

Second Generation Issues Committee Newsletter

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MESSAGE FROM THE CHAIR

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Welcome to another issue of our newsletter. We hope that you enjoyed the previous issue on trading programs. This issue focuses on an equally important aspect of environmental regulatory innovation – stakeholder involvement. Once again, Newsletter Vice-Chair Joe Dawley has brought together a first-class set of authors who offer diverse perspectives on a significant topic.

There is much to report since the time of our last Newsletter. To begin with, the ABA Section of Environment, Energy, and Resources has promoted our group from “Special Committee” to full “Committee” status as of September 2003. This means that we are no longer considered a provisional group but rather an integral part of the Section structure. Congratulations to those Committee members who have worked hard to bring us to this point and especially to George Wyeth of U.S. EPA, the first chair of our group, who led us so effectively during our initial two years of existence.

In addition to promoting us, the Section has given us a new name. We will be the *Innovation, Management Systems and Trading Committee*. Beginning in the fall this name will be incorporated into our publications and other activities. As the new name indicates, our Committee will have three main areas of focus: environmental regulatory innovation, EMS’s, and trading programs. We will be active on all three fronts in the year to come. For starters, we are putting on a program on trading at the 11th Section Fall Meeting, to be held in Washington, D.C., October 8-12, 2003. I encourage all Committee members to attend the panel and to make yourself known and say hello. If you have a particular interest in one of our three primary areas of focus, please let me know (dhirsch@law.capital.edu) and I will get you involved in our activities in that area.

Additionally, the Section has decided that our Committee should be grouped as a “general,” rather than an “environmental,” committee. The areas on which we focus – regulatory innovation, EMS’s and trading – have relevance not only for environmental law, but for energy and resources law as well. As a general committee, we will be better able to serve as a home to lawyers from all three practice areas. Our work already expands beyond the environmental field. At the Fall Meeting we will be co-sponsoring (with the Endangered Species Committee) a program

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Joseph M. Dawley, Editor**

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on innovative approaches under the ESA. We will continue to examine the ways in which innovation, EMS's and trading can be relevant to all three fields. Please send me your ideas for programs or other activities related to this.

Speaking of programs, I would like to welcome our new Programs vice-chair for 2003-04, James Conrad of the American Chemistry Council. Jamie has worked on and written extensively about regulatory innovation issues. He will be a valuable member of our leadership team. Welcome Jamie! We are also losing two terrific vice-chairs. Ira Feldman, our excellent Programs vice-chair for the past two years, has been appointed chair of the Sustainable Development, Ecosystems and Climate Change Committee. We look forward to a continued and strong partnership with Ira and his committee. Marylou Barton, one of the founding members of our group, is also leaving her position as At-Large vice-chair after three superb years of service. We appreciate all of Marylou's many contributions (including her outstanding tenure as Newsletter vice-chair) and look forward to her continued involvement with the group.

That's all for now. Enjoy this issue of the Newsletter.

MESSAGE FROM THE EDITOR

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Stakeholder involvement is a central component of second generation initiatives but it is rarely the central topic of discussion. Most attention is devoted to regulatory flexibility and superior environmental performance. This is perhaps due to the fact

that the regulators and the regulated are driving the issues most important to them. To shed a little more light on the stakeholder component of second generation initiatives, this Newsletter issue explores varying perspectives on the role stakeholder involvement plays in shaping environmental policy. This issue includes many interesting and provocative articles ranging from examination and evaluation of public participation initiatives to new developments in the public participation arena. I greatly appreciate the hard work of the contributors who have made this issue a reality and a success. Thanks for stopping by our Web page and taking the time to read our Newsletter.

E-GOVERNMENT AND THE ENVIRONMENT: NEW OPPORTUNITIES FOR POLICY AND PUBLIC PARTICIPATION

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Introduction

As e-commerce roared to life in the mid-1990s, dazzling investors and promising to change the country's economy forever, close on its heels came dramatic descriptions of a new e-democracy as well. According to Steve Case, chief executive officer of America Online, the Internet would offer "an unprecedented opportunity to reconnect people to the political process – by helping people become more informed citizens, by helping our elected representatives to be more responsive to those citizens, and by engaging more people in public policy discussions and debate." Daniel J. Weitzner of the Center for Democracy and Technology called the Internet

"a venue which comes closest to the one-to-one interaction among citizens, and between citizens and their government, which is all but absent from today's political landscape."

Despite its potential, the Internet has not yet wrought a revolution in democratic governance. However, in quiet corners of the federal bureaucracy, an evolution in public administration is taking place as the growth of the Internet converges with increasing interest in advancing public involvement in decisionmaking.

Enthusiasm for electronic democracy is driven by unique features of digital information and the Internet. Digital content is flexible, easily stored, and transported in a variety of media. Unlike telephone, television or radio, the Internet can share this digital information via many-to-many interactivity across geographic barriers with no intermediaries. These features have opened up interesting new opportunities for helping citizens understand and collaborate on the issues that affect their lives. In particular, there is significant potential for breaking down traditional barriers to information access, enhancing communication between the public and government, and creating new networks.

The Environmental Protection Agency (EPA) has been one of the most innovative federal agencies in experimenting with electronic enhancements to public involvement. The agency has broken new ground in using broad disclosure of data as a strategy for reducing pollution. EPA has also led the way in developing systems for electronic rulemaking and has great opportunities to expand electronic participation in permitting. New technology has created new roles and responsibilities for regulators, regulated entities, and public stakeholders in environmental policy and is likely to continue doing so. This article reviews the agency's experience with information disclosure,

electronic rulemaking and electronic enhancements to public participation in permitting, and identifies opportunities for the future.

Information Disclosure

One of the most notable innovations in environmental management in the past 15 years has been the use of environmental information disclosure as a strategy for improving firms' environmental performance. Critical to the success of such programs are relational databases that compile, aggregate and compare vast amounts of raw data, and the Internet, which brings that information to desktops around the world.

EPA's Toxics Release Inventory (TRI) – which provides broad public access to detailed, localized and customized information about industrial environmental performance – is the most recognized and copied information disclosure program. It has been called the first regulatory program to effectively take advantage of new information technologies and the Internet. From its inception, data was available electronically, first on electronic tapes, then CD-ROMS and now on the World Wide Web.

Originally intended to improve understanding of potential risks from industrial facilities, TRI surprised many by revealing that the releases it profiled were declining dramatically each year – by a total of 46 percent in the first 11 years of the program. Many analysts concluded that broadly disclosing environmental information could trigger pressure from communities, NGOs, the media, markets and firms themselves to reduce pollution. EPA came to call TRI “one of the most effective environmental programs ever legislated by Congress and administered by EPA.”

TRI launched EPA to the forefront of efforts to

use information provision as a regulatory tool and made disclosure one of the key strategic objectives of the agency throughout the 1990s. Other programs followed TRI, triggering intense political battles over what information would be provided in electronic databases and disclosed on the Internet. Risk management planning (RMP) provided detailed information on chemical accident risks and prevention, but concerns that terrorists would access such information ultimately kept the most sensitive information off of the Internet. Materials accounting was intended to provide information on how chemicals traveled through processes at industrial facilities, but opposition from industry helped scuttle the program. The Sector Facility Indexing Project (SFIP) successfully weathered controversy and was launched in 1998 as a Web site that provided facility-level enforcement, compliance and other data.

Opponents of these programs outlined three types of costs. Information collection and reporting would be expensive, they argued. Moreover, disclosure would leave policymaking up to an unpredictable and unknowing public rather than government managers. And, business competitors, terrorists, or others might access information easily and anonymously with ill intent.

Proponents countered these arguments by pointing to three types of benefits. First were “right to know” benefits based on people’s right to self-protection and therefore their right to information about the risks that they face. Second were informational benefits from data that revealed new opportunities, priorities and problems. Third were environmental benefits driven by a “shock and shame” dynamic by which new, comprehensive risk information shocked citizens, the media, agencies and markets into pressuring companies to improve performance externally and shamed companies themselves into driving change

from within.

Although many questions remain, there is little doubt that TRI and other disclosure programs have offered communities better access to information about risks they face and have made environmental policymaking a far more data-rich enterprise. Evidence is very fragmentary, however, on the important question of whether and how disclosure leads to improved environmental performance. After nearly 15 years of experience, analysts still haven't reached consensus on how much credit TRI can take for the decline in releases it has recorded since its inception, although most people would agree that it can take some credit. However, in other programs, such as SFIP, disclosure appears to have had little impact on facility performance.

