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Power to the People: Restoring the Public Voice in Environmental Law

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POWER TO THE PEOPLE:
RESTORING THE PUBLIC VOICE IN ENVIRONMENTAL LAW

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Although the last forty years of environmental law have witnessed some successes, they have also increasingly revealed the limitations of existing laws and regulatory structures. Congress has been unable to pass substantial environmental legislation in recent years,

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notwithstanding widespread recognition of the need for better tools for responding to climate change, toxic chemicals, non-point source water pollution, and other problems.\(^1\) In addition, the Environmental Protection Agency (“EPA”) has struggled in the wake of limited resources and politicization to effectively use the tools it has, and its rulemaking processes are often dominated by industry and other repeat players.\(^2\) To deal with the environmental challenges we face, we must better account for the interests of the general public and harness the insights and goodwill of those outside the conventional regulatory state. This article proposes two mechanisms for doing so: (1) establishment of regulatory contrarians within the EPA to serve as a voice for underrepresented interests and future generations in agency proceedings; and (2) government sanction of environmental certification systems to facilitate more sustainable purchasing decisions.

I. CHALLENGES TO THE REGULATORY STATE

This Part highlights several of the most serious challenges confronting the regulatory state today. Though these challenges are common among regulatory agencies, they are particularly acute at the EPA because of the complex and controversial subjects that the agency addresses.

A. Agency Ossification and Inaction

Regulatory agencies have been plagued by regulatory ossification—the increasingly slow and burdensome nature of rulemaking variously attributed to “hard look” judicial review as well as procedural requirements imposed by Congress and the executive branch.\(^3\) Ossification fosters excessive caution and delay in issuing rules, thereby frustrating statutory goals and discouraging policy experimentation and adaptation.\(^4\) Ossification also drains agency resources and pushes agencies to rely on informal policy statements.

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2. Id. at 253-56.
rather than promulgated rules. In light of the scientifically taxing mandates often imposed upon it, the EPA is especially vulnerable to rulemaking delay and frustration as compared to other agencies. Complaints about EPA inaction and delay were frequent during the George W. Bush Administration, but are not unique to that administration. Delay frequently characterizes revision of regulatory standards as well as initial policy making, as the EPA often misses statutory deadlines or fails to respond to new information or technology changes.

The difficulty of contesting agency inaction compounds the problem of ossification. Judicial review of agency action is generally easier to obtain than judicial review of agency inaction. Regulatory beneficiaries seeking to challenge inaction may not have standing to get into court and, even if they can demonstrate standing, are able to challenge only an agency’s failure to take discrete actions that are mandated by law. Legislative oversight and industry protests are also more likely to focus on agency action than inaction. Together, these

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“asymmetries create incentives for agencies to pay more attention to the interests and perspectives of regulated entities—and to ignore the views of regulatory beneficiaries—during the administrative process.”

B. Imbalanced Rulemaking

Even when agencies are able to overcome the barriers and disincentives to action, modern rulemaking departs substantially from the perhaps unrealizable ideal in which stakeholders and the public work together with agencies to develop rules that advance the social good in a fair and democratically responsive way. As predicted by public choice theory, rulemaking on health and environmental matters tends to be dominated by regulated entities, which have the most immediately at stake. Regulated entities face far stronger incentives than regulatory beneficiaries to make the substantial investments in time, personnel, and other resources required to participate in rulemaking. Also, regulated entities often have greater control of information relevant to crafting regulatory standards. The flood of information that agencies face further exacerbates the imbalance in favor of regulated entities, obscures the issues, and increases the costs of participation. As Professor Wendy Wagner has explained, environmental rulemakings that set industry- or product-specific standards are particularly susceptible to the problem of “information capture” because these proceedings necessarily focus on technical documentation relating to alternative compliance options and their cost burdens on industry.

Domination by regulated entities often begins before an agency formally proposes a rule. In hopes of crafting rules that can withstand or avoid legal challenge, agencies may communicate extensively with regulated parties regarding their drafting. The matters at hand are often technical and complex, particularly where environmental regulation is at issue. Proposals emerging from this process may be so

12. Staszewski, supra note 9, at 371.
13. This ideal reflects both a pluralist account of agency decision-making, in which the agency decision is seen as considering and reflecting a variety of interests, and a civic republican account, in which the agency decision is seen as the product of a democratically deliberative process. Nina A. Mendelson, Rulemaking, Democracy, and Torrents of E-Mail, 79 GEO. WASH. L. REV. 1343, 1350-51 (2011).
14. Id. at 1357-58.
15. Id. at 1357-58.
17. Id. at 1343-51.
18. Id. at 1380-81.
complicated and voluminous that participation by individual members of the public is difficult, if not impossible.\textsuperscript{19} Indeed, even with the ease of electronically accessing information and transmitting comments, levels of citizen participation in rulemaking remain low.\textsuperscript{20} Individual citizens may not realize the significance of agency rulemaking, and they typically have little motivation to become involved in a time-consuming process that promises negligible personal benefit.\textsuperscript{21} Environmental nonprofits can play an important role in representing the interests of regulatory beneficiaries, but their positions and interests may differ from those of their members and the general public.\textsuperscript{22} Moreover, given the high cost of active participation in a rulemaking, nonprofits must selectively deploy their limited resources towards issues that are likely to yield the highest payoff in terms of positive publicity.\textsuperscript{23}

When individuals or public interest groups do participate in rulemaking, effects on substantive outcomes are often difficult to discern. The idealized model of notice-and-comment rulemaking contemplates public input upon issuance of a proposed rule, followed by a thoughtful discussion and response to concerns that are raised. Standard rulemaking procedures, however, encourage commenters to take “extreme positions” and to file “one-shot attempts at persuasion.”\textsuperscript{24} As a result, comment processes often fail to promote a meaningful conversation among commenters and agency officials. Indeed, by the time a proposed rule is released, the agency often has already consulted extensively with regulated parties and is unlikely to make significant changes.\textsuperscript{25} To the extent that changes are made, they tend to reflect industry concerns rather than those of the general public.\textsuperscript{26} One explanation for the one-sided nature of agency changes to proposed rules is industry dominance of the comment process. For example, a study of EPA hazardous air pollutant rulemakings found that industry participated in more rulemaking proceedings than public interest groups.

