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Proposals for Environmental Regulatory Reform Colloquium: Foreword

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FOREWORD

SEAN MARCHESE

Over the past twenty-five years, environmental law has been ruled by a “command and control” approach to regulation. Although this approach has produced a great many successes, it has been severely criticized as not being the most efficient or effective method available to advance our environmental goals. Pace University School of Law and the Pace Environmental Law Review (PELR) organized a colloquium that addressed the topic of environmental regulatory reform. The colloquium, *Proposals for Regulatory Reform*, was held on February 28, 1997. The colloquium encompassed a host of prominent and experienced environmental lawyers and practitioners. As a result of their diverse backgrounds, these speakers discussed regulatory reform from various perspectives. Whether the speech was centered around future or present reform, one prevailing theme among all of them was the idea that if we – government, industry, environmental groups and the public – all work together, then a sufficient regulatory system can emerge that will cast our current system into the next century.

The following are general overviews of several of the speeches presented at the colloquium. The speeches have been minimally edited to aid the transition from the spoken to the written word. Footnotes have been added to assist interested readers in finding additional materials on the subject.

The keynote speaker, Carol M. Browner, is the current Administrator of the United States Environmental Protection Agency (EPA). She led the discussion of regulatory reform from a nationwide perspective.

Administrator Browner explained that a successful regulatory system is the ultimate product of what she termed “a

new generation of environmental protection.” A major impetus of this new generation of environmental protection is a philosophy that is best summed up by the African saying, “it takes a village to raise a child.” Administrator Browner envisioned that a successful system will come from a cooperative effort from all – government, industry, citizen groups and the public at large. If we all work together, our collective ingenuity, innovation and creativity will enable us to meet our environmental goals in the best manner possible.

The second major driving force behind this new generation of environmental protection, which is intertwined with the first, is the EPA’s outlook in reinventing the protection process. Throughout Administrator Browner’s tenure, the EPA has formulated regulations through processes that are cost effective and entail common sense. To that extent, Administrator Browner explained that although the utilization of a cost-benefit analysis during the process is a very important tool, it should not be the determining factor in the formulation of an environmental regulation. She supported this assertion by providing the audience with a historical account of how the American people, in the face of new environmental and health problems, will choose swift and ample protection over a detailed dollar for dollar account of the effects of implementing the regulation.

In her speech, Administrator Browner discussed several major federal environmental initiatives that are the direct result of the new generation of environmental protection. These include: the Brownfields Initiative, the Common Sense Initiative, Project XL, the Toxics Reduction Inventory program, administrative reforms in the Superfund project, the EPA’s Center for Environmental Information and Statistics, as well as, the passing of the Safe Water Drinking Act and the Food Quality Protection Act. Administrator Browner concluded that the new generation of environmental protection will help keep the regulatory process moving forward and continuously adapting to the ever-changing concerns of our health and environment.

Robert Sussman is a prominent environmental lawyer and partner in the law firm of Latham & Watkins. Mr. Suss-

man spoke about regulatory reform and had the advantage of working with the current system from both a governmental and industrial standpoint.

Mr. Sussman began his discussion by asking the question, "Why should we change our environmental management system?" From this, he elicited several different reasons that in the aggregate establish a strong case for regulatory reform.

Mr. Sussman described three different theories for evolving from the current system to one that will more adequately meet the needs of not only those who work first hand with the regulatory system, but also those who are the direct recipients of the fruits of a new regulatory system. According to Mr. Sussman, the concept of an integrating statute is the most applicable of the three theories to replace the existing system. The integrating statute would allow the government and its agencies to perform regulatory duties in a cooperative, orderly, incremental and creative manner. As Mr. Sussman explained, the integrating statute would serve as a solution to many, if not all, of the problems facing our environmental regulatory system today.

Mr. Sussman concluded by pointing out that between the many players in the regulatory process, the lines of communication have been strained. Accordingly, if we truly want reform, then we must work through this separation and create sustainable and meaningful alliances.

Robert King presented a general overview of how New York has already begun reforming its regulatory processes. In 1995, Governor Pataki issued Executive Order Number 20. The Executive Order not only marked the beginning of Mr. King's workplace, the Office of Regulatory Reform (Office), but it also provided this same Office with the ability to serve as a check on various agencies. The agencies, in their wisdom, are allowed to pursue whatever means they believe are appropriate in reaching the goals of their legislative mandates. Executive Order Number 20 permits the Office to intervene in this process. In essence, the agencies must check with the Office to ensure that they are meeting specific criteria that are set out in the Executive Order during the stage of regulation formulation. The idea is to encourage agencies to

do their "homework" by using the best available data to determine the effects that a proposed regulation would create.

Mr. King provided the audience with an illustrative example of how the Executive Order and the Office work in practice. In 1995, in an attempt to limit the introduction of certain types of point source pollutants into the Great Lakes Basin, the Great Lakes Initiative was passed. In the drive to achieve the purposes of this initiative, agencies like the Department of Environmental Conservation (DEC) check with the Office to make sure that during the process they meet specific criteria such as cost-benefit analysis and risk assessments. In addition, if the regulation that the agency intends to implement is more stringent than federal standards, the Office can ask for demonstrative evidence from the agency to justify such a determination. To support such a request, the Office can override the agency's stringent regulation and require it to regulate only up to the federal standards. Mr. King contended that New York has taken a positive step forward in reforming the regulatory process and with the continuance of sensible professional decisions, the system and the public will benefit.

John P. Cahill is the Commissioner of the New York State DEC. Commissioner Cahill explained that successful reformation of the regulatory process must be a result of innovative thinking from the governmental actors involved. His speech outlined examples of how New York has already begun reforming its regulatory system, as well as general comments and observations about reforming the regulatory process in general.

Commissioner Cahill described several approaches to reducing extraneous or duplicative regulatory requirements and streamlining the process, especially when dealing with permits. For example, the concept of priority ranking, in which permits are ranked and processed according to their importance, has helped New York reduce its backlog in issuing and renewing permits. Also, the use of general permits for routine matters and electronic permits has saved the DEC and the permittees hundreds of hours of paperwork.

Commissioner Cahill discussed what could be done to facilitate regulatory reform. One way is to keep track of the newly developing environmental technologies and to encourage the implementation of these technologies. Furthermore, Commissioner Cahill pointed out that a successful regulatory system must entail cooperation between all of the stakeholders at an early stage of the regulatory process, particularly public involvement. Finally, Commissioner Cahill suggested that sometimes common sense solutions can make big differences in the regulatory process, such as simply explaining how the regulatory system works to those who must abide by the environmental regulations.

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