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Interstate Competition for Jobs and Industry Through Laxity of Environmental Regulations: Pennsylvania's Response and the Effects

I. Introduction

In Pennsylvania the long-standing debate between jobs and the environment forges on. In recent years, the debate has galvanized businesses, environmentalists, and government alike. Pennsylvania businesses say the state has been too restrictive with its environmental regulations, putting them at a competitive disadvantage with other states.¹ Environmentalists claim that recent changes in Pennsylvania's environmental regulations have gone too far in easing environmental enforcement, thereby endangering the environmental health of the state.² Meanwhile, the state government, led by Governor Tom Ridge, is attempting to reach a balance between the needs of business and industry to provide for a stable economy and protection of Pennsylvania's environmental health.³

Since his election in 1995, Governor Ridge has taken many steps in revamping Pennsylvania's environmental regulation. Soon

1. Lois Caliri, *Study Gives Environmental Regulators Low Marks*, CENTRAL PENN BUS. J., April 19, 1996, at 30.

2. Brad Bumstead, *Ridge's Job-Friendly Environmental Policy Under Fire*, GANNETT NEWS SERVICE, July 25, 1997.

3. The Ridge administration has acknowledged the competition between the states to entice business and industry to locate in the respective states. See David Slade, *Governments Bid to Attract New Businesses*, SCRANTON TIMES, Oct. 1, 1996. This battle between the states is evident in a variety of ways. New large employers are courted with offers of numerous taxpayer-funded incentives, and existing employers are offered incentives to stay when they threaten to leave the state. *Id.* Pennsylvania provides training or retraining to workers and corporate tax breaks, and the legislature has passed a plan to cut down on workers' compensation costs. *Id.* The Administration has rationalized the incentives by taking the position that the cost of doing business in Pennsylvania must be reduced if jobs are to be retained. The Administration further states that issues such as workers' compensation reform, environmental regulations, taxes, and other regulatory burdens must be addressed to successfully keep existing firms and to attract new businesses to Pennsylvania. *Id.*

after his election, Governor Ridge succeeded in gaining legislative support to split the former Pennsylvania Department of Environmental Resources into two distinct agencies, one for environmental protection and the other to manage state parks and forests.⁴ Also since 1995, in an attempt to simplify environmental regulation in Pennsylvania, the administration has moved to eliminate regulations found to be redundant.⁵ The Legislature has passed a statute requiring a justification for state regulations that surpass federal regulations in strictness.⁶ Furthermore, the state has implemented a money-back guarantee deadline for various environmental permits, and Pennsylvania environmental regulators have placed a greater emphasis on obtaining compliance rather than levying fines.⁷

Environmental regulation reform has helped Pennsylvania win a place among the top 14 business-friendly states, according to a 1996 rating by Site Selection Magazine, where Pennsylvania was named the "Biggest Up and Comer."⁸ The questions raised by environmental regulation reform are whether it endangers the environmental health of the state and whether these reforms show that Pennsylvania is a participant in the interstate race for jobs using lax enforcement of environmental regulations to compete for those jobs.

This Comment discusses the recent trends in interstate competition for jobs through lax enforcement of environmental regulation and how Pennsylvania's recent environmental regulation reform fits into the scheme of interstate competition. This Comment will also address the effect environmental regulatory reform in Pennsylvania is having on the state job market. Finally, this Comment will analyze the impact of these reforms on the environmental health of the state.

II. Background of the Problem

A. *The Effect of Environmental Regulation on the Job Market*

The conflict between the environment and the job market is

4. See 71 P.S. § 1340.101.

5. Bumstead, *supra* note 2.

6. See *id.*

7. See *id.*

8. *Id.* In addition to state environmental regulations, business tax cuts and reform of worker's compensation laws were also considered by the committee in rating the most business-friendly states.

not a new phenomenon. Nevertheless, a strong push for protection of the environment through regulation did not develop until the 1950s and 60s. The implementation of environmental laws such as the Air Pollution Act (1955)⁹, the Clean Air Act (1963)¹⁰, and the National Environmental Policy Act (1969)¹¹ showed an increased interest in the protection of the natural world.

Along with the implementation of the regulations emerged worries from the business world about the costs of complying with the deluge of new laws and how these costs would affect the businesses and the economy as a whole.

Some commentators have questioned whether we are faced with a jobs versus the environment dilemma. W. Michael McCabe, the regional administrator for the Mid-Atlantic region of the United States Environmental Protection Agency answers with a resounding "no."¹² He states "study after study has clearly shown that the American economy is not adversely affected by environmental

9. The Act of July 14, 1955, enacted to promote pollution prevention was revised and included in its successor, known as the Clean Air Act. *See infra*, note 10.

10. As enacted, the Clean Air Act, 42 U.S.C. § 1857 *et. seq.* (1964) (amended 1977), was intended to (1) protect the Nation's air resources to promote the public health and welfare and the productive capacity of its population; (2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution; (3) to provide technical and financial assistance to state and local governments in connection with the development and execution of their air pollution prevention and control programs; and (4) to encourage and assist the development and operation of regional air pollution prevention and control programs. 42 U.S.C. § 1857(b) (1964) amended 1977). Although the Clean Air Act has been through many significant amendments, Congress' intent in enacting the law has remained generally the same. *See* 42 U.S.C. § 7401(b) (1994).

11. The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et. seq.*, as enacted, was intended to (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (2) assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (4) preserve important historical, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice; (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and (6) to enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources. 42 U.S.C. § 4331(b) (1990).

