

NEGOTIATED RULEMAKING: A TOOL FOR STATE ENVIRONMENTAL AGENCIES

by

Christine Mueller

B.A. degrees in Environmental Studies and Earth Sciences
University of California, Santa Cruz, 1989

Submitted to the Department of Urban Studies and Planning
in Partial Fulfillment of the Requirements for
the Degree of

Master of City Planning


at the

Massachusetts Institute of Technology
February 1997

©1997 Christine Mueller. All rights reserved

The author hereby grants to MIT permission to reproduce and to distribute publicly paper and electronic copies of this thesis document in whole or in part.


Signature of Author.....

 Department of Urban Studies and Planning
January 16, 1997

Certified by.....

 Lawrence Susskind
Professor of Urban Studies and Planning
Thesis Supervisor

Accepted by.....

 J. Mark Schuster
Chair, MCP Committee

MASSACHUSETTS INSTITUTE OF TECHNOLOGY

APR 23 1997

LIBRARIES

Negotiated Rulemaking: A Tool for State Environmental Agencies

by

Christine Mueller

Submitted to the Department of Urban Studies and Planning on January 22, 1997
in Partial Fulfillment of the Requirements for the Degree of Master of City Planning

ABSTRACT

State environmental agencies face opposition when they revise or propose new regulations. Environmental regulations are typically challenged because they impose costs, are perceived to be unfair, or the scientific basis of the regulation carries some degree of uncertainty. The difficulty of crafting regulations is compounded by the existence of multiple interest groups that are affected by rules and rulemaking in different ways. Attempts by the Massachusetts Department of Environmental Protection to update the state's septic code illustrate the difficulty state environmental agencies can face, even when most interest groups agree a regulation or regulatory revision is overdue.

Recognizing the shortcomings of traditional procedures, some state agencies have tried a negotiated approach to rulemaking, bringing together representatives of the agency and affected interests to negotiate the content of proposed regulations. Three examples are presented. In Texas, negotiations to develop procedures and protocols for assessing natural resource damages from oil spills brought together representatives of three state agencies, the oil transporting and oil producing industries, and environmental groups. In Ohio, representatives of the state's environmental protection agency, health departments, landfill operators, and citizen's groups negotiated new rules regulating landfilling of construction and demolition debris. In Maine, a divisive referendum campaign left the state transportation agency in charge of implementing a planning policy that it had opposed. A rule implementing the new transportation planning policy was successfully negotiated by a committee of representatives from the business community, environmental and public interest groups, and state agencies, with the assistance of a team of neutral facilitators.

Negotiated rulemaking, the process used in the three state examples, was developed in response to the perceived inadequacy of traditional rulemaking procedures to address the types of regulatory problems environmental agencies often face. While the theory of negotiated rulemaking is based on federal experience, the three state cases demonstrate that the process can improve regulatory outcomes at the state level, as well. State agencies may be motivated to utilize negotiated rulemaking less frequently than their federal counterparts, however, and a challenge will be to ensure that agencies know about the procedure for those instances when traditional procedures fall short.

Thesis supervisor: Lawrence Susskind

Title: Ford Professor of Urban Studies and Environmental Planning

Acknowledgments

I am grateful to the many people in state agencies and dispute resolution offices and practices around the country who shared their time and information, leads, and insights. Many members of the Title 5 advisory committee and the negotiating committees in Maine, Texas, and Ohio, as well as agency staff and the facilitators, were generous with their time and provided much useful information. I want particularly to thank Ingrid Hansen, Lenore Kuwik and Andy Bowman for their help and Charles Pou for pointing me toward the Texas dispute resolution center as I sought examples of negotiated rulemaking.

Thanks to my thesis supervisor Larry Susskind, whose challenging questions and advice helped me gain a better understanding of my topic, and to Marjorie Noack for her unflappable competence and kindness. I appreciate Paul Levy's participation on my thesis committee. Thanks to my friends and classmates for their support and camaraderie over the past couple years, and to Yu Hung Hong, teaching assistant extraordinaire during my first semester, whose generous spirit and dedication continues to inspire. I am extremely grateful for the encouragement, guidance, good humor, and patience of Dennis Ducsik at my job in the coastal zone.

Thanks most of all to my parents for all their support, Lynn for her sound advice and encouragement, regular calls, and astute editing, and Dan and the rest of the clan for cheering me along.

CONTENTS

Introduction	7
1. The challenge of writing the rules: points of contention	10
Costs	
Fairness	
Scientific uncertainty	
Multiple stakeholders	
Problems with the rulemaking process	
2. The Title 5 revisions	27
The problem	
Key stakeholders	
Points of contention	
Discussion	
3. Negotiating the rules: three examples.....	47
Introduction	
Texas: Oil spill damage assessment procedures and protocols.....	48
Ohio: Construction and demolition debris rules	67
Maine: The Sensible Transportation Policy Act regulations	76
4. Negotiated rulemaking: conditions, procedures and caveats.....	92
Background	
Key features	
Federal activity	
The Negotiated Rulemaking Act of 1990	
Not a cure-all	
Conclusion	
5: Conclusion: A tool for state agencies	110
Bibliography.....	121

NEGOTIATED RULEMAKING: A TOOL FOR STATE ENVIRONMENTAL AGENCIES

INTRODUCTION

State environmental agencies face problems when they set standards and revise or propose new regulations.¹ The challenge of environmental regulation stems from the complexity of the issues involved and the number and range of stakeholders typically affected by regulatory decisions. Conventional rulemaking procedures are frequently adversarial and do not provide agencies the means for dealing effectively with the inherent complexity and uncertainty of environmental issues in order to produce regulations diverse interests groups can accept. Unhappy stakeholders challenge the rules in court or, more frequently at the state level, appeal to the legislature or executive branch to intervene.² This thesis considers the characteristic problems in environmental regulatory disputes and reviews some examples of state experience with an alternative approach, negotiated rulemaking.

The first chapter reviews the factors that frequently make environmental regulations controversial. I argue that environmental regulations are vulnerable to challenge because they impose costs, which raises the question of whether the costs are justified by the

¹ See, e.g., Richard Stewart, "The Reformation of American Administrative Law," *Harvard Law Review*, Vol. 88: 1667. 1975; Philip J. Harter, "Negotiating Regulations: A Cure for Malaise," *Georgetown Law Journal*, Vol. 71:1, 1982; Lawrence Susskind, "Mediation and the Accountability Problem," *Vermont Law Review*, Vol. 6, No. 1, Spring, 1981; Lawrence Susskind and Jeffrey Cruikshank, *Breaking the Impasse*, Basic Books, 1987; Stephen G. Breyer, *Regulation and Its Reform*, Harvard University Press, 1982; David M. Pritzker (ACUS) and Deborah S. Dalton (EPA), *Negotiated Rulemaking Sourcebook*, Office of the Chairman, Administrative Conference of the United States, U.S. Government Printing Office, September 1995.

Although the focus of this paper is on state level regulation, I draw extensively on the theory and practice of administrative law and environmental regulation that has been written in reference to federal law and federal agencies. Some state laws will vary, certainly, and state and federal agency experience is unlikely to be exactly comparable. However, all states have state-level counterparts of the Environmental Protection Agency, (Lee M. Thomas "The Successful Use of Regulatory Negotiations by EPA," *Administrative Law News*, Fall 1987), and my assumption has been that state agencies face enough of the same demands and challenges that the references apply. The examples presented here bear out that assumption.

² *Negotiated Rulemaking Sourcebook*, 1995; p. 369.

environmental benefits; because they are perceived as unfair, since the burdens and benefits of the regulation are distributed unevenly or have uneven impacts, depending on the capacities of regulated entities to absorb the imposed costs, and because affected interests may feel they have no say in important decisions affecting them. Because the complexity and uncertainty of the scientific and technical bases of the regulations are difficult to convey and prove, environmental regulations are vulnerable to challenge by those who question the need for the regulations, and their likely effectiveness, on scientific grounds. Complicating the regulator's task is the fact that environmental regulations typically affect a wide range of interest groups that have different perspectives and priorities. Finally, the traditional rulemaking process, which is frequently adversarial, falls short of dealing effectively with these difficulties to produce a rule viewed as legitimate by a cross-section of affected interests.

The second chapter looks at a rulemaking endeavor that used the traditional “notice and comment” rulemaking process. The rule in question is very complex, affects a wide range of interest groups, and the process was very contentious. It is presented here to illustrate the points made in Chapter 1 and to establish that the difficulties inherent in environmental regulation are likely to resist easy solutions.

Negotiated rulemaking has been proposed as an alternative to traditional rulemaking and is designed to more effectively address the interests of diverse stakeholders to produce a better rule in a less adversarial forum. Chapter three presents summaries and analyses of three examples of state-level negotiated rulemaking, also called regulatory negotiation or reg-neg. The examples presented here met what I consider to be minimum criteria to qualify as negotiated rulemaking: a neutral was engaged to facilitate the talks, and representatives of key stakeholders, including the agency responsible for writing the rule, participated in developing the regulations. In addition, the negotiated rule had to have been promulgated, so that the response (if any) of affected interests not directly participating in the talks could be assessed.

I present here the first three examples I found that met the above criteria. Two were identified through correspondence and phone calls to dispute resolution offices (one in Texas and one in Ohio) and the third I read about in an article in the newsletter *Consensus*. The summaries are based on the limited amount of written material that was available and telephone interviews with some of the participants. What I found was successful rulemaking endeavors that were not necessarily spectacular, that had problems, that did not, perhaps, fulfill all the promise of innovation and the discovery of opportunities for mutual gain that an “ideal” reg-neg might have. Yet all three faced the tenacious and thorny problems outlined in the first chapter, and all three were successful in that they produced rules that all parties could agree to--an accomplishment that had seemed doubtful at the outset. The examples show that negotiated rulemaking does provide a forum to bring different stakeholders together that is less adversarial than the traditional regulatory model. The assistance of a skilled, neutral facilitator can help to establish and maintain a problem-solving focus for the group.

The fourth chapter covers the theory of negotiated rulemaking, including the conditions that help to ensure success, and provides an overview of federal experience with the process.

In the last chapter, I consider the merits of negotiated rulemaking for state agencies, and conclude that this process can be a valuable tool for state environmental agencies when used in appropriate circumstances.

1. THE CHALLENGE OF WRITING THE RULES: POINTS OF CONTENTION

The substance of proposed environmental regulations as well as the procedures by which they are produced can generate or magnify opposition. This section reviews five factors that are central to the problems administrative agencies face in drafting environmental regulations. First, environmental regulations impose costs, and those who are asked to bear the costs may object, and question whether the costs are justified.¹ Second, a regulation may be challenged on the basis of fairness, because costs and benefits are distributed unevenly -- or have unequal impacts.² Third, the scientific basis of a rule may be challenged, because regulatory decisions often must be made despite some degree of scientific or technical uncertainty.³ Fourth, environmental regulations typically affect a wide range of interests, making the agency's task of reconciling differences to produce a workable regulation more difficult. At a minimum, an agency is likely to hear from some who want greater flexibility and fewer environmental restrictions, others who want more and stronger environmental protections, and perhaps local governments resisting new responsibilities or other regulatory impacts, as well. Each interest group will attempt to make its case the most convincing to the agency.⁴ Fifth, the conventional rulemaking process can magnify opposition and hinder efforts to develop effective and fair regulations. Traditional "notice and comment" rulemaking procedures, combined with the potential for court challenges after a rule is adopted, are typically adversarial, and encourage parties to take extreme positions (to establish a record that may be useful later in court, for example, or as a starting point from which to negotiate toward a

¹ Lawrence Susskind, Lawrence Bacow, and Michael Wheeler, *Resolving Environmental Regulatory Disputes*, 1983, p. 1.

² Susskind, et al. (1983) *Ibid*.

³ Milton Russell and Michael Gruber, "Risk Assessment in Environmental Policy-Making," *Science*, Vol. 236, 17 April 1987, pp. 289-290; Stephen Breyer, *Breaking the Vicious Circle*. Cambridge: Harvard University Press, 1993; p. 49.

⁴ Lee Thomas, "The Successful Use of Regulatory Negotiations by EPA," *Administrative Law News*, Vol. 13, No. 1, Fall 1987; Lawrence Susskind, "Environmental Mediation and the Accountability Problem," *Vermont Law Review*, Vol.6, No. 1, Spring 1981; Stephen G. Breyer, *Regulation and Its Reform*, Cambridge: Harvard University Press, 1982.

compromise). An adversarial rulemaking process can undermine the perceived legitimacy of the final rule, thus reducing voluntary compliance and the rule's effectiveness, and contributing to its instability.⁵

COSTS

Environmental regulations impose costs--on regulated industries, businesses and individuals, and on municipal and county governments expected to implement and enforce regulations promulgated at the state or national level. Critics have charged that the costs of environmental regulation result in lost jobs and economic stagnation, and have portrayed environmental quality goals as a luxury that some segments of society can ill afford.⁶ Local governments have sided with industries in objecting to costly regulations.⁷ Concern about the costs of environmental regulations at the federal level emerged not long after the first major environmental laws were passed in the late 1960s and early 1970s, and are reflected in a series of executive orders requiring agencies to weigh the costs and benefits of proposed regulations, and authorizing regulatory oversight by the Office of Management and Budget (OMB).⁸ Some environmental statutes specify the degree to which the implementing agency should consider costs in meeting statutory goals, as well. For example, Rodgers observes that legislators may require regulations to be cost-oblivious (in exceptional cases), cost-effective, cost-sensitive, or able to meet a cost-benefit test.⁹

⁵ Thomas O. McGarity, "Some Thoughts on 'Deossifying' the Rulemaking Process," *Duke Law Journal*, Vol. 41, No. 6, June 1992; Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review*, Vol. 88, No. 8.; Philip J. Harter, *Op. Cit.*, "Negotiating Regulations: A Cure for Malaise," 71 *Georgetown Law Journal* 1, 1982.

⁶ See, e.g., Lester C. Thurow, "Environmental Problems," *The Zero-Sum Society: Distribution and the Possibilities of Economic Change*, 1980, pp. 103-121; Bob Benenson, "A Mature 'Green' America Spawns...Grass-Roots Anti-Regulatory Rebellion," *Congressional Quarterly Weekly Report*, Vol. 53, No. 24, June 17, 1995, p. 1694.

⁷ Tom Arrandale, "A Guide to the Environmental Mandate Maze," *Governing*, Vol. 8, No. 5, February 1995, p. 49.

⁸ Richard A. Liroff, "Federal Experience: Cost-Benefit Analysis in Federal Environmental Programs," in Swartzman, Liroff, and Croke, eds., *Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics and Methods*, 1982, pp. 38-40 (Nixon, Ford, Carter); Vice President Al Gore, *Creating A Government that Works Better and Costs Less: Improving Regulatory Systems, Accompanying Report of the National Performance Review*, p. 10 and p. 78 (Reagon, Bush, Clinton).

⁹ William H. Rodgers, Jr. "Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking," *Harvard Environmental Law Review*, Vol. 4, No. 2, 1980, pp. 201-214.

While the idea that agencies should weigh the costs and benefits of environmental regulations and ensure that costs are justified has obvious appeal, the appropriate means of verifying or agreeing that the proper balance has been struck is much less obvious. Cost-benefit analysis is regularly championed by some as a way to ensure that adequate attention is paid to the economic implications of regulatory decisions. However, others see severe practical limits to using the process, and question its legitimacy on a number of grounds. Moreover, some suspect that some of the advocacy of cost-benefit analysis is driven more by “a desire to subvert the nation’s commitment to environmental goals” than a desire to improve the cost-effectiveness of regulations.¹⁰ Because cost-benefit analysis is frequently advocated by those who question the worth of environmental regulations as a means to verify or establish some “objective” measure of costs and benefits (and by implication the legitimacy or illegitimacy of the regulation), a review of some of the problems associated with cost-benefit analysis follows.

Swartzman identifies methodological, political, and ethical sources of controversy in cost-benefit analysis.¹¹ Problems with methodology involve the problem of comparing incommensurables. They include the technical challenge of pricing things not normally traded on markets, the different outcomes that can result depending on what assumptions are made by the analyst (assumptions that should be, but may not be, made explicit to decision makers using the cost-benefit analysis), and the level of uncertainty associated with different steps along the way.¹² Time is a critical, and complicating, factor, as well; both present and future implications and consequences need to be considered. Short term costs may be required to produce long term benefits. Small changes in the discount rate used to calculate future costs and benefits can produce large differences in results.¹³ Contingent valuation techniques that attempt to determine a price in the absence of

¹⁰ Liroff, *Op. Cit.* p. 35.

¹¹ Daniel Swartzman, “Cost-Benefit Analysis in Environmental Regulation: Sources of Controversy,” in Swartzman, Liroff, and Croke, *Op. Cit.* p. 58.

¹² A. Myric Freeman, cited in Liroff, *Op. Cit.* p. 45; see also Steven Kelman, “Cost-Benefit Analysis and Environmental, Safety, and Health Regulations: Ethical and Philosophical Considerations,” in Swartzman, Liroff, and Croke, *Op. Cit.* p.143.

¹³ Liroff, *Op. Cit.* p. 44.

markets by, for example, asking people how much they would be willing to pay for some environmental improvement or how much they would be willing to accept for some environmental degradation, can produce variable and debatable results.¹⁴

The policy question is how the cost-benefit analysis is to be used: will the analysis produce a bottom-line decision rule whereby a proposed regulation or standard is approved or rejected? Or will the analysis be used as one source of information, a factor among others for the decision maker to consider? It is apparent that some advocates of cost benefit analysis believe that cost-benefit analysis is an appropriate way to make political decisions and that the cost-benefit balance should be the deciding factor.¹⁵ Others point out that government has other concerns that supersede economic efficiency, such as equity.¹⁶ Given methodological problems and the range of outcomes that might be predicted for a given proposal, as well as value judgments implicit in the way we view democratic decision making processes (discussed below), skeptics and critics of cost-benefit analysis argue against placing undue weight on forecasts of costs and benefits to decide policy.

