

JIM TOZZI PRODUCES REGULATORY PARALYSIS BY ANALYSIS

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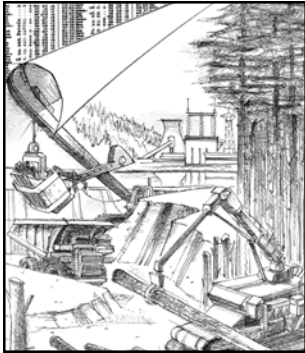
SEPTEMBER/OCTOBER 2004



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Revelations of corporate misconduct serve as a reminder that corporations are required to disclose material environmental risks to investors. These risks range from Superfund liabilities all the way to upcoming regulations. Such information transparency not only protects investors, it protects the public and pushes all companies toward better practices. But after surveying the pulp and paper, power, and mining sectors, the author finds environmental reporting lax, as well as SEC enforcement.

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In the Supreme Court, parties and justices alike are couching in “federalism” terms issues that until recently were treated as mere questions of statutory interpretation. The circuit courts likewise continue to entertain a range of federalism and constitutional theories that strike at the heart of environmental law. Seeking a return to a pre-New Deal theory of government, these “fundamentalist federalists” have gained some beachheads but are being turned back — for now.

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Conservation biology not the only science driven by a goal

Amid some useful observations made by Steven Quarles about why the Endangered Species Act has become more controversial since its passage in 1973 ("Why the ESA is Different: Eight Reasons," July/August) is a characterization of the scientific discipline of conservation biology that is fundamentally flawed. Quarles argues that conservation biology is not objective and that, in this respect, it is "unique among the sciences." Based on this supposition, he then suggests that the conclusions drawn from research in conservation biology are biased. This bias, Quarles says, gives "scant comfort to the regulated," inferring that lack of comfort promotes conflict over the implementation of the ESA. Furthermore, he insinuates an improper relationship when he says that this scientific discipline "has feasted on the ESA."

While we cannot speak to whether a lack of comfort by the regulated (which, in fact, includes everyone) promotes conflict, we propose that any lack of comfort about the scientific credentials of conservation biology is unfounded. The presence of a subjective mission for a scientific discipline does not preclude rigorous and objective posing of hypotheses, design of experiments, or collection, analysis, and interpretation of data. Although conservation biology is a normative discipline in that it has desired outcomes (for example, a diversity of life on Earth), it is far from unique in this regard. The scientific fields of medicine, engineering, forestry, and fisheries and wildlife management all have desired outcomes based on values, the existence of which has not led these fields to abandon, or be accused of abandoning, objectivity. Although the mission and goals of these sciences are value-laden, the task of determining how to meet these goals demands skillful and objective application of scientific methodologies.

What Quarles fails to see is the fundamental distinction between unavoidable subjectivity in the establishment of desired outcomes and objectivity in pro-

fessional practice. Conservation biologists can hold that a high rate of species extinctions is bad and should be avoided while also objectively collecting, analyzing, and interpreting data related to the provisions of the ESA in essentially the same way that doctors can hold that illness is bad while objectively collecting, analyzing, and interpreting data related to treatment. The problem is not with the practice of conservation biology by professional scientists; it is, rather, the lack of agreement about the goals of conservation. The sooner that Americans recognize that conflicts over the ESA and other environmental regulations are conflicts over social and ethical values and not over the practice and application of the science of conservation biology, the sooner these controversies will abate. In the meantime, conservation biologists will be busy trying to determine how to stem a mass extinction.

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Steven P. Quarles responds:

I admit I find the letter from Dr. Trombulak, et al., somewhat confusing. I am still struggling to "see" (as they would have me) what is "unavoidable subjectivity" and what makes it so. I also find confounding the authors' enlistment and characterization of "medicine" and "engineering" as "sciences" in their quest to justify their mission ori-

entation. I regard these pursuits as admittedly mission-imbued "professions" that employ, but do not claim themselves to be, scientific disciplines; they are typically housed by academic institutions in professional schools, not science faculties.

My concern about conservation biology's infatuation with policy is neither solitary nor ill-informed. In *The Idea of Biodiversity*, David Takacs wrote: "Conservation biologists do not merely seek to study and document the ecological and evolutionary phenomena most crucial to informed conservation policy; they are 'mission-oriented,' and the mission is to conserve the very objects they study. Embodied in conservation biology are a set of normative principles as inextricable from the science as the formulae, theories, and models they use or the entities they investigate. How to make it so that the facts appear credible, unshaped by the advocacy and norms? . . . Conservation biologists . . . seek to expand what *successful* means in the context of biological science. The 'successful' biologist would be she who takes this crusade furthest, who is most effective in changing the most minds, lobbying for the most laws on biodiversity's behalf, protecting the most habitat."

Nor is my concern either caviling or unjustified. One of the letter's most eminent authors, Dr. Noss, wrote in another letter that he published in 1989 in *Conservation Biology*: "Granting that a biodiversity crisis exists and that conservation biologists are charged with helping society find a solution, we have a duty to make our science relevant to policy. . . . What steps can conservation biologists take toward greater activism? We can support environmental groups and causes, with our money and our mouths. . . . Science and conservation rarely come into conflict; but when they do, there should be no question about which takes precedence. We need to stop arguing over esoteric details, stop declining to comment when we do not have all the data, and pull together to offer strong guidance on how to save the Earth." What scientific "discipline" would abide, even advocate, the avoidance of controversial facts and dismissal of inconvenient information gaps in a rush to supply "guidance" to "policy"?



By Margaret Kriz

Could Candidates Be Further Apart?

As the presidential election approaches, the news throughout the country has been dominated by war, terrorism, and the economy. Health care is a hot topic on the campaign trail with some crowds. And occasionally one of the candidates — usually Democratic nominee John Kerry — will bring up energy issues. When he does, he tends to frame the subject as a jobs and national security concern.

The environment has taken a distant backseat in this year's presidential election, barely a hiccup in public opinion polls. Ironically, the public's lack of interest comes at a time when the Democratic and the Republican standard bearers are supporting remarkably different policies on pollution control and protecting federal lands. Public interest is slight, but the consequences loom large.

Since taking office in 2001, President Bush has been true to his base, supporting market-based incentives and easing federal regulations on industry rather than vigorously curbing pollution. The White House deserves credit for finalizing regulations to control emissions from buses and large trucks and construction equipment, and restricting the sulfur allowed in diesel fuels. Bush also has championed development of urban brownfields.

But at the same time, he has opposed controls on greenhouse gases. He has expanded oil and natural gas development on federal lands and off U.S. shores. His appointees have methodically rewritten federal regulations to chip away at the land protection initiatives put into place during the Clinton administration.

During Kerry's 20 years in the Senate, he has advocated more aggressive and more immediate controls on the nation's pollution problems, including global warming. He supports some domestic oil and natural gas development, but at the same time he backs Clinton's land preservation programs. He also has been a leading opponent of oil drilling in the Arctic National Wildlife Refuge — which Bush strongly supports. Kerry supports brownfields development, but would go a step further to reach out to minority and poor communities by creating a new environmental justice division within the Justice Department.

The two candidates' energy plans also contain very different messages. Kerry's ambitious plan to make the U.S. more independent would earmark \$10 billion to develop a new generation of environmentally friendly cars and SUVs. He favors pushing carmakers to produce more efficient vehicles — although he recently backed away from his earlier proposals to require cars to average 36 miles per gallon, up from the current standard of 27.5 mpg.

Kerry also would require electric companies to produce 20 percent of their power from renewable sources by 2020 — a proposal that is strongly opposed by the power companies and the Bush administration. Industry officials are likely to be more enthusiastic about Kerry's proposals to dedicate \$10 billion toward upgrading the nation's coal-fired power plants to make them less polluting and more efficient.

For his part, Bush has allocated substantial funds for global warming research. He's backed technology development for hydrogen-powered cars, cleaner-burning coal plants, and new nuclear power plants. But at the same time, the president opposes new mandates forcing Detroit to make dramatically more-efficient cars, although he did require SUVs and light truck manufacturers to increase fuel efficiency by 1.5 mpg; SUVs are now required to achieve an average of 21.7 mpg.

Bush continues to push the 2001 energy plan written by Vice President Cheney's controversial energy task force. That broad blueprint would provide tax cuts and other benefits to the oil, natural gas, coal, and nuclear industries. The measure, which has been bogged down

in Congress, also would provide tax benefits to companies that use wind and other sources of renewable electricity. Kerry has sided with Senate Democrats in blocking the Republican energy package, primarily because he opposes the industry giveaways. He does, however, support parts of the bill that extend the production tax credit for renewable sources and expand ethanol use.

Bush and Kerry also part company on nuclear power. Bush has paved the way to use Nevada's Yucca Mountain to house the nation's commercial nuclear waste. He also favors building new nuclear power plants and is likely to back hefty federal subsidies in hopes of enticing industry to order the first new plant since the 1979 Three Mile Island accident. Kerry would take the opposite tack. He is trying to woo Nevada voters by promising not to open the Yucca Mountain waste repository. And in a February survey conducted by the Sustainable Energy Coalition, Kerry said that he does not support construction of new nuclear power plants.

As president, Bush has shifted national policy on energy and environment, primarily by rewriting administrative policy. He's had less success in getting Congress to adopt his proposals. If elected, Kerry's ambitious plans would also be subject to a reality check from Congress. Even if the Democrats' wildest dreams come true and they take the White House and regained control of the Senate, Kerry's environmental proposals would certainly be questioned by the House's conservative Republican leadership. The Senate will be no cakewalk for either candidate; neither the Democrats nor the Republicans are likely to have the 60 votes they'd need to break a filibuster.

The environmental community has ramped up its political machine for Kerry, going door-to-door in an attempt to get voters interested. They correctly argue that Bush and Kerry advocate dramatically different policies on the environment and energy. But polls show that voters are far more focused on the immediate concerns of war and their economic well-being than on longer-term environmental problems.

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By John Pendergrass

Fundamental Change In Our Basic Laws II

The time has come to change our environmental laws, wrote my colleague Elliott Laws in his THE BUSINESS OF ENVIRONMENT column in the last issue. He advocated a “wholesale reevaluation and reworking of the way we regulate environmental matters in the United States.” As one example of why existing law does not work, Elliott cited RCRA for not allowing a company to use as a raw material the hazardous wastes of another company. This illustrates a significant problem with environmental law — it is piecemeal, designed to solve specific environmental problems identified at a particular time. Anyone knowledgeable about U.S. environmental law likely can recite his or her own top 10 list of counterproductive or just plain silly results of well-intentioned statutes and regulations. But beyond the anecdotes, the broader issue that Elliott raises is certainly worth exploring in greater depth.

It is necessary to start by noting that our present system has been remarkably successful. There have been huge improvements in environmental quality while allowing the economy to grow substantially. But that same system has significant problems, going beyond those cited by Elliott. The RCRA scheme for regulating hazardous waste was conceived as a comprehensive system from cradle to grave. From the instant a hazardous material is determined to be a waste, it must be tracked and handled, stored, treated, and disposed of according to rules intended to assure safety and minimize environmental harm. But RCRA has turned out to be more of a funeral-to-grave system.

A true cradle-to-grave system was contemplated in ELI’s book *Environmental Law: From Resource to Recovery*, which considers how law deals with the environmental effects of resource use for several industrial sectors. The resource-to-recovery concept considers environmental consequences of resource exploration, extraction, manufacture, recovery, and disposal. Of course U.S. environmental law does not actually deal with resources in this way, but the concept can help to identify the problems with existing law and, more importantly, how to design new law that can work better.

One problem with RCRA, then, is that it does not necessarily make sense to focus on a hazardous material at the moment it becomes a waste to a user. Such a system is under- and over-protective. It fails to deal with the potential for environmental effects while the material is in use (and it is no answer to define it to be a waste if it causes environmental harm). Further, as Elliott noted, it fails to allow the material to be used as a raw material by another entity, or at best creates substantial legal barriers to such beneficial reuse. An interim conclusion appears to be that environmental law needs to be more holistic and have the capability of dealing with changes in how materials are used.

Elliott also complains that environmental law is designed based on an assumption that people will not do what needs to be done unless they are forced to do so. That is certainly a common view, now frequently referred to as the “outmoded command-and-control paradigm.” It never was the sole method used by environmental law, and even many “market mechanisms,” such as cap-and-trade systems, rely on a base level of command-and-control. But it is clear that people and institutions vary widely in what motivates them. A second interim conclusion might be that environmental law ought to use the full range of available techniques for achieving national goals for environmental quality and sustainable development, allowing them to be used as appropriate to particular issues.

What does this have to do with states? Whatever is done to change federal environmental law affects the states. To return to the RCRA example, a state

that wants to change its law to facilitate the beneficial use of hazardous waste by eliminating the determination that a material is a waste as the entry to the regulatory system could be found by EPA to be failing to implement its approved state program to implement RCRA. Where federal law exists states are generally locked in to the same structure and basic provisions as the federal law, with some flexibility to be more stringent within the framework of that law. A third interim conclusion might be that environmental law ought to allow states flexibility in how they implement federal environmental law to achieve the desired results.

Although there is much more to be said about the positives and negatives of existing environmental law, the real issue is what shape would fundamental change take, particularly with respect to state-related aspects. We should start with the premise that environmental law will and should continue to be a mix of federal and state law, consistent with our federal system. The next level of basic premise would be that there should be federal minimum standards, but that states should have the option to be more stringent based on local needs and conditions.

The next premise might be slightly less universally accepted, but still seems to be fundamental — that where states are implementing federal law they should be accountable for achieving the intended results. Accountability should be to the citizens of that state, but also to the nation, through federal agencies and Congress because pollution does not stop at political boundaries and natural resource use affects the entire nation. All of these premises are admittedly somewhat vague and susceptible to widely varying interpretations, but that is also a fundamental tenet of U.S. government. The major change suggested here is to move away from the medium- and problem-oriented individual laws to a holistic law that recognizes that the environment is an interlinked natural system and that human use of natural resources must become more sustainable.

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By Richard Lazarus

IN THE COURTS

Would New Justices Make A Difference?

With the November election approaching, the partisan divide between the Republican and Democratic parties and their respective presidential candidates seems wider than ever. One bit of common ground, however, concerns the significance of the election for the Supreme Court. Everyone agrees on that.

At least two, and likely three, justices are likely to retire during the next president's term. The last president able to appoint three or more members of the Court in one term was Richard Nixon, who appointed Warren Burger chief justice in 1969, and named Harry Blackmun in 1970 and Lewis Powell and William Rehnquist in 1972.

Not since 1823 has the membership of the Court remained the same for so long. Stephen Breyer is the newest justice, yet he joined the Court in 1994. Ten years is certainly a long time to be saddled with the administrative duties of the "junior justice."

The age of the justices, not their current vitality, is the sole reason that it is safe to assume that the next president will have a historic opportunity to influence the Court's decisionmaking. The two most likely retirements are Chief Justice Rehnquist, who will be 80 this October, and Justice John Paul Stevens, who turned 84 last April. The third rumored departure is Justice Sandra Day O'Connor, who is currently 74 and who is long reported to be favoring an early retirement.

The working assumption of both political parties is that such a profound shift in membership would have dramatic, long-term effects on the Supreme Court and its rulings. Given that President Bush as a candidate in 2000 stated that he would appoint more members of the Court like Justices Scalia and Thomas, and that Republican leaders have made plain their desire for "No More Souters," that would seem to be a fair assumption. What may be surprising is how the Court's most recent environmental law cases nonetheless suggest that even such a significant shift in Court membership could make no difference at all in many such cases.

During the Court's most recently completed term, the justices decided a total of seven environmental law cases. If President Bush had previously named replacements to the Court for the chief and Justices Stevens and O'Connor, it seems likely that only one out of those seven cases would have been decided differently. If a Democratic president had done so, it seems quite possible that none of the seven cases would have been decided differently.

The only case that industry lost by a close vote during the past term was *Alaska v. EPA*, which raised the question whether EPA could, using an administrative compliance order, directly contest the validity of the state's determination of Best Available Control Technology under the Clean Air Act. Justice Ginsburg authored the majority opinion in favor of EPA, which Justice O'Connor joined, and Justice Kennedy wrote the dissenting opinion for himself and three other justices. With a Republican president naming successors to O'Connor and Stevens, the state of Alaska would have likely won that case. The only other industry loss last term was the Clean Water Act case *South Florida Water Management District v. Miccosukee Tribe*, in which the Court refused to embrace petitioner's narrow construction of the meaning of point source. But the vote on that legal issue was so overwhelming that a shift of even

three votes would not have made any difference.

Nor is there any reason to assume that environmentalists, who suffered far more significant losses in the Supreme Court this past year, would have fared any better if a Democratic president had first replaced the same three justices. Environmentalists lost both *Norton v. Southern Utah Wilderness Alliance* and *Department of Transportation v. Public Citizen* unanimously, and they garnered only one vote for their position against Clean Air Act preemption in *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*.

It is likewise not clear what difference a Democratic president's appointees to the Court would have made to the result in either *BedRoc Ltd v. United States* or *Cheney v. U.S. District Court*. Justice Breyer joined the majority in *BedRoc*, concluding that "sand and gravel" is not a "valuable mineral" within the meaning of the Nevada Pittman Act. And Justices Stevens and Breyer joined Justice Kennedy's majority opinion in *Cheney* that the court of appeals had prematurely concluded that it lacked jurisdiction to consider the vice president's appeal of the trial court's order rejecting his effort to shield certain documents from discovery.

To be sure, there are plenty of significant environmental law issues likely to be decided by the Supreme Court in the near future in which it is a near certainty that it would make a big difference whether a Democratic or Republican president were to choose the next three justices. The Court remains sharply divided on both regulatory takings and federalism issues, both of which possess enormous implications for the reach of federal and state laws intended to protect the natural environment. It is nonetheless somewhat striking — for some reassuring and for others no doubt unsettling — to be reminded that the stakes are sometimes less rather than more than we anticipate.

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By Elliott P. Laws

'80 Contest Changed Environment Debate

In just a few weeks Americans will go to the polls to elect a president. By the time this is published, we will have been bombarded with more political rhetoric than is likely healthy for any normal human being. I venture to say that probably a minuscule amount will have anything to do with the environment.

For reasons that I have yet to figure out, between the two conventions last summer, I decided to look back at the election of 1980, Ronald Reagan vs. Jimmy Carter. Maybe it was the death of President Reagan earlier this year, or maybe misplaced fondness for the year that Congress enacted CERCLA. Whatever the motivation, I decided to look at the nomination acceptance speeches of the two candidates to see what they said, promised, and projected for the environment 24 years ago. I was in for a series of surprises.

The first surprise came when I read President Carter's speech of August 14. In almost 5,000 words he mentioned "environment," "conservation," and "Clean Air Act" one time each. "Environmental" was no where to be found.

That surprise was immediately followed by a second eye-opener, the context in which they were used: "But what have the Republicans proposed? — just an attack on everything that we've done in the achievement of social justice and decency that we've won in the last 50 years, ever since Franklin Delano Roosevelt's first term. They would make Social Security voluntary. They would reverse our progress on the minimum wage, full

employment laws, safety in the work place, and a healthy environment." The only reference to environment made by President Carter was in presenting his negative interpretation of the Republican agenda. And it was dead last in priority.

This tack continued in his conservation and Clean Air Act references: "Now, what do the Republicans propose? Basically, their energy program has two parts. The first part is to get rid of almost everything that we've done for the American public in the last three years. They want to reduce or abolish the synthetic fuels program. They want to slash the solar energy incentives, the conservation programs, aid to mass transit, aid to elderly Americans to help pay their fuel bills. They want to eliminate the 55-mile speed limit. And while they are at it, the Republicans would like to gut the Clean Air Act. They never liked it to begin with." Not a positive word about past environmental achievements or future environmental plans.