12. W. Michael McCabe, *The EPA is Good for the Economy*, PITT. POST GAZETTE, August 10, 1997, at E1. The debate between jobs and the environment was once again raised when news of a steel company's recent decision to close its Pittsburgh coke ovens was announced. *See id.*

regulation.”¹³ Rather, McCabe believes that environmental regulations have the opposite effect on the economy, creating new jobs, revenues, and companies.¹⁴

Studies conducted by the World Resources Institute (WRI) and the Organization for Economic Cooperation and Development (OECD) have shown that strict environmental regulation does not hurt the competitiveness of U.S. manufacturing companies.¹⁵ Even environmentally sensitive industries such as oil, chemical, steel, and paper were not hindered by environmental regulations.¹⁶

Disregarding the claims that environmental regulations do not diminish the competitiveness of companies, many business leaders and others still adhere to the proposition that differential environmental standards lead to loss of competitiveness and employment.¹⁷ However, Robert Repetto, Vice President and Senior Economist at WRI believes this theory, specifically on the international level, is flawed due to the preoccupation with competitiveness as the controlling factor in determining the economic superiority of a nation. Repetto believes that from an environmental as well as economic perspective, the best production level is the lowest production level needed to support a given standard of consumption.¹⁸

Studies such as those done by WRI and the OECD tend to show that high environmental standards are not an impediment to economic development.¹⁹ McCabe believes that the American economy is the strongest economy in the world, not in spite of the strict environmental standards, but, in part, because of those very laws and regulations.²⁰

This side of the argument is nonetheless a hard sell to those in

13. *Id.*

14. *See id.*

15. ROBERT REPETTO, WORLD RESOURCES INSTITUTE, JOBS, COMPETITIVENESS, AND ENVIRONMENTAL REGULATION: WHAT ARE THE REAL ISSUES? (1995) at 3. Although Mr. Repetto's discussion of competition between localities that embrace differing environmental standards is focused at the international level, his analysis also applies when inconsistent environmental regulations are implemented among the states.

16. *See id.*

17. *See id.* While Repetto speaks of competitiveness manifested as the ability to sell in competition with foreign producers and as an increase in net exports in a single industry or all industries together, on a state level it may be more applicable to look at the overall health of competing states both environmentally and economically.

18. McCabe, *supra* note 12, at E1.

19. *See id.*

20. *See id.*

business who must meet the standards or pay the price for failing to do so. In a 1996 survey conducted by the United States Chamber of Commerce, businesses responded to questions regarding the effect of environmental and natural resource regulation on their businesses.²¹ One third of the respondents stated that environmental compliance costs totaled about five percent of their annual budget.²² Businesses spoke out, stating that the costs of compliance with environmental and natural resource regulations have resulted in layoffs in one out of every ten businesses and that increased prices and reduced profits were the result of most of their compliance costs.²³

The argument that the implementation of environmental regulations negatively affects the economy and job market obviously is based upon the premise that regulations cost businesses money. Paul Portney, Vice President of Resources for the Future in Washington D.C., made this clear by stating "although tighter environmental standards can often be very good public policy, they will rarely come free of charge."²⁴ Portney strongly disagrees with those who believe that the compliance costs associated with stringent environmental regulations are offset by the efficiencies that businesses realize when they come into compliance.²⁵ His adversaries often treat the existence of pollution as *prima facie* evidence of inefficiency.²⁶ From a company's perspective this is

21. Oppenheimer, Wolff & Donnelly, *Federal Environmental Regulation Has a Substantial Effect on Business*, MINN. ENVTL. COMPLIANCE UPDATE, October, 1996. The Chamber of Commerce conducted two nationwide surveys of businesses. Surveys were sent to 4,000 businesses within the 50 states with a response rate of 20%. *See id.*

22. *Id.*

23: *See id.*

24. Paul R. Portney, *Green and Competitive*, HARV. BUS. REV., November 1995/December 1995 at 204.

25. *See id.*

26. *Id.* In their reply to Portney's assertions in *Green and Competitive*, Michael Porter and Claas van der Linde argue that strict environmental regulation and competitiveness can coexist. Porter and van der Linde support the notion that there are widespread opportunities to improve environmental performance cost-effectively through innovation. Where Portney asserts that Porter and van der Linde believe that more stringent regulations will make companies more profitable, they state that while they recognize the cost of meeting standards they still believe that costs of environmental compliance can be minimized and sometimes completely offset by improvements in resource productivity. Porter and van der Linde also rebuke Portney's extreme interpretation of their position stating that existence of pollution is inefficient because they "see pollution as wasted resources with inherent opportunity costs." They believe that the costs associated with reducing pollution will be balanced by the improvement in resource productivity.

not true at all; pollution is inefficient only if it can be prevented for less than it costs the company to deal with it.²⁷ The conflict between business, environmentalists, and environmental regulators over the benefits and costs of environmental regulations will likely continue into the distant future.

B. New Trends in Interstate Competition Through Environmental Regulation

A new trend amidst the environment versus the job market controversy has taken effect throughout the states. The implementation of individual state environmental regulations is the major reason for this new trend. Many states have initiated programs to reduce the regulatory red tape and ease environmental compliance for industry and communities. In a report from the National Governor's Association (NGA), states including California, Delaware, Iowa, Maryland, New Mexico, and South Carolina have initiated programs to reduce the administrative burden of obtaining permits.²⁸ Others such as Idaho, Indiana, Michigan, Missouri, and Oregon provide industry and communities with technical assistance to help meet environmental standards.²⁹ Georgia, Indiana, and Maine have implemented programs to finance the acquisition of public and private lands for protection.³⁰ The NGA says that these types of programs represent a trend to make regulatory processes more "customer-friendly."³¹

Individual states often find themselves competing for business and industry to locate in their states. Recently many states have used lax enforcement of stringent, state-imposed environmental regulations as a competitive lure. The moderator of the Panel on International Law, Global Environmentalism, and the Future of American Environmental Policy spoke of varying state regulations, stating:

"[w]e have learned in the United States that free movement of capital, labor, and commodities builds pressure for centralized government. It undermines the incentive of each individual state to impose its own stringent controls. States understandably fear handicapping their own industries by putting them at a

27. *See id.*

28. *State Programs Making Compliance More Customer-Friendly for Industry*, MED. WASTE NEWS, July 23, 1996.

