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THINKING AHEAD: PROTECTING THE ENVIRONMENT IN THE 21ST CENTURY

Thomas L. Eggert*

The United States has made notable progress in cleaning up the environment over the last 30 years. Our nation's air, land and water are, in almost all cases, significantly cleaner than they were only a few decades ago.¹ Before declaring victory though, we must acknowledge that some environmental problems are getting worse, and the nature of our environmental problems has changed. Many environmental problems are now global problems, as opposed to problems that could be dealt with at the national or state level. Problems have become diffuse, with no clearly identifiable source and with a lengthy delay between cause and effect, whereas before problems were immediately obvious with distinct sources. Finally, environmental problems have become very complex, changing from the relatively simple problems such as thinning eggshells due to pesticide abuse.²

Government agencies continue to address this new generation of problems with tools designed for a generation of problems now largely behind us. The time has come to develop complementary tools designed for these new problems.

As environmental regulatory agencies investigate new approaches to environmental protection, the way questions are phrased has a profound impact on the answers generated. If the question concerns how an environmental agency can do a better job working with businesses to ensure that they act in an environmentally responsible manner, then the

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¹ See Environmental Protection Agency, *Air Quality Trends* (1995); Environmental Protection Agency, *National Water Quality Inventory: Report to Congress* (1996).

² See RACHEL CARSON, *SILENT SPRING* 206 (1963). Rachel Carson is credited with making environmental threats understandable to the public. Much of her work focused on the impact of DDT on eggshells, and led to the banning of DDT by the Environmental Protection Agency.

answer must involve some type of cooperative effort between the environmental agency and the relevant businesses. If, however, the question concerns how an environmental agency can best use its resources to protect the environment, then the answer may require the agency to work with many different groups. It is my belief that environmental regulatory agencies should be asking the second question. Further, one possible answer to the question of how to develop effective, supplemental approaches to protecting and enhancing the environment lies in educating and influencing the public, specifically with respect to consumer purchasing decisions.

BACKGROUND

There is a surprising consensus that current environmental protection and enhancement strategies are not sufficient to meet the environmental challenges of the next century.³

According to work done by the Aspen Institute, business, government and environmental representatives agree that there are more effective approaches to environmental protection that can reduce environmental impacts in ways that reduce costs and inefficiencies and encourage innovation and technological advances.⁴

Unfortunately, most of the alternative strategies currently being considered involve improving relationships with business.⁵

Environmental agencies have been exploring the benefits of cooperative relationships with businesses for more than seven years. Examples include the Council of Great Lakes Governors' Great Printers Project⁶ (started in 1992), EPA's Project XL and Common Sense Initiative (started in 1994), Texas' Clean Texas 2000 programs⁷ (started in 1992),

³ See, e.g., William D. Ruckelshous & Karl Hausker, *The Environmental Protections System in Transition: Toward a More Desirable Future, Final Report of the Enterprise for the Environment*, 1997 The Center for Strategic and Int'l Stud. 4; *The Alternative Path: A Cleaner, Cheaper Way to Protect and Enhance the Environment*, 1996 The Aspen Inst. 2.

⁴ See Aspen, *supra* note 3, at 2.

⁵ For example, the Environmental Protection Agency has created a number of partnership oriented programs over the past five or more years. One of the earliest of these was the 33/50 program, which was followed by the Environmental Leadership Program, Project XL, and the Common Sense Initiative, Waste Wise, and others.

⁶ See ENVIRONMENTAL PROTECTION AGENCY, GREAT PRINTERS PROJECT: PROGRESS IN MAKING POLLUTION PREVENTION STANDARD PRACTICE IN PRINTING INDUSTRY (1994). This document was produced by the Great Printing team and signed by the Governors of the Great Lakes states, the heads of the Environmental Defense Fund, Printing Industry of America, and the EPA. *Id.*

⁷ TEXAS NATURAL RESOURCE CONSERVATION COMMITTEE, CLEAN TEXAS 2000: ENVIRONMENTAL PARTNERSHIPS FACT SHEET (1995).

and recognition programs that exist in virtually all states. All of these efforts are premised on the idea that rewarding business for acting responsibly will produce environmentally responsible businesses. However, as regulatory agencies prepare for the 21st century, they find themselves evaluating the efficacy of these programs. Although these programs have significantly decreased tensions between the agencies and the business community, they have been only marginally effective at creating new incentives to protect and enhance the environment.