\textsuperscript{19} Id. at 1384-86; Mendelson, supra note 13, at 1357 (noting paucity of comments from ordinary citizens in several studied rulemakings).
\textsuperscript{21} Id. at 965-66.
\textsuperscript{22} Mariano-Florentino Cuellar, Rethinking Regulatory Democracy, 57 ADMIN. L. REV. 411, 473 (2005).
\textsuperscript{23} Wagner, Administrative Law, supra note 16, at 1379, 1387.
\textsuperscript{25} Id. at 931-32; Wagner, Administrative Law, supra note 16, at 1366.
\textsuperscript{26} Wagner, Administrative Law, supra note 16, at 1387-88.
and filed far more comments in each proceeding.\textsuperscript{27} In addition, as Professor Nina Mendelson notes, “agencies appear to treat technically and scientifically oriented comments far more seriously than . . . value-laden or policy-focused comments.”\textsuperscript{28} Although the latter may be just as relevant as the former to the rulemaking task,\textsuperscript{29} agencies perceive value-laden comments as less likely to support a successful legal challenge.\textsuperscript{30}

Lack of meaningful public participation in agency rulemaking is problematic not only because participation itself is democratically valuable, but also because public participation can provide relevant information, inform decision makers of public values and preferences, and confer legitimacy on agency actions.\textsuperscript{31} Together, agency ossification, inaction, and imbalanced rulemaking processes create an agency that fails to act as often as it should, and that is less effective when it does act.

\section{C. The Limits of Regulation}

Finally, the government’s struggles to address environmental challenges suggest general limitations to the ability of conventional regulation alone to adequately respond to these challenges. The “New Governance” school of thought recognizes the growing significance of non-state actors and diverse policy instruments to address public problems alongside or in collaboration with government.\textsuperscript{32} Broader governance efforts, as exemplified by voluntary regulation and environmental certification, can foster coordination, innovation, and adaptation while tapping into the energy and resources of stakeholders, nongovernmental organizations (“NGOs”), and the public.\textsuperscript{33} At the same time, however, these governance mechanisms can raise serious

\textsuperscript{28} Mendelson, \textit{supra} note 13, at 1359.
\textsuperscript{29} Id. at 1347.
\textsuperscript{30} Wagner, \textit{Administrative Law, supra} note 16, at 1387-88.
\textsuperscript{33} Lobel, \textit{supra} note 32, at 345, 375.
concerns regarding effectiveness, transparency, and accountability. Finding ways to put these mechanisms to good use while attending to such concerns is essential.

II. THE CASE FOR ENVIRONMENTAL ADVOCATES

This Part proposes the establishment of new offices within the EPA—“environmental advocates”—to serve two critical needs suggested by the preceding discussion. One type of advocate would represent statutory beneficiaries or underrepresented groups in rulemaking processes. A second type of advocate would review the EPA’s performance more generally and recommend new initiatives or reforms to problematic processes and practices. While patterned after traditional ombudsmen, these new offices would have a broader mission and would not be limited to responding to specific complaints.

A. The Traditional Ombudsman

As a government official whose function is to take positions contrary to government agencies, the traditional ombudsman offers a useful starting point for considering the design and role of the proposed environmental advocates. Typically, an ombudsman is a public official who receives and investigates complaints regarding the conduct of government and makes recommendations for improving its operation.\(^\text{34}\) The concept originated in Sweden, whose justitieombudsman was established by parliament to “‘supervise the observance of laws and statutes’ as they may be applied ‘by the courts and by public officials and employees.’”\(^\text{35}\) The current justitieombudsman’s powers include the right to make a formal note to parliament, conduct inspections, initiate disciplinary actions, and publish criticisms and recommendations regarding the operation of the government.\(^\text{36}\)

The ombudsman institution now found in many countries is tasked primarily with receiving, investigating, and helping to resolve individual citizens’ complaints regarding maladministration.\(^\text{37}\) The investigation of


complaints by ombudsmen, moreover, can help bring systemic problems
to the attention of agency officials, legislators, and the public.\textsuperscript{38} Although ombudsmen in different systems vary in organization, power,
and methods, they share several common features: independence,
flexibility, and a lack of authority to impose a binding solution.\textsuperscript{39} This
last feature, lack of authority, forces the ombudsman to rely upon “the
power of report” to effectuate change.\textsuperscript{40} Ultimately, the appeal of the
ombudsman institution stems from its flexibility, informality, and
relatively low cost, as compared with more formal means of dispute
resolution.\textsuperscript{41}

The United States has adopted the ombudsman concept slowly.
Elected officials have been reluctant to allow others to intrude on the
delivery of constituent services, and public employees have been wary
of additional supervision.\textsuperscript{42} Nonetheless, ombudsmen can be found
within federal, state, and local governments, as well as in quasi-public
and private institutions.\textsuperscript{43} Examples of federal ombudsmen include the
Taxpayer Advocate Service (“TAS”) of the Internal Revenue Service
(“IRS”), which focuses on assisting taxpayers in disputes with the IRS,
and Food and Drug Administration ombudsmen, who handle disputes
from regulated industry regarding drug applications and the like.\textsuperscript{44}

The TAS illustrates the potential benefits of an effective
ombudsman. The TAS consists of 2,000 caseworkers and data analysts
who are overseen by a national taxpayer advocate appointed by the
Secretary of the Treasury. The TAS’ central function is to assist in
resolving taxpayer complaints and to serve as a check on the
inquisitorial and highly automated system of tax administration.\textsuperscript{45}
Although the TAS may, under appropriate circumstances, issue orders to
stay IRS enforcement against a complaining citizen, the TAS has
generally relied instead on less coercive means to resolve disputes.\textsuperscript{46}

\begin{itemize}
\item 38. Seneviratne, \textit{supra} note 34, at 19.
\item 39. Harden, \textit{supra} note 34, at 201-02.
\item 40. David R. Anderson & Diane M. Stockton, \textit{Federal Ombudsman: An Underused
\item 41. Harden, \textit{supra} note 34, at 201; Seneviratne, \textit{supra} note 34, at 17.
\item 42. Anderson & Stockton, \textit{supra} note 40, at 278.
\item 43. \textit{Id.} at 287.
\item 44. See, e.g., \textit{OMBUDSMAN 2011 ANNUAL REPORT} (FDA Ctr. for Drug Evaluation &
Research, Silver Spring, MD), at 4.
\item 45. 26 U.S.C. § 7803(c) (West 2013) (establishing Office of the Taxpayer Advocate); Bryan
Camp, \textit{What Good Is the National Taxpayer Advocate?}, 126 TAX NOTES 1243, 1249 (Mar. 8,
2010); McDonell & Schwarz, \textit{supra} note 11, at 1655; Elizabeth Dwoskin, \textit{Defender of Last
\item 46. Camp, \textit{supra} note 45, at 1252-54.
\end{itemize}
The TAS not only handles individual cases, but also promotes policy reform by proposing administrative and legislative changes, issuing an annual report to Congress, and disseminating its research widely.\textsuperscript{47} As described by one commentator, the TAS’s mission is “to continually present the taxpayer point of view to other subcomponents within the agency as a balance, counterweight, or check to insular thinking and the enforcement mentality that often pervades inquisitorial systems.”\textsuperscript{48}

