

**RECONCILING ENVIRONMENTALIST AND INDUSTRY  
DIFFERENCES: THE NEW CORPORATE CITIZENSHIP “RACE  
TO THE TOP”?**

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I. THE ROLE OF LITIGATION – PROGRESS THROUGH CLASHES

About ten years ago, I was sitting in Federal District Court in Miami, as part of the federal trial team that had sued the State of Florida over pollution in the Everglades. We claimed that the State and the South Florida Water Management District had failed to regulate phosphorus discharges from sugar cane farms that were flowing south and choking the Everglades. The litigation, as some of you may remember, was contentious. The state parties had hired a private law firm to defend them. The firm opposed every single step we at the Department of Justice took and in the process racked up \$7.5 million in legal fees, all the more extraordinary because at this time Florida was suffering financially, even to the point of having to cut school lunch programs.

That day, when we went in to federal court to argue the United States’ summary judgment motion, had to have been about the most remarkable moment in my legal career. The state parties had raised some 186 separate disputed issues of fact. To our amazement, and also that of the private lawyers defending against our action, Florida’s newly elected Governor, Lawton Chiles, advised by his new Secretary of the Environment, Carol Browner, decided that he himself would represent the State at the hearing. I remember he rose before the very distinguished, white-haired Judge Hoeveler, and in his wonderful, folksy, common manner, he ignored

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the years of contentiousness that had preceded him. He held out his arms and said, "Your Honor, the battlefield is littered. Here is my sword. I concede that the Everglades are polluted, and I agree that the state will work to clean it up."

Now I tell you this story for several reasons. Without that simple act of courage on Governor Chiles' part, I doubt I would have ever witnessed what probably was the most unusual moment in my career when, at the very moment that the *Gore v. Bush* case was being argued in the Supreme Court, I had the opportunity to join President Clinton and Governor Jeb Bush in the Oval Office for the signing of the law that put in place the \$8 billion, twenty-five year plan to restore Florida's Everglades. All enacted with substantial agreement from environmental groups, state, federal, tribal and local governments, and competing water users, from sugar cane farmers, to urban water users, to put the natural system not at the end of the pipe, but on a par with all these other demands.

Governor Chiles' action also represents, though, the transformation that I believe that is now occurring in the environmental movement, and in environmental law. The Everglades lawsuit illustrates an absolutely central feature of modern environmentalism; that it relied upon, developed with, and was completely dependent on lawyers and litigation. Without significant pieces of litigation to move the process along, we would not have near the level of public health and environmental protection that we have in this county today. But I believe, and I want to explore this with you this evening and I congratulate all of the Conference organizers, because they have put together not only a wonderful event, but one that touches a critical topic at a critical time. I believe that we are in fact entering a new phase in environmentalism, where clashes of views, as typified by litigation, are in fact of less consequence overall, and where industry and the environmental community are nearing a convergence, perhaps even a harmonic convergence, on the need to vigorously defend public health and the environment.

Let's think back for a moment to the beginning of the modern environmental movement just over thirty years ago in 1970. Public protest was becoming more common over issues such as the war in Vietnam. Public consciousness on environmental issues was exploding, as air inversions turned city skies black and threatened lives, and America's rivers literally caught on fire. Congress for years had been trying to move states along to address these issues, but was growing increasingly frustrated. And then, spurred on by the first Earth Day, in the early 1970s in a burst of bipartisanship, Congress enacted sweeping, fundamental new legislation: to establish a strong federal role in protecting the nation's air and

water; to put the country on a path toward protection and cleanup; to regard “polluters” and “pollution” not simply as a byproduct of our industrial age, but as at fault and intolerable; and to set forth the goal of reducing emissions to zero.

