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STICKY THICKETS*: LOCAL REGULATORY CHALLENGES FOR SMALL AND EMERGING SUSTAINABLE BUSINESSES

LISA M. LESAGE**

INTRODUCTION

“Sustainability” is the ubiquitous new buzzword for the twenty-first century. Large corporations everywhere tout their “sustainable” and “earth friendly” practices. Yet the explosive growth in sustainable business practices is not just a multinational corporate phenomenon. Small businesses and micro-entrepreneurs, especially in the western United States, long have been leaders in the development of sustainable business practices. The problem, however, is that these innovative small businesses on the cutting edge of sustainability frequently run headlong into the intractable thicket of local regulatory enforcement mechanisms—mechanisms that often foster and reinforce regressive behavior and methodologies, and exploitive growth over sustainable growth.

Small business is the fastest growing segment in the United States economy¹ and the country’s largest employer. Of the nation’s nearly six million employer firms, almost four million have fewer than ten employees; only approximately 38,000 businesses employ between 100 and 150 people.² In Oregon as well, small

* Merriam-Webster’s Collegiate Dictionary 1298 (11th ed. 2004) (“[S]omething resembling a thicket in density or impenetrability: TANGLE.”).

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1. See U.S. Census Bureau, Statistics About Business Size from the Census Bureau, <http://www.census.gov:80/epcd/www/smallbus.html> (last visited May 15, 2009).

2. OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., EMPLOYER FIRMS, ESTABLISHMENTS, EMPLOYMENT, AND ANNUAL PAYROLL SMALL FIRM SIZE CLASSES, 2006, AT 1 (2006), http://www.sba.gov/advo/research/us_06ss.pdf (segmenting the economy into twenty-five size classes).

businesses make up the great majority of all private enterprise.³ Increasingly, sustainable small businesses are an important segment of that growth.⁴ Although the Small Business Administration defines “small business” as one with “fewer than 500 employees,”⁵ the vast majority of small businesses in Oregon actually employ fewer than 100.⁶ In fact, the latest census figures from 2006 show that of Oregon’s 358,878 small businesses, only 110,684 had employees, and only 176 of those employed more than 500 people.⁷

In the Portland metropolitan area alone, over half of the sector’s 57,262 businesses employed fewer than five people in the year 2002, while another 10,000 businesses employed between five and nine workers.⁸ Taken together, small businesses form the backbone of Portland’s economy and constitute the major local employer. The majority of these small businesses are micro-enterprises, which are “defined as a business with five or less employees, which requires \$35,000 or less in start up capital, and [which] does not have access to the traditional commercial banking sector for financial assistance.”⁹ These statistics relating to small businesses and micro-

3. U.S. Census Bureau, 2006 County Business Patterns, <http://censtats.census.gov/cbpnaic/cbpnaic.shtml> (last visited May 15, 2009) (under “County Business Patterns,” select “Oregon”; then under “2006 County Business Patterns,” select “Submit”; select “2006” as the year) [hereinafter 2006 County Business Patterns]; U.S. Census Bureau, 2006 Nonemployer Statistics Total for All Sectors Oregon, <http://www.census.gov/epcd/nonemployer/2006/or/OR000.HTM> (last visited May 15, 2009) (listing nonemployer statistics).

4. JENNIFER H. ALLEN, OR. ENVTL. COUNCIL, ASSESSING THE MARKET DYNAMICS OF “VALUES-ADDED” AGRICULTURE AND FOOD BUSINESSES IN OREGON: CHALLENGES AND OPPORTUNITIES 6-7, 71 (2006), <http://www.oeonline.org/resources/publications/reportsandstudies/values-added-ag> (discussing growth in “regional demand for products that have added environmental and social attributes” and the position of small-scale producers in the marketplace); *see also id.* at 13-14 (discussing the importance of the food industry to the Oregon economy and the increase in the number of small farms in Oregon).

5. OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., SMALL BUSINESS PROFILE: OREGON 1 n.1 (2007), <http://www.sba.gov/advo/research/profiles/07or.pdf> [hereinafter SMALL BUSINESS PROFILE: OREGON].

6. *See* 2006 County Business Patterns, *supra* note 3.

7. The balance employed fewer than 500, and 248,194 were nonemployers. *Id.*; *see also* SMALL BUSINESS PROFILE: OREGON, *supra* note 5, at 1. Eighty-six percent of the employer firms in Oregon employ fewer than fifty employees. *See* PORTLAND DEV. COMM’N, OREGON/PORTLAND METROPOLITAN AREA SMALL BUSINESS STATISTICS 1 (2006), http://www.portlandalliance.com/pdf/1106_Small_Bus_Stats.pdf.

8. U.S. Census Bureau, 2002 MSA Business Patterns, <http://censtats.census.gov/cgi-bin/msanaic/msasect.pl> (under “2006 MSA Business Patterns,” select “2002” and “Portland-Vancouver, OR-WA”) (last visited May 15, 2009).

9. Alabama Microenterprise Network, <http://www.amencorp.com/> (last visited May 15, 2009) (emphasis omitted).

entrepreneurs are significant when considering that such businesses are subject to most of the same regulations as are larger, better financed businesses. Because of their size, however, these small businesses bear a much greater burden of regulatory compliance costs.

This Article explores the relationship between growth of sustainable small businesses and environmental regulation; identifies barriers to sustainable business practices found in state and local government regulations; provides a range of examples of specific thorny regulatory issues facing small, sustainable businesses in Oregon; and offers suggestions for re-examining states' approaches to local regulatory enforcement.

I. THE GROWTH OF SUSTAINABLE BUSINESS

There are as many definitions of "sustainable business" as there are types of businesses.¹⁰ Generally, a sustainable business can be defined as one that "integrates and balances economic growth, social equity and environmental impact into how it does business. . . . [I]ntegrating . . . business practices to work in harmony with—and not against—sound environmental management practices"¹¹ Regardless of how it is defined, "sustainable business" did not suddenly arise in the twenty-first century. Sustainability as a business practice actually has roots in the early 1970s when the "Club of Rome," a group of scientists and influential businesspeople, published *Limits to Growth*, which for the first time articulated that current trends of unsustainable, out-of-control growth could be altered to create environmental *and* economic stability in the future.¹²

10. "A sustainable business is one that operates in an environmentally responsible way. Its products and business processes are such that no negative environmental impact is felt as a result of their existence." What is a Sustainable Business?, The Evergreen Group, <http://www.theevergreengroup.com/sustainable-business.htm> (last visited May 15, 2009). A sustainable business is "one that 'leaves the environment no worse off at the end of each accounting period than it was at the beginning of that accounting period.'" STEPHAN SCHMIDHEINY & FEDERICO J. ZORRAQUIN, FINANCING CHANGE 17 (1996) (quoting the definition of "sustainable business" as proposed by the United Nations Conference on Trade and Development).

11. SUSTAINABLE BUS. NETWORK OF PORTLAND, SUSTAINABLE BUSINESS PRACTICES FOR LOCALLY OWNED BUSINESSES 1 (n.d.), <http://www.sbnportland.org/resources/SustBizPrac.pdf/> (last visited May 15, 2009).

12. Andrea Larson, *An Overview of the Historical Context for Sustainable Business in the United States, 1960-2000*, at 5 (Darden Sch. Found., Univ. of Va., UVA-ENT-0034, 1999) available at <http://ssrn.com/abstract=908795>. See generally DONELLA H. MEADOWS ET AL., THE LIMITS OF GROWTH: A REPORT FOR THE CLUB OF ROME'S PROJECT ON THE PREDICAMENT OF MANKIND (1972).