I was even more surprised when I read former Governor Reagan's acceptance speech of July 17. In a speech of almost identical length, Reagan also uttered my chosen test words an almost identical number of times: "environment" once, one "environmental," and "conservation" twice. But what a difference in the way that he used them! It bespoke volumes of his political skills, particularly of his moniker, The Great Communicator:

"Those who preside over the worst energy shortage in our history tell us to use less, so that we will run out of oil, gasoline, and natural gas a little more slowly. Conservation is desirable, of course, for we must not waste energy. But conservation is not the sole answer to our energy needs. America must get to work producing more energy.

"The Republican program for solving economic problems is based on growth and productivity. Large amounts of oil and natural gas lay beneath our land and off our shores, untouched because the present administration seems to believe the American people would rather see more regulation, taxes, and controls than more energy. Coal offers great potential. So does nuclear energy pro-

duced under rigorous safety standards. It could supply electricity for thousands of industries and millions of jobs and homes. It must not be thwarted by a tiny minority opposed to economic growth which often finds friendly ears in regulatory agencies for its obstructionist campaigns. Make no mistake. We will not permit the safety of our people or our environmental heritage to be jeopardized, but we are going to reaffirm that the economic prosperity of our people is a fundamental part of our environment."

As you look at the Reagan statement you see a melding of economic needs with an acknowledgment of the need for both conservation and environmental protection, and in a way that clearly states which trumps the other.

Now it must of course be realized that there were several major issues facing the United States that justified a reduced focus on the environment by both candidates. The economy was in terrible shape, with spiraling inflation. The Cold War was as hot as ever and over 50 American diplomats were being held hostage in Iran. Still, as I reread the excerpts I found myself marveling at the astuteness of the Reagan passage and thereby understanding some of the problems that led President Carter to defeat. I know I have repeatedly used a similar environment and economy linkage over the past decade (without the trump card!), as did other members of the Clinton administration — but look where it came from.

So what does this tell us? I find it interesting that many of the same policies called for by Candidate Reagan are very similar to those we are hearing from President Bush and Vice President Cheney — and most likely will face the same fate 24 years from now. Meanwhile, the Carter references, especially the one on the Clean Air Act, could have been uttered during this campaign by Senator Kerry. I like to think that we have made significant progress in environmental matters over the past 20 years or so. Now I'm just not so sure.

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By Robert N. Stavins

The Myths Of Market Prices And Efficiency

In my two previous columns I described a pair of prevalent myths regarding how economists think about the environment: “the myth of the universal market” — the notion that economists believe that the market solves all problems; and “the myth of simple market solutions” — the notion that economists always recommend simple market solutions for social problems. In response to those myths, I noted that in the environmental domain, perfectly functioning markets are the exception, not the rule, and that no particular form of government intervention is appropriate for all problems.

A third myth is that when non-market solutions are considered, economists use only market prices to evaluate them. No matter what policy instrument is chosen, the environmental goal must be identified. Should vehicle emissions be reduced by 10, 20, or 50 percent? Economists frequently try to identify the most efficient degree of control — that which provides the greatest net benefits. This means that both benefits and costs need to be evaluated. True enough, economists typically favor using market prices whenever possible to carry out such evaluations, because these prices reveal how people actually value scarce amenities and resources. Economists are wary of asking people how much they value something, because respondents may not provide honest assessments of their own valuations. Instead, economists prefer to watch how people reveal their preferences, such as when they pay more for a house in a neighborhood with cleaner air, all else equal.

But economists are not concerned

only with the financial value of things. Far from it. The financial flows that make up the GNP represent only a fraction of all economic flows. The scope of economics encompasses the allocation and use of all scarce resources. For example, the economic value of the health damages of pollution is greater than the sum of health-care costs and lost wages (or lost productivity), as it includes what lawyers call pain and suffering. Economists might use a market price indirectly to measure revealed rather than stated preferences, but the goal is to measure the total value of the loss that individuals incur.

For another example, the economic value of some parcel of the Amazon rain forest is not limited to its financial value as a repository of future drugs or as a location for ecotourism. Such “use value” may only be a small part of the properly defined economic valuation. For decades, economists have recognized the importance of “non-use value” of environmental amenities such as wilderness areas or endangered species. The public nature of these goods makes it particularly difficult to quantify the values empirically, as we cannot use market prices. Benefit-cost analysis of environmental policies, almost by definition, cannot rely exclusively on market prices.

Economists try to convert all of these disparate values into monetary terms because a common unit of measure is needed in order to add them up. How else can we combine the benefits of ten extra miles of visibility plus some amount of reduced morbidity, and then compare these total benefits with the total cost of installing scrubbers to clean stack gases at coal-fired power plants? Money, after all, is simply a medium of exchange, a convenient way to compare disparate goods and services. The dollar in a benefit-cost analysis is nothing more than a yardstick for measurement and comparison.

A fourth and final myth is that economic analyses are concerned only with efficiency rather than distribution. Many economists do give more attention to aggregate social welfare than to the distribution of the benefits and costs of policies among members of society. The reason is that an improvement in economic efficiency can be determined

by a simple and unambiguous criterion — an increase in total net benefits. What constitutes an improvement in distributional equity, on the other hand, is inevitably the subject of much dispute. Nevertheless, many economists do analyze distributional issues thoroughly. Although benefit-cost analyses often emphasize the overall relation between benefits and costs, many analyses also identify important distributional consequences.

So where does this leave us? First, economists do not believe that the market solves all problems. Indeed, many economists make a living out of analyzing “market failures” such as pollution in which laissez faire policy leads not to social efficiency, but to inefficiency. Second, when economists identify market problems, their tendency is to consider the feasibility of market solutions because of their potential cost-effectiveness, but market-based approaches to environmental protection are no panacea. Third, when market or non-market solutions to environmental problems are assessed, economists do not limit their analysis to financial considerations, but use monetary equivalents in benefit-cost calculations in the absence of a more convenient unit. Fourth and finally, although the efficiency criterion is by definition aggregate in nature, economic analysis can reveal much about the distribution of the benefits and the costs of environmental policies.

Having identified and sought to dispel four prevalent myths about how economists think about the natural environment, I want to acknowledge that my profession bears some responsibility for the existence of such misunderstandings about economics. Like our colleagues in the other social and natural sciences, academic economists focus their greatest energies on communicating to their peers within their own discipline. Greater effort can certainly be given by economists to improving communication across disciplinary boundaries. And that is my goal in this column in the months ahead.

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By Carolyn Raffensperger

What The Ocean Dead Zones Tell Us

It's a bad time of year for the fish in the Gulf of Mexico, especially those that live near the mouth of the Mississippi River. Every summer, vast quantities of fertilizer run off the land in the upper Midwest, go down the Mississippi, and flow over the top of the salty gulf waters, which are denser and heavier. The fresh water on the surface forms a barrier to oxygen penetrating to the bottom layers of the ocean. The nitrogen and phosphorus in the fertilizer stimulate the growth of the phytoplankton that naturally grow in the top layer of the sea. When the phytoplankton die and sink, their decomposition uses up much of the remaining oxygen in that bottom layer.

Dissolved oxygen of 4-6 parts per million in water is considered normal. Below 4 parts per million, fish are having the equivalent of severe asthma attacks and have to move to waters where they can respire more easily. Two parts per million is called hypoxia. In 2002 the gulf hypoxic zone reached a record 8,500 square miles, larger than the state of Massachusetts. But that record may be exceeded this year. Forty percent of U.S. commercial fish in the lower 48 states come from the Gulf of Mexico. This fishery is now threatened by hypoxia.

The irony is that the human food supplied by the oceans is jeopardized by land-based agriculture. More than one million tons of nitrogen, the major nutrient in the northern Gulf of Mexico, flows into the gulf through the Mississippi River system each year. About 56 percent of the nitrate

load enters the Mississippi above the Ohio River, drained from key agricultural states like Iowa and Illinois.

In response to the burgeoning problem, Congress passed the Harmful Algal Bloom and Hypoxia Research and Control Act in 1998. The act required that the president, in conjunction with the states, submit a plan for reducing, mitigating, and controlling hypoxia in the northern gulf. In January 2001, President Clinton sent to Congress an action plan with the goal of reducing the size of the zone by cutting nitrate runoff by 30 percent by 2015. Runoff was to be reduced by improving farming practices, restoring wetlands capable of filtering nutrients, and promoting flood-control projects. In addition, EPA would increase monitoring of the hypoxic zone and the waters flowing into it, under an adaptive management regime.

Scott Faber, an attorney with Environmental Defense, listed additional benefits of the plan, including reducing demand for natural gas, helping combat climate change, and restoring endangered species habitat.

Unfortunately, wrangling over the plan has delayed action. As I write this in early August, the dead zone is already 5,800 square miles. Terry Stelly, a biologist with the Texas Parks and Wildlife Department, says that "increasing numbers of sharks have been found in recent years in the waters along the Texas-Louisiana border, near the edge of the dead zone. . . . Chances are good they [sharks] were looking for higher dissolved oxygen in the water." Three people have been bitten by sharks along the upper Texas coast this year. Texas has recorded only 18 shark attacks since 1980.

In yet more disturbing August news, another dead zone has formed off the Oregon coast, the second in three years. The Oregon hypoxic zone first appeared in 2002 and scientists thought it was a fluke. Jane Lubchenco, former president of American Association for the Advancement of Science, says, "When you see the same thing happening with this regularity, it suggests that something is fundamentally different. This is a significant departure from normal conditions and you have to

wonder what's going on. This ocean system has changed, and we're paying attention." Scientists suspect that the Oregon zone is related to climate changes bringing cold, nutrient-rich, lower-oxygen Arctic waters down to the south, creating the same conditions of decomposition and oxygen depletion that occur in the gulf.

In a similar story, birds in the massive nesting sites of Orkney and Shetland in northern Scotland have had complete reproductive failure. Ornithologists are describing it as a collapse of an ecosystem. Michael McCarthy of the London *Independent* writes that on Shetland's southern tip, where 1,200 pairs of guillemots assembled to breed in the spring, not a single chick has been produced. Arctic terns, of which the last census in 2000 recorded 24,716 breeding pairs in Shetland, have produced no chicks at all in the south of the islands.

Why? The birds starved and were unable to support eggs or hatchlings. The reason seems to be global warming. The temperature of the North Sea has gone up by two degrees Celsius in two decades. The primary food of the migratory birds is the sand eel, a cold-water species that has moved closer to the Arctic in search of colder water.

Everywhere we turn, evidence is mounting that we are destroying the oceans. New research demonstrates that the oceans have been serving as industrial carbon dioxide sinks and have become acidified by the resulting formation of carbonic acid. The biological consequences of increased acidification include the inability of shellfish to make shells, since the chemical reaction of carbonic acid with calcium carbonate makes the calcium unavailable to the mollusc.

We are at a turning point. We can replace our destructive agricultural practices with sustainable farming and resurrect the dead zones. We can honor sustainable fishing practices. We can sign the Kyoto treaty and reduce our greenhouse gases. Or we can sing at the funeral of the oceans.

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NOTICE & COMMENT

Driving That Fuel Cell Car To Mars

At a time when national security focuses on the Middle East, here's an interesting thought experiment. Suppose that one night every car in the U.S. fleet were magically converted into highly fuel-efficient vehicles averaging 45 miles per gallon. According to the rules of our experiment, nobody would be able to tell the next morning as they drove to work, dropped kids off at school, etc. The cars would accelerate and drive just as well — and be just as roomy and safe — but they would be a lot cheaper to drive. Today's fleet average is a paltry 22 mpg. National oil consumption would drop by 2.5 million barrels per day.

That's the same amount as the United States imports from the Persian Gulf. As the fantasy plays out, Washington declares that the gulf is no longer an area of vital national interest and begins a gradual withdrawal (consistent with its obligations to stabilize the situation in Iraq). As an extra benefit, urban air pollution plummets. And gas stations start to give away steak knives again.

The key to this fantasy is that there is no difference to the ordinary American driver, who has shown no interest, even in time of war, in cutting back on fuel consumption, nor have elected officials shown any inclination to legislate increased fuel economy. Perhaps that's why President Bush addressed the interwoven problems of energy security, national security, and environmental security in his 2003 State of the Union

speech by launching the Freedom Car, a \$1.7-billion hydrogen fuel cell vehicle research initiative that won't go into commercial production until at least 2015. Today, the Department of Energy estimates that Bush's fuel cell initiative could reduce petroleum demand by 11 million barrels a day — in 2040. While prototypes are on the road now, the National Academy of Sciences says that consumer versions are decades away.

There are other very real problems with hydrogen fuel cells in vehicles. For one, forget about hydrogen as the "fuel of the future." Hydrogen is not a fuel; it is really an energy storage medium, akin to a battery. It does not occur in nature. It takes energy to break the chemical bonds between hydrogen and other elements, and it gives up energy (as electricity) when it bonds with oxygen to form water in a fuel cell.

But unless the energy to make the hydrogen for the U.S. vehicle fleet of 2040 is relatively benign, the Freedom Car may be more of a trap. While solar or wind power would be the utopian dream for a clean hydrogen economy of the future, the Sierra Club says that the moribund nuclear industry is vying to supply the needed energy. But that's like using "a nicotine patch that causes cancer," says the club's Daniel Becker.

For an excellent briefing on hydrogen fuel cells in cars, read Matt Wald's article "Questions About a Hydrogen Economy" in the May issue of *Scientific American*. Wald, the *New York Times's* top-notch energy reporter, summarizes the issue this way: "Fuel cell cars . . . are expected on about the same schedule as NASA's manned trip to Mars and

have about the same level of likelihood."

Here's one interesting point Wald makes. Supposing you did set up acres of windmills or solar cells to extract hydrogen. It may be environmentally better to use the electricity in other ways than to make hydrogen for transportation — offsetting coal plants, for instance. You can also "burn" natural gas in a fuel cell, extracting the hydrogen, but again, when the sums are done, it's better for the environment to use it to replace coal power plants. Because cars only run a few hours a day, they are a poor use of an expensive, difficult technology and infrastructure, Wald says. He predicts that the highway may be the last place we see widespread commercial applications of fuel cells.

A few months after President Bush's speech, Toyota drove an experimental fuel cell car to Washington, along with one of its Prius hybrids, perhaps the hottest car in the United States. The Prius gets 55 miles per gallon. Robert Wimmer, Toyota's research manager for technical and regulatory affairs, says it's hard to say, when all inputs are considered, which vehicle is cleaner.

Technology Review declared the hybrid the new new thing in its April issue. In contrast with all the hydrogen hype, "hybrids are available now, and they fuel up at the local pump." Toyota expects to sell 600,000 in 2006.

Obviously, my thought experiment was devised with hybrids like the Prius in mind, which use a smaller gasoline engine that charges a battery, which an electric motor draws on to assist the engine. The brakes act like generators and recapture the energy of motion, charg-

Once More, States Step In

"Could the next grassroots revolution in America be over climate change? George Bush stomped out of the UN's Kyoto treaty on global warming three years ago and did a U-turn on campaign pledges to regulate emissions of carbon dioxide. Since then, he has refused to come up with sensible

domestic policies. Yet that very obstinacy has fomented a backlash in the states.

"Massachusetts led the way by imposing curbs on CO₂ emissions from power plants. The New England states have also joined the eastern provinces of Canada in vowing to cut emissions of

greenhouse gases by 12 percent by the end of the decade. Emboldened by this, a dozen states and three cities sued EPA in October [2003] for refusing to treat CO₂, the chief greenhouse gas, as a pollutant.

"Not to be outdone by the Yankees, California, Oregon, and Washington

have now banded together to tackle climate change. California has passed the country's first law regulating emissions of greenhouse gases from cars. If the law survives legal changes, New York and several other states, as well as Canada, have said they may do the same." — The Economist

NOTICE & COMMENT

ing the battery too. Fuel economy gains are tremendous, and performance differences hard to tell.

The Prius costs about \$1,000 more than a comparable Camry and out-accelerates the 4-cylinder version. *Consumer Reports* called the Prius the top-scoring car in a review of affordable family sedans in May, declaring it “roomy” and possessing “competitive road manners.” The next frontier is light trucks. *Washington Post* auto writer Warren Brown, reviewing the first hybrid SUV, wrote that “the tested [Ford] Escape hybrid delivered.” The Escape gets 35 mpg.

Recasting my thought experiment to include not only cars, but SUVs, pickups, and minivans, the entire mix of passenger vehicles would only have to increase to 28 mpg to free the U.S. from Persian Gulf oil — and realize a 30 percent emissions reduction as an ancillary benefit. It would take some time to achieve that turnover, but it is clearly doable. Of course, the politics of the region will probably require a U.S. presence even if we do not require oil from the gulf.

Hybrids are not a fantasy, but they do cost more than regular cars and trucks. The Prius, which was designed from the ground up as a hybrid and is the mileage champ, can pay back its premium over a comparable Camry in two to four years, but the Honda Civic hybrid may take as much as 10 years compared to a regular Civic, even worse for the Escape. Brett Smith of the University of Michigan’s Center for Automotive Research says that pump prices will have to hit \$3 per gallon for hybrids to expand beyond a niche market.

Incentives could help. But just as GM, Nissan, and DaimlerChrysler are ready to enter the market, and Toyota, Honda, and Ford are designing new models, the IRS is phasing out its Clean Fuel Tax Deduction, which was \$2,000 in 2003 but will drop by \$500 a year until the program ends in 2006. “Incentives matter” is the modern mantra in environmental policy. Here’s a real chance to reap huge social benefits along with improved national security. Otherwise, my thought experiment will probably never see its consequences tested in the real world.

Notice & Comment is written by the editor and represents his opinions alone. Legal intern T.C. Turner’s research was instrumental in the above analysis.

NEWS THAT’S REUSED

Trial of the Centuries Update: The judge in the federal district court in Miami stopped the celebrated Greenpeace “ship mongering” trial before it went to the jury in May, issuing a rare directed verdict in favor of the defendants. Which is a shame, because it sure would have been fun to have heard what the jurors would have had to say about the use of an 1872 statute meant to stop the luring of ships into port by agents of brothels to, instead, silence protest by an environmental organization. Creative use of law, that.

As the *Miami Herald* put it, the judge “sank the U.S. government’s nationally publicized criminal case against the international environmental group Greenpeace because of lack of evidence.”

The story, you may recall, started when several Greenpeace protesters who had illegally boarded a cargo ship off the Florida coast carrying 70 tons of Brazilian mahogany — typical Greenpeace stuff. Months after the usual banner display and arrests, the Justice Department decided to take the unusual step of prosecuting the organization itself.

As we reported in the January/February issue, the audience at a pre-trial hearing burst into laughter when Judge Adalberto Jordan said he would like to speak to the judge who presided over the last such prosecution, knowing full well that it had been in the 1890s. “That’s beyond my capability,” responded Assistant U.S. Attorney Cameron Elliott.

In issuing his directed verdict at the trial, Jordan said that “because of fortuity, boarding a ship six miles from a port does not meet the requirement in the law of a ship ‘about to arrive.’” But now that Greenpeace knows the law, he said, “Caveat emptor.”

The U.S. Attorney’s Office cannot appeal because the case never went to a jury.

