on the formulation of the substantial rule and is thus left to the discretion of the responsible authority.

Rules on information and participation also have two sides, and here is a dilemma: Who participates? Do these types of rules in reality tend to favour the resourceful segment of the concerned public? This is at the core of the NIMBY – “not in my back yard” – syndrome. The result of transparent and participatory procedures is often that environmentally hazardous activities are located in poor neighbourhoods and thus cause “environmental injustice”, or they are placed in undeveloped areas in order to avoid neighbourhood nuisance and protests altogether. Social scientists discuss “the legitimacy/effectiveness dilemma”. Openness and participation may give legitimacy to a decision, but it does not necessarily lead to an optimal result from an environmental point of view.

These very general observations apply both to national and international environmental law. The soft character of many international environmental treaties is well known. But it is also true that an important development has been going on in this field for some time both at the international and the European level, with the objective of making both public and private obligations and rights more precise and to strengthen enforcement mechanisms. Gradually, this development seems to reduce “the discretionary space” of the authorities. This trend is relevant also for Norway being a party to all of the most


\(^{20}\) The EIA rules are laid down in the Act of 27 June 2008 no 71 on Planning and Building Regulation (lov om planlegging og byggesaksbehandling (plan- og bygningsloven)) chapters 4 and 14, and Regulation of 26 June 2009 no 855 on Environmental Impact Assessment.
important international conventions as well as the Treaty of the European Economic Area (EEA).

4. Must environmental law be so open?
A question is whether key elements of environmental law have to be so open and “political” in their form. In my view, the answer is partly yes. This has to do with the nature of the problem that environmental law relates to, in particular the complexity of the problems and of the many interests – often many conflicting interests involved.

This complexity means that environmental law is often not a question of solving a conflict between A and B: As between a buyer and a seller, between a landowner and a tenant, or between a tortfeasor and the injured party in classical private law, or between the state and the taxpayer, between the state and the social security client, or between the prosecuting agency and the accused in public law. In these areas it is possible to lay down rather precise mutual rights and obligations on the parties (even if a certain widening of relevant interests can be observed in the development of some of these areas of law as well).

Such a bilateral relationship is often at the core of an environmental case, for example between the authority and the private actor applying for a building permit or a pollution licence for a new factory. But usually there are a number of third party interests involved in environmental cases. These are of various types and strengths; both multiple and conflicting public interests, and several contradictory private interests, and interests at different levels - local, national and international. The interests range from clear and short term economic profit on the one hand, to uncertain, vague, long term effects on ideal, “soft” and disputed values such as environmental values and future concerns at the other end of the spectrum. It is difficult to see how these complex types of conflicts can be regulated in a just and reasonable way through simple, clear-cut legal rules. Therefore it is difficult to make conflict-solving here a legal exercise alone, in the sense of applying a given rule to a given fact and getting the answer. If one does this, the risk is that the decisions are neither environmentally acceptable, nor socially just, nor efficient in the economic sense of the word.

It may also be argued that discretionary rules contribute to decisions that are efficient in the economic sense. They require, explicitly or implicitly, a cost-benefit analysis in each individual case and the final balance may reflect the strength and the “value” of the various interests involved. For example, a cost-benefit analysis will identify positive and negative effects of a planned project and compare possible gains and losses. A further transparent and participatory procedure will ensure that the deciding authority is provided with additional information. In theory, this should ensure an optimal – and economically efficient – solution.

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21 My book Forurensningsansvaret (Pollution responsibility), Oslo, 1999, is in part an attempt to analyze Norway’s legal rules in the field of pollution control from three perspectives: environmental effectiveness, fairness, and economic efficiency.
However, these arguments are challenged by the fundamental problems of environmental law described above. Of particular importance in the perspective of economic efficiency is the problem of putting the right price, in terms of money, on environmental values, and the problem of cumulative effects. The balancing of values and interests is carried out in innumerable individual cases, and not by a single or a few well coordinated public bodies, but by numerous sector authorities at the state, county and municipal levels, working rather independently and putting different values on the environment. Here we are faced with the second major problem: the fragmentation of environmental law.

5. The problem of fragmentation and the principle of integration

What is usually defined and discussed as ‘environmental law’ are the parts of law which have environmental protection as their main objective. However, this is only a limited part of all the law which is relevant for the status of the environment – what may be called environmental law in a broad sense. The way and the extent to which environmental considerations are taken into account when these acts are applied is equally important or may be even more important than the environmental legislation in the narrow sense of the concept.

