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Industrial Policy Since Love Canal

Val Washington*

I am currently the executive director of Environmental Advocates, a state-wide environmental lobbying group. We are the “Albany insiders” to the environmental movement in New York State. Along with our sister organization, EPL Environmental Advocates, we prepare an annual report card and “voter’s guide” assessing the legislative session and the Governor’s performance.

Before coming to Environmental Advocates, I was head of the Attorney General’s Environmental Protection Bureau in Albany for thirteen years. At the Attorney General’s, though we had many proactive environmental initiatives, and it was our responsibility to represent the State in Superfund litigation. Prior to working for the Attorney General, I was an enforcement attorney for the Department of Environmental Conservation (DEC) in Region 3.

Alice Kryzan and I have a very different perspectives on the history of Hooker Chemical’s relationship to Love Canal. However, we both agree that the depth and breadth of these different perspectives has made it difficult to seek a reasonable discourse. Everyone, myself included, equates Love Canal with the Comprehensive Environmental Response Compensation Liability Act (CERCLA).¹ CERCLA, the government’s response to Love Canal, was a watershed in a world of distrust. Citizens had become very distrustful of industry and the government. The women who lost their babies were coldly documented as having experienced “negative pregnancy” outcomes by the government. There was tremendous resentment and anger expressed towards industry, particularly toward Hooker Chemical and its role in the history of Niagara Falls region.

The anger and resentment helped fuel CERCLA, which was a bombshell for industry. As a lawyer who negotiated some of the early agreements under Superfund, the lawyers we dealt with were not

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¹ The Comprehensive Environmental Response Compensation Liability Act of 1980 (Superfund), 42 U.S.C. §§ 9601-9675 (1999).

used to the concept of signing a consent order or a settlement agreement and still retaining liability. Liability continues into the future, in addition to the novel retroactive liability, joint and several liability, and strict liability of CERCLA. Consequently, industry was tremendously resentful. Distrust of the government and the community fear persist today.

Since Love Canal, citizen activism has changed. There has been enormous growth and sophistication; in Western New York, we have some of our most sophisticated environmental advocates. But we cannot begin to match industry. While our resentment and anger has played out, we have gained. We have been particularly successful in our demand for public processes and accountability. Consequently, we have been given a role, or a seat at the bargaining table. However, we do not have the resources of industry. Industry has been able to take their anger and resentment much farther than we have been able to, broadening and deepening the gap between industry and environmental activists. Although there have been gains such as the Emergency Planning and Community Right to Know Act,² industry has been able to prevent the passage of new environmental legislation and regulations. It has effectively rolled back government progress in regulating the environment through regulatory reform. Combined, industry resources are more powerful than those of environmental activists.

This is true across the nation. In every state, bills continue to be passed that have been crafted under the heavy influence of industry or a right-wing think tank, with express purpose of rolling back government regulation of industry. For example, twenty-two states have adopted regulations no stricter than federal environmental standards. This is in spite of the clear understanding that an industry initiated law that provides that state environmental regulations can be a floor, not a ceiling. One of a minority, New York has maintained higher environmental standards, and for that we are fortunate.

² Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001-11050 (1999).

However, we need to be cautious. Most of the environmentally damaging bills introduced in New York are not labeled as environmental statutes, specifically leaving the word “environment” out of the text. To encourage the legislature to pass the bills, the proposals are often presented as “good government” or “economic development” bills. Consequently, the environmental regulatory reform movement resembles a rhetorical high ground, denouncing bureaucratic red tape and duplication and supporting “sound science.” That is ersatz science based on flawed risk assessment measures and industry-biased cost-benefit analyses.

Again, this movement is sweeping the nation with great success. But, again, in New York, the movement has been less successful because it is exposed as anti-environment. This partly because my organization, Environment Advocates, has created a unique system of legislator accountability. The votes legislators cast are rated and recorded on a voter’s guide chart. It is a simple process. Memoranda are written by our lobbying group on the bills that would have an impact on New York’s environment discussing why we favor or oppose the proposed actions. Each memo is designated with a symbol at the top to indicate the rating we have given it. Three smoke stacks represent the worst bills, two for a “pretty bad” bill, and a single smoke stack for a bill that is merely harmful. Alternatively, trees are used to represent favorable bills, in a similar system, one tree being a useful bill, and three trees representing a major environmental initiative. This allows the legislators to glance at the top of the memorandum if they only want to know how their votes will be rated; they can read on if they are also concerned with the substance of our argument. From this information, the legislators interested in maintaining a “green image” can cast their votes knowing they have the support of the environmentalists. Since most legislators lack the necessary staff to be updated on every legislative issue, this simple method also allows legislators to be informed on environmental issues.