Understanding the relative effectiveness of different disclosure programs requires a better understanding of the dynamics by which information leads to action. Direct pressure from communities, environmental advocacy groups and the media is the dynamic most people look to in order to understand how disclosure works. Yet firms make changes absent direct pressure, often in response to new information or perhaps in anticipation of future regulatory or public pressure. Some firms act simply to avoid disclosure programs altogether. Regulatory agencies may put increased pressure on firms as a result of disclosure. Evidence increasingly suggests that markets may put pressure on low-performing firms as well.

What is clear is information technology's role in making this innovative approach to policy a reality. None of the benefits of disclosure – nor, certainly, the anxieties about its costs – would exist without the capacity to build large electronic databases and make them available in a user-friendly manner to anyone with a computer and a modem.

Rulemaking

One of the key activities of regulatory agencies is rulemaking. Roughly 160 federal agencies issue over 4,000 regulations each year. According to the Office of Management and Budget, regulations issued just between 1995 and 2001 have cost the economy around \$50 billion each year and provided annual benefits of between \$48 and \$102 billion. EPA regulations account for the lions share of these benefits and costs.

Unbeknownst to many, rulemaking is one of the principal avenues by which the public influences government policy. According to a leading expert, it “may be the most complex and important form of political action in the contemporary American political system.”

After years of effort, this process is increasingly moving online. The OMB-led Online Rulemaking Initiative, now buoyed by the 2002 E-Government Act, is driving the standardization and integration of electronic rulemaking, replacing systems of varying scope and quality across the executive branch. Part of the motivation for moving toward electronic rulemaking is economic. A system in place at the Department of Transportation reportedly saves the department over a million dollars a year in administrative costs.

Electronic rulemaking also offers the potential to turn a static commenting process dominated by interests inside the beltway into a far more intensive deliberative process involving policy discussions among a diversity of citizens and groups around the country. Prospective technologies for electronic rulemaking are electronic dockets and electronic dialogues.

Electronic dockets allow people to submit comments online, and more sophisticated applications also allow people to read

comments submitted by others and access a wealth of background material. Evidence suggests that electronic docket systems can indeed bring new voices into the rulemaking process when a rule is publicly salient and intermediaries make the effort to reach out to communities of interest and encourage them to participate. However, online dockets have yet to show that they can make the commenting process more deliberative, with stakeholders engaging each other in reciprocal and reasoned discussions.

More promising for introducing deliberation into rulemaking are electronic dialogues. Such dialogues explicitly encourage back-and-forth exchanges by giving participants the opportunity to post messages to a Web site and to reply to messages sent by others, creating a “thread” or conversation. An asynchronous structure allows adequate time for considered reading and posting, as opposed to the real-time banter that characterizes Internet chat rooms. Dialogues typically offer broad, open access – available to anyone who hears of the opportunity and is interested enough to participate.

An electronic dialogue conducted in the summer of 2001 by EPA on public participation at the agency – called the National Dialogue on Public Involvement in EPA Decisions – showed that such dialogues can engage relatively large numbers of people in reciprocal policy discussions. A total of 320 people wrote 1,261 messages and another 900 people participated by reading the discussion. Although they were not necessarily a reflection of the demographic makeup of the United States, participants were representative of a broad set of interest affiliations, attitudes about EPA, and geographical locations. In contrast to the largely non-reciprocal nature of electronic dockets, 83 percent of all messages in the dialogue were part of threaded conversations.

Electronic dockets and electronic dialogues are steps in the right direction of bringing people together to discuss regulatory issues. Policymakers should be encouraged to continue putting all rulemaking materials online and moving the commenting process ever more closely to a deliberative ideal. In particular, agencies should be encouraged to use structured electronic dialogues on important rules. To do so, the Office of Management and Budget and possibly Congress need to clarify and resolve outstanding legal issues, and bureaucratic incentives need to be put in place. A concerted research program aimed at evaluating electronic rulemaking reforms is also critical in this early stage of change.

Permitting

Vying with rulemaking as the most important activity of environmental agencies is permitting. Public participation in the permitting process is the primary formal method by which local communities can influence firms’ environmental behavior. Such participation, however, is hampered by what one analyst calls the “complexity and relative invisibility” of the permitting process. Local groups don’t have the resources to track the highly convoluted and technical process and national NGOs tend to focus on broader policy issues.

While businesses have increasing opportunities to apply for permits online, there have only been isolated efforts to use information technology to improve long-acknowledged deficiencies in public participation in permitting. Electronic enhancements could make it easier for individual citizens or stakeholder groups to obtain information on permits and build capacity for analyzing and commenting on them. Ultimately, the aim is to level the playing field by giving citizens access to the information and expertise that companies, law firms, and consultants routinely have.

Opportunities to improve participation in permitting with electronic resources include the following:

- Notification of permit applications through e-mail lists, bulletin boards, and Web sites.
- On-line information repositories containing all materials related to the permit application or renewal.
- On-line resources, such as guides for understanding the permitting process, databases of permit decisions to help members of the public rate the merits of a particular application, and databases on facility compliance.
- On-line networks for sharing ideas and information.

EPA is somewhat limited in pushing for permitting reforms. Although nearly all EPA programs are based on permitting, most permitting programs are actually run by states, tribes or local government. Some of these entities are leading innovations. For example, 80 percent of air permit applications in New Jersey are now submitted electronically. Pennsylvania has recently launched its eNotice program, which among other things, alerts registered users about permitting activity in their area. EPA can be an important catalyst for these efforts by encouraging a culture of innovation, supporting innovative efforts, and sharing success stories among states, tribes and local governments.

Conclusion

Expanding information disclosure, integrating on-line dialogues into policymaking and rulemaking, and improving permitting are evolutionary, not revolutionary changes in administrative governance. However, they promise to enhance the relationship between citizens and government in important ways. Agencies can improve electronic democracy through experimentation and innovation

coupled with evaluation and deeper integration of electronic democracy into their fundamental operations.

As innovations in electronic democracy proceed at an accelerating rate, a number of issues need to be anticipated and addressed. First are concerns about equity and how to make sure that those separated from electronic processes by the “digital divide” are not disenfranchised. Second is accountability, including agencies’ accountability to how disclosed data is used and citizens’ and groups’ accountability to the views they express online, particularly because the medium makes it so easy to mask one’s true identity. Third is the issue of “information overload,” and how agencies and citizens can manage and comprehend vast new flows of information.

All of these issues need serious analysis and perhaps serious policy, but none should keep agencies from experimenting with new ways of using information technology to enhance environmental management. In the long run, the barriers to e-government and electronic democracy are not technical, but political, bureaucratic and societal. Agencies should do what they can to overcome these barriers through clearer programmatic goals, a culture of innovation that rewards bottom-up efforts, and increased outreach and assistance to those stakeholders that have traditionally been hardest to reach.

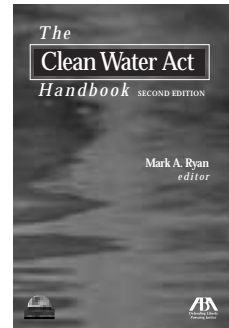
Author’s Note

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New from ABA Publishing and The Section of Environment, Energy, and Resources

The Clean Water Act Handbook, Second Edition **Mark A. Ryan, editor**

This updated guide is the definitive resource to the provisions and complexities of the federal Clean Water Act and how it continues to evolve. Recent court rulings and the change of administration have resulted in significant changes that dramatically affect practitioners working in the area. This new edition provides detailed explanations of these changes and considers the impact of recent court decisions, including the Supreme Court's decision in *SWANCC* and the Court of Appeals decisions in *American Mining Assoc.*, *Talent Irrigation*, and *Forsgren*, among others.



Beginning with an overview of the law's provisions and pertinent regulation and enforcement issues, the subsequent chapters address specific issues, such as:

- NPDES permits
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- Requirements applicable to indirect discharges
- The regulation of wetlands and the impact of recent judicial decisions
- Oil and hazardous substance spills
- Enforcement options under Section 309
- Judicial review

Chapters begin with a section on applicability and scope. Within each fully annotated chapter, clear explanations of specific statutory and regulatory provisions and court decisions applicable to the issue are presented in the order needed for full and accurate analysis – a virtual checklist of requirements and considerations. Making this new edition more useful than ever, the authors reference URL addresses for quick, up-to-the-minute information on government documents that are often difficult to locate.