The problem of discretionary rules must be seen in the context of this fragmentation of environmental law. The fragmentation is both “horizontal” and “vertical”. Most of the economic and social sectors and activities that harm the environment are regulated by special acts. Within each sector the decision-making authority is distributed between state, regional and local authorities. In total, the system is very complex.

This problem of fragmentation must be seen together with the “principle of integration”.22 Norway’s environmental law and administration is to a large extent based on this principle. Environmental considerations are to be “integrated” into the various sector policies. Each sector authority has the main responsibility for preventing and controlling the environmental hazardous effects of its activities. For some sectors this responsibility is found in the legislation itself. For example, the Aquaculture Act23 states that the sector ministry24 takes the necessary decisions to ensure an “environmentally sound” aquaculture in the country. The objective of the Forestry Act25 is both to promote forestry as an industry and “ensure biological diversity, and landscape, recreational and cultural values” in the forest. The responsible authorities are the ministry responsible for forestry26 and local forest authorities. For other sectors the principle of integration may be merely implicit. In sector policy formulation and in individual cases environmental authorities usually have a say in the preparatory procedure, and may influence the

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22 The “principle of integration” has a “narrow” and a “wide” meaning in international environmental law. The EU directive 2008/1/EC of Integrated pollution prevention and control (the “IPPC directive”) reflects the “narrow” meaning: Treat all environmental effects together (“integrated”) when considering a permit application for a polluting activity. The “broad” understanding is the integration of environmental objectives into the development process, and thus into the policy definition and implementation of various economic and social sectors. This is the meaning of the principle in this article.
23 Act of 17 June 2005 no 79 on aquaculture (Lov om akvakultur (akvakulturloven)), section 10.
24 Ministry for Fisheries and Coastal Affairs.
25 Act of 27 May 2005 no 31 on forestry (lov om skogbruk (skogbruksloven)).
26 Ministry of Agriculture and Food.
outcome. But the final balancing between the objectives of the sector and environmental considerations is made by the sector authority itself on the basis of discretionary rules.

As a matter of fact, the principle of integration may increase the fragmentation of environmental management and weaken environmental protection. This may seem to be a paradox, since the concept of “integration” suggests the opposite. The reason is that the different authorities weigh and balance their sector objectives against the related environmental effects differently. Thus environmental values are not treated consistently across sectors. A certain part of the environment such as an ecosystem is not treated as a whole either, which it should be. The environment becomes a “consideration” which is given different weight by different authorities, on a case-by-case basis. The fundamental problems described above come fully into play.

Let us take a closer look at this principle and its “raison d’être”.

One “root” of the principle of integration is found in the 1987 report from the World Commission on Environment and Development, known as the “Brundtland report”. The report launched sustainable development as a key objective for the international community, by which it meant “a development that meets the needs of today without compromising the ability of future generations to meet their own needs”.

“Merging environment and economics in decision making” is one of the seven “strategic imperatives” recommended by the Commission to achieve sustainable development. This reflects the fundamental message in the report: “Development” and “environmental protection” should no longer be seen as separate and often conflicting objectives, but as “two sides of the same coin”. As the commission expressed it:

“… But the ‘environment’ is where we all live; and ‘development’ is what we all do in attempting to improve our lot within that abode. The two are inseparable. …… Ecology and economy are becoming ever more interwoven – locally, regionally, nationally, and globally – into a seamless net of causes and effects.”

However, a fragmented legislation and administration makes it very difficult to treat ecology and economy in combination. The report states:

“The integrated and interdependent nature of the new challenges and issues contrasts sharply with the nature of the institutions that exist today. These institutions tend to be independent, fragmented, and working to relatively narrow mandates with closed decision processes. Those responsible for managing natural resources and protecting the environment are institutionally separated from those responsible for managing the economy. The real world of interlocked economic and ecological systems will not change; the policies and institutions concerned must.

This new awareness requires major shifts in the way governments and individuals approach issues of environment, development, and international cooperation. Approaches to environmental policy can be broadly characterized in two ways.