Cost-benefit analysis raises important ethical questions. The roots of economists' enthusiasm for economic efficiency (and its logical extension in regulatory matters, cost-benefit analysis) are in the utilitarian branch of moral philosophy, which holds that an action is moral if benefits of the action are greater than costs, and not moral if costs are greater than benefits.¹⁷ But, as Kelman argues, utility alone is insufficient as a moral philosophy, because it ignores commonly accepted moral rights and duties, which have "prima facie moral validity."¹⁸

¹⁴ Eric L. Hyman, "The Valuation of Extramarket Benefits and Costs in Environmental Impact Assessment," *Environmental Impact Assessment Review*, Vol. 2, No. 3, 1981, pp. 227-264.

¹⁵ Stewart, *Op. Cit.* p. 1702 ("economic analysis has frequently been advocated as a source of substantive rules for determining administrative policy").

¹⁶ George P. Schulz, "The Abrasive Interface," in *Business and Public Policy*, John T. Dunlop, editor, (Graduate School of Business Administration Harvard University), 1980, p. 18; McGarity, *Op. Cit.*, pp.1391-1392 (lists fairness, allocative efficiency, and factual accuracy as some of the societal goals with which public agencies are concerned).

¹⁷ Kelman, *Op. Cit.* pp. 138-140.

¹⁸ Kelman, *Op. Cit.* p. 142; Kelman cites duties not to lie and not to kill, and notions about human rights as examples.

Some critics of cost-benefit analysis argue that the equation of public, political decisions with a summing up of individual consumer preferences errors by failing to distinguish between “how people value things in private individual transactions and how they would wish a social valuation of those same things made in public decisions.”¹⁹ Such a judgment “violates a view of citizen behavior that is deeply [i]ngrained in our democratic tradition [and] denudes politics of any independent role in society....”²⁰ Another ethical concern is that the very act of pricing something that does not ordinarily have a price--from a human life to a spectacular scenic vista--may have the effect of lowering the perceived value of the thing. It diminishes the thing’s intrinsic value to its instrumental value, and has the opposite effect of, for example, asserting that something is “not for sale,” which “signals and affirms a thing’s distinctive value to others...”²¹

The common economic practice of applying a discount rate to calculate future costs and benefits has important ethical implications regarding intergenerational equity. For example, a committee of the National Research Council reporting on the regulation of chemicals found “that if a discount rate of 5 percent were used, one case of poisoning by chemicals today would be valued the same as 1,730 cases occurring in 200 years, and over 3 billion cases 450 years hence. The committee concluded that ‘intergenerational effects of these magnitudes are ethically unacceptable, yet they might be made to appear acceptable if the traditional social rate of discount concept were applied.’”²² Using “willingness to pay” as criterion will “bias the analysis against the poor and against future generations.”²³

The litany of difficulties and uncertainties and the long-running debate over the use and misuse of cost-benefit analysis suggests the trouble agencies may encounter over the cost of regulations and in their attempts to ensure that the benefits of proposed regulations

¹⁹ Kelman, *Op. Cit.* p. 145. See also, Mark Sagoff, *The Economy of the Earth*, Cambridge University Press, 1988.

²⁰ Kelman, *Op. Cit.* p. 146.

²¹ Kelman, *Op. Cit.* p. 147.

²² Liroff, *Op. Cit.* p. 44; internal quote is from National Academy of Sciences, “Decision Making for Regulation Chemicals in the Environment,” (1975).

²³ Rodgers, *Op. Cit.* p. 196.

justify costs. Whatever the method of calculation, the government's estimate of costs and benefits is likely to be disputed--and possibly by more than one side in the debate.

"[E]nvironmentalists and developers agree that government regulatory agencies figure costs and benefits incorrectly."²⁴ Furthermore, complaints about the cost of environmental regulations may have more political salience today than ever before, as regulations increasingly address more diffuse sources of pollution and increasingly impact small businesses and individuals.²⁵

FAIRNESS

Because environmental regulations entail choices about the distribution of costs and benefits,²⁶ and those costs and benefits have uneven impacts, regulations may be opposed on the grounds that they are unfair.²⁷ The perceived fairness of a regulation influences its perceived legitimacy,²⁸ which in turn can affect the rule's effectiveness (through higher or lower rates of voluntary compliance, for example) and stability.²⁹

The notions of fairness and justice are closely related. "Justice" pertains to "general principles for the distribution of resources and obligations in society as a whole," whereas the concept of "fairness" applies to particular cases and contexts and "includes views on how to apply any broader principle of justice regarded as pertinent to a specific context."³⁰ Requirements that administrative agencies apply rules consistently are related to the ideal of formal justice, which holds that "government interference with important private interests be permitted in accordance with rules known in advance and impartially applied."³¹

²⁴ Susskind (1981) *Op. Cit.* p.11.

²⁵ Benenson, *Op. Cit.* p. 1695.

²⁶ Susskind (1981) *Op. Cit.* pp. 13, 17.

²⁷ Susskind et al. (1983) p. 1.

²⁸ Lawrence Susskind and Jeffrey Cruikshank, *Breaking the Impasse*. Basic Books, 1987, pp. 24-25; also see Cecilia Albin, "The Role of Fairness in Negotiation," *Negotiation Journal*, July 1993, p. 240 (links perceptions of fairness and legitimacy in negotiated outcomes).

²⁹ See, e.g., Harter, *Op. Cit.*, p. 22; Albin, *Op. Cit.* p. 225; and Fisher and Ury, p. 156.

³⁰ Albin, *Op. Cit.* p. 225.

³¹ Stewart, *Op. Cit.* p. 1698.

However, environmental regulations inevitably have unequal impacts, even if uniform rules or standards are applied evenly.³² “[T]he fact that no two communities or companies have the same resources to draw upon creates unfair situations in practice.”³³ The distribution of costs and benefits of environmental regulations reflect value-laden decisions about which different interest groups may disagree,³⁴ so that considering the issue of fairness raises the question, “fair to whom?”³⁵ Different interests, values, time horizons, perceptions of risk, and other factors can influence perceptions of what is fair.

Given the absence of a single, ascertainable “public interest” in many regulatory matters, courts and the legislature have turned to expanding interest participation as a way to increase the fairness and legitimacy of regulations.³⁶ However, providing equal opportunity to participate requires more than extending the right to participate to increasing categories of affected interests. Effective participation requires resources--to conduct research, compile supporting documentation, and bring in experts to testify, for example. Powerful, well organized interests are better able to do all these things that less organized and less well-off interests.³⁷ Some observers therefore question the effectiveness of expanding participation rights as a means to increase the fairness of regulatory processes.

Furthermore, the expansion of participation rights has made rulemaking procedures more formal and more adversarial, which can undermine the perceived legitimacy of the outcome in the view of those who believe their interests were not sufficiently considered.³⁸

³² Susskind et al. (1983) *Op. Cit.* p. 1; Breyer (1982) *Op. Cit.* p. 115; also see Yeager, *The limits of law: public regulation of private pollution*, Cambridge University Press, 1981, p. 285 (smaller firms may be less able to absorb costs of compliance than larger, wealthier firms and therefore be cited for frequently for pollution violations; Yeager proposed that factors such as this and others bias regulations in favor of larger companies.

³³ Susskind et al. (1983) *Op. Cit.* p. 1.

³⁴ See, e.g., Susskind (1981) *Op. Cit.* p. 13.

³⁵ Albin, *Op. Cit.* p. 225.

³⁶ Stewart, *Op. Cit.* p. 1683; p.1761 (“[It is claimed that interest group participation] ...increases confidence in the fairness of government decisions.... [Proposals for expansion of participation rights] follow logically from the premise that justice results when all interests are considered.”)

³⁷ Breyer (1982) *Op. Cit.* p. 352.

³⁸ Breyer (1982) *Op. Cit.* p. 354; Harter, *Op. Cit.*, p. 22.

Another, somewhat contradictory concern comes from evidence suggesting that, in some cases, newly participating interests perceive outcomes and processes as fairer, even though outcomes remain substantially unchanged. This has led some observers to worry that increasing participation rights can serve to manipulate and co-opt affected interests without improving regulatory decisions. Susskind and Cruikshank argue that in judging fairness, both the process and the outcome need to be considered, and that fairness needs to be judged by the community at large as well as the participants.³⁹ The wide reach, long term consequences, and irreversibility of resource allocation decisions means that future generations and affected but unorganized interests also need to be considered in judging the fairness of an outcome.⁴⁰

SCIENTIFIC UNCERTAINTY

Science and technology play a key role in the assessment of risks and the management of risks to public health and the environment, two functions at the core of environmental regulation.⁴¹ Sound science is considered key to legitimate environmental regulation--not only to achieve regulatory goals, but also to withstand challenges from those who oppose the regulation.⁴² However, the processes of risk and environmental impact assessment and management are complex, the data ambiguous and replete with uncertainty, and assessors and managers are required to make subjective judgments throughout the process. These factors can lead to disagreement among experts about the characterization of environmental risks and the appropriate responses,⁴³ and provide the basis for opponents of the selected management option to challenge the agency's decision.

³⁹ Susskind and Cruikshank, *Op. Cit.* pp. 24-25; also Susskind (1981) *Op. Cit.* p. 17.

⁴⁰ Susskind (1981) *Op. Cit.* pp. 7, 8, 16.

⁴¹ John D. Graham, "Science and Environmental Regulation," in *Harnessing Science for Environmental Regulation*. John D. Graham, editor. New York: Praeger Publishers, 1991, p. 1; also, Russell and Gruber, *Op. Cit.*, pp.286-288.

⁴² Graham, *Ibid.* p.1.

⁴³ See, e.g., Dorothy Nelkin and Michael Pollak, "Problems and Procedures in the Regulation of Technological Risk," in *Societal Risk Assessment: How Safe is Safe Enough*. Richard C. Schwing and Walter A. Albers, Jr., editors. New York: Plenum Press; Richard Wilson and E.A. C. Crouch, "Risk Assessment and Comparisons: An Introduction," *Science*, Vol. 236, 17 April 1987; Dale Hattis and David Kennedy, "Assessing Risks from Health Hazards: An Imperfect Science," *Technology Review*, May/June 1986.

Risk assessment

The purpose of a risk assessment is to inform regulators' understanding of what the risks are and how big they are.⁴⁴ Simply by initiating a particular assessment the agency makes several important value judgments that are relevant to the outcome of the process. When an agency determines that a potential risk is worth looking into (a significant judgment), the boundaries of the problem or potential risk to be assessed are defined and an assessment team is selected and assigned to the task. The way in which the problem is bounded and defined will influence the selection of the assessment team, the team's understanding of its mission, and, ultimately, the results of the assessment.⁴⁵ Risk assessments often require interdisciplinary teams of scientists and engineers,⁴⁶ and whether and how experts on an interdisciplinary team interact can also influence the direction and evolution of the assessment.⁴⁷

The complexity of the assessment itself provides multiple avenues for the introduction of uncertainties and the incorporation of simplifying assumptions and subjective judgments. For example, assessing the health risk posed by a chemical pollutant involves determining dose-response relationships and estimates of human exposure. The exposure assessment needs to consider multiple pathways (for example, inhalation, ingestion and skin absorption), and the probable duration and intensity of the exposure.⁴⁸ The assessment must determine the environmental distribution and fate of the pollutant in and across different media.⁴⁹ The different physical states a chemical may exist in must be taken into account in calculating dispersion.⁵⁰

⁴⁴ Wilson and Crouch, *Op. Cit.* p. 267.

⁴⁵ Lawrence E. Susskind and Louise Dunlap, "The Importance of Nonobjective Judgments in Environmental Impact Assessments," *Environmental Impact Assessment Review*, Vol. 2, No. 4, 1981.

⁴⁶ Paul J. Liroy, "Assessing total human exposure to contaminants," *Environmental Science and Technology*, Vol. 24, No. 7, 1990.

⁴⁷ Susskind and Dunlap, *Op. Cit.*

⁴⁸ Jeffrey B. Stevens and Deborah L. Swackhamer, "Environmental pollution: A multimedia approach to modeling human exposure," *Environmental Science and Technology*, Vol. 23, No. 10, 1989.

⁴⁹ Stevens and Swackhamer, *Op. Cit.*; Hattis and Kennedy, *Op. Cit.* p.63.

⁵⁰ Stevens and Swackhamer, *Op. Cit.* p. 1181.

Data may be missing, flawed or only marginally appropriate. In general, data are drawn from historical sources (and used in epidemiological studies) or animal tests.

Epidemiological studies are suited to relatively few types of cases⁵¹ and the use of data from animal tests entails comparing effects in animals to humans and extrapolating from large doses to small, steps requiring the application of controversial theories.⁵² To make predictions based on either historical data or laboratory tests requires use of models,⁵³ and different models can produce vastly different results.⁵⁴ In addition, the data base required for the selected model may contain significant gaps or be of questionable quality, specificity, and/or applicability.⁵⁵ Because generating new data entails considerable time and expense and may not be an option, analysts frequently must make assumptions and judgments where gaps exist or the precision or applicability of data is questionable. As risks are estimated, estimates of uncertainty are applied to the estimates about risks.⁵⁶

The final product of the assessment, a risk characterization, is used by risk managers to develop, consider and select from a range of management options.⁵⁷ Subjective judgments and assumptions are a necessary part of a process that aspires to (but can never fully achieve) an ideal of “scientific objectivity.” To aid those who must evaluate the results of the assessment, assumptions and value judgments should be made as explicit as possible. As this outline of the process suggests, risk assessment is an uncertain science that, despite the assessors’ conscientious adherence to scientific and analytic principles, entails decisions and judgments about which qualified, disinterested scientists may disagree. Similarly, the consequences of land use decisions and the assessment of environmental

⁵¹ Hattis and Kennedy, *Op. Cit.* pp. 63-64.

⁵² Wilson and Crouch, *Op. Cit.* p. 268.

⁵³ Wilson and Crouch, *Op. Cit.* p. 268.

⁵⁴ Hattis and Kennedy, *Op. Cit.* p. 65. According to Hattis and Kennedy, analysts in different fields prefer different models; they provide the example that molecular biologists favor “multistage” models, while pharmacologists and toxicologists favor “probit” models. Hattis and Kennedy also cite a study comparing a number of different models that showed that, depending on the model used, the risk of cancer from a particular substance differed by a factor of one million.

⁵⁵ Stevens and Swackhamer, *Op. Cit.*

⁵⁶ Wilson and Crouch, *Op. Cit.* p. 267.

⁵⁷ Paul F. Deisler, Jr., “The risk management-risk assessment interface,” *Environmental Science and Technology*, Vol. 22, No. 1, 1988.

impacts of proposed development projects can be just as uncertain and subject to debate.⁵⁸

Risk management

Risk management, the process of controlling and minimizing risks, is certainly no more straightforward. Risk assessments inform regulators in setting priorities, designing regulations, and formulating technological requirements.⁵⁹ To set priorities, risks are compared and ranked.⁶⁰ To do this, the risk manager must take into account not only the characterization of risk determined by the assessment, but also ethical, social, and political factors; public and individual perceptions of risks and benefits; technical factors and feasibility; economic costs and benefits; legislative and legal constraints; and the concerns of public, business, labor, and other interest groups.⁶¹ As with risk assessments, value judgments and assumptions are incorporated in the decision making process, and predictions about the effectiveness and suitability of management solutions necessarily carry some degree of uncertainty.

Regulatory agencies must act despite scientific uncertainty, however.⁶² Scientists by training prefer to reserve commitment to a hypotheses until it is proven,⁶³ and rightly so. But the responsibilities of public agencies with mandates to protect public health and the environment are different from those of a research scientist.⁶⁴ Failure to act to minimize or mitigate an identified risk--waiting until every scientific uncertainty has been banished, for example--is after all a type of action, and has consequences. "We can never do

⁵⁸ See, e.g., Susskind and Cruikshank, *Op. Cit.*; Susskind and Dunlap, *Op. Cit.*; and Susskind (1981) *Op. Cit.*

⁵⁹ Russell and Gruber, *Op. Cit.*

⁶⁰ Wilson and Crouch, *Op. Cit.* p. 269.

⁶¹ Deisler, *Op. Cit.* (list of factors from Figures 1 and 20) pp. 17-18.

⁶² David L. Bazelon, "Science and Uncertainty: A Jurist's View," *Harvard Environmental Law Review*, Vol. 5:209; Lawrence Susskind and Gerald McMahon, "The Theory and Practice of Negotiated Rulemaking," *Yale Journal on Regulation*, Vol. 3:133, 1985 ("Agencies ... must ... make policy choices in situations where either the desired facts are not available or the available "facts" are contested.") p. 135.

⁶³ Graham, *Op. Cit.* p. 1; Bazelon, *Op. Cit.* p. 213. Graham observes that "[a]s long as the burden of proving risk to human health lies with the regulator, any imperfections in scientific knowledge about human risk can operate to permit continued human exposures to toxic chemicals."

