Alternative Dispute Resolution and the Wetlands Manual Debate: Could Negotiated Rulemaking Have Avoided the Impasse?

I. INTRODUCTION

Regulation negotiation is the process by which administrative agencies sit down with interested parties and negotiate a proposed rule. Regulation negotiation has become an effective alternative to traditional agency rulemaking proceedings. The goal of this Comment is to determine whether regulation negotiation is a viable alternative to the normal administrative rulemaking process being undertaken in the wetlands manual debate. Section II contains a general discussion of the concept of regulation negotiation, its advantages and disadvantages, and the criteria used to determine whether regulation negotiation is appropriate for a particular rule. Section III briefly describes the wetlands delineation debate and the manuals at the center of the debate. Section IV applies the criteria discussed in Section II to the wetlands manual debate and evaluates the appropriateness of negotiated rulemaking.

II. ADR IN REGULATORY PROCEEDINGS: NEGOTIATED RULEMAKING

A. Concept of Regulatory Negotiation and Negotiated Rulemaking

"Negotiated rulemaking" describes the use of negotiation by an administrative agency in any decision making process.[1] Regulatory negotiation creates the opportunity for the interested parties to exchange views and ideas using procedures designed to achieve consensus.[2] Regulatory negotiation emerged in the late 1970s as a distinct administrative law concept because it is better suited to making administrative agency decisions than traditional rulemaking processes.[3] "Negotiated rulemaking," a specific application of regulatory negotiation, refers to the use of negotiation in the decision making process associated with rulemaking.[4] The negotiated rulemaking process is similar to the

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1. Henry H. Perritt, Jr., *Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes*, 14 PEPP. L. REV. 863, 865 n.1 (1987).

2. ADMINISTRATIVE CONFERENCE OF THE U.S., NEGOTIATED RULEMAKING SOURCEBOOK i (1990) [hereinafter ADMINISTRATIVE CONFERENCE OF THE U.S.].

3. Perritt, *supra* note 1, at 865-66.

4. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 1.

legislative process in many ways.[5]

Negotiated rulemaking is the only form of alternative dispute resolution (ADR) used by administrative agencies because it is designed to resolve "interest disputes" while other forms such as mediation, fact-finding, and arbitration are more suited to "rights disputes."[6] "Rights disputes" are resolved by applying set legal standards, or rules of decision, to facts determined by an adjudicator; "interest disputes," on the other hand, are characterized by the lack of rules of decision.[7] The political process and private negotiations are appropriate venues for interest disputes because such disputes are resolved when the interested parties sit down together and devise rules which accommodated all interests involved.[8]

Throughout the 1980s, negotiated rulemaking became an accepted process by which proposed rules could be drafted.[9] The essence of negotiated rulemaking is to bring together representatives of the administrative agency and various interest groups to negotiate the content of a proposed rule.[10] The goal is for the parties to reach a consensus by evaluating their own priorities and then compromising in order to reach the desired outcome on the issues most important to them.[11] A rule reached by concession is easier to implement and less likely to generate subsequent litigation.[12]

Under the Administrative Procedure Act (APA), public participation is not required in the drafting of proposed rules.[13] The agencies are only required to publish the proposed rule and allow the public an opportunity to comment. This process is called notice-and-comment rulemaking. Through contact with those affected by the proposed rule, the agency acquires important information; either the agency or the interested parties may initiate the contact.[14]

Negotiated rulemaking uses negotiation and consensus to combine the resources and energy of the interested parties to solve the problem presented. This process harnesses the creativity of a group of distinct,

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5. *Id.*
6. Perritt, *supra* note 1, at 866.
7. *Id.* at 869.
8. *Id.*
9. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 1.
10. *Id.*
11. *Id.*
12. *Id.*
13. 5 U.S.C. § 553 (1988).
14. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 1.

interested parties focused on proposing better, more acceptable rules.[15]