Success of the regulatory reform movement in New York has been through the executive branch rather than the legislature. Our Governor is pro-business. Once in office, one of his first initiatives

was to establish the Governor's Office of Regulatory Reform (GORR). Through this office, an executive order was created requiring GORR to review any agency proposed regulations prior to public distribution. This gives the Governor's office a veto power over regulations that a regulating agency feels are appropriate and necessary for protecting the public health or environment. Under this system, judicial review, legislative review and public oversight are circumvented. Once GORR was established, an initial act was to poll industry to determine their opinion of standing regulations. Predictably, the results of these surveys showed an overwhelming "need" for reform. This failure of vision has become a serious problem in New York State. Regulatory has played out as less enforcement, more self-regulation and reduced oversight.

But there have been positive changes in industry. Self-interest can be a good thing, and occasionally an environmental advocate may share the same interests as an industrial executive. This is exemplified by the published opinions of the Monsanto Company's President. The opinions he expressed regarding pollution reduction could have easily been penned by an environmental advocate. Monsanto was one the largest companies hit by Superfund. The company's reaction has been to anticipate and avoid future liability. By limiting its liability through a pollution prevention strategy, Monsanto is placed in good stead with their stockholders and the Securities Exchange Commission. Slowly, the worst polluters, such as E.I. du Pont de Nemours and Company (Du Pont) are accepting leadership roles to solve the problem of pollution. My favorite example is Toyota. The President of Toyota's visionary goal is to have the image of Toyota invoke the idea of environmental consciousness, similar to Volvo's image of safety or a Rolls Royce' image of luxury.

The movement towards performance based standards, rather than government determined standards based upon technology availability can be a positive change, in that it represents more of a collaborative process. The government is, in effect, acquiescing to industry technical superiority. Real visions are occurring in other countries as well. In Germany, radical recycling initiatives have been

introduced and Holland has adopted a Green Planning Process. There is a hopeful spreading of environmental awareness.

A significant part of pollution prevention focuses upon the use of toxics, not just the resulting waste. Much of our pollution comes not from waste, but from the products we use in manufacturing and by consumers. New Jersey and Massachusetts have adopted very progressive statutes to address these concerns, and the result has been quite successful. These statutes do not dictate to industry the amount of reduction necessary, but instead require an analysis and an audit of the processes the company uses for production. Through this system of analysis, companies have, on their own initiative, completed comprehensive studies to show how changes in processes can reduce pollution beyond the statutory goal of fifty percent. Ironically, not using toxic chemicals saves industry money. Every year, New York State has a contest and awards companies that have made progress in pollution prevention. I participate on the committee that reviews the applications. Every single application references the money that has been saved in reducing pollution. So again, self-interest plays a role.

But I still believe in our "command and control" system. In an analysis of history, reliance on volunteerism does not work. At issue, is DEC enforcement policy and regulatory reform efforts. The public does not want more environmental regulation, rather it strongly supports enforcement of existing policies after being criticized for eliminating hundreds of regulatory jobs. Consequently, the Governor has appropriated more money for enforcement. But enforcement is not the only answer to environmental progress. We need to do a lot more. We need vision. We need people in the field, and right now we are relying on a system, thanks to the regulatory reform movement, that is self-monitoring, self-certifying, and self-reporting. This is not good for the environment.

The environmental movement has been historically insular. There is a need for a more inclusive environmental movement. We have to reach out to unions and academics. We have a lot of friends out there that we are not communicating with. Polling data regarding the demographics of the people who care about the environment is

revealing. For example, young men and blue-collar workers support environmental protection for two reasons: they believe environmental protection creates jobs and new technology. They also believe in "open space," they are hunters and fishermen who enjoy being outdoors with their families. The environmental movement has historically failed to reach these constituencies. We need to do better. One of the greatest statements I have ever heard Lois Gibbs make is, "If you look around your table at your coalition and everybody looks like you, and everybody has your background, and you wouldn't hesitate to invite anyone of those people home to dinner that night, that is not a coalition; that is a club."³ I believe the environmental movement has been a little "clubby" and to be effective this must change. The second thing we must do is elect politicians with vision. We have to groom people and elect them into office, people with vision who are not afraid to move this vision. Finally, and most importantly, I would say that we cannot just look at environmental issues. People want to talk to us about other issues, such as coalitions with other groups, and we have resisted it, citing too few of us and too many environmental priorities. Most critically, we have to get involved in "good government" issues. I know that any single initiative we fight for, if put to public referendum, would overwhelmingly win. Yet every year they lose in Congress and the Legislature due to campaign finances. We all have to unite and open our agendas.

³ Speech given by Lois Gibbs at a State Environmental Leadership Conference, November 1996.