## II. THE DAMPING OF THE PENDULUM

The most important feature of that legislation, namely the clarity and absolutism that characterizes it, was only fully settled, in a critical Supreme Court decision, just last year, after some 30 years of application. Three features of these laws stand out, and have in fact been essential to the progress that has been made in this country in protecting public health and our environment. The case, *American Trucking Ass'n v. Whitman*,<sup>1</sup> was actually argued in the Supreme Court on the day of the last presidential election, and then decided last spring by a vote of 9-0, in a decision authored by Justice Scalia. It upheld EPA's decision to strengthen ozone and particulate matter National Ambient Air Quality Standards against a broad-scale industry attack, including charges that the Clean Air Act violated the Constitution's non-delegation doctrine. But the importance of that decision should be to answer, once and for all, any question about the appropriateness of the structure of our basic environmental protections, and I believe it will stand as the most important environmental case in a generation. It affirms a basic approach in the environmental laws: to set protective standards based on the best available science; to review this science at regular intervals; to force the development of new pollution control technologies; and to allow flexibility to find the most cost effective reductions. This approach has proven right time and time again.

Many in industry had long bridled at the idea that the targets under the environmental laws, such as the National Ambient Air Quality Standards for example, could be set based purely upon public health, without the consideration of costs and benefits. In *American Trucking*, they finally succeeded in getting that issue before the Supreme Court. And industry believed they had a receptive audience. Justice Breyer had in fact written about the concerns with whether Superfund cleanups foolishly chased every cancer risk with increasingly exorbitant costs for each final increment of protection not making any economic sense. Yet Justice Breyer himself, in his concurring opinion in *American Trucking*, makes perfectly clear that Congress' absolutist choice from the 1970s made complete sense.<sup>2</sup> First, one could argue about possible

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1. 121 S.Ct. 903 (2001).

2. *Id.* at 922-24.

costs and benefits endlessly, with little resolution. How do you value the lost IQ points in a child, for example? Further, the environmental law was consciously set up to force the development of new pollution control technology, and this is an approach that has worked. Thus, arguments about costs really are speculation about new technologies.<sup>3</sup> As Justice Breyer reminded us, the automobile industry said it would be forced to economic ruin in the 1970s if it were required to put catalytic converters on cars, and these have proven hugely successful at a low cost.<sup>4</sup> Similarly, utilities claimed it would cost \$1,500 a ton to purge their emissions of sulfur dioxide, and these reductions now trade on the open market at approximately \$100 per ton. Simply setting a health-based target protects the public, ensures results, allows industry flexibility in how to actually meet the requirements, and provides the right incentives for industry to develop the solutions.

So too should the idea have been put to rest, as expressed for example by the current Administration regarding global climate change, that science may be too uncertain to regulate. Congress in the 1970s wisely recognized, for the major air and water pollutants, that protective standards could be set to begin our country on the road to protection without further delay, even while on-going scientific reviews continued. This was why the Clean Air Act requires that the level of protection for these pollutants be reviewed every five years. This dual approach was recognized, ironically, by Christie Todd Whitman, EPA's current Administrator, in a speech she gave when she was still New Jersey's Governor. She observed that, "science and policy operate on different time scales . . . policymakers need to take a precautionary approach to environmental protection . . . we must acknowledge that uncertainty is inherent in managing natural resources, [and] recognize it is easier to prevent environmental damage than to repair it later . . . The absence of certainty is not an excuse to do nothing . . . Environmental policy should always be based on the soundest information available at the time."<sup>5</sup>

A large part of my time, when I served at EPA, was spent deterring a full-scale Congressional and industry assault on the Agency seeking to slash its budget, hobble its authorities, tether decisions to cost-benefit analyses, allow new litigation against the agency, and require it to pay for the effect of any of its actions on lost income or property values, regardless of how harmful the action

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3. *Id.* at 923.

4. *Id.* at 922.

5. Christie Todd Whitman, *Effective Policy Making: The Role of Good Science*, address to the National Academy of Sciences (2000).

was that EPA was seeking to deter. These were the goals of Newt Gingrich's so-called "Contract with America" in 1995. But a former Republican EPA Administrator, Bill Ruckelshaus, wisely pointed out that our country's history of environmental protection is best characterized by a "swinging pendulum" where we protect perhaps too vigorously and rigidly, which leads to a reaction of too much slackening, and then back again. Certainly this has characterized Congressional action on the environment over the years. But underneath it all, the notion that protecting our health and environment as an enduring American value always comes back. I have become hopeful the *American Trucking* case is a huge damper on the swings of that pendulum, modulating it to an area of agreed-upon convergence. No longer is EPA seen as "the crucible of everyone's discontent," as it was called on its twentieth Anniversary in 1990, but it is now seen as an important protector of communities, and a valuable resource and partner for industry.

