

Abstract in response to call for papers, “Towards Sustainable Companies: Identifying New Avenues”

Working Title: “ Improving Corporate Environmental Performance: Encouraging Sustainable Commerce Through Regulatory and Other Governmental Action”

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Basic structure of corporations and the relationship between corporations and the environment create powerful reasons for environmental underperformance by firms. Major overhaul to corporations law, environmental law, or both could solve these problems but is unlikely at least within the US. As a result, smaller-scale governmental efforts to induce environmentally-sound corporate behavior presents an attractive possibility for near-term improvements. The recent sustainability efforts of major corporations present hopeful signs that private efforts at sustainable commerce, leveraged through public actions such as procurement, assistance, and partnerships, can achieve further environmental gains more quickly and more economically than traditional command-and-control regulation alone. By sustainable commerce, we mean products and practices that minimize environmental impacts and optimize commercial value while realizing both public and private environmental benchmarks. The term includes means of improving the environment often described as sustainable development, greentech, cleantech, and the like. US corporations still lag behind in the adoption of sustainable commerce compared to their global counterparts, and national and subnational governments have passed over opportunities to encourage its expansion. A system relying on stimulating sustainable commerce and providing incentives for environmentally positive performance—especially one that understands and responds to problems inherent in the traditional structure of the corporation—will achieve faster and better environmental results than a command-and-control program alone.

Unique characteristics of environmental threats provide some insights into understanding why these problems resist easy solutions. Environmental threats directly affecting human health are diffuse and often operate at a subclinical level of impact. Obtaining legal redress is therefore difficult. To complicate matters further, even if an individual correctly calculates her potential harm, she may nevertheless rationally choose to free-ride on the efforts of others (either other private actors or the government) for protection against the danger. For these reasons and more, markets do not provide accurate and up-to-date signals to economic actors that induce them to anticipate negative externalities that they should internalize and to protect against them either through such actions as proactive abatement activity or insurance.

As important economic actors comprised of multiple stakeholders, corporations face additional difficulties in internalizing externalities and taking proactive steps to prevent against creating environmental problems. Basic corporate structure also creates principal/agent problems arising from unshared goals and asymmetric information that are widely discussed in the literature. These fundamental aspects of the firm predicts that corporations will usually

underperform from an environmental standpoint. Although current corporate governance structures allow a corporation to pursue sustainable commerce if management so chooses, reliance on voluntary efforts through a corporate social responsibility model (CSR) will prove insufficient to achieve comprehensive environmental improvement. Some firms will require greater impetus to improve their environmental performance, and others will respond only to command-and-control regulations. When the difficulties of responding to environmental problems encounter the principal/agent problems inherent in the corporation, environmental catastrophe can predictably ensue.

As a historical matter, the national government in the US has responded to environmental threats and degradation primarily through comprehensive command-and-control regulations. National regulation emerged as a response to weak regulation from state governments and their inability to address interstate problems. Although federal regulations have resulted in dramatic environmental improvements and recovery, they often meet with resistance by members of the regulated community, which consist primarily of corporations. Corporations commonly complain that the costs imposed by the regulations exceed the benefits gained or harms avoided. Their chief concern is actually that the costs harm their own bottom lines. The US command-and-control regulations of the 1970s and 1980s emerged from an adversarial vision of government relations with private enterprise, one that fundamentally mistrusted the willingness of the private sector to act in an environmentally-protective way even when these actions were ultimately in the long-term best economic interest of both the firm and the nation. That jaded view probably correctly assessed most corporations' responses to environmental challenges and still captures the attitude of many firms. Despite their efficacy, command-and-control regulations have often come at great cost and fostered resistance to regulation through such tactics as litigation challenging regulations and resort to political processes that undermine the regulatory direction of these programs. Given the current political climate in the US, the likelihood is slim that Congress will adopt a new regulatory scheme for such problems as global climate change (GCC).

GCC poses additional difficulties. Greenhouse gases (GHGs) have residence time in the atmosphere that is typically measured in decades, and most of the more significant predicted effects of GCC will occur not immediately but in the mid- to long-term. Stakeholders interested in short-term corporate profits or share value will eschew adopting GHG abatement measures that cut into bottom lines. Informational asymmetry also hampers response. Although general patterns of GCC impacts can be predicted, specific events are harder to link to it, and the effects of GCC will be felt in diffuse areas, often far from the site of the sources of the pollution. To the extent that a global legal solution is required, the lack of effective legal regimes (especially in the near term) renders a true top-down solution nearly impossible.

Similarly, a complete overhaul to US corporations law is unlikely. Although some commentators have called for the creation of a new form of corporation, they have not theorized how to require corporations to adopt this form. Voluntary adoption of the sustainable corporation form in the US, like CSR, will likely not produce near term results.

Sustainable commerce, especially as achieved through public/private partnerships, presents an underutilized strategy for further environmental gains. Publicly-required adherence to private ordering systems can provide one means of achieving systematic improvement of environmental performance, and public actors can through encouragement and regulation create positive incentive for private actors to adopt these means. Procurement and debarment also offer

opportunities to economically pressure environmentally sound performance. Through these private public partnerships, environmental problems can be averted more successfully than through pure regulation alone.

Biographical Sketch:

Professor Peter A. Appel is the Alex W. Smith Professor of Law at the University of Georgia School of Law in the US. Appel joined the faculty in 1997 after six years in practice with the US Department of Justice. Appel's research spans three primary areas: the use of law to promote sustainable commerce, wilderness preservation and the courts, and more traditional doctrinal scholarship in environmental and natural resources law. He has made several presentations on sustainable commerce, including its relationship to intellectual property (Yale/UNITAR 2010), corporate governance law (University of Auckland 2010), and public health law (Southern Illinois University School of Law 2009). His recent published work will or has appeared in *Corporate Governance after the Financial Crisis* (Edward Elgar Publishing, forthcoming 2011), the *Harvard Environmental Law Review* (forthcoming 2011), the *Stanford Environmental Law Journal* (2010), and the *Boston College Environmental Affairs Review* (2008). For a more detailed biography, see <http://www.law.uga.edu/profile/peter-appel>.