Reliance on voluntary partnership development as the shining star in a new constellation of environmental protection tools is misplaced. Project XL and the Common Sense Initiative have been severely criticized for their lack of results.⁸

Similarly, the Great Printers Project has not produced enough interest within the printing community to justify continued funding.⁹

Although voluntary partnerships have been shown to work well in other countries,¹⁰ the US has a very different history and cultural background which makes the value of these voluntary partnerships lie in speculative potential rather than actual accomplishments.

In searching for a system to supplement current environmental protection and enhancement strategies, the government seems to have been asking the wrong question. The answer has repeatedly come back as "partnership development." However, partnerships have not lived up to the government's expectations.

This is not to say that developing more cooperative relationships with the business community has been entirely futile. It has not. Improving adversarial relationships will pay dividends, yet it is presently uncertain whether those dividends will include the enlightened understanding that will produce improved corporate environmental performance without the threat of sanctions.

DISCUSSION

Regulatory agencies have been trying to "evolve" from mandating an environmental ethic (which in most cases has resulted in the development of a compliance ethic, not an environmental one) to encouraging one.

⁸ See T. DAVIES & J. MAZUREK, *REGULATING POLLUTION: DOES THE U.S. SYSTEM WORK* 28 (1997).

⁹ At the Great Plains Regional Meeting on April 24, 1997, representatives from the printing community could not commit to sustaining project activities once funding ran out. Lack of demand from the trade association membership was cited as the prevailing reason.

¹⁰ See HUEY D. JOHNSON, *GREEN PLANS* 45 (1995).

Agencies are replacing the old sanctions of fines and lawsuits with incentives and relationship building. Yet, as these agencies "evolve", they seem to ignore the reasons which motivate most companies to comply with the laws. In the vast majority of cases it is because they are afraid of the consequences of being caught "out of compliance."¹¹

Absent regulations, business would be much less concerned with the environmental impact of their production process or products.

This fundamental truth, that business is concerned about environmental emissions because the government is concerned about them, must influence the consideration of alternative approaches. An alternative approach that replaces this incentive, must create an equally compelling incentive to replace it. One candidate that regulatory agencies have little experience with is the "invisible hand" of Adam Smith's market.¹²

Market incentives come in many forms. Air emissions trading is one example of market forces at work.¹³

The Superfund program's enlistment of lenders and insurers as "quasi-regulators," encouraging and overseeing cleanups of contaminated sites is another example.¹⁴

In both instances, the environmental regulatory agencies were relatively minor players, mostly responsible for answering market participant questions. The results have been impressive. SO₂ emissions trading has achieved SO₂ reductions greater than those required, and sooner than required, under the regulatory program.¹⁵

In addition, the industry has saved over \$2 billion.¹⁶

The story is the same in the area of cleanups. Thousands of sites are being cleaned up because lenders and insurance companies are acting in their best financial interests and minimizing their risks.¹⁷

¹¹ See SCOTT E. DAVID ET AL., WISCONSIN DEP'T OF NATURAL RESOURCES, ENVIRONMENTAL INNOVATION AND REGULATION: SIFTING REALITY FROM RHETORIC (1998). See generally Tom Egery, *Moving Forward by Looking Back: The Role of Enforcement in Promoting Pollution Prevention*, 9 POLLUTION PREVENTION R. 1 (1999).

¹² See ADAM SMITH, THE WEALTH OF NATIONS 423 (1776).

¹³ See T. DAVIES & J. MAZUREK, POLLUTION CONTROL IN THE U.S.: EVALUATING THE SYSTEM 52-65 (1998).

¹⁴ See Environmental Law Institute, *The Environmental Forum*.

¹⁵ See DAVIES & MAZUREK, *supra* note 13, at 56.