The adversarial nature of the traditional rulemaking process under the APA is considered "a major contributor to the expense and delay associated with regulatory proceedings."[16] In fact, the traditional rulemaking process has been perceived as merely the first round of a fight that will ultimately be decided by a cout of law.[17] It has been suggested that the need to establish a record as the basis for potential litigation down the road sharpens divisions that may foreclose any willingness of the parties to acknowledge other views.[18] Under such circumstances, parties tend to take extreme positions and to withhold information they view as potentially damaging to their positions.[19] The traditional APA rulemaking process thus lacks the opportunity for parties to exchange views and to focus on designing creative solutions to problems.[20]

The decision to use negotiated rulemaking involves several steps. First, someone must propose that a rule be considered for negotiated rulemaking. Although the proposal usually comes from within the agency, it may also come from an outside affected party or Congress.[21] Congress may even require that an agency use negotiated rulemaking for particular types of proposed rules.[22]

Second, the agency will usually hire a convener, or neutral person, to determine what interests are affected by the rule; Philip Harter has described this process as "an adult version of the children's game telephone."[23] The Environmental Protection Agency (EPA), on the other hand, has institutionalized the entire negotiated rulemaking process. The EPA's Regulatory Negotiation Project systematically evaluates rules for the appropriateness of negotiated rulemaking and makes recommendations

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15. *Id.* at 2.

16. *Id.*

17. *Id.* This reflects the belief that the process is not effective in reaching a rule that all affected parties can live with and that disgruntled parties will go to court to gain satisfaction.

18. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 2.

19. *Id.*

20. *Id.*

21. *Id.* at 40.

22. *Id.* For example, § 1431 of the Elementary and Secondary Education Act of 1965, as amended in 1988, requires that regulations authorized by the Secretary of Education be developed in part by negotiated rulemaking. 20 U.S.C.S. § 1431 (Law. Co-op. 1988).

23. Chip Cameron et al., *Alternative Dispute Resolution with Emphasis on Rulemaking Negotiations*, 4 ADMIN. L.J. 83, 88 (1990-91).

to the rulemaking staff.[24] Whether the process is institutionalized or not, the appropriateness of negotiated rulemaking is determined by applying certain criteria that may vary slightly from agency to agency.[25]

Third, if it appears that negotiated rulemaking will be recommended, the agency will publish a notice in the *Federal Register*. The notice normally states what issues are expected to be deliberated, lists the various parties that have been contacted, and invites public comment.[26] Through public comment, the agency hopes to learn of any interested parties not represented, whether the issues it picked are correct and if others exist, and whether negotiated rulemaking is even appropriate for the proposed rule.[27]

When an agency proceeds by negotiated rulemaking, it does so under the Federal Advisory Committee Act (FACA),[28] and the negotiation committee essentially becomes a quasi-federal agency.[29] The FACA requires that the agency publish notice of the committee meetings in the *Federal Register* and that the meetings be open to the public.[30]

B. *Criteria For Determining the Appropriateness of Negotiated Rulemaking*

As mentioned above, negotiated rulemaking is not suitable for all instances of agency rulemaking; limitations on its application exist. "Negotiation should be viewed as an alternative method of rulemaking to be used when it is superior to other processes."[31] A list of seven criteria has been used to determine when negotiated rulemaking is appropriate.

First, there must be a limited number of parties or interests significantly affected by the rule;[32] twenty-five is the upper limit, but each interest can be represented by a caucus or team. A caucus or team consists of multiple parties with similar interests and can be represented by a single individual or more.[33] While twenty-five may appear to be a large

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24. *Id.*

25. For a discussion, see *infra* Section IIB.

26. Cameron et al., *supra* note 23, at 89.

27. *Id.* at 89.

28. 5 U.S.C. app. §§ 1-15 (1988).

29. Cameron et al., *supra* note 23, at 89.

30. *Id.* at 90.

31. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 44 (1982).

32. *Id.* at 46.

