

## **Washington Watch**

### **Environmental Accountability: Keeping Pace with the Evolving Role of Responsible Environmental Corporate Stewardship**

**Lynn L. Bergeson**

Over the past ten years or so, stakeholders involved in the areas of environment, health, and safety (EHS) have witnessed an explosion of voluntary environmental leadership programs of one form or another. The growth of voluntary programs (along with related new approaches intended to enhance environmental protection and workplace safety) reflects the complexity of EHS issues today, the high visibility of these concerns, and their relevance to the public. Clearly, diverse skill sets increasingly are required to manage these issues effectively.

Professor LeRoy Paddock of Pace University is a leading expert on the topic of environmental accountability. Professor Paddock notes that the growing number of EHS activities -- and the sheer number of people needed to manage them at the local, regional, national, and international levels -- have led government agencies and private stakeholders alike to employ a wide range of techniques aimed at holding organizations accountable for their behavior, and seeking to encourage the development of more robust and innovative engagement in EHS stewardship initiatives.<sup>1</sup>

The concept of “environmental accountability” includes a broad range of mechanisms that are intended to make the environmental behaviors and practices of organizations more transparent and subject to greater public scrutiny. Transparency, in turn, is expected to “incentivize” organizations to adopt more responsible corporate practices and programs that go well beyond mere compliance-oriented governance strategies.

This "Washington Watch" column outlines the concept of environmental accountability, provides a summary overview of the many mechanisms that are included within this broad topic, and discusses the role that environmental accountability plays in influencing corporate business standards pertinent to environmental performance.<sup>2</sup>

As government resources earmarked for more traditional environmental enforcement and compliance-assistance initiatives continue to dwindle, environmental accountability will increasingly serve as a key driving force to compel higher standards of corporate environmental accountability.

### **Environmental Accountability Mechanisms**

The term "environmental accountability" is amenable to differing interpretations. As a result, there is no single set of approaches or mechanisms that can be included within the scope of the concept. Certain mechanisms are frequently mentioned in connection with the idea of environmental accountability, however. These include:

- traditional command-and-control mechanisms, and related compliance-assistance efforts;
- performance-based standards;
- voluntary industry leadership/stewardship programs;
- efforts to enhance public education and outreach;
- corporate codes of conduct and social responsibility programs;
- legal liability standards; and
- stakeholder dialogue.

These mechanisms, and the contribution they make to environmental accountability, are discussed in the following sections.

### ***Traditional Command-and-Control/Compliance Assistance***

Traditional command-and-control regulation and enforcement mechanisms need little explanation: They are premised on a model of deterrence. Simply put, the assumption is that unlawful behavior should be punished. Bad actors should be forced to pay stiff financial penalties, and will be publicly shamed as a result.

The resources available for traditional enforcement activities have been steadily diminishing for the past several years. As a result, the United States Environmental Protection Agency (EPA) has increasingly sought to leverage its enforcement capability by addressing those areas of non-compliance that are believed to pose the greatest potential harm to human health and the environment.

EPA's Office of Enforcement and Compliance Assurance has recognized that it must broaden its range of enforcement tools to include non-deterrence mechanisms. As a result, the "compliance assistance" component of this division has expanded.

The Agency characterizes compliance assistance as a tool that can be used to improve the regulated community's compliance with environmental requirements, stating, "EPA partners with compliance assistance providers to develop and deliver compliance assistance resources such as Web sites, compliance guides, fact sheets and training materials."<sup>3</sup>

EPA's website describes a diverse range of industry and government sector-oriented compliance assistance mechanisms, including compliance assistance centers, sector notebooks, compliance assistance and inspection publications, and the national compliance assistance clearinghouse (which provides public and private compliance assistance materials).<sup>4</sup>

Compliance assistance rests on the premise that environmental compliance is more likely to result if the regulated community becomes better educated on how to comply with the applicable requirements, and if regulated organizations are provided with the tools and resources they need to understand clearly what is required and expected of them.

### ***Performance-Based Standards***

Performance-based standards focus on achievement of a certain level of environmental performance, without specifying the precise means by which to achieve it. These standards reflect the availability of multiple technology-based or management-oriented means to achieve targeted risk levels. Their success depends on the government's commitment to allowing as much flexibility as possible in order to achieve the desired outcomes.