29. *See id.*

30. *See id.*

31. *Id.*

competitive disadvantage with the industries of other states. They worry about driving their industries elsewhere. They do not want to impose laws that appear unattractive to companies thinking about locating within their borders.”³²

A recent study conducted by Kirsten H. Engel, Associate Professor at Tulane Law School, consisted of a survey of five separate groups. These groups were made up of respondents who were responsible for, or influential in, state environmental standard setting.³³ The survey sought to determine whether many states were concerned with industry relocation and siting, and that this concern influenced environmental decisions in the development of policies and standards.³⁴ Fifty-seven of the sixty-five regulators who responded to the survey revealed concern over industry relocation and how siting affects environmental decision-making in their state.³⁵ Although a direct link between environmental regulation and an industry’s decision for plant-location is unsubstantiated, states allow the threats of job-loss and economic loss to influence policy and standard-setting decisions.³⁶ Response to Engel’s survey indicates that state regulators are either unaware of or disbelieve the results of firm location studies that support findings that many businesses consider environmental standards of very little importance in their relocation and siting decisions.³⁷

A minority of the respondent-regulators’ concerns over industry relocation and siting has played a role in the state relaxing or failing

32. Symposium, *Panel III: International Law, Global Environmentalism, and the Future of American Environmental Policy*, 21 *ECOLOGY L.Q.* 475 (1994).

33. See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and is it “To the Bottom”?*, 48 *HASTINGS L.J.* 271, 337 (1997).

34. See *id.* at 340.

35. *Id.* at 341.

36. Theodore M. Crone, *Where Have All the Factory Jobs Gone—And Why?*, 136 *BUS. REV.* 3 (Fed. Reserve Bank of Philadelphia 1997). When environmental regulations are mentioned in surveys of plant-location decisions, they do not rank high on the list of concerns. However, many Pennsylvania business leaders believe that state environmental regulations do more to deter businesses from locating within the state than to attract businesses. In a recent study done by the law firm of Manko, Gold & Katcher, at the Wharton School of the University of Pennsylvania, and the Pennsylvania Chamber of Business and Industry, 25% of the business-respondents identified environmental laws and regulations as the primary reason for locating facilities outside of Pennsylvania. Only 4% of the respondents identified environmental laws and regulations as the primary reason for locating facilities in Pennsylvania. See *1997 Pennsylvania Environmental Survey: Voices From the Business Community*, 1997 at 3. (Available from Manko, Gold & Katcher, Bala Cynwyd, PA; The Wharton School of the University of Pennsylvania; or the Pennsylvania Chamber of Business and Industry)

37. Engel, *supra* note 33, at 347.

to adopt, implement, or enforce environmental regulations. Reactions to industry relocation and siting has spanned a broad spectrum including: reducing the number of steps in a typical permit review process, adopting less stringent environmental standards, delaying the adoption of an environmental civil penalty or a lighter criminal penalty for an environmental violation, or opposing the adoption of a standard altogether.³⁸

*C. Does the Use of Environmental Regulations to Compete Among States Create a "Race-to-the-Bottom?"*³⁹

Does state control of environmental regulation lead to a more efficient, productive economy, while maintaining a high level of protection for the environment, or does state control of environmental regulation and the states' use of these regulations to compete for business and industry threaten the health of the natural environment? This question is often raised when more control over environmental regulation is delegated to the individual states. Claims that regulation at the state level may lead to a "Race-to-the-Bottom," in which states lower their environmental standards to suboptimal levels in an attempt to attract business and industry to their state is one of the primary arguments in favor of maintaining strict environmental standards at the federal level.⁴⁰

The effects of competition among jurisdictions in the environmental arena has been hotly debated in recent years. Scholars such as David Vogel have suggested that this inter-jurisdiction competition will lead to stricter standards and a brighter future for the environment.⁴¹ Others, such as Richard Revesz, a Professor of

38. *See id.* at 341.

39. For purposes of this Comment, the term "Race-to-the-Bottom" generally denotes the idea that competition among the states results in a relaxation of state environmental law and regulatory standards. *See generally*, Engel, *supra* note 33. This description of the term also provides that this laxity in environmental regulation results in an undesirable effect on the environmental health and social welfare of the state. The term "Race-to-the-Bottom" encompasses both the use of the environmental laxity as well as the effect of undesirability as those terms are used elsewhere in the text. *See id.*

40. *See* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210 (1992). "Perhaps the most widely accepted justification for environmental regulation at the federal level is that it prevents states from competing for industry by offering pollution control standards that are too lax." Although Revesz, does not support this theory, he recognizes it as one of the primary arguments in favor of federal environmental regulation.

41. *See* DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 259 (1995). David Vogel's discussion of

Law at New York University, believe that competition among jurisdictions through environmental regulation may lead to environmental laxity. However, Revesz does not believe that less stringent regulations are necessarily undesirable. Rather, Revesz believes less strict standards will lead to a desirable and more efficient outcome.⁴² Others believe that competition among the states will lead to less strict regulations that will lead to an undesirable outcome.⁴³

environmental regulation addresses competition between individual jurisdictions at both the state level within the United States as well as in the global economy. Vogel believes that competition among the states will lead to more stringent standards being imposed in the states.

42. See Revesz, *supra* note 40, at 1233-35. Revesz uses an analogy between interstate competition and markets for traditional goods to question the Race-to-the-Bottom claim. He compares interstate competition for business and industry and the market for traditional goods on four bases. First, because of the mobility of individuals across state lines, the pollution costs to state residents depend on who those residents are. This determination would strongly affect the resulting supply curve of the state and factor into whether the new industry would be acceptable in that state. Second, if shareholders of polluting companies are residents of the states where lax standards are implemented it is likely that the state, as a seller of location rights, would take into account the interests of the shareholders. Third, a comparison between competition for business and industry and that for traditional goods is weak because the states' interest in business and industry are not controlled by the market. Even where a state compromises the health and welfare of its citizens or the environment, the state will continue to exist, where a market for traditional goods may likely collapse. Therefore, although a state may undervalue environmental benefits, it is likely that this undervaluation may occur in the absence of competition. Finally, the idea of selling "location rights" as an independent product is not realistic. When business or industry locate within a state they must deal with all of the regulatory issues imposed upon them, not only environmental regulations. Revesz acknowledges the weaknesses of the analogy between interstate competition for business and industry and markets for traditional goods, but the comparison should at least push those who argue the Race-to-the-Bottom theory into identifying the differences between the markets and explain why they turn otherwise desirable competition into an undesirable race to the bottom.