In the early 1990s, Swiss industrialist Stephan Schmidheiny established the Business Council for Sustainable Development (BCSD), comprised of over fifty business leaders from around the globe, to work on the tensions between economic development and the environment. In the book *Changing Course*, Schmidheiny and the BCSD posit the need for an integrated approach to confronting these tensions.¹³ They argue that business “must devise strategies to maximize added value while minimizing resource and energy use [g]iven the large technological and productive capacity of business, any progress toward sustainable development requires its active leadership.”¹⁴

From these nascent beginnings, the idea of businesses taking on a leadership role in fostering stewardship of the environment began to take root. The United Nations conference on the environment, better known as the “Rio Earth Summit,” drew thousands of participants, including businesspeople, and led to the establishment of the United Nations Commission on Sustainable Development.¹⁵ Paul Hawken, a wealthy businessman and founder of The Natural Step,¹⁶ wrote *The Ecology of Commerce*, which put forth a model of commerce designed to operate on biodiversity “that is so intelligently designed and constructed that it mimics nature at every step, a symbiosis of company and customer and ecology.”¹⁷

Within the last twenty years, and especially within the last ten, the business community has begun to realize the unprecedented competitive opportunities in the “green marketplace.” Market demand for “green products” (usually identified as those with environmentally or socially positive impacts) grew markedly beginning in the 1970s¹⁸ in response to public concern for the environment.¹⁹ Increasingly, businesses created new eco-friendly products, manufacturing methods, and delivery systems that gave them a competi-

13. STEPHAN SCHMIDHEINY WITH THE BUS. COUNCIL FOR SUSTAINABLE DEV., *CHANGING COURSE: A GLOBAL BUSINESS PERSPECTIVE ON DEVELOPMENT AND THE ENVIRONMENT*, AT XXI-XXII (1992).

14. *Id.* at 9.

15. See S. Jacob Scherr & R. Juge Gregg, *Johannesburg and Beyond: The 2002 World Summit on Sustainable Development and the Rise of Partnerships*, 18 GEO. INT'L ENVTL. L. REV. 425, 430 (2006); United Nations-Earth Summit+5, <http://www.un.org/esa/earthsummit/> (last visited May 15, 2009).

16. See The Natural Step, <http://www.naturalstep.org/en/about-us> (last visited May 15, 2009) (“The Natural Step is a non profit organization founded with the vision of creating a sustainable society.”).

17. PAUL HAWKEN, *THE ECOLOGY OF COMMERCE* 15 (1993).

18. W. Thomas Anderson, Jr. & William H. Cunningham, *The Socially Conscious Consumer*, 36 J. MARKETING 23, 24 (1972).

tive advantage. By the mid-1990s, nearly twenty percent of adults in the United States and Canada belonged to environmental consumer groups, and the demand for environment-related products was estimated to be \$120 million.²⁰

The range of opportunities for businesses to produce a sustainable product, participate in the supply chain for sustainable products, provide a sustainable service, or incorporate sustainability practices within an existing business model have grown to be almost limitless. For example, in the solar power supply chain alone, there are opportunities for raw material extraction and manufacturing (silicon), wafer manufacturing, module development, engineering, and installation.²¹ In generating wind energy, a single turbine is composed of over 3000 separately manufactured parts.²² In addition to the manufacturing sector, organic farming has seen a dramatic surge in the last fifteen years. In the United States, annual sales of organic products were around \$1 billion in 1990, soaring to over \$12 billion in 2004, and retail sales have historically grown twenty to twenty-four percent per year since 1990.²³ In Oregon, strong market demand for local, sustainable products exists in a wide variety of areas, and a large number of businesses purchase these products.²⁴

II. BUSINESS INCENTIVES FOR “GOING GREEN”

There are several mechanisms already in place—and continuing to emerge—that “provide compensation or incentives for producers investing in environmentally friendly practices.”²⁵ These consist of developing markets for ecosystem services like “provision of clean water and air, pollination of crops, mitigation of environmental hazards, and pest and disease control.”²⁶ As an example, the food industry is one of the largest economic sectors in the Pacific Northwest. Within the “natural” food sector, there are a num-

19. Timothy Forsyth, *Environmental Responsibility and Business Regulation: The Case of Sustainable Tourism*, 163 *GEOGRAPHICAL J.* 270, 271 (1997), available at <http://www.jstor.org/stable/3059723>.

20. Paul Shrivastava, *Environmental Technologies and Competitive Advantage*, 16 *STRATEGIC MGMT. J. (SPECIAL ISSUE)* 183, 184 (1995).

21. Interview with Pamela Neal, Sustainable Indus. Liaison, Portland Dev. Comm'n (July 29, 2008).

22. *Id.*

23. ALLEN, *supra* note 4, at 32.

24. *Id.* at 60.

25. *Id.* at 11.

26. *Id.*

ber of smaller cooperative groceries being established.²⁷ Although across the United States “the number of operating farms has been decreasing,” in Oregon, the number has increased significantly.²⁸ At least some of this growth may be attributable to consumers choosing to buy locally grown food. Farmers can gain greater value for their products by selling through direct and local channels.²⁹

Studies of motivations and contextual factors inducing companies to “go green” suggest at least three kinds of motivating dynamics: competitive advantage, legitimacy,³⁰ and ecological responsibility.³¹ In response to a survey of Oregon businesses conducted by the Oregon Sustainability Board, seventy-seven percent of respondents stated that the primary competitive advantage of engaging in sustainability practices was a better “public image,” with the second “customer demand.” Only eight percent of respondents said that sustainable practices offered no competitive advantage.³² Management studies show that firms motivated by competitiveness have “actively innovated ecologically benign processes and products to enhance their market positions.”³³

Firms motivated primarily by legitimacy or compliance tend not to focus “on proactive efforts, but rather on reactions to external constraints made to avoid sanctions.”³⁴ Their corporate environmental policies appear to be focused on “keeping up with environmental regulations” rather than focusing resources on innovation.³⁵ Their initiatives are geared toward reducing risk rather than publicizing or creating ecological responsiveness.³⁶

Firms motivated primarily by ecological responsibility (concerns for the firm’s social obligations and values) emphasize their ethical responsibility rather than self-interest.³⁷ Interestingly, most

27. *Id.* at 13.

28. *Id.* at 14.

29. *See id.* at 39-43.

30. Legitimacy refers to the desire of a firm to demonstrate the appropriateness of its actions—namely, to comply—within an established set of regulations, “norms, values [or] beliefs.” *See* Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 *ACAD. MGMT. REV.* 571, 574 (1995).

31. Pratima Bansal & Kendall Roth, *Why Companies Go Green: A Model of Ecological Responsiveness*, 43 *ACAD. MGMT. J.* 717, 728 (2000).

32. RES. INNOVATION GROUP, UNIV. OF OR., STATUS, TRENDS AND NEEDS OF SELECTED BUSINESSES APPLYING SUSTAINABILITY PRACTICES IN OREGON 18 (2005).

33. Bansal & Roth, *supra* note 31, at 724.

34. *Id.* at 727.

35. *Id.*

36. *Id.* at 728.

37. *Id.*

firms in the latter category often choose innovative courses of action rather than copying the activities of other businesses.³⁸ In addition, such initiatives tend to be led by management or a single individual whose ecological values are responsible for the direction of the firm.³⁹

Although most of these studies focused on larger firms or included a combination of small and large firms, it would be logical to assume that small businesses that are led by entrepreneurs motivated by social responsibility and competitiveness—and not exclusively self-interest—will also be among those that are most innovative. However, small businesses forced to spend a great amount of time and resources responding to regulatory requirements are much less likely to have the time and resources to spend on innovation. Likewise, those entrepreneurs seeking to enter the marketplace with innovative business plans may be prevented from doing so when faced with an overwhelming array of regulations.

