"Environmentalism and the Right to Know Expanding the Practice of Democracy"

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Environmentalism and the right-to-know: Expanding the practice of democracy

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ABSTRACT


In recent years, the practice of democracy in America has expanded significantly through guarantees of public access to government information. This access, in turn, assures that government, along with other major institutions, remains accountable to the public even as the authority invested in these institutions continues to expand. This democratic expansion is clearest in the arena of environmentalism.

Throughout American history, 'information' has been recognized as an important component of democracy although it has only recently been embodied as an explicit instrument of public policy in the Freedom of Information Act and in environmental laws. Greater information access is intimately connected to greater public accountability. These two themes are perhaps best exemplified by environmental right-to-know laws. Environmental concerns have become a window into our broadening sense of participatory democracy.

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INTRODUCTION

Our thesis is a simple one. We are living in an age when the practice of democracy is appreciably expanding, and society's response to environmental concerns has contributed greatly to this trend. Environmental concerns have given rise to legislation and regulations which have made available unprecedented amounts of information on sources of pollution. The information, in turn, has itself become an instrument of policy, identifying new concerns, and providing citizens a greater degree of participation in environmental policy-making. Access to information — at first haphazard, then reluctantly guaranteed, then actively encouraged — has expanded the concept and practice of democracy by promoting greater public accountability. Accountability is an imperative as more and more authority becomes concentrated in private and public bureaucracies. Accountability has expanded beyond elected officials to include all mechanisms of government and, in a very significant way, non-governmental institutions that provide much of the fabric of our modern society.

These two notions — accessibility and accountability — are intimately entwined. Accessibility is an epistemological notion regarding states of knowledge, and the means of acquiring it. Accountability is a moral notion regarding our collective sense of responsibility. Both are essential in a working democracy. And both are strongly linked through the concept of information.

ACCESS TO INFORMATION: INSURING ACCOUNTABILITY

The American practice of democracy has undergone a significant change. It is less obvious than, say, the collapse of the Berlin Wall or the dismantling of apartheid, for it is part of our long-standing democratic history, rather than a dramatic and sudden occurrence. The principles of free speech and a free press embodied in our Bill of Rights have gradually expanded, so that we are now assured a freedom that is both basic and newly-defined — that of access to information.

Information is a major currency on which society operates, so that information access is a necessary safeguard for assuring public accountability. If we do not know what our government — or, more broadly, the institutions which constitute society — are doing, then the public is severely limited in its ability to criticize or hold responsible these same institutions. That these institutions have grown larger in recent decades, concentrating greater amounts of social power, is obvious. That information-access has played an important role in counter-balancing such concentrated power is less so.
We can see the importance of information access in the basic tenets of our political framework. One of the underpinnings of democracy is freedom of the press; a guarantee that all citizens have access to the facts and thoughts of an active news and information media. The central necessity of a free press is captured by Thomas Jefferson's famous quote: "...were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." To Jefferson, the press was the vanguard of liberty:

I am persuaded myself that the good sense of the people will always be found to be the best army. They may be led astray for a moment, but will soon correct themselves. The people are the only censors of their governors; and even their errors will tend to keep these to the true principles of their institution. To punish these errors too severely would be to suppress the only safeguard of the public liberty. The way to prevent these irregular interposions of the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people.

(Padover, 1939)

Jefferson recognized the importance not only of a free flow of information, but of the necessity of actively insuring that it be made available to "the whole mass of the people." This latter point is quite important, for information access means much more than just freedom of the press. For without the "full information" Jefferson called for, it is possible that a press that is perfectly free to say what it will, may find itself with little to say. If the news media are denied a means of gathering information on their government's activities, then a free and open press is hamstrung and becomes only a limited virtue.

The distinction between freedom of the press and accessibility to information is best seen by contrasting the U.S.A., which has a good deal of both, to a country with much of the former, but little of the latter. The Peruvian writer Hernando de Soto, author of The Other Path, graphically described to an interviewer a picture of a country with a press that is absolutely free, but has startlingly little information with which to do its work:

Peru has freedom. What it lacks is democracy. Let me tell you a few things you cannot do in Peru which you can do in practically any Western country. If I want to find out the organization chart of a ministry to see to whom I should address myself, I won't get it. If I want to find out what is on the next agenda of the regulatory commission, I won't get it. If I want to make sure that the next time they are going to spring legislation on me I will at least see draft legislation, I won't get it. The fact that all this information cannot be had in Peru means that not only am I, a citizen, uninformed but the press is uninformed.
In the West there is a humdrum, automatic flow of information to the press that allows newspapers to inform their readers. A free press means little in a country where democracy only means elections and not information.