43. See, e.g., Peter P. Swire, *The Race To Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE J. ON REG. 67, 108 (March 1996). Peter P. Swire, an Associate Professor at the Ohio State University College of Law joins scholars such as Richard Stewart in supporting the general theory that competition among jurisdictions in environmental regulation often leads to softer environmental laws and a lower degree of protection for the environment. Swire, however, acknowledges that determining whether this competition leads to laxity, desirability or undesirability depends on the factual setting. One critical aspect of the determination that Swire believes is often overlooked is the effect of public choice on the individual jurisdiction's decision-making in environmental law. State decision-makers, in their attempt to balance the interests of its citizens and the environment, are often swayed by public choices in favor of business and industry. However, depending upon the type and degree of environmental impact that would occur from less

The theory that interstate competition leads to stricter environmental standards, rather than less strict standards, is usually referred to as the "California Effect."⁴⁴ The California Effect refers to the role of large and powerful political jurisdictions promoting a regulatory "race to the top" or sharp upswing in environmental strictness.⁴⁵ It assumes that large and often wealthy jurisdictions can place themselves at a competitive advantage by requiring out of state competitors to meet the stricter environmental standards in order to do business in their state.⁴⁶ Therefore, each state is driven to meet the standards set in the stricter state so as to do business within the state. As a result, a competing state provides itself an advantage by strengthening its regulations, thereby improving its position in competing both inside and outside of its borders.

Other scholars, such as Revesz, believe that interstate competition, although it may lead to less stringent environmental standards, will result in a more efficient and desirable outcome.⁴⁷ Competition among states for business and industry should not be expected to lead to a decrease in social welfare. Rather, such competition can be expected to produce an efficient allocation of business and industry among the states.⁴⁸

Arguing that existing models of interstate competition do not support the race-to-the-bottom theory, Revesz uses the hypothetical of two island states opened up to inter-jurisdiction competition and

stringent standards, a Not-In-My-Backyard or NIMBY mentality may develop. Public choice would then favor more stringent environmental regulation even at the cost of new business or industry. *See also* Engel, *supra* note 32 at 347 .

44. Vogel, *supra* note 41, at 6. The California effect can be traced back to the enactment of the 1970 Clean Air Act Amendments. California was given permission to implement stricter air quality standards than those required by the federal government. California took the opportunity and required lower emission levels than those in the Clean Air Act. After amendments to the Clean Air Act in 1990, where in the federal government brought the rest of the nation up to California standards, it once again permitted California to implement stricter emission standards. Although the term "California effect" is meant to illustrate a much broader phenomenon, the general implication is the increase of regulatory standards in competing political jurisdictions.

45. *See id.*

46. *Id.* Vogel believes that stricter standards represent a source of competitive advantage for domestic producers, in part, because it is easier for the producers to comply with the regulations. On an international level, the development of stricter standards is equally significant so that trading partners are forced to meet the higher standards in order to maintain their export markets.

47. Revesz, *supra* note 40 at 1211.

48. *See id.* at 1211-1212.

the resulting effects on the social welfare of the island states.⁴⁹ While regulatory changes are taking place in each of the island states, regulators can weigh the increases in wages and productivity against the effect of new business and industry upon the environment. This balancing will determine the value of new business against the effect it will have on the social welfare of the island state. Revesz believes that this balance of interests will not result in a decrease in social welfare since the needs of the island states' citizens will be met. For this reason, Revesz believes that the Race-to-the-Bottom hypothesis lacks a sound theoretical basis.⁵⁰

The major contention of advocates of the Race-to-the-Bottom theory such as Peter Swire, is that the economic models supporting the desirability of competition assume that the cost/benefit analysis that weighs the benefits of the interstate competition against the costs to social welfare will be perfect and applicable to many fundamental elements needed to determine whether environmental regulations should be made less strict.⁵¹ Swire states that these assumptions are misleading and in their absence there is much less reason to believe that the actual decisions of the states will be desirable.⁵²

The debate over whether interstate competition through a state's manipulation of its environmental regulations results in a Race-to-the-Bottom is thus plagued with the same uncertainty that many other environmental issues face. The ambiguity in the interpretation of the determinative factors in the answer to the debate have little chance of being reconciled easily or quickly.

III. Discussion

A. *Environmental Regulation Reform in Pennsylvania*

In August of 1995, the Pennsylvania Department of Environmental Regulation (DEP) began its Regulatory Basics Initiative, the first comprehensive review of the DEP's regulations and policies ever undertaken by the agency.⁵³ The Initiative was intended to further the Ridge Administration's goal of creating a new environmental partnership that would allow the Commonwealth to succeed

49. See *id.* at 1246.

50. See *id.* at 1244.

51. Swire, *supra* note 42, at 98.

52. See *id.*

53. Pennsylvania Department of Environmental Protection, *Regulatory Basics Initiative: "One Year Later,"* October 1996.

both environmentally and economically.⁵⁴

During the Initiative, 13,000 pages of DEP regulations and 16,000 pages of policies were reviewed to identify areas where agency requirements no longer fit into the plan for future environmental regulation.⁵⁵ The purpose of the Initiative was to assure that agency requirements were not more stringent than standards imposed by Federal law without good reason,⁵⁶ to minimize costs upon the regulated community, to eliminate requirements which were no longer necessary or redundant, to encourage performance or outcome-based requirements, to facilitate the use of new green technologies, to eliminate barriers to recycling and pollution prevention, and to ensure that information was prepared in clear and concise language.⁵⁷ Existing regulations and technical guidance were evaluated to facilitate compliance, and the adequacy of related educational, technical, and financial assistance programs was also evaluated.⁵⁸