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**THE NORTHWEST COLLABORATIVE
AIR PRIORITIES PROJECT:
A WORKING MODEL FOR THE
STAKEHOLDER PROCESS**

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The Northwest Collaborative Air Priorities Project (NW CAPP) and its recent Northwest Air Summit are excellent examples of the stakeholder process at its best. The brain-child of Barbara McAllister, senior advisor for the Office of Air Quality at EPA's Region 10, the NW CAPP was launched in 2002 as a community-based effort to address air quality issues in the Pacific Northwest by bringing together individuals and organizations from Alaska, Idaho, Oregon, Washington and Canada. The NW CAPP is governed by a Leadership Team that consists of a diverse group of leaders representing the broad spectrum of interests, including federal and state government, local air agencies, tribes, agriculture, business and industry, and health and public interest organizations.

In early June, 2003, the NW CAPP Leadership Team hosted a Northwest Air Summit in Seattle, Washington, bringing together nearly 200 delegates for a three-day workshop. Delegates to the Air Summit included citizen, business, public interest and governmental (tribal, federal, state, local) agency leaders from across the greater Pacific Northwest. Throughout the Air Summit, the participants worked together, learning about the issues, exchanging viewpoints, and building consensus as to what issues are important for the region. The intent was to develop five regional air priorities to focus on over the next 5-10 years. Ultimately, the Air Summit resulted in the identification of eight priorities for regional air quality in the Pacific Northwest and 17 "promising projects" for continued work.

Creating the Air Summit was a major task for Barbara McAllister and the NW CAPP Leadership Team. In planning for and creating the Air Summit, they were assisted by a Process Management Team, a Design Team, a Logistics Team and a Research and Information Team. Consultants assisted with planning and acted as facilitators during the Air Summit. The cost to put together the NW CAPP was significant – EPA contributed \$150,000 and the equivalent of approximately 4 full time employees over a two year period, while others contributed over \$120,000 and the time and expertise of hundreds of people throughout the greater Pacific Northwest. Significant donations were also made to the project by certain delegates to the Air Summit.

Educating the Delegates

On the first day of the Air Summit, the Leadership Team's goal was to educate the delegates so that everyone was aware of "what the issues are, why they are important, why others care and what the implications are for people and the ecosystem." Presentations were made regarding the history with air quality in the Pacific Northwest and Alaska, the health effects of air pollution, ecosystem effects of air pollution, and regulatory programs and initiatives. Delegates also had the opportunity to share perspectives with other delegates through roundtable discussions, and open forum question and answers. The day was followed by a "Learning Marketplace" where delegates could interact, discuss and discover more about air quality issues in the Northwest.

Recommending Priorities

On the second day of the Air Summit, the Leadership Team further educated the delegates with presentations, including presentations on national air toxics assessment, a geographic overview and future trends impacting air quality. Again, delegates

had the opportunity to participate throughout the day in roundtable discussions, and open forum questions and answers. The roundtables also created “mind maps” to capture the group’s thinking on the future trends that might impact air quality in the Pacific Northwest and Alaska.

Selecting Air Quality Priorities

Following the second day, a Turnaround Team made up of the NW CAPP Leadership Team and delegate representatives from all of the delegate tables worked through the early and late evening to review all of the comments, feedback and recommendations, and to integrate all of the thoughts and ideas into a statement of air quality priorities. Although the intent was to develop five priorities, the Turnaround Team ultimately came up with a list of eight priorities. In addition to the list of eight priorities, the Turnaround Team also developed a preamble to the priorities. The preamble reads:

We recognize that air quality issues are critical to our quality of life now and for future generations. Air quality issues are inter-connected with economic development, ecosystems, and environmental justice. Decisions must be supported by sound science. Economic prosperity and vitality are also important to achieve balance. We acknowledge, maintain, celebrate, and build upon our past successes in air quality and will focus on the following priorities for the next 5 to 10 years.

The priorities established were the following:

1. Reduce emissions from transportation, especially diesel and carbon dioxide, and support land use planning and alternate

transportation as tools.

2. Reduce emissions from stationary combustion sources.
3. Reduce risks from indoor air pollution.
4. Increase support for education and other means of encouraging the public to take actions to reduce air pollution.
5. Reduce health risks from outdoor toxic air pollutants, including identification of hot spots and primary contributing sources of toxic emissions.
6. Reduce greenhouse gas emissions that contribute to climate change.
7. Reduce health risks from toxic and other air pollution where people live, especially in minority, low income, rural and other under-represented communities.
8. Reduce risks to ecosystems, and tribal communities and their cultural resources, from toxic and other air pollution sources.

Developing Promising Projects

On the third day of the Air Summit, the Turnaround Team presented a revised statement of Air Quality Priorities reflecting the integration of the delegates input from the previous day. The delegates then worked together to identify what success would look like for each of the Air Quality Priorities, and small groups of delegates worked together to develop recommendations for promising projects that might be undertaken to move the Air Quality Priorities forward. These projects include:

1. Linking Land Use, Transportation and Air Quality
2. Workshop on Economic Incentives for Alternative Energy
3. Grassroots Collaborative Projects to Achieve (voluntary) Emission Reductions

4. Clean Diesel Initiative
5. Regional Smoke Management Coordination
6. Amend Building Codes/Materials/ Manufacturing Process
7. Consumer/Personal Products/ Manufacturing/Labeling
8. Develop Air Educational Curriculum and Implement K-12 School Program
9. Develop Complete Emissions Inventory for the Northwest
10. Proposal to Establish the Northwest International Air Quality Science Coordinating Committee
11. Healthy Buildings
12. Marine Vessels/Ports Emissions
13. Biodiesel Purchasing
14. Develop Educational Program on Burning
15. September 2003 Workshop on Air Quality for Producers and Small Businesses
16. Portland Hot Spots Project
17. Support Tribal Implementation of Air Programs

Each of the Promising Project Teams has a leader and a liaison to the NW CAPP Leadership Team. Promising Project Teams are now in the process of further clarifying their projects and putting together project proposals to be presented to the NW CAPP Leadership Team in October 2003. Those projects that remain promising will be further worked on over the coming years.

In conclusion, through careful planning, hard work and vision, and by bringing together stakeholders from all across the Pacific Northwest and Alaska, the NW CAPP Leadership Team has empowered and energized delegates to work together to set priorities, develop working project teams, and to collectively sustain momentum and progress to advance air quality improvement priorities.

PBLAC PUBLIC SERVICE PILOT UNDERWAY

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Last year, our Committee established a pilot program to provide legal support to communities undertaking second generation community-based environmental protection efforts. That program, the Pro Bon Legal Assistance for Communities (PBLAC) Pilot, is now successfully underway, with a network of volunteer attorneys willing to lend assistance to communities exploring innovative approaches to environmental protection and with community applicants receiving much needed pro bono legal support.

For example, Chris Davis and Randi Eisner of Goodwin Procter volunteered to assist the Jones River Watershed Association and its community partners in purchasing an historic site on the Jones River in Kingston, Massachusetts and converting it into the Jones River Marine Ecology Center. The purpose of the Center will be to promote and encourage education in marine and river science, habitat restoration projects, and eco-friendly water-based recreation and skills development, including such activities as small classic wooden boat building. The community partners hope to use the center as a base for environmental stewardship and education as well as to provide a place for community recreation.

In addition, the Parker River Clean Water Association sought assistance from PBLAC in resolving issues of concern related to sewer line repair and siting with a local sewer authority. Mitchell Burack has offered to provide facilitation/mediation services to assist them in resolving the issues.

As evidenced by these examples, the PBLAC

pilot is as varied as the community applicants. The unifying theme of the pilot, however, is that it seeks to assist stakeholders and communities that are exploring more innovative approaches to environmental protection; that is, approaches that move beyond the traditional narrow focus on a particular medium or problem to more integrated systems which broaden the environmental considerations. This approach tends to recognize interrelated resources in an ecosystem, including the place of humans in the system, so to allow for more comprehensive long-term planning to address the needs of the community and the environment. Additional information on the PBLAC program can be found on the ABA Web site at www.abanet.org/environ/pubservice6.html.

The types of assistance offered under the PBLAC program include legal analysis, counseling, policy development, drafting of sustainable development tools (*i.e.*, conservation easements or plans, local ordinances, environmental or resource management plans), facilitation, mediation, alternative dispute resolution (ADR) and other non-litigation types of support. Communities interested in participating in the PBLAC pilot must complete an application describing their proposed project, the type of legal assistance needed and the expected time commitment involved.

