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Introduction to the Symposium: Corporate Governance and Environmental Best Practices

Jayne W. Barnard
William & Mary Law School, jwbarn@wm.edu

INTRODUCTION

JAYNE W. BARNARD*

In February of 2006, the *Environmental Law and Policy Review* welcomed a diverse group of scholars and practitioners, each of whom had a unique vantage point from which to view the changing landscape of corporate environmental behavior. The occasion was the *Review*'s annual symposium, this year focusing on "Corporate Governance and Environmental Best Practices."

The symposium participants included experts on corporate governance, energy, environmental management, public policy, investment strategies, business ethics, and shareholders' rights. More specifically, they included law professors, a business school professor, a senior government official, an influential investment analyst who specializes in assessing companies' environmental practices, and a senior executive of Smithfield Foods, Inc., a Fortune 500 company which has made a dramatic turnaround as an environmental actor.

These diverse participants exchanged ideas both formally and informally, bringing to the conversation their own experiences and expertise. The results of this exciting symposium will comprise this and part of the subsequent issue of the *Environmental Law and Policy Review*.

In this issue, we feature three Articles and one Essay reflecting the range of viewpoints and issues represented at the symposium. In the opening Article, George Wyeth—a senior level official at the U.S. Environmental Protection Agency ("EPA")—examines two models by which a regulatory agency may achieve its objectives: the "standard" regulatory model which emphasizes prescriptions, prohibitions, and compliance and the "alternative" model which emphasizes customization, flexibility, and attention to outcomes rather than to box-checking. Wyeth offers both a theoretical assessment of these models and an insider's view of their application in practice. He discusses why some alternative strategies adopted by the EPA have been more successful than others, and why the prognosis for alternative strategies is mixed. Some alternative strategies will continue to flourish, but not at the expense of traditional command-and-control regulation. Others are likely to wither

* James Gould Cutler Professor of Law, The College of William & Mary.

away. Wyeth offers some predictions about the response of corporate managers to this emerging hybrid environment.

One alternative strategy examined by Wyeth is the EPA's encouragement of the use by corporations of environmental management systems ("EMS"). There are many reasons a corporation might adopt such a system: altruism, "me-too-ism," cost containment, market positioning, and hope for regulatory accommodation, among others. Adoption of an EMS may also help in responding to allegations of criminal wrongdoing.

David Case examines more closely the origins and characteristics of environmental management systems. He notes reliable evidence that adoption of an EMS is associated with improvement in corporate environmental behavior. He suggests, moreover, that adoption of an EMS may generate better corporate environmental behavior than would occur under the traditional command-and-control system. In part this is because of the acculturation value of thinking through and implementing an EMS. Improvements in corporate behavior also occur because of the power of information—sometimes sobering information—derived from a systematic EMS process. Case ultimately questions whether the EPA has failed to maximize the utility of EMSs by limiting the agency's involvement to voluntary, incentive-based programs. While an incentive-based program is "politically palatable," he argues, it is also "short-sighted."

Steven Ferrey addresses the role of corporate boards in moving corporate environmental behavior forward. Why, he asks, don't they demand that their companies adopt renewable energy sources, or exploit their own capacity to engage in electricity co-generation? Both, in theory, can be cost-effective. Co-generation can also relieve pressure on the conventional power supply, provide protection from disruption of the conventional power supply due to weather or terrorist attacks, and minimize emissions of air pollutants. In other words, what's not to love? Ferrey offers two answers: (1) a mess of regulation that differs from state to state, and may be impenetrable to many corporate managers (many states actually offer subsidies and other incentives, though managers may not know it), and (2) disincentives in the form of high stand-by power rates, interconnection difficulties, and exit fees, all of which could be minimized by regulatory reform. In this case, the available technology has gotten ahead of the regulatory structure that might be used to promote it. Ferrey has identified a key area for public policy reform.

In his Essay, Geoffrey Rapp asks what remedies might be available when a board *refuses* to address significant corporate environmental shortcomings. He quickly discounts proxy contests and shareholder proposals as effective drivers of institutional change. Rather, he raises the interesting possibility of a *Caremark*-type case, at least insofar as it would correct a board's failure to create any environmental compliance system at all. More problematic, of course, is what to do with a board that puts into place a minimal "keep us out of trouble" compliance system, but is otherwise lackadaisical in achieving desirable environmental goals. Rapp concedes the limitations of the tools currently available to shareholders with such concerns.

The next issue of the *Environmental Law and Policy Review* will feature three additional Articles from the symposium examining some historical, comparative, and ethical aspects of the current corporate environmental scene.

My own Article traces several recent developments that have shifted the gaze of corporate directors from short-term profitability to longer-term risk management, particularly in the environmental domain. I identify twelve trends that may account for these corporate behavioral changes and also that provide a firm foundation for future environmental improvements. While I do not claim that shareholder primacy has been replaced by environmental values, I do suggest that investor wealth-seeking and sustainable practices can co-exist.

Cynthia Williams and John Conley tell a remarkable story of the development of heightened reporting requirements for environmental risks facing companies listed in the United Kingdom ("UK"). This type of disclosure has been encouraged as a "best practice" in the UK for many years. In March of 2005, as part of a comprehensive revision of the Companies Act, risk-based disclosure was made mandatory in the form of an annual Operating and Financial Review and Directors Report ("OFR"), a much-extended counterpart to the United States Management Discussion and Analysis. Then, in November of 2005, the Labor Government, through Chancellor Gordon Brown, announced that it was withdrawing the requirement for an OFR. What followed is the focus of Williams and Conley's eye-opening Article: an uprising of corporate leaders, accounting professionals, Labor Party leaders, and proponents of corporate social responsibility of a variety of stripes. This confluence of interests, coupled with a well-timed litigation and press strategy, appears to have rescued (at least a form of) mandatory risk-based disclosure in the UK. Whether this type of reporting will become an international norm, or find a place in the American view of appropriate corporate disclosure regulation, of course, remains to be seen.

Finally, Tara Radin offers a compelling business-based case for corporate commitment to environmental sustainability. She explains why building a "compliance culture" that attends only to the details of regulatory commands is not enough; to do well competitively, firms must develop a culture that rewards "moral imagination." Importantly, she offers some concrete examples of moral imagination in action: banks that profitably serve the poor, so-called "cradle-to-cradle" (constantly recycling) supply chains, and a firm that found a way to trim its landfill-bound by-products while still protecting the bottom line. Radin places these examples into a rich tapestry of theoretical principles and practical questions and answers.

I am very gratified to have been involved in the construction and delivery of this symposium issue. The students who organized the symposium have now graduated, but I hope they look back with pride on an outstanding day of scholarly interchange and the resulting provocative Articles included within these pages.