A key part of the review was a public comment period. The DEP asked individuals, local governments, citizen and environmental groups, and the regulated community to identify regulations or policies that should be changed. The Department received

54. On August 4, 1995 James M. Seif, Secretary of the Pennsylvania Department of Environmental Protection, distributed the Secretary's Directive on Review of Existing Regulations to the Deputies and Directors of the Department of Environmental Protection. Secretary Seif initiated this review of existing regulations and technical guidance documents to strengthen the foundation of the Department of Environmental Protection's effort to provide for a safe and clean environment, consistent with the mandates of the General Assembly. Secretary Seif issued the Directive to describe how the review was to be performed and to announce when the recommendations of the Deputies and Directors were to be submitted. Through the review, Secretary Seif hoped to further the attempt of the Ridge Administration in creating a new environmental partnership which would allow the Commonwealth of Pennsylvania to succeed both environmentally and economically. See James M. Seif, *Secretary's Directive on Review of Existing Regulations*, August 5, 1995.

55. The Initiative, planned as a review of all the state environmental regulations to identify regulations that no longer served the purpose of the Department of Environmental Protection, resulted in a 19-month process. The review included the review of regulations, a public comment period, and recommendation for change to specific regulations. The initiative was scheduled to close on December 31, 1997, with the submission of all recommended regulations to the Environmental Quality Board as a proposed rulemaking. See Pennsylvania Department of Environmental Protection, *supra* note 51, at 1-2.

56. A large number of states have passed laws limiting state agencies' authority to pass standards more stringent than Federal standards. See Organ, *infra* note 62.

57. See Pennsylvania Department of Environmental Protection, *supra* note 51, at 1.

58. See *id.*

comments from 113 groups and individuals. Businesses and trade associations spoke out in the greatest volume, contributing 59 representatives.⁵⁹

As a result of this year-long review, approximately 152 pages of the 4,987 pages of regulations in the *Pennsylvania Code* will be deleted and approximately 1,700 pages of the 55,000 regulatory requirements will be eliminated.⁶⁰ The public comments along with each section of the Department's regulations were reviewed to determine where, in addition to the deletion of the aforementioned regulations and regulatory requirements, the regulations and requirements could be revised to encourage performance based requirements, minimize costs, clarify requirements, and eliminate barriers to recycling and pollution prevention.⁶¹

1. *The Department of Environmental Protection's Review of Regulations and Technical Guidance*—All regulations which contained standards or requirements more stringent than federal law without good reason, were recommended for change so that the standard would no longer be more stringent than the corresponding federal law.⁶² Only regulations and requirements that were

59. *Id.* at 3.

60. *Id.* at 4. The greatest number of recommended changes in existing regulations were in the areas of Water Quality Management, Air Quality, Land Recycling and Waste Management. Under the Water Quality Management program 26 pages of regulations were removed, 289 sections and unneeded or unnecessary regulatory requirements were eliminated, and 804 pages of technical guidance documents were deleted. In the Air Quality program, 24 pages of regulations were removed, 263 sections and unneeded or unnecessary regulatory requirements were eliminated, and 81 pages of technical guidance documents were deleted. In the Land Recycling and Waste Management program, 68 pages of regulations were removed, 865 sections and unneeded or unnecessary regulatory requirements were eliminated, and 59 pages of technical guidance documents were deleted. The remainder of the 152 pages of regulations removed, 1716 sections and unneeded or unnecessary regulatory requirements that were eliminated, and the 2174 pages of technical guidance documents that were deleted were taken from the Radiation Protection, Mining and Reclamation, Oil and Gas Management, Dams, Waterways, and Wetlands, and the Water Supply and Community Health programs. See Appendix A. of Department of Environmental Protection, *Regulatory Basics Initiative: "One Year Later"*, October 1996.

61. *Id.*

62. Many federal environmental statutes establish minimum standards, but authorize states to implement standards more stringent than the federal minimum. While the trend had been for states to take advantage of the opportunity to implement more stringent environmental standards, that trend has now reversed itself. A large number of states have passed laws preventing their state environmental agencies from establishing standards more stringent than the federal minimums. See Engel, *supra* note 32 at 347-8. As of 1995, nineteen states had enacted at least one statute limiting the authority of a state environmental agency

appropriate and necessary under state law could surpass the standards found in federal environmental laws. The DEP compared the state requirements to federal requirements and those of other states, DEP examined the statutory, policy, or technical reasons for imposing regulations more strict than their federal counterparts, and performed an associated cost/benefit analysis to determine the viability of the stricter state standards.⁶³

Regulations that imposed disproportionate economic costs without significant benefits were identified for change.⁶⁴ Changes to these existing regulations were to be implemented based on four criteria: how the regulation achieves the intended environmental result and the costs imposed on the regulated community to comply with the regulation; availability of a nonregulatory compliance alternative which could achieve the intended environmental result; whether a less costly approach would be acceptable and if it was not recommended, a justification for why it was not recommended; and whether there was the availability of existing or proposed programs available to the regulated community to help minimize the costs of compliance.⁶⁵

The DEP's Regulatory Basics Initiative also reviewed each program area to improve regulations having the greatest incidence of noncompliance.⁶⁶ DEP considered the reasons for the high rate of noncompliance and the impact of noncompliance on public health, safety, and the environment to find alternative regulatory

to promulgate rules more stringent than those required by federal laws. See Engel, *supra*, note 32 at 347, note 223; Jerome M. Organ, *Limitations on State Agency Authority to Adopt Environmental Standards More Stringent Than Federal Standards: Policy Considerations and Interpretive Problems*, 54 MD. L. REV. 1373 (1995). Trends over the last decade reflect an increasing number of states enacting legislation that limits the authority of state environmental agencies to promulgate regulations more stringent than federal environmental statutes. States establish this limit on agency authority by enacting either statutes imposing an unconditional restriction on state agency authority or statutes imposing a conditional restriction on state agency authority. See Organ, *supra* note 60 at 1376-81.