In addition to working with other Section committees to get the program up and running, we recently received word from the Environmental Litigation and Toxic Torts Committee that it would like to participate in the PBLAC program and offer assistance in the areas of facilitation, mediation and ADR. Nicole Friant, the committee's vice-chair for Public Service will be coordinating this effort.

We are always looking for new volunteer attorneys and new community projects. If you

are interested in participating in the PBLAC pilot as a volunteer attorney, contact the PBLAC Coordinator, Brenda Gotanda, vice-chair of the Committee on Innovation, Management Systems and Trading, at bgotanda@mgkflaw.com or at 484/430-5700. Community groups needing assistance should complete and submit the Community Assistance Application posted on the Web site noted above.

REPORT SUMMARY: BUILDING CAPACITY TO PARTICIPATE IN ENVIRONMENTAL PROTECTION AGENCY ACTIVITIES – A NEEDS ASSESSMENT AND ANALYSIS

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In 1999, the Environmental Law Institute (ELI) published a research report, written by Linda Breggin, entitled "Building Capacity to Participate in Environmental Protection Agency Activities: A Needs Assessment and Analysis." The report identified and examined various ways to build the capacity of communities to participate effectively in the activities and decision-making of the Environmental Protection Agency (EPA). This précis of the report will present the impetus for and methodology of the study, the potential approaches and specific impediments to capacity building as identified in the report, overarching impediments to capacity building, and the report's proposed strategy for moving forward.

Impetus and Methodology for the Study

ELI's report notes that the number of requirements and programs for government public participation efforts has grown dramatically since the passage of the Administrative Procedure Act of 1946. It cites

the hallmarks of this public participation movement as the Freedom of Information Act in 1966, the National Environmental Policy Act in 1969 and the Federal Advisory Committee Act in 1972, but it recognizes that the list of laws, regulations and policies that call for public participation in agency administration is extensive.

The report further notes that a shift has occurred over the last decades in the manner in which these laws and regulations are implemented to involve the public. No longer do agencies typically rely strictly on the written notice and comment approach; instead, there appears to be increased interest in employing more participatory processes.

The report specifically recognizes several of EPA's efforts to implement more participatory public participation mechanisms. In the course of these efforts, however, the report notes that both EPA and stakeholders have expressed frustration that citizens and communities do not necessarily have the time, resources and expertise to participate effectively in EPA's activities. The ELI study was initiated to examine how the capacity of local communities could be increased and to analyze several potential approaches to capacity building.

The study consisted of three phases. In the first phase, ELI conducted confidential interviews with thirty-four citizen experts on public participation and community capacity building across the country, primarily those working with communities at the grassroots and local level on a day-to-day basis on environmental issues. Although many of the interviewees agreed on certain fundamental principles, their opinions on three prevailing themes were markedly diverse. For example, when asked which stakeholders most need capacity building, interviewees were divided in their support for efforts directed at individuals such as environmental activists and

community leaders, for non-environmental civic groups or for the public as a whole.

The interviewees also expressed divergent opinions when asked to identify the fundamental building blocks for capacity building. They identified timely information dissemination, technical assistance, process education, easy and inexpensive access to documents, and education on legal requirements and procedures. Finally, in response to the question of how capacity building tools should be delivered, the interviewees identified face-to-face meetings, mailing lists, advisory groups, the Internet, door-to-door or telephone information campaigns, mass media, newsletters, outreach programs of regulated entities, facility notices, fact sheets and grants.

In the second phase of the study, ELI analyzed each community need and capacity-building approach identified in the interviews to identify potential impediments to implementation, infrastructure requirements and the likelihood of success.

In the third phase of the study, ELI reviewed literature on public participation as it relates to capacity building and studied models or programs from other disciplines that could translate into the environmental context.

Potential Approaches and Impediments

Based upon an analysis of the ideas expressed in the interviews, ELI identified several potential approaches to building the capacity of communities to participate in EPA activities and decision-making, discussed the strengths and weakness of each potential approach, and identified several relevant models. The approaches identified include: independent information brokers, ombudspersons, hotlines, technical assistance grants, citizen training on EPA processes and legal requirements, collaborative participation

processes, increased data availability and dissemination networks, grants to community groups, improved access to documents and improved mailing lists. Each of these approaches is discussed below.

An independent information broker model, as discussed in ELI's report, would help alleviate the concern that current approaches to information dissemination are too bureaucratic, unresponsive or removed from communities' needs. Information brokers would be responsible for disseminating information relevant to a particular area in the manner most effective given their knowledge of the communities. However, the interviewees disagreed on whether the individuals should be truly independent, if true independence would be possible given the individuals' reliance on EPA for information, or if the information brokers should be EPA or agency staff members accountable to a board comprised of community members. The experts also disagreed on whether the individuals should be housed within EPA, noting that locating an information broker's office within EPA would be a potential impediment to independence, but also a likely benefit with respect to timely and effective information gathering activities.

While the report concludes that the information broker model could prove effective in light of the fact that citizens would be more receptive to and process information more easily if presented to them by a trusted messenger who has tailored the information to their needs, it cites logistical and resource questions that could pose challenges. For example, EPA may be reluctant to fund or house such a position, and infrastructure development outside of EPA would be costly. The report proposes that other existing infrastructures could be utilized, such as the USDA Cooperative State Research, Education and Extension Service, Americorps or universities.

Ombudspersons, as discussed in the report, would be employed by EPA and serve either as neutral problem solvers to assist citizens in obtaining responses to their questions or complaints, or as proactive advocates who would reach out to the community to disseminate information and represent communities within EPA. Unlike an independent information broker, ombudspersons would necessarily be located at EPA and, depending on the ombudsperson model selected, may not spend considerable time in communities.

The report finds that despite the benefit of having an existing infrastructure, a proven track record for the ombudsperson approach, and assurance that the disseminator of information will be knowledgeable about the agency, this model presents a number of challenges, such as employing enough ombudspersons to meet the information needs of communities and avoiding the problem of ombudspersons representing numerous communities with competing concerns. The report also notes the concern that ombudspersons may not feel accountable to their customers, or that the customers could perceive them as inaccessible or unhelpful.

Hotlines, according to the report, have the potential to make a substantial contribution to community capacity building, but like the other approaches discussed, have limitations. The experts interviewed expressed that the hotline would need to be very well-publicized and that the hotline employees would need to be well-trained to make callers feel that they are truly interested, knowledgeable and responsive. Some interviewees felt that the same objectives could be accomplished by training EPA's telephone operators to direct calls appropriately, rather than establishing a hotline.

The report finds that hotlines, though reactive rather than proactive, are cost-effective in that

the required infrastructure essentially exists and that the resources expended to train operators would directly benefit people who were more likely to participate in EPA's public process. The latter benefit is also seen as a drawback in that a hotline would only build the capacity of those who already know about an issue and are motivated to get involved. Moreover, while hotlines were perceived to have the potential, if operated well, to improve community confidence in and comfort with EPA, they were also perceived to have the potential, if operated poorly, to create ill will, waste resources and undermine other capacity building efforts that may have motivated citizens to call in the first place.

ELI's report also identifies technical assistance grants as a capacity building tool that was viewed favorably by those interviewed. These grants would allow interested communities to commission an independent assessment of the technical aspects of issues pending before EPA. According to the report, this independent assessment would reduce the need for communities to rely on EPA's experts and thereby avoid skepticism and distrust. The report states that technical assistance grants can help to level the playing field by enabling communities independently to verify information and contribute to the scientific dialogue underlying agency decisions and thus participate in the public policy debate.

The report, however, questions the feasibility of obtaining the necessary funding and indicates that there is considerable debate about the usefulness of technical assistance grants in that they could contribute to a "battle of experts" that does not necessarily lead to better-informed decisions. Moreover, according to the report, some experts saw this as a duplication of effort in that EPA should provide scientific backup needed to assess the communities' concerns because EPA is funded by tax dollars and charged with protecting the health and environment of all communities.

Citizen training on EPA processes and legal requirements, as discussed in the report, would involve working with community members who indicate an interest in EPA processes and a willingness to participate for the benefit of communities that have the desire but lack the expertise to participate effectively in complicated agency processes. According to the report, when confronting regulated entities that are well-versed, well-staffed, well-funded and expert at working within the EPA system, communities are often at a competitive disadvantage. This approach would help level the playing field from a procedural, rather than technical, standpoint. Moreover, those individuals receiving training could in turn educate others, and apply their knowledge in a variety of contexts.