But proving that the Justice Department never rests, Greenpeace activists faced the organization’s first-ever felony trespass charges in June

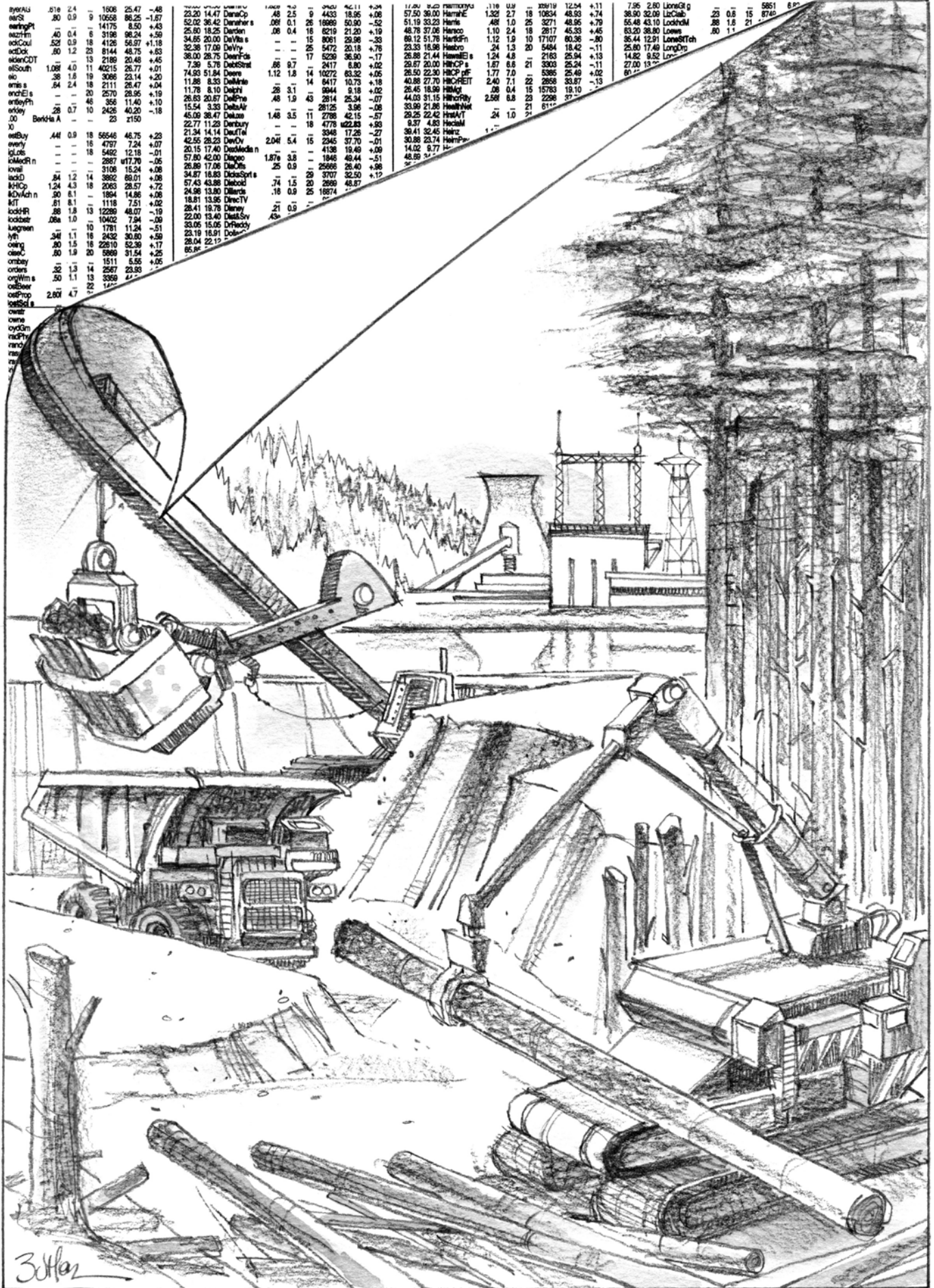
for yet another banner-hanging. This time it was a banner protesting the Bush energy plan hung by four women and two men on the 700-foot-tall smokestack at the Hatfield Ferry power plant, near Pittsburgh, Pennsylvania. The facility is a large coal burning plant that the group says is highly polluting. No damage was done to the generator, nor were its operations impaired.

In a press release, Greenpeace said that the climbers were charged with two federal felonies, one of which was “knowingly and willfully damag[ing] or attempt[ing] to damage the property of an energy facility” and “attempt[ing] to cause a significant interruption or impairment of a function of an energy facility.”

The federal felonies were dropped, and state rioting and burglary felony charges have been thrown out, but the six still face state felony trespass charges, carrying a maximum of seven years in prison. Greenpeace General Counsel Tom Wetterer told the *Forum* he believes this is the first time individual Greenpeace activists have faced felony charges for banner-hanging protests.

Donnybrook: In a *New York Times* column titled “Clearing The Air,” David Brooks wrote, “For two years, [Senator] Jim Jeffords and a Democratic-led coalition have blocked the Bush initiative” — referring to the Clear Skies cap-and-trade multi-pollutant bill, which would replace the current command-and-control clean air approach. “Many Democrats in the past have backed cap-and-trade approaches, but they don’t want to allow Bush a victory.”

He might have mentioned that Jeffords sponsored a multi-pollutant cap-and-trade bill when he ran the Senate Environment Committee for most of the first two years of the Bush administration. But then, it was the Republicans, opposing the added CO₂ controls, who ensured that clean air law retained its command-and-control format by blocking his bill.



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Are Companies Coming Clean?

Revelations of corporate misconduct serve as a reminder that corporations are required to disclose material environmental risks to investors. These risks range from Superfund liabilities all the way to upcoming regulations. Such information transparency not only protects investors, it protects the public and pushes all companies toward better practices. But after surveying the pulp and paper, power, and mining sectors, the author finds environmental reporting lax, as well as SEC enforcement

ROBERT REPETTO

Current securities law requires that companies disclose the material financial implications of their environmental exposures. Without such disclosure, financial market valuations will not accurately reflect the financial risks that companies incur through their environmental management decisions. Investors will be endangered and an important market incentive for prudent environmental management will be lacking.

Indeed, when environmental risks have been hidden behind a veil of corporate secrecy until unfortunate occurrences revealed their extent, investors have suffered. Rational investments to reduce future environmental costs, liabilities, or risks have been undervalued in the capital markets and thus discouraged. As some of the case studies that follow illustrate, companies, investors, and the public can suffer dramatic damage through lack of transparency regarding corporate environmental risks and exposures.

The recent revelations of corporate misconduct have underscored the importance of informational transparency in protecting investors, deterring self-dealing by corporate insiders and bringing capital market discipline to bear on questionable management policies. It was when the Securities and Exchange Acts of 1933 and 1934 enshrined disclosure as the principal means for regulating financial markets in the United States that Justice Brandeis famously said, "Sunlight is the best disinfectant." A leading contemporary scholar of securities law, J. Seligman, writes in his book *The Transformation of Wall Street*: "At its core, the primary policy of the federal securities laws

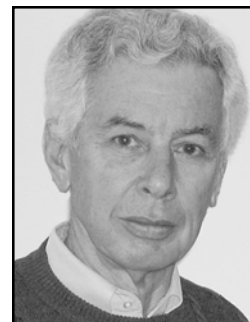
today involves the remediation of information asymmetries."

To ensure sufficient disclosure, the SEC established a comprehensive set of guidelines and rules governing what companies should report. In addition to rigorous accounting rules for reporting financial results, the SEC demands the disclosure of qualitative non-financial information that is needed lest current financial statements be misleading. These requirements include any known risks and uncertainties that might have future material financial effects.

On top of specific disclosure requirements, listed companies must disclose any material information needed to prevent statements from misleading investors. The SEC and the courts have avoided any numerical threshold of materiality, instead defining it as information that a reasonable investor would be likely to consider important in the context of all the information available. SEC guidance states that facts can be material if they bear on the ethics of management, its integrity, or its legal compliance record, irrespective of the financial sums involved. Omitting to disclose material information is equivalent to making false or misleading statements and is subject to serious penalties.

The requirement that all material information must be promptly disclosed is widespread in countries with developed financial markets. Moreover, in recent years securities regulators and accounting standards bodies in the United States, Canada, the United Kingdom and the European Union have emphasized the need for fuller disclosure of material future risks and uncertainties.

Robert Repetto, whose work on environmental finance won the Moskowitz Prize in 2000, recently retired from the Yale School of Forestry and Environmental Studies as a professor in the practice of sustainable development. Earlier in his career, he was vice president of the World Resources Institute and an associate professor of economics and population at Harvard University.





Disclosure requirements apply to environmental uncertainties, such as Superfund liabilities, and could reasonably apply to upcoming regulations and even Kyoto obligations.

Mandatory disclosure has become a more effective policy instrument in the last two decades. The internet has dramatically increased communication. In many industries more of a company's market value consists of intangible assets, including its reputation. Reputational losses can impair strategic alliances, undermine consumers' brand loyalty, and make it more difficult for a company to recruit and retain high-quality employees.

Writing in the *Harvard Law Review* in 1999, Cynthia A. Williams has tried to make the case that the SEC should require disclosure of information on environmental performance and other social issues — irrespective of financial materiality — because of its mandate to promote corporate accountability. She argues that Section 14(a) of the Securities Exchange Act empowers the SEC to issue necessary or appropriate rules regulating proxy solicitations "in the public interest or for the protection of investors." [Emphasis added.] Similar language pervades the acts.

She follows a failed attempt, in the 1970s, by the Natural Resources Defense Council. NRDC had petitioned the SEC with the proposal that listed companies should have to report on pollution, environmental practices, and the environmental impacts of their products and operations.

The SEC finally decided, with judicial concurrence, that it would continue to rely on an economic materiality criterion in judging environmental disclosure requirements. The SEC affirmed that if environmental issues are economically material, they must be disclosed under existing requirements. The SEC argued that its enforcement activities would elicit disclosure of material environmental information in specific cases and committed itself to active enforcement.

However, that commitment remains unfulfilled. Disclosure remains incomplete despite considerable evidence that the materiality of environmental information has increased substantially since the early 1970s. For example:

- Companies now spend much more to comply with environmental regulations. Between 1972 and 1994, business expenditures on pollution abatement more than doubled in real terms;
- It has been demonstrated repeatedly that companies' stock prices have been affected by disclosure of information regarding emissions (even if legal), violations of environ-

mental regulations, or potential liability to environmental remediation requirements;

- In the 1970s, only a trivial fraction of institutionally managed assets were in socially screened funds or portfolios. By 2003, their assets had grown to \$2.1 trillion;

- Several financial research services now sell environmental performance information to the investment community, demonstrating that professional investors consider such information relevant to their decisions; and

- An increasing number of shareholder resolutions, some backed by very large coalitions of institutional investors, have been filed demanding fuller environmental disclosure. This also demonstrates that the investment community considers such information to be material.

However, the availability of information on environmental issues has not kept pace with this growing materiality. Many government databases, although in the public domain, are hard to access, inaccurate, inconsistent, out of date, and not formatted in useful ways for financial or company-specific analysis. Moreover, companies' own environmental reports are typically selective, unstandardized, and unrelated to financial statements. Therefore, the public information available elsewhere is not a substitute for adequate disclosure by companies of financially material environmental information.

Disclosure of environmental information is governed both by the SEC's core rules on materiality and by additional specific requirements. General disclosure requirements explicitly include forward-looking statements. Item 303 of Regulation S-K requires a Management Discussion and Analysis of "material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or future financial condition." The firm shall disclose "where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operations." Disclosure of known trends, risks, and other uncertainties affecting future business results is particularly important to investors because asset markets are themselves inherently forward-looking. The value of any financial security is derived from the

A N O T H E R V I E W

GAO Study Finds Little Agreement — Or Data — On Disclosure

Recent scandals in the business world have shaken investor confidence in corporate financial reporting and underlying accounting and auditing practices, highlighting the importance of disclosing key information. Environmental risks and liabilities are among the conditions that, if undisclosed, could impair the public's ability to make sound investment decisions. In light of these circumstances, Senator James Jeffords, ranking minority member of the Environment Committee, along with Senators Jon Corzine and Joseph Lieberman, asked GAO to study environmental disclosure under Securities and Exchange Commission regulations.

We issued a report to the senators in July that addresses key stakeholders' views on how well the SEC has defined the requirements for environmental disclosure, the extent to which companies are disclosing in their SEC filings, the adequacy of the SEC's efforts to monitor and enforce compliance with disclosure requirements, and experts' suggestions for increasing and improving environmental disclosure. (See *Environmental Disclosure: SEC Should Explore Ways to Improve Tracking and Transparency of Information*, available at www.gao.gov.)

We found that stakeholders disagree on how well the SEC has defined the requirements for environmental disclosure. Some say that certain requirements provide too much flexibility and are too narrowly scoped. Others maintain that the flexibility is warranted and the scope adequate. Those who cited concerns included groups with an interest in environmental protection or socially responsible investing. As an example, they said, companies may not be disclosing some potential liabilities or may be minimizing amounts because SEC guidance is not specific enough in certain areas, such as disclosure of potentially significant environmental problems or regulatory initiatives that could pose future financial risks.

In contrast, the ones who viewed existing requirements as sufficient generally represented entities responsible for reporting information to the SEC or groups with general investment interests. They said that flexibility is necessary to accommodate variability in firms' circumstances, and that developing guidance for every situation would not be feasible.



John Stephenson

After reviewing 27 recent studies on environmental disclosure, we concluded that several factors make it difficult to conduct such studies and limit the extent to which conclusions can be drawn. The primary impediment lies in determining for specific companies what environmental information is potentially subject to disclosure and whether it should be considered material — thus meeting the reporting threshold — given the companies' circumstances. Determining what should have been reported may be impossible without direct access to company records.

The studies included in our review had other serious limitations, including small sample size and narrow focus. Significantly, the studies cannot establish whether a low level of disclosure means that a firm does not have existing or potential liabilities, has determined that such liabilities are not material — or is not adequately complying. While the results of the studies are very limited and not generalizable, some indicate that the extent of environmental disclosure has increased over time and that, within a particular industry, the amount and type of information can vary considerably.

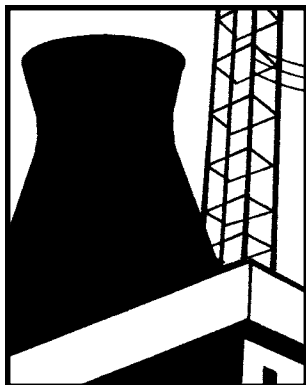
Without better information on the extent of environmental disclosure, we found that the adequacy of the SEC's efforts to monitor and enforce compliance cannot be determined. In addition, we found that the SEC does not systematically track the issues raised in its reviews of companies' filings and, thus, does not have the information it needs to analyze the frequency of problems involving en-

vironmental disclosure, compared with other types of disclosure problems; to identify trends over time or within particular industries; or to identify areas in which additional guidance may be warranted. Over the years, the SEC and EPA have made sporadic efforts to coordinate on improving disclosure, but the agencies have not formally agreed to share relevant information and the extent of information sharing is currently limited.

Using a survey of 30 experts who use disclosure information, including investor organizations and financial analysts among others, we obtained suggestions for increasing and improving environmental disclosure in three broad categories: modifying disclosure requirements and improving guidance for reporting entities, stepping up SEC's monitoring and enforcement of existing requirements, and using nonregulatory approaches, such as shareholder petitions and voluntary environmental reporting initiatives. Some experts commented on why particular proposals are unnecessary or unworkable. Representatives of reporting companies also maintained that some of the suggestions would not improve disclosure but agreed that nonregulatory approaches can be effective in making company management aware of public interest in disclosure.

In our report, we recommended that the SEC take steps to improve the tracking and transparency of information related to its reviews of companies' filings, and work with EPA to explore ways to take better advantage of agency data relevant to environmental disclosure. The SEC agreed with our recommendations and is taking action by, for example, making comment letters and company responses available on its web site, beginning with August filings. We believe that this is a positive step toward making additional information on corporate environmental liabilities available to the investing public.

John Stephenson is Director of Natural Resources and the Environment at the Government Accountability Office in Washington, D.C.



Over the period 1975-2000, the SEC initiated only three administrative proceedings and one civil action over inadequate environmental disclosures.

stream of returns it is expected to bring and the riskiness of those returns.

The SEC has narrowed companies' ability to avoid disclosure on grounds of uncertainty. In its release on MD&A requirements, the SEC indicated that disclosure of uncertain events is necessary unless the registrant "determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur." The SEC warned companies that, if a registrant's future filings reveal a material effect from an event that was a known uncertainty in a prior period, the SEC enforcement staff will "inquire as to circumstances existing at the time of the earlier filings to determine whether the registrant failed to disclose a known . . . uncertainty." Moreover, forward-looking disclosure is further encouraged by a safe harbor rule that protects companies from applicable liability provisions of federal securities laws that might otherwise be relevant. Companies cannot be penalized for making "reasonably based and adequately presented" projections that subsequently fail to materialize.

Disclosure requirements of known uncertainties under Item 303 of Regulation S-K apply to environmental uncertainties, such as Superfund liabilities. The requirements of Item 303 could reasonably apply to many other environmental uncertainties:

- Contaminated industrial sites that have not yet been identified for mandatory remediation although contamination might well be discovered through future investigation, particularly if the site is transferred to another owner;
- EPA regulations are first issued in proposed forms before final promulgation. Many final regulations are challenged in court, with billions of dollars in compliance costs resting on the judicial outcome;
- Inadequate environmental controls create risks of spills, releases, and discharges that could prompt lawsuits by affected parties and often have done so; and
- The possible ratification of the Kyoto Protocol or adoption of policies to curb greenhouse gas emissions (such as the EU emissions trading program that begins next year) could be considered a known uncertainty with potentially material consequences for some companies.

Thus, Item 303 would seem to require a significant increase in the disclosure of forward-looking financially material environmental information that is essential to protect investors.

In addition, SEC rules and Generally Accepted Accounting Practices impose specific requirements on companies for environmental disclosure. Item 101 of Regulation S-K, governing the general description of the business, states:

"Appropriate disclosure shall be made as to the material effects that compliance with federal, state, or local provisions which have been enacted or adopted regulating the discharge of materials into the environment may have on the capital expenditures, earnings, and competitive position of the registrant and its subsidiaries. The registrant shall disclose any material capital expenditures for environmental control facilities for the remainder of the current fiscal year and its succeeding fiscal year and for such future periods as the registrant may deem material."

This requirement evidently covers regulations that have been enacted but not yet adopted because of court challenge. It requires that the registrant apply existing materiality guidelines to financial impacts beyond the one- or two-year expenditure horizon. Many regulations include compliance deadlines several years in the future, such that planned capital expenditures to comply with them are initiated only after considerable time has elapsed.

Item 103 of Regulation S-K requires disclosure of "any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is subject." Environmentally related proceedings must be disclosed if: they are material; they involve a claim for more than 10 percent of current assets; or they involve the government and potential monetary sanctions greater than \$100,000.

During the 1980s, the discovery of many contaminated industrial sites requiring remediation under the Comprehensive Environmental Response, Compensation, and Liability Act or under the Resource Conservation and Recovery Act and the rapid escalation of cleanup costs led to an elaboration of disclosure requirements for contingent liabilities. The GAAP, as enunciated by the Financial Accounting Standards Board, requires companies to accrue a contingent liability for future remediation costs if the loss is probable and reasonably estimable. SEC and FASB guidance add clarification that if a loss is probable, the firm must recognize its best estimate of the loss, despite uncertainty, and cannot wait until only one estimate is likely. New information should be recognized in later disclosures. Together,

ANOTHER VIEW

Forget Past; Disclosure Is Inevitable Wave Of Future

Some investor groups and some environmental groups have been arguing that corporate environmental disclosure has been inadequate. Three senators requested a GAO investigation. Among other things, GAO reviewed 27 studies and papers prepared by investor and environmental groups and others and found all to have “severe” to “strong” limitations. The GAO report concluded that “little is known about the extent to which companies are disclosing environmental information in their filings with the SEC.”

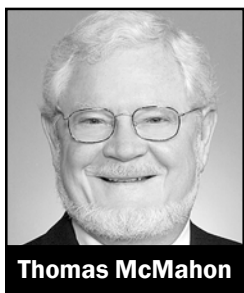
My take-away from the report (see GAO’s sidebar, page 21) is that continued searching for a backward-looking answer would be a waste of resources. There are powerful reasons that, whatever level of environmental disclosure may have been acceptable in the past, greater disclosure will be required in the future. Corporate environmental disclosure practices are evolving rapidly, driven as much by market forces as by changes in legal and accounting requirements. This may be one of those rare situations where we can more reliably predict the future than describe the past.