Pennsylvania has imposed the latter type of restriction on its state agency authority within its air pollution program, requiring that the agency provide written findings regarding the need for more stringent air pollution emission standards. Pennsylvania specifically forbids "a more stringent performance or emission standard for hazardous air pollutant emissions from existing sources" than the federal standards under section 112 of the Clean Air Act. See 35 PaC.S.A. 4006.6(a), (d)(1) (1993); Organ, *supra* note 60 at 1382.

63. See *id.* See also Engel, *supra* note 32, at 347.

64. See Pennsylvania Department of Environmental Protection, *supra* note 51, at 5.

65. See *id.*

66. See *id.*

and nonregulatory approaches that may be more effective in obtaining compliance.⁶⁷

The DEP's review of existing regulations further inspected regulations that are prescriptive or technology-specific. Regulations not providing for the maximum flexibility allowed under the law in achieving a desired level of environmental performance were recommended for change where alternative regulatory approaches were thought to be more effective.⁶⁸

Environmental regulations should utilize "new green technologies." Therefore, review procedures included in these regulations should provide incentives for the development and use of these new green technologies. The DEP, in its review, identified regulations that stand as roadblocks for applying new, less costly methods or technologies that will maintain or improve environmental quality.⁶⁹ These regulations were to be recommended for elimination in lieu of the new green technologies.

Regulations that do not fulfill the intent of environmental protection as a whole should likewise be eliminated. Pollution prevention rather than waste management is better for the environment and, in most cases, cheaper to implement. Therefore, any regulations that do not support a pollution prevention approach or place barriers or disincentives in the way of pollution prevention should be eliminated.⁷⁰ The DEP identified regulations that were unfavorable to the pollution prevention approach and recommended that they be changed.⁷¹ Where pollution is prevented or reduced at its source, it does not have to be managed or regulated, saving the regulated community as well as the Commonwealth money and resources.⁷²

To complete its review of existing regulations, the DEP identified regulations that are redundant, outdated, or no longer necessary due to changes in statutory language. In addition, it identified regulations that created a potential for uncertainty or misinterpretation due to poor drafting and unclear language.⁷³ The DEP's goal by identifying these types of regulations was to reduce paperwork, minimize administrative burdens, and save time

67. *See id.*

68. *See id.*

69. *See* Pennsylvania Department of Environmental Protection, *supra* note 53, at 6.

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

by eliminating or revising the regulations.⁷⁴

The DEP's goal in their review of the state's environmental regulations was three-fold. First, to make it easier for the state to enforce the environmental regulations; second, for the regulated community to better understand and comply with the environmental regulations; and third, to decrease the costs associated with the protection of the environment to the state, its citizens, and the regulated community.⁷⁵

2. *Cost Implications to the Commonwealth, Local Governments, Individuals, and Regulated Community of The Department of Environmental Protection's Regulatory Basics Initiative*—The DEP's Regulatory Basics Initiative had many goals. The Initiative was intended to improve the efficiency of the Department of Environmental Protection's enforcement of the state's environmental regulations.⁷⁶ Also, the Initiative was to alter Pennsylvania's environmental regulations so that they make sense to local governments and the community that is regulated by them.⁷⁷ The Initiative was also intended to save all of those affected by environmental regulations money and resources while maintaining a safe and healthy environment.⁷⁸ In the Initiative, the DEP estimated that the changes recommended throughout the initiative would result in a cost savings of \$1,025,319 to the Commonwealth through more effective use of staff time and reduction of administrative costs in paperwork.⁷⁹ Changes in the permitting process, monitoring, and review, recommended by the Initiative save both time and money.

While the recommendations save the Commonwealth and its taxpayers over \$1 million, it also saves local governments and the regulated community an estimated \$154 million per year.⁸⁰ The regulated community will realize savings through improved application and reporting requirements and more clear and precise regulations that will reduce a company's transaction costs for

74. Pennsylvania Department of Environmental Protection, *supra* note 53, at 6.

75. *See id.* at 23. *See also* James M. Seif, *supra* note 54.

76. Pennsylvania Department of Environmental Protection, *supra* note 53, at 1. *See also* James M. Seif, *supra* note 54.

77. *See id.* at 23.

78. James M. Seif, *supra* note 52.

79. Pennsylvania Department of Environmental Protection, *supra* note 51, at 22.

80. *See id.* at 23.

consulting or legal fees spent to deal with redundant or unnecessary plans or paperwork.⁸¹ Local communities will see savings through changes to sewage sludge regulation.⁸²

From the outset, the overall goal of the Regulatory Basics Initiative was to make environmental regulation in Pennsylvania more efficient for those charged with the responsibility of enforcing the regulations and more logical to those who must follow them.⁸³ The Initiative, with recommendations received through it, seems to accomplish these goals while improving the economic outlook in Pennsylvania without compromising the public health, welfare, or the environmental well-being of the state.

B. Response of Business, Environmentalists, and the Public

Recent changes in environmental laws and regulations in Pennsylvania have not developed without reaction from businesses, environmentalists, municipalities, and the general public.⁸⁴ A large number of responses to the Department of Environmental Protection's regulatory initiative was received through the public comment period.⁸⁵ During this time, organizations, citizens, consultants, environmental organizations, and municipalities voiced their opinions concerning the need for change in state environmental regulation which showed the regulated community's interest in playing a part in the future of environmental regulation in Pennsylvania.⁸⁶ Many environmentalists question whether the new trend

81. *See id.*

82. *See id.*

83. *See* James M. Seif, *supra* note 54.