One potential impediment to the successful implementation of this proposed approach to capacity building identified by the report is that the time commitment required to participate in training will limit the number of people who are willing to participate. Moreover, the training programs could also be costly, and laws and regulations may restrict the extent to which EPA can support groups that may lobby EPA and Congress.

A collaborative participation process, as discussed by the ELI report, would be a new approach to community involvement through which EPA would establish formal relationships with community stakeholders to enable those stakeholders to be involved in developing proposals and negotiating agreements with regulated entities and EPA, rather than merely commenting upon proposed actions. This approach would also have the ancillary effects of furthering information sharing and building citizen trust in EPA.

While a collaborative participation process is viewed as an effective and desirable tool for capacity building, the report anticipates that

this approach will take considerable time and resources to implement, as well as involve substantial changes in accepted approaches to participation that are comfortable for EPA. Therefore, as the report suggests, this approach should not be undertaken at the expense of implementing more basic tools, such as improving EPA's response to telephone inquiries and maintaining an up-to-date mailing list of potentially interested communities and individuals.

ELI's report also discussed increased data availability and dissemination networks as a fundamental capacity building tool that those interviewed believed was the most powerful. The report states that the Internet has the potential to provide ample and accurate environmental data to communities, as well as access to the tools to use that data going forward. Nevertheless, there is a perceived gap in the data available that EPA could address by supporting online information sharing networks.

The report, however, warns that merely providing huge volumes of data will not be effective unless the public has ready access to the data, can understand it, and has a mechanism for using the data to influence policy and the regulated community. Moreover, the report notes that there is likely to be limited access to the Internet among low-income communities.

Grants to community groups are another way to build the capacity of a community to participate in EPA decisionmaking, according to ELI's report. As community groups, such as churches, schools, educational institutions, non-profit organizations, universities or tribal governments, are often the primary disseminators of information about EPA activities and pending actions, granting money to these groups was seen as one way to leverage limited funds.

The report notes, however, that granting resources to community groups will necessarily require selection of specific groups and would not necessarily provide resources to the community as a whole or even to larger segments of the community with diverse interests. Moreover, as discussed above, there may be limitations on government funding of organizations that participate in lobbying efforts.

Improved access to documents, as discussed in the report, is also a fundamental capacity building tool that is readily achievable at a relatively low cost. Currently, according to the report, access to documents such as permit applications or inspection reports can be difficult to obtain because those documents are housed at regional offices. Copies of these documents could also be provided to local libraries or universities in order to increase their accessibility. As discussed above, these documents could also be provided on the Internet.

Despite the relatively low cost to implement this capacity building tool, it will nevertheless require, according to the report, a coordination of time and resources with community stakeholders to determine what documents are important to them, as well as coordination with the various locations where the documents would be kept. Moreover, as the report points out, simply providing the documents may not be sufficient if those documents are written in technical jargon that may impede the community's ability to determine the impact of EPA's actions.

Finally, the report discusses how improved mailing lists could be utilized to build community capacity. According to those interviewed for the report, EPA's mailing lists are poorly maintained and underused. Strengthening and improving these lists would allow EPA to target mailings to interested citizens. Moreover, the report notes that use

of mailing lists when public participation is not required by law would constitute a proactive step toward strengthening the relationship between EPA and communities.

The report states that the expanded use of mailing lists should not require fundamental changes or new programs, and the costs should be relatively low. It also suggests that e-mail and facsimile lists could be utilized as well. However, the report warns that strengthening the use of mailing lists is a limited approach to capacity building that should be used in connection with other approaches.

Additional Overarching Impediments

The report also identifies fundamental impediments that will affect EPA's ability to build capacity, regardless of the approaches adopted. These global impediments include the common perception that public participation is futile because, for a variety of reasons, communities do not actually influence EPA's decisions. Interviewees also noted the perception that the role of the public in particular initiatives is often unclear or ill-defined. Another global impediment is the fact that citizens suffer from a lack of time, energy and funding, or are unwilling to devote their limited time, energy and funding to issues that are not perceived as crisis situations. Finally, the report notes that lack of oversight or encouragement of state public participation activities may limit the effectiveness of capacity-building efforts, as many states are delegated the responsibility for core environmental programs.

Proposed Strategy

Although capacity building was the primary focus of the study, the report finds that improving the public participation process is a crucial first step to capacity building efforts. Therefore, the report suggests that EPA take

the following steps: (1) review EPA's mandate and authorities for public involvement to determine when public participation is required and when it is discretionary; (2) develop public participation goals and principles; and (3) develop a public participation plan. The report finds that only after EPA has implemented its public participation plan will it be positioned to address local capacity building. However, the report suggests that EPA may also want to take certain concrete steps, regardless of whether it develops and implements public participation and capacity building plans. The report suggests that appropriate steps include pilot programs for the more complex initiatives proposed, as well as permanent improvements in the areas of information dissemination, training, technical support and proactive assessment of community needs.

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THE PATHOLOGIES OF CONSENSUS-BUILDING

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If so-called next-generation policy wonks had their own political party, I suspect that one of the planks in their platform might call for greater use of consensus-building in the regulatory process. Or at least that's what one might have surmised from much of the rhetoric in regulatory circles over the last decade. One of the most platform-like documents of recent years – the National Performance Review's (NPR) report on improving regulation – explicitly called for efforts to “encourage consensus-based rulemaking.” Moreover, nearly every major commission report and panel study issued on environmental policy during the 1990s called for greater reliance on consensus-building. Prominent figures in regulatory policy making came together as part of the Enterprise for the Environment initiative in the late 1990s to try to forge consensus on fundamental revisions of environmental law. Around that same time, the U.S. Environmental Protection Agency (EPA) also launched several high-profile projects organized around consensus-building, including the Common Sense Initiative and Project XL.

With the benefit of hindsight, what can we learn about the use of consensus-building in the regulatory process? One of the chief lessons is that consensus-building is actually much more problematic than most observers had previously supposed. In the years leading up to the NPR report, academics and negotiation consultants had predicted great benefits would come from consensus-building and regulatory negotiation. The NPR's

recommendations were therefore consistent with what could be gleaned from the relevant academic literature at the time. However, much of the literature had been built upon single case studies or was written by negotiation consultants or others seeking to promote the use of consensus-based processes. These advocates often accentuated the purported advantages of consensus-building and either overlooked or downplayed the potentially significant problems that consensus-building can bring to policymaking.

This article offers some balance to the corpus of writing on consensus-building. By consensus-building, I specifically mean efforts to try to secure a unanimous agreement among diverse parties interested in a regulatory policy, a meaning that tracks the definition contained in the Negotiated Rulemaking Act as well as the general usage in regulatory circles. In other articles, I have reported findings showing that consensus-building has failed to deliver the principal benefits that advocates have promised for it. See, e.g., Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L.J. 1255 (1997); Cary Coglianese, *Assessing the Advocacy of Negotiated Rulemaking*, 9 N.Y.U. Envtl. L.J. 386 (2001). In this article, I highlight how consensus-building can also expose the policy process to a host of problems. Specifically, a search for consensus can create or exacerbate at least six pathologies: (1) tractability taking priority over policy importance; (2) regulatory imprecision; (3) the lowest common denominator problem; (4) increased time and expense; (5) the generation of unrealistic expectations; and perhaps most strikingly, (6) new sources of conflict. Anyone contemplating the use of consensus-building would do well to bear in mind these pathologies before embarking on a quest for consensus.

Tractability Over Importance

The first pathology created by a focus on consensus relates to the nature of the issues selected for consideration. Organizing policymaking around a search for consensus increases the likelihood that the wrong issues will receive attention. Instead of devoting time and resources to the issues of most importance to the public, an emphasis on reaching a consensus can lead to the selection of the most tractable issues, the ones most amenable to agreement.

That such a selection process occurs is evident in the paucity of cases in which consensus has been used to develop federal regulations. Proponents of negotiated rulemaking have never claimed that consensus-building would be appropriate for more than about five percent of all agency rulemakings, and in practice the use of the procedure has been exceedingly rare (less than one-tenth of one percent of all regulations). Indeed, the Negotiated Rulemaking Act specifically calls upon agencies to select rules for negotiation only if they have a “reasonable likelihood” of achieving consensus, a standard that undoubtedly predisposes agencies to select the more tractable rules. The relatively few rules agencies have selected for negotiated rulemaking have typically not been those with the largest impact on the public, but have instead tended to be rules that an EPA report once described as “second-tier” rules. Coglianesse, 46 Duke L.J. at 1319.