III. THE “MODERN” REGULATORY FRAMEWORK: THWARTED INNOVATION, INCREASED COST, AND QUESTIONABLE PROTECTION

In the United States, the growth of the regulatory state emerged out of industrialization and its abuses in the early part of the twentieth century.⁴⁰ Legislative action regulating the market was accomplished after the New Deal, with the federal government creating seventeen new agencies between 1930 and 1940 and another fifty-five new agencies between 1960 and the mid-1980s.⁴¹

The framework for modern environmental legislation at the national level was created during the 1970s.⁴² Beginning with the National Environmental Policy Act of 1969,⁴³ several cornerstone pieces of legislation were passed into law during the following decades, including the Endangered Species Act, the Toxic Substance Control Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Re-

38. *Id.*

39. *Id.*

40. See Thomas McInerney, *Putting Regulation Before Responsibility: Towards Binding Norms of Corporate Social Responsibility*, 40 CORNELL INT'L L.J. 171, 176 (2007).

41. *Id.* at 177 n.24 (citing CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 24 (1990)).

42. Larson, *supra* note 12, at 2.

43. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852, 856 (1970) (signed into law by President Richard Nixon).

sponse, Compensation and Liability Act.⁴⁴ As the move to create federal legislation and corresponding regulations intensified, state and local legislation and regulation began to proliferate as well. In addition, several states around the country began to look at land use regulation in an effort to curb out-of-control urban sprawl.

A. *Innovation Tangled in the Regulatory Thicket*

Since the mid-1970s, approaches to business management and production practices have undergone massive change.⁴⁵ Firms became much more flexible, allowing them to quickly adapt to changing economic, institutional, and technological environments.⁴⁶ As a result, the role of the regulator today is significantly more challenging.⁴⁷

The very malleability of management practices makes it difficult even to pinpoint the business practices that require regulation. A given practice may become outmoded before agencies can promulgate regulations controlling a certain type of conduct. The relative decline in vertical integration strategies, brought about through contracting, has given rise to more network-oriented forms of organization. Due to this increased flexibility in business, governments must constantly keep pace with the economy. Firms may not intend to evade regulatory initiatives, but regulators are slow to respond to their rapidly-changing practices. Within this framework, traditional command-and-control regulatory systems have had to change.⁴⁸

Despite these societal changes, however, “top down” or centralized legislation and regulation continue to be the norm and are the primary tools of federal and local governments for achieving environmental compliance in the private sector.⁴⁹ Politicians craft environmental policy aimed at the behavior of the largest players,

44. See Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 15 U.S.C. §§ 1531-1544 (2006)); Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified as amended at 15 U.S.C. §§ 2601-2628); Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. §§ 300f-300j (2000)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6987); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9657).

45. McInerney, *supra* note 40, at 177.

46. *Id.* at 182.

47. *Id.*

48. *Id.* (internal citation omitted).

49. See, e.g., John R. Nolon, *Fusing Economic and Environmental Policy: The Need for Framework Laws in the United States and Argentina*, 13 PACE ENVTL. L. REV.

with little or no regard for how these laws affect small businesses. Increasingly, these regulatory tools are outdated and fail to keep pace with private sector innovations as they relate to environmental protection and sustainability. New and changing methods of building, creating energy efficiency and new energy sources, dealing with groundwater runoff, and even emerging technologies often risk violating existing local regulatory frameworks. Small businesses tend to be especially nimble in their ability to create innovative sustainable products, methods, and technology (and in many circumstances in their ability to respond to consumer demand), and therefore may undergo changes even more rapidly than large corporations.

Local control can present a daunting web of conflicting laws and regulations that actually serve to constrict, rather than encourage, local, small, and sustainable businesses.⁵⁰ In addition, many local regulatory agencies also continue to suffer from a host of problems that impede efficient regulation and business innovation. Often individual regulators are grounded only in the minutiae or science of the industry or activity being regulated, with little idea of the overall marketplace and regulatory framework within which the regulated businesses operate.⁵¹ Others suffer from a lack of knowledge about economic drivers of the industry, new innovations or emerging technologies, or the other regulatory agencies that may also oversee, or have overlapping jurisdiction over, such regulated industries. Government officials charged with enforcing local regulations often do not have private industry experience. Thus, when presented with issues of changing technology, enforcers are often ill-equipped to respond. The result is that creativity and entrepreneurship are often thwarted, which has a disproportionately negative effect on small businesses, especially those operated by micro-

685, 725 (1996) (“The current system[] for environmental protection in the U.S. . . . [is] top-down, standard driven, centralist and not integrated with . . . local processes . . .”).

50. See, e.g., Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 *ECOLOGY L.Q.* 663, 719 (1996) (“Unlike most of corporate America, small businesses have limited technical and financial resources to comply with the law, let alone engage in proactive environmental management strategies . . .”).

51. Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 *GEO. L.J.* 257, 263 (2001) (“Conventional approaches to environmental regulation are nearing a dead end, limited by the capacity of regulators to acquire the information necessary to set regulatory standards and keep pace with rapid changes in knowledge, technology, and environmental conditions.”).

entrepreneurs.⁵² Agencies also are plagued by technical deficiencies; for example, public health risks or specific measurements upon which regulations are based may be miscalculated.⁵³ Local regulations are more focused on big business and thus are more favorable to them because they often have much better resources to wield influence with policymakers.⁵⁴

B. *Costs of Regulatory Compliance: The Burden on Small Business*

At least one comprehensive global study covering more than 3600 entrepreneurs in sixty-nine countries found that entrepreneurs in developed countries identified five out of six major obstacles for doing business as related to regulations.⁵⁵ The direct and indirect costs to businesses for compliance with state and local regulation are substantial, and they frequently bear no relation to social advances.⁵⁶ Direct costs include such things as fees for licenses, permits, inspections, and document filings. Indirect costs include, for example, attorneys' fees incurred in regulatory compliance, management time responding to regulators' inquiries, supplying documentation, and delays in production or innovation due to slow regulatory responses.⁵⁷ For the most part, direct costs tend to be fixed and unavoidable,⁵⁸ thus, their effects are much greater on smaller operations.⁵⁹ These direct costs, coupled with indirect costs, can literally cripple a small business. Take, for example, the

52. See James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 314 (2000); David Schoenbrod, *246 Glorious Cheeses or the Impact of Environmental Regulation on Small and Emerging Business*, 5 J. SMALL & EMERGING BUS. L. 91, 110 (2001).

53. Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 585-86 (1996).

54. See *id.* at 604-05 (talking about the influence big businesses have at the national level). There is also some evidence at the macro level that the regulatory structure in the United States has been a serious impediment to the availability of venture capital. *Id.* at 619-20.

55. AYO BRUNETTI, GREGORY KISUNGO & BEATRICE WEDER, INSTITUTIONAL OBSTACLES FOR DOING BUSINESS: DATA DESCRIPTION AND METHODOLOGY OF A WORLDWIDE PRIVATE SECTOR SURVEY 21 (1997), <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/wps1759.pdf>.

56. See Michael A. Crew, *Efficiency and Regulation: A Basis for Reform*, 3 MANAGERIAL & DECISION ECON. 177, 179 (1982); Robert J. Gaston & Sharon E. Bell, *State and Local Regulatory Barriers to Small Business Enterprise*, 13 POL'Y STUD. J. 709, 710 (1985); James L. Huffman & Elizabeth Howard, *The Impact of Land Use Regulations on Small and Emerging Businesses*, 5 J. SMALL & EMERGING BUS. L. 49, 56 (2001).