84. In an attempt to promote public input in Pennsylvania's regulatory policies, the Ridge Administration publishes regulatory agendas that describe changes that are being considered rather than regulations that have already been proposed for adoption. The regulatory agendas are published in the *Pennsylvania Bulletin* to provide the public access to the regulations at an early step in the process so that public input is given more weight in the development of the final regulation. By encouraging a greater amount of public input in the regulatory process, Governor Ridge hopes to develop a partnership with the regulated community and make the process more user-friendly. He stated that [b]usiness regulations, environmental regulations, . . . all have a tangible impact on the jobs and lives of Pennsylvanians. It makes good sense to incorporate public opinion as much as possible before proposing and adopting regulation." *See Public Gets Greater Opportunity to Shape Pennsylvania State Regulations*, PR NEWSWIRE, July 8, 1996 at 13:02.

85. Pennsylvania Department of Environmental Protection, *supra* note 53, at 3.

86. *See id.* at 3. Comments were received from over 100 commentators representing business and trade associations, citizens, consultants, environmental organizations, and municipalities. In total, over 1200 individual regulatory recommendations and comments were submitted.

in environmental regulation in Pennsylvania will sufficiently protect the public health, welfare, and the environment.⁸⁷ Local communities question whether the costs associated with environmental regulation are affordable and whether the specific regulations will protect their citizens. While business leaders seem to be optimistic about the future of environmental regulation in Pennsylvania, many businesses continue to voice concern over the costs of compliance at both the state and federal level.⁸⁸

The impact of environmental regulation on businesses has increased between 1996 and 1997. Pennsylvania businesses have ranked environmental laws and regulations as the third most important type of regulatory issue.⁸⁹ Although there has been a significant change in attitude since the Ridge administration has taken office and new legislation has been adopted, Pennsylvania business leaders still say that both state and federal lawmakers hurt local business climates with constrictive environmental regulations.⁹⁰ Two out of three Pennsylvania companies feel that environmental compliance is an important budgetary consideration when dealing with profitability decision-making in their business.⁹¹

A 1997 study conducted by the law firm of Manko, Gold & Katcher, the Wharton School of the University of Pennsylvania, and the Pennsylvania Chamber of Business and Industry, attempted to gauge Pennsylvania business leaders' reactions to environmental regulations.⁹² The study focused on business community's view of environmental regulations, specifically, the implementation and

87. See, e.g., Bumstead, *supra* note 2.

88. See *1997 Pennsylvania Environmental Survey: Voices From the Business Community*, *supra* note 36, at 9.

89. *Id.* at 5. Implications of environmental laws, worker's compensation issues, and business taxes are the top three regulatory issues that businesses are concerned with. Although worker's compensation issues dropped a dramatic 11 percentage points, it still ranks first among regulatory concerns with Pennsylvania businesses. In 1997, the relative importance of healthcare and OSHA laws and regulations decreased as compared to 1996.

90. See *CEO's: Green Laws Restrictive But Rate DEP Better than Feds; Statewide Survey Results Released*, THE LEGAL INTELLIGENCER, April 19, 1996 at 3.

91. *1997 Pennsylvania Environmental Survey: Voices From the Business Community*, *supra* note 35 at 5.

92. In 1996, Manko, Gold & Katcher sponsored the first statewide environmental survey conducted by the Wharton School of Business of the University of Pennsylvania. The purpose of the survey was to obtain the Pennsylvania business community's views on the present and future impact of state environmental regulation on their businesses. The results of the first statewide survey provided a benchmark against which the second survey was conducted.

enforcement of the regulations on both a federal and state level.⁹³ The study concluded that overall, businesses consider environmental regulations to be restrictive and compliance with the regulations to be costly.⁹⁴ In addition, half of the companies that responded to the survey felt that environmental compliance and litigation have a substantially adverse impact on their profitability.⁹⁵

Although many business leaders continue to believe that environmental regulation in Pennsylvania restricts profit-making and competitiveness with similar companies in other states, their outlook for the future of environmental regulation is optimistic.⁹⁶ In 1997, the percentage of companies who felt dissatisfied with the DEP's activities actually decreased over those who were dissatisfied with the DEP's activities in 1996.⁹⁷

There is overwhelming support from state businesses to change existing environmental regulations, as suggested by the DEP's Regulatory Basics Initiative.⁹⁸ Pennsylvania businesses support more flexible and practicable regulations based on a reward approach, as opposed to a punishment based approach often found

93. See 1997 *Pennsylvania Environmental Survey: Voices From the Business Community*, *supra* note 36.

94. See *id.* at 2. Although many businesses continue to claim that compliance with environmental regulations are too restrictive and costly, the Pennsylvania Department of Environmental Protection claims that for every dollar spent on pollution prevention, a company saves five to nine dollars in raw materials, time associated with reporting activities, and in pollution treatment and disposal costs. Pennsylvania has even taken steps to aid companies in determining the most efficient way to comply with environmental regulations. The Pennsylvania Small Business Development Centers (SBDC) provide training and information on how entrepreneurs can increase profitability by implementing pollution prevention techniques and complying with environmental regulations. The services provided by SBDC are intended to help small businesses that would often react to environmental regulations with expensive waste management approaches, to develop pollution prevention approaches which will save the companies money and allow them to survive and compete in the Pennsylvania economy. See *Helping Pennsylvania Entrepreneurs Profit From Pollution Prevention; SBDC Announces New Environmental Education and Outreach Program*, PR NEWSWIRE, October 28, 1996 at 12:41.

95. *Id.* at 3. The profitability of businesses is negatively affected by postponements of expansions or installation of equipment due to permit delays. Twenty-four percent of the survey respondents said that they have experienced delays due to federal permitting procedures and thirty-three percent of the respondents said that they experienced delays due to state permitting procedures. See 1997 *Pennsylvania Environmental Survey: Voices From the Business Community*, *supra* note 36, at 5.

96. *Id.* at 4.

