

# The Best of Intentions

Incentive, not bureaucracy, is the key to environmental protection.

by BRENT FEWELL

**M**uch speculation has emerged over what the forthcoming Donald Trump administration will do for environmental protection. While many liberals and environmentalists fear Trump will cause substantial harm to the environment, there is ample reason to believe that his election poses a unique opportunity to reset the way we think about and respond to environmental challenges.

As a former U.S. EPA water official, I have spent years working with a wide variety of stakeholders, eco-entrepreneurs, companies, utilities, and environmental and conservation groups to advance environmental protection. And I have seen firsthand many of the great strides the country has taken since the Nixon era, which saw the enactment of those seminal federal environmental statutes, the Clean Water and Clean Air acts. The environment and public health are largely better off for that.

However, while our rivers no longer catch fire, the challenges we face today, such as “dead zones” in the Gulf of Mexico and Chesapeake Bay and pharmaceutical drugs increasingly found in our water supply, are perhaps even more vexing because of the ubiquitous and distributive nature of these problems. As well, our nation’s aging water and wastewater systems, while some of the best in the world, are showing signs of deterioration and posing risks to human health and the environment.

While climate change will remain an intractable political issue into the foreseeable future, we should be able to find agreement on the need to fix other things. But to make progress on many environmental issues we must recognize the im-

pediments to progress and be willing to change the status quo.

There is a serious structural problem when it’s easier to obtain agency approvals to destroy a wetland than it is to obtain approvals to restore that same wetland. But unfortunately, that’s the upside-down reality we live in today.

You may ask how this can be. Prior to the advent of modern environmental law, societal decisions and actions were largely informed by common-law property rights, where neighbors were guided by the principle of “do no harm” and no trespass. Under a common-law regime, neighbors were accountable to neighbors for any environmental harm they caused. But this regime was eventually supplanted by statutory law, based largely on the legal principle of strict liability and the increased role of administrative law, meaning governmental intrusion.

Federal environmental laws were passed with good intentions, but unfortunately many of them have resulted in many unintended consequences that impede environmental progress. This is not to suggest we should jettison them, but they do require modernization to bring about more common sense and better results. Some anecdotes illustrate the point.

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# Trump's Challenge

Take, for example, the story of a “bridge to somewhere,” involving a seemingly simple replacement of a stream culvert in a suburban Maryland community where my family and I reside. For years, the small perennial stream that bisects our neighborhood has been ravaged by flashy storm flows caused by impervious land that no longer breathes.

The goal of the project was simple: to replace the aging culvert with an environmentally friendly pedestrian bridge. Groups like Trout Unlimited have long advocated the removal of harmful culverts that block the movement of anadromous fish and other aquatic critters. What should have been a relatively simple and straightforward infrastructure project conducted over the course of several months turned into a three-year debacle, overshadowed by dozens of federal, state, and local reviews and approvals and reams of bureaucratic red tape.

The myriad of reviews and delays resulted in the culvert removal costing the community three times what the project should have cost, not to mention the civic frustration. For years, the community had engaged in self-help, patching and repairing the culverts without agency approvals and permits. It worked smoothly, but unfortunately the work had been done illegally.

But doing the work legally—and replacing the culvert with a much better bridge—generated excessive costs, delays, and frustrations that marred the experience of making the right decision. In the end, not only were there no incentives for the community to choose the right course in protecting the environment, but there were actually incentives to continue along the wrong course.

Social cognitive theory confirms that we humans make choices and modify behavior based on incentives that align with our personal values, unless the behavioral costs are too high. That is, all of us make decisions based on our own inherent benefit-cost analyses. The costs of making the right decision in this case were inordinately high relative to the costs of making the wrong decision. That is, there was little chance the community would be caught and punished for doing things the wrong way.

The lesson one can draw from this experience is that when government makes it exceedingly difficult to make the right choices or fails to establish the right incentives, we shouldn't be surprised when individual choices may be exactly the opposite of those that are good for the environment.

In 2005, while I was at the EPA's Office of Water, Chris Wood of Trout Unlimited approached the agency's leadership with a project aimed at restoring a watershed in Utah degraded by a toxic leachate from an abandoned hard rock mine. The goal was to restore the habitat of a rare cutthroat trout that had been extirpated due to waters uninhabitable since the turn of the 20th century. TU had everything lined up to proceed with a successful cleanup, including the financial resources and consent from the landowner, Snowbird Ski and Summer Resort, to complete the work. It was a win-win for the environment and the public.

So why did TU need the help of the EPA?