The EPA has had some limited experience with ombudsmen. The 1984 Resource Conservation and Recovery Act (“RCRA”) amendments required EPA to establish a national Office of the Ombudsman to receive complaints and requests for information with respect to EPA’s hazardous waste program.\textsuperscript{49} Although the position was statutorily authorized for only four years, the EPA continued the office until 2002 as a matter of policy. The EPA even expanded the office’s scope to include the Superfund program, and established regional ombudsmen as well.\textsuperscript{50} In its early years, the national ombudsman primarily provided information and addressed concerns regarding the interpretation and enforcement of hazardous waste regulations.\textsuperscript{51} In later years, its focus shifted to investigating malfeasance at Superfund cleanups.\textsuperscript{52} The national ombudsman office was eliminated in 2002, however, apparently as a result of conflict between the Office of the Ombudsman and the EPA administrator.\textsuperscript{53} The regional ombudsmen, which were renamed “Regional Public Liaisons,” continue to be responsible today for providing information and resolving complaints pertaining to the Superfund and hazardous waste programs, but their efficacy has come into question.\textsuperscript{54} In addition to the regional ombudsmen, an EPA small

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{47} 26 U.S.C. § 7803(c)(2); Camp, supra note 45, at 1254.
\item \textsuperscript{48} Camp, supra note 45, at 1249.
\item \textsuperscript{49} 42 U.S.C. § 6917.
\item \textsuperscript{50} GENERAL ACCOUNTING OFFICE (GAO), EPA’S NATIONAL AND REGIONAL OMBUDSMEN DO NOT HAVE SUFFICIENT INDEPENDENCE 1 (2001) [hereinafter GAO].
\item \textsuperscript{51} Anderson & Stockton, supra note 40, at 319-20; see generally OFFICE OF OMBUDSMAN, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, EPA, HAZARDOUS WASTE OMBUDSMAN HANDBOOK (1987).
\item \textsuperscript{53} See id.
\item \textsuperscript{54} EPA, REGIONAL PUBLIC LIAISON PROGRAM GUIDANCE, OSWER 9200.1-106 (May 2011) (describing duties of liaison); EPA, FY 2010 REGIONAL PUBLIC LIAISON ANNUAL REPORT, OSWER 9200.0-79 (2011) (reporting that two of ten liaison positions were vacant and that liaisons handled less than a dozen cases, including information requests); EPA OFFICE OF INSPECTOR GENERAL, REGIONAL PUBLIC LIAISON PROGRAM NEEDS GREATER FOCUS ON RESULTS AND CUSTOMER AWARENESS 6-7 (2009) (observing that implementation of liaison functions “is a
\end{enumerate}
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business ombudsman serves as a liaison in disputes between the EPA and small businesses, provides technical assistance to small businesses, and advocates for small business in EPA rulemakings.55

The EPA’s national ombudsman office was criticized in a Government Accountability Office (“GAO”) report for failing to satisfy professional standards that might have ensured its independence and impartiality. Specifically, the national ombudsman was located within the organizational unit that it was responsible for investigating, and the ombudsman was subject to that unit’s budget, staffing, and supervisory decisions.56 The national ombudsman also did not issue an annual report that might have fostered accountability.57 The GAO report found EPA’s regional ombudsmen to be even less independent and effective, as employees assigned to the position divided time between their program function of implementing hazardous waste programs and their ombudsman function of investigating those same programs.58

B. A Broader Role for Agency Outsiders: Regulatory Contrarians

The TAS and EPA ombudsmen are traditional ombudsmen focused on receiving and resolving complaints by regulated parties. This model of a reactive ombudsman assumes that complainants require relief from a heavy-handed or unresponsive bureaucracy.59 However, there are broader functions and roles that ombudsmen-like officials can undertake. Professors Brett McDonnell and Daniel Schwarz have coined the term “regulatory contrarians” to generally describe entities that are “affiliated with, but independent of, a . . . [regulator and that have] the task of monitoring the regulator and the regulated marketplace and publicly suggesting new initiatives or potential structural or personnel changes.”60 Regulatory contrarians include not only traditional ombudsmen, but also: (1) “consumer representative contrarians” or “proxy advocates,” whose primary function is to represent consumers or the public as a class, rather than to handle individual complaints; and (2) “research contrarians,” who have the autonomy to produce independent

56. GAO, supra note 50, at 2-3, 7-9.
57. Id. at 3.
58. Id. at 3.
59. Cf. HAZARDOUS WASTE OMBUDSMAN HANDBOOK, supra note 51, at 1-1.
60. McDonnell & Schwarz, supra note 11, at 1632-33.
research specifically aimed at identifying new problems for the agency to address.61

1. Proxy Advocates

A common example of a proxy advocate is the Offices of Public Counsel established by many states in affiliation with their public utility regulators.62 The California Division of Ratepayer Advocates ("DRA"), for example, is charged with representing the interests of public utility customers before the California Public Utilities Commission and other forums in proceedings that affect the rates, reliability, and quality of utility services.63 The DRA’s objective is “to obtain the lowest possible rate for service consistent with reliable and safe service levels,”64 and the DRA files pleadings in a range of formal and informal proceedings, including applications to raise rates, investigations, rulemakings, and complaints.65 At the federal level, the recent financial crisis led to the inclusion of similar proxy advocate mechanisms in the 2010 Dodd-Frank Act. These mechanisms include a Consumer Advisory Board, a body composed of consumer interest advocates that advise and consult with the regulatory agency (the Consumer Financial Protection Bureau) to protect consumers. In addition there is an Investor Advisory Committee, which advises and consults with the Securities and Exchange Commission on protecting investor interests.66 These advisory bodies are required to meet at least twice per year and are located within the agencies they advise.67

Proxy advocates are intended as a corrective to public choice dynamics by advocating on behalf of consumers or other diffuse groups who cannot adequately represent themselves before administrative

65. DRA 2011 ANNUAL REPORT, supra note 63, at 9-11.
agencies, particularly in ratemaking proceedings. Such groups are generally “less able to organize, less able to participate in technical agency proceedings, and less likely to be heard by agency decision makers.” Historically, the need for proxy advocates was commonly recognized in the context of public utility regulation, where competition was often unavailable as a means of protecting consumers, and where the disparity between the participatory capacities of regulated entities and other interests tended to be especially large. Proxy advocates typically are tasked with addressing matters that directly implicate consumer welfare and that are already the subject of agency proceedings.