27 “Our Common Future”, Chairman’s foreword p. xi.
One, characterized as the ‘standard agenda’, reflects an approach to environmental policy, laws, and institutions that focuses on environmental effects. The second reflects an approach concentrating on the policies that are the sources of those effects. These two approaches represent distinctively different ways of looking both at the issues and at the institutions to manage them.\(^\text{28}\)

The solution, the Commission said, is to move away from the first approach, and adopt the second approach: This means to integrate environmental protection objectives into the policies of important sectors that cause environmental problems. The main challenge for institutional and legal change is expressed in the title of a key section of the report: “Shifting the Focus to the Policy Sources”.\(^\text{29}\) The Commission further develops its reasoning as follows:

“Sustainable development objectives should be incorporated in the terms of reference of those cabinet and legislative committees dealing with national economic policy and planning as well as those dealing with key sectoral and international policies. As an extension of this the major central economic and sectoral agencies of governments should now be made \textit{directly responsible and fully accountable} for ensuring that their policies, programmes, and budgets support development that is ecologically as well as economically sustainable.”\(^\text{30}\)

It should be added that the idea of “integration” is supplemented by another key aspect in the Brundtland report: the notion of “ultimate limits”. Although the commission did not want the report to be perceived as “another “Limits to Growth” report”, it states clearly that integration cannot mean just including and balancing the various interests in decision-making. The commission recognizes that, in reality, there are limits to growth:

“At a minimum, sustainable development must not endanger the natural systems that support life on Earth, the atmosphere, the waters, the soils, and the living beings.

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But ultimate limits there are, and sustainability requires that long before these are reached, the world must ensure equitable access to the constrained resource and reorient technological efforts to relieve the pressure.”\(^\text{31}\)

In the process of follow-up of the Brundtland report the “principle of integration” was recognized as a core of the objective of sustainable development. For example, it is expressed - in the widest possible way - in the Rio declaration,\(^\text{32}\) and it is the very basis

\(^{32}\) Principle 4 of the Rio Declaration states: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”
for the international action plan Agenda 21, which describes what must be done in the various economic sectors in order to achieve sustainable development.

The Treaty of the European Community laid down the principle of integration. Its article 6 read:

“Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities (referred to in Article 3), in particular with a view to promoting sustainable development.”

This is now included as article 11 in the (Lisbon) Treaty on the Functioning of the European Union.  

To “integrate” environmental concerns into sector policy means not only that environmental issues and effects must be assessed and taken into account when decisions are made but also that the objective and content of important sector policies in reality are modified in order to ensure long-term environmental protection. It means giving environmental concerns more weight in such areas as finance policy, consumer policy, industry policy, transport policy, energy policy, agricultural and fisheries policy, and general land use policy – just to mention some of the most important policy areas.

6. The dilemma of the integration principle:
Empirical studies show that real environmental policy integration is difficult, in spite of strong, ambitious and well formulated policy objectives to this effect.

Integration of environmental protection requires changes in the “paradigm”, objective and priorities of important sectors and authorities at different levels. There certainly are possibilities for “win-win”-situations: the “environmental solution” can be in accordance with and even improve the sector performance on its own criteria. But too often, and in the short term, it is perceived as a “problem” working against the success criteria of a sector authority and the people working there. It requires that sector authorities work with objectives, issues and problems about which they know little, with which they frequently do not identify and which they perceive as contrary to what they regard as their primary task and “mission”.

With the formal modification that “Community policies and activities (referred to in Article 3)” has been replaced by “the Union’s policies and activities”. It should be added, however, that while environmental protection was the only main task that was to be “integrated” into other policies and activities in the EC Treaty, several objectives have been given similar status in the Lisbon Treaty, such as: high level of employment, the guarantee of adequate social protection, the fight against social exclusion, a high level of education, training and protection of human health (article 9), and “discrimination based on sex, racial or ethnic origin religion or belief, disability, age or sexual orientation” (article 10). So, since more or less “everything must be integrated into everything”, the environmental integration principle has not quite the same strong meaning any longer as before.

William M. Lafferty: From environmental protection to sustainable development: the challenge of decoupling through sectoral integration, in William M. Lafferty (ed.): Governance for Sustainable
So, we are faced with a dilemma: Environmental protection and sustainable development require that each economic sector is “directly responsible and fully accountable” for ensuring ecological sustainability of its policy and measures. But how can this be achieved if and when:

- Environmental values and economic interests are difficult to compare, even “incommensurable”?
- Environmental protection goes contrary to the objective and “paradigm” of the sector?
- Responsibility for the environment becomes a question of decisions in numerous different, fragmented sector institutions and authorities, all valuing and weighing environmental issues differently?
- Authority is divided between various levels of government, including local government with considerable independence and self-determination?