### III. A SECOND REVOLUTION IN ENVIRONMENTAL PROTECTION?

While I believe that we now have, after thirty years, wide-spread agreement on the baseline system for public health and environmental protection in this country, I want to turn to what I also think has happened over just the past few years, a no-less significant transformation in the approach of many in the private sector to these issues. Compare what is happening today to where this country was just five years ago, much less in 1970, and I think there are five broad and interdependent trends that are emerging.

First, environmental information and the internet have taken on central importance. Think of the change in technology, some call it the "hyper-web," where everything we now do is linked to interactive information technology. From cell phones to Blackberrys to the Global Positioning System in cars, we are linked in nearly every move to computing capabilities. While we take these changes somewhat for granted, here's what they mean. When I first arrived at EPA, its web page received about 300,000 hits a year. Today, it receives about thirty million hits per month, providing information on companies' releases of toxic chemicals into the environment, the quality of drinking water, or the latest state of its scientific risk assessments. This information has become an important part of our system of environmental accountability. And more of it is reflecting real time continuous emissions monitoring or even remote or satellite-based plume analysis. The same is true for the work being done now by advocacy groups. Environmental Defense's scorecard links this information to localized potential public health impacts. Greenpeace International's web page received some 142 million hits

over the past four years. This has meant that there is an enormous amount of environmental information available to the public, and that information can be readily mustered and advocacy campaigns simply turned on nearly instantaneously. Companies are beginning to recognize that they must operate in a transparent way in this "networked economy," and the more progressive ones are embracing that, making key information available in carefully prepared corporate environmental and sustainability reports. Fifty percent of the world's largest companies, the Fortune 100, now prepare these kinds of reports.

Second, the world's economy is becoming globalized at a rapid pace. More and more companies are operating globally. Whether airplane wings are sourced in Spain, or credit card services are provided in New Delhi, traditional geo-political borders are disappearing for the world's businesses. Actions and information in one place can be instantaneously shared and known across the world and can greatly affect a company's reputation. And global institutions, such as the World Bank, have developed standards in the environmental field that are driving behavior due to how prevalent its funding is for work in developing countries.

Third, market-based systems and incentives have now become widely accepted as legitimate, beneficial approaches to regulation. The concept of the trading of emissions reductions is central to finding cost-effective ways to address greenhouse gases. Companies understand these systems; they thrive on finding new efficiencies.

Fourth, environmental compliance has now become part and parcel of the routine way of doing business for most companies. Many have adopted sophisticated environmental management systems, to assure appropriate reporting, tracking, and to encourage innovative thinking about meeting the environmental requirements. A system known as ISO 14001 has become widely accepted as an international standard.

But perhaps most importantly, these actions are no longer simply about meeting the requirements, many companies "get" that acting responsibly on the environment is critical for their bottom line. It helps them operate most efficiently in their production; it helps them attract the most talented employees; it helps their reputations among customers. In short, many companies now believe that being a good environmental citizen helps to impart shareholder value, what large public companies are all about.

Let me read you a recent statement from a group known as the World Business Council for Sustainable Development. This is a group of Chief Executive Officers of some one hundred fifty international companies, including such leaders as BP, DuPont,

Dow, Shell, and Toyota. They recently put forward the “business case” for sustainable development as follows:

We define sustainable development as forms of progress that meet the needs of the present without compromising the ability of future generations to meet their needs. . . . The business case [for sustainable development] has a financial bottom line. During the five years before August 2001 the Dow Jones Sustainability Index clearly outperformed the Dow Jones Global Index [by] 15.8% to 12.5%. The DJSI consists of the top 10 per cent of companies in 68 industry groups in 21 countries seen as leaders in sustainable development. However, our rationale is not based solely on short-term financial returns. Companies comprise, are led by, and serve people with vision and values. Companies that do not reflect their people’s best vision and values in their actions will wither in the marketplace in the long-term. The business case is also an entrepreneurial position: it looks to the next point on the business curve – the point at which business can be more competitive by being more sustainability driven. WBCSD companies intend to be at that point first and to stake it out as their value opportunity.