33. *Id.* at n.258; ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 37; Cameron, *supra* note 23, at 87.

number for one table, only a few of the parties play significant roles in the negotiations. Negotiation is not appropriate if the regulation affects many interests in such diverse ways that representation by a few is not possible, or if a major interest is not sufficiently organized so that a representative can be selected.[34]

Second, the issues must be known and ripe for decision. All necessary parties must be ready to participate; the issues must be identifiable, and information must be sufficient.[35] Negotiated rulemaking is appropriate if "you know what the problem is, and it is ready for you."[36]

Third, no interested party will have to compromise a fundamental value. A value is fundamental if it is the very purpose of the organizational interest or an "article of faith."[37] Issues can be major and important and still negotiable, but if an issue rises to the level of an article of faith then agreement is unlikely, and some alternative forum should be used.[38] As one noted author suggests, "you do not negotiate which is the better of several religions."[39] However, once a conflict of fundamental values is resolved, "the parties may use the resolution as a basis for negotiated agreements on individual regulations."[40] In the regulatory context, the likelihood of successful negotiation increases the more the parties agree on the fundamental principles at the root of the decision.[41]

Fourth, there must be a number of diverse issues. A rule must involve a number of issues or approaches or there is nothing to compromise. Interested parties will yield on issues they consider lower priority in order to improve their position on issues they give higher priority.[42] "The whole purpose of negotiation is kind of the Jack Sprat theory: [w]hat one person values the other person does not value as much, and you can trade and optimize everybody's satisfaction because people look at this differential value on the issues."[43]

Fifth, sufficient countervailing power must exist so that the outcome is genuinely in doubt. Sufficient countervailing power means that

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34. *Id.*
35. Harter, *supra* note 31, at 47.
36. Cameron et al., *supra* note 23, at 87-88.
37. *Id.* at 88; ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 38.
38. *Id.*
39. Cameron et al., *supra* note 23, at 88.
40. Harter, *supra* note 31, at 50.
41. *Id.* at 49-50.
42. *Id.* at 50.
43. Cameron et al., *supra* note 23, at 88.

no interested party can accomplish its goal without incurring an unacceptable sanction.[44] Negotiated rulemaking is not appropriate when a party has no incentive to negotiate because it possesses the raw power to dictate the outcome.[45] The parties to negotiation must believe that the presence of countervailing powers makes the negotiation process the most appropriate process.[46]

Sixth, the parties must view negotiation as in their best interests. Parties must believe that they can achieve more through negotiation than through any other means. Participants who are not at the table willingly do not make positive contributions and may even take subsequent actions to attempt to destroy the product of any discussions.[47] Success is not likely in zero sum game situations where a party wins only to the extent another party loses; therefore the dispute must be transformed into a win-win situation.[48]

Seventh, the agency must be willing to use negotiated rulemaking and to participate in the process. The agency must believe that the direct discussion characteristic of negotiation will most effectively develop the proposed rule.[49] A senior official with the agency should be an active participant so that agency views are incorporated into the deliberations, the agency feels like a part of the negotiations, and the original purpose for developing the rule is met.[50] In this manner, the agency cannot later reject the proposed rule on the grounds that the rule was not created by the agency or that a proper balance was not struck.[51]

C. Advantages of the Negotiated Rulemaking Process

Long-term "benefits flow from the broader participation of the parties, the opportunity to have creative solutions to regulatory problems,

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44. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 38.

45. *Id.*

46. Harter, *supra* note 31, at 46. Some examples of countervailing powers include: (1) the ability to invoke a proceeding in which a third party will decide the issue based on governing principles that are not clear enough to allow prediction of the outcome, (2) the ability to create doubt on the outcome, and (3) in connection with (1), the ability to inflict costs and delays. *Id.*

47. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 38.

48. Harter, *supra* note 31, at 48.

49. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 39.

50. *Id.*

51. *Id.*

and the potential of avoiding litigation."[52] The negotiated rulemaking process saves time and resources. Negotiating the proposed rule before it is published avoids the postpublishing settlement negotiations that often occur under judicial supervision in programs involving adversarial rulemaking.[53] Regulated businesses will know earlier how the rule will affect them. Thus, they can plan capital expenditures or product changes at an earlier time than if they were faced with years of litigation and uncertainty over the outcome.[54] In addition, the public would receive a more timely schedule of those benefits Congress intended to flow from promulgation of the rule.[55]