The traditional view in the United States seems to be that changes in environmental disclosure practices must come through legal means — new laws and regulations or more stringent enforcement. Other stakeholders throughout the world do not focus their thinking on legalistic frameworks. Change of this nature is wrought by mobilizing powerful global economic forces. For example, the United Nations Environment Program recently joined with institutional investors throughout the world (e.g., Citigroup, BNP Paribas) to develop a set of corporate social responsibility investment standards that prominently include environmental matters. There are numerous similar initiatives underway.

Of perhaps more immediate concern to targeted U.S. companies, shareholders are waging increasingly

successful proxy battles demanding greater environmental disclosure. And mainstream investor groups, particularly large institutional investors like CalPERS and other state pension funds, are flatly demanding greater environmental disclosure, regardless of whether the law — past or present — requires it. Money talks.

Further foreshadowing the inevitably of change is the fact that corporate America has broken ranks on at least one hotly debated environmental disclosure issue. Major firms are now discussing climate change issues in their SEC filings, regardless of whether they are required by legal or accounting



Thomas McMahon

rules to do so.

Another market force involves director and officer liability insurance. Most insurance carriers have recently modified their standard D&O policies to include a broad “pollution exclusion” that expressly *denies coverage for claims under securities laws alleging inadequate environmental disclosure*. This market force, by itself, could bring about a greater level of disclosure, simply as a matter of risk reduction.

In addition, there are significant legal and accounting developments, triggered by Enron and Sarbanes-Oxley. In 2001 the SEC issued “Cautionary Advice Regarding Disclosure About Critical Accounting Policies.” The advice reminded companies that SEC rules governing the Management Discussion & Analysis filing require disclosure about “trends, events, or uncertainties” that could have a material impact on reported financial information. Environmental uncertainties were cited as an example.

Then, in 2002, the SEC proposed an elaborate rule for disclosing “critical accounting policies.” The proposal would require public companies to include in the MD&A a detailed narrative disclosure about “critical accounting estimates.” A critical accounting estimate is an approximation by management about a matter that is “highly uncertain” and where

different estimates that reasonably could have used would have a material impact on the company’s financial condition. One part of the proposal would require *quantification* of the dollar impact on the company’s financial presentation if, for example, an environmental matter that involved a critical accounting estimate were to be accrued at the *high* end (rather than the low end) of the range.

Then, in 2003, the SEC reiterated the 2001 cautionary advice and the 2002 proposed rule, adding that the proposed rule remains under consideration.

Some argue that the SEC is moving too slowly in requiring better MD&A disclosure generally, and is not making environmental disclosure a priority. Others argue that the SEC is focusing its limited resources on stopping Enron-type abuses, and is looking to EPA to take the lead with respect to complex environmental issues (including especially climate change). Be that as it may, the SEC recently agreed, in conjunction with the release of the GAO report, to change internal SEC procedures to better track environmental disclosure, make available to the public the comment letters SEC staff send to individual companies regarding their environmental disclosures, and to work more closely with EPA.

Whatever the pace, the direction is clear. The evolution toward increased environmental disclosure is in springtime bloom. This is no longer a fringe proposition. Environmental professionals need to understand the rapidly changing industry environmental disclosure practices and the reasons therefor.

Tom McMahon is Co-Chair of a recently created American Bar Association Committee on Environmental Disclosure. He participated as a member of the GAO report’s expert panel. He is a retired partner of Sidley & Austin. The views expressed are not necessarily those of the committee nor of his former firm. Further information can be found at the committee’s website: <http://www.abanet.org/environ/committees/environdisclosures/home.html>.



Our studies of three industrial sectors show that many companies are not providing investors with material information on upcoming regulations that could have significant effects on stock prices.

these rules impose extensive obligations on corporate management to disclose financially material environmental costs, liabilities, and future risks.

In addition to these accounting guidances and releases, it became known that EPA was sharing information with the SEC about companies' potential liabilities. Consequently, a few SEC letters of inquiry put companies on notice that improved disclosure of site remediation liabilities was expected. By and large, U.S. corporations have responded. Disclosure of potential Superfund liabilities is by far the most complete and detailed of all environmental information to be found in corporate financial reports. As a result, banks, insurance companies, and other financial-sector actors can now evaluate such risks more accurately. This experience indicates that a modicum of enforcement attention is sufficient to produce a fairly high degree of compliance with disclosure obligations.

Despite this success, there has been little effort to enforce disclosure of other financially material environmental information. In the United States, over the period 1975-2000, the SEC has initiated only three administrative proceedings and one civil action over inadequate environmental disclosures. None of these actions was initiated by a referral from SEC's Division of Corporate Finance. In other countries, the enforcement record is even scantier. Enforcement has not been vigorous in years past because environmental issues were not salient among all the securities regulatory issues with which the responsible agencies were faced. Moreover, in the United States, as a 2002 Government Accountability Office study showed, those agencies have typically been understaffed and underfunded to the extent that they were able to deal with only the most urgent and egregious issues.

Consequently, compliance with existing environmental disclosure requirements has been scant. Many companies have not even complied with the letter of the law, failing to reveal environmental legal proceedings or failing to disclose an accurate estimate of their environmental obligations and liabilities. My own research shows that very few companies have complied with the spirit of existing securities law that require disclosure of all material information and material risks known to management that would significantly affect the financial conditions or results of the enterprise. Companies use various devices to avoid disclosure, including deliberative avoidance of internal analysis of potential environmental li-

abilities. A study by the Rose Foundation demonstrated that reports typically discuss in any detail only those regulations that have already been issued in final form and have survived court challenges. If companies mention other pending environmental regulations, legislation, litigation or other issues at all, they usually take refuge in uncertainty, claiming inability to estimate likely or possible financial outcomes, even within a range.

Recent research provides strong evidence that U.S. corporations in environmentally sensitive industries have not been adequately disclosing known financially material environmental exposures and risks in their MD&As. The first such study examined 13 large publicly listed (but anonymous for the purpose of the study) companies in the U.S. pulp and paper industry. The study, conducted in 2002 by myself and my World Resources Institute colleague Duncan Austin, estimated the impacts of known, impending environmental issues on capital expenditures and future earnings. The study found that companies in the industry were differentially exposed to most of the environmental issues because of the location of their facilities, the extent of their present and past pollution releases, the technologies installed in their mills, their energy and fiber sources, and other factors. Consequently, environmental issues are likely to create competitive advantages and disadvantages among companies that should be discussed as known risk factors. Several companies are virtually immune to environmental risk: their earnings will be relatively unaffected, whatever the outcomes of the impending issues. At least half the companies in the group face expected financial impacts of at least 5 percent of shareholder value and several face expected impacts approaching or exceeding 10 percent of the total share value of the companies.

These environmental exposures should have been disclosed in the MD&A. However, only 3 of 13 even mentioned in their SEC filings any of the issues that were deemed significant by their senior environmental officers. Some companies, while disclosing little information about the financial impacts of impending regulations, minimized their likely effects on their own competitive positions. For example, according to one company: "In the opinion of . . . management, environmental protection requirements are not likely to adversely



affect the company's competitive industry position since other domestic companies are subject to similar requirements." Two other companies in the sample made similar claims. These statements were quite inaccurate and could have been considered misleading: all three companies had above-average financial exposure to pending environmental issues and will probably suffer adverse competitive impacts.

A more recent study of another environmentally sensitive industry, the electric power generating sector, strongly confirmed the findings of earlier reports. My colleague James Henderson and I analyzed 47 large U.S. investor-owned electric utility holding companies to estimate the potential financial impacts of environmental legislation introduced in the Congress. The study estimated companies' least-cost options to comply with the following pending air quality regulations:

- The financial impacts of a three-pollutant cap-and-trade bill that imposes strict future controls on emissions of nitrogen oxides, sulfur oxides, and mercury as called for in President Bush's Clear Skies Initiative;
- A four-pollutant cap-and-trade bill that adds restrictions on future emissions of carbon dioxide to the preceding environmental requirements, as proposed in legislation introduced by Senators McCain, Lieberman, Jeffords, and others; and
- A hybrid scenario constructed on the assumption that controls on carbon emissions would be announced belatedly, after decisions to comply with the three-pollutant caps had been finalized, with a later compliance deadline.

We estimated financial impacts under the assumption that permits would initially be grandfathered to utilities in proportion to their historical emissions, the most likely outcome. To compare environmental exposures among companies, the present value of future compliance costs in constant year 2000 prices, discounted at 8 percent per year to the year 2000, were benchmarked to each company's revenues in the year 2000.

A three-pollutant cap-and-trade policy would force most companies to install expensive pollution controls or buy permits in an allowance-trading market at high prices. More than half of the 47 companies would face compliance costs with a discounted present value greater than 10 percent of their total year 2000 revenues. Over a quarter would face costs exceeding 20 percent of those revenues. To put these magnitudes into perspective, operating

profits among these companies average only 4 or 5 percent of operating revenues. Different companies within the electric power sector are exposed in markedly differing degrees to future environmental restrictions of this kind.

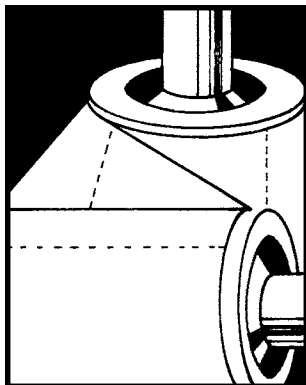
The predicted impacts of a four-pollutant cap-and-trade policy and the hybrid scenario also show highly significant and differentiated exposures. For most companies, the prospect of a four-pollutant cap-and-trade policy represents a material financial risk but one or two companies face negative compliance costs because of their potential revenue gains in selling permits. Unless companies can determine that the known risks are unlikely to materialize or would not be financially material, they are obliged to provide an MD&A. Nonetheless, there is currently little disclosure in the companies' financial reports regarding these issues and almost no quantitative information.

A new study reviewed past disclosures of financially material environmental information by companies in the North American hard rock mining sector. In conducting the study, I took up a promise made years ago by the Securities and Exchange Commission, which said that when a material event occurred that had not previously been disclosed, SEC staff would inquire whether the risks of that event had been a known uncertainty in earlier periods and should have been discussed in the MD&A. The SEC has rarely, if ever, done so.

This research, "Silence Is Golden, Leaden, and Copper," identified 10 recent environmentally related events that had highly material consequences for investors in the companies involved, including bankruptcies for several firms. (See page 27 for information on ordering or downloading the report.) The events also had severe environmental consequences, such as toxic spills or the abandonment of badly contaminated mine sites.

- One company, Royal Oak Mining Ltd., had accumulated in its underground mine vaults 240,000 tons of highly lethal, water-soluble arsenic trioxide, which is leaching into underground and surface waters. Though the company had legal responsibility to deal with it and had no feasible plans or reserves for doing so, it did not disclose the situation as a material risk or uncertainty before it filed for bankruptcy.

- Another company, Cambior, knew at the time of construction that a tailings dam was flawed and at risk of failing but nonetheless



Companies should include senior environmental affairs managers in the development and review of SEC disclosure statements.

filled it to eight times its permitted capacity with cyanide-laden liquids too toxic for discharge. The dam did fail, sending 4 million cubic meters of these wastes into a major river. The company's stock fell precipitously and the company was sued but prior to the accident no risk of a spill was disclosed as a known, material uncertainty.

- A third company, Hecla Mining Co., suffered a series of adverse legal and regulatory decisions over a period of years, leaving it with substantial liability for remediation of a huge Superfund site and liability for associated natural resource damages. Though its liability may be in the range of \$200 to \$500 million, it has claimed in financial filings, with no explanation, that a figure of \$18 million is as likely as any other.

In all 10 of these cases, the study found that the companies did know of the risks well before the events occurred. However, in 9 of the 10 cases, the companies made inadequate disclosures of those risks, if any. In most instances, financial reports, particularly the MD&A, made no mention at all of those known uncertainties.

In response to such deficiencies, financial markets are now demanding more environmental disclosure. Electricity and energy companies have been prominent targets. A large coalition of institutional investors, the Investor Network on Climate Risk, has submitted shareholder resolutions to many of the largest U.S. utilities demanding more information on their climate exposures. These resolutions were supported by Investor Shareholder Services and captured sizable percentages of votes cast, leading American Electric Power, the Southern Company, TXU, Cinergy, and PSEG to agree to make such reports. In the oil and gas sector, a similar climate resolution to ExxonMobil captured 20 percent of the vote. Resolutions have also been directed toward ChevronTexaco, Anadarko, Marathon, and other large producers. The Carbon Disclosure Project, an even larger initiative backed by 35 of the world's largest institutional investors, has been urging companies to disclose their greenhouse gas emissions, the risks they pose to the companies, and the extent of their emission reduction programs. INCR recently submitted a letter to the SEC chairman requesting that the agency clarify the requirement that listed companies disclose their financial exposure to climate risk.

In June 2004, 20 major international invest-

ment companies managing more than \$6 trillion endorsed recommendations published by the United Nations Global Compact calling for increased disclosure of relevant environmental information. The U.S. government has responded to the demand for improved disclosure. New requirements have been adopted in the Sarbanes-Oxley law requiring CEOs and CFOs to certify the accuracy and completeness of their financial statements, more independence of corporate directors from management, requirements that corporation lawyers take action if accounting or reporting irregularities are discovered and not corrected, and separation of auditing and advisory functions. In addition, the administration and Congress have markedly increased appropriations of funds to strengthen the SEC's enforcement capabilities.

In 2003 several Democratic senators introduced the Global Climate Security Act, which included a resolution calling on the SEC to clarify that existing regulations require publicly traded companies to inform shareholders of the financial risks that might be incurred on account of greenhouse gas emissions. Earlier, in 2002 the senators requested the Government Accountability Office to investigate the adequacy of environmental disclosure by corporations publicly listed on U.S. securities markets, and of the SEC's enforcement of its own requirements. This request followed the release of a 1998 study by EPA that found that 74 percent of the companies subject to environmental legal proceedings that should have been disclosed under SEC rules had failed to do so. The GAO report, which was released in July, recommended increased cooperation and information sharing between the SEC and EPA and that the SEC make public its comment letters to companies on their filings. Both recommendations were accepted by the SEC.

A report made public in 2003 by the SEC on its review of financial statements filed by the Fortune 500 largest U.S. companies stated:

"We found that we issued more comments on the MD&A discussions of the Fortune 500 companies than any other topic. Item 303 of Regulation S-K requires . . . [a discussion of] known material events and uncertainties that would cause reported financial information not to be necessarily indicative of future operating results or of future financial conditions. . . . Our comments addressed situations where companies simply recited financial statement information without analysis or presented boilerplate analysis that did not provide any insight into the companies' past performance

or business prospects as understood by management.”

The SEC review of Fortune 500 disclosures found specifically that information on environmental exposures and liabilities was frequently deficient.

In Europe as well, the European Commission issued stricter non-binding guidelines in 2001 for disclosure of environmental costs and liabilities, in response to a finding that unreliable and inadequate information about environmental performance “makes it difficult for investors . . . to form a clear and accurate picture of the impact of environmental factors on a company’s performance or to make comparisons between companies.” The recommendation stated that “environmental issues should be disclosed to the extent that they are material to the financial performance or the financial position of the reporting entity.”

In the United Kingdom, beginning in 2005 listed companies will have to provide shareholders with an Operating and Financial Review, similar to the MD&A, that indicates the companies’ key performance drivers and future prospects, including environmental matters whenever significant.

Similarly, in Canada, the Canadian Institute of Chartered Accountants has issued new guidelines on the preparation and content of the MD&A portion of the financial reports. The guidelines reiterate that the purpose of the MD&A is to enable investors to understand the company’s business and prospects through the eyes of management and should state clearly the factors that drive performance as well as the risks that may affect results. These factors and risks may include environmental matters.

Despite these steps, further governmental action is needed. Fortunately, relatively small actions can bring substantial results. If a government notification or an action taken against a single company signals that new emphasis is being placed on environmental disclosure, those signals reverberate powerfully through corporate boardrooms and executive suites. Therefore, a signal from the SEC that environmental disclosures will be scrutinized more carefully would have substantial effects. This might take the form of a speech by an SEC commissioner or enforcement chief, a staff release reinforcing existing disclosure obligations or a well-publicized enforcement action taken against one or a few companies. The increased budget for en-

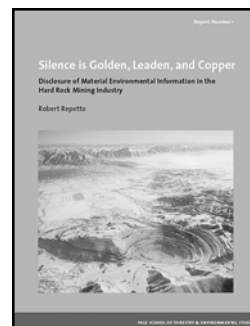
forcement should make such an action feasible.

There are also relatively simple and low-cost initiatives that environmental ministries and agencies can take. For example, in October 2001, following release of its study showing inadequate compliance, EPA issued an enforcement alert emphasizing the obligation of publicly listed companies to disclose environmental legal proceedings and other material environmental information. In that document EPA revealed that it had begun notifying companies subject to certain enforcement actions of their potential duty to disclose and had established informational links to the SEC’s enforcement division.

In addition, environmental agencies can greatly enhance their role as an information resource to investors and investment analysts. The environmental agency could review its publicly available databases and attempt to make them more accessible and more useful to investors. A useful step would be to establish an internet website for investors and analysts containing links and directories to potentially useful information. Such a website would be even more useful if it contained a search engine capability that enabled users to search for information by industry, company, or environmental issue.

Listed companies and their legal counsel should respond to these trends not only to avoid difficulties with regulators and auditors but also to improve investor relations. Boilerplate disclaimers, silence, or inadequate disclosures will be increasingly unacceptable. A study by Ernst and Young found, after a study of share performance in the 1,000 largest global companies, that poor investor relations was the third most frequent cause of sudden and major drops in share value. Companies that are lax on disclosure suffer more share price volatility than those that provide good information. Sudden discovery of adverse environmental news can precipitate sharp share price declines and other financial impacts.

Companies should ensure that their environmental management staff identifies potentially material environmental exposures and develops objective quantitative estimates of potential financial impacts under reasonable alternative scenarios. Companies should include senior environmental affairs managers in the development and review of disclosure statements. The audit function should ensure that systems are in place to produce adequate information regarding known material environmental exposures and that such information is delivered to senior management and properly disclosed. •



The author’s report “Silence Is Golden, Lead, and Copper: Disclosure of Material Environmental Information in the Hard Rock Mining Industry” was published by the Yale School of Forestry and Environmental Studies in New Haven in 2004. For more information, go to www.yale.edu/environment/publications



**COVER
STORY**

Fundamentalist Federalism

In the Supreme Court, parties and justices alike are couching in “federalism” terms issues that until recently were treated as mere questions of statutory interpretation. The circuit courts likewise continue to entertain a range of federalism and constitutional theories that strike at the heart of environmental law. Seeking a return to a pre-New Deal theory of government, these “fundamentalist federalists” have gained some beachheads but are being turned back — for now

JAY AUSTIN and SCOTT SCHANG

2004 may go down as the year that “judicial activist” became a prime-time epithet. With high-profile court decisions on gay marriage and the Pledge of Allegiance set amid ongoing battles between the White House and the Senate over judicial nominees — and now a presidential election where a number of Supreme Court seats are likely at stake — the term has been tossed around in public more than any time since the heyday of the Warren Court.

Of course, lawyers know there is both more and less to charges of judicial activism than meets the eye. More, because even decisions that betray an ideological bent rarely come from a single unfettered judge, but from other people’s invention of legal theories, factual opportunities exploited by litigants, and subtle interactions within appellate panels. Less, because activism often is in the eye of the beholder, and because judges over time often do stick to their principles — even if it’s possible to disagree with those principles. Further, lawyers understand better than most that there are valid spheres of judicial action, where the legislature has inadvertently or purposefully left a law’s implementation to the courts, or where equity demands a remedy.