97. See *id.*

98. 1997 *Pennsylvania Environmental Survey: Voices From the Business Community*, *supra* note 36, at 7.

in current Pennsylvania environmental laws and regulations.⁹⁹

Many businesses cite specific environmental issues such as air issues, waste management, and water issues as their primary concern with environmental regulation.¹⁰⁰ Other businesses cite more general issues such as conflicting laws, administration by agencies, or permitting problems as their primary concern.¹⁰¹ Despite inconsistency in the issues that businesses are most concerned with, many businesses continue to view compliance with environmental laws and regulations as costly in time, money, and effort.¹⁰²

Businesses, regulators, and citizens alike thus support a change in environmental regulation much like the changes recommended in the DEP's Regulatory Basics Initiative. While many citizens consider themselves enthusiastic about environmental protection, there is a growing feeling that existing laws and regulations make little sense. Many feel that much of the money spent on environmental regulation is not well spent and that environmental protection can be achieved in a more sensible, cost-effective, and flexible way.¹⁰³

C. *Effect of Environmental Regulation Reform on Employment in Pennsylvania*

The actual effects of environmental laws and regulations on employment in Pennsylvania are clouded with ambiguity. While the environmental business climate in Pennsylvania is rated as "fair" by half of the respondents in the Manko study,¹⁰⁴ of the businesses who have operations outside of Pennsylvania, two and a half as many companies feel that the environmental business climate is better in other states than it is in Pennsylvania.¹⁰⁵ This belief by Pennsylvania businesses may lead one to believe that employment opportunities in Pennsylvania are in danger due to environmental regulations at the state level.

Further supporting the belief that Pennsylvania jobs are threatened because of governmental regulation, a recent study

99. *Id.*

100. *See id.* at 9.

101. *See id.*

102. *See id.*

103. *1997 Pennsylvania Environmental Survey: Voices From the Business Community*, *supra* note 35, at 10.

104. *Id.* at 3.

105. *Id.*

conducted by Dun & Bradstreet showed that from 1990 to 1995 Pennsylvania suffered the fifth largest loss of jobs nationwide.¹⁰⁶ Government regulations were cited as one of the major reasons for this result.¹⁰⁷

On the other hand, environmental regulation compliance and pollution control has itself become a major growth industry.¹⁰⁸ Many jobs and businesses have been created through the implementation of environmental regulations. "Pennsylvania alone has 6,243 environmental companies generating \$9.1 billion in revenues and 67,332 jobs."¹⁰⁹

IV. Conclusion

A "new environmental partnership, a partnership that will allow the Commonwealth to succeed environmentally and economically" is what Governor Tom Ridge envisioned as he addressed the citizens of Pennsylvania upon his inauguration as Pennsylvania's new Governor in 1995.¹¹⁰

When the Pennsylvania Department of Environmental Protection began its first comprehensive review of the state's environmental regulations and policies in August of 1995 they were answering the call of changing times in Pennsylvania both environmentally and economically. The administration purports that "the cost of doing business in Pennsylvania must be reduced if jobs are to be retained."¹¹¹ By implementing the Regulatory Basics Initiative, the DEP is attempting to eliminate unnecessary, outdated regulations and policies, save individuals, businesses, and local governments an estimated \$154 million per year, and make environmental regulation more efficient and logical for both those who must comply with the regulations and those who must enforce

106. *See id.* at 1.

107. *See id.*

108. McCabe, *supra* note 12, at E1.

109. *Id.*

110. *Id.* at 1. James M. Seif, Secretary of The Pennsylvania Department of Environmental Protection, in his introductory statement to the Department of Environmental Protection's Regulatory Basics Initiative, reiterated the Ridge Administration's commitment to the comprehensive review of the Department of Environmental Protection's regulations and policies. *Id.*

111. Slade, *supra* note 3. Johnny Butler, State Secretary of Labor echoed the administration's commitment to retain Pennsylvania jobs. He stated that issues such as worker's compensation, environmental regulations, and taxes must be considered. *See id.*

the regulations.¹¹² Many environmentalists continue to worry about the softening of environmental regulation in Pennsylvania to accommodate business and industry.¹¹³

The question that remains unanswered is whether Pennsylvania regulators have taken these recent steps toward environmental regulation reform in order to compete in the national market for businesses and industries seeking to locate within Pennsylvania borders. This question must be answered in the affirmative. The DEP claims that the most important goal of the administration's Initiative is to make Pennsylvania more job-friendly and competitive with other states.¹¹⁴ However, studies discussed herein demonstrate that pursuing the goal of becoming job-friendly through manipulation of environmental regulation is unnecessary. The results of many business location surveys demonstrate that environmental regulation is relatively unimportant in a business' decision of where to locate their business facilities.¹¹⁵

Although many business location surveys do not place a great deal of emphasis on environmental regulations, many Pennsylvania businesses still believe that environmental regulations play a part in business decisions regarding the location of business facilities. In a recent environmental survey 25% of the business-respondents identified environmental laws and regulations as the primary reason for locating facilities outside of the state.¹¹⁶ Overall, Pennsylvania businesses are still concerned with the costs of complying with environmental regulations.¹¹⁷

The effect of recent environmental regulation reform in Pennsylvania on the state job market is difficult to measure. While Dun & Bradstreet record Pennsylvania as having the fifth largest loss of jobs in the nation between 1990 and 1995,¹¹⁸ Pennsylvania

112. Pennsylvania Department of Environmental Protection, *supra* note 51, at 23.

113. *See* Bumstead, *supra* note 2.

114. Pennsylvania Department of Environmental Protection, *supra* note 51, at 23.

115. Engel, *supra* note 33 at 347.

116. *1997 Pennsylvania Environmental Survey: Voices From the Business Community*, *supra* note 36, at 3.

117. *See id.* at 9.

118. *Id.* at 1.

has seen the creation of a large number of jobs and businesses because of environmental regulation.¹¹⁹ The job versus the environment debate, if we can continue to call it that, will likely continue on into the distant future.

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119. See McCabe, *supra* note 12 at E1.