57. Crew, *supra* note 56, at 179.

58. Gaston & Bell, *supra* note 56, at 710.

59. *Id.*; Huffman & Howard, *supra* note 56, at 68-69.

case of Horizon Airlines when it was still a relatively small company. In 1980, it spent \$79,000 on legal fees, a figure representing approximately one quarter of its annual payroll.⁶⁰

Small and emerging businesses are often subject to the same regulatory schemes as large multinational corporations operating in the same geographic area. Pollution control regulation, for example, may have a much greater detrimental impact on small plants than on large operations.⁶¹ Yet these small businesses cannot afford the luxury of in-house counsel or large-firm business lawyers specializing in regulatory compliance. Many cannot even afford dues for trade organizations that may be able to represent their interests in regulatory or legislative proceedings.⁶² Unlike large corporations, with in-house lawyers and regulatory compliance staffs, the owners of small businesses must either take their personal time to wade through the complex regulations or spend scarce resources on attorneys to help them do so.⁶³

IV. SUSTAINABILITY SNARED IN THE REGULATORY THICKET: THE OREGON EXPERIENCE

Oregon is often considered a national leader in sustainability.⁶⁴ However, several state and local regulatory structures and mechanisms continue to thwart development and stunt growth of sustainable small businesses.⁶⁵ Existing regulatory barriers identified by business owners in Oregon include: excessive time spent on compliance issues, both by owners or other workers in a small business; inconsistency of application from project to project within a jurisdiction; outdated codes, for example, requiring installation of devices that do not promote green infrastructure; lack of government staff capacity and resources, often an insufficiency of technical staff; small municipalities that lack time and funding to keep codes and requirements on the cutting edge; resistance to change, often including conservative public officials who adhere to the "old ways"; public safety concerns; and resistance to change at the top making it

60. Crew, *supra* note 56, at 186 n.9 (citing Paul Hasse, *Lawyers, Regulation, and the Taxpayer*, AM. FOR LEGAL REFORM, Summer 1981, at 3).

61. See B. Peter Pashigian, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 J.L. & ECON. 1, 23-26 (1984).

62. Schoenbrod, *supra* note 52, at 100.

63. Huffman & Howard, *supra* note 56, at 68; Schoenbrod, *supra* note 52, at 100-01.

64. Huffman & Howard, *supra* note 56, at 53.

65. RES. INNOVATION GROUP, *supra* note 32, at 19.

less likely to occur at the bottom.⁶⁶ From licensing to regulation, significant barriers to land use, alternative energy, street vendors, and grey water systems continue to thwart the efforts of small sustainable businesses to establish themselves and thrive.

A. *Licensing Boards*

Oregon has twenty-nine licensing boards.⁶⁷ Although, arguably, they perform some public protection functions, they present unique challenges to small business owners and often serve merely to restrict competition. In certain cases, such as that of health professionals, lawyers, and those whose roles include fiduciary duties, the costs and benefits may be balanced. But the licensing requirements appear to make little sense in the case of other professions, and there are persuasive arguments that these licensing boards adversely affect the poor and quash creativity.⁶⁸

It is illustrative to take the fictional but realistic example of Maria, a former migrant worker who has a high school education. She sees a way out of poverty for herself and her family by starting a small landscaping business using chemical-free products and environmentally friendly landscaping methods. Maria plans on advertising her business and providing landscape maintenance, such as cutting grass, preparing property for planting, clearing brush and weeds, digging beds for new planting areas, and planting a selection of flowers she has grown herself from organic seed. She will not be planting trees or shrubs or engaging in any constructing or design work.⁶⁹

Among the occupations licensed in Oregon are landscape contractors and landscape architects. Anyone who advertises, operates, or uses the title of a “landscape construction professional or

66. OR. ENVTL. COUNCIL, *STORMWATER SOLUTIONS: TURNING OREGON'S RAIN BACK INTO A RESOURCE* 20-24 (2007), <http://www.oeonline.org/resources/publications/reportsandstudies/sstreport>.

67. Oregon Licensing Boards, Oregon Network for Education, <http://oregonone.org/ORlicbd.htm> (last visited May 15, 2009).

68. See Nicole Stelle Garnette, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1216-19 (2001) (discussing the effect of zoning laws on non-white-collar workers); Huffman, *supra* note 52, at 314 (discussing the effects of regulation on “capital poor” entrepreneurs); see also Regina Austin, *“An Honest Living”: Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2121-23, 30 (1994).

69. See Architect; Landscape Professions and Business, OR. REV. STAT. § 671.540 (2007) (outlining exemptions to the licensing requirements, which would allow Maria to operate without a license as long as she did not advertise, or perform work that exceeded \$500 per job site, per calendar year).

landscape contracting business” must be licensed with the Landscape Contractors Board (LCB).⁷⁰ Before Maria can get a license, she must first obtain specific qualifications in order to sit for a comprehensive exam.⁷¹ However, these qualifications may preclude her from the start. The Board requires that an applicant have been employed by a licensed landscape contracting business for two years; been self-employed as, or worked for, a landscape maintenance business for four years; or have completed the “Certified Landscape Technician” program administered by the Oregon Landscape Contractors Association or another licensed entity; or have obtained an associate’s, bachelor’s, or master’s degree in horticulture or a related field; or hold other certifications from accredited entities.⁷² Assuming Maria did meet these qualifications, she then would have to sit for a written examination with up to 450 questions, and pay at least \$165 in exam and application fees.⁷³ The exam was developed by a committee made up exclusively of licensed landscape contractors, members of the LCB, and educators in the field of landscape technology.⁷⁴ Potential questions on the exam deal with a wide range of issues not pertinent to a substantial portion of Maria’s business. There is no indication that any part of the exam deals with sustainable landscaping methods or the use of alternative, organic materials.

But it does not end there. Even if Maria passes the exam, and pays all the required fees, she still cannot work as a contractor unless she *is employed* by a landscape contracting business. If she wants to set up her own landscape contracting business with her

70. *See id.* § 671.520; Oregon Licensing Board, <http://oregonone.org/ORlicbd.htm> (last visited May 15, 2009).

71. Landscape Contractors Board, <http://www.lcb.state.or.us/LCB/licensing.shtml> (last visited May 15, 2009) [hereinafter Landscape Contractors Board].

72. *See id.*; *see also* Landscape Contractors Board: Alternative Experience, OR. ADMIN. R. 808-003-0025 (2005), available at Oregon Secretary of State, http://arcweb.sos.state.or.us/rules/OARS_800/OAR_808/808_003.html (detailing other certifications and accreditations that satisfy the experience requirement of the Landscape Contractors Board Licensing Exam).

73. *See* Landscape Contractors Board, *supra* note 71. The initial application fee is sixty dollars, which Maria would have to submit with her license application and documentation of eligibility. *Id.* Then, she will have to pay a fifty-five dollar fee to take the Standard License exam, plus an additional ten dollars for each of the four additional stages required to obtain the Standard License. *Id.* If she passes the exam, her cost for the license is seventy-five dollars with an annual renewal amount of seventy-five dollars. *Id.*

74. LANDSCAPE CONTRACTORS BD., STATE OF OR., LANDSCAPE CONTRACTOR EXAM STUDY GUIDE PACKET 3 (2007), <http://www.oregon.gov/LCB/docs/Applications/studyguide.pdf>.

newly minted license, she has to obtain yet another license from the Board: a landscape contracting *business* license. Not only that, if she sets up a landscape contracting business, she “must employ at least one person that holds the landscape construction professional license to supervise the landscaping work that is done on a project.”⁷⁵ This person will have had to pass an exam and have worked in the industry for two years. Maria will have to post a \$3000 bond for jobs up to \$10,000 and carry a minimum of \$100,000 in insurance.⁷⁶ It stretches credulity in the extreme to argue that these regulations are in place to protect the public. Rather, they exist almost exclusively to protect the interests of existing contractors, who are strongly motivated to limit their competition. The more complex the regulations and the higher the bar for entry, the fewer small businesses can compete with existing contractors, especially larger operations.

B. *Land Use and Agricultural Regulations*

In Oregon, there are approximately 38,300 farms, the vast majority of which are “small” operations owned by individuals.⁷⁷ Over 80% of these farms are less than 180 acres in size. Of these, 18% are between 50 and 179 acres in size, and over 62% of farms have less than 50 acres.⁷⁸ Eighty-eight percent of farms are individually owned, and 78% of farms are owned by “full owners.”⁷⁹ The number of small producers (defined as farms with acreage of less than two hundred acres) seeking organic certification in Oregon continues to grow.⁸⁰ In 2005, of the thirty-five new organic farms certified by Oregon Tilth, fifteen had less than ten acres, and only five were larger than two hundred acres.⁸¹ Food co-ops frequently make commitments to buy “from smaller producers rather than larger ones.”⁸² The proliferation of small farm businesses featuring locally grown organic produce is a continuing phenomenon in Oregon.