⁶⁴ Bazelon, *Op. Cit.* pp. 212-213.

nothing. [T]he status quo is action....”⁶⁵ Agencies cannot do everything,⁶⁶ of course, and not responding to an identified environmental risk may be the appropriate decision. Such a decision needs to be evaluated and weighed with other options. Whatever the agency’s course of action, the absence of certainty about the feasibility and effectiveness of proposed management solutions can fuel public doubts, if not outright opposition and resistance, and lead to charges that the agency is doing too much, or too little, and often enough, both.⁶⁷

MULTIPLE STAKEHOLDERS

As the preceding sections suggest, environmental regulations affect many different groups and individuals. Interested parties include the agency; other agencies directly involved or interested in the resolution of the issue; regulated businesses, industries, and governmental agencies; public interest and environmental groups; citizens interested in a site specific action or decision; the agency’s counterpart agencies in other jurisdictions and levels of government; and citizens at large.⁶⁸ Legislators and the executive branch are likely to be interested as well, if their constituents are. Consumers and utility rate payers,⁶⁹ diffuse and unorganized interests who may be unaware of the regulatory proceedings,⁷⁰ and future generations all may be affected by environmental regulatory decisions.⁷¹

Different parties have different stakes in the outcome. A regulated industry and its neighbors may have more obvious stakes in siting and permitting requirements than others

⁶⁵ Garret Hardin, “The Tragedy of the Commons,” *Science*, Vol. 162, 13 December 1968, pp. 1243-1248; also, see Stewart, *Op. Cit.* p. 1756 (The “non-assertion of governmental authority may itself be a decision among competing interests”); and Bazelon, *Op. Cit.* p. 213. (“[I]t would be ironic if agencies had to show that a scientific consensus existed before they could act against suspected health and safety hazards.”)

⁶⁶ Russell and Gruber, *Op. Cit.* p. 286.

⁶⁷ Russell and Gruber, *Op. Cit.* pp. 289-290; Breyer (1993) *Op. Cit.* (“The very fact that the many assumptions required by uncertainties are not clearly derivable from science can make them a lightning rod for contending political forces.”) p. 49.

⁶⁸ Thomas, *Op. Cit.*

⁶⁹ Breyer, (1982) *Op. Cit.* (on hearings of the Federal Power Commission on gas prices, “both sides had legitimate claim to representing the consumer--one stressing lower prices and the other stressing need to avert a shortage”) p. 352.

⁷⁰ Susskind and Cruikshank, *Op. Cit.* p. 102.

⁷¹ Susskind (1981) *Op. Cit.* p. 8.

who nevertheless have equally legitimate interests in the outcome, for example. Also, broadly defined interest groups such as developers and environmentalists contain subgroups and factions, including pragmatists and hardliners, whose views may vary from the group as a whole.⁷² And, as noted, different interests have different perspectives and values, different methods of calculating costs, risks and benefits, and different levels of technical knowledge, advocacy skills, and resources.⁷³

The expansion of participation rights in administrative decision making procedures has transformed the agency's role from decision making expert to a kind of "umpire" balancing competing interests,⁷⁴ although agency expertise in both administrative and substantive matters remains important, as well.⁷⁵ Susskind and Cruikshank observe that "the agency's problem, typically, is that any given standard will please some groups and offend others, and the available scientific data...rarely offer a definitive basis by which to justify the choice of one standard over another."⁷⁶ Moreover, each side "suspect[s] that regulatory agencies are more sympathetic to the other side."⁷⁷

PROBLEMS WITH THE RULEMAKING PROCESS

Most federal agencies promulgate regulations according to "informal" rulemaking procedures of the federal Administrative Procedures Act (APA), enacted in 1946.⁷⁸ Although some variations inevitably occur in rulemaking procedures at the state level, states too have enacted administrative procedures laws. Informal procedures under the APA are outlined here to provide an overview of the requirements that govern agency rulemaking generally.

⁷² Susskind (1981) *Op. Cit.* p. 10.

⁷³ Breyer (1982) *Op. Cit.* pp. 352-353.

⁷⁴ Harter, *Op. Cit.*, p. 14; Stewart, *Op. Cit.* p. 1683.

⁷⁵ Breyer (1993) *Op. Cit.* p. 62.

⁷⁶ Susskind and Cruikshank, *Op. Cit.* p. 36.

⁷⁷ Susskind (1981) *Op. Cit.* p. 12.

⁷⁸ Administrative Conference of the United States (ACUS), *A Guide to Federal Agency Rulemaking*, 2nd Edition, Office of the Chairman, 1991 (by Benjamin W. Mintz and Nancy F. Miller), p. 3 and p. 47.

"Formal" APA procedures are rarely used, and only in very limited types of cases.

The evolution of informal rulemaking

Typically, when developing or revising a rule, an agency generates a draft of the proposed rule and publishes a notice of proposed rulemaking in the *Federal Register* (or, for state agencies, the analogous state publication). The notice includes a description of subjects and issues involved in the proposed rule, the authority under which the rule is proposed, and the time, location and nature of public proceedings.⁷⁹ A comment period follows the announcement, providing the public the opportunity to contribute to the rulemaking record by submitting written information and arguments and, theoretically, helping shape the final rule.⁸⁰ Public hearings also may be conducted during this time, but are not required under APA provisions. The APA directs the agency to consider “all relevant matter presented” and include a “concise general statement of [the rule’s] basis and purpose” in the final rule.⁸¹ The final rule is published in the *Federal Register*.⁸² If the rule is controversial, however, opponents are likely to seek judicial review at this point to stop the rule altogether or, at a minimum, to delay implementation.⁸³

This once straightforward process, which was intended to shorten the rulemaking process and enhance agency flexibility, has become increasingly complex and formal over the years.⁸⁴ In the early 1970s, new programs, especially in the areas of health, safety, and the environment, delegated broad discretionary authority to agencies.⁸⁵ At the same time, however, there was concern about agency discretionary power and the potential misuse of this delegated authority. Subsequently, new laws, executive orders and judicial decisions have added new procedural and substantive requirements to administrative rulemaking.⁸⁶

⁷⁹ 5 U.S.C., S. 553(b) (1988 ed.), reprinted in ACUS, *Federal Agency Rulemaking, Op.Cit.*; p. 376.

⁸⁰ Susskind and McMahon, *Op. Cit.*

⁸¹ 5 U.S.C., S. 553(c), in ACUS, *Federal Agency Rulemaking, Op.Cit.*; p. 376.

⁸² 5 U.S.C., S.552(a)(1)(D); publication requirement applies to “substantive rules of general applicability,” in ACUS, *Federal Agency Rulemaking, Op. Cit.*, p. 273.

⁸³ The APA provides that the reviewing court shall “hold unlawful and set aside...agency actions, findings and conclusions found to be...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” among other reasons. (5 U.S.C., S. 706(2)(A), in ACUS, *Federal Agency Rulemaking, Op.Cit.*, p. 385)

⁸⁴ McGarity, *Op. Cit.*, p. 1385; Stewart, *Op. Cit.* p. 1752.

⁸⁵ Carnegie Commission on Science, Technology, and Government, *Risk and the Environment: Improving Regulatory Decision Making*; New York, June 1993, p. 107; Harter, *Op. Cit.*, p. 10.

⁸⁶ Harter, *Op. Cit.*, pp. 10-13.

To ensure that all pertinent facts and interests are adequately and fairly considered, courts have expanded substantive, factual requirements; directed agencies to consider all affected interests; and widened the scope of interests with legal standing to participate in and challenge regulatory decisions.⁸⁷ As the technical complexity of new areas being regulated exceeded agency expertise,⁸⁸ and the range of diverse interests affected by the new regulations expanded, rulemaking became a largely political process of balancing competing claims and interests.⁸⁹ Yet despite the broadening of requirements, “notice and comment” rulemaking has not achieved the promise of interest participation some had hoped for it. It has made the process more formal and more adversarial, without necessarily improving regulatory decisions. Critics charge that in general little changes between proposed and final rules.⁹⁰

Problems with the adversarial nature of interest participation

Interest representation in typical rulemaking procedures is adversarial, with each party striving to persuade the agency of the merits of its position and pointing out the flaws in opposing positions.⁹¹ The adversarial process encourages agencies and private parties to take extreme positions, anticipating that they will need to move toward the center as a compromise.⁹² Similarly, the process encourages parties to take strong positions even on issues that are relatively unimportant to them, to have issues to concede in a compromise. This makes it difficult for the agency and other parties to identify what really matters to each party, in order to make “informed trade-offs.”⁹³ Sturm, discussing public law remedies, points out that the traditional adversarial approach to dispute resolution, well-suited for determining liability, does not serve well when the challenge is to find

⁸⁷ Harter, *Op. Cit.* pp. 10-12; Stewart, *Op. Cit.* pp. 1670, 1679, 1712, 1716, 1728.

⁸⁸ McGarity, *Op. Cit.* p. 1398; Harter, *Op. Cit.* p. 17.

⁸⁹ Stewart, *Op. Cit.* pp. 1683-1686; Stephen Breyer (1993) *Op. Cit.* p. 57.

⁹⁰ Stewart, *Op. Cit.* p. 1775 (“Public interest advocates have tended to scorn resort to rulemaking proceedings on the ground that participation in such proceedings may have little impact on agency policy determinations.”)

⁹¹ Harter, *Op. Cit.* p. 18.

⁹² Harter, *Op. Cit.* p. 19.

⁹³ Harter, *Op. Cit.* p. 19-20;

practicable options that diverse affected parties are willing and able to comply with.⁹⁴ This is the challenge environmental regulatory agencies face, as well.

Because the process can end up in court, agencies and private parties are impelled to develop vast amounts of material to establish a record and buttress their positions. Such effort in “defensive research” consumes time and material resources of all parties, and frequently is only of marginal value to the ultimate decision or rule.⁹⁵ The process encourages participants to exploit scientific uncertainty,⁹⁶ and contributes to the distortion of scientific and technological information. Each side focuses on evidence that supports its position and ignores contradictory evidence, as well as the uncertainties and qualifying elements associated with the data.⁹⁷ No forum is provided to resolve disagreement over scientific and technological issues. Parties do not directly interact, limiting the opportunity for an exchange of important information as well as discussion of possible trade-offs between competing interests.⁹⁸ Instead, each directs its argument to the agency, converting the agency, as noted earlier, “from an expert guardian of the public interest to a form of ‘umpire,’ albeit an active one.”⁹⁹

The adversarial nature of the traditional rulemaking process also undermines the perceived legitimacy of the outcome and may reduce voluntary compliance with the regulation.¹⁰⁰ Lack of perceived legitimacy also undermines the stability of the regulation, as those who perceive themselves to be the “losers” of the contest await the opportunity to have the

⁹⁴ Susan P. Sturm, “A Normative Theory of Public Law Remedies,” *The Georgetown Law Journal*, Vol. 79, No. 5, June 1991, pp. 1358-1365.

⁹⁵ Harter, *Op. Cit.* p. 21; Stewart, *Op. Cit.* p. 1773.

⁹⁶ Breyer (1993) *Op. Cit.* p. 49.

⁹⁷ Harter, *Op. Cit.* p.21; Susskind and Cruikshank, *Op. Cit.*, p. 29. (Describes the hiring of experts to exploit uncertainties and “undercut each other’s claims” as the “dismal process of “advocacy science.”); also see Bazelon, *Op. Cit.*, p. 213. (Calls on agencies to disclose uncertainty, noting, however, that “[t]hose who must make practical decisions [despite uncertainty]... may be tempted to disregard or even suppress any lack of confidence they may have.”)

⁹⁸ Harter, *Op. Cit.* p. 20; Susskind and Cruikshank, *Op. Cit.* p. 71.

⁹⁹ Harter, *Op. Cit.* P. 14. (Citing Williams’ use of ‘umpire’ in “Fifty Years of the Law of Federal Administrative Agencies--and Beyond,” 19 Fed.B.J.267,268 (1970).)

¹⁰⁰ Harter, *Op. Cit.* p. 22.

regulation changed or overturned.¹⁰¹ Likewise, if the debate is decided (for a time) by the courts on procedural grounds, the substantive conflicts will remain unresolved, casting doubt on both the legitimacy and stability of the outcome.

Finally, the traditional rulemaking process has evolved into such an arduous and expensive process that breeds so much conflict, agencies are loathe to revisit issues even in light of new information or changed circumstances.¹⁰² That is not stability, however, it is ossification;¹⁰³ it raises the stakes in each rulemaking procedure, and contributes to the erosion of agency credibility and public's confidence in regulatory decision making.

The next chapter reviews a recent rulemaking effort by the Massachusetts Department of Environmental Protection (DEP). DEP followed traditional notice and comment procedures to revise the state environmental code regulating on site sewage treatment systems, and was challenged on many of the points raised here.

¹⁰¹ Susskind and Cruikshank, *Op. Cit.* pp. 39-41.

¹⁰² McGarity, *Op. Cit.* p. 1436.

¹⁰³ McGarity, *Op. Cit.* p. 1385. McGarity attributes use of the term in reference to rulemaking to E. Donald Elliott, former General Counsel of the Environmental Protection Agency.

2. THE TITLE 5 REVISIONS

The experience of the Massachusetts Department of Environmental Protection (DEP) in revising Title 5 of the state environmental code, which regulates septic systems and cesspools, illustrates the problems described in the first chapter. The process of revising the code started before 1991 and may be complete in 1996. DEP followed the usual steps in the regulatory process, first identifying failing septic systems and the inadequacy of the existing code as a problem, hiring a technical consultant to study the issue, drafting revisions to the code, and presenting them to the public for comment. The technical evaluation was completed in 1991,¹ and by the end of the next year the department had a draft proposal ready. Sensitive to the fact that the proposed revisions were significant, the department took some extra steps and scheduled preliminary information meetings around the state in November and December 1992, to explain the changes and solicit input on several outstanding issues, before finalizing its proposal.² Public reaction was pronounced, ranging from some support to a good deal more apprehension and anger.³ Repeated revisions followed that initial round of meetings over the next three years, during which time the governor and state legislature also became involved.

THE PROBLEM

Broadly defined, the problem facing DEP was the pollution of the state's groundwater and surface water from nonpoint (diffuse) pollution sources. In revising Title 5, DEP focused on the problem of pollution from on-site sewage disposal systems (septic systems and cesspools). More than a quarter of the households in the state use on-site sewage disposal systems, and the existing code had not been updated since 1978.⁴ In the meantime,

¹ DeFeo Wait and Associates, Inc., for the Commonwealth of Massachusetts Department of Environmental Protection, *Technical Evaluation of Title 5: The State Environmental Code 310 CMR 15.00*, March 1991.

² Richard Kindleberger, "Sewage plan will face fight," *The Boston Globe*, December 26, 1992, p. 28.

³ Kindleberger, *Ibid.*; Department of Environmental Protection, "Response to comments received following the Title 5 Public Information Meetings," February 1993.

⁴ DeFeo, Wait & Associates, *Op. Cit.*, p. v.

scientific understanding of the impacts of subsurface sewage disposal on groundwater and surface water had advanced, suggesting to the department that provisions in the existing code were not sufficient to protect public health and the environment. Furthermore, DEP estimated that half of all on-site systems did not even meet existing standards.⁵ The 1978 code had no enforcement provisions, and all but the most blatant failures might go undetected.

Concerns about shortcomings of the existing code were supported by surveys of the state's coastal and inland waters, which indicated that more than half failed to meet federal standards for fishing and swimming, due mostly to nonpoint pollution.⁶ DEP ranked pollution from failing septic systems and cesspools as one of the top four contributors of surface water pollution.⁷ In coastal waters, shellfish bed closures more than doubled between 1980 and 1990, due to bacterial pollution. On Cape Cod, the number of acres of shellfish beds closed due to pollution jumped from 700 acres to approximately 7,000 acres during the same period, and then recovered--some 2,000 acres reopened by 1993--as a result of efforts in some Cape towns to more aggressively monitor septic systems and require that failing systems be replaced.⁸

KEY STAKEHOLDERS

As with most environmental issues, the revisions of Title 5 affected many interest groups. None of the groups was monolithic, each had subgroups whose priorities varied to some degree. Key stakeholders and their interests included the following:

- DEP technical staff and legal staff, at regional offices and in Boston, and commissioner. DEP's interests included achieving better protection of groundwater and

⁵ DeFeo, Wait & Associates, *Ibid.*, p. v; DEP, "Response to comments following the Title 5 public information meetings, February 1993; and DEP, "Response to comments following the Title 5 public information meetings, 15 June, 1993.

⁶ Diane Dumanoski, "60% of waters in Mass. still polluted," *The Boston Globe*, Metro Section, June 13, 1993, p. 17.

⁷ DEP, "Executive Summary: Proposed Revisions to Title 5," undated; circa Fall 1993.

⁸ Dumanoski, *Op. Cit.*

surface water resources by revising on-site sewage disposal standards and incorporating a means to encourage and achieve compliance. The department had a political interest in achieving these goals with a minimum of acrimony and conflict. In addition, DEP sought to postpone changes to the code that would open to development some areas that had long been assumed to be off limits because of the existing code, until communities had time to prepare for such changes. The department therefore intended to postpone changes in soil evaluation methods recommended in the consultant's technical evaluation, and the routine approval of any alternative treatment technologies, pending a statewide growth management initiative planned by the Executive Office of Environmental Affairs.⁹

- Local boards of health. Health officials are responsible at the local level for administering Title 5.¹⁰ At first, some were specifically concerned about being saddled with a new, potentially overwhelming, burden of conducting regular septic system inspections, as proposed in DEP's initial draft.¹¹ That requirement was eventually dropped,¹² although local health officials remained interested and retained responsibility for local administration of Title 5. Their priorities and interests were varied. Some were interested in increasing the flexibility and discretion they could exercise at the local level;¹³ some expressed concern about the economic impacts the code might have on their neighbors and their community;¹⁴ some were concerned about the position they would be placed in, including vulnerability to lawsuits, for enforcing the proposed stricter

⁹ Kindleberger, *Op. Cit.*; DEP, "Summary of key policy issues in the revision of Title 5," 11/17/92.

¹⁰ DEP, "Questions and answers to proposed revisions to Title 5," June 15, 1993.

