

A R T I C L E

Imagining Corporate Sustainability as a Public Good Rather Than a Corporate Bad

by Wendy E. Wagner

Wendy E. Wagner is the Joe A. Worsham Centennial Professor at the University of Texas at Austin School of Law.

Corporations have been criticized for their environmental misdeeds for over a century, so it is not surprising that many view corporate approaches to sustainability with skepticism. Reports of green-washing and other forms of misleading advertising by a handful of corporations only serve to reinforce this negative perception.

Based on this evidence of poor corporate behavior, a number of analysts have concluded that sustainability should be regulated in the same way as other industrial polluting activities. Just as laws require corporations to disclose information on their polluting activities because these activities are wrongs to society, so the thinking goes, corporations should be required to engage in an internal accounting of their unsustainable practices. Specifically, corporations should be required to assess the sustainability of their operations in standardized disclosures and take their resulting, publicly administered medicine, whether it involves being shamed in the marketplace or subjected to greater regulatory control with respect to resource use or disposal practices.

This Article argues that addressing corporate sustainability by putting the onus on corporations to assess the sustainability of their operations may get the solution exactly backwards, at least at this early stage in advancing sustainability. Rather than view the lack of sustainability efforts as another corporate bad that individual corporations should be required to redress, this Article suggests that corporate sustainability should be treated instead as a public good that becomes the government's responsibility to address, at least initially, by advancing knowledge and generating baseline information. Information about an industrial sector's sustainability profile—for example, a life cycle analysis of a typical facility—has clear public good

qualities associated with it. This type of assessment allows for cross comparisons between competitors, identifies areas for possible synergies among producing companies, and highlights areas that may ultimately deserve further regulatory oversight. Equally important, if sustainability analyses concerning various production processes and services are produced in the first instance by publicly funded, third-party experts rather than extracted from private actors, the resulting reports are more likely to be reliable, complete, and accessible to a wide range of stakeholders who can use them in public-benefitting ways.

Clearly, a key component to such a government sustainability program is greater information about corporate practices, and life cycle analysis ("LCA") offers a particularly robust measure for assessing sustainability. LCA begins where raw materials are produced, and follows the production process through transport and manufacturing to ultimate disposal of the product.¹ Its goal is to identify materials and burdens at each stage of the production process. By focusing on the design of production processes, rather than simple output adjustments, much greater environmental gains, as well as cost savings, are possible.²

The resulting information on corporate sustainability generated by robust LCA can provide valuable information to downstream consumers, insurers, investors, corporate partners, and others who ultimately keep the corporation in business. It can also inform internal practices; enhanced corporate self-assessment is one of the primary virtues of mandating information disclosures. Moreover, individual corporate decisions about production processes, when amalgamated, may yield a global market of goods and services which may be environmentally unsustainable. Until the relevant information is gathered and synthesized, how-

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1. See SCIENTIFIC APPLICATIONS INTERNATIONAL CORPORATION, LIFE CYCLE ASSESSMENT: PRINCIPLES AND PRACTICE 15 (May 2006) [hereinafter SAIC], available at <http://www.epa.gov/nrmrl/lcaccess/pdfs/600r06060.pdf>.
2. Nike, for example, redesigned shoes to reduce the use of glues or solvents. See, e.g., DELOITTE, LIFECYCLE ASSESSMENT: WHERE IS IT ON YOUR SUSTAINABILITY AGENDA? 2 (2009), available at http://www.deloitte.com/assets/Dcom-UnitedStates/Local%20Assets/Documents/us_es_LifecycleAssessment.pdf.

ever, the overall impact of corporate practices and the most promising areas for gains are obscured.

Given its virtues, many commentators are clamoring for greater incorporation of LCA into sustainability calculations. But just as LCAs offer great potential for advancing corporate sustainability, their information-intensive features introduce some formidable challenges. The first, and most significant, challenge lies in the fact that a great deal of the information needed to conduct LCAs is in the hands of companies, which may lack incentives to collect, analyze, or share information in a comprehensive way. A second challenge for LCAs lies in the considerable discretion of companies that select the methods for conducting them. Numerous international and nonprofit organizations have worked to improve the methods for conducting LCAs in ways that guard against sponsor discretion. Nevertheless, developing a prescriptive method that guards against all forms of bias is difficult, and methods that are too rigid run the risk of sacrificing innovation in the drive for reduced analyst discretion. A third feature of a robust LCA is its comprehensibility to a wide range of users, that, when left to the discretion of an interested party, may be manipulated. If a corporation conducts an LCA that reveals embarrassing information, for example, it enjoys considerable discretion to obscure the negative findings.³ Even when results are communicated clearly, the comprehensibility of LCA may be impaired if analyses cannot be cross-compared. Yet in most cases, this cross-comparison will only occur when facilities use the same models for their assessments, which they may not be inclined to do without external pressure.