75. Landscape Contractors Board, *supra* note 71.

76. *Id.*

77. OR. DEPT OF AGRIC., OREGON AGRICULTURE: FACTS AND FIGURES 2 (2008), <http://oregon.gov/ODA/docs/pdf/pubs/ff.pdf>.

78. *Id.*

79. *Id.*

80. ALLEN, *supra* note 4, at 42.

81. *Id.*; Overview of Oregon Tilth, <http://www.tilth.org/about> (last visited May 15, 2009) (“Oregon Tilth is a nonprofit organization supporting and promoting biologically sound and socially equitable agriculture through education, research, advocacy, and certification.”)

82. ALLEN, *supra* note 4, at 49.

Small producers increasingly seek to distinguish their products through their use of environmental practices, and to highlight these practices in their marketing.⁸³ An estimated ninety-thousand customers buy from farmers' markets each week during the summer growing season in Oregon.⁸⁴

Because of high customer demand, many market seasons have been extended, and increasingly the markets are being held year round.⁸⁵ Additionally, the number of vendors at these markets has mushroomed; the Portland Farmers' Market alone went from one market location and thirteen farmers in 1992 to three market locations and one hundred and forty participating farmers in 2005.⁸⁶ Farmers' markets in Oregon have grown from thirty-eight in 1998 to sixty-eight in 2005.⁸⁷ These markets feature small producers who offer an increasingly diversified range of horticultural, agricultural, and non-agricultural products, such as crafts.⁸⁸

Despite the continued growth of small "sustainable" producers and customer demand for locally grown goods, land use regulations in Oregon remain significant barriers to these small, sustainable farming businesses. Currently, land use regulations require that landowners on agricultural property generate at least \$80,000 in gross income from operations "on a farm" before they may build a home on that farm.⁸⁹ This regulation ostensibly is in place to ensure that farm dwellings are supporting a true farming operation.⁹⁰ However, very few small farmers are able to generate this amount of gross receipts their first years in operation.⁹¹ Not only that, organic farms that produce goods without the use of pesticides tend to be much smaller, more diverse, and more labor intensive, with higher costs and lower profits. Many farmers interested in making a modest income and producing crops raised and sold locally are effectively forced by these regulations to live in the city and commute to their farmland. In addition, current slaughterhouse and composting regulations are oriented toward larger operations and

83. *Id.* at 9, 42.

84. *Id.* at 39; Oregon Farmers' Markets Association, <http://oregonfarmersmarkets.org/about.html> (last visited May 15, 2009).

85. ALLEN, *supra* note 4, at 39.

86. *Id.* at 39-40.

87. *Id.* at 40.

88. *Id.*

89. *See* OR. REV. STAT. §§ 215.213(1)(g), 215.283(1)(f) (1999); OR. ADMIN. R. 660-033-0135 (2000).

90. Huffman & Howard, *supra* note 56, at 67.

91. *Id.*

impose requirements that may be unreasonable for smaller operators.⁹²

These regulations, particularly in a state where the overwhelming majority of farms are small and owned by individuals and not corporations, have the potential to cripple small sustainable farms, cooperatives, and local sustainable production operations such as canneries, food packers, slaughterhouses, and composting operations.

C. *Alternative Energy Regulation*

Solar and other alternative energy businesses are growing exponentially in Oregon.⁹³ Unfortunately, Oregon's Department of Energy, the certifying agency, cannot keep up with the flood of applications.⁹⁴ Although the 2007 legislature doubled the business energy tax credit, no new money was given to the agency to increase its staff.⁹⁵ This has created a backlog of three months and longer for project applications to wend their way through the pre-approval process, putting many businesses in danger of losing huge federal subsidies that are contingent on state approval.⁹⁶ Given the ongoing energy crisis and the keen interest in the development of alternative energy, the proliferation of small business innovation in alternative energy continues to be strong. If, however, these businesses cannot gain access to capital at the local level, these efforts will be all but foreclosed. The failure of local government to invest in the infrastructure necessary to facilitate the regulatory approval and compliance process for alternative energy will cripple the growth of this critical industry sector.

D. *Regulation of Street Vendors*

In 2007, the Portland Development Commission chartered the Sustainability Program in an effort to marry its vision of "economic prosperity, quality housing and employment opportunities" to its mission of "achiev[ing] Portland's vision of a sustainable commu-

92. ALLEN, *supra* note 4, at 73.

93. Erik Siemers, *Solar Suppliers Continue Flocking to Oregon*, PORTLAND BUS. J., June 20, 2008, available at <http://portland.bizjournals.com/portland/stories/2008/06/23/story6.html>.

94. Gail Kinsey Hill, *Program Backlog Clouds Solar Power Projects*, THE OREGONIAN, Aug. 6, 2008, available at http://www.oregonlive.com/environment/index.ssf/2008/08/program_backlog_clouds_solar_p.html.

95. *Id.*

96. *Id.*

nity with healthy neighborhoods, [and] a vibrant urban core.”⁹⁷ For centuries, street vending has been a component of the vibrancy of urban cores across the globe. Street vending can provide an avenue for entrepreneurship and self-sufficiency and can contribute to the overall economic health of a community.⁹⁸

Given this vehicle for empowerment of individuals and communities, it seems logical that local community officials would foster such small businesses. However, as local business owners complain, rules pertaining to street vending carts are “too complicated, poorly publicized and unfairly applied,”⁹⁹ and “no cart [can] meet Portland’s four pages of vending-cart rules if they were strictly applied.”¹⁰⁰ The City of Portland’s Office of Transportation Sidewalk Vending Cart Permit Application appears to offer a vendor just three simple steps to obtaining a permit and being “ready to open for business.”¹⁰¹ However, these steps are not so simple, and failure to strictly comply with requirements can be costly. Carts located on private property are governed by a different set of rules than those located on the right of way.¹⁰² In addition, vending carts are classified as mobile, fixed, or drive-through, and each is required to meet a different set of regulations.¹⁰³ The Portland Planning and Zoning department mandates a set of rules based upon the placement of each particular food cart and its size. Removal of the cart’s wheels changes the classification of a trailer from a mobile to a fixed cart, which, in turn, results in its classification as a building. The cart owner is then compelled to comply with a completely different set of rules that apply to buildings.¹⁰⁴

These types of compliance-mandated modifications can leave a vendor crippled by unplanned costs and wondering whether the

97. PORTLAND DEV. COMM’N, SUSTAINABILITY PROGRAM CHARTER FOR INVESTING IN PORTLAND’S FUTURE 4 (2007), <http://www.pdc.us/pdf/sustainability/2007SustainabilityProgramCharter.pdf> (internal quotation marks omitted).

98. Austin, *supra* note 68, at 2123.

99. J. David Santen Jr., *Simmering Issue: City’s Rules for Food Carts*, THE OREGONIAN, June 26, 2008, http://www.oregonlive.com/portland/oregonian/index.ssf?/base/portland_news/121401513498950.xml&coll=7.

100. *Id.*

101. OFFICE OF TRANSP., CITY OF PORTLAND, SIDEWALK VENDING CART PERMIT APPLICATION PACKET 1 (2006), <http://www.portlandonline.com/shared/cfm/image.cfm?id=163986>.

102. *Id.* at 2.

103. BUREAU OF DEV. SERVS., CITY OF PORTLAND, VENDING CARTS ON PRIVATE PROPERTY 1 (2009), <http://www.portlandonline.com/bds/index.cfm?a=154593&c=45033>.

104. Santen, *supra* note 99.

rules protect anything other than government coffers and insecure competitors.¹⁰⁵ Regulations covering street vendors should be under the jurisdiction of a single agency, not several, with one set of rules related to cart classifications, engineering and electricity, and food safety. A single agency, working in tandem with other city agencies and with authority to incorporate codes and safety regulations “cross agency,” would not only ensure compliance as well as efficiency, but foster entrepreneurship as well.