This last point has proven particularly important in federal environmental law, which for over three decades has found an essential backstop in the federal courts. As far back as 1975, Justice Thurgood Marshall praised the “vaguely worded” National Environmental Policy Act for giving judges room to create a “common law” that has been “the source of NEPA’s success.” Far from activist, those early decisions created a consistent body of NEPA procedure that even-

tually was codified into regulations. Many other environmental statutes have routinely benefited from judicial review and interpretation.

Lately, though, judicial innovation has taken a more dramatic form. This can be most clearly seen in the wake of the Supreme Court rulings in *U.S. v. Lopez* (1995) and *U.S. v. Morrison* (2000), involving the federal Gun-Free School Zones Act and Violence Against Women Act. These decisions limited federal power under the Commerce Clause for the first time in sixty years, and sparked a wave of similar challenges to environmental statutes. Those challenges were bolstered by the Court’s delphic decision in *Solid Waste Authority of Northern Cook County v. U.S. Army Corps of Engineers* (2001), which raised new questions about the Clean Water Act’s constitutional underpinnings that are still reverberating. Meanwhile lower court opinions, such as the Fourth Circuit’s in *Bragg v. West Virginia Department of Environmental Protection* (2001), have applied the Court’s expanded view of sovereign immunity to bar most citizen suits against state agencies under the Surface Mining Control and Reclamation Act.

What separates these cases, their recent progeny, and similar lines of argument from most prior environmental litigation is a profoundly different view of the Constitution that challenges the basic premises of federal regulation and the established balance of power between federal and state governments. At stake are both Congress’s power to legislate on environmental issues, and the ability of federal executive agencies and courts to implement, adjudicate, and enforce the laws.

It is no accident that these opinions and arguments come at a time when some legal

theorists and political activists have been advocating that the proven system of cooperative environmental federalism be replaced with a devolution of federal authority to the states, or even the simple abolition of most regulation. With persistence and determination, the Federalist Society promotes, and ideology-driven law firms like the Pacific Legal Foundation actively litigate, a “fundamentalist” version of federalism that calls for a pre-1937 reading of the Commerce Clause, near-absolute state sovereign immunity, and, overall, a limited scope of both federal and state regulatory authority. While this fundamentalist federalism has had only modest success in the environmental sphere, it has already changed the shape of the debate at the highest levels.

This past term, the Supreme Court heard eight environmental cases, fully 10 percent of its docket — each of which, as IN THE COURTS columnist Richard Lazarus noted in these pages, had been won below by environmental plaintiffs. The Court’s actual decisions were a mixed bag, but taken together they show the increasing tendency of parties and justices alike to couch in “federalism” terms issues that until quite recently were treated as mere questions of statutory interpretation. The circuit courts likewise continue to entertain a range of federalism and constitutional theories that strike at the heart of environmental law, and that feature prominently in dissents by conservative judges. And as fundamentalist federalism gets more play in courtrooms, it has given rise to concern about not just the outcomes of specific cases, but also the beliefs of recent and future nominees to the federal bench.

Federalism did not dominate any of the Supreme Court’s environmental decisions this term, but its presence was palpable. As has been happening in other areas of law, constitutional and quasi-constitutional arguments now turn up in the most mundane discussions of federal environmental statutes. Once little more than an afterthought

for a “kitchen sink” brief, they are becoming almost de rigueur for those hoping to draw the Court’s attention to environmental cases or to garner certain justices’ votes.

In *Alaska Department of Environmental Conservation v. EPA*, the Court upheld the Environmental Protection Agency’s authority to override a Best Available Control Technology decision issued by the state of Alaska under the Clean Air Act. *Alaska* hinged on statutory language that authorizes EPA to “take such measures . . . as necessary to prevent the construction” of facilities that fail to meet the act’s requirements, and on whether this language is outweighed by states’ express authority to “determine” BACT on a case-by-case basis. In the first 5-4 vote of the term, the Court said that EPA can step in where the state fails to provide a “reasoned justification” for its decision.

The dissenters — Justices Kennedy, Scalia, Thomas, and Chief Justice Rehnquist — both questioned the majority’s reading of the act and charged it with ignoring “principles that preserve the integrity of states in our federal system.” In a now-standard federalist move, they called for a “clear statement rule” that would require Congress to be unambiguous when it grants oversight authority to EPA. Hinting darkly at lurking constitutional concerns, they even cited the Court’s recent Tenth and Eleventh Amendment cases to the effect that states are “coequal sovereigns entitled to the same dignity and respect” as the federal government. In so doing, they went well beyond the arguments raised by Alaska and the 10 states that joined it as amici, all of which were based on statutory and policy grounds.

To be sure, cooperative federalism is at the core of the CAA and many other environmental statutes. But there is a significant difference between the constitutional canons that come into play when Congress preempts state law or abrogates state sovereign immunity, and the parsing of a statute designed to share power that unquestionably flows from the federal level in the first place. If the dire oppression predicted by the *Alaska* dissent ever did come to pass, the states could respond by simply abandoning their delegated

The protests are coming not from the states, but from economic interests, legal theorists, and political activists pushing an anti-regulatory agenda through the courts

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programs, an outcome no one is seriously suggesting. Notably, an even larger number of states sided with EPA and against their sister states, arguing for federal oversight under what they, like the Court majority, viewed as an unremarkable reading of the act. Yet only the vote of Justice O'Connor, who is decidedly not a fundamentalist, kept the CAA from being radically redefined.

The justices' preoccupation with federalism also added an unexpected twist to *Engine Manufacturers Association v. South Coast Air Quality Management District*, a CAA pre-emption case. At issue was whether SCAQMD rules that required public and private fleet operators to purchase low-emission vehicles were pre-empted by Section 209 of the act, which prohibits states and localities from adopting their own emission "standards." The parties thoroughly briefed this statutory matter, which the Court eventually resolved in favor of pre-emption. But to the clear surprise of counsel, oral argument was dominated by spontaneous questions about whether the act could bar even the portion of the rules dealing with government agencies' vehicle purchases — since at least some justices appear to view procurement as a purely internal state function. Indeed, the 8-1 majority opinion remanded this issue, which has allowed SCAQMD to hang onto a fair portion of its rules for the time being.

Naturally, the Court's fondness for viewing the world through federalism-tinted glasses has not been lost on other environmental litigants. *South Florida Water Management District v. Miccosukee Tribe of Indians* raised a definitional question of whether pumping polluted water from one side of a levee into clean water on the other side constitutes a "discharge of a pollutant" under the Clean Water Act. This fairly straightforward issue was clouded by the fact that the pumping was being done by a state water management district, prompting the district and some state amici to argue that requiring a National Pollutant Discharge Elimination System permit would impermissibly "alter the federal-state balance." The force of that claim again was blunted when even more states weighed in on behalf of the federal permit requirement,

and when the solicitor general opposed it. This time all the justices resisted the temptation to address the federalism question that had been dangled in front of them, and all but Justice Scalia voted to remand for additional fact-finding.

While fundamentalist federalism has been a subtext of the Supreme Court's environmental cases, in the lower courts it is front and center. With judges both taking the Supreme Court's cues and anticipating its interest in future cases, federalism issues play a role in many high-profile environmental suits. Perhaps the most contentious Clean Air topic is New Source Review, which requires existing plants to install state-of-the-art pollution controls when they upgrade and increase emissions. The NSR debate pits certain states against others and against the federal government, as downwind states claim that EPA is failing in its duty to protect their citizens from pollution transported from upwind states. Similarly, one of the largest forest management topics, the fate of the four-year-old Roadless Rule, promises to put the respective roles of the federal and state governments under the microscope, with the Bush administration proposing to relax federal protections and grant governors significant say over

The Court's fondness for viewing the world through federalism-tinted glasses has not been lost on other litigants

the regulation and management of federal lands.

But the most significant environmental federalism issue continues to be the reach of federal power under the Endangered Species Act and the Clean Water Act. After almost ten years of post-*Lopez* Commerce Clause litigation, only these two statutes appear to be in any real jeopardy. The ESA battle may be in its last stages, as a dissenting group of Fifth Circuit judges have declared themselves the last keepers of the faith in restraining federal power over endangered species. The Fifth is also the only circuit to have significantly restricted federal jurisdiction over wetlands and water pollution following the *Solid Waste Agency of Northern Cook County* decision. In both instances, fundamentalist

Of Pot, Porn, Machine Guns – And Mold Beetles

Court watchers asked to name the most conservative circuit court and the most frequently overturned circuit court might automatically respond “the Fifth and the Ninth,” but in recent months they would have gotten it backwards. In a series of ironic twists, the Ninth Circuit, often labeled the most liberal and the most likely to attract Supreme Court review, appears determined to show that it too can strike down what it sees as congressional overreaching, having invalidated several federal criminal statutes. Meanwhile, the traditionally conservative Fifth Circuit had an 0-6 record in Supreme Court cases last term, and also made the “liberal” move of upholding the Endangered Species Act against constitutional challenge. Because the Ninth’s rationale for striking down federal statutes arguably is in tension with the Fifth’s rationale for upholding the ESA, these courts’ seeming role reversal may graduate from a court watchers’ pastime to an important issue for environmental practitioners.

Two of the Ninth Circuit’s most liberal voices, Judges Stephen Reinhardt and Harry Pregerson, sparked that court’s trend of invalidating federal statutes on Commerce Clause grounds. In *United States v. McCoy*, Judge Reinhardt took a page from the fundamentalist federalist’s playbook (see main article) and found that the U.S. government had no authority to prosecute a mother who posed for sexually explicit pictures with her young daughter, but who had no intention to sell or distribute the photos.

While the government claimed that the prosecution was predicated upon use of film and a camera that had traveled in interstate commerce, Judge Reinhardt would have none of it. The court conceded that there is an interstate market in child pornography, but ruled that the regulated activity was the actual picture-taking, which in this case was clearly non-economic and unrelated to the interstate market. It disagreed with an earlier Third Circuit opinion, *U.S. v. Rodia*, that upheld the same federal provision by applying the so-called aggregation principle — the notion, derived from *Wickard v. Filburn*, that all instances of this activity taken together would substantially affect interstate commerce. Instead, the *McCoy* court pointed to the Supreme Court decisions in *Lopez* and *Morrison* as making clear that the aggregation principle was inapplicable to non-economic activity.

Subsequent Ninth Circuit panels have used the *McCoy* rationale to invalidate federal criminal statutes as applied to homemade machine

guns (*United States v. Stewart*) and marijuana grown for purely intrastate medicinal use (*Raich v. Ashcroft*). Thus, as pointed out by Dan Schweitzer, Supreme Court counsel for the National Association of Attorneys General, the Ninth has “learned to stop worrying and love” the Rehnquist Court’s new federalist tendencies.

While Ninth Circuit judges have applied Court precedent largely to overturn statutes favored by social conservatives, the circuit’s approach may have the consequence, intended or not, of undercutting the constitutional support for the ESA or other environmental statutes, at least as applied in certain cases. At first blush, the Ninth’s position against aggregation arguably conflicts with the Fifth Circuit majority opinion in *GDF Realty*, which relied on the aggregation principle to uphold ESA protection of mold beetles and other putative “cave bugs” against a Commerce Clause challenge. Indeed, the petitioners in *GDF* have cited *McCoy* and its disagreement with the Third Circuit to claim a general level of “confusion” over the aggregation principle that merits Supreme Court intervention, arguing that “other courts of appeals have differed on . . . whether non-economic activity can be aggregated.”

But the conflict between the circuits is more one of appearance than reality. The Fifth’s analysis differs from the Ninth’s by looking at the ESA as a larger regulatory scheme that is inherently economic in nature, something the Ninth said could not be done with the federal pornography provision. By finding that the ESA’s larger scheme protects endangered species with their “esthetic, ecological, educational, historical, recreational, and scientific value,” the Fifth relied upon a different line of cases to find that the activity is in fact economic and, therefore, that aggregation is appropriate.

Despite this potential to reconcile the two circuits’ results, it is true that case law on how to analyze non-criminal regulatory activity under *Lopez* and *Morrison* is still in the developing stages, with many opinions and few clear answers. Given that these two circuits’ reversal rates defied conventional wisdom last term (the Ninth’s was a middling 72 percent, while the Fifth’s hit 100 percent), it would be difficult to predict which circuit would prevail if the Supreme Court decides there is an actual conflict. The Court has granted certiorari in the Ninth’s medical marijuana case, but has yet to decide whether to hear *GDF Realty*. Court watchers and environmental lawyers should both stay tuned. — *Scott Schang*

federalism is at the center of the controversy.

As with many environmental laws, the link between the Commerce Clause and the Endangered Species Act is a tacit one. Congress drafted the ESA in the early 1970s, a high-water mark of federal jurisdiction, and did not appear to feel a need to expressly state its constitutional basis. Twenty years later, the *Lopez* and *Morrison* opinions established a stricter definition of interstate commerce and gave new, and apparently retroactive, weight to congressional findings about a statute's nexus to commerce. That may have made some sense in those cases, which dealt with the expansion of federal authority into areas — handgun possession and legal remedies for domestic violence or rape — typically occupied by state criminal law. Indeed, almost all the Commerce Clause cases now working their way to the Supreme Court similarly involve criminal matters: gun possession, controlled substances, and child pornography (see sidebar, page 31).

But the logic and language of *Lopez* and *Morrison* are ill-suited to address topics such as species and ecosystem protection, which both challenge traditional economic valuation and largely lack a comprehensive state-law counterpart. For jurists who strongly believe in the federalist principles embodied by these opinions, they provide bright, inflexible lines of analysis which the ESA fails to satisfy; while those who focus more on the act's ecological purposes and national scope have labored to articulate the nexus that Congress did not know it would need to provide. By its silence to date, the Supreme Court so far has sided with the latter group of judges.

Three courts of appeals — the D.C., Fourth, and Fifth Circuits — have rejected challenges to the ESA's provisions against the "take" of a listed species, with the Ninth Circuit suggesting it would do the same. These circuits held that the Commerce Clause empowers Congress to protect even species that are found only within a single state and have minimal commercial value. But though the outcomes have been uniform, the rationales the courts used to uphold the act's farthest reaches have been diverse, with each opinion provoking at least one dissent. Indeed,

the two most recent decisions took conflicting approaches in deciding just why the statute remains constitutional, while the reasoning put forth by dissenting judges has been steady, if quite narrow.

The main sticking point is identifying what constitutes the "regulated activity" to be analyzed for Commerce Clause purposes. Is Congress regulating the take of species — such as the killing of arroyo toads in California? Or is it regulating the activity that would result in the take — the 202-acre housing development slated for the toads' habitat? Courts such as the D.C. Circuit in *Rancho Viejo v. Norton* chose to focus on the economic motives behind the taking of the endangered species. Instead of examining whether the Commerce Clause reaches incidental takes of the arroyo toad, the court asked whether it allows federal regulation of a massive housing development with interstate ties.

Clearly, it is not hard to find a significant nexus to interstate commerce when the question is framed in this way.

Dissenting judges David Sentelle and John Roberts, as well as Judge Michael Luttig of the Fourth Circuit, have roundly criticized this approach as being based on inaccurate readings of the controlling Supreme Court precedent. They argue, with at least some analytical force, that under *Lopez* and *Morrison* the actual taking of the protected species must itself have a significant connection with interstate commerce. They maintain that looking to the reason

for the take, rather than the take itself, removes any meaningful restraint on Congress's power and renders the Commerce Clause all-encompassing.

One practical problem for the dissenters' fundamentalist federalist approach is that as many as half of all threatened and endangered species may be found within a single state; they are being regulated precisely because they have been reduced to small numbers in just a few places. Extinction of species can be a national problem with obvious commercial impacts, yet the very characteristics that make individual species endangered may also make them intrastate and non-commercial. But *Lopez* and *Morrison* fundamentalists see no way around this dilemma,

Constitutional arguments are becoming almost de rigueur to attract the Court's attention or garner votes

Judges' Party Affiliations Predict Outcome Of NEPA Cases

In 1997, Professor Richard Revesz published an article in the *Virginia Law Review* claiming that judicial ideology “significantly influences” the outcome of environmental cases in the D.C. Circuit. The results of Revesz’s study, though vigorously disputed by then-Chief Judge Harry Edwards, support what many environmental practitioners have long believed, that it is possible to predict the chance of success in certain cases by the party affiliation of the presiding judges. This view of judicial decision-making is rather starkly borne out by a new ELI study of decisions in NEPA cases. The forthcoming report, written by ELI attorneys and John Carter of the Judicial Accountability Project, suggests that the political leanings of judges may be the most decisive factor in determining the outcome of NEPA cases.



Brad Klein

The National Environmental Policy Act was passed in December 1969 and is often referred to as the “backbone” of federal environmental law. It requires federal agencies to document and consider the environmental impacts of certain projects before they are carried out. Over the years, ELI has reported on, analyzed, and conducted groundbreaking research on NEPA case law as it has evolved. To take the pulse of NEPA on its 35th birthday, ELI researchers reviewed 325 NEPA cases brought in

federal district and circuit courts from January 21, 2001, the first full day of the George W. Bush (“Bush II”) administration, through June 30, 2004. The results are dramatic, and in some instances disturbing.

Although the overall success rates for NEPA plaintiffs today — 44 percent in the district courts and 32 percent in the circuit courts — are roughly comparable to historical baselines, the voting patterns of “Democratic” judges (using the party of the nominating president as a proxy for the judges’ own affiliations) are quite different from those of Republican appointees. In the district courts, the study found that a plaintiff with pro-environmental goals had more than twice the chance of success before a Democratic-appointed judge (59 percent) than before a Republican appointee (28 percent).

In contrast, plaintiffs with pro-development or industry goals were successful only 14 percent of the time before Democratic appointees, but 58 percent of the time — more than four times as often — before Republicans. Moreover, in the 23 cases that have been decided so far by Bush II district court appointees, environmental plaintiffs successfully advanced NEPA claims in only four instances. Although it’s still too early to draw definitive conclusions, this initial 17 percent success rate is well below the

average for all Republican appointees, and less than half of the historical and current baseline rates.

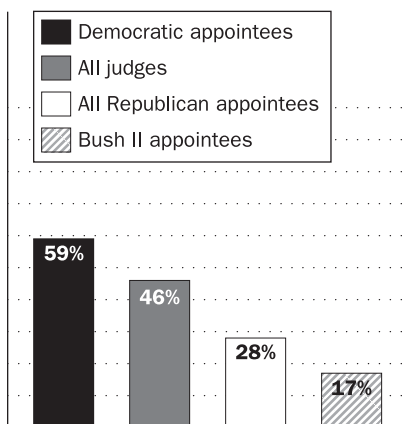
Similar results were observed in the circuit courts. Over the period from 2001 through June 2004, environmental NEPA plaintiffs enjoyed a 52 percent chance of success before panels composed of two Democratic and one Republican appointee, and a remarkable 75 percent success rate when all three judges were Democratic appointees. But if those plaintiffs were unlucky enough to draw three Republican-appointed jurists, they may as well have packed it in and gone home: their chance of success was one in nine.

These results, though based on just three-and-a-half years of data, mirror Revesz’s findings and more recent conclusions by Professor Cass Sunstein that, at least in certain kinds of cases, there is a correlation between ideology and judicial decisionmaking. Further research is needed to build on this growing body of academic work, particularly in contexts that impose greater legal or structural constraints on judges. Given these striking preliminary results and the fact that NEPA law stems largely from judicial precedent, this study does suggest that parties whose interests are affected by NEPA litigation should be particularly attuned to the political leanings of judges before whom they practice.

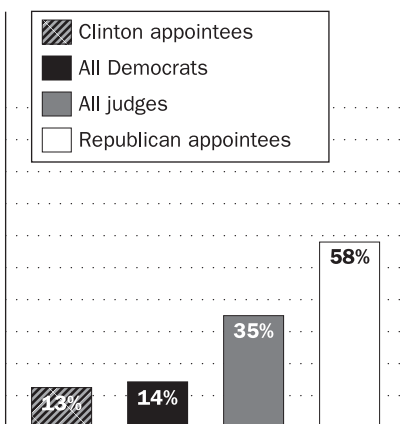
Brad Klein is the 2003-04 Law Fellow at the Environmental Law Institute.