The institution of the proxy advocate must be carefully designed if it is to fulfill its intended function. Like the agencies before which they appear, proxy advocates are dependent on public support and vulnerable to industry capture. Moreover, proxy advocates who represent broad constituencies may have to contend with conflicting obligations and competing constituencies, and in the process may fail to represent those groups most needing proxy representation.

2. Research Contrarians

In addition to acting as advocates for underrepresented interests in agency proceedings, regulatory contrarians also may act as research contrarians, seeking to improve agency performance more broadly. The Dodd-Frank Act creates a number of offices relating to financial reform that might be described as research contrarians. For example, the Office of Financial Research is responsible for collecting data, identifying potential sources of systemic financial risk, and bringing its analyses to the attention of Congress and the Financial Stability Oversight Council, a newly created council of agency heads that must meet regularly to consider inadequacies of existing regulation. Another office, the Federal Insurance Office, is responsible for monitoring the insurance industry and “identifying issues or gaps in the regulation of insurers that could contribute to a systemic crisis.” As these examples suggest,

68. Stein, supra note 61, at 515; McDonnell & Schwarcz, supra note 11, at 1658.
69. Stein, supra note 61, at 533.
70. Id. at 522-23.
71. McDonnell & Schwarcz, supra note 11, at 1658, 1660.
72. Stein, supra note 61, at 546.
73. Id. at 548-49.
74. McDonnell & Schwarcz, supra note 11, at 1670, 1674-75.
75. 31 U.S.C. § 313(c)(1)(A) (West 2013); McDonnell & Schwarcz, supra note 11, at 1671.
research contrarians have the leeway to investigate incipient problems and recommend administrative or legislative responses to those problems.

C. Proposal: A Public Advocate and a Reform Advocate at the EPA

What sort of regulatory contrarians would improve the EPA’s effectiveness and representativeness? As discussed in Part I, rulemaking processes suffer from a large disparity in participation and influence as between regulated entities and the public. This fact suggests the potential value of a proxy advocate who can represent the interests of the general public and counter the influence of regulated entities before and after a rule is proposed. For example, such an official, whom we might call a “public advocate,” could raise concerns about overlooked public health benefits and submit comments and data for the agency (and any reviewing courts) to consider.76 The proxy advocate might also choose to participate in proceedings other than rulemakings, such as permitting decisions, though its efforts should generally focus on agency action having the greatest scope and effect.

Underrepresentation is not the only need that a regulatory contrarian could address. The breakdown of the rulemaking process means that the EPA is not undertaking initiatives—whether in the form of rulemaking, rule enforcement, or otherwise—that it has the authority to undertake. In addition, the pace of technological and societal change, combined with the dynamic threat of climate change, suggests the utility of an early warning function that would alert the EPA and the public to emerging environmental threats or developments.77 In short, there is a need for an official who could carry out the functions of a research contrarian, whom we might term a “reform advocate.” An EPA reform advocate would have broad discretion to study issues relevant to the EPA’s regulatory functions, including but not limited to problems with existing regulatory processes.78

A number of institutional design issues should be considered with respect to designing the proposed EPA advocate offices. Independence and persuasive authority will be critical for any contrarian, whether a

77. Cf. David Rejeski, The Molecular Economy, 27 ENVTL. FORUM 1, Jan./Feb. 2010, at 40-41 (proposing “establishment of a high-level Early Warning Officer”); McDonnell & Schwarcz, supra note 11, at 1635 (contending that contrarian institutions “can improve the capacity of regulators to adapt to changing market conditions and structures”).
78. Cf. McDonnell & Schwarcz, supra note 11, at 1664-67 (discussing research contrarians).
research contrarian or proxy advocate. Ultimately, the offices should be designed to promote the essential characteristics of independence, credibility, and representation.

1. Independence

An effective contrarian must be independent of the EPA, willing to publicize the agency’s failings and take positions contrary to EPA officials and staff. The ombudsman literature suggests several factors that can affect the office’s independence, including qualifications, method of appointment, funding, and placement.

Requiring that the proposed EPA advocates have a minimum amount of expertise and other qualifications can reduce the risk that the advocates will be overly political. At the same time, the positions should not be defined so narrowly as to eliminate candidates who would bring an outsider perspective to the office. The TAS’ national taxpayer advocate, for example, must have “a background in customer service as well as tax law” and “experience in representing taxpayers,” but cannot have worked for the IRS for two years prior to appointment. Similarly, the EPA advocates should be required to have a background in environmental advocacy and environmental law or policy and should be made subject to similar employment restrictions.

For many state-level public utility proxy advocates, appointment by the executive or a lower-level executive official is common. Regulatory contrarians can also be appointed by the legislature or by a commission. Appointment of the EPA advocates by the EPA administrator would be far from ideal; such advocates may be reluctant to criticize the administrator or the EPA. One advantage of such an arrangement, however, is that it could be set up administratively and would require no congressional action. It thus may offer the most realistic option for establishing some sort of contrarian at the EPA in the present political climate. Greater independence for the EPA advocates might be provided through presidential or other high-level appointment,

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79. Id. at 1645-46.
80. McDonnell & Schwartz, supra note 11, at 1679-80; Anderson & Stockton, supra note 40, at 335-41; Stein, supra note 61, at 551-58.
81. Stein, supra note 61, at 553.
82. 26 U.S.C. § 7803(c)(1) (West 2013). The advocate is also prohibited from working for the IRS for at least five years after leaving the office. Id.
83. Stein, supra note 61, at 556.
84. Cf. Anderson & Stockton, supra note 40, at 335 (noting in 1991 that most federal ombudsmen were created by agency order). An administratively created advocate could also be administratively eliminated, of course.
as suggested by the national taxpayer advocate’s appointment by the Secretary of the Treasury. Such an arrangement would not necessarily guarantee independence, however, as the advocates and the EPA administrator, having been appointed by the same person, could well share similar views. Establishment and appointment of the advocates by the legislature (or one of its subcommittees), would be consistent with the traditional ombudsman model and more likely to promote independence. However, too great a level of independence may limit the advocates’ ability to persuade the EPA. Perhaps a hybrid approach would be preferable, in which the president appoints each advocate from a list of candidates approved by a congressional committee, or in which a congressional committee selects candidates identified by the president. Alternatively, a non-legislative commission composed of public officials and private citizens could identify qualified candidates for presidential selection. These latter options all separate the functions of nomination and appointment and thus would tend to promote a neutral selection process.