The negotiation process provides the agency with a more complete understanding of the concerns of the potentially affected parties, the relative importance to the parties of different regulatory choices, and the factual grounds for the regulation.[56] This is true regardless of whether or not a consensus is reached.[57]

The negotiation process focuses on objectivity, such as practical and empirical concerns, rather than theoretical predictions. Because the interested parties decide what information is necessary to make an informed decision, the data can emphasize practical and empirical concerns rather than simply theoretical predictions.[58] This emphasis on practical experience can decrease time and cost to the agency of developing extensive theoretical data.[59] Negotiation allows agencies to more accurately understand the costs and benefits of policy alternatives than it could through adversarial hearings.[60]

In negotiated rulemaking, the parties focus squarely on their respective interests instead of advocating and maintaining extreme positions as in the normal rulemaking process.[61] Negotiated rulemaking enables the participants to grasp an understanding of the important issues and then act accordingly to accomodate the various competing interests.[62]

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52. *Id.* at 3.

53. *Id.*

54. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 3.

55. *Id.*

56. *Id.*

57. *Id.* at 3-4.

58. Harter, *supra* note 31, at 30.

59. *Id.*

60. Henry H. Perritt, Jr., *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625, 1627 (1986).

61. Harter, *supra* note 31, at 29.

62. *Id.*

In a negotiation, the parties can rank their concerns and then negotiate away their lesser concerns in order to get what they really want.[63] In traditional rulemaking, the agency may not be able to anticipate how strongly a party views the various provisions of the proposed rule; in negotiated rulemaking, an interested party can accomodate the concerns of one or more of the other parties in order to receive concessions on a critical point.[64]

Negotiation permits the affected interests "greater control over the content of agency rules while ensuring fairness and balanced participation."[65] Negotiation enfranchises parties who have important interests at stake but who may be relatively quiet or feel they have little bargaining power under the traditional rulemaking process.[66] The dynamic nature of negotiating rules forces each party to participate in drafting a solution. If a party is dissatisfied with a proposed solution, the other parties will press for finding an alternative proposal that might satisfy it.[67] The diversity of the parties at the negotiating table allows for a higher level of creativity in crafting solutions than if the rule were drafted by the agency alone.[68]

D. Disadvantages of the Negotiated Rulemaking Process

Despite its potential for significant long-term savings, negotiated rulemaking is resource intensive in the short term for the agency and for the parties.[69] The agency must employ a convener and a mediator, and it must assign a senior manager to sit at the negotiation table. Also, the compression of the rulemaking schedule may require the allocation of staff and technical contractor resources for use over a shorter period of time than in the traditional rulemaking process.[70] The compression of the internal review process during negotiations adds to the administrative burden on those personnel assisting the agency's representative, not to mention those who must pick up the slack created by the time demand of negotiations.[71]

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63. *Id.*
64. *Id.* at 29-30.
65. Perritt, *supra* note 60, at 1627.
66. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 4.
67. *Id.*
68. *Id.* at 4-5.
69. *Id.* at 5.
70. *Id.*
71. ADMINISTRATIVE CONFERENCE OF THE U.S., *supra* note 2, at 5.

Outside interested parties may also have to spend more resources and staff time than is normally spent on traditional rulemaking. Participation in negotiations brings with it the responsibility to review additional documents and to generate ideas, proposals, and data that require significant time and resources to develop.[72] A rule must be of significant importance to a group before it will commit the time and resources to participate in the negotiation process.[73]

III. HISTORY OF WETLAND IDENTIFICATION AND DELINEATION

In the spring of 1988, presidential candidate George Bush promised the American people "no net loss" of wetlands.[74] This theme was developed by the Wetlands Policy Forum, a group consisting of state and federal officials, private industry representatives, and environmental advocates.[75] Buried in this catchy and seemingly benign slogan, however, was the question of what exactly constitutes a wetland for federal regulatory purposes.[76] Shortly after George Bush settled into the oval office, this question became a debate that has escalated into one of the most controversial regulatory issues of our times. Conservationists pushed for preservation while private property owners pushed for the protection of property rights.[77]