(World Link, 1990)

This “humdrum” flow of information is indeed a crucial feature of our democratic society and one which, as we have said, has expanded in important ways in the environmental arena. Yet, it is difficult to pinpoint where and when in our democratic history the notion of a fundamental right to information actually arose.

The threads of access to information, and the resulting accountability that such access creates, are many and diffuse. Our notions of a ‘free press’ and ‘free speech’ emphasize freedom of expression, and recognize these freedoms as essential to fostering criticism, and criticism as essential to fostering government accountable to the public it serves. These principles are carried through in our judicial system, where the proceedings of the courts are open to all, with the presumption that access to the judiciary reduces the likelihood of abuse of judicial powers. An ‘open’ government is deemed an essential safeguard of liberty.

However, the distinction between a press that is free to express itself and a press (and a society) with open and ready access to government information is rarely made explicit: it is difficult to know, for instance, if Jefferson’s reference to giving the people “full information of their affairs” is meant to embrace the notion of a free press, or the more expansive notion of an open government with ready access to official information. We believe that those who were instrumental in giving shape to American democracy recognized the distinction that de Soto describes. There is an ample record in American history that an open government (precisely what is so lacking in de Soto’s description of Peru) is exactly what was desired in a secure democracy.

ACCESS TO PUBLIC INFORMATION: A BRIEF HISTORY

Although much has been written regarding free press and free speech, actual references to the importance of information access to the exercise of democracy are rare in American history, although not entirely absent. James Madison’s well-known sentiment that “...a popular government without popular information is but a prologue to a farce or a tragedy” (Evans, 1990) or Jefferson’s “Whenever the people are well-informed, they can be trusted with their own government” voice very important (and very American) sentiments about the necessity of information to the proper functioning of a democratic society.
In the absence of serious reflection on the question of ‘what is meant by information?’, it is easy to presume that these quotes were meant as a simple reference to the information conveyed by a free press and free speech. But we believe the intent of Madison’s and Jefferson’s sentiments was such that they would be quite comfortable with our present day, expanded notion of free access to information. A document entitled *A Treatise Concerning Political Enquiry and the Liberty of the Press* by Tunis Wortman (1800) gives eloquent expansion of the ideals expressed by Madison and Jefferson, and addresses directly the importance of public access:

It has been a question of the most extensive importance to the happiness of the human race...whether the mysterious arcana of State affairs should not be asidiously confined within the impenetrable recesses of the castle? It has been practically maintained by the advocates of mystery, that a people...will cease to retain a proper reverence for their public institutions, the moment the hand which conducts the machine is rendered visible...Such has been the language which has hitherto perpetuated the existence of despotism, and such the sentiments that have impeded the progressive improvement of society...It follows, that the only antidote which can be applied, is the progress of information: in every rational theory of society, it should therefore be established as an essential principle, that the freedom of investigation is one of the most important rights of the people.

(Wortman, 1800)

Wortman’s treatise embeds information access squarely in the context of the advancement of democracy. We have a right, Wortman maintains, not only to criticize the government, but to gain access to the “mysterious arcana” of government so that we may exercise appropriate oversight.

Although Wortman recognizes the importance of information to the right of inquiry, neither his work nor the quotes cited earlier have yet offered any guidance as to the meaning of ‘information’ itself. One has to look to fairly obscure historical detail to begin to glean answers to the question of the extent to which ‘information’ is treated as a fundamental right.

English common law granted citizens a limited right of access to public records, provided the citizen could demonstrate a legitimate interest in such records (Cross, 1953). The law did not define ‘public records’, nor did it establish criteria for what constituted a legitimate interest. These principles were transferred, their vagueness intact, to the emerging legal systems of the American colonies. The result was that the question of public access was left to hundreds of individual legal decisions in federal, state and local courts, creating a body of legal opinion, but no national consensus on when and how and for whom access was appropriate. Access, even when it was available, often took a fight. The accountability of our institutions to the
public, through access (by reporters or by ordinary citizens) to official records, was by no means guaranteed.