Extracting reliable life cycle analyses from corporations is thus fraught with difficulty,⁴ but one simple move can help avoid this impasse: sustainability analysis can be reconceived as a public good rather than a responsibility that should be shouldered by corporations. Reconceptualizing life cycle assessments as public information helps sidestep the impediments to collecting reliable and comprehensible information identified above. It also manages to produce considerably more relevant, accurate, and potentially path-breaking types of analyses and recommendations in forms that would not occur if individual firms, who have a clear stake in the findings, were the primary source of this information.

At least four features of industrial LCAs closely associate them with public goods. First, it is not clear what LCA will reveal for any given industrial sector. As such, a LCA is just

as likely to provide general information about industrial practices and highlight issues for further study, rather than to expose specific information about the environmentally irresponsible practices of a particular company. Second, conducting LCAs and developing innovative solutions for more sustainable approaches constitute a type of good for which a firm is unlikely to realize a sufficient return on its investment, creating an incentive problem. Third, just as the benefits of LCA are broadly dispersed, the costs are concentrated. Data collection can be costly, and applying the methods of LCA requires expertise. Utilizing the outputs of LCA also requires an organizational structure that can act on the results, which adds still more costs. Last, the large-scale cost associated with developing methods, models, and databases and viewing problems more synoptically also favors a public good approach to LCA, since publicly produced assessments can identify areas for cross-fertilization and better allow for the diffusion of information as compared with private assessments.

Since LCAs come closer to being public goods than negative externalities, a disinterested public organization may be the most appropriate entity to produce them. Publicly administered LCAs would be based on an average firm within a particular industrial sector, much as is currently done by the Environmental Protection Agency (“EPA”) in setting technology-based air and water pollution standards under the Clean Water and Clean Air Acts. If this generic assessment reveals reasonable areas for improvements, then consumers, investors, shareholders, and regulators may begin to demand sustainability progress from firms. Individual facilities themselves will also learn of ways to operate more sustainably.

LCAs would be completed by respected experts who are independent but have access to internal corporate information. Ideally, much of the analysis would be done cooperatively with firms since the goal is to identify areas for improvement and possible cost savings. To the extent that life cycle analysts face opposition, information extraction tools could be used to secure reliable internal records.⁵ Because EPA has legal authority to access private records, it is perhaps best situated to conduct these life cycle assessments. It could also subcontract the work to a respected nonprofit body. The resulting industrial-sector LCAs could be peer reviewed and subjected to comments from the industry, and the expert assessor group would have complete independence in how to respond. Much like technology-based standards, the LCAs would also be updated at regular intervals or could be subject to more informal updating processes.

3. See, e.g., BRUCE M. OWEN & RONALD BRAEUTIGAM, *THE REGULATION GAME: STRATEGIC USE OF THE ADMINISTRATIVE PROCESS* 4–5 (1978) (describing these and other types of information-based strategies for controlling the message).

4. Cf. Sanford Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1, 9, 21 (2002) (noting that “mechanisms for dealing with uncertainty, ambiguity, and inequity in the distribution of information are poorly developed in both theory and practice”).

5. EPA, for example, has extensively used its information collection power under Section 114 of the Clean Air Act to obtain internal, industry information about processes that inform its selection of best technologies under the Clean Air Act. 42 U.S.C. §7414(a) (2006).

In conducting the assessment, the expert assessor should produce two different, bookend life cycle analyses for each industrial sector: (1) a reasonable worst-case life-cycle assessment and (2) the very best life-cycle assessment. The reasonable worst-case analysis would present the assessment for a typical facility that falls in the bottom third relative to its competitors with respect to the sustainability of its operations. The very best-case analysis would be based on the sustainability profile of an imaginary facility that employs all of the best sustainable innovations and process inventions that are reasonably available. This best-case sustainability profile serves not only to set a high bar but also to showcase the types of innovations that are possible.