These problems require thorough consideration and cannot be solved without a number of legal and institutional measures and reforms.

7. The role of principles of environmental law

Recent developments in international and national environmental law have been influenced by several “principles” of environmental law. These may serve to overcome the problems of fragmentation and broad discretionary power, provided that they are understood and applied consistently by the various authorities. Unfortunately, this is only to a limited extent the case in Norway.

The principle of sustainable development has been laid down as an important overall political goal in Norway, and it has been explicitly included in several major acts. But there is no agreed and consistent meaning of “sustainable development” as a concept in Norwegian law. A recent analysis indicates that the meaning differs from one act to another. It also shows that the inclusion of sustainable development or “sustainability” as an objective, in various forms, in reality does not mean anything very different from “business as usual”.

Likewise, the precautionary principle is defined as an important principle in Norway’s environmental policy. However, any application of the principle in other important policy areas such as petroleum policy, energy policy, transport policy, fish farming policy and agricultural policy has been difficult to identify. The principle is now explicitly laid down as an important overall political goal in Norway, and it has been explicitly included in several major acts.

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in the new Nature Diversity Act, and it is intended to have an effect across sectors and thus influence the application of sector legislation. To what extent this will be the case remains to be seen.

In 1992 an environmental section was included as section 110 b in Norway’s constitution (“Grunnloven”). In general terms it states that everybody has the right to a healthy environment and to a natural environment in which diversity is protected. This right should also extend to future generations. In its third paragraph, however, it states that it is up to the state’s authorities to define the content of this right more precisely, and thus decide how environmental and other social and economic objectives shall be balanced. So far section 110 b has only played a marginal role in strengthening Norway’s environmental law.

8. The combined effects of the fundamental problems, discretionary rules, fragmentation and sector responsibility. Can they be overcome?

The combination of discretionary rules, fragmented legislation, the application of the principle of integration, and the feeble application of principles of environmental law may easily give environmental values and concerns a weak legal position in decision-making. Consistent management of the environment based on certain environmental objectives becomes very difficult. The fundamental problems of environmental law, as described in the introduction to this article, are an essential factor here. When the environmental effects of an individual case are uncertain and difficult to assess, and if some of the effects in addition are long-term and distant, they will easily appear as marginal and quite unimportant compared to short-term economic benefits of, for example, a new factory, a power plant, a motorway, an aquaculture plant, a ski station or even a single recreational house. And when the law leaves much discretion to the authority, there are limited legal means to ensure that the environmental values are taken properly into account.

As already pointed out, it can of course be argued that the way environmental goals and values are treated by sector authorities and at different levels of government is simply a reflection of political priorities. The decision-makers – and ultimately the public – favour economic development, jobs, improved transport, supermarkets closer to home, etc. before environmental protection. I maintain that political priorities – as a matter of course – are part of the explanation, but not the only explanation. Law has a very important role to play as a frame for decisions, and in particular as an instrument for adopting good environmental alternatives and solutions. It becomes a legal issue when the legislation demands that environmental effects are properly assessed and ensures a fair balance.

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The legal challenges relate to both procedural and substantial rules, and may be described as follows:

- How to ensure through legal means and instruments that environmental objectives are both fully integrated in sector policies and on an equal footing with sector objectives?

- How can law be developed to ensure that environmental values and interests are treated more consistently across sectors and levels of authority?

- How can legislation work in such a way that the objectives of environmental protection and sustainable development are naturally internalized in sector objectives and in the application of sector policies instead of being seen and treated as contrary to their primary objective, which need to be avoided?

- How can law contribute to ensure “accountability” of the various sector authorities in this respect?

It would be naïve to recommend doing away with sector legislation, the integration principle and discretionary rules altogether. The principle of integration has come to stay. Administrative fragmentation is also a fact which is very difficult to change, and there is a long tradition in Norway of flexible legislation in the field of land use, management of natural resources and protection of the environment.