The important issue of what is really meant by ‘public accessibility’ and by ‘information’ was left largely unanswered; or rather, was answered thousands of times in court cases, administrative decisions, state legislatures, and other venues, weaving an incomplete and inconsistent fabric of public accessibility. Senate hearings in the 1950s documented scores of odd and often bizarre federal government practices of secrecy which denied public access to the memoirs of a Confederate Army general, kept confidential the information in call-in weather forecasts, would not de-classify a textbook of military intelligence methods used by George Washington, and refused to make public the telephone books of government agencies (O'Reilly, 1989).

It was not until the passage of the Freedom of Information Act in 1966 that the nation, almost two hundred years after its founding, had a law explicitly addressing information as its principle subject, and codifying both the principle of public accessibility for all citizens (regardless of their aims, interests or standing) and the importance of such access as a means of insuring accountability.

We can only speculate as to why the Freedom of Information Act came into being when it did. The veil of secrecy that fell over government activities during World War II was never fully lifted once the war came to an end, often frustrating the public in its expectation of an open and accountable government. The American Society of Newspaper Editors had a standing Committee on Freedom of Information at least as far back as 1950, and the phrase itself was a fairly common rallying cry among journalists in the late 1940s. Certainly, political momentum for a law insuring access to government records was further fueled by abuses of the public trust regarding the flow of information, such as the revelation of extensive FBI files on figures both public and private who could hardly be construed as enemies of the state.

A second wave of changing attitudes was also sweeping ashore. We were entering ‘The Age of Information’, a time when now-hackneyed phrases like “information is power”, “information management”, and “networking” were entering the national vocabulary. Although linked to the technological development of computers, the growing focus on information as a primary commodity, rather than a subsidiary tool, may well have contributed to the rise of the explicit use of information as an instrument of public policy.

Whatever the reasons, the Freedom of Information Act accomplished several things (however imperfectly – the Act is not without its shortcomings). It provided: (1) a guarantee of access to government information, (2) relatively clear-cut guidelines for when and how this access could be
limited, (3) a mechanism for access which lowered the threshold for acquiring information.

The last point allows information to be thought of in quasi-economic terms; there are both costs and benefits to acquiring access to government records, and these can be made greater or lesser as matters of public policy. It has been stated by two political scientists this way:

The small expected benefit [of acquiring information]... is virtually always outweighed by the costs of acquiring relevant information. Citizens therefore choose, rationally, to limit their acquisition of information to that information which can be obtained at zero cost. (Cohen and Rogers, 1983)

From this perspective, the Freedom of Information Act was the first deliberate policy effort at the national level to "lower the cost" of information access, a trend which was continued and strengthened by subsequent legislation.

ENVIRONMENTALISM AND THE EXPANSION OF DEMOCRACY

In many respects, the social mechanisms for guaranteeing – or restricting – access to information, and for fostering or inhibiting accountability are what defines the practice of participatory democracy. The daily practices of government – embodied in the millions of decisions routinely made by enormous bureaucracies – are instrumental in giving an operational meaning to democracy. A greater and greater concentration of personnel, money and authority in the hands of often isolated bureaucratic institutions represents a loss of the authority vested in the public. In the U.S., this growing authority of government bodies and private special interests has been offset by the emergence of a greater authority in the hands of ‘the people’.

What we mean by this is that our democratic society is always faced with a tension between representative democracy and true participatory democracy. In the former, the affairs of society are left largely in the hands of a few government representatives, with the exercise of democracy more or less limited to decisions made in the voting booth. A more participatory democracy allows for greater public involvement through the tools of accessibility and accountability. An even greater degree of participatory democracy is provided when social institutions actively promote citizen access and involvement. Our society has moved decisively in the direction of greater participation in recent years. Nowhere is this more clear than in the arena of environmentalism.
Figure 1 documents an expanding sense of both accountability and accessibility, particularly with regard to environmental concerns. The figure reveals first that accountability is more ancient than accessibility, appearing as a key principle in the Magna Carta. Second, it reveals that the American public's 'right to know' becomes much broader and more clearly defined with time. Third, there is a great gap in time between initial commitments to the principles of public access, and subsequent laws requiring that government and other bastions of institutional decision-making be accessible for inquiry. Fourth, that environmentalism is perhaps the clearest case where one sees the development of the right to know.