A. Pre-1989 Wetlands Manual

Prior to 1989, four federal administrative agencies had their own respective procedures for identifying and delineating wetlands: the Environmental Protection Agency, the Army Corps of Engineers (CE), the Department of Agriculture Soil Conservation Service (SCS), and the Department of Interior Fish and Wildlife Service (FWS). For wetlands subject to Section 404 of the Clean Water Act,[78] the CE and EPA each

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72. *Id.*

73. *Id.*

74. Anthony Thompson & Steven Tabackman, *Critics All Wet on Wetlands Proposal*, LEGAL TIMES, Jan. 27, 1992, at 23.

75. *Id.*

76. *Id.*

77. Jeffrey P. Cohn, *How Wet Must A Wetland Be?*, NAT'L J. GOV'T EXEC., Mar. 1992, *available in* LEXIS, News Library, Arcnws File.

78. Clean Water Act § 404, 33 U.S.C. § 1344 (1990) (granting the EPA and CE concurrent authority over permitting the discharge of dredged or fill material into navigable waters, including wetlands).

developed individual manuals in 1987 and 1988, respectively.[79] The problem was not only that each agency had its own manual, but that the manuals were not nationally implemented standards within the agencies. Delineation and identification were inconsistent between and within the agencies.[80] The SCS adopted procedures for national use by the Department of Agriculture in 1987 for purposes of the "Swampbuster" provision of the Food Security Act of 1985.[81] In 1979, the FWS established guidelines in the form of its official wetland classification system report.[82] The different approaches meant inconsistent designations, and this was particularly obvious in the Clean Water Act.

B. 1989 Federal Manual for Identifying and Delineating Jurisdictional Wetlands

In early 1988, the CE and EPA resumed their discussion of combining their manuals to create a national standard, and they invited the SCS and FWS to join them.[83] The end product was the Federal Manual for Identifying and Delineating Jurisdictional Wetlands, which was published on January 10, 1989.[84] The 1989 Manual established a national standard for wetland identification and delineation and terminated any locally implemented approaches that were not consistent.[85]

What came out of the 1989 Manual were four wetland definitions that were conceptually the same in that they focus on three basic elements for identifying wetlands: (1) wetland hydrology (permanent or periodic inundation or soil saturation or both), (2) hydrophytic plants (characteristic plants), and (3) hydric soil (characteristic soils).[86] The FWS and SCS definitions contain certain exceptions that are specific to their respective organic statutes.

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79. 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed Revisions, 56 Fed. Reg. 40,446, 40,449 (proposed Aug. 31, 1991).

80. *Id.*

81. *Id.* at 40,450.

82. *Id.* at 40,449.

83. *Id.*

84. U.S. ARMY CORPS OF ENGINEERS, U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. FISH AND WILDLIFE SERVICE, U.S.D.A. SOIL CONSERVATION SERVICE, FEDERAL MANUAL FOR IDENTIFYING AND DELINEATING JURISDICTIONAL WETLANDS (1989) [hereinafter 1989 MANUAL].

85. *Id.*

86. 1989 "Federal Manual for Identifying and Delineating Wetlands"; Proposed Revisions, 56 Fed. Reg. 40,446, 40,451 (proposed Aug. 31, 1991).

The 1989 Manual has created a great deal of controversy by effectively expanding the definition of wetlands, or at least the agencies' interpretations of the definition. It has been estimated that the 1989 Manual almost doubled the estimated 100 million acres of land previously identified as wetlands.[87] Naturally, the criticism has come from farmers, real estate interests, and the oil industry while support has come from environmentalists, commercial fisherman, and duck hunters.[88] What started out as a scientific manual to be used as a guide to designating wetlands has become a policy document that critics argue amounts to a government taking.[89]

While congresspersons were busy introducing bills aimed at reducing the scope of section 404, the Bush administration appointed an interagency wetlands task force under the White House's Domestic Policy Council in 1990.[90] Task force deliberations led to an agreement between the EPA and the Vice President's Competitiveness Council to propose a revised delineation manual in August of 1991.[91] The proposed 1991 manual uses the 1989 Manual's three criteria to identify vegetated wetlands.[92] All three criteria are mandatory although exceptions under certain circumstances do exist.[93] However, the proposed 1991 manual narrows the definition of a wetland by lengthening the time soil must be saturated and changing vegetation requirements.[94] The proposed revisions were intended to improve the methodology for delineating wetlands while at the same time taking into consideration the policy implications of delineation.[95]

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87. Thompson & Tabackman, *supra* note 74, at 23.