Instead, the answer should be to clarify and apply recognized environmental law principles, improve sector coordination i.a. through strengthened land use planning, and develop substantive environmental legislation which can apply equally across sectors and at various levels of government. One necessary element seems to be a more consistent valuing of environmental goods and services, which are accepted and applied by the various authorities in policy formulation and in individual cases. Another important instrument is environmental quality objectives as a basis and framework for all decisions affecting a certain part of nature or a given geographical area. This is the core of the concept of an “ecosystem approach” in environmental governance. This concept has now been introduced in the new Nature Diversity Act although it is not clearly defined.

Such an ecosystem approach would ensure that the ecological system is governed in its entirety. It enables the observance of its performance in relation to decisions taken, and entails several other advantages as well. Most importantly, consistent valuing of environmental goods and services is much more feasible when carried out for a fixed ecosystem. As an illustration, environmental governance based on the performance of one river basin could clearly reveal the value of this river basin at a very early stage. In any weighing and balancing assessment, this value could be incorporated systematically, instead of carrying out a single valuation assessment for the particular environmental goods and services affected by the individual decision. In this manner, decision-making incorporates predetermined environmental values, which significantly increases accountability, transparency and consistency in environmental policy.
Another advantage of the ecosystem approach is that certain environmental objectives such as sustainability may more easily be made operational and assessed, if and when policy-makers agree in advance on what sustainability means for the particular ecosystem affected by their decision. What is the resilience of that particular ecosystem? What are the limits of its performance? What kind of trade-offs are desirable? Disclosing these questions at an early stage could make environmental policy much more consistent and sustainable. In this respect, interconnection between the fields of science, policy and law are of utmost importance.

Recent trends in Norwegian legislation point in this direction. The 2008 Planning and Building Act has sustainable development as its overall objective. It strengthens spatial and land use planning as an instrument for cross-sector coordination in particular at the regional and municipal levels. It makes it possible for the planning authorities to lay down environmental quality objectives in municipal master plans and local development plans, and provides new zoning instruments to this effect. New principles for sustainable management of biodiversity, including the precautionary principle, are – as mentioned - laid down in the 2009 Nature Diversity Act. It is the intention of the legislator that these principles shall be applied by all sector authorities when exercising discretionary authority in individual cases. To what extent this will be followed up, and what the results will be, remains to be seen. In addition, environmental quality norms, aiming particularly at the protection of biodiversity, may also be laid down pursuant to this new act. They may serve as guidelines when decisions are taken pursuant to sector legislation.

However, Norway’s implementation of the major EU directives in this field will be even more important, and in particular the Water Framework Directive (“WFD”). It is one of the most ambitious and innovative pieces of environmental legislation from EU. It implies an ecosystem approach to the management of the rivers, lakes and coastal waters, by requiring binding water quality objectives. Thus it seeks to achieve a more consistent approach to water management by framing the decisions related to the environment by sectors and planning authorities at all levels.

The implementation and application of the directive appears to be a challenge for Norway due to our legal and administrative system in the field of environmental management. It is not based on natural geographical and hydrological units. Instead, it focuses on regulating activities related to water within the different sectors (not on the quality of the water recourse itself) through widely formulated, discretionary rules. The implementation of the directive raises the question of how environmental objectives in the WFD may limit various sector authorities’ policy formulation as well as the exercise of discretion in individual cases.


It must be recognized that the content and implementation of sector legislation are crucial for environmental management and protection. More consistent valuing of environmental goods and services, and implementation of environmental law principles across sectors in

\[40 \text{ Directive 2000/60/EC.}\]
the balancing of environmental concerns and sector objective, appear as essential, as do legal solutions to the problem of cumulative effects.

This is a challenge for research in environmental law. It cannot be limited to environmental legislation in the strict sense but must study how the environment is considered and treated within economic sectors that directly and indirectly influence the quality of the environment. How are principles of environmental law, and environmental considerations, taken into account and valued within the “development sectors” of law? It is an important task to identify the “margin of appreciation”, or the “hard core” of environmental law. We need more projects in this field, and we may need to develop methods, a more systematic approach, and knowledge concerning the relationship between environmental law and other parts of law.

The Research Group in Natural Resources Law at the Faculty of Law, University of Oslo, of which Erling Eide is an active member, has taken up these issues in one of its projects called “Consistency in Environmental Law”. The basic hypothesis is that the problems we face when trying to protect the environment through law are partly due to lack of consistency in Norway’s system of environmental law. The objective of the project is to identify relevant “inconsistencies” and other weaknesses in the law and/or its application and on this basis – hopefully - suggest improvements.

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