¹¹ Letter from Gregory Erickson, Director of Public Health, Town of Wilmington, to Brian Donahoe, Director, DEP Division of Water Pollution Control, December 21, 1992.

¹² DEP, "Summary & Comparison of Major Revisions to Proposed Clean Water Rules (Title 5), Spring 1994," indicates that the "current draft...requires inspections only at time of property transfer, change of use, or expansion."

¹³ Erickson, letter, *Op. Cit.*, and pers. com., April 17, 1996;

¹⁴ Everett Penney, Andover health agent, quoted in "D-Day is night for impact of septic rules: complying with Title 5 expected to be expensive for homeowners," by Andy Dabilis, *The Boston Globe*, Northwest Weekly section, March 26, 1995, p. 1; letter from John P. Gusha, Chairman, Holden Board of Health to Brian Donahoe, (urged DEP to coordinate with other state agencies and work with communities and individuals that do not have sufficient resources to implement the new measures on their own), November 11, 1993.

standards;¹⁵ some were interested in tightening existing standards, which they considered inadequate from a public health standpoint;¹⁶ and some believed it was important for municipalities to retain the option to pass stricter standards.¹⁷

- Home owners with on-site sewage disposal systems. Home owners with septic systems or cesspools had an obvious interest in being able to meet new standards, preferably with a minimum of disruption. The cost of upgrading a system, or even paying for an inspection, was a great concern for some.¹⁸ Others were concerned that they simply would be unable to meet new requirements at any cost, due, for example, to lot size or slope, or soil or hydrologic conditions.¹⁹ Home owners also were concerned that the new code would interfere with their ability to sell their property.²⁰ To the extent that new regulations drove up the costs of home ownership, by requiring more expensive technologies or larger land areas, for example, present and future home owners generally, and lower income home owners in particular, had an interest. To the extent that the revised code had a positive impact on water quality and environmental quality, the code's influence on future water supply costs, property values, and quality of life generally also was of interest, especially to future home owners and residents.

- Realtors. Because new requirements would be factored into housing costs and potentially impact the real estate market, realtors had an interest in containing costs of any new proposals. Realtors' stakes in the debate escalated sharply in 1994, when DEP revised its initial proposal by replacing the requirement for regularly scheduled inspections

¹⁵ Everett Penney, *Ibid.*, (some departments are referring homeowners to private inspectors for fear of liability); Erickson letter, *Op. Cit.*, (proposed inspection program "would create tremendous 'ill will' between the community and the Board of Health").

¹⁶ Louise B. Kress, member of Boxford Board of Health, prepared Testimony for Department of Environmental Protection on Proposed Revision to Title V, June 1, 1994; Gusha letter, *Op. Cit.*; Andy Dabilis, *Op. Cit.*

¹⁷ Letter from Marcia Benes, Executive Director, The Massachusetts Association of Health Boards, Inc., Plainville, MA, to Leo Roy, Executive Office of Environmental Affairs, June 19, 1994; letter from Fran Sculley, Town of Rowley Board of Health re DEP hearing on Title V revision, September 29, 1995.

¹⁸ DEP, "Response to comments received (15 June 1993) *Op. Cit.*

¹⁹ Laura Pappano, "State weighs new rules on septic woes," *Boston Globe*, West Weekly section, November 21, 1993.

²⁰ Mary Sit, "Sewage disposal showdown," *Boston Globe*, Real Estate section, February 26, 1995.

with a requirement that systems be inspected at the time property was sold or the title transferred. That stipulation added uncertainty as well as monetary costs to property transfers, and was strenuously opposed by real estate interests.²¹

- **Developers.** Developers were interested in minimizing any new constraints on development and hoped to remove some existing constraints. Thus, they opposed DEP's proposal to increase setbacks from waterways, wetlands, and wells, for example, and other land area or technological requirements that would increase development costs.

Developers sought the identification and approval of alternative treatment technologies that could allow building in areas where traditional septic systems were unsuitable and could provide adequate sewage treatment at lower costs than traditional systems in other areas. They argued that the agency was ignoring scientific advances that had been made in alternative treatment systems. Developers objected strenuously to DEP's intention to postpone changes in soil evaluation methodology that would likely have opened some areas to development. They also wanted the code to be considered a "standard code" that applied equally throughout the state and eliminated the option for communities to enact stricter requirements.²²

- **Environmentalists.** Environmentalists were concerned about the adverse impacts of failing septic systems on the environment and supported DEP's efforts to strengthen Title 5.²³ They supported proposed new setbacks from water resources, but were concerned that proposals for nutrient loading were not sufficient to protect environmentally sensitive

²¹ Mary Sit (Feb. 26, 1995), *Ibid.*; Robert Daylor, Daylor Consulting Group (representing NAIOP on Title 5 advisory committee), pers. com., and Dabilis, *Op. Cit.*

²² Kindleberger, *Op. Cit.*, December 26, 1992; letter from Christine Braley, Home Builders Association of Massachusetts, Inc., to Brian Donahue, DEP, November 30, 1993; letter from John S. Marini, President, Home Builders Association of Massachusetts, to the Honorable Argeo Paul Cellucci, Office of the Lt. Governor, May 27, 1994; letter from Guy A. Webb, Development Director, Builders Association of Central Massachusetts, Inc., to Senator Matthew J. Amorello, July 14, 1994; letter from William Habib, Director of Government Affairs, Homebuilders Association of Massachusetts, Inc., to author, May 9, 1996; David Chandler, "State unveils more flexible rules to stop septic pollution," *Boston Globe*, Metro, September 9, 1994.

²³ Letter from Alexandra Dawson, Massachusetts Association of Conservation Commissioners, to author, April 16, 1996; Jeff McLaughlin, "Consensus is sought on septic rules," *Boston Globe*, Metro, June 5, 1994.

areas.²⁴ Although they had concerns about the land use implications of some of the proposed changes, some environmentalists saw Title 5 as an inappropriate growth management tool, and urged the state to assist and encourage communities to “enact more appropriate growth control measures.”²⁵ They supported the approval of alternative treatment technologies that offered pollution prevention benefits over traditional systems.²⁶ They also stressed the importance of providing financial assistance to those unable to pay for needed upgrades.²⁷ DEP was also urged to complete a “long-awaited” septage management plan, because enforcement of the revised code would encourage many residents to pump their systems more regularly, increasing the volume of septage needing disposal and exacerbating the existing problem of a shortage of septic waste facilities.²⁸

- Regional planning boards and county commissions. Regional planning boards generally expressed a shared interest in DEP’s goals. They were concerned, however, about potential changes in land use and the financial impacts proposed revisions might have on some individuals and communities. Many supported a proposed statewide planning initiative to assist regions and municipalities in developing regional or local land use plans, before development constraints provided by the existing Title 5 were lifted. They also wanted the code to be flexible enough to deal with exceptional circumstances, so that home owners would be spared unnecessary financial hardship. They were concerned that proposed flow limits, which limited the number of bedrooms allowed per acre, might discourage cluster zoning and hinder prospects for developing and maintaining low and middle income housing.²⁹ While acknowledging that concerns about the costs of

²⁴ Letter from Joseph E. Costa, Buzzards Bay Project, to Daniel Greenbaum, DEP, November 30, 1993.

²⁵ Letter from Louis J. Wagner, Massachusetts Audubon Society, to Brian Donahoe, DEP, November 23, 1993.

²⁶ Letter from Alexandra Dawson, Massachusetts Association of Conservation Commissions, to Brian Donahoe, DEP, December 16, 1992; letter from Philip B. Posner on behalf of 1000 Friends of Massachusetts to Brian Donahoe, Division of Water Pollution Control, November 30, 1993; Wagner letter, *Ibid.*

²⁷ Wagner letter, *Ibid.*

²⁸ Wagner letter, *Ibid.*

²⁹ See, e.g., letter from Timothy W. Brennan, Executive Director, Pioneer Valley Planning Commission to Brian Donahoe, November 29, 1993; letter from Margaret Striebel, Chair, and Mary Forbes, Franklin County Commission to Secretary Trudy Coxé, November 29, 1993; and letter from Charles W. Cook,

the proposed regulations were important, one commenter noted that pollution prevention measures, such as those contained in the proposed revisions, were cost effective in the long run.³⁰

- Residents in sewered areas were less directly affected, but had an interest in seeing that efforts undertaken in their areas to upgrade sewage treatment plants and otherwise clean up water pollution--efforts undertaken at considerable costs that were producing results--not be undone by pollution emanating from improperly maintained and inadequately monitored on-site systems.³¹
- Governor. Like the agency, the governor had a political interest in resolving the conflict over Title 5 as quickly and amicably as possible. Whereas the agency had the governor and legislators to be thinking about (in addition to more directly affected stakeholders), the governor had legislators threatening to block implementation as well as his supporters and the voters of the state in general to consider.³² After the revisions finally took effect in spring 1995, and higher than expected inspection and repair costs set off more protests (louder than ever), the governor attempted to quell the uproar by convening a commission of primarily business interests to recommend changes.³³

Interim Administrator, Berkshire County Regional Planning Commission to DEP Division of Water Pollution Control, November 30, 1993.

³⁰ Brennan letter, *Ibid.*

³¹ Dumanoski, *Op. Cit.*, (scientist who worked on recent water quality survey observed that rivers have improved substantially over past 20 years, largely due to construction of municipal sewage treatment plants and eliminating factory discharges). The view that all regions need to contribute to cleaning up and protecting the state's waterways was expressed in *Boston Globe* editorials in 1993 and 1995, "The cost of clean water," November 5, 1993; and "Paying the water bill," March 26, 1995.

³² Frank Phillips and Peter J. Howe with Matt Carroll, "State plans effort to quite the roar over septic rules," *Boston Globe*, June 8, 1995; P. Howe, J. Jacoby, S. Lehigh, B. Mohl, F. Phillips and A. Walker, "Weld aides fret over fallout from new septic system rules," *Boston Globe*, June 18, 1995, p. 26.

³³ Peter Howe, "Weld to ok measure on Title 5 Study Panel," *Boston Globe*, June 20, 1995, p. 41.

- Legislators: Legislators were hearing from anxious and unhappy homeowners and business interests, and had an interest in protecting their constituents and in maintaining public health and environmental protection.³⁴

POINTS OF CONTENTION

Concerns and disagreements about the costs, fairness, and scientific justification of proposed revisions pervaded the long-running debate over Title 5. And, as might be expected, the resolution of these differences was complicated by the wide range of affected interests, outlined above. The legitimacy of the final outcome was undermined by a process that was adversarial, did not serve to effectively resolve issues and address interests so much as it achieved “split the difference” type compromises that left no one particularly happy, and, in turn left each revision unstable and subject to attack from one or more disaffected interests.

Costs

Costs were widely recognized as a critical factor in code revisions. Those who generally supported the revisions, including conservation organizations and planning commissions, and several other state agencies that commented, were concerned about the impact on communities and individuals, and urged DEP to develop some funding sources to assist home owners and communities in order to make the new code work.³⁵ Environmentalists also were concerned that consideration of costs and affordable housing not be used by some who opposed the new code as a strategy to derail needed improvements.³⁶

³⁴ Pappano (Nov. 21, 1993) *Op. Cit.*; the Joint Committee on Natural Resources and Agriculture, *Legislative Report on the 1995 Revisions to Title 5: The Commonwealth's Clean Water Rules*, February 6, 1996.

³⁵ Letter from Jeffrey R. Benoit, Massachusetts, Coastal Zone Management Office, to Brian Donahoe, DEP, December 24, 1992; letter from Peter Webber, Department of Environmental Management, to Brian Donahoe, DEP, November 30, 1993, letter from Charles W. Cook, Berkshire County Regional Planning Commission, to Title 5 Revisions, DEP, November 30, 1993; Brennan letter, *Op. Cit.*; Striebel and Forbes letter, *Op. Cit.*.

³⁶ Dawson letter, *Op. Cit.*

Home owners, developers, local health officials, and realtors were particularly concerned about costs associated with the revised code. The costs of having a system inspected was a new, unanticipated, and considerable expense for home owners. Home owners whose systems failed to meet new standards would face even greater costs, to upgrade.³⁷ The uncertainty of what the costs might be fueled speculation and anxiety. Home builders were concerned about the impact the new regulations would have on the cost of new homes. New setbacks and other areal requirements, for example, could decrease allowable housing densities, driving up costs and depressing demand. Planning commissions and other commenters also were concerned about the impact of such changes on the availability of affordable housing. DEP initially proposed that local health officials administer a regular inspection and maintenance program, suggesting that inspections be conducted at least every three years. In response to objections that such a program would impose a huge burden on health departments and suggestions from a number of sectors that time of title transfer would be a more workable trigger for inspections, DEP proposed that inspections instead be required whenever property changed hands. Needless to say, the real estate industry argued that inspections at the time property was sold added unacceptable costs to real estate transactions. One developer went so far so to argue that the proposed revisions threatened to kill economic recovery in the state.³⁸

Others noted that preventing pollution by such measures as DEP proposed was cost effective over time, and that the revisions served to protect future homeowners. The agency was challenged to find a balance between both long term, future benefits, and short term, present costs, as it worked on various revisions.³⁹

³⁷ DEP, "Response to comments (February, 1993), *Op. Cit.* ("[E]xpense to the homeowner and the resources necessary to implement an [inspection and maintenance] program at the local level were two issues identified 75% of commenters as of the most concern.")

³⁸ Letter from Garen M. Bresnick, Home Builders Association of Massachusetts, to Brian Donohoe, DEP December 24, 1992, p. 14. ("The real question which we are asking is whether E.O.E.A. and D.E.P. ascribe to the Governor's desire to facilitate economic recovery in Massachusetts or whether they are on a lark of their own to shut down any prospects of economic recovery.")

³⁹ Brennan letter, *Op. Cit.*

The question of how the costs of the revised code were distributed, and whether costly changes were scientifically justified and would produce tangible benefits, were also hotly contested. These questions, relating to fairness and scientific uncertainty, are discussed below.

Fairness

The fairness of the revisions was also challenged. Different stakeholders protested the impact of the revisions on their constituency, suggesting that they were being required to bear a disproportionate and unfair share of the costs.

Health officials objected to being handed the responsibility of ensuring compliance by conducting regular inspections, a job some estimated would be impossible to complete, considering limited staff and resources, even if they did nothing else.⁴⁰ Real estate interests protested when the requirement for inspections was then shifted to take effect when a house was sold or changed hands. They considered this an impediment to housing sales, and a dubious means to identify failing systems, since only home owners whose houses were on the market (or who were otherwise transferring title) were required to have their systems inspected.⁴¹ Nevertheless, the requirement for systems to be inspected when property changed hands withstood challenges and was part of the rules that took effect on March 31, 1995. By August 1995, DEP had authorized an option for communities to establish and seek approval for a regular inspection program. Home owners in communities with an approved program would not be required to have their systems inspected when property was sold.⁴²

⁴⁰ Erickson letter, *Op. Cit.*; Usha Lee McFarling, "A cesspool, septic compromise," *Boston Globe*, April 24, 1994.

⁴¹ Pappano (Nov. 21, 1993), *Op. Cit.*

⁴² Letter to Marilyn Contreas, Senior Analyst, Executive Office of Communities and Development, from Dean Spencer, Acting Director, Division of Water Pollution Control, Re: Notice of proposed regulatory revisions - Title 5 of the State Environmental Code, 310 CMR 15.00; August 24, 1995.

Home owners were obviously concerned about their share of the cost of the new regulations.⁴³ Arguably, it is fair to expect home owners not to have polluting systems, and to expect them to pay for upgrading systems if necessary to ensure that their waste does not become a cost for their neighbors or the public at large.⁴⁴ But, in practical terms, application of the rules is not so straightforward. Since different people have different resources and different capacities to absorb the new costs contained in the code, it automatically had differential impacts as it was applied.⁴⁵ Media coverage of hardships imposed by the new code emphasized this aspect of the issue.⁴⁶ In addition, people who had diligently maintained their systems, paying regularly to have them pumped out to keep them functioning, felt that instituting an inspection program on top of their regular maintenance was unjustified.⁴⁷ Homeowners with cesspools challenged DEP's proposal that all cesspools be considered failing systems that would have to be replaced. Cesspools were already considered substandard under the 1978 code, but remained in use and evidence indicated they were a major source of pollution. Despite evidence of the general inadequacy of cesspools as disposal systems, however, individuals with functioning cesspools that were not polluting could argue that the proposed revision was unfair as it applied in their case.⁴⁸ Eventually DEP moved on this requirement so that cesspools did not fail "by definition" when the rules were finally promulgated.

Home builders challenged what they termed "selective implementation" of the technical report that provided the basis for many of DEP's proposed revisions.⁴⁹ DEP explicitly stated that it would not adopt the soil evaluation method recommended in the report, and would instead, for a time, keep the soil percolation rate standard that was in the existing code. DEP had stated from the beginning that the basis for keeping the old standard in

⁴³ See, e.g., McFarling, *Op. Cit.*

⁴⁴ Matt Carroll, "Tinkering with Title 5," *Boston Globe*, June 11, 1995 (quotes resident saying she did not want to be penalized for her neighbor's pollution).

⁴⁵ See, e.g., letter from Karen S. Fung to Division of Water Pollution Control, November 24, 1993.

⁴⁶ E.g., Mary Sit, "Fallout from septic failures," *Boston Globe*, Real Estate, May 7, 1995.

⁴⁷ Letter from George R. Northrup, Sunderland, MA, to John Vivieros, DEP Water Pollution Control Div., Jan. 25, 1995.

⁴⁸ See, e.g., letter from Kenneth R. Ramsay to Director, Division of Water Pollution Control, October 27, 1993; letter from Roland Foley to Brain Donahoe, DEP, November 24, 1993.