Performance-based standards are embedded in numerous environmental regulations issued under a range of statutes. A few examples include:

- Maximum Achievable Control Technology (MACT) standards under the Clean Air Act,
- effluent limitation guidelines under the Clean Water Act, and
- treatment, storage, and disposal facility standards under the Resource Conservation and Recovery Act.

### ***Voluntary Industry Leadership/Stewardship Programs***

Voluntary industry environmental programs represent an area where EPA's leadership has truly excelled. Review of the Agency's website reveals no fewer than five dozen voluntary initiatives of all shapes and sizes.<sup>5</sup> At the heart of all of these programs is the government's desire not only to encourage compliance, but also to foster the development of innovative measures for achieving environmental goals that far exceed mere compliance with applicable rules and regulations.

Flagship EPA programs include Project XL<sup>6</sup> and the National Environmental Performance Track program.<sup>7</sup> Both programs encourage participant organizations to achieve new levels of environmental excellence in return for a more flexible approach to regulation, among other incentives. The innovative voluntary mechanisms being implemented under these programs include enhanced public reporting on environmental issues, increased public participation, and the use of environmental management systems.

One recent example of EPA's increasing reliance on voluntary programs can be found in the Agency's efforts toward establishing a Nanoscale Materials Voluntary Program, which would provide EPA with a quick and efficient means to obtain information on both new and existing engineered nanoscale materials.<sup>8</sup>

Another recent example in this area is the Agency's rollout earlier this year of its 2010/15 PFOA Stewardship Program.<sup>9</sup> Under this program, EPA has asked eight chemical producers to eliminate or greatly reduce sources of exposure to perfluorooctanoic acid (PFOA), a chemical used in producing a wide range of consumer products.<sup>10</sup>

### ***Enhanced Public Education and Outreach***

Virtually all corporate entities now engage in some type of public education and outreach. These activities may take the form of direct communications with neighbors, shareholders, stakeholders, and other parties. They may involve robust and interactive websites where the organization posts important information that is likely to be of interest to stakeholders. They may also include the use of "town hall"-style meetings, especially in cases where a facility is seeking to obtain an environmental permit or some other kind of regulatory approval. There is no limit to the type, quality, and degree of enhanced outreach and education in which private stakeholders now engage.

EPA and other government agencies also make good use of websites and other communication tools, such as issuance of numerous public news releases and sponsorship of frequently scheduled public dialogues dealing with a wide range of topics. All illustrate the government's effective use of public outreach tools to ensure that its key messages are being communicated often and broadly.<sup>11</sup>

### ***Corporate Codes of Conduct and Social Responsibility Programs***

Corporate codes of conduct have grown more important in recent years, and increasingly are being joined by corporate social responsibility (CSR) programs. Both approaches generally include initiatives that are intended to satisfy companies' obligation to be sensitive to the needs of all stakeholders in its business dealings. Hewlett-Packard describes its commitment to CSR in the following terms:

In the course of doing business, corporations have an impact on a wide spectrum of people, in a variety of social arenas, all over the world. With that comes an enormous responsibility: to ensure our activities and behaviors are conducted with utmost integrity in every one of these arenas. As a leader in social responsibility, HP is building on decades of uncompromised ethical business practices and values-based governance to reinforce our commitments to customers, employees, suppliers, partners and communities. In this way, as our company grows in size and complexity, we can continue to lead our industry and others in shaping the impact of the corporation as a constructive force in an ever-changing world.<sup>12</sup>

Corporate codes of conduct often are premised on compliance with voluntary standards, such as the ISO 14000 environmental management standard, the Coalition for Environmentally Responsible Economics (CERES) principles, and related standards.

## ***Legal Liability Standards***

Corporate concerns about legal liability for environmental transgressions have long been compelling motivators of compliant behavior. Both common law principles and statutory enactments provide numerous sources of potential liability that act as *de facto* standards of conduct.