This attitude has led to a blossoming of corporate-environmental group partnerships, many of them with a focus on the critical issue of global climate change. Ford Motor Company recently gave \$25 million to Conservation International to establish the Center for Environmental Leadership in Business. Some thirty-five companies have joined with the Pew Center on Global Climate Change to renounce their former membership in an industry advocacy organization challenging climate change science, and instead assert the need for responsible action. Sophisticated companies are embracing third-party certification of their practices. Home Depot has teamed with Rainforest Action, after years of protest, to end purchases of wood products from old growth forests and to prefer products certified by the independent Forest Stewardship Council. The United Nations has issued its global corporate challenge, the “Global Compact,” and other codes of conduct, such as CERES, are widely adhered to. There are now codes for everything from mining to raising bananas. The World Resources Institute, a leading environmental group, has worked with dozens of companies to

pioneer the Global Reporting Initiative, to make environmental reporting as well-understood and consistent (and hopefully more reliable) as financial reporting. And socially-oriented investment funds are also thriving with some two trillion dollars under management, where many fund managers now argue that good corporate environmentalism is a proxy for good and enlightened management overall. The recent World Economic Forum in New York became something of an ode for corporations to find the right balance in helping others and securing sustainability, to ensure that globalization does not become permanently fixed as a negative. Is it surprising that when the leaders of the world's largest corporations gathered in New York two weeks ago, they discussed "The Road to Johannesburg," the Earth Summit conference that will be ten years after Rio this Fall?

Let me give you an example of how powerful this new collaborative approach can be. During my tenure at EPA, we brought in the automobile industry, the oil refining industry, emissions control manufacturers, states, and public health and environmental groups, to craft a plan that would close the Sport Utility Vehicle loophole for emissions, providing the next generation of automobile emissions requirements, and taking dirty sulfur out of gasoline. Actions that in the past had seen huge, drawn out fights, instead became a process that achieved clear and timely public health goals, but did it in a way that accommodated industry's need for flexibility on phasing and timing. In the end, no major litigation resulted to delay these new requirements. You know the story of the Everglades as well. These approaches, built on trust and the belief in the system of public health and environmental protection, and informed by good will in participation, are bound to be the most enduring.

Some may assert that companies take these steps so that they can "greenwash" their questionable practices and as nothing more than public relations stunts. The real test will be whether a company's statement of environmentally protective principles really does get translated into the day-to-day work of all of its employees, "driven into its very DNA," as some say. And no doubt many companies reach this enlightened plane because they want to avoid the negative consequences of failing to act in this fashion, witness Monsanto being characterized as "Monsatan" in Europe where its biotech-engineered corn is spurned as "Frankenfood," leading to the loss of billions of dollars in markets, or AES having to spend hundreds of millions of dollars on hydropower siting issues because of alleged insensitivity to local land impacts.

But this time of transition is very real. We have moved from: the first stage of resistance and opposition; to the second stage of

President Clinton's constant refrain, that "the economy and the environment can go hand-in-hand;" beyond even that, to a third stage that is something very different, where major forward-looking corporations are now beginning to define their strategic opportunity in terms of sustainability and social responsibility, the so-called "triple bottom line" of economic, social, and environmental returns. Many companies now know that they benefit from engaging stakeholders, including non-governmental organizations, at every turn. Many new corporate leaders are now of a generation that came of age at the same time as did the modern environmental movement. And this focus on "corporate citizenship" is only accelerating after September 11th and after Enron. The key question to assess will be: do we ever reach a defining point where the rationale for a strong regulatory state, the failure of the free market in forcing companies to internalize environmental costs, is instead being replaced by a race to the top? That said, even with these changes of huge significance, we must remain vigilant, for a competent governmental environmental enforcement presence ensures consistency and provides the baseline protection in case some companies still don't "get it."