A spate of environmental legislation in the 1970s established the framework of government involvement in environmental protection, a framework which included both implicit and explicit recognition of the importance of information access as a means of insuring environmental accountability.

The Clean Water Act of 1977 is fairly typical of the environmental legislation of the decade in terms of assuring an open process of government decision-making. The law includes several provisions regarding information access. Section 101(e) reads in part:

Public participation in the development...of any...standard...shall be provided for...by the Administrator [of the Environmental Protection Agency] and the States. The Administrator...shall develop...minimum guidelines for public participation in such processes.

Section 402(b)(2)(B)(3) directs EPA to insure that water discharge permits issued by the federal government or by the States are managed in such a way as to:

...insure that the public...receive notice of each application for a permit and to provide an opportunity for public hearing before ruling on each such application.

And Section 402(j) further requires that:

A copy of each permit application and each permit...shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

These brief provisions, and others strewn throughout the 100 + pages of the Act, not only insure access to permit information and, more generally, to the entire process, but impose a series of requirements that begin to expand the notion of what access means and how it can be achieved. In particular, the above provisions:
Fig. 1. Expanding government accountability leads to an expansion of the public’s ‘right to know’.

- require that an explicit statement of policy and procedure be developed to ensure public participation in all stages of policy, rulemaking, and permit writing.
- provide the public with an opportunity to insist on public hearings prior to major decisions.
- impose the same degree of openness on State programs as required at the Federal level.
- recognize the widespread availability of photocopying machines, and provide for photocopying or other means of reproduction as a routine part of what is meant by information access.

This last provision is a direct acknowledgement of the importance of technologies for information management, and gives explicit guidance to EPA and to States as to what these technologies mean in terms of citizen access to information. While the provision is somewhat mundane in and of itself, it is tied to much larger issues. It is, in effect, a direct link between the broad principles of democracy, and the detailed practice of it. This provision can be seen as the forerunner of laws which appear in the 1980s and directly address the issue of information access to computerized data files.
The growing momentum of the use of information as a tool of environmental policy ultimately achieved a stature that many have deemed a revolution. At the federal level, this revolution is most clearly embodied in the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).

The political origins of EPCRA are very clear cut. The act grew almost directly out of the tragic accident in Bhopal, India in December 1984, when a tank ruptured at a Union Carbide India plant, releasing the poisonous chemicals methyl isocyanate. The resulting cloud of gas spread over the community of Bhopal, killing thousands and maiming tens of thousands. It was, by many measures, the worst industrial accident in history. The horror of the tragedy, the immediate fear of could-it-happen-here, the realization that several plants in the United States handle methyl isocyanate — including a Union Carbide facility with operations similar to those in Bhopal — led to calls for national legislation to insure the safety of industrial operations. EPCRA was created, debated, and steered through the legislative process with extraordinary rapidity, and by October 1986 was the law of the land.

But while Bhopal shocked the entire industrialized world into an awareness of the need for better chemical safety measures, EPCRA is a uniquely American solution to these concerns, one which stems from our long tradition of information access which, in recent years, had begun to coalesce in the environmental movement under the banner of ‘right-to-know’. An active campaign by environmental groups, labor unions, and local communities highlighted the public’s expectation of its right to know of toxic releases, and to become involved in policies regarding their control. Hence, EPCRA addresses not only ‘emergency planning’ spawned from the Bhopal tragedy, but also “community right-to-know”, a concept that has fundamentally altered the relationship between government, industry and the general public. The right-to-know aspect of EPCRA is realized in the creation of the Toxics Release Inventory (TRI).