88. *New Administration Wetlands Policy Focuses On Definition, Permit Process*, 22 Env't Rep. (BNA) No. 16, at 1052 (Aug. 16, 1991).

89. Cohn, *supra* note 77.

90. *Id.*

91. *See* 1989 "Federal Manual for Identifying and Delineating Jurisdictional Wetlands"; Proposed Revisions, 56 Fed. Reg. 40,466 (proposed Aug. 31, 1991).

92. Wetlands that are vegetated under normal circumstances are considered "vegetated wetlands" for the purposes of the proposed 1991 manual.

93. 1989 "Federal Manual for Identifying and Delineating Juridictional Wetlands"; Proposed Revisions, 56 Fed. Reg. 40,446, 40,452 (proposed Aug. 31, 1991).

94. *New Administration Policy Focuses on Definition, Permit Process*, *supra* note 88, at 1052; *see also* 56 Fed. Reg. 40,446, 40,452 (proposed Aug. 31, 1991) (proposing a revision requiring wetlands be covered with water for 15 consecutive days or saturated to the surface for 21 consecutive days during the growing season in most years). *But see* 1989 MANUAL, *supra* note 84 (requiring wetlands to be saturated eighteen inches below ground for seven consecutive days).

95. Thompson & Tabackman, *supra* note 74, at 23.

This time scientists and conservationists are criticizing and protesting the proposed revisions. Environmental groups warn that at least half of the nation's remaining wetlands will be excluded under the proposed manual.[96] Critics also maintain that the proposed manual will cost tens of billions of dollars through the loss of pollution and flood control provided by wetlands.[97]

IV. NEGOTIATED RULEMAKING AND THE WETLANDS DEBATE

Some commentators feel that because the wetlands designation issue is fundamentally a policy issue, it is proper that the new manual be "subjected to the highest level of public comment, policy review, and political accountability."[98] The goal of this section is to apply the criteria discussed in Section IIB. in order to determine if negotiated rulemaking would have avoided the regulatory impasse that the wetlands debate has created.

A. Application of the Criteria

1. Are a limited Number of Parties or Interests Significantly Affected by the Proposed Manual?

There are a myriad of individual interests affected by the identification and delineation of wetlands. However, the interests affected by the proposed manual can be broken down generally into six categories: private landowners, developers, scientists, government policymakers, conservationists, and resource users. There are basically two sides of the fence; one side argues that the wetlands definition should be narrow while the other predictably argues that it should be broad.

2. Are Issues Known and Ripe for Decision?

Although there seems to be some debate between scientists as to which criteria are better suited to wetland designation, the economic, constitutional, and environmental implications ultimately turn the debate into one about policy. Do we define wetlands broadly so as to protect the

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96. *Environmental, Economic Harm Predicted If 1991 Revisions to Wetlands Manual Adopted*, 22 Env't Rep. (BNA) No. 39, at 2176 (Jan. 24, 1992).

97. *Id.*

98. Thompson & Tabackman, *supra* note 74, at 23.

biological, purifying, and flood control aspects? Do we define wetlands narrowly in order to avoid the flood of takings cases by private landowners? Which scientific methodology is better suited to my policy goals? Whose policy goals matter? How do we take into consideration the regional differences in wetlands? The issue -- how to define wetlands for purposes of federal regulation -- is ripe; the subissues are identifiable; the parties are ready to participate, and the information is sufficient, albeit controversial.