An emphasis on consensus not only can lead to the selection of more tractable policy matters for negotiation to begin with, it can also lead to a selection of the more tractable issues within negotiating proceedings themselves. The problem with tractability was clearly evidenced in the report of the Enterprise for the Environment initiative. In 1996, former EPA Administrator William

Ruckelshaus convened this initiative, dubbed “E4E” for short, in order to bring together leaders from industry, government and the environmental community to forge a consensus about how to improve environmental policy in the United States. The project initially sought agreement on a diagnosis of the problems in the current system of environmental protection and on a set of concrete legislative solutions. Not long into the discussions, however, it became apparent to the participants that consensus would never be achieved on either the specification of current problems or the precise form of legislative proposals. Even though an illumination of existing problems and specific legislative fixes was surely what was needed, the group shifted its goals to what was more attainable (but ultimately less valuable): agreement on a broad “vision” of an ideal environmental protection system. As this example suggests, the subset of issues addressed in consensus-building are likely to be the more tractable ones, not necessarily the ones that are most important. See Cary Coglianesse, *Limits of Consensus*, 41 Env’t. 28 (April 1999).

Imprecision

Just as a focus on tractability makes consensus easier to achieve, so too does imprecision or ambiguity. The E4E process just mentioned is a stark example of the pathology of imprecision that can come from a quest for consensus. The final Enterprise for the Environment report described the project’s resulting consensus in terms with which no one could seriously disagree: “[T]he environmental protection system of the next century must become as efficient and low cost as possible without compromising environmental progress.” Enterprise for the Environment, *The Environmental Protection System in Transition: Toward a More Desirable Future* 3 (1998). Elsewhere the report offered other platitudes as recommendations: policy-

makers should “adapt and adjust policies, strategies, and systems based on experience and new information”; they should “generate, disseminate, and rely on the best-available scientific and economic information;” and society should “place authority, responsibility, and accountability at the appropriate level of government.” *Id.* at 4. Of course, no one would seriously urge otherwise, although different people do disagree about specifically how best to achieve better environmental protection at lower cost. Rather than seek consensus for its own sake, what was needed was to illuminate areas of disagreement and to conduct further analysis that might better inform decision-making.

Admittedly, the language found in a single consensus-based policy report can simply be viewed as an extreme case, but the pressure always exists that, in order to secure an agreement, negotiators will adopt abstract or unclear language. After all, it will usually be easier to achieve consensus at higher levels of abstraction, and it is always less time-consuming and less controversial to adopt imprecise language. Settling upon abstract principles and vague standards may serve to secure agreement in the face of conflict, but doing so will constrain the usefulness of any policies that emerge from consensual processes.

Lowest Common Denominator

Consensus-based processes effectively hands each participant a veto. In so doing, they make it more likely that the final outcome will amount to no more than the lowest common denominator acceptable to all the parties. Decision rules based on consensus (*i.e.*, unanimity) have the effect of giving domestic policy-making the same structural form as international policy-making. It is common for multilateral international agreements to require no more than what is acceptable to the state with the most objections to regulation. For

example, initial drafts of the ISO 14001 environmental management system standards would have required public accessibility of environmental data, third party certification, and sector-specific pollution standards – requirements that some have argued are needed to make environmental management systems credible. However, these requirements were reportedly dropped in response to objections from the United States and Japan. See Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 *Ecology L.Q.* 479 (1995).

The problem with the lowest common denominator, of course, is that such a minimally-acceptable outcome will not be enough when a more dramatic decision is needed. In a study of negotiated rulemaking at EPA and OSHA, Charles Caldart and Nicholas Ashford concluded that because industry representatives will not likely “sign on” to any regulations that would force dramatic changes upon business, “negotiated rulemaking’s focus on consensus can effectively remove the potential to spur innovation.” Charles Caldart and Nicholas Ashford, *Negotiation as a Means of Developing and Implementing Environmental and Occupational Health and Safety Policy*, 23 *Harv. Env’tl. L. Rev.* 141, 201 (1999).

Time and Resources

The lowest common denominator problem, along with the pathologies of tractability and imprecision, arises in part because it takes more time and resources to achieve consensus. Deliberation takes time for everyone to present their concerns and for others to respond, and consensus demands that the deliberation continue until everyone agrees (or at least agrees to “live with” a decision). Time, in itself, is not inherently a pathology, at least not if the additional time

yields valuable information and better results. All things being equal, though, the additional time it takes to develop a decision through consensus is certainly an important drawback, especially when it takes longer to reach closure on only the most tractable issues.

Those who have participated in consensus-building processes complain about the amount of time and effort they take. Studies of negotiated rulemaking confirm that consensus-building fails to save time. Steven J. Balla & John R. Wright, *Consensual Rulemaking and the Time It Takes to Develop Rules* 25 (1999) (unpublished paper presented at the Fifth National Public Management Conference, College Station, Texas); Coglianese, 9 N.Y.U. Envtl. L.J. at 398-415. In one study, participants in negotiated rulemakings were three times more likely to complain that the process took too much time, effort, and resources than were those respondents who participated in conventional rulemakings. Cornelius Kerwin and Laura Langbein, *An Evaluation of Negotiated Rulemaking at the Environmental Protection Agency* (1997). One of the most common complaints about the EPA's now-defunct Common Sense Initiative was that it took a frustratingly long time to accomplish anything. See Laurie K. Allen & Cary Coglianese, *Building Sector-Based Consensus: A Review of the U.S. EPA's Common Sense Initiative*, in Theo de Bruijn & Vicki Norberg-Bohm, *Industrial Transformations* (forthcoming); Joel Ann Todd, *Review of the Common Sense Initiative* (1997). No one should expect that decision-making by consensus will help speed up the policy process.

Unrealistic Expectations

When consensus is made the goal of regulatory processes, public officials can raise unrealistic expectations about how much any agreement will affect the government's

ultimate decision. Even though the idea of consensus-building may sound appealing, agreements forged through collaborative processes with government are often not self-implementing. Most of the time, government officials must still formally enact and implement these agreements through conventional procedures. In so doing, the final policy may change – even slightly – from the proposal on which the parties thought they had agreed. After a consensus is forged, maintaining that consensus throughout the remaining procedural steps can prove difficult. Other actors not party to the agreement, such as legislators, other interest groups, and executive branch officials, may also try to take another bite at the apple.

When this happens and the policy outcome diverges from the agreement, participants in the regulatory negotiation will undoubtedly have certain expectations dashed, expectations that would have been much less likely to have been raised had the process simply sought public input to assist the agency in reaching its decision. In a study of several consensus-building initiatives at the National Marine Fisheries Service, sixty percent of the participants who were surveyed reported that they were dissatisfied with the results of the process. The study's authors found that much of the dissatisfaction arose because participants expected to control the outcomes much more than was realistically possible. RESOLVE, Inc., *The National Marine Fisheries Service Take Reduction Team Negotiation Process Evaluation* (1999)

It was also precisely such a case of dashed expectations that led to the litigation in the first major appellate decision to interpret the Negotiated Rulemaking Act. In *USA Group Loan Servicers, Inc. v. Riley*, 82 F.3d 708 (7th Cir. 1996), participants in a Department of Education negotiated rulemaking sued the agency claiming that it had reneged on commitments made during the negotiated

rulemaking. The Seventh Circuit held that federal agencies could not be compelled to adopt a consensus agreement nor held to positions taken during negotiations because the agency retains the ultimate decision-making authority. To the extent that it will remain possible for government officials to enact policies that depart from the precise (or perhaps not-so-precise) understandings of those involved in policy negotiations, a process centered on the quest for consensus only sets up expectations that in the end probably cannot help but be somewhat unfulfilled. In this way, an increased reliance on processes that aim for consensus could very well undermine trust and increase cynicism in the policy process.