E. *Grey Water Recycling*

The average American household uses 146,000 gallons of water per year, which represents a ten-fold increase in consumption over the last century.¹⁰⁶ As cities grow, there is an increasing need for water-supply planning.¹⁰⁷ As water becomes rarer and “more expensive to find, pump, treat, and deliver,”¹⁰⁸ more cities are answering the call to conserve through grey water recycling programs. In Oregon, grey water is defined as household water from the bathtub, bathroom sink, or laundry, whereas black water contains human body waste and originates in the toilet, kitchen sink, or dishwasher.¹⁰⁹ Grey water is useful for landscape irrigation and is a safe and appropriate substitute for potable water in the lavatory. However, thickets of conflicting laws and a patchwork of health codes¹¹⁰ have prevented the promotion of grey water products and solutions.

Opportunities for small business innovation in this area abound. From on-site water treatment systems to “green” plumbers, the industry is poised for an explosion of these products over the next ten years.¹¹¹ According to water conservation consultant John Koeller, “[l]egislation is definitely the problem.”¹¹² In the

105. Austin, *supra* note 68, at 2121.

106. Edna Sussman, *Building Stock Offers Opportunities to Foster Sustainability and Provides Tools for Climate Change Mitigation and Adaptation*, 7 SUSTAINABLE DEV. L. & POL'Y 17, 18 (2007).

107. A. Dan Tarlock & Sarah Bates, *Western Growth and Sustainable Water Use: If There Are No “Natural Limits,” Should We Worry About Water Supplies?*, 38 ENVTL. L. REP. NEWS & ANALYSIS 10582, 10583 (2008).

108. Ed Ritchie, *A New Era: Anxious Water Districts, Green Plumbers, and Australian Marketers Predict Blue Skies Ahead for Graywater*, WATER EFFICIENCY, May-June 2008, <http://www.waterefficiency.net/may-june-2008/water-green-plumbers.aspx>.

109. OR. REV. STAT. § 454.610 (2003); OR. ADMIN. R. 340-071-0100 (20) (2008); *see also* Greywater-ReCode, <http://www.recode.ws/index.php?title=Greywater> (last visited May 15, 2009) [hereinafter ReCode Greywater].

110. Ritchie, *supra* note 108.

111. *Id.*

112. *Id.*

meantime, entrepreneurs are creating products to meet the growing interest in grey water recycling. Recent product developments include whole-house treatment systems which can capture as much as seventy-five percent of a household's water.¹¹³ Also available are products specifically designed to capture water from the primary source of grey water—washing machines—and convert that water for irrigation purposes.¹¹⁴ These innovative efforts are thwarted, however, in states such as Oregon where regulatory impediments still impede the use of grey water.

For example, Oregon's Building Codes Division recently approved grey water as a statewide alternative method for flushing toilets and urinals.¹¹⁵ While this is a step in the right direction, Oregon law does not permit the use of grey water for irrigation without a Water Pollution Control Facility Permit.¹¹⁶ Such a permit is costly and impractical for the average applicant.¹¹⁷ Arizona has opted for the most progressive and well-defined codes pertaining to water recycling.¹¹⁸ The genius of these codes is that rather than proscribe methods by which systems must operate, they regulate grey water system performance.¹¹⁹ This approach ensures that health and safety standards are upheld, while fostering innovation.¹²⁰ In Portland, a model ordinance inspired by Arizona and New Mexico codes has been drafted—but to date not implemented—which requires no additional inspection or fees, and ultimately legalizes grey water use for inside and outside applications.¹²¹ It could potentially satisfy health and safety concerns while at the same time preserving potable water for more appropriate uses.

113. *Id.*

114. *Id.*

115. See Memorandum from Bldg. Code Div., State of Or., to the Residential Structures Board (July 2, 2008), http://www.cbs.state.or.us/bcd/boards/rsb/boardpack/08/20080702/Residential_070208_VIIId.pdf.

116. OR. REV. STAT. § 468B.050 (2003); OR. ADMIN. R. 340-071-0130(3) (2008); OR. ADMIN. R. 340-071-0130(15); see also ReCode Greywater, *supra* note 109.

117. ReCode Greywater, *supra* note 109.

118. ARIZ. REV. STAT. ANN. § 49-204 (2006).

119. Oasis Design, <http://www.oasisdesign.net/greywater/law/index.htm#arizona> (last visited May 15, 2009).

120. The Arizona grey water policy is a simple, three-tiered approach. Systems for less than four hundred gallons per day require no special permit; a builder's general permit is sufficient. Systems that process more than four hundred gallons per day, or are used in multi-family housing, commercial or institutional settings, require a standard permit. Systems exceeding three thousand gallons per day are reviewed by regulators on a case-by-case basis. *Id.*

121. See Model Gray Water Ordinance, http://www.recode.ws/index.php?title=Image:Model_Gray_Water_Ordinance.doc (last visited May 15, 2009).

V. RECOMMENDED SOLUTIONS—MORE THAN HYPE?

Regulatory agencies perform important functions in society, and the advances in public health, workplace safety, and other areas would not have taken place without a certain amount of government regulation. Indeed, most of the scholarly literature demonstrates that voluntary regulatory compliance by businesses alone is not effective, and that some form of “sanction” is a critical element to the willingness of businesses to comply.¹²² Rather than relying exclusively on self-reporting or private verification on the one hand, and rigid, top-down regulatory control on the other, local government, community stakeholders, and businesses should come together to create a system of government-enforced self-regulation.¹²³ In the environmental realm, because of the complexity and sheer number of potential harms, it makes sense to institute diverse approaches that include centralized, decentralized, governmental, and non-governmental enforcement structures.¹²⁴ Implementing flexible approaches to a wide variety of environmental issues can create active and responsive (rather than reactive and static) regulatory schemes.

Maintaining diverse enforcement efforts can simultaneously create opportunities for innovation and entrepreneurship that are complementary to environmental objectives and to sustainable communities. Collaborative and creative efforts aimed at creating regulatory frameworks, revising existing ones, and setting enforcement mechanisms, can revolutionize the way small businesses approach sustainability. Involving community stakeholders in the policymaking, rulemaking, and enforcement mechanisms is critical. Non-governmental organizations (NGOs), such as environmental groups, are often much more nimble than state agencies. They “have an incentive to hustle and to seek quick diffusion of their scientific and policy advances because this is how they win credibility and financial support.”¹²⁵ Likewise, NGOs often have access to

122. Forsyth, *supra* note 19, at 272, 274; McInerney, *supra* note 40, at 186; *see also* HM TREASURY, STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE, at viii (2007), http://www.hm-treasury.gov.uk/d/Summary_of_Conclusions.pdf (noting that “[c]limate change is the greatest market failure the world has ever seen” because of self-regulation, which proves that this method has been an abject failure).

123. McInerney, *supra* note 40, at 186 (citing IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (Donald R. Harris et al. eds., 1992)).

124. Esty, *supra* note 53, at 652-53.

125. *Id.* at 616.

outside experts and are in a better position to provide technical expertise.¹²⁶

Regulatory officials must not only be grounded in the scientific and technological aspects of the businesses they regulate, but must educate themselves about emerging innovative technology, market drivers, economic incentives, and basic business principles surrounding these businesses. Most often, the scientific, entrepreneurial, and environmental communities are in the best position to provide that education. Regulators can only be effective with this type of comprehensive understanding and collaborative, ongoing education.

Even though community standards are constantly changing, they frequently fall behind scientific and technological advances.¹²⁷ In this rapid-fire environment, agencies too often operate on their own as “silos.” Instead, they must be able to share information across subject-matter boundaries. Increasingly critical is inter-agency cooperation that fosters sharing of information and, where possible, the creation of centralized regulatory schemes that can be effectuated across the marketplace rather than focused on specific types of businesses. The creation of internal mechanisms, such as interagency and cross-agency “wikis,” to educate regulators across sectors, collect data, and share information, will be instrumental in streamlining the regulatory process, and in enabling agencies to be proactive, rather than reactive, in addressing new technologies.