NEPA Success Rates in U.S. District Court, Jan. 2001–June 2004 (%)

“Pro-Environment” Plaintiffs

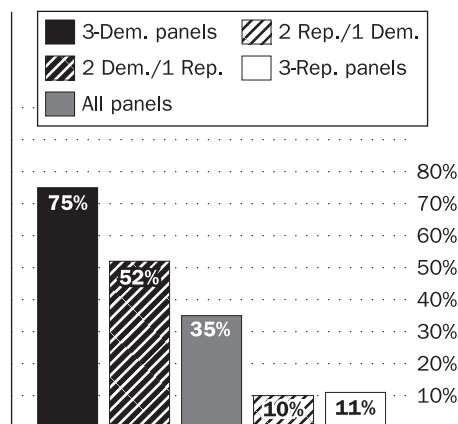


“Pro-Development” Plaintiffs



NEPA Success Rates in U.S. Courts of Appeal, Jan. 2001–June 2004 (%)

“Pro-Environment” Plaintiffs





and insist that Congress is simply without power over the “uncharismatic mini-fauna” that are often carefully chosen for ESA test cases.

In what might be viewed as hoisting the fundamentalists on their own petard, a panel of Fifth Circuit judges recently agreed to limit their analysis to the actual take, yet nonetheless upheld the ESA. In *GDF Realty Investments v. Norton*, developers wanted to site a Wal-Mart on a plot of land that housed a group of underground arthropods, arguably of little or no current economic value, that are found only in one Texas county. The Fifth Circuit panel said that the taking of these species — derided by plaintiffs as “cave bugs” — was the regulated activity that was required to have a sufficient nexus to interstate commerce. In conducting its analysis, however, the panel looked at the cumulative impacts of all takes of all endangered species, regardless of their location. By invoking this so-called aggregation principle, it found that all species takes do in fact have a sufficient effect on interstate commerce to validate federal jurisdiction under the ESA’s take prohibition.

When the Fifth Circuit en banc declined to review the panel decision, six judges mounted a rear-guard defense. Led by Judge Edith Jones and joined by, among others, the recess-appointed Charles Pickering, these dissenters applauded the panel for taking the fundamentalist approach and focusing on the take of the species. But they strongly protested application of the aggregation principle to what they continue to view as non-commercial activity, arguing that this is impermissible under *Lopez* and *Morrison*. Their dissenting opinion seems calculated to raise the Supreme Court’s federalism antennae, as does plaintiffs’ portrayal of the ESA as the “federalization of land use issues traditionally reserved to the states and their localities.”

The chances that the Court will grant certiorari in *GDF Realty* appear slim. The justices already refused a petition in *Rancho Viejo* with full knowledge of the differing approaches taken by the D.C. and Fifth circuits, though likely without the benefit of Judge Jones’s en banc dissent, which was issued just two days prior. If the Court fails to hear the case, that

dissent may well be the last hurrah for the fundamentalist view that the federal government cannot protect intrastate, non-commercial endangered species due to Commerce Clause limitations. Future constitutional challenges to the ESA would most likely abandon the federalism angle under the Commerce Clause and swing to the Fifth Amendment’s Takings Clause — the *GDF Realty* plaintiffs have already filed a \$60 million takings suit in the Court of Federal Claims.

*In its last term,
10 percent of
the Court’s
cases were
environmental
— all won
below by
environmental
plaintiffs*

Meanwhile, in numerous skirmishes at the margins of the Clean Water Act, the fundamentalists have gained a beachhead, but appear to be stalled. In 2001, the Supreme Court held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* that part of the Corps’ Migratory Bird Rule was unsupported by the CWA. The Court also noted in dictum that “significant constitutional and federalism questions” might be raised when federal jurisdiction purports to extend to waters that are neither navigable nor adjacent or tributary to navigable waters. This set off significant litigation over whether SWANCC merely addressed a narrow instance — the “abandoned gravel pits” at issue in that case — or whether it more severely restricted CWA jurisdiction.

Ruling less than four months after *SWANCC* was decided, the Fifth Circuit in *Rice v. Harken Exploration* held that the Oil Pollution Act could only protect waters that are “actually navigable” or adjacent to such waters. Over the intervening three-and-a-half years, however, the Fourth, Sixth, Seventh, and Ninth Circuits all have adopted narrower readings of SWANCC, and repeatedly upheld broad CWA jurisdiction over all manner of waterbodies. None of these circuits has found a single instance of a completely isolated waterbody, like the gravel pit in SWANCC, that escaped federal jurisdiction. If the waters or wetlands at issue flow into navigable waters, are adjacent to them, or have a “significant nexus” to them, these circuits hold — usually relying on the Supreme Court’s earlier decision in *U.S. v. Riverside Bayview Homes*

— that the federal government retains authority to regulate them.

One might think that the Fifth Circuit could be persuaded by its fellow circuits; after all, if the goal is to protect navigable waters, how effective can one be if one cannot regulate the waters that flow into them? But late last year, the circuit reiterated its idiosyncratic reading of *SWANCC*. In *In re Needham*, again in an opinion written by Judge Edith Jones, the court went to significant lengths to reaffirm *Rice v. Harken* and to transplant its Oil Pollution Act holding directly into the Clean Water Act context. Oddly, the panel upheld federal jurisdiction on the facts of the case before it, but at the same time advanced a limited view of CWA jurisdiction in general, making a detailed legal argument that is superfluous and arguably dicta. But at least in the Fifth Circuit, EPA and the Corps of Engineers are being told to float their boats elsewhere unless they are in a water that is navigable-in-fact or one directly adjacent.

The *Needham* court failed to discuss the rationales adopted by circuits that take a narrower reading of *SWANCC*, and instead simply repeated its fundamentalist view. The all-important D.C. Circuit perhaps could have benefited from such a discussion, as it may eventually have to weigh in on the issue when considering a suit that opposes revisions to EPA's Spill Prevention Control and Countermeasure Rule. In *American Petroleum Institute v. Leavitt*, currently in the D.C. District Court, plaintiffs are asking for a ruling that isolated waters, intermittent streams, remote tributaries, and ephemeral streams are beyond federal jurisdiction as a matter of both statutory interpretation and constitutional law.

It remains to be seen whether *API* will bolster the Fifth Circuit's attempt to manufacture a post-*SWANCC* circuit split or help swamp it. But the *API* plaintiffs are also in the challenging position of arguing in the same circuit that upheld the reach of the Commerce Clause in *Rancho Viejo*. To distinguish *Rancho Viejo* and the other ESA cases, they are making an explicitly federalist argument that Congress's power over endangered species is more encompassing than its power over wetlands and remote waters because the states have less of

a history in regulating endangered species. This argument echoes dicta in the *SWANCC* opinion emphasizing the states' "traditional and primary power over land and water use." But it also requires plaintiffs to assert that the states' water quality protection efforts are somehow more "traditional" than, say, their authority over fish and wildlife — an exceedingly fine line to draw. Moreover, it ignores that many states favor concurrent federal jurisdiction in both areas, again raising the question of exactly whom fundamentalist federalism is really trying to protect.

If the Rehnquist Court's Commerce Clause revolution has been reduced to a "more-local-than-thou" squabble voiced only by oil producers and real estate developers, it may have lost its steam, at least where environmental law is concerned. Fundamentalists are still trying to provoke the Court with claims that the ESA and CWA amount to "federalization of land use issues" and a "deep intrusion into the ordinary lives of landowners." But most jurists and states, and many regulated parties, still see these statutes as a relatively common-sense solution to modern environmental

problems. As Justice Stevens wrote in his *SWANCC* dissent: "The CWA is not a land-use code; it is a paradigm of environmental regulation. Such regulation is an accepted exercise of federal power." Never truly addressed by the *SWANCC* majority, this paradigm continues to be followed in all but one circuit. Whether the D.C. Circuit follows suit may ultimately depend upon the federalist leanings of the judges who hear the *API* case.

Indeed, the emergence of fundamentalist federalism among sitting judges has resonated in the halls of the Senate, sparking heated battles over judicial nominees' federalist credentials and how they may color their view of environmental cases. Senate Democrats have filibustered circuit court nominees such as William Myers, the former Interior Department solicitor who once likened federal management of public lands to "the tyrannical actions of King George." Myers also filed an amicus brief

A subtext of the Supreme Court's cases, in the lower courts fundamentalist federalism is front and center



in SWANCC urging the Supreme Court to reach the Commerce Clause issue that even the Rehnquist majority seemed eager to avoid; and his view of citizen suits was summed up in an article stating that “environmentalists are mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety, and welfare.” Environmental groups seized upon these instances as evidence that Myers would be an anti-environmental activist judge, and led a fight to keep him off the bench. The filibuster of Myers’s nomination is thought to be the first time that environmental issues have played a decisive role in the judicial selection process, with many mainstream organizations, such as the National Wildlife Federation, taking their first-ever stance on a nominee.

Similarly raising the hackles of environmental groups are several nominees who have been architects of the larger federalist movement, first as practicing lawyers and now as sitting judges. These include Jeffrey Sutton, who successfully argued several state sovereign immunity cases in the Supreme Court before being appointed to the Sixth Circuit; his frequent client, former Alabama Attorney General William Pryor, who was recess-appointed to the Eleventh Circuit; and Federalist Society stalwart Paul Cassell, now a judge in the District of Utah. Judge Sutton has already penned one dissent suggesting that he brought a narrow interpretation of the Commerce Clause with him to the bench, while Judge Cassell — like a number of the Bush administration’s appointees — has proven notably unsympathetic to NEPA plaintiffs (see sidebar, page 33).

The debate about “environmental federalism” at all stages of the judicial process highlights a disconnect between, on the one hand, modern understandings of the relation between humans and nature and the workings of ecosystems, and on the other, classical (and neoclassical) views of how the Constitution divides power between federal and state governments. As modern environmental law transcended police powers and tort law to become its own discipline, grounding cooperative federalism in the Constitution’s text was not thought to be particularly problematic. Legislators and judges both relied upon post-1937 readings of the Commerce Clause, Property Clause, and

Spending Clause to address pollution that respects no boundaries, or to curb the impact of development that destroys habitat without accounting for the national effects of species loss.

Since 1995, however, the penchant of some to read the Commerce Clause narrowly and to see any exercise of federal authority within state borders as inherently suspect has put on the defensive environmental laws that even arguably touch upon land use, such as the Clean Water Act and the Endangered Species Act. These fundamentalist federalists try to create a sense of outrage at the federal government’s “meddling” with individual landowners, just as environmentalists can provoke anger at the extinction of thousands of native species with value yet unknown. The hard part is finding the right balance between emotion, science, law, and tradition to create a workable, dual system of environmental regulation.

There is a need for serious, continuing public dialogue about the proper balance of power between the federal and state governments in implementing environmental protections. History shows that this federal-state relationship has no setpoint, but instead ebbs and flows as the issues and times demand. Now that a concerted effort to advance fundamentalist federalist principles in the courts has to some degree succeeded, the very language and argument of federal environmental cases reflect an ongoing dispute over these principles’ validity. We would all benefit from a more public debate of the appropriate roles of activism at the bar and within the judiciary in overseeing the environmental federalism created, but not always fully defined, by the elected branches.

So far, most courts have opted to continue deferring to the balance jointly established by Congress and state legislatures, and to uphold our system of cooperative federalism that for almost 35 years has supported federal jurisdiction concurrent with state jurisdiction. Tellingly, the cries protesting this system by and large are not coming from the states themselves, but from economic interests, legal theorists, and political activists who have undertaken a concerted effort to advance an anti-regulatory agenda through the courts. As the composition of the federal judiciary continues to shift, time will tell whether their fundamentalist ideology will reach critical mass and significantly reorder federal environmental law, or whether it is simply a burst of “judicial activism,” destined to become a footnote in legal textbooks. •

PARALYSIS BY ANALYSIS

Jim Tozzi's regulation to end all regulation

By Chris Mooney

If you stand near the fountain at the center of Dupont Circle in Washington, D.C., and gaze up at the surrounding buildings, you should be able to spot a large brass telescope in a seventh story window above Books-A-Million. The instrument belongs to Jim Tozzi, a former Reagan budget official, well-remunerated corporate consultant, self-described regulatory policy “nerd,” and self-confessed voyeur. The telescope has become a “landmark,” brags the 65-year-old Tozzi, a gleeful cut-up whose “JJT” monogrammed shirt cuffs belie his musician-jive patter. “That can get you in a lot of trouble,” he adds. “I’m a dirty old man. I love it.”

If Tozzi is shameless about his extracurricular activities, he’s equally proud of the work that occupies his daylight hours. As the flamboyant head of an industry-funded, for-profit think tank called the Center for Regulatory Effectiveness, Tozzi has made his career in the decidedly unflamboyant field of government regulation. In the three decades or so since the Environmental Protection Agency, Occupational Safety and Health Administration, and other agencies were formed, industry has become adept both at weighing down the rulemaking process with years of preliminaries and at challenging regulations once promulgated. And for years, Tozzi — thanks to official contacts and regulatory expertise gleaned from two decades in government — has been a master of the game, gumming up the regulatory works and, as he puts it, giving environmentalists and consumer advocates “gastronomical pains.”

But now Tozzi has a chance to change the rules of the game itself. With assistance from the Bush administration, a little-known statute called the Data Quality Act — conceived by Tozzi and passed with little debate by Congress three years ago — allows businesses to challenge not just government regulations, but the taxpayer-sponsored science which agencies rely upon to formulate these rules in the first place.

On its face, the Data Quality Act merely requires government agencies to field complaints over the data, studies, and reports they disseminate, in order to ensure the “quality, objectivity, utility, and integrity” of the information. Though seemingly unobjectionable, this provides a new workload for agencies that could impinge upon their other duties. But it’s just the beginning. The Bush administration has used the DQA as a springboard to implement an unprecedented “peer



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Tozzi says he's trying to "regulate the regulators" — blocking agencies from releasing weak data or questionable information. Yet most of the studies that Tozzi and his allies challenge are actually pretty reliable.

review" system for government science, a cumbersome set of protocols that was strenuously opposed by the nation's science community, which saw little in the original plan resembling standard academic peer review. (The White House later released a revised "peer review" bulletin that appeared to respond to some of these criticisms, but failed to entirely mollify detractors.)

If these efforts succeed, industry groups will have a new set of tools to stop regulations before they even get started — often by using questionable scientific critiques paid for by industry to challenge legitimate science sponsored by taxpayers. "Anyone who is involved in the regulatory process knows it begins ten years or so before you ever see a rule," says William Kovacs, a Chamber of Commerce vice president who's met with Tozzi "a hundred times" to plot strategy. The Data Quality Act "allows you to begin inputting, and access the process [from] the very beginning." In fact, the act may also enable businesses to file lawsuits against agencies that reject data quality complaints, a potentially powerful new device in the deregulatory arsenal that could let motivated groups head sensible regulatory changes off at the pass. "Up until the Data Quality Act, the courts almost uniformly held you couldn't get judicial review of government reports," says law professor Sidney Shapiro of the University of Kansas, a member scholar of the Center for Progressive Regulation.

Already, Tozzi's Data Quality Act has led to suits challenging a government report on climate change and a National Institutes of Health study on diet, both of which represent state-of-the-art scientific work in their fields. The latter suit was recently filed by the Chamber of Commerce and the Salt Institute, an industry group, as a strategic test case to establish judicial review under the Data Quality Act. Slowly, Tozzi and allies are laying the groundwork for a broader assault on the regulatory state. Data quality, says Kovacs, is going to have "a revolutionary impact on the regulatory process."

Tozzi's realm is a subterranean world of arcane rules and obscure alphabet-soup agencies. A self-described "market-based conservative," he's become a master of helping companies challenge the scientific underpinnings of government rules by

zooming in, telescope-like, on alleged flaws in individual studies. Tozzi says he's trying to "regulate the regulators" — blocking agencies from releasing weak data or questionable information. Yet most of the studies that Tozzi and his allies challenge are actually pretty reliable.

An economics Ph.D. who hung around New Orleans until he realized he'd never make it playing jazz, Tozzi began his Washington stint in 1964, reviewing regulations at the Army Corps of Engineers. Having established a reputation as "that nerd over there in the Pentagon that really likes to review rules," as he puts it, Tozzi later joined the Office of Management and Budget during the Nixon administration. Tasked with scrutinizing regs churned out by the newly created Environmental Protection Agency, he became infamous for second-guessing the agency's enforcement efforts. Environmentalists would ask, "Christ, who's running EPA—Tozzi?" he recalls with a cackle. Tozzi stayed at the budget office through the election of Ronald Reagan, who named him deputy head of a new OMB division dedicated to overseeing proposed regulations. Soon enough, Tozzi's domain became known as the "black hole" of the regulatory process for its reputation of sucking in rules proposed by agencies and never letting them see light again. He earned the nickname "Stealth." "I don't want to leave fingerprints," he once told the *Washington Post*.

In 1983, after 20 years of learning how to induce regulatory sclerosis from the inside, Tozzi set up a consulting shop — Multinational Business Services — to do it from the outside. MBS clients have included everyone from chemical companies to tire and rubber manufacturers, but Tozzi's most controversial client was undoubtedly the tobacco industry, which during the 1990s sought to battle the emerging scientific consensus that secondhand smoke was a danger to those who were over-exposed to it, particularly people living or working with smokers. One of tobacco's strategies was to advocate standards for "good epidemiology" that would have made it almost impossible to conclude that secondhand smoke was dangerous. These standards insisted that unless secondhand smoke doubled your risk of getting cancer, it should be ignored — a standard, notes tobacco researcher Stanton Glantz of the University of California-San Francisco, that would bar regulation of nearly any environmental toxin.



Tozzi played a key part in this push, earning hundreds of thousands of dollars from Philip Morris for such activities as supporting “legislative mandates on epidemiological standards” and increasing “debate on [secondhand smoke] risk assessment within EPA,” according to internal company documents. In one instance, Tozzi deployed a phalanx of lobbyists to his old haunts at the OMB to block the implementation of a government medical code, used for Medicare and Medicaid claims, that tracked secondhand smoke illnesses. By presenting itself as “a defender of good science, not tobacco,” noted the *Los Angeles Times* in a 1995 article, Tozzi’s company succeeded in getting the rule changed — an obscure but major victory for his client. As he explains today, had the government been allowed to accumulate such statistics, tobacco firms “could have been subject to tons of legal actions saying, ‘Look at all these illnesses caused by secondary smoke.’”

Although Tozzi says tobacco companies are no longer contributing to the Center for Regulatory Effectiveness (founded in 1996), the fight over secondhand smoke was very much a warm-up for his later efforts. Among other work he did for Philip Morris during the mid- and late-1990s, Tozzi circulated information and proposals concerning two pieces of legislation. The first, a “data access” law, would allow interested parties to obtain, under the Freedom of Information Act, “all data produced” by any publicly funded scientific study. The second was the Data Quality Act (though Tozzi insists it was originally his idea and that other industries besides tobacco were interested as well). Together, the proposals would allow regulated companies to conduct detailed internal audits of unfavorable studies—and then battle to stop those unfavorable studies from getting translated into unfavorable regulation.

By the end of the 1990s, as formerly obscure government studies became widely and easily obtainable on agency web sites — sometimes affecting a firm’s stock valuation simply by being posted — business groups and their GOP allies made a concerted effort to make Tozzi’s proposals a reality. And instead of calling for the kind of massive “regulatory reform” campaign that had fizzled in 1995, they took a backdoor approach, attaching Tozzi’s proposals to must-pass appropriations bills. The data access amendment, also known as

the “Shelby Amendment” for its sponsor Richard Shelby (R-Alabama), was passed in 1998, and subsequently minimized in scope by a wary Clinton administration. The Data Quality Act rolled through three years ago, and was welcomed with open arms by the Bushies. Now Tozzi’s timebomb sits waiting to detonate. In the end, says Kovacs, “what we’re going to get is far more than we could have ever gotten by having a comprehensive regulatory law passed.”