The Toxics Release Inventory is a bit like filing taxes. Every year about 20,000 industrial plants around the country must file annual reports of their prior year’s toxic chemical releases: how many pounds of benzene were emitted to the atmosphere, how much mercury was shipped off-site for treatment, what chemicals were discharged into the river. There the resemblance ends, however, and the true power of TRI begins to emerge. All the information is entered into a federal computer (TRI forms are also sent to individual state agencies, which may create their own data bases as well) which anyone in the country can tap into, either directly with their own computers, or indirectly by making a telephone or written request to the government.
TRI clearly adds to an already heavy burden of government paperwork and regulation imposed on the business community: a company may spend several thousand dollars for each chemical it is required to report. Yet, it is hard to envision a more effective tool for increasing public involvement in decisions regarding toxic chemicals. If greater public access is accepted as a legitimate societal goal, then TRI is an efficient means of providing it.

TRI reinforces the precedent of access to information established by the Freedom of Information Act. Like FOIA, the federal right-to-know program insures public access to information — in this case, environmental data — mandated by federal law. But TRI also broadens the notion of accessibility in several important ways.

The act requires that TRI data be aggressively managed for accessibility. The government is required to maintain a computer database of information on toxic chemicals which is readily available to the public — a straightforward provision, but one which had never been mandated before. In addition, access is insured through what the act calls “other means”: printed reports, microfiche, floppy disks, and so on. Gaining access to TRI data is far simpler than filing a FOIA request, and requires far less familiarity with bureaucratic protocol. Once again, the ‘cost’ of gaining access to public information had been dramatically reduced.

TRI differs from other public-access provisions in another important way. Whereas previous laws only provided for access to information that existed in government files, EPCRA calls for the explicit collection of new data. What’s more, this new information is not intended to primarily serve government purposes (with public access as an after-thought) but is primarily for use by the public. Whatever use the data may be to the Environmental Protection Agency, or to state regulatory agencies, is secondary. TRI data is intended chiefly to serve the public’s right-to-know about toxic chemicals in their communities.

The Toxics Release Inventory speaks directly to our primary theme of information access, and to the institutional accountability that such access fosters. TRI — and more broadly, the law that created it — gives explicit direction to industry as to what types of information it must provide; to the government as to how to manage and make available such information; and to the public as to what its rights are in terms of information access. Once again, we find an environmental law embracing democratic principles and expanding them by defining democratic practice.

The accessibility part of TRI is apparent: new information, centrally located, widely disseminated and made freely and actively available to the community at large. The accountability aspect of the toxics inventory is a bit more subtle. The law contains no requirements for what must be done about toxic emissions: no permits, no environmental standards to be met,
no timetables, no mandated technologies. Yet, the law has given local communities a powerful voice to address toxic pollution. The public's use of TRI routinely accomplishes what some of the great muckrakers have done sporadically throughout our modern history - cast a spotlight on heretofore unknown conditions so that society can make informed decisions about what is proper and what is not.

The lever for this new-found public influence is the power of community indignation and corporate embarrassment for what the TRI spotlight reveals. Accountability stems from a host of concerns on the part of company managers releasing toxic pollution. Some of these are business concerns - fear of losing customers, potential economic liabilities, cost of new regulations, and so on. But some are personal concerns, for company managers attend the same parties, PTA functions, and town meetings as their neighbors, who have suddenly become much more knowledgeable about how a local industrial plant may be affecting their community. These pressures translate into new priorities as business decisions are being made: decisions which factor in a public sense of right and wrong as never before.

The result is a different corporate measure of things such as 'progress', 'safety', and 'environmental responsibility'. In the past, corporate environmental performance was often measured by environmental compliance - having one's permits in order, and operating within proscribed limits was the definition of environmental acceptability.

With the public thrust into the picture, compliance became only the minimal expected performance, and a new definition of 'acceptable' arose. TRI boils down environmental performance to a simple set of pounds-per-year numbers. If a company emits 50,000 pounds of benzene - a known carcinogen - into the atmosphere in one year, the public might understandably become more concerned if the releases increase to 100,000 the next year, grumble if releases remain the same, and feel some comfort if the numbers decrease from year to year. Environmental progress is equated directly with reductions in emissions. Prior to TRI, however, increasing emissions would not have been viewed by company management as a problem as long as the increases were within the bounds of existing environmental permits. And the increases would not have been known to the public at large.