Product- and tort-liability concerns often provide powerful incentives to avoid environmental noncompliance. This is not because regulatory compliance inoculates a company from such liability (it does not), but rather because instances of regulatory noncompliance may be used as proof of wrongdoing in tort or product-liability actions.

In any event, the high cost of litigation (whether based on civil, administrative, or criminal causes of action) serves as a compelling check on corporate behavior and a strong motivator to do the right thing.

## ***Stakeholder Dialogue***

Increasingly, EPA is using the mechanism of stakeholder dialogue to solicit public comment and input on key topics. For example, as the Agency began to tackle the challenging issue of regulating engineered nanoscale materials, it convened a public stakeholder meeting. This dialogue, held in June 2005, sought to obtain information from the public to “inform EPA on possible approaches to protect human health and the environment from exposure to [engineered nanoscale materials].”<sup>13</sup> The Agency intends to convene several additional meetings on this subject in the near future.

In the recent past, EPA has convened a raft of stakeholder dialogues through virtually all its program offices. Among the key stakeholder initiatives are the National Pollution Prevention and Toxics Advisory Committee, the Pesticide Program Dialogue Committee, and the Clean Air Act Advisory Committee.

## **The Growing Role of Environmental Accountability**

As the foregoing discussion makes clear, there is no dearth of mechanisms that fall under the heading of “environmental accountability.” The tools and programs are diverse, they are innovative -- and they are likely to expand in both number and scope.

## ***Beyond Compliance, Toward Commitment***

A key unresolved issue is what effect, if any, the various environmental accountability mechanisms have, or are likely to have, on corporate governance with respect to EHS matters. Some believe that participation in leadership initiatives, voluntary programs, and related stewardship measures has become a *de facto* standard against which an entity’s commitment to environmental protection can be measured. Under this view, nominal compliance with the law is no longer a relevant metric by which to gauge such a commitment.

Others contend that legal compliance (measured as the absence of noncompliance) will always be relevant. Even under this view, however, participation in leadership programs, voluntary initiatives, and related environmental accountability approaches is seen as a necessary, if not essential, adjunct to regulatory compliance that helps demonstrate commitment to environmental stewardship. Such participation is particularly important in the case of large, publicly traded entities for a number of reasons, as discussed in the following sections.

### ***Public Policy and Business Financial Value***

Both business entities and government officials are beginning to see the rewards that can be realized through environmental accountability programs. Business organizations often gain financial value and increased regulatory flexibility from participating in such programs, while government agencies frequently find they can achieve important public policy objectives.

Consider EPA's National Environmental Performance Track program: As the Agency has been quick to note, businesses can realize a considerable level of cost savings through implementing the types of improvements encouraged by the program, in addition to being able to take advantage of networking opportunities and less rigid regulatory approaches.<sup>14</sup>

The benefits to be gained from widespread participation in Performance Track and other programs, such as the Design for the Environment initiative, are significant -- so significant, in fact, that state governments increasingly are beginning to offer similar rewards to businesses that participate in analogous programs.

### ***Shareholder and Stakeholder Pressure***

Publicly traded companies increasingly find themselves under pressure from shareholders and stakeholders to demonstrate leadership, and to fulfill their commitment to environmental stewardship in a meaningful way.

Given the abundance of corporate leadership programs now available, it may in fact be difficult for larger companies to rationalize failure to participate in at least some of them. Inability to demonstrate commitment to environmental stewardship by participation in some type of voluntary environmental program can give rise to allegations that the company's written commitment to environmental protection is nothing more than empty rhetoric.

### ***Deflection of Future Regulatory Requirements***

Widespread business participation in voluntary environmental programs can potentially blunt the need for more stringent government responses. For example, participation in voluntary information-gathering programs often provides EPA with valuable information, receipt of which may obviate the need for a more formal regulatory scheme.

A key illustration of this is provided by the HPV Challenge Program, a data-development initiative targeted at producers of high production-volume chemicals. EPA urged chemical manufacturers to participate in the program by "sponsoring" data collection on particular

chemicals. Businesses were challenged to balance the cost of participation against the possibility that certain chemicals might remain “unsponsored” -- and thus eligible for more vigorous mandatory regulatory requirements.