¹⁶ See *id.* at 58.

¹⁷ See GENERAL ACCOUNTING OFFICE, SUPERFUND: STATE VOLUNTARY PROGRAMS PROVIDE INCENTIVES TO ENCOURAGE CLEANUPS 18-21 (1997).

By elevating the supervisory role of lenders to a legal duty backed by Superfund liability, Congress empowered lenders to function as a second level of enforcement of environmental laws.¹⁸

By creating potential liability for undiscovered contamination, the government created an incentive for banks and the lending community as a whole to compel cleanups as a condition of a loan. Insurance companies are also setting policy prices based upon known risks, thereby encouraging companies to fully identify the risks and to remediate them. Clearly, experimenting with the invisible hand of the market is producing results.

The more traditional understanding of the invisible hand holds that consumers express their preferences through their purchase decisions. Producers are rewarded for meeting the needs of the consumers at a price which consumers are willing to pay. Producers that fail to attract consumers ultimately disappear from the market.

Information is one of the keys to this exchange between producers and consumers. Limited or inadequate information may result in a miscommunication of signals between consumers and producers. In our current market, consumers are seldom, if ever, provided with information about the relative environmental strengths and weaknesses of competing products. In other countries, environmental labels, or eco-labels are used on a great array of consumer products. Eco-label programs can be found in Europe,¹⁹ the Far East,²⁰ and North America.²¹

These labels are designed both to educate the consumer on the relative environmental merit of a particular product and to recognize and reward companies that are performing in an environmentally superior manner. They are found on products from soaps and detergents to toilet paper to personal care products.²²

In this country, we do not have a widely recognized eco-label system. It is very difficult for consumers to compare the relative environmental qualities of products. Yet, the logic of the market suggests that if customers demand or select in favor of companies that demonstrate an

¹⁸ See Sara A. Goldberg, *Lender Liability Under CERCLA: Shaping a New Legal Rule*, 4 N.Y.U. ENVTL. L.J. 61, 78 (1995).

¹⁹ See generally Julian Morris & Lynn Scarlett, *Buying Green: Consumers Products and the Environment*, 1996 REASON INST. 50 (Austria, France, Germany, the Netherlands, Sweden, Norway, Finland, and the United Kingdom all have eco-labeling programs).

²⁰ See generally *id.* (Australia, India, Japan, New Zealand, South Korea, Singapore, China, and Taiwan all have eco-labeling programs).

²¹ See generally *id.* (Canada and, to a very limited extent, the United States, have eco-labeling programs).

²² See generally *id.*

environmental ethic, companies will respond by demonstrating their environmental ethic. This power of the consumer is a power that is untapped by environmental regulatory agencies.

It is possible that regulatory agencies could influence the choices of consumers by providing information on the relative environmental performance of competitors. Recent studies also suggest that a majority of U.S. consumers prefer to buy environmentally friendly products.²³

These survey findings are supported by the demonstrated purchasing behaviors of German citizens. Products labeled as environmentally friendly by the German Institute for Quality Assurance and Certification command a distinct market share, and there is stiff competition for the right to display the label.²⁴

RATIONALE

This is not a call for total privatization of environmental protection. The government can not abdicate responsibility for developing standards and enforcing regulations. However, empowering the private sector, and the public at large, to bring independent pressure on polluting businesses is not an abdication of authority. Rather, utilizing the market forces at work in the private sector would represent an expanded view of the responsibilities and abilities of regulatory agencies. In an era of dwindling resources, educated and empowered consumers should allow regulatory agencies to focus their limited resources on dealing with truly bad actors. In an era of government re-invention, many environmental regulatory agencies have identified citizen empowerment as a desirable activity to be pursued. The strength of these approaches can be seen in the accomplishments of the SARA Title III program (the Community Right To Know or TRI legislation).²⁵

By annually publishing a list of the largest emitters of pollution in each state, known as the Toxic Release Inventory (TRI), the EPA allows public pressure to influence corporate decision making.²⁶

²³ See Harvey Hartman, *Myths and Realities of the "New" Green Economy*, ENVTL. QUALITY MGMT., Winter 1996, at 47, 47–55.