TU, a nonprofit conservation group, was concerned about the potential liability under federal environmental laws, i.e., strict liability under the Clean Water Act and the Comprehensive Environmental Response Compensation and Liability Act (CERCLA, also known as the Superfund law). Although TU had not caused the environmental problem, the organization risked being saddled with a \$50 million cleanup of the entire abandoned mine and its environmental pollution. It was unwilling to take that risk. This was completely understandable, given the litigious nature of our society. The financial risks were simply too steep, and TU wanted assurance from the federal government that it would not be held liable for any environmental pollution they hadn't caused.

TU's request prompted a two-year effort by President George W. Bush and the Bush EPA to remove the legal impediments. Although Good Samaritan cleanups could be accomplished administratively, through friendly CERCLA enforcement orders, it was cumbersome and time-consuming. So the Bush Administration sponsored legislation designed to scale up the number of voluntary cleanups. But congressional Democratic leaders blocked the effort largely for political reasons. They didn't want the Bush Administration to have an environmental win. That led to the death of Good Samaritan legislation.

The missed opportunity means that the approximately 500,000 abandoned hard rock mines and thousands of impaired watersheds from toxic leachate remain in a state of impairment.

I had the privilege recently of speaking to a group of landowners participating in a Sand County Foundation forum on Innovation on the Land. The Sand County Foundation, based in Madison, Wis., is a nonprofit entity dedicated to promoting private land conservation, and it was refreshing to

engage with farmers and ranchers committed to managing their land to promote the conservation of at-risk species, such as black-capped vireos, Texas horned lizards, and spot-tailed lizards.

While the actions of these landowners are laudable, only a small minority of landowners are willing to take the risk of voluntarily providing habitat to species listed under the federal Endangered Species Act (ESA), which makes it a federal crime to harm or “take” a listed species or its habitat.

The ESA is a serious law, adopted with all the best intentions. Yet, it may be causing as much harm as good because of the law of unintended consequences. With the majority of land in the United States under private ownership, an estimated 72 percent of threatened and endangered (T&E) species and their habitat are located on private property. Given the legal restrictions and potential liabilities associated with T&E species on one’s property—and the economic impact on that same land—over the years many landowners have actively destroyed habitat on their land that might otherwise attract and support such species. For example, the red-cockaded woodpecker is a listed species that lives in the Southeast and is dependent on mature longleaf pines to reproduce. To avoid attracting the woodpecker, landowners routinely harvest stands of longleaf pines before they mature and attract the birds, which is legal.

The unintended consequences of the ESA are terribly unfortunate, and we must find ways to change this reality—turning listed species from liabilities into assets. Toward this end, to counter the negative impacts of the ESA, over the last two decades, the U.S. Fish and Wildlife Services has begun to use what is called a Safe Harbor Agreement (SHA), which is a voluntary agreement between a private owner whose actions contribute to the recovery of a listed species and the federal government. The idea is to not punish a landowner for “good deeds” associated with making voluntary improvements to their land that are intended to promote the habitat of a listed species. The use of SHAs has been met with limited success, and we can and must do more to encourage their use along with other administrative mechanisms to reduce the fears, liability, and economic impacts of the ESA felt by many landowners.

Environmental author and professor Steve Hayward puts it well when he says, “We need to do more to get the government out of the way of environmental improvement.”

Just so. I remain optimistic that we can make environmental progress over the next four years. But we must begin to do things differently and knock down the barriers and obstacles that stand in the way of common-sense solutions. ■

## OLD *and* RIGHT

**W**hy are the cattle in a common so puny and stunted? Why is the common itself so bare-worn and cropped differently from the adjoining enclosures? No inequality, in respect of natural or acquired fertility, will account for the phenomenon. The difference depends on the difference of the way in which an increase of stock in the two cases affects the circumstances of the author of the increase. If a person puts more cattle into his own field, the amount of subsistence which they consume will be deducted from that which was at the command of his original stock; and, if, before, there was no more than a sufficiency of pasture, he reaps no benefits from the additional cattle, what is gained in one way being lost in another. But if he puts more cattle on a common, the food which they consume forms a deduction which is shared between all the cattle, as well as that of

others as his own, in proportion to their number, and only a small part of it is taken from his own cattle. In an enclosed pasture, there is a point of saturation, if I may so call it, (by which, I mean a barrier depending on considerations of interest), beyond which no prudent man will add to his stock. In a common, also, there is in like manner a point of saturation. But the position of the point in the two cases is obviously different. Were a number of adjoining pastures, already fully stocked, to be at once thrown open, and converted into one vast common, the position of the point of saturation would immediately be changed. The stock would be increased, and would be made to press much more forcibly against the means of subsistence.

—WILLIAM FOSTER LLOYD,  
“Two lectures on the checks to population,” 1833