The clear success of the HPV program suggests that EPA was correct in believing that chemical manufacturers would prefer to submit data voluntarily, rather than be told how and when to do so under Toxic Substances Control Act Section 4 rules.

Similar balancing acts are likely now underway among businesses involved in the production of engineered nanoscale materials. In EPA's much-praised *External Review Draft Nanotechnology White Paper*, the Agency notes that there is a significant “gap in our knowledge” regarding the health implications of exposure to engineered nanoscale materials.<sup>15</sup> This gap is a key reason why EPA is now expending substantial effort in determining how best to obtain information and data on engineered nanoscale materials through a Nanoscale Materials Voluntary Program (the specifics of which EPA is still considering).

Plainly, manufacturers and users of engineered nanoscale materials will need to consider the advantages of electing to participate in such a voluntary program. This includes the possibility of staving off more aggressive EPA-initiated mandatory data development requirements. Companies also will have to consider the potential disadvantages of non-participation. Among these are the adverse inferences that might arise if a company decides not to participate in the program, and is later revealed to be a player in the nanotech arena.

### **Deciding Whether to Participate in Voluntary Environmental Programs**

When a company is deciding whether to participate in a voluntary environmental leadership or stewardship program, the pressure to demonstrate environmental accountability must be tempered by many considerations. Among them are company size, market sector, whether the company is publicly traded, and corporate history and culture, to name just a few.

The smaller the company, the less it may feel compelled to participate in environmental leadership programs, absent other factors such as unique market considerations or an extraordinary desire by the company to “stand out” in the area of environmental accountability.

Larger companies -- particularly in market sectors that are seen as creating heavy environmental footprints -- may well feel the heat from stakeholders and other interested parties. These organizations thus may be more inclined to participate in environmental leadership programs since failure to do so could invite too many questions and yield adverse inferences detrimental to the company's business interests.

## Concluding Thoughts

Despite the breadth and the fluid nature of the topic discussed in this column, a few general conclusions can be drawn. First, environmental accountability mechanisms will proliferate further as federal and state enforcement resources continue to decline, and as the ability of traditional command-and-control measures to address emerging environmental, health, and safety issues correspondingly diminishes.

Second, business entities that are larger and higher profile will be most inclined to demonstrate leadership in the environmental accountability area because they have more to lose, and because stakeholders tend to hold them to a higher standard of accountability than applies to smaller, less public entities.

Third, entities in those manufacturing sectors that are thought to leave larger environmental footprints will be more likely to participate in accountability programs in an attempt to demonstrate their commitment to environmental sustainability.

Finally, the calculus each entity must undertake when presented with the option of participating in an environmental accountability program includes a range of factors that must be addressed on a company-by-company basis. The decision to participate in, for example, a voluntary chemical data-generation program will be driven by many considerations that are purely competitive and business-oriented, as well as by issues of public perception. The numerous considerations involved will not all be readily apparent, however, making conclusions inherently difficult to predict.

One thing is fairly certain, however: Environmental accountability mechanisms will continue to proliferate, and many more companies are likely to participate in them in the future as time, resources, and need permit.

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**Lynn L. Bergeson** is managing director of Bergeson & Campbell, P.C., a Washington, D.C. law firm focusing on conventional and engineered nanoscale chemical, pesticide, and other specialty chemical product approval and regulation, environmental health and safety law, chemical product litigation, and associated business issues. She is president of The Acta Group, L.L.C. and The Acta Group EU, Ltd., with offices in Washington, D.C. and Manchester, UK.