Funding to ensure independent advocates presents another difficult question of institutional design. On the one hand, funding through the EPA would leave the advocates subject to EPA control, as experience with the EPA’s RCRA ombudsman demonstrates. Direct budget appropriations from the legislature would offer independence from the EPA, but would also subject the advocates to annual budgetary battles. Independent advocates are not likely to have strong defenders in the budgeting process, and consequently would be vulnerable to underfunding or elimination. Ideally, the advocates would be supported by a dedicated and distinct source of funding, which would promote their independence. State proxy advocates are often supported through fee levies on regulated entities, and a similar levy could be used to support the EPA advocates.

The placement of regulatory contrarians within the bureaucracy also affects their independence. As noted earlier, the independence of EPA’s national ombudsman was compromised by its placement within the organization it was responsible for investigating. At the state level,

88.  Stein, *supra* note 61, at 557 (equating budgetary authority with overall control).
proxy advocates can be found in various locations within the executive branch: within the regulatory agency, but in a different division; within the attorney general’s office or an agency other than the one it is charged with investigating; or as a freestanding agency. Placement outside the agency generally promotes independence, but also creates a distance that can foster distrust and undermine the contrarian’s effectiveness. A balance between these competing interests might be struck by establishing the advocates as a separate division within the EPA, distinct from the programmatic offices whose work they will be evaluating. Such an arrangement would foster some degree of independence, while encouraging information sharing and relationships that can bring about beneficial reforms.

2. Persuasive Authority

Lacking the authority to compel an agency to adopt a particular course of action, regulatory contrarians must instead rely on their ability to persuade. A contrarian’s persuasive authority derives from its credibility as well as its capacity to attract the attention of agency officials and influential forces outside the agency. To be credible, a contrarian must be respected and well-qualified. Ideally, the appointment process would produce such contrarians. The selection of a respected contrarian is especially critical when the office of the advocate—and its reputation—is initially being established. Moreover, a contrarian’s arguments must be well-informed. Accordingly, the EPA advocates should have access to the information, practices, and culture of the agency and relevant environmental problems. Each advocate will have to rely heavily on the EPA’s expertise and information-gathering ability, but should also have a modest expert staff of its own that can reassess and supplement the EPA’s work. The separate staff, along with the advocate’s outsider

89. Id. at 554-55.
90. Anderson & Stockton, supra note 40, at 339. With respect to the TAS, for example, staff once rotated between functions as TAS and IRS employees. The clear separation of the two organizations subsequently mandated by Congress has eliminated the opportunity for IRS employees to experience and incorporate a more taxpayer-friendly view and “expanded potential for mutual distrust.” Camp, supra note 45, at 1250.
93. Institute of Governmental Studies, supra note 87, at 11, 14.
94. McDonnell & Schwartz, supra note 11, at 1648.
status, will promote an independent perspective that will contribute to the advocate's persuasive power, particularly outside the agency. Finally, the advocates can persuade by bringing outside pressure on the agency to consider their arguments and to respond to their concerns. Giving the EPA advocates access to the EPA administrator, White House officials, legislators, and media, along with the authority to speak publicly and issue public reports, will be essential to their empowerment.95

3. Representation

The purpose of having a proxy advocate would be to ensure representation in agency processes for those requiring it most. Similarly, a research contrarian’s function would be to give voice to unarticulated views. But who are those most needing such representation? One candidate is nature, whose interest is often defended by environmental groups, but which of course cannot speak for itself. Similarly, future generations would benefit from an official representative to articulate their interests. In either instance, however, the political viability of such an advocate would be doubtful because there would exist no direct constituency to defend its work. A more politically feasible possibility would be for the EPA advocates to represent the general public. The general public may present too broad a class to be effectively represented by a single advocate, however, due to its multiple and potentially conflicting interests. Defining the potential group to be represented too broadly can confuse a proxy advocate’s objective and leave diffuse interests at a disadvantage.96

There are several options for narrowing the interests that the advocates are to represent. One possibility would be to identify subpopulations that are systematically underrepresented in the political process and agency proceedings, and to assign an advocate to specifically represent those subpopulations. For example, an advocate might be tasked with representing vulnerable populations or raising environmental justice concerns.97 This approach has the advantage of being fairly straightforward, and it would be relatively easy to determine if the advocate strays from its defined mission. Another possibility would be to define an advocate’s role in rulemaking proceedings by

95. Id. at 1645.
96. Stein, supra note 61, at 549.
looking first to the provisions on which a proposed rule is based to identify a statute’s intended beneficiaries, and then comparing those beneficiaries with rulemaking participants to identify those interests needing representation. For example, in a proceeding to revise ambient air quality standards under Section 109 of the Clean Air Act, the advocate’s job would be to ensure adequate representation of public health and welfare interests throughout the process. While such a mechanism would tailor representation to particular proceedings, it could be somewhat cumbersome to administer and would involve a significant amount of discretion. Moreover, outside of rulemakings—as in the case of the reform advocate—the advocate’s role is less subject to easy definition. A final option would be to have the EPA advocates accept suggestions from the public or from a diverse committee regarding matters meriting further attention, and to allow the advocates broad discretion in deciding where additional representation is needed.98 Excessively broad discretion would be vulnerable to abuse, however, and would leave the advocates especially at risk of capture by regulated interests.