⁴⁹ Kindleberger, *Op. Cit.*

this case mostly had to do with land use planning concerns rather than soil science. The department believed it would be irresponsible not to allow communities the time to make changes in land use zoning codes, if necessary, before the department made changes that would remove development constraints that had long existed. The department also pointed out that the new soil evaluation method recommended in the report was more complex than the existing percolation rate test, and that soil evaluators would need to be trained before the new method could safely be implemented.⁵⁰ Developers, however, believed the department was unfairly refusing to remove old restrictions found no longer to be warranted on scientific grounds, while introducing new restrictions based on new scientific understanding.⁵¹ As noted in the first chapter, agencies have many factors to consider in developing rules, but developers attempted to frame the discussion on soil evaluation as a choice between rationally based decision making on one hand (which would remove previously existing constraints on development in some areas) and arbitrary, and thus unjust, consideration of other factors, on the other hand.

Another question was how changes would affect lot owners' future construction plans and investment expectations. Was it fair to prohibit a construction plan that had received local permit approvals and that was allowable under the 1978 code but was not permitted under the proposed code? In environmentally sensitive areas, some lots considered buildable under the old code might be completely unbuildable under the new code. DEP at first proposed that the new guidelines apply to existing lots, but over time this changed so that plans approved under the 1978 code would be allowed to go forward.⁵²

Yet another issue considered unfair by some was DEP's original system design assumptions for all new houses. DEP recognized that homeowners frequently added bedrooms onto their homes without increasing the capacity of the septic system, and that this was a significant cause of septic system failure in the state. To address this problem,

⁵⁰ DEP, "Response to comments (15 June 1993) *Op. Cit.*

⁵¹ Letter from David Begelfer, Davis, Malm & D'Agostine, representing the NAIOP (the Association for Commercial Real Estate), to Daniel Greenbaum, Commissioner, DEP, December 23, 1992.

⁵² DEP, "Executive Summary" (circa Fall, 1993), *Op. Cit.*

DEP proposed that any new house should have a system that could accommodate a four bedroom house, even if the house was actually smaller.⁵³ Obviously people with smaller families who wanted a smaller house could consider this requirement unfair because they would be required to pay for extra capacity that they did not need.

Scientific uncertainty

Disagreement over the scientific and technical bases of the revised code emerged before the technical report commissioned by DEP was finished. The foreword of the report notes that comments submitted by members of a DEP advisory committee reflected a wide range of concerns. “Given the diversity of interests represented by the advisory committee,” the forward notes, “it is extremely doubtful that unanimity among reviewers could ever be achieved.”⁵⁴ The report does not reveal the specific areas of disagreement that emerged, but presumably they were among the scientific and technical issues questioned and debated subsequent to the report’s completion and each round of proposed revisions that followed. As noted previously, the department was also criticized for taking into consideration factors other than science and technology, as it did for its proposals on soil evaluation methods and the use of alternative treatment technologies. Some of the disputed issues are outlined below.

DEP was challenged on a number of common assumptions it made in proposing a nitrogen loading limit (later generalized to a nutrient loading limit). The expected nitrogen load was assumed to be correlated to wastewater flow, and the expected flow was assumed to be correlated to the number of bedrooms in the house. Developers and realtors questioned the assumption that the size of a household could be estimated from the number of bedrooms in the house. They also questioned the need for DEP’s proposed flow limits.⁵⁵ Environmentalists doubted that the proposed flow limits would be sufficient

⁵³ The flow through a system was estimated based on the number of people assumed to be living in a house, which was estimated based on the number of bedrooms. The assumptions underlying this method of estimating a household’s septic system usage also were challenged.

⁵⁴ DeFeo Wait & Associates, March 1991, *Op. Cit.*, p. ii.

⁵⁵ Jeff McLaughlin, *Op. Cit.* (Quotes Rep. and realtor Teague, “we insist you distinguish between matters of opinion and matters of science.”)

to protect some particularly sensitive areas such as coastal embayments and areas already damaged by excess nitrogen.⁵⁶

The scientific validity of deep observation hole tests to determine groundwater level was contested. DEP proposed adding methods used by the U.S. Geological Survey to the measures required to establish groundwater levels, while leaving some methods previously used in the state, notably deep observation hole tests, to the discretion of local authorities. A developers' association questioned the usefulness of deep observation hole tests, charging that communities require them only to delay and thwart construction.⁵⁷ An association of conservation commissions argued that the deep hole tests were still needed.⁵⁸

Different sides challenged or commended the department's specifications for calculating the effective leaching area of a particular type of septic system.⁵⁹

DEP offered both scientific and administrative grounds for increasing setback distances from wetlands--to provide additional environmental protection and to attain consistency with the state's wetlands regulations. Developers challenged the department's reasoning and early in the review process the department conceded the point, emphasizing administrative reasons for the concession.⁶⁰

The capacity of a statewide code to provide adequate protection for all areas was also debated. Some environmentalists and public health officials objected to DEP's proposal that the revised code be considered a statewide standard, which would make it difficult or impossible for local boards of health to adopt more conservative standards believed

⁵⁶ McLaughlin, *Ibid.*; letter from Joseph E. Costa, Buzzards Bay Project, to Daniel Greenbaum, DEP, November 3, 1993.

⁵⁷ Bresnick letter, *Op. Cit.*, p. 13.

⁵⁸ Dawson letter, *Op. Cit.*

⁵⁹ Bresnick letter, *Op. Cit.*; letter from Charles H. Dauchy, an environmental consultant, to Brian Donahoe, DEP, December 22, 1992 (described leaching pits, the system at issue, as "cannons pointed at the groundwater").

⁶⁰ DEP, "Response to comments (15 June 1993), *Op. Cit.*

necessary due to local conditions.⁶¹ Developers and real estate interests sought to establish a statewide code that allowed no (or very few) options for what they viewed as arbitrary local standards.⁶²

Developers contended that DEP failed to demonstrate that its proposed changes would produce a “finite or quantifiable improvement” of either groundwater quality or the life span of the septic system, although its proposals would require more land and drive up the cost of home ownership.⁶³

The process

DEP determined that Title 5 needed to be updated and commissioned a technical evaluation of the code. The study covered site evaluation, system design, and locational standards, and included information on regulatory practices in other states.⁶⁴ An advisory committee of representatives of different interest groups reviewed and commented on drafts of the report, which was completed in March 1991. The report authors noted that they were unable to reconcile the wide range of viewpoints that were expressed on some issues.⁶⁵

The agency’s presented its proposed Title 5 revisions to the public in seven public meetings held around the state in November and December 1992. The purpose of the meetings was both to present and explain the proposed revisions and to solicit comment on several issues that had not been resolved. The department proposed increased setbacks from water resources, a locally administered inspection and maintenance program, and tighter siting and technological standards, among other changes, and requested input on nutrient loading standards and the kinds of environmentally sensitive areas that should trigger more restrictive standards. DEP stated that it would postpone changing soil

⁶¹ Costa letter, *Op. Cit.*; Benes letter, *Op. Cit.*; Sculley letter, *Op. Cit.*

⁶² Bresnick letter, *Op. Cit.*

⁶³ Bresnick letter, *Ibid.*, p. 10.

⁶⁴ DeFeo, Wait & Associates, *Op. Cit.*

⁶⁵ DeFeo, Wait & Associates, *Ibid.*, p. ii.

percolation rate standards or making any across-the-board approvals of alternative treatment technologies until a pending statewide growth planning initiative was undertaken. The agency expected the proposed rules to be published within a couple months.⁶⁶

More than 650 people attended the meetings, and the concern expressed at the meetings and in subsequent comment letters and phone calls apparently convinced the agency to make more extensive changes than it had initially foreseen. After nearly a year, in October 1993, the department held hearings around the state to present its revised proposal.⁶⁷ Most of the hearings drew approximately 150 people, but one meeting in central Massachusetts had to be rescheduled when more than 1,000 people showed up. In response to continued opposition to the proposed changes, DEP convened an advisory committee that included representatives from health boards, the development community, real estate interests, and environmental groups, to work on new revisions.⁶⁸

The following April the advisory committee reached agreement members said they could live with,⁶⁹ and a “tamer reaction” was reported to another round of hearings.⁷⁰ Some groups clearly remained unhappy with the proposals; in May developers represented on the committee appealed to the Lieutenant Governor that the agency was ignoring important concerns and announced they were withdrawing their support. The acting DEP commissioner refuted the charges and suggested the real difficulty may have arisen from a splinter group within the organization.⁷¹ More hearings were held around the state in late spring, and the new regulations were promulgated in September 1994.⁷² Several

⁶⁶ Kindleberger, *Op. Cit.*

⁶⁷ DEP, “Executive Summary” (circa Fall, 1993), *Op. Cit.*

⁶⁸ Pappano (Nov. 21, 1993) *Op. Cit.* Attendance figures from letter from John P. Gusha, Chairman of the Holden Board of Health, *Op. Cit.*

⁶⁹ McFarling, *Op. Cit.*

⁷⁰ Pappano, “A tamer reaction for septic rules,” *Boston Globe*, West Weekly, June 5, 1994.

⁷¹ Letter from John S. Marini, President, Home Builders Association of Massachusetts, Inc., to Lt. Governor Argeo Paul Cellucci, May 27, 1994; and memorandum from DEP Acting Commissioner Thomas B. Powers to Lieutenant Governor Paul Cellucci Re: Title 5 Revisions/ Homebuilder’s Association letter, June 3, 1994.

⁷² David Chandler, *Op. Cit.*; DEP, “Summary of Major Revisions to Clean Water Rules (Title 5), September, 1994;” Letter to Massachusetts Office of the Secretary of State, Re: Revisions to Title 5 of the

“clarifications and corrections” to the new code were announced in December 1994,⁷³ along with a final round of hearings scheduled for January and a public comment period that closed in February, 1995.⁷⁴ The adjusted new code took effect on March 31, 1995.

Protests heated up notably after implementation, as the rate of systems failing inspections under the new code turned out to be higher than expected. Inspection and repair costs were reported to be higher than expected, as well. The major newspaper carried regular reports of stunned and angry homeowners. Realtors blamed a slump in the spring selling season on the new code. State legislators signaled their concern as several members drafted bills to change or suspend the new code.⁷⁵ At the same time, environmentalists and health agents maintained that the revisions were necessary. In June 1995 the Lieutenant Governor announced some minor alterations to the code and later that month the Governor signed legislation to set up a commission of predominantly business interests to look into the issue.⁷⁶ In August “emergency regulations” designed to soften the impact of the new code were announced.⁷⁷ Although protests continued at considerable volume, no more changes were made and the August revisions were incorporated into Title 5 in November 1995.⁷⁸ Sentiments on the other side of the debate are reflected in a September letter from a local health agent who urged the department to stick with what it had, that

State Environmental Code, 310 CMR 15.000 from Thomas Powers, Acting Commissioner, DEP, September 2, 1994; “New Clean Water Rules (Title 5) Summary of Major Provisions, 310 CMR 15.000” (undated, circa 9/23/94), provided by DEP.

⁷³ “Public Notice” (“[DEP] gives notice of its intent to revise Title 5 of the State Environmental Code, 310 CMR 15.000, as promulgated on September 23, 1994, (the “new Code”)....”) Undated; circa December 1994.

⁷⁴ “Public Notice,” *Ibid*.

⁷⁵ Mary Sit (May 7, 1995) Op. Cit.; Matt Carroll, “Towns without sewers,” *Boston Globe*, Real Estate, May 28, 1995; Matt Carroll, “Yearly cost of septic law seen at \$20M,” *Boston Globe*, Business, June 1, 1996.

⁷⁶ Peter J. Howe, “Sides still far apart on septic system rules,” *Boston Globe*, June 9, 1995; “Weld to ok measure on Title 5 Study Panel,” *Boston Globe*, June 20, 1995.

⁷⁷ Doris Sue Wong, “Revisions to Title 5 unveiled,” *Boston Globe*, August 2, 1995.

⁷⁸ Doris Sue Wong, “State Retreats on Septic Systems,” *Boston Globe*, August 3, 1995; Tina Cassidy, “Homeowners, brokers say Title 5 Needs Changes--Fast,” *Boston Globe*, September 21, 1995; Letter to Marilyn Contreas, Executive Office of Communities and Development from Dean Spencer, DEP, Re: Notice of proposed regulatory revisions - Title 5 of the State Environmental Code, 310 CMR 15.000, August 24, 1995, *Op. Cit.*; “Revisions: 310 CMR 15.000, Effective November 3, 1995,” handout showing changes to text, provided by DEP.

the constant changes were making people more frustrated than ever.⁷⁹ In February 1996 the Joint Committee on Natural Resources and Agriculture of the Massachusetts House of Representatives and Senate released a report recommending ways to “minimize hardships associated with Title 5 and facilitate implementation of the septic system inspection requirement.”⁸⁰

DISCUSSION

DEP’s experience in revising Title 5 exemplifies the problems state environmental agencies can have making rules. The revisions were contested because of costs, because the distribution of costs and benefits of the new requirements were perceived to be unfair, and because of the inherent scientific uncertainty of both the diagnosis of the problem and the probable effectiveness of proposed solutions. The difficulty of addressing these issues was compounded by the wide range of interests affected by the rule. The traditional rulemaking process did not serve the agency well in addressing and reconciling these issues.

There is no question that the agency took on an extremely complex and inherently difficult task in revising the statewide septic code, which is perhaps why the code had not been updated sooner. (Many, including some who objected to specifics proposed by the department, acknowledged that revisions were overdue.) DEP was embroiled in the contentious revision effort for several years despite adding extra steps to the traditional notice and comment process. It started the process thoughtfully by commissioning a comprehensive technical evaluation of the existing environmental code. The agency put additional effort into public outreach, to explain the changes and the need for them at public meetings around the state and in published “responses to comments” and other fact sheets. The agency sought input from a range of interests on the advisory committee that

⁷⁹ Letter from Fran Sculley, Chairperson of the Town of Rowley Board of Health, to DEP hearing on Title V revisions, September 29, 1995.

⁸⁰ Cover letter to Dear Colleague from Barbara E. Gray, House Chair, The Joint Committee on Natural Resources and Agriculture, and accompanying *Legislative Report on the 1995 Revisions to Title 5: The Commonwealth’s Clean Water Rules*, February 6, 1996.

reviewed drafts of the technical report and later from the advisory committee convened in response to the protests that surfaced in late 1993.

The traditional rulemaking process, even with add-ons, did not serve the department well to anticipate serious concerns of different stakeholders and develop acceptable responses to those concerns. As soon as the department proposed the revisions, the objective of some stakeholders was to convince the department to change them, whatever that took. Some submitted comments to the department and spoke up in public meetings, and some took their objections to the media, the legislature, and the governor. With its proposal under attack, the department, one can reasonably imagine, was put on the defensive.

As “umpire,” DEP attempted to respond to some concerns and ended up alienating and infuriating other interests. The principal example of this was shifting inspection requirements from a regular program conducted by the local health department to inspections required whenever the property title changed hands. By convening the advisory committee, DEP sought input from key stakeholders. However, the department was not represented as one of the stakeholders, and so all arguments continued to be directed at the department. Had the department participated as one of the stakeholders, the group’s focus may have been allowed to shift toward attacking the problem --as it affected all interests including the department--rather than the department. Not all members of the committee were on the attack, but DEP was the target of input.

Judging from comments and the uproar following implementation, the advisory committee did not comprise a sufficiently broad spectrum of affected interest groups. Some commenters expressed doubts about the advisory committee’s balance, saying that it was dominated by interests who had a financial stake in defeating the new rules.⁸¹ Comment from regional staff indicated they felt valuable technical information from regional staff

⁸¹ Letter from Marcia Benes, Massachusetts Association of Health Boards, Inc., to Leo Roy, Executive Office of Environmental Affairs, June 19, 1994.

was being lost in the department's balancing (or refereeing) act.⁸² And the committee did not anticipate the response from homeowners after the rules took effect.⁸³ Homeowners as a group are unorganized, and finding appropriate representatives to participate on an advisory committee or otherwise provide input to a department would be a challenge. Likewise, if some representative homeowners were to be identified and brought to the table, the difficulty of their reporting back to a wide ranging and diffuse constituency would remain. Nevertheless, a more comprehensive scoping process to find broad regional and interest representation on the committee would have helped the department better anticipate stakeholder's concerns.

The biggest loser in this process may be the perceived legitimacy of the code. The department's credibility also may have been diminished by ongoing criticism by the real estate industry and others, and the success of the protesters in getting the proposed code revisions changed. Some homeowners made costly repairs based on requirements that were later rescinded. It is doubtful that they, or anyone who read about their experiences, will be as likely to cooperate the next time a revision or new regulation is promulgated. Those who supported and understood the reasons for the changes were frustrated by backtracking and the agency's lack of response to the criticism.

The next chapter presents summaries of three other rulemaking endeavors by state agencies. The topics are varied and probably none was as complex as the Title 5 revisions, with its many stakeholders. However, the course taken by these agencies illustrate a hopeful, but infrequently used, alternative to the combativeness that often characterizes traditional rulemaking.

⁸² Memo from Bob Kimball [DEP Central Regional Office] through James Fuller to Beth Nicklas, June 9, 1994, Title 5 - Regional comments on proposed revisions.

⁸³ Lois Bruinooge, personal communication, October 26, 1995. Bruinooge, then on the staff of the Massachusetts Office of Coastal Zone Management, had been attending meetings at the time rules were promulgated.