## Notes

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- <sup>1</sup> Paddock, L.C. (2004). Environmental Accountability and Public Involvement. *Pace Environmental Law Review*, 21(2) 801.
- <sup>2</sup> While space constraints prevent discussion of workplace safety issues, it is important to note that these concerns also are the subject of numerous voluntary programs and mechanisms. One example is the Occupational Safety and Health Administration (OSHA) Voluntary Protection Program, which is intended to promote worksite-based safety and health through cooperative relationships among labor, OSHA, and management.
- <sup>3</sup> U.S. Environmental Protection Agency. Compliance Assistance. Program web site. Available at <http://www.epa.gov/compliance/assistance/index.html>.
- <sup>4</sup> U.S. Environmental Protection Agency. Compliance Assistance -- Industry and Government Sectors. Program web site. Available at <http://www.epa.gov/compliance/assistance/sectors/index.html>
- <sup>5</sup> U.S. Environmental Protection Agency. Business Opportunities -- Industry Partnerships. Program web site. Available at <http://www.epa.gov/epahome/industry.htm>.
- <sup>6</sup> U.S. Environmental Protection Agency. Project XL. Program web site. Available at <http://www.epa.gov/ProjectXL/>.
- <sup>7</sup> U.S. Environmental Protection Agency. National Environmental Performance Track. Program web site. Available at <http://www.epa.gov/performance/track/>.
- <sup>8</sup> U.S. Environmental Protection Agency, National Pollution Prevention and Toxics Advisory Committee (2005, November 22). Overview Document on Nanoscale Materials. Available at <http://www.epa.gov/oppt/npptac/pubs/nanowgovoverviewdocument20051125.pdf>.
- <sup>9</sup> U.S. Environmental Protection Agency. 2010/15 PFOA Stewardship Program. Program web site. Available at <http://www.epa.gov/opptintr/pfoa/pubs/pfoastewardship.htm>. EPA has asked facilities to commit to achieving, by no later than 2010, a 95-percent reduction (measured from a 2000 baseline) in both facility emissions of PFOA to all media and in product-content levels of PFOA, with PFOA being defined to include precursor chemicals that can break down to form PFOA and related higher homologue chemicals. EPA also has asked facilities to commit to working toward eliminating PFOA, PFOA precursors, and related higher homologue chemicals from emissions and products by five years thereafter, or no later than 2015.

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<sup>10</sup> EPA's history with respect to voluntary programs is extensive, and no attempt is made here to consider all the initiatives the Agency has developed over the years. Notable successes include the High Production Volume (HPV) Challenge Program and the Voluntary Children's Chemical Evaluation Program.

Not all voluntary programs have been successful. For example, last year EPA formally ended a voluntary program for preventing childhood lead poisoning not long after it was first unveiled. EPA rolled out the program in 2004. On May 16, 2005, the Agency published a *Federal Register* notice saying the program had been "withdrawn," but gave no explanation or elaboration. Some speculate that the withdrawal may have been prompted by Congressional opposition to the program expressed by Senators Hillary Clinton and Barack Obama.

In addition, the Government Accountability Office (GAO) has been critical of EPA's voluntary measures to reduce emissions of carbon dioxide and other greenhouse gases. See US GAO (2006, April). *Climate Change -- EPA and DOE Should Do More to Encourage Progress Under Two Voluntary Programs*. Available at <http://www.gao.gov/new.items/d0697.pdf>.

<sup>11</sup> See, for example 63 Fed. Reg. 27279 (May 18, 1998), announcing establishment of a joint EPA-United States Department of Agriculture (USDA) Tolerance Reassessment Advisory Committee (TRAC) to ensure the "smooth implementation" of the Food Quality Protection Act; 64 Fed. Reg. 46673 (Aug. 26, 1999), announcing initiation of a stakeholder involvement process for development of a voluntary program to test commercial chemicals to which children may have a high likelihood of exposure; 65 Fed. Reg. 35925 (June 6, 2000), announcing the EPA-USDA Committee to Advise on Reassessment and Transition, which followed TRAC; and 70 Fed. Reg. 24574 (May 10, 2005), seeking comment on engineered nanoscale materials.

<sup>12</sup> See <http://www.hp.com/>.

<sup>13</sup> 70 Fed. Reg. 24574 (May 10, 2005).

<sup>14</sup> EPA has prepared a "business case" presentation for membership in the program, which notes its many benefits. See U.S. Environmental Protection Agency. *National Environmental Performance Track. Is Performance Track Right for You?* Available at <http://www.epa.gov/performance-track/rightforyou.htm>.

<sup>15</sup> U.S. Environmental Protection Agency, *Nanotechnology Workgroup* (2005, December 2). *External Review Draft Nanotechnology White Paper*. Available at <http://www.epa.gov/osa/nanotech.htm>.