III. THE CASE FOR A PUBLIC ROLE IN ENVIRONMENTAL CERTIFICATION

Neither a more vigorous EPA nor vigorous advocacy by regulatory contrarians within the EPA will be enough to address our environmental challenges. Government resources and public support for traditional forms of oversight are limited. In addition, such oversight may not be politically or practically feasible for regulating the individual behaviors that are contributing significantly to environmental problems ranging from biodiversity loss to climate change.99 Efforts to protect the environment must embrace collaborative and multi-party governance.100

98. Use of an advisory committee would be comparable to the Investor Advisory Committee created by Dodd-Frank, which includes an Investor Advocate (an official with ombudsman duties comparable to the Taxpayer Advocate), as well as representatives of state governments, senior citizens, and individual and institutional investors. 15 U.S.C. § 78pp(b); McDonnell & Schwartz, supra note 11, at 1673.
100. Ruhl, supra note 99, at 425; see generally Lobel, supra note 32, at 371-404.
A. The Promise of Environmental Certification

One important multi-party governance tool for influencing individual behaviors is environmental certification, the use of which has risen dramatically in recent years. Companies and nonprofit organizations issue hundreds of environmental labels worldwide, covering food, forest products, and numerous other items. In the United States, companies desiring to label the carbon content of their products can choose from more than ten voluntary certification programs. The growing popularity of environmental certification reflects the fact that many consumers deem a product’s environmental attributes to be relevant to their purchasing decisions. In addition, the development of voluntary certification programs has enabled public and private actors to adopt procurement and permitting policies that favor more sustainable goods and services. Ultimately, well-designed environmental certification processes can encourage environmentally beneficial product substitution, improve production practices, and promote green innovation.

Voluntary environmental certification programs are unlikely to influence the operations of environmental laggards and cannot substitute for traditional government regulation. Moreover, the broader effects of these programs in promoting sustainability can be difficult to measure. But like regulatory contrarians, environmental certification schemes can complement traditional regulation, shift “power to the people,” and help to achieve outcomes that better reflect the public interest. The mechanisms by which regulatory contrarians and

105. TOWARD SUSTAINABILITY, supra note 102, at ES-9.
106. Vandenbergh, Dietz & Stern, supra note 104, at 4-5; TOWARD SUSTAINABILITY, supra note 102, at ES-6.
107. TOWARD SUSTAINABILITY, supra note 102, at ES-14.
108. Id. at ES-6 (noting paucity of empirical evidence on whether certification drives large-scale changes in favor of sustainability); Ralph E. Horne, Limits to Labels: The Role of Eco-Labels in the Assessment of Product Sustainability and Routes to Sustainable Consumption, 33 INT’L J. CONSUMER STUD. 175, 179-80 (2009).
environmental certification systems operate are very different, of course. Regulatory contrarians are proxies that stand for the interests of underrepresented groups in regulatory proceedings. In contrast, environmental certification empowers consumers to express their preferences about production processes and environmental practices directly through market transactions.\textsuperscript{109} While it would be erroneous to equate the preferences expressed in such transactions with choices made through democratic political processes, marketplace decisions undoubtedly have environmental impacts.

\textbf{B. Private Certification}

The private sector dominates environmental certification in the United States. Private certification allows the market to respond to consumer demand for green products. In addition, competing labels presumably can offer producers a range of certification options of varying stringency. Although certifiers conceivably could reach a consensus regarding appropriate criteria for certification, the proliferation of environmental certification schemes—and the varying standards the schemes apply—suggest a lack of consensus.\textsuperscript{110} The sheer number of certifications engenders consumer confusion regarding the meaning and significance of eco-labels.\textsuperscript{111} Exacerbating this confusion, the source of a label is often unclear because certification-like labels can be obtained with little or no testing by merely paying a fee.\textsuperscript{112} Confusion diminishes the information value of labeling and contributes to overall consumer skepticism towards environmental marketing claims.\textsuperscript{113} To the extent consumers are unable to distinguish between certifications, consumer confusion reduces the attractiveness of more


\textsuperscript{110} Fliegelman, *supra* note 103, at 1045-46 (discussing private environmental certification).


\textsuperscript{113} Harbaugh, Maxwell & Roussillon, *supra* note 112, at 1513.
rigorous labeling schemes and creates incentives for certification organizations to water down their standards. 114 Competing businesses and certification systems sometimes do draw attention to the weaknesses of certifications used or developed by rivals. 115 Similarly, NGOs may try to sort through the confusion on consumers’ behalf or pressure businesses to use more stringent certifications. 116 Nonetheless, consumers are confronted with a bewildering array of eco-labels.

Credibility, transparency, and accountability concerns also surround private certification systems. 117 Consumers generally cannot determine directly whether a product was produced in an environmentally friendly manner and must rely on certifiers to monitor environmental attributes for them. 118 Therefore, credibility is essential to the success of environmental certification. 119 If a certification is not credible, consumers will not be willing to pay a premium for certified products. The credibility of many environmental certifications is subject to doubt, however, not only because of consumer confusion, but also because producers typically pay for third-party certification. 120 In the absence of truly independent certifiers or independent oversight of certification systems, consumers have good reason to be skeptical.

Transparency can be a powerful means of bolstering credibility and countering pressures to weaken certification criteria. 121 Consumers or other third parties with access to information on certifiers’ finances, evaluation criteria, and monitoring processes, can assess the credibility of certification schemes for themselves. Unfortunately, many certification schemes suffer from a lack of transparency. For example, one study found over half of eco-labeling organizations “unreachable, difficult to reach, or uncooperative when asked about core metrics.” 122

116. Id. at 77.
117. McAllister, supra note 32, at 5.
119. Grodsky, supra note 114, at 211.
120. Id. at 209-10; Errol E. Meidinger, The New Environmental Law: Forest Certification, 10 BUFF. ENVTL. L.J. 277, 284 (2002-03) [hereinafter Meidinger, New Environmental Law] (suggesting that certifiers “are in effect public fiduciaries employed by the very private actors whose activities they are supposed to assess and monitor”).
121. Grodsky, supra note 114, at 213; Harbaugh, Maxwell & Roussillon, supra note 112, at 1513.
122. WORLD RESOURCES INST., supra note 104, at 14.
Information on certification inspections tends to be especially sparse, shrouded in concerns that confidential business information might be revealed.\textsuperscript{123}

Transparency, moreover, is a critical element of accountability and legitimacy.\textsuperscript{124} These qualities matter because certification schemes can influence formal legal mandates and serve as a form of regulation.\textsuperscript{125} Namely, these schemes set standards, determine compliance with those standards, and sanction noncompliance.\textsuperscript{126} As a form of governance, certification systems have a responsibility to society at large and to affected interests. Ultimately, private certification systems vary in the extent to which they engage industry members, governments, NGOs, and consumers.\textsuperscript{127} Yet in contrast to government regulators, certifiers are not accountable—directly or indirectly—to the electorate.