3. NEGOTIATING THE RULES: THREE EXAMPLES

INTRODUCTION

As the previous chapter illustrates, state agencies must deal with complex and contentious issues when they write or revise regulations. And, as noted previously, the “notice and comment” rulemaking process has not proven to be well suited for dealing with the uncertainties, complexities and wide range of viewpoints and affected interests that typify environmental issues. Recognizing the shortcomings of the traditional rulemaking process, some federal and state agencies have tried a negotiated approach.

This chapter summarizes three state rulemaking efforts, from Texas, Ohio, and Maine. In Texas, negotiations to decide the procedures and protocols for assessing natural resource damages from oil spills brought together state natural resource agencies, oil industry representatives, and conservation groups. In Ohio, regulations for construction and demolition debris landfills were negotiated by the state environmental protection agency, large and small landfill operators, health departments, and citizen’s groups. And in Maine, a new approach to transportation planning was adopted by the Maine Department of Transportation, as a result of regulations negotiated between the agency and a range of business and environmental and public interest groups. In each case, the rule in question threatened to be particularly contentious or already had proven to be. In each case, an effort was made to bring key stakeholders to the table, including the agency in charge of writing the regulation, to negotiate the content of the regulation. A neutral party was engaged to mediate each set of talks. Despite skepticism on the part of some participants, a few snags in procedures, and some deviations from generally recommended procedures for negotiated rulemaking, each group fashioned a set of rules that all participants accepted, that elicited only minor comments when the rules were proposed for public comment, and that were promulgated without incident.

States exercise the capacity to innovate

A combination of factors motivated the agencies to try negotiated rulemaking: being faced with a particularly difficult issue for which traditional rulemaking seemed inadequate; having access to advice and information on the use of negotiated rulemaking; and the openness of key agency personnel to try a new approach. None of the three states discussed here have negotiated rulemaking statutes on their books. Rather, the legal authority to use the procedure already existed, because the negotiations supplemented rather than replaced traditional notice and comment procedures.¹ Nevertheless, a negotiated rulemaking law has been enacted at the federal level, and some states have also adopted negotiated rulemaking laws. Such laws mostly serve to encourage agencies to use the procedure and provide guidance, rather than legal authority, which agencies generally already have.²

TEXAS: OIL SPILL DAMAGE ASSESSMENT PROCEDURES AND PROTOCOLS

In 1993, the Texas state legislature directed the Texas General Land Office (GLO), in conjunction with the Texas Natural Resource Conservation Commission (TNRCC), and the Texas Parks and Wildlife Department (TPWD), to adopt “administrative procedures and protocols” for the assessment of damages to natural resources resulting from oil spills. The directive was part of the 1993 amendments to the state’s Oil Spill Prevention and Response Act (OSPRA). The amendments direct the agencies to adopt the damage assessment procedural rules using “negotiated rulemaking with the ... other interested parties.”³

¹ ACUS, *Negotiated Rulemaking Sourcebook*, p. 69.

² *Negotiated Rulemaking Sourcebook, Op. Cit.* p. 67; state Senator David Landis of Nebraska, testifying in support of his bill, the Negotiated Rulemaking Act, acknowledged that agencies in his state already had the authority to use negotiated rulemaking, and that the proposed law was intended to “show an agency head a process that has worked....” (Committee Statement, LB 1043 (Landis) Adopt the Negotiated Rulemaking Act, Hearing before the Committee on Government, Military, and Veterans Affairs, February 2, 1994, p. 10.)

³ Conference Committee Report, S.B. 1049, 05/27/93, p. 13.

The background leading to the OSPRA amendments, the context of the problem the agencies were attempting to address in adopting the procedural rules, the key stakeholders and their interests, and the process used to develop the rules, are described and analyzed below.

Background

In 1990, the United States Congress passed the Oil Pollution Act of 1990 (OPA)⁴ in response to the Exxon Valdez oil spill in Prince William Sound. The act establishes the liability of the owner or operator of a vessel or facility discharging oil for the cost of containment and removal of the oil, and for specified damages, including damages to natural resources.⁵ The party responsible for the spill covers the cost of the damage assessment, as well. The law is one of three federal laws that establish the right of the government, acting on behalf of the public, to sue to collect damages for injury to natural resources. (The other two laws are the Clean Water Act of 1972 and the Comprehensive Environmental Response and Liability Act of 1980 (CERCLA).)⁶

Measuring damage to natural resources. According to the federal law, the standard for measuring natural resource damages is “diminution of value,”⁷ and court decisions have held that assessment of the value of natural resources must include both direct use values and passive use values that can be reliably calculated.⁸ Direct use values derive from both consumptive and nonconsumptive uses of natural resources, such as fishing and birdwatching, respectively. “Passive use values include...the value of knowing the resource is available for use by family and friends, or the general public, the value derived

⁴ 33 USC 2701.

⁵ Susan A. Austin, “The National Oceanic and Atmospheric Administration’s Proposed Rules for Natural Resource Damage Assessment Under the Oil Pollution Act,” *Harvard Environmental Law Review*, Vol. 18:549. 1994.

⁶ Austin, *Op. Cit.*

⁷ Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), 15 CFR Part 990, Notice of proposed rulemaking (quoting OPA Conference Report). *Federal Register*, Vol. 59, No. 5, Jan. 7, 1994, p. 1073.

⁸ NOAA Notice of proposed rulemaking, *Op. Cit.* (citing D.C. Circuit Court decision on *Ohio v. DOI*), *Federal Register*, Vol. 59, No. 5, p. 1073.

from protecting the natural resource for its own sake; and the value of knowing that future generations will be able to use the resource.”⁹

Although courts have held that natural resource values include both direct and passive use values, the specific kinds of values to be measured and the methods for measuring them are uncertain and extremely controversial.¹⁰ Factors contributing to the uncertainty of natural resource damage assessments include “the nascent state of restoration techniques, the incompletely understood interactions among biological organisms, the unknown toxicological effects of petroleum products, [and] the economic debate about appropriate valuation methodologies.”¹¹

Agencies responsible for conducting natural resource damage assessments following an oil spill have been directed under federal and state laws to establish procedures to be followed in conducting an assessment. Officials conducting an assessment would not be bound to follow the established procedures. However, once such procedures are established, an assessment done in accordance with them will enjoy a presumption of accuracy (a “rebuttable presumption”), should it be challenged in court.

Natural resource trustees. The public officials authorized to assert claims against the responsible party (the spiller) for injury to natural resources on behalf of the public are known as natural resource “trustees.” Under OPA, the President designates federal officials, and the governor of each state designates state officials, to “act on behalf of the public as trustees for natural resources under this Act.”¹² In the event of a spill, state trustees are to “assess natural resource damages ... for the natural resources under their trusteeship and ... develop and implement a plan for the restoration, rehabilitation,

⁹ NOAA Notice of proposed rulemaking, *Op. Cit.*, *Federal Register*, Vol. 59, No. 5, p. 1073.

¹⁰ NOAA Notice of proposed rulemaking, *Op. Cit.*, *Federal Register*, Vol. 59, No. 5, p. 1073.

¹¹ Ingrid Hansen, “Innovative procedures for natural resource damage assessment,” in *Proceedings...[1995] Oil Spill Conference*. Washington: American Petroleum Institute, 1995. p. 352.

¹² The law defines natural resources as including the “land, fish, wildlife, biota, air, water, ground water, drinking water, and other such resources belonging to, managed by, [or] held in trust by” the United States, any state or local government, or Indian tribe, or any foreign government.” (Oil Pollution Act, P.L. 101-380, Sec. 1001).

replacement, or acquisition of the equivalent, of the natural resources under their trusteeship.”¹³ The governor of Texas has designated three state agencies, the General Land Office (GLO), the Texas Natural Resources Conservation Commission (TNRCC), and the Texas Parks and Wildlife Department as natural resource trustees (hereinafter “trustees”).

Liability limits. At the time OPA was enacted in 1990, 24 states had oil spill liability and compensation laws, 17 of them without any specified limit on the amount of damages for which a responsible party might be liable.¹⁴ Although OPA sets liability limits, it does not pre-empt the state laws. The difficulty of determining the value of natural resources complicates the establishment of liability limits because of the problem of “set[ting] an appropriate limit on liability when it is unclear how to value the resource at risk.”¹⁵

OSPRA. The Texas legislature passed the state’s first oil spill law in 1991, in response to two significant spills off the Texas coast.¹⁶ The Oil Spill Prevention and Response Act (OSPRA) did not set any limits on liability, but established an Oil Spill Commission to look into the implications of not having such limits. The Oil Spill Commission reported its findings and recommendations in 1993. It found that “an unlimited risk, such as natural resource damages liability, is uninsurable,” and recommended that OSPRA be amended to ensure the continued health of the marine transportation industry.¹⁷

The commission also found that due to the *ad hoc* nature of damage assessments, the controversy over economic valuation methods, and the “uncertainty involved in measuring impairment and loss of natural resources,” trustees were settling some damage

¹³ Oil Pollution Act, P.L. 101-380, Sec. 1006; *U. S. Code, Congressional and Administrative News*, 101st Congress, Second Session, 1990, p. 495.

¹⁴ Legislative History, Oil Pollution Act of 1990. *U.S. Code Congressional and Administrative News*, 101st Congress, Second Session, 1990, p. 728.

¹⁵ Hansen (1995) *Op. Cit.* p. 351.

¹⁶ Hansen (1995) *Op. Cit.* (the *Mega Borg* and *Apex* oil spills, which occurred in the summer of 1990) p. 351.

¹⁷ Hansen (1995) *Op. Cit.*

assessments more to avoid being challenged in court by the responsible party than to ensure adequate compensation for the damaged resource.¹⁸

In June 1993 the Texas legislature amended OSPRA in response to recommendations made by the commission. The legislature set limits on liability equal to those established in OPA, and directed state trustees to inventory existing resources to establish an information base to aid in future damage assessments. To ensure that the three state trustees present the responsible party with a unified assessment, the legislation directs the trustees to enter a memorandum of agreement to cooperate in conducting assessments, and designates the commissioner of the General Land Office to represent the consensus of the trustees. Any disputed issues among the trustees are to be resolved through mediation. And, as noted, the legislation directs the trustees to adopt damage assessment procedures and protocols, and to do so using negotiated rulemaking with other interested parties.¹⁹ This undertaking by the trustees is considered in the following section.

The problem

The goal of the legislative mandate and the challenge facing the trustees was to identify and establish rules for conducting natural resource damage assessments that would enable trustees to accurately assess the damages and would be accepted as fair and reasonable by the oil industry as well as by the public. Yet, how to assess natural resource damages is a hotly debated question. As noted, there is a great deal of scientific uncertainty in measuring the physical and biological impacts of a spill and determining the appropriate restoration methods. Economic valuation techniques are controversial, and some economists question whether it is even possible to measure passive use values with any degree of reliability.²⁰

¹⁸ Hansen (1995) p. 352.

¹⁹ Conference Committee Report, S.B. No. 1049, May 27, 1993.

²⁰ "Ask a Silly Question...": Contingent Valuation of Natural Resource Damages." *Harvard Law Review*, Vol. 105, No. 8, June 1992; pp. 1981-2000.

Damage to natural resources can be very costly. Congress passed OPA in part to ensure that the costs of natural resource damages would be borne by the polluter rather than by the public,²¹ while the Exxon Valdez spill alerted the oil industry to the enormous costs that can be incurred from a spill.²² Because the damage assessment procedures and protocols adopted by the trustees would create a “rebuttable presumption of the amount of [the] damages,”²³ industry wanted to ensure that the rules would not go overboard and create unnecessary costs, and trustees wanted to ensure that the rules would enable them to assess damages as accurately as possible to ensure the responsible party would bear the costs.

Key stakeholders

Ingrid Hansen, an attorney with the GLO, convened a committee to negotiate the damage assessment procedures and protocols. The committee included representatives of the three state natural resource trustees; representatives of the Texas Waterways Operators Association and the Texas Mid-Continental Oil and Gas Association, representing the owners and operators of oil transporting vessels and oil handling facilities, respectively; and representatives of the Galveston Bay Foundation and the Galveston Bay National Estuary Program, representing the public.²⁴

The state natural resource trustees. As noted, the GLO, the TNRCC, and the TPWD are designated by the governor as the state’s natural resource trustees under OPA. Under the state law, OSPRA, the GLO is designated as the lead agency. As such, the commissioner of the GLO is responsible for “represent[ing] the consensus position of the trustees whenever a collective decision or agreement is required,” invoking mediation when a consensus among the trustees cannot be reached, and otherwise meeting the requirements of the statute in conjunction with the other state trustees.²⁵ The GLO’s principal

²¹ Legislative History, Oil Pollution Act of 1990. *U.S. Code Congressional and Administrative News*, 101st Congress, Second Session, 1990, p. 723.

²² Hansen (1995) p. 352.

²³ S.B. 1049 Conference Committee Report, p. 11.

²⁴ 9 *TexReg* 6525, June 1994.

²⁵ S.B. 1049 Conference Committee Report.

responsibility in the state is the management of more than 20 million acres of state-owned lands.²⁶ The TNRCC, formerly the Texas Water Commission, has jurisdiction over air and water pollution control and solid waste management in the state. The TPWD regulates hunting and fishing, manages the state parks and preserves,²⁷ and is the principal wildlife authority for the state.

As the lead agency, the GLO was concerned first of all with developing rules that all three agencies could agree to. A history of jurisdictional tensions as well as the different personalities involved led GLO representative Hansen to believe that getting the trustees to agree on assessment procedures would be a challenge. In addition, due to the controversy and uncertainty surrounding natural resource damage assessment methods, she believed that any damage assessment procedures and protocols that the trustees might adopt on their own would be considered suspect by both the public and industry, and would likely be challenged.²⁸

The TNRCC and TPWD were concerned about being tied to predetermined procedures that might prove inadequate or inappropriate in a particular field situation. They wanted the damage assessment protocols to contain enough flexibility for the trustees to respond appropriately to the particulars of a given situation, and to use their best professional judgment in conducting the assessment.²⁹

Typically, trustees would be required to use the payments collected (“recoveries”) from a responsible party for the restoration of the spill site. In the case of small spills, the trustees wanted the freedom to combine (or “pool”) recoveries from multiple small spills to use in funding regional or ecosystem-based restoration efforts.³⁰ The reasoning was that in a bay or estuarine ecosystem under stress from a number of forces, for example, combining

²⁶ Hansen (1995) *Op. Cit.* p. 352.

²⁷ Hansen (1995) *Op. Cit.* p. 352.

²⁸ Hansen, pers. com., April 26, 1996, and December 16, 1996.

²⁹ Letter from Hansen to author, April 26, 1995; Richard Seiler, TNRCC, personal communication, May 7, 1996.

³⁰ Richard Seiler, TNRCC, pers. com., May 1996.

small recoveries to further an existing, system-wide restoration and management plan would likely produce net benefits over simply using the recoveries on fragmented areas where the small spills occurred.³¹

The legislation directed the trustees to invite the responsible party (the spiller) to participate in the damage assessment. The TNRCC and TPWD opposed the suggestion, made by environmentalists on the negotiating committee, to also invite a member of the public from the affected community to participate in the assessment. The TNRCC and TPWD representatives worried that a person unfamiliar with the complexities of the trustee's task would simply be critical and would hamper the assessment process. The GLO representative, who supported the idea of public participation, argued that allowing the public to participate would help the public understand how complex the damage assessment process is.³²

Industry: vessel and facility owners and operators. The persons liable for damages in the event of an oil spill in coastal waters are the owners and operators of oil transport vessels and oil handling facilities.³³ The Texas Waterways Operators Association represented transporters and the Texas Mid-Continental Oil and Gas Association represented facility owners and operators. They were concerned about the potential costs that could be incurred for natural resource damages resulting from oil spills under OSPRA, as well as the costs of the assessment, which the party responsible for a spill is required to pay. Although the 1993 OSPRA amendments include limits on liability³⁴ and require the

³¹ Seiler, pers. com., May 1996, and NOAA Notice of proposed rules, *Federal Register*, January 7, 1994, p. 1073. (The issue of pooling recoveries is discussed relative to proposed federal damage assessment rules.)

³² Hansen, pers. com., April, 1996.

³³ 9 *TexReg* 6525, June 1994.

³⁴ The liability caps for vessels are the same as the federal limits: for vessels carrying oil in bulk, \$1,200 per gross ton or, in the case of a vessel of 3,000 gross tons, \$10 million; or in the case of a vessel of 3,000 gross tons or less, \$2 million; or for any other vessel, \$600 per gross ton or \$500,000, whichever is greater. The federal law does not establish liability limits on facilities. OSPRA set the caps at \$70 per barrel for facilities with capacity above 150,000 barrels, not to exceed \$350,000,000; \$10,000,000 for facilities with capacity from 70,001 to 150,000 barrels; \$5,000,000 for facilities with capacity from 30,001 to 70,000 barrels; \$2,000,000 for facilities from 10,000 to 30,000 barrels, and for any other terminal, \$500,000 (S.B. 1049, Conference Committee Report, p. 22).

trustees to ensure that restoration or replacement costs of the damaged resources “not be disproportionate to the value of the natural resource before injury” and that the trustees use “the most cost effective method to achieve restoration,”³⁵ giving industry greater certainty about potential costs than before, costs remained its principal concern.