3. Will an Interested Party Compromise a Fundamental Value?

If a particular group's organizational purpose is either preserving wetlands or protecting farmers' interests, does that mean the identification and delineation of wetlands rises to the level of an "article of faith" for that group? The issue that is really being negotiated is not what is a wetland, but rather what wetlands will be protected by federal statute. However, perhaps these two issues cannot be effectively separated for the purpose of negotiation. It is possible that a party on either side of the identification and delineation debate may, for ideological reasons, be incapable of compromising its view. However, the agency should not abandon an attempt at negotiation merely on the assumption that a party will not compromise.[99]

99. Cameron et al., *supra* note 23, at 104. Neil Eisner cites as an example an issue the FTC faced regarding access of the handicapped to transportation. Based on dealings in the past, the FTC felt that the party representing the handicapped would not be willing to compromise on a civil rights issue. However, the party in fact felt that there was room for compromise and suggested a negotiation. *Id.*

4. Are There a Number of Diverse Issues?

The debate over what wetlands will be protected by federal regulation presents many diverse issues. How do you define a wetland when some wetlands are not always wet, and some do not support vegetation? Can you really devise a national standard or should there be regional standards? Should the landowner be compensated for wetlands they cannot develop? These diverse issues will provide the negotiating parties with leverage.

5. Are There Sufficient Countervailing Powers?

The last three years provide a pretty obvious answer to this question. Both the 1989 Manual and the proposed 1991 manual have attracted sufficient criticism to make the policymakers nervous enough to initiate change. Both manuals were heavily criticized by the opposition, which had enough clout to cause reconsideration.

6. Is it in the Best Interests of the Interested Parties to Use Negotiation?

The 1989 Manual was created without public comment, and it has cost the agencies and outside interested parties considerable time and resources. The proposed 1991 manual had attracted 70,000 comments to the EPA by the middle of February of 1992.[100] The cost of processing all those comments in terms of time and resources is quite a burden. Given the nature of this issue, it seems unlikely that the interested parties will be satisfied with a normal notice-and-comment rulemaking. Probably the biggest incentive for the interested parties to make negotiations work is the realization that otherwise the agencies will make the determination on their own.

7. Will the Agencies Want to Participate?

When looking at the amount of time it has taken to move through the normal rulemaking processes, an argument certainly exists that the agencies would be willing to negotiate. The time and resources put into gathering data and processing all the comments from interested parties will be a tremendous burden on the agencies, especially the EPA. The

100. *Processing of Comments to Continue Despite Possible NAS Study, Official Says*, 22 Env't Rep. (BNA) No. 43, at 2417 (Feb. 21, 1992).

administrators must realize that this rule will not be based solely on the scientific data available but rather on the data that best supports the policy goals of the administration. Therefore, it makes sense for agencies to bring the interested parties together when setting these policy goals.

B. Evaluation of the Appropriateness of Negotiated Rulemaking

The goal of negotiations would be to propose an identification and delineation rule that could accommodate all interested parties' desire to reach a consensus. Four observations come to mind when applying the criteria to the proposed rulemaking.

First, the number of interested parties is substantial. On the government side there are the four agencies, the wetlands task force, and Dan Quayle's Competitiveness Council. On the technical side, there are those scientists whose data support a narrow definition and those whose data support a broad definition of wetlands. On the public side, there are conservationists and others who argue for a broad definition and landowners and developers who argue for a narrow definition. One question to address is whether various interests can be caucused into twenty-five seats.

It is possible to place the various interest groups into three basic categories: (1) those who believe landowners should be able to use their land as they please, even if it means destroying important ecology; (2) those who believe we should preserve all wetlands, even if it causes substantial economic loss to landowners and communities; and (3) those realists who recognize the futility of the polar views. Even though each interested party may have its own distinctive motivations, these three categories encompass the final goals of all parties. Looking at the situation in this perspective, it is not unrealistic to believe that all the interested parties can be effectively represented at a negotiation table with twenty-five seats.