²⁴ See INGRID LAUDE, THE ENVIRONMENTAL LABEL: A GERMAN SYSTEM FOR IDENTIFYING ENVIRONMENTALLY FRIENDLY PRODUCTS 1–15 (1995) (on file with author); Jans Hemmelskamp & Karl Ludwig Brockmann, *Environmental Labels—The German "Blue Angel,"* 29 FUTURES 67 (1997).

²⁵ See Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §§ 300–330, 100 Stat. 1613 (1986).

²⁶ See Carol J. Forrest, *The TRI, P2, and Public Dialogue*, 6 POLLUTION PREVENTION REV. 1 (1996).

Experience to date with the Right To Know legislation suggests that the public can, and does, influence business decisions on emissions.²⁷

The public availability of TRI information has had another far-reaching effect: it has acted as a catalyst for increased dialogue among environmental activists, community residents, industry, and government on a wide range of environmental and community issues.²⁸

The opportunity for regulatory agencies to work with consumers and the public should be expanded. Work is underway in many agencies to make data more accessible and useful.²⁹

This type of work supports a broad strategy for incorporating the public into the environmental protection effort as it takes advantage of trends evident within many regulatory agencies to seek greater public involvement in environmental decision making.

However, merely making information available to the public is not sufficient to create consumers that are ready to influence the market. Targeted education of consumers is important. So too is providing consumers with access to technical assistance, so that they can understand and use information appropriately.

One such effort underway in Wisconsin arose out of a partnership between the Wisconsin Department of Natural Resources, the Wisconsin Fabricare Association (the dry cleaners' state trade association), the University of Wisconsin-Extension and Citizens for a Better Environment. Together, this group developed a recognition program for dry cleaners that emphasized the efficient use of the solvents used in the dry cleaning process and encouraged the use of water, soap and human labor for many traditional "dry" cleaning jobs. Companies that were very efficient with their use of solvents, and which did a high percentage of their cleaning with soap and water were awarded with five stars, while less superior performers received one to four stars. The public was then educated on the benefit of patronizing a dry cleaner that was participating in this program, and if a choice existed, to choose the most environmentally efficient dry cleaner. After four years, the program continues to attract the interest of additional dry cleaners, primarily because of the interest of consumers. Though far from conclusive proof that the power of the consumer can drive companies to become more efficient, this effort provides support for

²⁷ See Paul Hilton & Alice Tepper Marlin, *The Role of the Nonprofit in Rating Environmental Performance*, 3 CORP. ENVTL. STRATEGY 21 (1996).

²⁸ See Forrest, *supra* note 26.

²⁹ See NANCY BARKER & TOM ATEN, WISCONSIN DEP'T OF NATURAL RESOURCES, EQ FACILITIES DESIGN DOCUMENT (1995).

the proposition that the government can work through consumers to influence choices that businesses make.

CONCLUSION

By continuing to focus heavily on business, environmental regulatory agencies limit their ability to develop strategies that are sufficient to meet the environmental challenges of tomorrow. However, by providing credible, readily available information to customers in an effort to encourage responsible choices, environmental agencies can empower customers to bring pressure on manufacturers to minimize emissions. Customer pressure is entirely different than regulatory pressure, but potentially no less effective. Businesses that fail to respond appropriately to customer pressure suffer even more devastating consequences than those that fail to respond to regulatory pressure.

Accessible, trustworthy information is one of the greatest limitations that the consuming public faces. If regulatory agencies can aggressively act to fill this gap through a wide variety of approaches, it will have begun to enlist legions of informed buyers that can make a difference in how business approaches environmental decisions.

Agencies must slowly shift environmental protection power to consumers. Few, if any, businesses currently identify customer pressure as the primary reason for minimizing environmental emissions. However, lessons from other countries (notably Germany and the Scandinavian countries)³⁰ suggest that market pressure holds great potential in this country. It is time to investigate that potential.

³⁰ See Laude, *supra* note 24; Hemmelskamp & Brockman, *supra* note 24.