Industry sought to limit the use of some damage assessment methods, such as the use of compensation formulas, an assessment technique trustees supported for its cost-effectiveness, which would be utilized for assessing small spills.³⁶ Industry argued that use of such formulas becomes perfunctory, with too little attention to accurately reflecting the actual extent and costs of damages.³⁷ At the other end of the spectrum of assessment techniques, industry sought to limit the use of some mathematical and computer models that were expensive to utilize because of the many variables involved, which required extensive sampling and testing to gather input data.³⁸

As noted in the background discussion above, some methods of economic valuation are controversial, and none more so than “contingent valuation.” Contingent valuation is the only economic valuation method that has been devised to determine passive use values of natural resources,³⁹ through the use of interviews that ask people what they would be willing to pay for an environmental amenity (or natural resource) or what they would be willing to accept for the loss of an amenity or resource. Many economists object to the use of contingent valuation, arguing that it is unreliable and results in the overvaluing of resources.⁴⁰ Contingent valuation and other non-market methods used to determine non-market values have been developed in recognition that resources have values beyond those reflected in markets --the means of evaluation favored by some economists and previously

³⁵ S.B. 1049, Conference Committee Report, p. 17.

³⁶ Richard Seiler, pers. com.

³⁷ Tom Reavley, pers. com. (Use of formulas and models were extensively debated); *Federal Register*, January 7, 1994, p. 1072 (some objections to NOAA’s proposed use of compensation formulas).

³⁸ Tom Reavley, pers. com.

³⁹ *Federal Register*, January 7, 1994, p. 1074.

⁴⁰ “Ask a Silly Question...” *Harvard Law Review*, *Op. Cit.* (On the other hand, as noted in Chapter 1, some argue that any attempt to put a price on an object that is not normally traded on markets may have the effect of lowering its perceived value. Nevertheless, the debate over contingent valuation in Texas focused on whether using the technique would lead to inflated damage assessments.)

used by the Department of Interior (before court decisions reversed Interior's use of that narrow approach).⁴¹ OPA, for example, "makes clear that forests are more than board feet of lumber, and that seals and sea otters are more than just commodities traded on the market."⁴² To limit the possibility of overvaluing resources, industry sought to limit the use of contingent valuation, arguing that it should be used only for valuing permanent damage or damage to unique resources such as endangered species.⁴³

Industry opposed pooling small recoveries for use in a regional restoration plan because they worried it could lead to industry being charged more than once for a spill, and that it was contrary to the idea of compensatory damages and the requirement that a nexus exist between damages recovered and their use to restore the damaged resource.⁴⁴

The public. Two Galveston Bay conservation organizations, the Galveston Bay Foundation and the Galveston Bay National Estuary Program, represented the public on the negotiated rulemaking committee.⁴⁵ They stressed the importance of having a representative of the local community or other public representative participate in damage assessments. One of the public representatives had a couple decades of experience working on oil spill assessment and clean up issues, and pointed out that local representatives could bring expertise on local conditions that would otherwise be missing from the damage assessment.⁴⁶

Other stakeholders, not on the negotiated rulemaking committee, included the marine pollution insurance industry, admiralty law interests, and port operators. These interest

⁴¹ Legislative History, Oil Pollution Act of 1990, p. 737.

⁴² Legislative History, Oil Pollution Act of 1990. *U.S. Code Congressional and Administrative News*, 101st Congress, Second Session, 1990, p. 737.

⁴³ Dan Hinkle, TMOGA, pers. com., and *Federal Register*, January 7, 1994, p. 1073 (arguments against NOAA's proposed use of contingent valuation in damage assessments).

⁴⁴ Richard Seiler, pers. com. (pooling recoveries was an issue) and *Federal Register*, January 7, 1994 (comments in response to NOAA's proposal concerning pooled recoveries provides elaboration of industry concerns).

⁴⁵ 9 *TexReg* 6525, June 1994.

⁴⁶ Sharron Stewart, Galveston Bay National Estuary Program, pers. com., October 1996; Dan Hinkle, TMOGA, also observed that industry and some local organizations had more expertise on some of the issues than the trustees (pers. com., May 1996).

groups had participated on the Oil Spill Commission, whose recommendations led to the OSPRA amendments. The negotiating committee also did not include fishers, some of whom were still dealing with trustees and responsible persons on issues relating to a 1990 spill; or representatives from the National Oceanic and Atmospheric Administration (NOAA) and the U.S. Fish and Wildlife Service (FWS), the federal agencies with jurisdiction relating to oil spills. The GLO representative who convened the negotiating committee was concerned that the OSPRA amendments under which the negotiating committee was operating were so specific that there would be difficulty reconciling statutory constraints with suggestions that were likely to come from federal representatives. NOAA and FWS were invited to attend meetings, but were not invited to be part of the negotiating committee.⁴⁷ The omission of key stakeholding groups from a negotiated rulemaking committee is contrary to the idea of negotiated rulemaking. The process of convening this committee and negotiating the damage assessment protocols is discussed in the next section.

The process

As noted, the 1993 OSPRA amendments direct the state natural resource trustees to develop the damage assessment procedures and protocols using “negotiated rulemaking with other interested parties.”⁴⁸ Ingrid Hansen, an attorney with the GLO who was involved in the legislative negotiations to amend OSPRA, made the suggestion. She had heard that negotiated rulemaking had been used by the federal government, including the Coast Guard in developing oil spill response plans. It seemed like it would work here.⁴⁹ At the time, Hansen did not know a considerable body of writing existed on both the theory and practice of negotiated rulemaking. What she assumed “negotiated rulemaking” meant, and the way she explained it as the OSPRA bill was being discussed, was to bring together representatives of all interested parties from the start, bringing them together to work on developing the rule.⁵⁰ Her suggestion was supported by the general counsel of

⁴⁷ Hansen, pers. com., April 26, 1996.

⁴⁸ Conference Committee Report, S.B. No. 1049, May 27, 1993 p. 13.

⁴⁹ Hansen, letter to author, April 1996, and pers. com., April 1996.

⁵⁰ Hansen, pers. com., December 1996.

the GLO, and no one opposed the idea, which did not receive much attention. The requirement to use negotiated rulemaking to develop the assessment protocols was subsequently incorporated into the OSPRA amendments.⁵¹

Hansen had several reasons to suggest negotiating the regulations. Her greatest concern was getting the three natural resource trustees to agree on a set of procedures and protocols. In view of past contentious inter-agency interactions, the personalities involved, and tensions between the agencies over “turf,” getting the agencies to agree on any set of damage assessment procedures promised to be a challenge. She thought that a public process might encourage the trustees to work more cooperatively to reach mutually acceptable procedures.⁵²

In addition, the issue of damage assessments was controversial. Contingent valuation, especially, was being held up as a threat to the oil transporting and oil handling industries. Even if the agencies could agree on the procedures and protocols, given the controversial nature of the issue, Hansen believed that industry would object to any procedures the trustees developed on their own.⁵³

Finally, she wished to guard against both the possibility of last minute, behind-the-scenes changes to the rules, once agreement was reached, and allegations of any behind-the-scene changes or deals. Such a last-minute change had just occurred in the OSPRA amendments: the statute contains a substantive change from the version negotiators who worked on the bill thought was the “final” draft. The statute designates the commissioner of the GLO as spokesperson for the trustees, making the GLO the lead agency, even though the idea of designating the GLO as lead agency had been proposed, discussed, and rejected, during the legislative negotiations. The modification surprised GLO

⁵¹ Hansen letter, April 1996; SB 1049 Conference Committee Report.

⁵² Hansen, pers. com., April and December 1996.

⁵³ Hansen, pers. com., April 1996.

representative Hansen,⁵⁴ and understandably raised some suspicions among the other trustees about possible GLO involvement.⁵⁵

Hansen convened a negotiating committee in November 1993. She defined stakeholders as those who have liability under OSPRA: the oil handling facility owners and operators and the vessel owners and operators.⁵⁶ They were represented on the committee by the Texas Mid-Continental Oil and Gas Association and the Texas Waterways Operators Association. Hansen also sought representatives from environmental groups to participate on the committee. However, finding groups willing and able to participate was difficult because the groups that were contacted had very limited resources and most groups were not focused on the issue of natural resource damage assessments. The two environmental organizations that did want to participate were the Galveston Bay National Estuary Program (GBNEP) and the Galveston Bay Foundation. Both groups had experience with oil spill issues, as a couple major spills had occurred in their vicinity in recent years, one in Galveston Bay and one off the coast nearby.⁵⁷ The other two natural resource trustees, the Texas Natural Resource Conservation Commission and the Texas Parks and Wildlife Department, also were represented on the committee.

The committee, dubbed the Negotiated Rulemaking Group (NRG), met for the first time in November 1993. During that meeting it became clear to Hansen that she would be unable to move the talks forward as a facilitator and at the same time advocate for her agency. She turned to the University of Texas Law School Center for Public Policy Dispute Resolution for assistance in identifying a facilitator. The Center's director, Jan Summers, attended the NRG's next meeting as an observer. She agreed the group needed the assistance of a neutral and agreed to find one. Tom Reavley, a lawyer with a mediation practice in Austin, was hired by the GLO as the group's facilitator before the group met next, in February 1994. The son of a well-respected district judge, Reavley

⁵⁴ Hansen, pers. com., 4/96 and 12/96.

⁵⁵ Richard Seiler, pers. com.

⁵⁶ Hansen, pers. com.

⁵⁷ Hansen, letter, April 26, 1996; pers. com.

himself had a solid reputation, and was accepted by all the members of the NRG. At that time, the Center also conducted a training session on negotiated rulemaking for the NRG. According to Hansen, the whole dynamic of the group changed when Reavley came aboard, and everyone became more comfortable with the process.⁵⁸

During a meeting, an issue would be introduced and its pros and cons discussed, as negotiators attempted to discover how set the others were on the issue and what the underlying concerns were.⁵⁹ The facilitator's assistance was critical in helping the negotiators explore issues, keeping discussions on track, pointing out when certain approaches (such as arguing) were not being helpful, and knowing when to put aside a particularly thorny issue in order to move forward.⁶⁰ When technical issues were under discussion, the industry representatives (who were both attorneys) occasionally brought in technical experts to make presentations, after getting the group's okay. Experts were available to answer questions and discuss issues with the committee.⁶¹

Some of the tougher technical issues, such as which assessment techniques to use in a particular circumstance, were not precisely resolved. Instead, the final rules specify some assessment techniques while admitting the possibility that trustees may use others. Using phrases such as "including but not limited to" and allowing "best professional judgment" helped clarify the techniques that the group agreed were most appropriate, while giving the trustees the flexibility they believed they needed.⁶²

Going into the regulatory negotiations, two of the trustees felt their agencies had not had adequate input in the preceding legislative process (although the agencies had been represented). The new statute had placed limitations on the way these trustees did their jobs and also mandated their participation in the current negotiated rulemaking, which

⁵⁸ Hansen, pers. com.

⁵⁹ Hinkle, pers. com., May 1, 1996.

⁶⁰ Hansen, pers. com., April 26, 1996 and letter of April 26, 1996; Hinkle, pers. com. May 1, 1996; Seiler, pers. com., May 7, 1996.

⁶¹ Hinkle, pers. com., May 1, 1996.

⁶² Hansen letter, April 26, 1996.

created an adversarial atmosphere.⁶³ The strained history leading to the negotiated rulemaking and resentment about the mandated participation was never completely surmounted. Nevertheless, one of the trustee representatives acknowledged that the process had been beneficial, that bringing the parties together had helped everyone become more familiar with the others' concerns, and this had led to greater cooperation; he believed his agency had made some gains while not losing anything.⁶⁴ Negotiations concluded in June 1994 and the proposed rules were published in the *Texas Register* in August. Some minor clarifications were made in response to comments, and the GLO announced adoption of the new rules on October 4, 1994.⁶⁵

Discussion

The underlying issues. The complexity and uncertainty of assessing natural resource damages presents the Texas natural resource trustees with many of the thorny issues discussed in Chapter 1: measuring the impact of spilled oil on natural resources, designing appropriate and cost-effective restoration plans, and determining the economic value of damaged natural resources that cannot be mitigated, or the lost value until they recover, are complex problems rife with uncertainty. The regulated industry is concerned about costs for which it might be liable, as well as the fairness and legitimacy of the assessment and the manner in which the assessed liability claims are to be used to repair and restore injured resources. Affected communities and other members of the public also have an interest in ensuring that the natural resource damages are appropriately assessed. Damage assessment questions are further complicated by the involvement of three state agencies having different perspectives, institutional mandates, and responsibilities. The damage assessment process the trustees had been using was adversarial and, according to the Oil Spill Commission, sometimes led to damage claim being decided more to avoid a costly legal battle over the assessment than to ensure appropriate compensation for damaged resources.⁶⁶

⁶³ Seiler, pers. com., May 7, 1996.

⁶⁴ Seiler, pers. com., May 7, 1996.

⁶⁵ 19 *TexReg* 6525-6526.

⁶⁶ Hansen (1995) p. 352.

The role of legislation. Many of the difficulties associated with natural resource damage assessment were addressed by the legislature prior to the negotiated rulemaking. The legislation specifies some of the procedures and protocols the trustees are to use and is narrowly drawn to limit agency discretion. Recognizing the limitations of the traditional adversarial approach in dealing with the complexity and uncertainty of a damage assessment, the legislation calls for interest representation, greater cooperation, and mediation to settle disputes related to the damage assessment. The legislation directs the trustees to invite the responsible person (the spiller) to participate in the damage assessment, requires trustees and industry to share any photographs and samples taken in the course of a damage assessment, requires the trustees to enter a memorandum of agreement to resolve through mediation any internal disputes related to the assessment, and requires disputes between the trustees and the responsible person to be mediated before any court has jurisdiction to review an assessment challenge.⁶⁷

Elements of the rule. In terms of rules, the NRG

- established a list of scientific and economic assessment procedures and protocols that trustees may use in determining, quantifying, and valuing natural resource injury and loss of services in any field investigation;
- expanded upon the statutory requirement that trustees and the responsible person share assessment photographs and sampling data to include sharing of all assessment data upon written request of the other party;
- entitled trustees to pool compensation recovered from more than one assessment claim to execute a restoration project;
- agreed that trustees could limit the participation by the responsible person (who trustees are required by law to invite to participate) if the trustees agree the responsible person is interfering with their responsibilities or causing delay;

⁶⁷ S.B. 1049 Conference Committee Report. According to Hansen of the GLO, Texas laws are typically specific, to limit agency discretion (pers. com., April 26, 1996).

- provide a mechanism by which the responsible person may rejoin the assessment process;
- expanded public participation opportunities by providing the public an opportunity to review and comment on assessment procedures and protocols selected for any negotiated, expedited, or comprehensive assessment; and by providing that members of the public would be invited to participate in the development and design of resource plans for their area.⁶⁸

The most important thing the process accomplished, though, was to give the outcome legitimacy. Given the history of turf conflicts between the agencies, and the apparent tensions among the agencies coming out of the legislative process, what was needed was a process that all the trustees, as well as industry and environmental interests, would view as legitimate; and that met their interests. The negotiated rulemaking process, including highly valued assistance from the neutral facilitator, provided this.

Sturm argues that the norms of impartiality, participation, and rational decisionmaking are critical to the legitimacy and acceptance of an outcome that multiple affected interests will be expected to live with.⁶⁹ In this case, the trustees themselves, as well as the regulated community and the public, needed to be convinced of the legitimacy of the rulemaking process, since two of the trustees felt the antecedent legislative process had not sufficiently considered their interests. The negotiated rulemaking provided the opportunity for the key stakeholders to exchange information and debate the merits of assessment techniques and other issues, with a trusted neutral to keep the discussion from getting bogged down, to produce procedures and protocols that met each party's interests. Unquestionably, the scope of the rulemaking assignment was quite limited in this instance, and, as the GLO's Ingrid Hansen has observed, much of the innovation in the protocols came out of the legislative process.⁷⁰ Nevertheless, the negotiated

⁶⁸ S.B. 1049 Conference Committee Report.

⁶⁹ Sturm, "A Normative Theory of Public Law Remedies," *Georgetown Law Journal*, Vol. 79, No. 5, June 1991.

⁷⁰ Hansen (1995), and pers.com.

rulemaking process did serve to encourage impartiality, participation and rational decisionmaking, and enhanced the legitimacy of the rules as a consequence.

Was it successful? Alternative dispute resolution professionals stress the importance of considering both process and outcome in assessing the success of a negotiated rulemaking or public dispute resolution process.⁷¹ Measures of success include the extent to which participants believe the effort satisfies their interests; the fairness of the process; its efficiency; whether the community at large believes a good precedent has been set; how the negotiations affected relationships of those involved; the stability and feasibility of the agreement; and its wisdom.

By standards that can be evaluated today, the natural resource damage assessment negotiated rulemaking was successful. It provided an opportunity for the key stakeholders to meaningfully participate in developing the procedures and protocols. Although not all affected interests participated, the key stakeholders appear to have been identified and involved. The neutral facilitator played a critical part in helping ensure that each member of the committee was heard. Some relationships between participants improved, and it appears that none deteriorated. The protocols were developed within the time frame the legislature and trustees had hoped, and elicited relatively minor comments when they were published.

Time will tell if the protocols are stable and wise. Stability depends in part on the feasibility of the regulations and their legitimacy. Because the merits of pertinent issues were debated and discussed by key stakeholders who will be responsible for implementing them, it is likely that the regulations finally agreed to are, in fact, feasible. Because the negotiated rulemaking process aimed to involve the key stakeholders in a fair and open process, the outcome has legitimacy. The prospects for stability appear, therefore, to be good. The wisdom of the protocols will depend on how well they work in the field. To

⁷¹ Evaluation criteria taken from Susskind and Cruikshank, *Breaking the Impasse, Op. Cit.*; Gail Bingham, *Resolving Environmental Disputes*. Washington: The Conservation Foundation, 1986; and *Negotiated Rulemaking Sourcebook, Op. Cit.*

the extent the new procedures and protocols improve the accuracy of damage assessments, and enhance efficiency and cooperation, they may be viewed as wise.