C. The Government and Environmental Certification

1. Present Involvement

The federal government presently provides environmental certifications in limited areas.\textsuperscript{128} Perhaps most familiar is the Energy Star program, under which the EPA offers an “Energy Star” designation for appliances, office equipment, new residential buildings, and various other products meeting specified energy efficiency standards.\textsuperscript{129} Similarly, the EPA’s Water Sense designation recognizes water-using products meeting EPA-determined efficiency and performance criteria.\textsuperscript{130} For both programs, participation is voluntary, specifications are developed with stakeholder input and public comment, and an

\begin{itemize}
\item \textsuperscript{123} Meidinger, \textit{Administrative Law}, supra note 115, at 81.
\item \textsuperscript{124} Errol E. Meidinger, \textit{Environmental Certification Programs and U.S. Environmental Law: Closer Than You May Think}, 31 ENVTL. L. REP. 10,162, 10,164 (2001) [hereinafter Meidinger, \textit{Environmental Certification} (characterizing public access to information as “the most important mechanism for protecting the legitimacy of government regulatory agencies in the modern era”).
\item \textsuperscript{125} Meidinger, \textit{ supra } note 124, at 10,165-66, 10,176 (“certification programs perform public functions”).
\item \textsuperscript{126} Forest certification, for example, has been described as “a transnational, rule-oriented system made up of competing, mutually adjusting organizations and institutions.” Meidinger, \textit{Administrative Law}, \textit{ supra } note 115, at 60.
\item \textsuperscript{127} \textit{TOWARD SUSTAINABILITY}, \textit{ supra } note 102, at ES-13; Meidinger, \textit{Administrative Law}, \textit{ supra } note 115, at 82-83.
\item \textsuperscript{129} McAllister, \textit{ supra } note 32, at 18-19.
\end{itemize}
independent third party certifies products. Importantly, both programs are product-based schemes that focus narrowly on one environmental impact from use—i.e., energy consumption in the case of Energy Star, and water consumption in the case of Water Sense—rather than on overall environmental impacts over the life cycle of a product.

Beyond such programs, government involvement is largely limited to Federal Trade Commission (“FTC”) policing of the market for deceptive practices. Since 1992, FTC guidelines, known as the Green Guides, have assisted marketers in avoiding misleading environmental marketing claims by suggesting practices that qualify for safe harbors against prosecution. The Green Guides have focused primarily on the use of specific language regarding the environmental characteristics of a product or production process. However, the Green Guides do not constitute binding rules. In addition, the FTC has brought relatively few enforcement actions against green washing, and it has expressed a reluctance to engage in setting environmental standards.

The FTC’s recent revisions to the Green Guides for the first time specifically address claims relating to environmental certifications. The revisions state that a third-party certification may constitute an endorsement, and as such, must reflect the endorser’s honest opinion. They also recommend that certifications be accompanied by clear language explaining the specific environmental benefits that have been substantiated. In addition, marketers who rely on third-party certification must ensure that the certification adequately substantiates the marketer’s claims. Notably, in revising the Green Guides, the FTC did not propose the establishment of a particular certification system, or even guidance on the development of third-party certification programs. Thus, while the revisions may curb the making of

134. See generally 16 C.F.R. § Part 260.
137. Id. at 62,126-27 (setting out 16 C.F.R. § 260.6).
138. Id.
139. Id. (setting out 16 C.F.R. § 260.6(c)).
unsubstantiated claims, they are unlikely to reduce consumer confusion or ensure real environmental benefits.140

2. Potential Benefits of Further Involvement

Greater government involvement in environmental certification can address many of the concerns that surround private certification.141 Such involvement might simply take the form of stepped-up policing of private certification programs. Alternatively, the government might directly set standards, certify that processes and products meet those standards, accredit certifiers, or select a board of directors to operate a certification program.142 Although stepped-up policing of private certifiers may discourage green washing and increase transparency, more direct government participation will likely be necessary to reduce consumer confusion effectively. Accreditation of private certification systems can reduce credibility concerns by ensuring that certifiers are independent of the companies whose products are being certified. In a market where multiple standards are overwhelming consumers, government sanction can create a “focal” standard having clearly defined requirements that would restore much of the information value of labeling.143 The Energy Star program provides one illustration of a government standard that has attracted considerable participation from major manufacturers, while gaining broad public recognition and confidence.144 Indeed, a focal standard may be valuable even if consumers are not aware of the precise criteria underlying it. Consumers may come to expect that the standard be met, and they may draw

141. Grodsky, supra note 114, at 206.
142. Meidinger, Administrative Law, supra note 115, at 60 (discussing components of certification systems); Grodsky, supra note 114, at 207-08 (sketching out hybrid model of certification).
143. Harbaugh, Maxwell & Roussillon, supra note 112, at 1520; Crespi & Marette, supra note 118, at 101.
negative inferences about products that only obtain alternative certifications.\footnote{Harbaugh, Maxwell & Roussillon, \textit{supra} note 112, at 1520.}

Government involvement also can alleviate other difficulties associated with purely private certification. A government-run program can provide greater accountability because it would be subject to public disclosure requirements and ultimately responsible to the public.\footnote{Grodsky, \textit{supra} note 114, at 206 (suggesting that a purely governmental program would be subject to the Administrative Procedure Act).} Government certification programs also tend to incorporate concerns of a wider range of stakeholders.\footnote{\textit{Id.}; Horne, \textit{supra} note 108, at 179.} Finally, government support can foster financial stability and long-term viability.\footnote{\textit{Id.}} An examination of certification programs worldwide found those with significant government involvement to have generally higher levels of market penetration.\footnote{\textit{Id.}}

The U.S. organic food labeling program and Germany’s Blue Angel environmental certification scheme illustrate the potential benefits of government involvement in certification. U.S. Department of Agriculture (“USDA”) implementation of national standards for organic food has spurred dramatic growth in the organic market and led to widespread acceptance of the organic label.\footnote{\textit{Id.} at 31, 33; Jason J. Czarneski, \textit{The Future of Food Eco-Labeling: Organic, Carbon Footprint, and Environmental Life-Cycle Analysis}, 30 STAN. ENVTL. L.J. 3, 14-15 (2011).} Central to the program’s success has been the reduction of consumer confusion regarding the meaning of the term “organic,” which had been plagued with misleading claims prior to creation of the government program.\footnote{Fliegelman, \textit{supra} note 103, at 1025-26.} Although the program has been criticized for ignoring the organic movement’s vision of small-scale production, humane practices, and environmental stewardship,\footnote{J. Heckman, \textit{A History of Organic Farming: Transitions from Sir Albert Howard’s War in the Soil to USDA National Organic Program}, 21 RENEWABLE AGRICULTURE \\& FOOD SYSTEMS 143, 148 (2006).} the program undoubtedly has achieved its aims of reducing confusion and satisfying consumer demand for foods produced with fewer chemicals.