Business groups haven’t wasted much time making use of Tozzi’s labors. Last August, the Competitive Enterprise Institute, a conservative think tank partly funded by the energy industry, filed suit under the Data Quality Act over a Clinton-era report on global warming, known as the National Assessment of Climate Change. Though the suit was ultimately settled out of court, government lawyers agreed to attach a disclaimer to the report stating that it was “not subjected” to the Data Quality Act. There’s little evidence that the study was flawed. But the suit appears to have given the Bush administration a pretext to ignore the National Assessment when it issued its own 10-year plan on climate change research in June 2003.

In September 2003, Tozzi submitted a data quality complaint challenging the government’s intent to use a World Health Organization report in assembling U.S. dietary guidelines. The WHO report called for individuals to cut dietary intake of so-called “free sugars” — a recommendation considered utterly uncontroversial among mainstream nutritionists, but sharply opposed by the sugar industry, which stood to lose a fortune if the WHO used the report to bolster a global anti-obesity strategy. (Tozzi admits his petition was filed on behalf of “somebody in the food business,” but declined to be more specific.) Here, too, “data quality” was merely a cudgel by which to block the government from considering good science when making policy.

Tozzi likes to point out that the act has not gummed up the federal regulatory system with challenges, as some environmentalists feared. But that may not last for long. Even now, Tozzi and his allies are preparing to expand the act’s scope by making agency rejection of a data quality complaint grounds for a lawsuit. “Somebody has to test whether

He insists that he doesn’t have anything against government or bureaucrats — after all, he used to be one. He says he just wants government to run more efficiently.

it's judicially reviewable," says Kovacs. If they succeed, they'll have created two new entry points into the regulatory process. Industry groups will not only be able to saddle agencies with scientific complaints over their studies that could be costly and time-consuming to answer. They'll also be able to force agencies to defend their responses in court. Hence the term Tozzi's critics often apply to his type of strategy: "Paralysis by analysis."

Tozzi also points out that the Data Quality Act can be used by anybody. And to be sure, a few opportunistic environmental groups have filed data quality complaints with agencies. Most of the current challenges, however, have been brought by industry, which shouldn't come as much of a surprise. Over the past few decades, business interests have spawned an entire infrastructure to generate so-called "counter research," exploiting the nuance and openness inherent to good science in order to "manufacture uncertainty" where little exists. Now that capacity can be deployed not only at the

back end of the regulatory process — the P.R. battles waged in the popular and scientific press — but also at the front end, before regulators can get their shoes on.

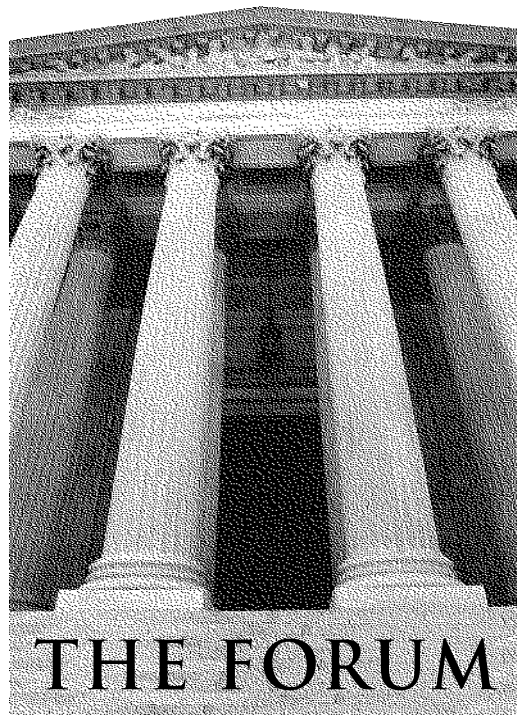
Tozzi himself insists that he doesn't have anything against government or bureaucrats—after all, he used to be one. He says he just wants government to run more efficiently, and believes that "if you intervene in the market, there should be a compelling need to do so, and you should demonstrate that." But while there are no doubt some bureaucrats who live to stick it to big business, the Data Quality Act is transparently a solution in search of a problem. As legal scholar Wendy Wagner of the University of Texas pointed out in a recent article entitled "The 'Bad Science' Fiction," there's little evidence to support the notion that government agencies churn out "junk science" or that their existing peer review protocols are inadequate. The Center for Regulatory Effectiveness, Wagner charges, "provides virtually no evidence to support its assumption that a bad-science problem exists."

That hasn't stopped Tozzi from seeking to increase the Data Quality Act's scope in a variety of ways.

He's written letters both to the WHO and universities warning that if they want their science to influence the U.S. government, it had better meet data quality standards. In one controversial letter, Tozzi even invoked the Data Quality Act in an attempt to disallow comments submitted to the Environmental Protection Agency by an environmental group.

Most importantly, he's drafted sample legislation for states. Near the close of a long interview in his spacious office, Tozzi stands up, saunters past his piano and a globe containing a hidden alcohol stash, and collects from his desk a sheet of paper that he's been saving for me. The state of Wisconsin, Tozzi says, has adopted a version of the Data Quality Act. "It's like kudzu, baby," says Tozzi. "You can spray it, shoot it — here," he says, handing over the text of the act. "Now there'll be a whole rumor mill around Washington," he continues. "There's that goddamn Tozzi." •

Piedmont Environmental Council



Is It Moral To Create Markets In Human Health And Lives?

The utility of economics in environmental decision-making is often debated, but rarely its morality. Precepts like the polluter pays or the precautionary principle are fairly easy to grasp and their consequences deduced, but not so for an analytical tool. Yet billions of dollars and millions of people are affected by methods such as cost-benefit analysis (sometimes called benefit-cost analysis), which has been enshrined by a long-standing series of executive orders and now appears to be entering environmental statutes.

Earlier this year, an economist and a law professor, Frank Ackerman and Lisa Heinzerling, teamed up to publish the book *Priceless: On Knowing the Price of Everything and the Value of Nothing* (The New Press), a systematic attack on cost-benefit as applied to environmental and health protection. It is mostly an attack on the ben-

efits side of the ratio, which has always been the most problematic.

The major benefit of many pollution regulations is that people do not die, which requires calculating the “value of a statistical life.” There can also be benefits for illnesses reduced or avoided, like asthma. These benefit calculations, when compared with the calculated costs of pollution abatement, are then used by decisionmakers in helping them determine how much pollution protection society can afford.

The result, say the authors, is that the government has in effect created a market in human lives and health — pricing the priceless, without the consent of those affected.

Are Ackerman and Heinzerling right, that such markets are created? Is it moral to do so? How can we improve the way cost-benefit analysis is done today in environmental decisionmaking?



Frank Ackerman
Economist
Global Development and
Environment Institute
Tufts University

"Freedom from harmful pollution has long been viewed as a right, not a commodity, by many people — the drafters of environmental laws among them. Valuation of life and health is immoral because it is part of a retreat from this standard."



Maureen Cropper
Professor of Economics
University of Maryland

"Environmental standards effectively create a market for environmental quality in which all must participate. The question is whether it is moral for EPA to impose the costs of environmental protection on people without considering the benefits."



James K. Hammitt
Director
Harvard Center for Risk Analysis

"Characterizing benefit-cost analysis as 'placing prices on' or 'creating markets in' peoples' health and lives, while superficially plausible, is deeply misleading."



Cass R. Sunstein
*Karl N. Llewellyn
Distinguished Service
Professor of Jurisprudence*
University of Chicago Law School

"Regulators aren't really assigning a dollar value to human life. Instead they're assigning a dollar value to risks. There's nothing immoral about assigning dollar values to statistical risks. Ordinary people assign such values all the time. Do you drive a Volvo?"

THE FORUM

Morality, Cost-Benefit, And The Price Of Life

FRANK ACKERMAN

Imagine a morally unacceptable world: one in which an occasional lottery will select a few people who will be enslaved to a major corporation, forced to work for the company without pay for the rest of their lives. Industry might explain that while it will make every effort to minimize the need for something as distasteful as enslaving its workers, it would be impossibly expensive to avoid every single case of slavery throughout the American economy. Economists might point out that the lotteries involve prospective cases of “statistical slavery,” not something that has already happened to named individuals. They might advocate accepting the “optimal” level of slavery rather than holding out for the utopian goal of zero.

Does this story sound any better if “enslaved” is replaced by “killed by pollution”? The slavery version sounds archaic and absurd, as well as immoral. Yet the death-by-pollution version of the same argument is what passes for sound environmental economics in 21st-century cost-benefit analysis. The only use of the monetary valuation of life and health, for public policy purposes, is to decide which involuntary lotteries (i.e., harmful pollutants) we can “afford” to protect ourselves against, and which ones we will accept. If it would cost more than the market value of the lives saved for an industry to control lethal emissions, cost-benefit analysis would allow the pollution lottery to proceed and select a few victims without regulatory interference.

The slavery lottery is unacceptable because freedom from slavery is an absolute right. It is not conditional on the costs incurred or profits lost by potential slave-owners; there is no optimal level except zero. How strong is the analogy? Is freedom from pollution that causes death or illness a right, like freedom from slavery? Or is it more like a new car, an attractive commodity to be bought if we can afford it?

Freedom from harmful pollution has long been viewed as a right, not a commodity, by many people — the drafters of the Clean Air Act and other major environmental laws among them. The polluter pays principle expresses the same idea in different language: polluters, not the public, are responsible for the costs imposed by pollution. Valuation of life and health is immoral because it is part of a retreat from this standard, because it embraces the disturbing notion that we will allow some innocent bystanders to be killed by someone else’s economic activity, just because the price is wrong.

In contrast, when buying a car, everything on the lot does have a price, and “let’s make a deal” is the obvious standard for decision-making. Years ago, Ronald Coase made the famous suggestion that the same process of private bargaining could often resolve environmental conflicts without government intervention. The Coasian bargain between opposing parties, which has now distracted economic and legal scholars for more than a generation, rests on the hidden assumption that all debates are about commodities, and none are about rights. Cost-benefit analysis systematizes the same false premise, assuming that everything, even human life, has a price.

Morality aside, advocates of cost-benefit analysis often maintain that monetary valuation helps set priorities for effective

policymaking. With cost-benefit analysis, we supposedly have a transparent, objective standard for identifying low-cost policies that save lives and protect health and the environment, and distinguishing them from much-higher-cost alternatives. This defense fails on several grounds.

In practice, there is nothing transparent or objective about cost-benefit analysis. Rather, it represents a continuation of partisan debate, cloaked in intricately technical language that excludes almost everyone from participation. The regulation of arsenic in drinking water, one of the first major rules to be based on cost-benefit analysis, led to bitter controversy over the shape of the dose-response curve and other subtleties of toxicology. Summarizing the debate, Cass Sunstein said that under plausible assumptions, the monetized benefits of arsenic regulation could be almost zero, or more than \$1 billion a year. That expansive conclusion could have been reached on the back of an envelope before the cost-benefit studies began — and has no useful implications for policymaking.

The problem that cost-benefit analysis is supposed to solve, the risk of squandering resources on high-cost regulations, is vastly overrated. The numerous stories about horrendously expensive regulations all stem from a handful of sources that are riddled with errors. Many of the classic examples of allegedly unaffordable regulations turn out, on closer examination, to be mere proposals that were never implemented. As Lisa Heinzerling has said, we face regulatory costs of mythic proportions.

Another popular misconception suggests that society is using cost-benefit analysis to allocate a fixed budget for regulatory compliance among rival claimants. Yet almost all the costs of regulations are borne by the private sector. There is no trade-off between the funds

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spent on regulatory compliance by different companies; money saved on one regulation does not flow into another industry to deal with another environmental problem. Ultimately there is a fixed limit on total regulatory costs, since we cannot spend our entire incomes on environmental protection. However, we are so far away from that limit that we can safely ignore it, just as automobile designers can ignore the fact that their vehicles can never exceed the speed of light.

If valuation of life and health raises troubling moral questions, and solves no identifiable practical problems, what should be done instead to improve the policymaking process? When scarce resources must be allocated, a "holistic" comparison of total (usually monetary) costs and total (usually nonmonetary) benefits will be more transparent and meaningful than the attempt at monetization of highly disaggregated benefits. Resources are always allocated on the basis of moral arguments and political strategies, as shown by the recent history of tax cuts and military and security-related spending. There is no reason to treat health and environmental protection differently — that is, if our government still wants to protect human health and the environment. An administration acting in good faith on these issues would stop constructing technical economic excuses for deregulation; it would celebrate our impressive history of successful, entirely affordable regulation; and it would only "fix" the limited number of policies that are actually broken.

Frank Ackerman is an economist at the Global Development and Environment Institute at Tufts University and a member of the Center for Progressive Regulation. He has served as a consultant to EPA, state agencies, and environmental groups.

Immoral Not To Weigh Benefits Against Costs

MAUREEN CROPPER

One of EPA's chief roles is to limit contaminants in air and drinking water to protect the health of the U.S. population. Air and water pollution exist because — absent government action — markets for the right to pollute the environment do not exist. EPA in effect creates these markets by limiting allowable levels of emissions — for example, by imposing emissions standards on motor vehicles and limiting the sulfur content of gasoline, or by imposing maximum contaminant levels on pollutants in drinking water. In so doing, EPA implicitly puts a price on environmental quality — a price that citizens must pay. Setting a maximum contaminant level for arsenic in drinking water of 10 parts per billion, to take one instance, imposes a treatment cost of approximately \$350 per year on households in small drinking water systems affected by the rule. Imposing Tier II emissions standards and lowering the sulfur content of gasoline raises the cost of gasoline and light duty trucks.

Because EPA in setting environmental standards effectively creates a market for environmental quality in which all must participate, the question that should be asked is whether it is moral for EPA to impose the costs of environmental protection on people without considering the benefits. In the case of air pollution and drinking water regulations — regulations that are largely health-based — this amounts to asking whether EPA should weigh the health benefits of environmental

regulation against the costs. To me, it would be immoral not to do so. The question is how this should be done.

At the very least, it is important to describe, and, when possible, to quantify the health benefits of environmental regulations. Good health may be priceless, but few households would voluntarily pay \$350 per year for an extremely small reduction in their risk of contracting cancer many years in the future. The key question is how big the risk reduction is and how far in the future it will occur. Similar questions arise in evaluating the benefits of regulations to reduce air pollution: how large are the associated health benefits, when will they occur, and who will receive them?

Should regulators assign a dollar value to the health benefits of environmental regulations? One rationale for doing so is to mimic the decisions that people would themselves make if they had full information about the costs and benefits of environmental standards. In the case of arsenic in drinking water, for example, what level of contamination would people choose if they knew the costs and benefits of different treatment options? Assigning a dollar value to the benefits of reductions in risk of death and illness requires, of course, that people have well-defined monetary values for small changes in health risks, and that these values can be measured.

Can people place a value on a small reduction in their risk of dying (or of contracting cancer) — a risk reduction of the size that would be delivered by an environmental regulation? There is certainly ample evidence that people trade time and money for small changes in health risks. People drive faster to save time and thereby increase their risk of dying. They also spend money to buy safer cars. They pay money for medicines (not always covered by

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health insurance) to lower their blood pressure or reduce their risk of cancer. And, there is empirical evidence that increased risk of death on the job is compensated in the labor market with higher wages. To infer a dollar value for risk changes from these activities requires making assumptions about the magnitude of the risk reductions people believe that they are buying when they buy safer cars or work in a safer job. It also requires controlling for all of the other aspects of the car or job that may be correlated with safety. An alternate approach is to ask people directly whether they would buy a product that would reduce their risk of dying, after taking care to communicate the size of the risk change they are buying.

There seems little doubt that people do make tradeoffs between money and risk and between time and risk — that a small change in risk is, indeed, not priceless. However, measuring what people will pay to reduce their risk of dying is difficult. It is an area where much progress has been made, but where there is still much progress to be made. In light of this fact, are there alternate methods that could be used to help regulators make tradeoffs between the costs and benefits of health and safety regulations?

An approach commonly used in public health is to express health benefits of a program in terms of the number of quality-adjusted life years saved. This entails converting reductions in illness and injury into an equivalent number of life-years saved, rather than aggregating health benefits using monetary values. The costs of the program are then divided by the number of quality-adjusted life years saved to produce a cost per QALY—a measure of the cost-effectiveness of the program. This approach avoids monetizing health benefits. It weights health benefits by the amount of healthy time gained, rather than by people's private

willingness to pay for such benefits.

Ultimately, the purpose of providing risk-based cost-benefit or cost-effectiveness measures is three-fold: to help regulators decide, in conjunction with information about the distributional impacts of a regulation, whether it should be issued; to indicate which programs are extremely good buys—for example, those that reduce particulate air pollution—and should be expanded, and those which, perhaps, should not; and, finally, to encourage a comparison of health and safety regulations across agencies. In the end, risk-based cost-benefit (or cost-effectiveness) analysis should not be the only guide to regulation, but can be used to help clarify the tradeoffs inherent in allocating scarce resources.

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Method Is Populist And Democratic

JAMES K. HAMMITT

Risk-based benefit-cost analysis provides a systematic way to determine whether a regulation helps a community of people more than it hurts them, using the affected people's preferences as the basis for evaluation. Characterizing BCA as "placing prices on" or "creating markets in" peoples' health and lives, while superficially plausible, is deeply misleading.

As individuals we frequently make choices about spending money to protect our health. In deciding whether to buy optional side-impact airbags on a new car, a home water filter, or a carbon monoxide detector, we weigh the reduction in risk against other things on which we could spend that money. BCA tries to clarify such choices at a societal level, by quantifying the consequences of a regulation and determining how important they are to the people who face them.

At the national level, choices are complicated by the fact that the beneficiaries of a regulation—whose health risk is reduced—may not be the people who bear the costs. BCA attempts to determine whether the beneficiaries gain enough that they could compensate those who bear the costs (or are harmed in other ways), leaving everyone better off.

Since compensation is rarely paid, the moral relevance of BCA can be questioned. Two justifications can be offered. First, redistribution toward a deserving group can be achieved more efficiently through directed taxes and subsi-

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dies than by providing either more or less health protection than the affected people would purchase for themselves. Second, the people who benefit and those who are harmed by a regulation will differ from case to case, and nearly everyone may be better off if regulatory decisions are routinely made using BCA than if they are made in some other way.

BCA favors no particular outcome. It is neutral on the question of whether more health protection or less regulatory burden is better. It is populist — it counts the preferences of all the people affected by a regulation, not only the preferences of those who vote or those who are represented by lobbyists. It is democratic — it relies on what people in the affected population say they want, both in surveys and as reflected in the choices they make in their daily lives.

The practice of BCA can be improved in several ways. More should be done to recognize that people's values may differ by context — a 1 in a million risk of dying from breast cancer, in a plane crash, or while scuba diving are not the same, and the monetary values people place on reducing different risks may vary. The value an individual places on risk reduction may also depend on his or her age, health, income, and other factors. Greater sensitivity to these variations, and better evidence about their magnitudes, would allow analysts to more accurately determine whether a population would judge itself better or worse off with a particular regulation.

The practice of BCA can also be improved by better characterizing the uncertainty in the estimates, and by not claiming more precision than current methods permit. For many environmental regulations, uncertainty about how much health risks will be reduced, and about the monetary values, span a factor of 10 or more. BCA cannot be expected to determine the uniquely best level of health pro-

tection and a degree of humility among BCA proponents is warranted.

Another improvement would be to revise the often misleading terminology. Perhaps the worst offender is the "value per statistical life." Although it sounds like "what one life is worth in dollars," VSL is nothing of the kind. Rather, it is the amount of money that a large population would be willing to spend to reduce a risk by enough to prevent one expected fatality (in a specified time period). If one million people would each pay \$7 to reduce their own risk of dying next year by one in a million, their average VSL is \$7 million. Ron Howard of Stanford University long ago proposed a more accurate term — "micromort" — defined as the value of a one in a million reduction in mortality risk (\$7 in this example). One could extend the concept to millimorts, nanomorts, and so forth.