Additional Sources of Conflict

It may seem paradoxical, but consensus-building can add new sources of conflict. The case of *USA Group Loan Servicers* shows that conflicts not only can persist following consensus-building, but that they can even be exacerbated by the expectations such processes can heighten. Not only is consensus not always attainable, but even when it is the resulting agreement may only temporarily hide underlying conflicts, especially if agreement is made on the basis of imprecise language. Perhaps the most notable disappointment in terms of avoiding conflict has been the EPA's reformulated gasoline regulation. Heralded by consensus advocates as a successful case of consensus-building because an agreement was reached, this negotiated rulemaking hardly succeeded at all in eliminating conflict. The final rule elicited extensive criticism in the press and from the public, prompted four legal challenges and a petition for administrative review, and resulted in an adverse ruling by the World Trade Organization. See Coglianesi, 46 Duke L.J. 1290-94.

The reformulated gasoline regulation is not

unique. Overall, environmental regulations developed through consensus-based processes end up being challenged in court more frequently than do comparable regulations formulated through procedures that do not depend on consensus. These legal actions challenging negotiated rules turn out also to be just as complex and sustained as litigation filed against other comparable rules that were not negotiated. *Id.* at 1300-09; Coglianesi, 9 N.Y.U. Envtl. L.J. at 420-27.

In addition, consensus-based processes create new sources of conflict that do not exist with other methods of policy-making. Conflicts first arise over who participates in the negotiations. A set of negotiated rulemakings at the Department of Housing and Urban Development (HUD) spawned a legal action filed to secure a spot on a negotiated rulemaking committee. HUD had originally named four public housing organizations to participate on negotiated rulemaking committees for regulations addressing subsidies and capital funds. After the housing organizations subsequently filed a petition against the agency over a separate matter, HUD officials declared that the organizations could no longer bargain in good faith and removed them from the negotiated rulemaking committees. The organizations filed for a court order reversing the agency's decision to remove them from the committee, claiming that HUD's action discriminated against them for exercising their fundamental right of petition. *Council of Large Public Housing Authorities, Inc. v. US Department of Housing and Urban Development*, No. 1:99CV00634 (Dist. D.C. Mar. 25, 1999) (motion for a temporary restraining order). HUD subsequently capitulated and reinstated the organizations to the negotiated rulemaking committees, but the experience demonstrates one significant new source of conflict caused by a process designed around the search for consensus.

In addition to conflicts over who gets to participate, processes structured around consensus can create conflicts over the meaning of any agreements that are reached and over whether final government decisions comport with those agreements. Disagreements also arise over the meaning of terms in consensus statements as well as over the implications of terms or issues that are absent from these statements. Coglianese, 9 N.Y.U. Envtl. L.J. at 427-28. Just as with disputes over membership in the consensus process itself, none of these additional sources of conflict arise outside the context of consensus-based processes.

Conclusion

A reliance on consensus introduces new sources of potential conflict and creates or exacerbates the risk of a series of public policy pathologies. Attempts to use consensus as the basis for regulatory decision making can lead to unrealistic expectations, increased time and resources, lowest common denominators, imprecision and a focus on tractability over importance. Those interested in the next generation of regulatory policy should therefore not engage in any wishful thinking about consensus-based processes. Even though it may seem fashionable to favor policy-making based on consensus, it is not realistic to expect that, simply by organizing policy making around consensus, regulation will become more timely, less conflictual or of better quality. If the next generation of regulatory policies is to make substantial gains over the previous generation, we should not count on any such improvements to arise from consensus-based processes.

Portions of this article are drawn from Cary Coglianese, Is Consensus an Appropriate Basis for Regulatory Policy?, in Eric Orts and Kurt Deketelaere, eds., Environmental Contracts: Comparative Approaches to Regulatory Innovation in the United States and Europe (2000).

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ENVIRONMENTAL POLICY THROUGH SHAREHOLDER RESOLUTIONS

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Having a tough time influencing the administration's environmental policy? No problem, take your issues directly to the senior management and boardrooms of major U.S. companies. Shareholders are doing just that, in droves. Take climate change as an example. The Investor Responsibility Research Center (IRRC) reports that a record 26 global warming resolutions were filed with U.S. companies for consideration during the 2003 proxy season, up from 21 such proposals in 2002. Corporate giants American Electric Power, General Electric, TXU, Chevron Texaco, ExxonMobil, and Southern each weathered shareholder resolutions that garnered more than 20 percent of the vote, with one vote (Chevron Texaco) reaching 32 percent. Twelve of the 26 proposals came to a vote and, as Table 1 illustrates, the resolutions sought action ranging from fuller disclosure of greenhouse gas emissions to development of renewable energy alternatives.

What do these numbers mean? According to the IRRC, among electric utilities and oil and gas companies, the average support level was 22.6 percent in 2003, and "[i]n the 32-year history of shareholder activism on social issues, only board diversity proposals have had average support levels topping 20 percent (in 2001 and 2002)." See <http://www.irrc.org/company/global.html>. The growing tide of shareholder activism on these issues appears to reflect a far-reaching Wall Street strategy to influence corporate environmental policy.

A number of factors help explain the growing clout of socially responsible investment (SRI) funds. While stock markets soared in the 1990s, corporate accountability seemed to be an afterthought. That is, until accounting scandals demolished Enron, Tyco, Worldcom and other high-flying companies, as well as the virtual evaporation of the dot.com industry. These corporate debacles wiped-out investor savings and, to put it mildly, fueled investor outrage and demands for accountability and full disclosure. See, e.g., Geoffrey Colvin, *Shareholders Are No Fools—Anymore*, *Fortune*, July 7, 2003, at 42.

Congress, in turn, responded by passing the Sarbanes-Oxley Act. Among other features, Sarbanes-Oxley makes the chief executive officer (CEO) and chief financial officer (CFO) personally responsible for the disclosures in reports filed under the Securities Exchange Act of 1934, as well as the controls and procedures applicable to all information potentially subject to disclosure. Under new regulations adopted by the Securities and Exchange Commission (SEC), CEOs and CFOs must personally certify that they have reviewed the annual and quarterly reports filed with the SEC, and that such reports are accurate. Moreover, they must certify that they have designed disclosure controls and procedures to ensure that material information (which would include environmental information) concerning the company is made known to them, and that they have disclosed any flaws in such disclosure controls and procedures. In other words, CEOs and CFOs are charged with knowing what their company is up to with respect to environmental compliance and management matters, and that their company accurately discloses material issues (again, including environmental issues) in SEC filings. The consequences of non-compliance could be stiff: a false certification could subject the certifying officer to up to \$5 million in penalties and up to 20 years imprisonment. It also is

COMPANY	MEETING DATE	RESOLUTION	% VOTE
Citigroup	April 15, 2003	review financial ventures' impact on climate	5.2%
	April 15, 2003	provide leadership on climate change	5.9%
Weyerhaeuser	April 15, 2003	report on greenhouse gas emissions	8.0%
PG&E	April 16, 2003	report on greenhouse gas, other emission risks	9.0%
American Electric Power	April 23, 2003	report on greenhouse gas, other emission risks	26.9%
General Electric	April 23, 2003	report on/reduce greenhouse gas emissions	22.6%
TXU	May 16, 2003	report on greenhouse gas, other emission risks	24.2%
Chevron Texaco	May 22, 2003	develop renewable energy alternatives	32%
ExxonMobil	May 28, 2003	develop renewable energy alternatives	21.0%
	May 28, 2003	report on global climate change risk	22.0%
Southern	May 28, 2003	report on greenhouse gas, other emission risks	23.0%
General Motors	June 3, 2003	report on/reduce greenhouse gas, other emissions	5.7%

Source: IRRRC, available online at <http://www.irrc.org/company/global.html>.

Table 1

not difficult to predict that these public affirmations will expose CEOs and CFOs to an increased likelihood of being personally targeted as defendants in shareholder and derivative suits if matters turn out to be different than as represented.

In addition, the regulators are focusing on inadequate environmental disclosures by public companies. Of particular note, the SEC's Division of Corporation Finance

recently evaluated the disclosures of Fortune 500 companies, and observed that "many companies did not provide adequate disclosure" relating to environmental matters, and further urged companies to provide more meaningful analysis of their environmental liabilities. *Summary by the Division of Corporation Finance of Significant Issues Addressed in the Review of the Periodic Reports of the Fortune 500 Companies*, U.S. Securities and Exchange

Commission, available online at <http://www.sec.gov/divisions/corpfina/fortune500rep.htm> (visited July 22, 2003).