Germany’s Blue Angel program similarly suggests benefits from government certification. Created in 1978, Blue Angel is the oldest environmental certification system in the world. Under the program, the German environmental agency helps to formulate technical criteria for certification. An “environmental label jury” composed of
representatives from industry, consumer and environmental groups, unions, and other interests approves and applies the criteria. The environmental minister primarily appoints jury representatives. The jury is responsible not only for choosing recipients of the certification, but also for determining the product groups eligible for labeling. The Blue Angel eco-label is widely recognized in Germany, and consumers value its independence.

None of this is to suggest that government certification systems are flawless. Wary of certification standards that can be satisfied by only a few of its members, industry will pressure government-run certification programs to generate watered-down standards. Industry may come to dominate the establishment of governmental certification standards, just as it has come to dominate rulemaking processes. The credibility of government certification may come into question if the government is perceived as having close ties to industry. In addition, a wholly governmental certification system would surely involve significant start-up and administrative costs. In contrast to the Energy Star and Water Sense programs, which focus narrowly on a single, readily testable product characteristic, a comprehensive environmental certification program would have to analyze production processes as well as multiple product characteristics.

Ultimately, these concerns suggest the value of a hybrid approach that incorporates both the government and the private sector. Government oversight can provide credibility and ensure that minimum standards for transparency and accountability are met. At the same time, leaving the administration of certification programs to independent private actors can provide insulation against industry pressure, allow greater flexibility, and reduce administrative costs. The potential value of having broad stakeholder participation in implementing a certification program, as in the Blue Angel program, is reflected by a study finding that consumers trust consumer and environmental

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156. Grodsky, supra note 114, at 206.
157. Crespi & Marette, supra note 118, at 100.
158. Savasta-Kennedy, supra note 140, at 883.
159. Grodsky, supra note 114, at 208; Savasta-Kennedy, supra note 140, at 883.
organizations the most to produce a credible eco-label.160

D. Proposal: Government Accreditation of Environmental Certification

Under a hybrid approach, government involvement in environmental certification systems could take a variety of forms. The government could step up its policing of green claims, with the EPA playing a lead role in defining the terms used by green marketers. An effective policing effort would require the government to expend substantial resources, however, in testing products and examining supply chains and production processes. A more prominent yet less demanding government role might involve regulation of the procedures followed by certification programs. The government might, for example, mandate information disclosure or public participation.161 In light of the importance of transparency in enabling citizens and third parties to interpret eco-labels and to monitor the certification process,162 requiring transparency in the development and application of standards is essential. However, because neither this approach nor stepped-up policing would create a focal standard, the consumer confusion would likely persist.

Perhaps the most promising means of generating a focal standard would be to establish a government program that would officially accredit certification systems already in existence. Although such an approach might be attacked for favoring a small group of certifiers, it would require the creation of only minimal new infrastructure. One precedent for sanctioning existing certification systems involves Underwriters Laboratories (“UL”), a nonprofit organization engaged in product safety certification. Initially funded by the insurance industry,163 UL is one of a handful of certifiers that the Occupational Safety and Health Administration (“OSHA”) has accredited to provide the testing and certification required by many of OSHA’s safety standards.164 In deciding whether to accredit UL or any other certifier, OSHA considers a certifier’s independence, ability to perform testing, control procedures, use of inspections to evaluate products and monitor

161. Meidinger, Environmental Certification, supra note 124, at 10,175.
162. Meidinger, New Environmental Law, supra note 120, at 285.
163. Grodsky, supra note 114, at 212.
proper use of the certifier’s mark, and procedures for producing objective findings and handling complaints. The EPA could consider similar factors in awarding a government seal to environmental certifiers. The EPA might also identify relevant environmental criteria and develop substantive standards that certifiers would be expected to apply. These standards, on the one hand, could be quite general—for example, recognizing no more than twenty percent of a market as the top performers with respect to an environmental criterion. On the other hand, the standards could be quite specific. For example, they could require consideration of carbon footprints or preclude certification for products that use or contain designated highly toxic substances. Such standards would help ensure that certifications actually promote sustainability, climate change mitigation, or other desired goals.

Alternatively, the government could set up a new certification program blending government direction with private implementation. Such a program might take a form similar to the proposed Eco-Labeling Act of 2008, which was circulated but never officially endorsed by Senator Dianne Feinstein. That proposal was patterned in part after the organic food-labeling program, which requires organic operations to be certified by third parties accredited by the USDA. Under the proposed Eco-Labeling Act, the EPA would determine the product categories generally eligible for green labeling and set up an eco-labeling board whose thirteen members would come from the government as well as manufacturing, environmental, consumer, scientific, and labor groups. The board would be responsible for accrediting independent certification centers, which in turn would set eco-label criteria for specific product categories, audit production facilities, and award a federal eco-label to products meeting those criteria.

A new, government-sponsored certification program along these lines would have the advantage of creating a single label under a single

165. 29 C.F.R. § 1910.7.
167. 7 C.F.R § Pt. 205.
168. Joe Kamalick, US Eco-Label Mandate on the Table, ICIS CHEMICAL BUSINESS, Oct. 27, 2008, at 13. Eco-Labeling Act §§ 3, 5. Toxic or dangerous products would be ineligible for the eco-label, as would products manufactured through processes likely to significantly harm human health or the environment.
governance structure. Unlike a purely government-run program, such a scheme would not require the creation of a substantial bureaucracy to test and certify products. 170 Although the organic label experience suggests that such a label could become established fairly rapidly, it is worth noting that the European Union’s eco-label program, launched in 1992, remains relatively unknown among European consumers despite substantial publicity. 171 Unless potentially competing labels are cleared from the field, a completely new government certification may suffer a similar fate.

IV. CONCLUSION

Establishment of environmental advocates within the EPA would counter biased rulemaking processes, provide a needed outsider perspective, and stimulate more vigorous use of existing regulatory authority. Government sanction of environmental certification systems would reduce confusion in green marketing and foster more effective consumer participation in the sustainability movement. These reforms are important steps toward shifting environmental decision-making power away from powerful economic interests and to the people, where it ultimately belongs.

170. Fliegelman, supra note 103, at 1048.