Although better terminology may help, many people are offended by the idea of using money to measure preferences for health. As a matter of effective policy making, it may be useful to measure health using "quality-adjusted life years" or other non-monetary metrics and to evaluate regulations by their "cost-effectiveness," defined as the cost per unit health gain.

Despite its limitations, BCA provides a practical method to help determine whether the community of people affected by a regulation — including those who benefit and those who bear the costs — would judge themselves to be better off, on net. It provides principled guidance for regulatory decisions and can serve as an important counterweight to special-interest advocates on all sides of a regulation.

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Cost-Benefit: Two And A Half Cheers

CASS R. SUNSTEIN

Over the past twenty years, cost-benefit analysis has become a familiar part of national environmental policy. It has been endorsed by President Clinton as well as Presidents Reagan and George H. W. Bush; in fact President George W. Bush is operating under a cost-benefit order written in the Clinton administration. It's fair to say that cost-benefit analysis now enjoys a lot of bipartisan support.

If cost-benefit analysis is good, it's because an effort to specify costs and benefits helps to clarify what's at stake. All of us have difficulties in evaluating risks; we tend to exaggerate some hazards and to neglect others. Cost-benefit analysis imposes a valuable discipline. If a regulation would save 50 lives each year, and cost just \$10 million, then we should go forward with it. If a regulation would save one life each year, and cost \$50 million, it probably makes little sense. After the September 11 attacks, we might have shut down air travel in the United States for the next year. We didn't, because the benefits wouldn't justify the costs.

But how can government officials assign dollar values to human lives, or to reductions in human health? That's a good question. Here's what officials now do. They consult market evidence to see how much people are paid to face higher risks — in the case of mortality, risks usually on the order of 1 in 10,000 or 1 in 50,000. Suppose that American workers generally receive \$600 in additional wages when they face a risk of 1 in

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10,000. If so, regulators say that the “value of a statistical life” is \$6 million ($\$600 \times 10,000$) — and hence that a program that saves 10 lives is worth \$60 million.

Is this absurd? Notice that regulators aren’t really assigning a dollar value to human life. Instead they’re assigning a dollar value to risks — usually low-level risks. It isn’t so dumb to use the numbers that emerge from real-world evidence. But maybe you don’t like that evidence. Workers may be insufficiently informed; maybe they’re coerced to take risks; maybe the evidence is too old or otherwise unreliable. Then you might ask: How much would you, or (better) would most people, be willing to spend to eliminate a mortality risk of 1 in 50,000, or 1 in 10,000, or 1 in 100,000? The question might seem impossibly abstract. If so, let’s specify it, by giving more details. But few of us would want to spend just \$1 on eliminating risks of that magnitude — and almost none of us would want to spend, say, \$50,000 or more.

In any case there’s nothing immoral about assigning dollar values to statistical risks. Ordinary people assign such values all the time, at least implicitly. (Do you drive a Volvo? The best smoke alarm on the market?) By assigning dollar values to risks, we’re not really creating markets in human life — no more than we do when we buy and sell the innumerable goods on the market that now impose various levels of risk. Suppose that a regulation would save 10 lives and cost \$150 million; suppose too that regulators go forward with it — but not with a regulation that would save one life and cost \$151 million. Shouldn’t they be candid about what they’re doing? Cost-benefit analysis has real democratic advantages, because it promotes transparency about what’s at stake.

Of course science won’t always allow us to get specific estimates

for anticipated benefits. Sometimes a range is all that we’ll have. And of course the numbers I’ve given are too sparse. We need to know about health benefits, and benefits for animals and the environment, as well as mortality reductions; and we need to know more than the bottom line. But without a sense of the anticipated effects of regulation, we’ll just be making stabs in the dark.

Certainly we should care about who pays the costs and about who gets the benefits. Suppose, for example, that a regulatory program would eliminate a 1/100,000 risk faced by 100,000 poor people, and that the cost would be paid by 1 million rich people. Suppose too that the costs of the program exceed the benefits. We might well want to go forward with the program even though it fails a cost-benefit test. An analysis of costs and benefits should be an important part of regulatory choices, but it shouldn’t be decisive.

But be careful with this point. Many environmentalists think that environmental goals march hand-in-hand with distributional goals. They think that if we force “polluters” to clean up, we’ll help poor people too. Would that life were so simple! When “companies” are asked to bear certain costs it’s likely that consumers will foot the bill, and poor people are less able to absorb price increases than rich people are. Sometimes the costs of environmental programs are borne mostly by poor people, who pay for them in higher prices and lower wages. Distributional effects are important to consider, but they don’t always argue for environmental regulation.

Cost-benefit has had many good results. It helped to encourage aggressive controls on ozone-depleting chemicals and also the phasedown of lead in gasoline. Cost-benefit analysis has also encouraged agencies to devise lower-cost methods of achieving environmental goals — and discouraged

initiatives that were pretty questionable. But under several presidents, including George W. Bush, it isn’t hard to find instances in which cost-benefit analysis served to discourage regulations that were probably desirable. Any tool can be misused.

In my view, cost-benefit analysis is best justified in pragmatic terms, as a response to the problems faced by both ordinary people and government officials in dealing with environmental risks. At the very least, it is important to know, as best we can, what we are going to get from proposed regulations — even if the benefits cannot be monetized. It’s senseless to ignore costs. To know what to do, we should compare benefits with costs; to do that, it’s important to turn benefits in monetary equivalents. Distributional considerations matter, and we need to attend to qualitative considerations as well as quantitative ones. Cost-benefit analysis doesn’t tell us all we need to know. But without it, we’ll know far too little.

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T H E F O R U M



ELI REPORT

Former ELI President Receives ABA Achievement Award

J. William Futrell, who was President of ELI from 1980-2003, received the Award for Distinguished Achievement in Environmental Law and Policy at the American Bar Association's annual meeting, in Atlanta, Georgia, on August 8. The award was conferred by the Standing Committee on Environmental Law and the Section of Environment, Energy, and Resources.

The award was presented by ABA Section of Environment, Energy, and Resources Chair Kenneth J. Warren and Standing Committee Chair Robert L. Falk, who said, "Futrell has mentored a generation of lawyers in environmental law and has devoted his life to professional and public service. We are proud to honor him with this award."

The award recognizes individuals, organizations, and programs that have distinguished themselves in environmental law and policy by contributing significant leadership in improving the substance, process, or understanding of environmental protection and sustainable development. The New Mexico Environmental Law Center won in the organizational category.

In his remarks after receiving the award, Futrell told the story about how his quest for racial justice with the NAACP in the Deep South of the 1950s — followed by a Marine Corps posting as an MP, then law school at Columbia — led naturally if not inevitably to a career in the law of environmental protection.

Both the civil rights movement and the environmental movement were quests for deep social change in America. And both depended on the



J. William Futrell, center, receives the Award for Distinguished Achievement in Environmental Law and Policy from ABA Standing Committee on Environmental Law Chair Robert L. Falk and ABA Section of Environment, Energy, and Resources Chair Kenneth J. Warren

types of nuance in the use of force that only the law can apply. On the environmental side, he became deeply involved in the Sierra Club, rising to regional vice president and eventually national president in 1978.

"In 1980, I moved to ELI, where we had the opportunity to shape a new agenda fitted to the needs of the maturing environmental movement, which needed an organization that focused on implementation and pragmatic ways to achieve environmental goals."

After a synopsis of the years since, Futrell said: "We have witnessed two great triumphs: the success of the civil rights movement domestically and the fall of the Berlin Wall and the emergence of democracy in Eastern Europe internationally." One of his great satisfactions organizationally was to help bring truly effective environmental laws and institutions to the Eastern Europe states when the

Iron Curtain came down, he said. "Sadly, we have experienced no such triumph in environmental law in the United States. Indeed, environmental law is stuck in a rut and is not delivering environmental protection."

Futrell, who was a law professor at both Alabama and Georgia, believes he knows why.

Sustainable development is an undefined term, he said. But so is justice. The law can deal with injustice, however, and logically it can thus do so with unsustainable development by looking at problems in the law of development.

"Sustainable development law will be statutes, regulations, and cases that prevent, mitigate, or remedy unsustainable conduct," he said. "Sustainable development law will infuse environmental values into the bedrock of the common law, the law that determines winners and losers, the law of torts, property, contract, and tax."

ELI REPORT

Visiting Scholar brought EPA emergency response into terrorism age

It is hard to imagine a more challenging and important job than that performed by Marianne Horinko over the past three years. As Assistant Administrator for EPA's Office of Solid Waste and Emergency Response, Horinko supervised the environmental cleanup in New York City and the Pentagon after September 11th.

She then led the decontamination of the U.S. Capitol following the anthrax attacks. She later managed EPA's response to toxics released by the *Columbia* Space Shuttle disaster. And all this in addition to taking the reins as Acting EPA Administrator following the departure of Christine Whitman in the summer of 2003.

Horinko recently brought her expertise in the areas of hazardous waste, emergency response, and more "ordinary" OSWER work such as brownfields to ELI as a Visiting Scholar. Horinko advised ELI researchers studying using existing authorities in the Safe Drinking Water Act and other legislation to ensure homeland security. She helped lawyers working on community projects in New Bedford, Massachusetts, and Florida to promote healthy, sustainable communities through brownfields redevelopment — including creative ideas on how to bring in the regulated community. And she worked with attorneys ensuring that environmental law and environmental management systems work smoothly together.

Horinko's environmental law career has been shaped by a strong scientific foundation. Her father was a geology professor at the University of Maryland and a "scientific passion" permeated her childhood home, she says. She majored in chemistry at Maryland, where "she set the record for most glassware broken," before attending Georgetown Law School.

She graduated at a time when "environmental law was extremely hot" and worked for several years at the D.C. law firm Morgan, Lewis



Former EPA Administrator Marianne Horinko points to path to success in environmental careers with ELI Research Associates Ben Gerhardstein, Sarah Wu, and Katie Wells.

& Bockius. Horinko got her initial taste of government service during the first Bush administration, working as an attorney-advisor to OSWER Administrator Don Clay.

In 2001, while serving as President of the environmental consulting firm Clay Associates, "lightning struck," she says, and an appointment to follow in her mentor's footsteps launched her on "the most exciting three years of [her] life."

Horinko expected her appointment to OSWER to be "the easiest job at EPA," but "it turned out to be a rollercoaster every day." In addition to leading EPA's emergency response efforts, Horinko presided over the enactment of President Bush's brownfields bill, which she considers the "signature environmental accomplishment" of this administration.

Then came Whitman's resignation and Horinko's elevation to a cabinet-level position. Next thing she knew, she found herself on Air Force One discussing substantive environmental policy issues with the President. Looking back on her tenure as Acting EPA Administrator, Horinko recalled "the incredible privilege it was to be just a small part of history."

But it was not an easy privilege. Horinko faced a grueling schedule of congressional testimony and press appearances, and also had to

weather the controversies over proposals to change the New Source Review provisions of the Clean Air Act, redefine hazardous waste, and cut the Superfund tax.

Shortly after the confirmation of Mike Leavitt as Administrator last year, and after yet another nearly sleepless week overseeing the ricin cleanup in Senator Tom Daschle's office, Horinko finally decided it was too much. She left EPA to spend more time with her husband and two young children, one of whom was just starting kindergarten.

EPA's loss was ELI's gain. At a recent junior staff lunch within ELI's Research Department, Horinko held the full attention of several eager young environmental professionals who had gathered to glean some insights and career advice. Noting the long-lasting nature of relationships in the environmental field, she advised the young environmentalists to "pick your bosses wisely" and maintain those relationships throughout your career. Second, "always stretch," and "never be afraid to screw up." Finally, and most importantly, "do something you love." For Marianne Horinko, this guidance has already led to great success; for others in the room that day (including the author), it hopefully someday will.

— Brad Klein

ELI REPORT

Book uses Clean Water Act to explore right to clean environment

Do Americans have a constitutional right to a clean and healthy environment?

According to Robin Kundis Craig, Associate Professor of Law at Indian University School of Law and author of ELI's latest book, *The Clean Water Act and the Constitution*, the crux of the controversy regarding the constitutionality of the Clean Water Act lies in one simple fact: nowhere does the United States' foundational document mention the environment, nor does it establish any citizen's right to a clean environment.

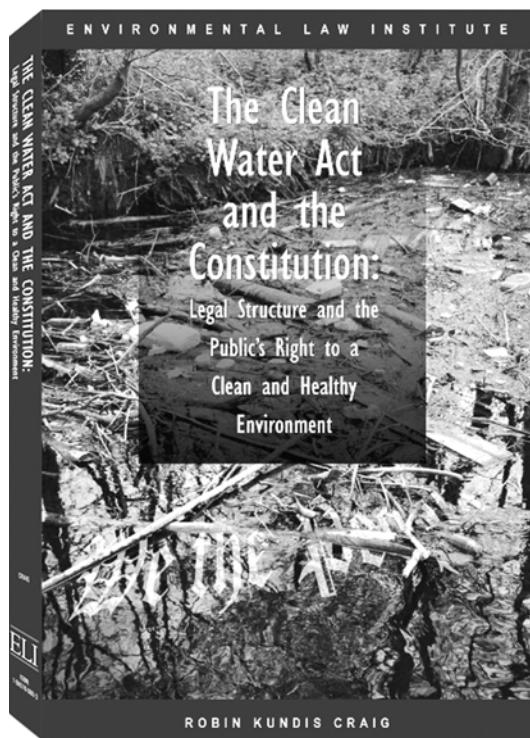
Thus, unlike other regulatory issues — think speech or abortion regulation — when environmental issues do run up against the Constitution, (in cases involving federalism, the Commerce Clause, takings of private property, federal court jurisdiction, or the separation of powers, for instance) U.S. Supreme Court justices tend to discuss boundaries of regulation, rather than abridgement of rights.

Craig points to the book's subtitle for a clearer reference on the problem: *Legal Structure and the Public's Right to a Clean and Healthy Environment*. She says, "Constitutional jurisprudence may have progressed to the point that the very structure of the Constitution may impede necessary solutions to increasingly complex environmental problems."

Moreover, Craig asserts, the Court's interpretation of that structure may force an environmental regime that cannot meet scientifically and politically desirable goals. This regime may exist even to the detriment of American quality of life, and certainly counter to the Founding Fathers' intention of secur-

ing "Life, Liberty, and the pursuit of Happiness" for all citizens.

"This book articulates the Clean Water Act in light of what Congress thought was necessary to achieve water quality goals on a national scale," states John Turner, Vice President of Publications and Editor-in-Chief of the *Environmental Law Reporter*. "Professor Craig then examines what constitutional jurisprudence has done to change that structure."



After introducing the history of the act and its antecedents, Craig examines the law's "co-operative federalism," interstate water quality and the federal common law, environmental regulation and the Tenth Amendment, federal supremacy and "overfiling," and federal sovereign immunity and federal facilities. Craig also analyzes the Commerce Clause and looks at issues re-

garding its applicability to the regulation of navigable and non-navigable waterways.

The book concludes with an in-depth analysis of the need for an amendment guaranteeing American citizens the right to a clean and healthy environment.

The Clean Water Act and the Constitution: Legal Structure and the Public's Right to a Clean and Healthy Environment represents the third title in ELI's new casebook series for the academic community. It joins *Economy, Ethics and the Environment*, by Stephen M. Johnson, and *Sophisticated Sabotage: The Intellectual Games Used to Subvert Responsible Regulation*, by Thomas O. McGarity, Sidney Shapiro, and David Bollier, and precedes five more titles to be released in the series over the next six to nine months.

"The casebook series features books that are designed for use as either primary texts or supplemental material at the undergraduate and graduate level," says John Thompson, Director of Marketing. When complete, the series will boast titles that may include electronically enhanced "virtual texts" and even instructors' manuals for use in a variety of classroom and computer-assisted learning settings.

For the time being, they stand alone as individual print editions.

The Clean Water Act and the Constitution: Legal Structure and the Public's Right to a Clean and Healthy Environment will appeal to professors of constitutional and environmental law, as well as classes in public policy and federalism, among others.

It may be purchased online at www.elistore.org

ELI REPORT

Opening Argument

Outside Judicial Opinions, States Need EPA Oversight



Leslie Carothers
President

Last January, the Supreme Court narrowly upheld EPA's authority to reject Alaska's determination of what constitutes Best Available Control Technology for a new power generating unit at a zinc mine. Five members of the Court agreed that the Clean Air Amendments of 1977 codifying a permit program to prevent significant deterioration of air quality in areas meeting standards, requiring new or expanded major facilities to install BACT, also give EPA the authority to block construction where the state has failed to include adequate BACT terms in a permit. This was a close call for effective regulation under the act.

The dissenting opinion by Justice Kennedy boils down to the conclusion that the content and reasonableness of a state's BACT determination are solely within the state's discretion so long as the state agency produces a determination that purports to take account of the statutory considerations of "energy, environmental, and economic impacts and other costs." The dissenting judges in the Alaska case apparently see no need for oversight of

state regulation now, even if Congress clearly did see such a need in adopting the 1970 Clean Air Act and the 1977 Amendments. According to Kennedy, EPA concedes that "states, by and large, take their responsibility seriously, and EPA sees no reason to intervene in the vast majority of cases. . . . In light of this concession, EPA and amici. . . . admit that their fears about a race to the bottom bear little relation to the real-world experience under the statute."

An appreciation of the "real-world" experience is precisely what is lacking in this portion of the opinion. The provision for federal oversight of state regulation of new or expanded major sources in particular is more critical than ever for both political and scientific reasons. First, the competence of state environmental agencies — definitely rising — is rarely the issue. The fact remains that the highest priorities of state governments are increasing employment and tax revenues. This makes the regulation of new or expanded pollution sources the area most susceptible to political pressures. It is not hard to infer such pressure from the facts in the Alaska case, where the agency initially defined BACT as EPA would have defined it and then backed off, citing the impact of "world competition" on the mining company, which refused to provide any financial data documenting harm.

According to *ELR News & Analysis* author Sean Donahue, there are only two reported cases where EPA has overruled a state BACT determination since the amendments were passed. Does this mean that the need for active EPA intervention is vanishingly small? Certainly not. I know from experience as an EPA regional enforcement official and as a state environmental agency chief that oversight activity is common and occurs through routine and informal consultation between state and EPA staff. Arguments can be heated, but these disputes rarely

attract public attention, much less end up in court. In the real world, nobody writes law review articles about oversight cases because making these negotiations and compromises public or claiming credit does not serve the vital working relationship between state and EPA professionals.

Advocates of minimal limits on state discretion — strictly procedural in Alaska's view — basically do not place any value on preventing weaker regulation in states where economic and political pressures prevail. From an air quality perspective, however, the case for greater consistency and stringency in new source regulation is much stronger than it was in 1977.

Indeed, just one week after the Supreme Court's Alaska ruling, EPA published a massive proposed rulemaking requiring 29 states and the District of Columbia to develop more stringent regulations on sources of sulfur dioxide and nitrogen oxides because they contribute significantly to non-attainment of ambient air quality standards for ozone and fine particulates by downwind states. As an example of the impact, EPA finds that 21 of 47 non-attainment areas studied showed contributions from transported emissions to ozone violations of over 50 percent.

Air quality monitoring (though still inadequate), satellite data, and computer modeling tools that can identify the most likely locations of sources contributing to elevated pollutant levels downwind are producing much better understanding of pollutant transport and much more resistance from states on the receiving end to tightening controls on in-state industry to compensate for weak regulation of other states' sources. The litigation now occurring over New Source Review between states and EPA and among states is a sign of the need for EPA oversight of key state permitting decisions and of a loss of confidence that adequate oversight is occurring. This is the real world.