Second, the debate is of a very scientific and technical nature. This fact is not necessarily fatal; in fact, several EPA regulations have been successfully negotiated despite their highly technical natures.[101] However, it would be foolish to argue that the debate is purely scientific even though science is at the very heart of it. In reality, the debate is scientific, economic, and political. Each side has its scientists to reinforce

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101. Cameron et al., *supra* note 23, at 96. Examples of successfully negotiated technical regulations include: regulations governing the remedy for asbestos in public schools, 40 C.F.R. §§ 763.80-.99 (1988), and regulations affecting the design of wood stoves for decreased air pollutant emissions, 40 C.F.R. §§ 60.530-.539b (1989). *Id.*

its public policy or economic arguments. Scientific complexity would not be an impediment to negotiation in this case because policy and economics are strong ingredients. However, because the rule is complicated by its technical and scientific nature, it will be important for the committee to marshall the data and analysis required for an efficient and intelligent negotiation.[102]

Third, the issue of whether the designation of land as wetlands constitutes a compensable taking cannot be ignored. Indeed, the issue is at the very center of the landowners' argument. The ownership of real property can open many doors of opportunity for the owner, particularly economic ones. One can argue that the issue of what an individual does with private property rises to the level of an article of faith. However, nuisance law requires a landowner to use property in a way that does not threaten the public health, safety, and welfare. The taking and property rights arguments are bargaining tools that can be brought to the table but should not prevent the negotiation from succeeding.

Fourth, the debate is clearly political. The negotiated rulemaking process gives the parties the opportunity to reconcile the political differences surrounding the rule, much like in the legislative process.[103] Traditional rulemaking, on the other hand, tends to omit the political dimension, which may later hamper successful rulemaking.[104]

In the wetlands debate, not only are the individual agencies that will administer the rule involved, but the Competitiveness Council and the administration are involved as well. The issue is not merely a marginal political issue, but rather an important political issue involving campaign promises and economics.

Negotiated rulemaking is appropriate for a highly political issue; yet at the same time, the political nature of an issue may render the process inappropriate or destined to fail. The fact that the negotiation meetings are open and geared to include all affected parties makes the process appropriate for political issues.[105] Traditional rulemaking, although it invites public comment, is not as open.

Negotiated rulemaking may not succeed if the issues to be decided are linked to fundamental values or to setting precedent, and the linkage manifests itself politically.[106] Here, the issue of how to identify and designate a wetland is linked politically to whether there will be "no net

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102. Cameron et al., *supra* note 23, at 101.

103. *Id.* at 87.

104. *Id.*

105. *Id.* at 100.

106. *Id.*

loss" and to whether real estate interests will be affected adversely. The ongoing disagreement between the EPA, which administers the permitting process, and the Competitiveness Council, which represents the interests of the country's business sector, indicates the political nature of the issue. The particular way in which the linkage manifests itself will determine whether politics will prevent successful negotiation.[107]

V. CONCLUSION

Negotiated rulemaking would have given the parties affected by the Wetlands Manual an opportunity to meet with the agencies and to develop a consensus on how a wetland is defined for purposes of the Clean Water Act. Even if the negotiation did not end in a consensus, the agencies would have had the opportunity to see what rule would be most fair. The greatest impediment to the success of a negotiated rulemaking of the wetlands issue is the political atmosphere of the debate.

One would normally assume that what constitutes a wetlands should be and can only be determined by scientific principles. However, the economic and political impact of the rule has become just as important, if not controlling. The consensus will be a definition of a wetland that is based, not on pure science, but on science manipulated by politics and economics.

The wetlands debate is merely another example of the dilemma environmental protection presents today: How far do we go to effectively preserve, conserve, and protect our natural resources? Wetlands provide flood control, water purification, fish and wildlife habitats, biological diversity, recreation opportunities, and natural beauty.[108] However, wetlands can also be filled or drained for development or farming, thereby bringing income to the owners and economic development to the community.

107. Cameron et al., *supra* note 23, at 100.

108. Thompson & Tabackman, *supra* note 74, at 23.

There is no better forum for effectively settling such dilemmas than a negotiation. The political nature of the issues may be an impediment, but that bridge should be crossed when it is reached. With the benefit of hindsight, one can now conclude that negotiated rulemaking could have avoided the lengthy debate that has ensued by bringing representatives of the affected interests together to negotiate a proposed delineation manual. Perhaps, it is not too late to bring the affected interests together and at least attempt to reach a consensus through negotiated rulemaking.

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