In one respect, it is the government that is still held accountable to the community at large through the expanded framework of accessibility provided by TRI. The message of the public information can be paraphrased as: "Here are the releases of toxic chemicals that we, your government, are allowing under our current environmental laws and regulations. Do you, the public, find these acceptable?"
Clearly, however, TRI also provides the wherewithal for the public to do an end run around its government, and take the exercise of accountability directly to the source... in this case, the industrial sources of toxic chemical releases. The government does more than passively manage and make available the data collected under TRI; it is an active proponent of public use of the data. William Reilly, the Administrator of the U.S. Environmental Protection Agency, put it this way:

The information [in TRI] will no doubt raise concern about toxic releases. This is exactly what it is meant to do... The Right-to-Know law is empowering the public. Implicit in this power, I believe, is a responsibility-to-act. TRI is a tool... by which citizens can help improve their community's environment. Use the information to identify releases in your community. Involve your schools, local press, civic and business and conservation organizations. Express your concerns to facilities handling toxics, to industry trade groups, to local and state agencies, to your elected officials, and to us, at EPA.

(USEPA, 1989)

Let us put this in very concrete terms then. The Toxics Release Inventory has strengthened and expanded the practice of participatory democracy. Strengthened it by making important environmental information actively and easily available to the public at large. Expanded it by providing a direct channel of accountability, linking a public greatly concerned about toxic wastes to a government charged with regulating such wastes, and to the industrial community which is a major source of toxic releases.

None of this is meant to imply that TRI is without shortcomings. The law applies only to manufacturers, and does not capture sizable toxic pollution from other industrial activities such as mining, transportation, service industries, or even commercial waste management firms. Federal facilities are exempt from the law, as are small businesses. Not all of the information that environmentalists had wanted collected is contained in TRI. For instance, there is no data on inputs and commercial outputs of toxic chemicals.

These issues have been captured under a new rallying cry of 'the right-to-know-more' and have already led to legislation, the Pollution Prevention Act of 1990, which expands TRI data collection in some of these areas. Like TRI itself, the Pollution Prevention Act owes its existence largely to public interest groups and labor organizations that saw the need for expanded information access, and worked with sympathetic legislators in Congress to bring needed laws into being.

CONCLUSION

We have shown a trend in environmental laws toward providing greater access to information on releases of toxic chemicals. This is best expressed
by the concept of community right-to-know. One result of enhanced access is the imposition of an additional layer of accountability on companies that use toxic chemicals. The result of this interaction of access to information and accountability of institutions is a significant expansion of the practice of democracy.

Democracy, of course, is much more than a set of ideals or a guarantee of rights. It is a way of life that takes its shape from the uncounted numbers of individual actions at all levels of society (Tocqueville, 1848). Power ebbs and flows among branches of government, institutions, and the bedrock of the whole process known simply as ‘the people’.

Democracy, like science, can be envisioned as a self-corrective process (Dewey, 1939), one that creates a right-to-know law as a counter-measure to greater amounts of information becoming more and more sequestered in the recesses of government. To men like Jefferson, the experimental spirit of democracy lifted it above other forms of government. The making and revising of laws is experimental, and is aimed at promoting the welfare of the people. As in any process of experimentation, good and complete information is necessary for success. This is why the modern guarantee of a right-to-know strikes us as a necessary next step in the grand experiment of democracy.

But a guarantee of a right-to-know is no assurance that it will be used. While our age is clearly the age of information, this does not automatically translate into action and social consciousness. Americans believe in their right to know, but do not often exercise that right. Perhaps what is special with regard to environmentalism is the prospect that we are willing to put this right to use, and play a larger role in self-governance. What we are witnessing is an expanding sense of democracy – the evolution of democratic practice, social responsibility and the further appreciation of our ties to nature. The hallmark of such evolution is participation. Democracy necessitates participation, and environmental concerns highlight a greater sense of citizen involvement. For with the right to know there is also the responsibility to act, to do something about what one knows. Democracy extends beyond the political to the social and economic (Gould, 1988). The borders of our social world merge into the landscapes of our natural resources.

In conclusion, we witness two encouraging advances: one is a greater sense of participation in our democracy, the second is a greater regard for our natural resources. The two themes meet in environmental laws that provide access to information and accountability. But we recognize as well the difficulties involved in creating an expanded means of practicing democracy, and the difficulty in maintaining it through continued public involvement. For, as Spinoza (1668) cautioned, “all things excellent are as difficult as they are rare.”
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