Publicly prepared LCAs would operate much like penalty defaults. Using the worst-case assessment as a baseline, corporations would be able to distinguish their processes or boast of accomplishments that go beyond the laggard facilities in their sector. Corporations can then use this positive comparison in the market to gain a competitive edge with insurers, investors, and the public at large. A process for validating a corporation's claims in making these positive distinctions should also be established to provide added reliability to the firm's efforts to compare its processes against the publicly produced sustainability assessments. One difficulty that front-mover firms face is the challenge of distinguishing themselves in the marketplace in ways that can be trusted by outsiders. The public assessments suggested here should help limit the ability of facilities to exaggerate or green-wash, since they offer specific baselines against which a firm's boasting can be more readily compared.

A central entity could use these public LCAs to identify innovations across multiple industrial sectors, as well as gain a bird's-eye view of American production processes. The assessments are also likely to identify blind spots that are otherwise missed by regulatory approaches or voluntary incentives. For example, the assessments may highlight goods or services that are so costly to the environment that they should be significantly curtailed or even eliminated. Finally, centralized LCA can help identify and compare national differences in the sustainability of industrial operations.

There are a variety of supplemental LCA tools that could be developed by a centralized expert analyst body to reduce the costs to firms of conducting their own facility-based assessments. For example, a web-based model for a facility-specific LCA could be developed with user-friendly interfaces that allow corporations to insert a few parameters and then run the model. Commentators observe that "companies frequently look for simplified assessment tools that offer quick, approximate results," such as checklists and simplified calculators, and this type of model could fill that niche.⁶ Educational materials, including guides,

workshops, and symposia, might also be provided to help firms use the generic, industry-specific LCA for their facilities as a springboard to improving sustainability. EPA has already made progress in preparing these types of guides, but further outreach and education is needed since "[m]any companies do not see how life-cycle thinking can be applied to their specific operations—or even the benefits of doing so."⁷

In order to produce meaningful incentives for corporations to take sustainability seriously, the LCA could also be used as a baseline for imposing additional regulatory controls that encourage or require specific improvements. Firms might be "commanded" to reach certain sustainability goals in ways that parallel the technology-based standards of the Clean Water and Clean Air Acts. For example, all firms would be required to reach some mid- or best-available level of sustainability within their industrial sector through legislation. Alternatively, all firms in a sector could be charged a sustainability tax based on resource use and waste production of the reasonable worst-case life cycle (perhaps further adjusted by the size or production volume of the facility). Facilities that provide validated accounts of how they accomplish sustainability above this baseline could then earn tax credits. Companies that pioneer innovations in sustainable technologies or operations might not only enjoy even greater tax credits but also reputational benefits—for example, being officially certified by the EPA or a nonprofit as a leader in sustainable innovation.

The United States "does not have a sustainability strategy."⁸ The most promising proposals in the current economically and politically fragile climate are those that can be accomplished without political warfare and that build on progress in incremental ways. The proposal here could be a modest first step in the long march towards corporate sustainability. This information-generation approach develops a partnership with business that is in line with larger goals for enhancing corporate social responsibility in ways that go beyond what specific legal requirements can accomplish alone. By trading off detail and specificity in individual firm LCAs for comprehensiveness and more general illumination of the sustainability of diverse practices through industry-wide LCAs, progress can be made on the sustainability front more quickly. By producing large amounts of fresh and relevant information about corporate sustainability, consumers, investors, and other actors will be better able to evaluate the sustainability of corporations and, if necessary, demand change.

6. Claire Early et al., *Informing Packaging Design Decisions at Toyota Motor Sales Using Life Cycle Assessment and Costing*, 13 J. INDUS. ECOLOGY 592, 595 (2009).

7. D. ELCOCK, *LIFE-CYCLE THINKING FOR THE OIL AND GAS EXPLORATION AND PRODUCTION INDUSTRY* 72 (2007), available at http://www.evs.anl.gov/pub/dsp_detail.cfm?PubID=2154.

8. Alan Hecht, *The Next Level of Environmental Protection: Business Strategies and Government Policies Converging on Sustainability*, 8 SUSTAINABLE DEV. L. & POL'Y 19, 23 (2007).