#### IV. THE FUTURE CHALLENGE

There is a ready test for the effectiveness and legitimacy of this new approach, and it is in how we as a nation face up to the challenge of global climate change. Several trends are combining to make this issue the ultimate test of corporate environmental commitment. First, the science of climate change has been becoming more and more refined and certain. A panel of 1,500 renowned scientists, under the auspices of the United Nations, the Intergovernmental Panel on Climate Change, released several reports last year documenting that human actions causing the release of greenhouse gases have already affected the Earth's ability to regulate its own climate. These scientists predicted that temperature rises are likely to be far greater than previously believed, from five to ten degrees or maybe even higher by the end of this century – perhaps even on the order of from the last Ice Age to the present. And in response to a request from the Bush Administration, the National Academy of Sciences, our nation's premiere science policy institution, endorsed these assessments.

Climate change has also reached a level of public and political consensus that demands a response. The rest of the world is moving forward with implementing the Kyoto Protocol to reduce greenhouse gases, even without U.S. participation. Before September 11th, this was the one area where the public most doubted the Bush

Administration's abilities, and where the environmental community centered their campaign to discredit the Administration's policy reversals. Public awareness on this issue has vastly increased, from a *Time* Magazine cover story, to widely disseminated information on local effects, such as the recent University and National Resources Defense Council study, *Feeling the Heat in Florida*,<sup>6</sup> showing likely flooding with the loss of up to four hundred feet of coastline, wildfires, coral bleaching, and saltwater intrusion in Florida. The effect in Congress has been striking. Republican Senator John McCain has joined with Democratic Senator Joe Lieberman in calling for a prompt U.S. response on climate change, and even so stark a Kyoto opponent as Senator Robert Byrd of coal-producing West Virginia has said that the United States must act. September 11th also reaffirms how interdependent the nations of the world are.

Without meaningful governmental action on global warming, how can companies based or operating in the United States engage in long-range investment decisions without knowing where this country's climate policy will take them? How can United States companies who operate globally take maximum advantage of the most cost-effective approaches to reducing carbon emissions within their operations across the globe? Many companies have, in fact, moved well beyond where government currently is on this issue. Some, like BP, have adopted explicit carbon reduction goals similar to the Kyoto requirements. Others, such as Shell, are accounting for future greenhouse gas costs in all of their investment decisions. Others are working with the environmental community to pioneer emissions monitoring and verification systems. But until they break with the Administration and endorse U.S. compliance with the Kyoto mechanism, and as they bridle against strengthened Corporate Average Fuel Economy standards, then fair questions may be raised about the integrity of these commitments. Where the Administration's approach, announced by President Bush yesterday, would allow for a significant growth in greenhouse gases, perhaps by even thirty percent over 1990 levels; where the Administration continues to question the science of global climate change; where despite whatever incentives they have proposed for energy efficiency, the Administration still advocates for some \$17 billion worth of fossil fuel incentives in its Energy Plan; where the Administration would actually weaken existing clean air environmental protections, it is even clearer today that private sector leadership will be more crucial without responsible, engaged government leadership on these fundamental issues.

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6. *Feeling the Heat in Florida*, NATIONAL RESOURCES DEFENSE COUNCIL (2001).

## V. THE BENEFITS OF PUBLIC SERVICE

As you think about your future career path, let me commend to you the benefits of public service. Many understand now, better than ever, the importance of giving back to our society. It is impossible to quantify the satisfaction that comes from focusing on issues with larger meaning, on the challenge and fulfillment of discerning what is the right approach or policy, on what serves people and communities best, and in finding ways to be true to your ideals and values. The private sector has unmatched capabilities, as well, for you to keep in mind the contributions you can make. That is why since my service at EPA, I have been working to build a corporate social responsibility practice focusing on the opportunities for progressive companies to deal pro-actively with emerging environmental issues, in an open and collaborative, solution-oriented way. Even though under the scenario I have discussed tonight, the traditional role of litigation may be diminished, the challenges for the role of creative lawyering have never been greater or more stimulating.

Let me return to the story I began with about Governor Chiles' bold act. Governor Chiles' act of "laying down his sword" was memorable as well because it was based, quite simply, on a stand of principle: Doing what was right. That has served as a critical lesson to me. At Governor Chiles' funeral a few years ago, one eulogy captured that spirit in quoting Mark Twain, who said, "if you always do what is right, you will please those who agree with you, and simply astound those who don't."

Best of luck in this exciting new era.