Market activity is typically not limited to just one community. Yet, too often there is no consistency in regulatory enforcement from one community to the next, even though they may be adjacent to one another.¹²⁸ With increasing frequency, individual business activities cross jurisdictional boundaries. For example, emissions from dry cleaners or small farms may flow into more central locations—such as rivers or streams.¹²⁹ For all these reasons, it makes sense to institute a centralized scheme that allows regulatory agencies to share information “horizontally” across agencies with overlapping jurisdictions.¹³⁰ This type of information-sharing makes public enforcement more efficient. Moreover, agencies regulating broad segments of the marketplace will be better able to keep up with innovation and respond quickly to changes. It also helps to

126. *Id.*

127. *Id.* at 576.

128. *Id.* at 577.

129. *Id.* at 580.

130. McInerney, *supra* note 40, at 192.

ensure that businesses will not be bogged down at one level of agency regulation. An example of this integration is demonstrated within the European Union.¹³¹ At first focused on the regulation of just two commodities, the governmental cooperation across boundaries has grown to encompass a wide array of economic and environmental issues.¹³²

In a similar fashion, regulations that are specific about how to perform a certain process risk becoming outdated before they are implemented. Rather than regulating uniform means, such as technologies or processes for production, it may be much more effective to set performance-based standards. For example, allowing a certain level of effluent per day or week but not controlling the means by which that effluent is discharged would eliminate the need for constant rulemaking as well as corporate spending on specific methodologies that may not be applicable to all industries.¹³³ Businesses will have financial incentive to select the most efficient means to comply with performance-based standards.¹³⁴

Before undertaking any new regulatory enforcement, local governments should first investigate whether control is most appropriate at the state or local level.¹³⁵ If the business activity to be regulated is statewide, it would be more appropriate to have a single, statewide regulatory scheme to address that activity rather than a series of overlapping, and at times conflicting, local rules.¹³⁶ If there is a particular need for local control, the local governmental entity should take care to craft regulations that relate specifically to doing business in the geographic area and that do not overlap with the state regulatory scheme.

A. *New Regulatory Initiatives Still Fall Short*

Although a few states and localities have statutes relating to sustainability, this still is a rare phenomenon. For those states that are tackling these issues, the efforts are headed in the right direction, but several still fall short of the mark. To date, Oregon ap-

131. Esty, *supra* note 53, at 645.

132. *Id.*

133. *Id.* at 621.

134. *Id.* at 647-48 (stating “[h]ybrid regulatory systems capable of addressing various problems and parts of problems at different levels of aggregation therefore make sense”); *see also* Schoenbrod, *supra* note 52, at 98.

135. Pamela Corrie, Comment, *An Assessment of the Role of Local Government in Environmental Regulation*, 5 UCLA J. ENVTL. L. & POL’Y 145, 181 (1986).

136. *Id.*

appears to be the only state with a statute—The Oregon Sustainability Act—that both defines sustainability and expresses a commitment to pursue sustainable policies.¹³⁷ However, rather than providing an aggressive mandate for more efficient and creative collaborative regulatory practices that would lead to true change, this statute is reduced to being a broad, and therefore weak, policy statement. For example, Oregon’s statute merely establishes “goals” that “encourage” state agencies to adopt sustainable purchasing practices and to help communities meet sustainability objectives.¹³⁸

Issues of land use, especially in Oregon, are fundamental to the economic and environmental sustainability of the state. Unfortunately, policymakers continue to implement shortsighted approaches to these complex regulatory problems. In 2005, Oregon created the Oregon Task Force on Land Use Planning to address the myriad complicated issues raised by Oregon’s land use regulatory scheme.¹³⁹ The Task Force “is charged with conducting a comprehensive review of the Oregon Statewide Planning Program and mak[ing] recommendations for any needed changes to land-use policy to the 2009 Legislature.”¹⁴⁰ Specifically, the task force was charged with studying and making recommendations on

[t]he effectiveness of Oregon’s land use planning program in meeting the current and future needs of Oregonians in all parts of the state;

[t]he respective roles and responsibilities of state and local governments in land use planning; and

[l]and use issues specific to areas inside and outside urban growth boundaries.¹⁴¹

While the effort is laudable, it falls far short of what should be expected for a state that prides itself on promoting sustainability and progressive approaches to land use reform. The governor, senate president, and speaker jointly appoint all members of the task

137. OR. REV. STAT. §§ 184.421, 184.423 (2004); Nancy J. King & Brian J. King, *Creating Incentives for Sustainable Buildings: A Comparative Law Approach Featuring the United States and the European Union*, 23 VA. ENVTL. L.J. 397, 413 (2005).

138. King & King, *supra* note 137, at 413.

139. S. 82, 73d Or. Legis. Assem., Reg. Sess. (Or. 2005).

140. Mission & Work Program, The Big Look Task Force on Oregon Land Use Planning, <http://www.oregonbiglook.org/mission> (last visited May 15, 2009).

141. OR. TASK FORCE ON LAND USE PLANNING, FINAL REPORT TO THE 2009 OREGON LEGISLATURE, at i (2009), http://centralpt.com/upload/301/7243_BLTF-final-report-JAN8-screen.pdf.

force, who must be familiar with Oregon's land use system and the state's economic and employment base.¹⁴²

However, the task force does not contain a single representative from an environmental group, conservation group, or other NGO, nor from a small business, or small sustainable business, and it includes only one representative from a family farm that purports to use sustainable farming methods.¹⁴³ In addition, the task force lacks geographical diversity, which is a significant deficiency, given that the task force is charged with making recommendations on sweeping policy issues that will affect the state for decades to come. Those issues include "[i]dentify[ing] farm land . . . and natural areas of statewide importance, and apply[ing] market-based tools to complement regulation as a means to" sustainability.¹⁴⁴ Without the involvement of all stakeholder groups, however, the effort is doomed to be incomplete.

B. *Successful Regulatory Initiatives Must Involve All Stakeholders*

Providing small businesses with guidance through the regulatory process, as well as bringing all local regulatory bodies together, can be a catalyst for innovative and effective regulatory change. One governmental agency, the Portland Development Commission (PDC), facilitates the permitting process for targeted small businesses.¹⁴⁵ The PDC has identified nine "cluster targets": Activewear/Footwear/Outdoor Gear, Biosciences, Creative Services, Distribution and Logistics, Food Processing, High Tech, Metals and Transportation Equipment, Sustainable/Energy, and Professional Services.¹⁴⁶ The PDC initially meets with the business owners, and then walks each through the permitting process, which includes identifying all costs associated with regulatory compliance, helping

142. See Press Release, Governor's Office, State Appoints Oregon Task Force on Land Use Planning (Jan. 26, 2006), http://governor.oregon.gov/Gov/p2006/press_012606.shtml.

143. See OR. TASK FORCE ON LAND USE PLANNING, PART 1 EVALUATION REPORT 2-3 (2007), http://centralpt.com/upload/301/2458_BLTF%20Final%20Report%206_29_07.pdf.

144. OR. TASK FORCE ON LAND USE PLANNING, BIG LOOK: CHOICES FOR OREGON'S FUTURE 2 (2008), http://centralpt.com/upload/301/5291_BigLook_StakeholderBooklet_060608_screen.pdf.

145. PORTLAND DEV. COMM'N, ECONOMIC DEVELOPMENT TARGET INDUSTRY PLAN: FISCAL YEAR 2006/2007, at 2 (2007), http://www.pdc.us/pdf/bus_serv/target_industry/target-industry-plan_fy2006-07.pdf.

