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INTRODUCTION

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We live in a society that places great demands on its natural resources. We insist upon a lifestyle that requires massive utilization of raw resources, be it water for domestic uses, recreation and irrigation, timber for fuel, paper and building materials, or oil, for heat and transportation. Yet at the same time we are becoming even more insistent that the environment be restored to, and preserved in, its natural state, free from human interference. Clearly a complete “hands-off” approach to our natural resources is unworkable, yet we continue to adopt new requirements for the use of our natural resources in an attempt to reverse the impacts caused by years of unrestricted use, and to control current and future uses to prevent waste and mismanagement.

Historically such requirements were based upon the concept of “command and control,” a method of regulation that imposes strict requirements on polluting facilities. High civil penalties for violations of those requirements provide the incentive to comply. This method of regulation has advanced the restoration and preservation of the environment considerably, but its many shortcomings are likely to reduce its effectiveness as we continue to pursue the reduction and elimination of environmental pollution. Further success in our efforts to curb environmental degradation must come from new incentives to eliminate pollution, and a recognition that the costs of clean-up and preservation of the environment must be borne by all members of society.

MARKET INCENTIVES APPROACH

Until very recently the “environment” was viewed as a free commodity, belonging to no one, but subject to use by everyone. Because they were free for the taking, the natural resources that make up our environment — air, water, soil, flora and fauna — were often exploited to the point that the resource was either depleted, or left in such a condition that future use was impracticable. In the middle of the twentieth century we began to recognize the importance of the environment, and the need to control the use of our natural resources to prevent their misuse, and to secure their availability into the future. We enacted many environmental laws designed to regulate the use of our natural resources and to mandate that past environmental degradation be cleaned up. These environmental laws have relied upon the “command and control” method of regulation. Technology-based controls or maximum pollutant levels have been imposed on those who release pollutants into the environment. Those who violate these generally inflexible

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controls are subject to enforcement. Known as "end-of-the-pipe" requirements, these controls have traditionally been implemented across the board, with little or no consideration of the difficulties encountered by a particular facility in attempting to comply with the regulatory requirements. Compliance costs can vary markedly between facilities, depending on the age and location of the facility and the type of manufacturing process it utilizes. Frequently, these kinds of regulations have the greatest economic impact on smaller or older facilities, because of the high costs of compliance or the difficulties in integrating new technology into older processes.

Compliance with "end-of-the-pipe" requirements has significantly reduced the release of pollution, but it has not eliminated pollution entirely. Tighter end-of-the-pipe controls may further reduce the release of pollution into the environment, but the costs associated with such tighter controls may force many facilities out of business. One alternative is to require the establishment of pollution prevention and waste minimization programs to reduce the generation of pollutants. This kind of strategy, however, does not adapt well to the traditional approach of command and control. Instead of monitoring and limiting what comes out of the pipe, pollution prevention under command and control concepts would require monitoring and regulating the front end of the facility, the raw products that go in, the processes that are used, and how the waste is generated. Because of the huge variability in facilities and their internal processes, adopting meaningful regulations to prevent pollution or to minimize waste will be nearly impossible. Moreover, such regulation moves dangerously close to regulating the business activities internal to the facility.

The market incentives approach to pollution prevention and control may provide a partial solution to the problem of further reducing or controlling pollution. The advantage of this approach is that it controls pollution in an especially effective and efficient manner by better distributing the costs of compliance among facilities, and by allowing facilities to determine, within their own structures, how best to comply with environmental requirements.

The market approach to pollution control utilizes the market to encourage the voluntary adoption of environmentally beneficial measures. Private property rights in land, recreation uses and environmental amenities, for example, can provide substantial incentive for the owner to take appropriate actions to preserve and enhance that privately-held right. There are many current examples of private groups using the market to protect the environment. The Nature Conservancy, a private non-profit organization, buys and protects valuable habitat. In this way, private dollars from people with the desire to protect habitat pay for the conservation effort, rather than protection being paid for by the public as a whole. Defenders of Wildlife, a national nonprofit wildlife conservation group, has initiated a program under which it will pay ranchers for livestock killed by wolves. The group has undertaken this program

in an effort to gain acceptance of wolf reintroduction programs. And in England, a program of allowing private rights in fishing has been very successful in improving stream quality. When rights are private, private individuals utilize private causes of action, such as common law tort or nuisance suits, to protect environmental resources.