The SEC's observation squares with the U.S. Environmental Protection Agency's (EPA) own evaluation of public company disclosures, which found that 74 percent of public companies failed to disclose environmental-related legal proceedings, and that only one out of twenty companies were properly disclosing liabilities relating to corrective actions under the Resource Conservation and Recovery Act (commonly known as RCRA). See Donald Sutherland, *EPA Reveals U.S. Publicly Traded Corporations Hide Billions in Environmental Debt*, Risk News Report, October 2002, available online at <http://www.riskworld.com/NEWS/02q2/nw02a096.htm> (visited July 22, 2003).

As the recent crop of climate change resolutions illustrates, SRI funds and environmental groups are moving aggressively to capitalize on investor outrage and the new regulatory climate. The funds include a loose affiliation of religious investors, environmental organizations, and institutional investors. By way of example, among the SRI funds is the Interfaith Center on Corporate Responsibility (ICCR), an association of 275 faith-based institutional communities, pension funds, endowments, hospital corporations, economic development funds, and publishing companies that collectively represent a portfolio of \$110 billion. The Coalition for Environmentally Responsible Economies (CERES), which represents investors worth an estimated \$300 billion, is another good example. The SRI funds also include among their ranks institutional investors such as the pension managers for New York, Connecticut and Vermont, who have combined to leverage an estimated \$190 billion to influence corporate policy on environmental and social issues. While these funds are premised on socially-responsible investments, they appear to

compete favorably with non-SRI funds. In 1999, for example, 21 percent of the SRI funds analyzed by Morningstar (which evaluates the financial performance of mutual funds) received a five-star rating, the highest rating it gives and twice the rate for mutual funds overall. Today, the SEC's Division of Corporate Finance reports that SRI investments total more than \$2 trillion in assets, representing one out of every eight dollars under professional management in the United States.

SRI funds and environmental group allies are pushing their Wall Street strategy on several fronts. For instance, Friends of the Earth released a well-publicized survey of climate change disclosure in SEC filings of 87 companies in the auto, insurance, oil & gas, petrochemical, and electric power sectors. Of the 87 companies surveyed, the report states that only 26 percent provided some (albeit uneven) reporting. On that basis, the Friends of the Earth survey states that it "provides compelling and additional evidence that publicly traded companies...are failing to report material environmental issues such as climate change in [SEC] filings." Michelle Chan-Fishel, Friends of the Earth-US, *Survey of Climate Change Disclosure in SEC Filings of Automobile, Insurance, Oil & Gas, Petrochemical, and Utilities Companies*, Sept. 2002, at 1, available online at <http://www.foe.org/camps/intl/corpacct/wallstreet/secsurvey.pdf> (visited July 22, 2003). The World Resources Institute recently published a study evaluating the environmental disclosure practices in the pulp and paper industry, and concluded that "environmental risks that are both material and known to companies are not being disclosed to investors." Robert Repetto and Duncan Austin, World Resources Institute, *Coming Clean: Corporate Disclosure of Financially Significant Environmental Risks*, March 2000, at 3, available online at <http://www.wri.org/pdf/clean.pdf> (visited July 22, 2003). And, this past June, the IRRC released

a report commissioned by CERES, evaluating how the largest greenhouse gas emitters are factoring climate change into their business strategies and governance practices. Among other conclusions, the IRRC report states that “American companies, in particular, are pursuing business strategies that discount the threat [of climate change], leaving them – and their shareholders – especially vulnerable to increased financial risks and missed market opportunities.” Douglas G. Cogan, Investor Responsibility Research Center, *Corporate Governance and Climate Change: Making the Connection*, June 2003, at 1, available online at http://www.irrc.com/company/corp_gov_exec_summary.pdf (visited July 22, 2003).

Reports like those, in turn, provide the grist for investor action with the SEC and senior management. Last August, on behalf of a group of philanthropic foundations and investment managers, the Rose Foundation petitioned the SEC to enforce its environmental disclosure requirements and issue a new rule clarifying the intent of the SEC’s material disclosure requirements. The Rose Foundation’s petition puts pressure on the SEC to investigate the adequacy of environmental disclosures which, as stated above, seems to be having some effect, at least given the recent pronouncement by the SEC’s Division of Corporation Finance that many company disclosures are, indeed, deficient.

Perhaps the most prominent manifestation of investor activism, however, is the growing tide of shareholder resolutions discussed above. Shareholder resolutions alone may not trigger fundamental policy changes at public companies. Resolutions rarely win a majority vote, and the overwhelming majority of resolutions are nonbinding, which means that management can ignore even those that garner more than 50 percent of the vote. That said, it would be a mistake to underestimate

the value of shareholder resolutions. Shareholder resolutions are a visible way for shareholders to register concerns with management, and they have the potential to become a public relations ordeal. The resolutions also send signals to the markets and the SEC that companies may not be disclosing issues that could impair shareholder value.

The following quotation helps frame the strategy. It is an excerpt from Congressional testimony recently provided by Denise Nappier, the treasurer of Connecticut, who has joined with other state pension funds to advance climate change resolutions at American Electric Power and other companies.

As institutional and individual investors, we need accurate and complete disclosure of information that could affect the current and future health of the companies we invest in . . . and that goes beyond accounting to include, among other things, climate change as a risk factor. The consequence for those companies that do not act responsibly today and take steps to assess and mitigate the risk associated with climate change can be quite devastating. For example, companies could face the prospect of losing their competitive edge, incurring litigation costs, or being saddled with unforeseen capital expenses, just to name a few. All of these factors – and others – can erode shareholder value and place today’s seemingly solid investment in jeopardy. Climate change may well be about our planet’s future, *but it is also about the financial risks to corporations, and the impact on retirement savings of millions of Americans.* As a result, we have every right to know what is being done about it and how America’s corporations will protect their bottom line, and thereby the value of our investments.

Statement by Conn. Treasurer Denise L. Nappier, U.S. Senate Comm. on Env't and Public Works, Subcomm. on Clean Air, Climate Change, and Nuclear Safety, June 5, 2003, Washington, D.C. (emphasis added). Nappier's testimony distills a Wall Street strategy that is elegant in its simplicity – instead of relying on a moral or health-based argument to advance their interests, SRI funds are framing environmental risks primarily in economic terms. Wall Street understands those terms, which means management may face increasing pressure to address these issues as shareholder resolutions garner more and more votes. Climate change is a useful illustration of this Wall Street strategy, both because of its importance to the environmental community and because there is no current federal mandate to reduce greenhouse gases. While the Kyoto Protocol against global warming has been ratified by more than 100 countries, the administration has withdrawn U.S. support from the pact and has come out firmly opposed to mandating reductions in greenhouse gas emissions. As Nappier's testimony implies, however, the specter of climate change regulation in the United States is a risk factor that could impact shareholder value in the future, and companies that fail to confront this risk could face problems both on Wall Street and in the courts. In that respect, the use of a Wall Street strategy to influence corporate policy on climate change is a fascinating case-study showing how environmental stakeholders are moving to leverage their clout in the financial markets when they find little redress through political channels.

In sum, the strategy is unfolding like this: Public companies have a legal obligation to disclose material environmental risks. Environmental and other interest groups publish reams of data showing that current or potential regulatory mandates associated with, for instance, climate change could have a

dramatic effect on the earning capacity of greenhouse gas-intensive industries (e.g., electricity, automobile, petroleum, and the like). Petitions are filed with the SEC purporting to show that corporations are failing to meet their legal obligations to disclose environmental risks, including climate change. And shareholder resolutions are advanced demanding that senior management take a hard look at the financial impact of climate change and, in some cases, demanding that the company take steps to reduce greenhouse gas emissions. Management, in turn, is given a choice: either ignore the shareholder actions and suffer potential public relations problems and possible legal action, or take steps to address their shareholders' concerns.

Will the strategy work? It may be too early to tell, but there are signs that companies are taking notice. BP, for instance, has adopted a new moniker – “Beyond Petroleum” – to help give the company a more environmentally-friendly edge. And, with respect to climate change, the recent IRRC report noted that while few of the companies evaluated had adopted comprehensive programs “to treat the issue as an imminent financial and environmental threat,” all of the companies nonetheless were taking some governance actions to respond to climate change. As stated above, the resolutions also may become a benchmark for identifying issues that shareholders consider to be material to their investment decisions, at least where a critical mass of resolutions exists as appears to be the case with climate change. In that regard, companies that fail to adequately disclose such issues therefore run the risk of inviting legal action from the SEC and their shareholders. On a more practical level, money talks. SRI funds have it and are using it to advance their agenda. It is therefore not a stretch to predict that SRI funds will have increasing influence on how companies approach environmental and social issues that may affect the bottom line.