146. *Id.*

to locate a business site, taking the owners to city agencies and introducing them to regulators, and connecting them to state agencies. The PDC then gathers all possible stakeholders around the same table: the business owner, the owner's engineers and architects, the city or county bureau of environmental services, the fire marshal, Portland's Bureau of Development Services, and others, to hammer out the details of federal, state, and local compliance in one sitting. This process helps to educate regulators and business owners alike.

The PDC prides itself on its ability to focus on targeted industries and to understand their needs and issues.¹⁴⁷ By focusing on the industries that exist in the region or those that the region wants to attract, rather than assisting any business that walks in the door, the agency is able to devote substantial resources to helping these targeted businesses through the entire regulatory process. Making a commitment to researching and understanding each of these industries in depth, as well as taking the time to develop agency relationships allows the PDC to act as an effective and powerful force in forging streamlined regulatory processes. Its process ensures that all interests are represented, issues are identified, and solutions are reached at one time. Regulation is not done in a vacuum, but rather as part of a transparent, multi-layered collaborative process. This is tremendously beneficial to small businesses because they are able to complete the regulatory process at minimal cost. It is also beneficial to agencies that regulate several types of industries; they are able to have ongoing meetings to discuss new technologies, new market strategies, and new ways of doing business with entrepreneurs and other stakeholders. Information is shared, regulators are educated, and regulations can be updated or revised as needed to keep up with new technology.

In another unique initiative, the Oregon Department of Consumer and Business Services has inaugurated the nation's first statewide e-permitting program.¹⁴⁸ The online program enables contractors throughout the state to submit plans electronically for review and tracking, to submit applications and payments, to receive permits, and to schedule and receive inspection reports.¹⁴⁹ This electronic process frees up staff time to address more complex

147. Interview with Pamela Neil, *supra* note 21.

148. Regulatory Streamlining Initiative, Department of Consumer and Business Services, <http://www.streamline.oregon.gov/DCBS/RSL/e-permitting.shtml> (last visited May 15, 2009).

149. *Id.*

regulatory issues. The project is funded by a four percent surcharge on all building permits sold in Oregon.¹⁵⁰

Additionally, over the past fifteen years, some small regulatory changes have been made to encourage local, micro-enterprise activities, such as the Oregon Liquor Control Commission (OLCC) regulations relating to distilleries.¹⁵¹ Before 1987, Oregon regulations mandated that distillers sell their products only to the OLCC.¹⁵² After that time, the regulations changed to allow small manufacturers to market their products directly to consumers through tastings, which allows a company to own both a brewery and a distillery.¹⁵³ This change opened the door to large savings for small distilleries using local fruit who are marketing to local communities because they can now avoid the regulatory “middleman.”¹⁵⁴

An example of innovative, collaborative, local rulemaking is the Tryon Life Community (TLC) Farm and its ReCode project.¹⁵⁵ TLC Farm is located in a heavily wooded area of Southwest Portland and is adjacent to Tryon Creek State Park, the only state park in Oregon within city limits.¹⁵⁶ A community cooperative, TLC set out to buy several acres of property that had been up for sale for a subdivision.¹⁵⁷ TLC Farm enlisted the financial and moral support of the surrounding neighborhoods, city council members, the local land use regulatory agency, and others as it went about purchasing the land.¹⁵⁸ Rather than face an ongoing pattern of hearings for multiple use permits, TLC Farm decided to work toward amending the Portland city code to allow for a zoning district known as an “Ecovillage Zone.”¹⁵⁹ These zones, which are scattered around the country—and the world—are multi-dimensional cooperative communities focused on integrating ecological design, permaculture,

150. *Id.*

151. Melissa Bearns, *New Spirits: Oregon's Microdistilleries Lead the Market*, SWIZZLE, Mar. 9, 2006, at 2, available at <http://www.eugeneweekly.com/2006/03/09/swizzle/distilleries.html>.

152. *Id.*

153. *See id.*

154. *Id.*

155. AMY TYSON, RECODE PORTLAND, THE CASE OF TLC FARM: AFFECTING CHANGE IN ZONING AND BUILDING CODES 1 (2007), <http://tryonfarm.org/share/files/TLC%20Farm%20Case%20Study.pdf>.

156. *See* Oregon State Parks and Recreation, Tryon Creek State Natural Area, http://www.oregonstateparks.org/park_144.php (last visited May 15, 2009).

157. *Id.*

158. *Id.*

159. *Id.*

green production, and alternative energy.¹⁶⁰ TLC has formed a project entitled “ReCode,” whose mission is to bring together “citizens, planners, builders, activists, and other stakeholders in developing, coordinating, and building the movement for regulations that support grassroots sustainability.”¹⁶¹ Part of ReCode’s mission is to facilitate coordination among regulatory agencies, businesses, and community groups to take steps to effect systemic regulatory change that will reflect the needs of the community.¹⁶²

Some of the work that ReCode has done includes the creation of a wiki, an interactive, community-based website for up-to-date information on a plethora of regulatory information.¹⁶³ The suggestions for posting new content to the wiki are: that each page includes descriptions of current practices, potential future best practices, concerns or disagreements about such practices, research or data regarding practices, the current regulatory situation, existing examples from other jurisdictions, existence of processes or resources for creating new codes, and specific development of new codes.¹⁶⁴ On these wiki pages, community members provide updates on legislative and regulatory changes; keep track of significant changes in the building codes at municipal and state levels; investigate model codes from other jurisdictions and propose examples of model codes; provide information on new technologies; and provide information on meetings, task force activities related to regulatory issues, and the current status of state and local regulations.¹⁶⁵

ReCode has also co-sponsored meetings with the City of Portland’s Office of Sustainable Development and other stakeholders to discuss methods of ensuring safe and affordable grey water re-use systems in Oregon.¹⁶⁶ Ongoing collaborative, community-based approaches to local regulatory enforcement ensure the appropriate level of government oversight and control, while encouraging entrepreneurship.

160. Earth Rights Institute, Ecovillage Development, <http://www.earthrights.net/ecovillages/> (last visited May 15, 2009).

161. Who We Are-ReCode Portland, http://recode.ws/index.php?title=Who_we_are (last visited May 15, 2009).

162. *Id.*

163. *See generally id.*

164. Practices and Regulations - ReCode, http://recode.ws/index.php?title=Practices_and_regulations (last visited May 15, 2009). For an example page on grey water recycling see Greywater - ReCode, <http://recode.ws/index.php?title=Greywater> (last visited May 15, 2009) [hereinafter Greywater].

165. What Can I Do to Help?, ReCode Oregon, http://recode.ws/index.php?title=What_can_i_do_to_help%3F (last visited May 15, 2009).

166. Greywater, *supra* note 164.

CONCLUSION

On signing the Oregon Sustainability Act, Governor Kulongoski said, "I firmly believe that a commitment to sustainability is the best vehicle for creating long-term prosperity in Oregon, while also helping enrich our communities and our environment" ¹⁶⁷ He continued, "With this legislation, Oregon is pioneering efforts to create more sustainable business structures and I am confident that it will assist Oregon businesses in attracting investment and economic opportunities to the state." ¹⁶⁸

Fostering the growth and health of a variety of sustainable small businesses is vital to the economic stability of every community, especially at the local level. Small businesses and micro-enterprises, which make up the majority of the business community in Oregon, are profoundly impacted by costs associated with regulatory compliance. State and local government can both foster the development of these businesses and ensure greater environmental protection by eliminating "top-down" regulation and relying more on community-based, collaborative approaches with key stakeholders; by crafting regulations focused on desired outcomes rather than methodology; by centralizing at the state level single-entry portals for most types of permits; and by eliminating draconian licensing requirements. The successes, challenges, and barriers identified in the experiences of small and emerging sustainable business in Oregon may prove instructive to other jurisdictions seeking to nurture sustainable business practices.

167. Press Release, Or. Lawyers for a Sustainable Future, New Law Embeds "Sustainability" in Oregon Business Corporation Act (June 1, 2007), <http://www.earthleaders.org/olsf/hb2826>.

168. *Id.*