A market incentives approach can likewise be used to encourage private industry to voluntarily prevent and control pollution. This approach was adopted in the Clean Air Act of 1990 through provisions that authorize sulfur dioxide emissions trading. Utilities can now sell sulfur dioxide allowances credited to them for reducing their own sulfur dioxide emissions below the legally imposed limit. The utilities that purchase such allowances can thereby avoid the potentially more expensive option of installing control equipment. Overall, total emissions of sulfur dioxide are reduced to the Clean Air Act standard, at substantially less cost than under traditional command and control concepts.

Market incentives can also be applied to encourage individuals to reduce waste. Solid waste can be reduced through deposit refund systems or variable garbage collection fee programs. Applicants for environmental permits can be encouraged to adopt source reduction or waste minimization projects if in return their permit receives an expedited review.

Market incentives will not replace command and control methods of regulating the use of our natural resources, but they are a valuable tool to explore and utilize to promote environmental protection.

ECONOMIC IMPACTS ON PRIVATE PROPERTY

The negative impact of environmental regulation on private property values has also steadily increased, creating a demand for the re-examination of the costs of environmental protection. As we recognize the finite nature of our natural resources, we have attempted to halt the development and use of real property to preserve its natural condition or to remediate its environmental ills. Real property has always been subject to reasonable regulation to promote public health, safety and welfare. This police power has continuously been expanded by federal, state and local governments to restrict available uses of land, because of environmental concerns or the desire to preserve natural resources. Property values can be greatly diminished if the property is located on the shoreline or if it contains a wetlands or an endangered species. Real property transactions are greatly hampered because of fears of finding environmental contamination.

In the recent *Lucas* decision, however, the United States Supreme Court may have limited government ability to regulate land use based upon environmental or natural resources issues.¹ Now public entities wishing to preserve or protect the natural characteristics of real property may be required to pay private landowners for taking their property

1. *Lucas v. South Carolina Coastal Council*, 505 U.S. —, 112 S.Ct. 2886 (1992).

rights. Governments may be precluded from imposing environmentally based restrictions on the use of private property without compensating the property owner for the diminution in property values resulting from such restrictions. This outcome would represent a shift in whom we burden with the cost of paying for protecting our environment. Society as a whole would be required to bear the burden instead of the individual property owner. Shifting the burden of environmental protection from the private to public sectors would compel us to determine priorities for our environmental goals. To do this, we would have to place more consciously a value on particular environmental attributes. This would be an immensely difficult task because of the difficulty in assigning a value to resources which sometimes have little popular or economic value, but may have great scientific value. Government officials could find themselves subject to public pressure to save a scenic coastline instead of a little known, but endangered, Black-spored quillwort.² In short, having the public pay the true cost of environmental protection under caselaw such as *Lucas* would force governments to prioritize and perhaps abandon some environmental goals. Nevertheless, the *Lucas* decision represents a recognition that the costs of environmental protection can be enormous, and that we as a society need to rethink who must bear that burden. These new demands underscore even more the importance of seeking and utilizing alternative methods of environmental controls, including pollution prevention, waste minimization and market incentives.

CONCLUSION

The recognition of the true value of our natural resources, and the need to restore and protect them has given rise to numerous controls on their use. The traditional command and control strategies of the last 25 years have succeeded in the elimination of many of our worst environmental problems, but the effectiveness of using command and control strategies to further reduce and eliminate adverse affects on our environment will likely decrease. Other methods must be explored and utilized if we are to succeed in restoring and protecting our environment. Utilizing market incentives appears to be a valuable tool for governments, private industry and individuals to provide the incentive to reduce waste and pollution and to promote restoration of our natural resources. Shifting the responsibility for the costs of protecting the environment also must be explored as we place more controls on the use of our natural resources. Just as individual facilities can no longer burden society with unregulated releases of pollution, society must limit the burden on individuals caused by unreasonable restrictions on land use. Individual facilities and society must both learn to internalize these externalities.

One need only look at Eastern Europe to appreciate how far we

2. 50 C.F.R. § 17.12 (1992).

have come in restoring and preserving our environment and natural resources. The greater challenge remaining is to address the outstanding environmental issues. Further progress in environmental restoration and protection will continue to demand our attention and our creativity in finding equitable and effective strategies to pursue.