Shortcomings. This regulatory negotiation was successful despite some important shortcomings. According to proponents of negotiated rulemaking, the prenegotiation phase, during which the conflict is assessed and affected interests are identified, is usually critical. The aim of the conflict assessment and convening process is to ensure that representatives of all identified interests have the opportunity to participate on the negotiated rulemaking committee. This can help ensure that the committee will consider all the pertinent facts and help protect the outcome from being challenged by an interest that was excluded.

Ideally, a neutral party conducts the conflict assessment, interviewing stakeholders to learn what issues are involved and which issues are considered by each party to be the most important. A neutral convener is recommended in order to encourage parties to be as candid as possible about their interests with respect to the issue. The convener also asks who else she needs to talk to, in order to identify as many of the significantly affected interest groups as possible.

Arguably, all the groups represented on the Oil Spill Commission -- the marine pollution insurance industry, fishers, port operators, and admiralty law interests -- have a significant stake in the way natural resource damage assessments are conducted, and as such belonged on the negotiated rulemaking committee. It is conceivable that any of these interests, in they were sufficiently unhappy with the outcome, could have mounted a significant challenge. Of course, representatives of these interests already had an important say in the issue, since it was the commission's recommendations that prompted the OSPRA amendments in the first place. And, judging from the minor comments received in response to the proposed rules, the concerns of significant interest groups were in fact sufficiently addressed by the NRG.

Another shortcoming of this negotiated rulemaking can be traced to the fact that it was mandatory -- required in the OSPRA amendments. It is generally considered important by negotiated rulemaking proponents to keep the process voluntary. As long as participation is voluntary, the reasoning goes, participants are at the table because they see it as being in their best interest to be there. Likewise, as long as anyone can decline to come to the table or can walk away at any time, all parties have an incentive to pay attention to the other parties' concerns. That motivation to pay attention to the concerns and interests of others, as well as one's own, is a key to developing an outcome that all parties can live with.

One of the trustee representatives, who felt his agency's interests were not adequately considered during the legislative phase, felt that he had no choice but to participate in the negotiated rulemaking in order to protect the agency's interests, and did not appreciate not having a choice. Still, the negotiated rulemaking mandate did not greatly damage the process or the perceived legitimacy of the outcome. Analysts of negotiated agreements have found that mandated talks can work if negotiators have other reasons to participate.⁷² In this case, the trustees had a stake in making the process succeed because they understood that if it failed, industry could go to the legislature to get a new bill to resolve the issue.⁷³

OHIO: CONSTRUCTION AND DEMOLITION DEBRIS RULES

The problem

Construction and demolition debris (CDD) landfills were unregulated in Ohio in 1990, when concerns about potential groundwater contamination and a couple serious fires at CDD facilities prompted the state legislature to pass a law governing them. The statute directs the Ohio Environmental Protection Agency (OEPA) to develop the implementing

⁷² Timothy J. Sullivan, "Difficulties of Mandatory Negotiation," in *Resolving Environmental Regulatory Disputes*, p. 74.

⁷³ Hansen letter, April 1996.

regulations, including facility design and construction standards, controls over access and operation; groundwater monitoring requirements and standards for the installation of monitoring wells; requirements for contingency plans in case of fire or explosion; and closure and financial assurance requirements. The law specifies that new facilities cannot be located in floodplains or over sole source aquifers, although existing facilities in such locations may continue to operate and in some instances expand.⁷⁴

In April 1992 the OEPA distributed draft regulations to interested parties for comment. The wide range of diverse and conflicting comments that came back left the agency uncertain about how to respond. The short-staffed agency extended the comment period as it considered the matter. After more than a year the agency learned through its legal department that the Ohio Commission on Dispute Resolution and Conflict Management (OCDRCM) was seeking candidates for alternative dispute resolution demonstration projects, including negotiated rulemaking. The OCDRCM assisted the agency in determining that negotiated rulemaking would be appropriate for developing the CDD rules (see next chapter for commonly used evaluation criteria), and the agency applied for and received a \$10,000 grant which it used to initiate the effort.

Key stakeholders

Key stakeholders included local health departments, which have responsibility for enforcing the regulations; large and small CDD facility operators; CDD generators, such as building contractors; local and county governments; environmental and public interest groups; and the agency, OEPA. Health departments were concerned about the cost and technical expertise required to implement the new regulations. Different health departments had submitted widely divergent comments on the proposed regulations. Some thought the regulations were too strict, others thought they were not strict enough. CDD facility operators were chiefly concerned about the cost of the new regulations, but there was a range of responses from operators, as well. Some CDD operators also

⁷⁴ “Summary of the Construction and Demolition Debris Law and Rules” memorandum to Interested Parties from Don Slivka through Barbara Brdicka, Chief, Division of Solid and Infectious Waste Management (DSIWM), (undated).

questioned the validity of scientific studies that provided the basis for groundwater monitoring requirements and other provisions in the regulations. Of the four facility operators on the committee at the outset, the two operators of small CDD facility were more concerned about the new requirements and their associated costs than the large facility operators.⁷⁵ OEPA was concerned about fulfilling its responsibility of implementing the new law, and faced a challenge in responding to and reconciling the wide range of opinion expressed by commenters. The agency was particularly concerned about addressing the diverse views expressed by local health officials.⁷⁶

The Process

OCDRCM assisted the agency by first evaluating the prospective rule to determine whether it was appropriate for negotiated rulemaking, and then helping to prepare a request for proposal (RFP) to hire a facilitator to convene a rulemaking committee and facilitate the rulemaking process, and recommending places to send the RFPs. The agency received two proposals, and hired a team of two facilitators, Suzanne Orenstein, vice president of RESOLVE, a dispute resolution center in Washington, D.C. and Jerry Lawson, executive director of the Center for the Resolution of Disputes in Cincinnati. The proposal for the team came from RESOLVE, and Orenstein served as lead facilitator.⁷⁷ The agency used the OCDRCM grant to get started and hire the facilitators,⁷⁸ and the agency covered the balance of the costs.⁷⁹ To help identify stakeholders, the agency provided the facilitators a list of those who had commented on the proposed rules. The facilitators convened a 19-member negotiated rulemaking committee, which included representatives of health departments, CDD facility operators; CDD generators; a quarry operator, local and county governments; a groundwater scientist; environmental and public interest groups; and OEPA, which was represented by the chief of the Division of Solid and Infectious Waste Management (DSIWM) .

⁷⁵ Don Slivka, Environmental Specialist, OEPA DSIWM, pers. com., April 1996.

⁷⁶ Brdicka, Chief, DSIWM, pers. com., April 30, 1996.

⁷⁷ Slivka, pers. com.

⁷⁸ Brdicka, pers. com.

⁷⁹ Slivka, pers. com. By the end of the process, costs for the facilitators services was \$70,000 according to Slivka.

Initially, ten meetings were held over the course of a year.⁸⁰ The agency rented a conference facility for each meeting.⁸¹ (This can help ensure the neutrality of the setting for all participants, but adds to the costs of the process.) Meetings were open to the public and regularly attended by interested observers and reported in a trade publication; people occasionally addressed the committee from the floor.⁸² The group “got stuck” on the issue of groundwater monitoring. Some doubted that CDD waste posed enough risk to warrant groundwater monitoring. They doubted the scientific basis for a monitoring requirement, and questioned whether the benefits of monitoring justified the costs.⁸³

The OEPA representative acknowledged there were problems with some of the studies the agency had used to draft the regulation. Some dated back to the 1960s and 1970s, and some failed to distinguish between municipal solid waste (MSW) and CDD, which is now generally believed to be less hazardous than MSW. Other members of the committee brought to the table more recent leachate studies they had. However, the committee continued to disagree about the interpretation of the newer studies, and whether or not groundwater monitoring should be required in all areas or only in areas where the groundwater was especially vulnerable due to local geology. The agency said it would be willing to accept an agreement if one could be reached by the opposing sides on the issue.⁸⁴

Eventually, after meeting for a year, the committee reached agreement that all members could “live with,” and the agency submitted the draft rules to a committee of the state legislature for review, according to the state’s administrative procedures. In the meantime, however, an association of small CDD facility operators had organized and approached the legislative committee, urging it not to approve the rules. This group of

⁸⁰ Slivka, pers. com..

⁸¹ Slivka, pers. com.

⁸² Jerry Lawson, pers. com.

⁸³ Brdicka, pers. com.

⁸⁴ Brdicka, pers. com.

facility operators argued that the proposal was too expensive and would put some of them out of business. The legislative committee encouraged the agency to withdraw the proposed rules and reconvene the reg-neg committee to take another look at the operators' concerns.⁸⁵

The negotiating committee reconvened, adding three small facility operators and one more generator to the committee. The second committee grappled with the question of costs and reconvened a subcommittee to investigate the costs of landfill liners, capping systems, and measures to assure quality control. The question facing the committee was whether costs could be lowered without sacrificing environmental protection. After four more meetings, the committee reached agreement on all except one issue, which concerned groundwater monitoring. In light of the impasse, the parties agreed to defer to the commissioner of OEPA on that issue. Although the committee members did not formally sign on to an endorsement of the rules, they all did agree not to block implementation or sue. The regulations took effect as planned on September 30, 1996.

Discussion

The underlying issues. Predictably, the costs of the new regulations were of paramount concern to the regulated community. And because the smaller operators were less able to absorb new costs, the impacts of the regulations would hit them harder than the larger facility operators. This illustrates the concern about fairness discussed in the first chapter, that even when regulations are applied evenly, they can be unfair in practice because they have uneven impacts.⁸⁶

The science underlying the proposed rule was challenged by CDD operators who disputed assumptions made in the studies cited by OEPA, arguing that the studies were not only outdated, but some had erroneously combined results of tests at both solid waste landfills and CDD landfills.⁸⁷ The operators argued that more current research showed that CDD

⁸⁵ Brdicka, pers. com. April 30, 1996.

⁸⁶ Susskind, Bacow, and Wheeler. *Resolving Environmental Regulatory Disputes, Op. Cit.*

⁸⁷ Slivka, pers. com.

poses less threat to groundwater supplies than solid waste, and that current science therefore did not justify regulating CDD landfills as stringently as was proposed. When committee members brought more current research to the discussion, different members continued to disagree on the interpretation and regulatory implications of the new studies.

And the regulations affected a range of stakeholders with widely divergent perspectives, whose comments had exposed a dimension of the agency's rulemaking task in the first place. Comments in response to the agency's initial draft rule had been "all over the map" according to the head of the Solid and Infectious Waste Management division.⁸⁸

Elements of the rule. Regulations developed by the negotiated rulemaking committee include the following provisions:⁸⁹

- design, construction, operation, closure, and financial assurance requirements;
- annual license requirements to establish, maintain, or modify a facility; license requirements include facility design plan; letter from local fire department; financial assurance documentation; debris placement plan; and drawings showing surface water runoff and runoff control structures;
- certain exemptions for construction debris used as fill;
- exemptions from liner and leachate collection system requirements for filled areas of existing sites;
- limitations on the types of waste that can be accepted: readily identifiable construction and demolition debris, stumps and trunks are acceptable; fly ash and foundry sand may be accepted subject to additional provisions, and asbestos subject to air control permit requirements; hazardous or infectious wastes cannot be accepted, neither can containerized or bulk liquids or solid wastes other than those specified.

⁸⁸ Brdicka, pers. com.

⁸⁹ "Summary of the Construction and Demolition Debris Law and Rules," memo to interested parties from Don Slivka through Barbara Brdicka, Chief, Division of Solid and Infectious Waste Management (DSIWM), undated.

Modifications made by the expanded committee include:

- grace periods for submission of parts of the facility design plan were established for existing facilities;
- thickness of recompacted soil liner, when required, was reduced;
- select debris and other wastes can be used as drainage medium for leachate collection system;
- leachate collection system is allowed to be constructed in phases.

Decided by agency director: (The negotiating committee was unable to reach agreement on this issue; director based his decision on documentation provided by the committee).

- groundwater monitoring requirements.

In response to a suggestion by some members of the negotiated rulemaking committee, the Division of Solid and Infectious Waste Management staff is developing guidance documents to supplement the regulations.

Was it successful? The rulemaking had undeniable shortcomings, which are discussed below. On the positive side, the committee was able to reach agreement on most of a rule, and to agree to defer to the judgment of the agency director on the contested issue. Producing a rule that has overall acceptance is a reasonable measure of success, given the wide range of views on the topic.

The negotiated rulemaking process provided a forum for the agency to explain, as one of the participants, the legislative constraints under which the rules were written. For example, some of the commenters had pointed out inconsistencies in regulations pertaining to the protection of sole sources aquifers as compared with other drinking water aquifers. The agency was able to explain that the different approaches were mandated in the legislation. Because the agency was one of the participants, it could present this kind of information less as a defense of the rules, as it might in other circumstances have been, and

more as an invitation to the group to help address the challenges presented by the legislation.

Moreover, regulating CDD facilities was new regulatory territory for the agency. The reg-neg provided stakeholders the opportunity to not only share their concerns and explain their interests, but to bring to the table valuable scientific information that would otherwise be missing. As noted in Chapter 1, administrative law has evolved partly in recognition that, given the technical complexity of environmental regulations, agencies cannot be expected to have all the expertise needed to appropriately address a particular issue. Thus, greater emphasis has been placed on ensuring that affected interests -- who may have more specific information and expertise on a topic -- have the opportunity to influence the development of proposed rules. (The Texas negotiated rulemaking experience also revealed that industry and environmental groups believed that, in some areas, they had more expertise than the trustees charged with conducting the damage assessments.)

The negotiations provided a forum to bring together stakeholders with different interests and different points of view to attempt, with the help of neutrals, to reconcile those differences. The facilitators helped maintain a productive pace and kept the negotiators focused on problem solving.⁹⁰ As noted, it was not something the agency had figured out how to do alone.

Shortcomings:

It's fair to say that this negotiated rulemaking had some important shortcomings. The central problem was the failure of the conflict assessment to identify appropriate representatives of the regulated community. Identifying key interests is a central part of the conflict assessment stage of a public dispute resolution process. In addition to exploring the underlying concerns of the party being interviewed, the convener asks who else they need to talk to. The convener knows they have located the key players when

⁹⁰ Brdicka, pers. com.

they stop hearing new names.⁹¹ Such an approach helps, but still may not resolve the problem of relatively unorganized interests, as the CDD operators were in this case. Not only is there a problem of how to identify and select the appropriate representative of the interest group, but also a mechanism for the representative to report back to constituents on the progress of the negotiations must be found. In the case of the CDD negotiations, it took impending regulations to motivate some of the small operators to organize and identify some representatives, and it is unclear how they might have done so sooner.

As OEPA learned, most CDD facilities are small operations, and the operators were not organized as a cohesive interest group when the negotiated rulemaking got underway. The problem of identifying these key stakeholders was present from the start. The agency sought names and addresses of CDD facilities from local health departments when it first sent out its proposed rules for comment.⁹² However, since CDD facilities were unregulated at the time, it is likely that most health departments did not have complete information, and, because health departments do regulate municipal solid waste facilities, it is also likely that solid waste facilities were included on the initial list of parties receiving the agency's draft rules. Thus the comments that were received from "industry" may have been skewed to reflect the perspectives of the already-regulated solid waste industry more than those of CDD facility operators. Over the course of the negotiations the agency learned about differences between CDD and solid waste, as well as differences in small, independent CDD operations and much larger, national solid waste companies, and that one could not appropriately represent the other.⁹³

By the time additional small CDD operators joined the committee, after appealing to the legislature, much work had been done and the committee was unable to revisit all of the issues that had been settled. The expanded committee did revise timetables for implementation, taking a more graduated approach to make it more possible for small

⁹¹ Susan Carpenter and W. J. D. Kennedy. *Managing Public Disputes*. San Francisco: Jossey-Bass, 1988, "Analyzing the Conflict," pp. 71-91.

⁹² Brdicka, pers. com.

⁹³ Slivka, pers. com.

operators to comply. However, it is not clear that all participants' interests were met as well as might be expected under more ideal circumstances. The agency was able to produce regulations that were acceptable to all the affected interests, however, and given the disparity of opinion that started the process, this must be considered a significant achievement. The problem in identifying important stakeholders impacted the efficiency of the process, since after a year of meetings and reaching a tentative agreement, the committee was asked by the state legislature to reconvene.

Because the committee could not agree on the regulatory implications of the scientific data concerning groundwater monitoring, the long term stability of the agreement may be in doubt. However, the commissioner of OEPA, who made the final decision on groundwater monitoring issues that the committee had been unable to agree upon, did review all the committee's notes and findings, which gives greater credibility and legitimacy to his decision than any the agency may have made unilaterally at the start.

MAINE: THE SENSIBLE TRANSPORTATION POLICY ACT REGULATIONS

The problem

In 1985, to solve the problem of traffic congestion on the Maine Turnpike in southern Maine, the Maine Turnpike Authority (MTA) proposed to widen a 30-mile section of the turnpike, at a cost of \$100 million.⁹⁴ The expansion was approved by state lawmakers and considered to be necessary by the Maine Department of Transportation (MDOT), the lead transportation agency in state.⁹⁵ Others in the state, however, believed the root of the traffic problem was not inadequate roadway, but the failure of traditional strategies such as expanding roadway capacity to manage transportation demand, and that the state

⁹⁴ Jonathan W. Reitman and Ann R. Gosline, "Transportation Planning Model for the Future: Maine's road from referendum to reform," *Consensus*, No. 22, April 1994.

⁹⁵ Sondra Bogdonoff, "Consensus Building to Write Environmentally Responsive Rules for Maine's New Transportation Policy," in *Mediating Environmental Conflicts*, J. Walton Blackburn and Willa Marie Bruce, eds.; Quorum Books, Westport, CT; 1995; p. 153.

needed to broaden its approach to transportation planning and policy. In response to the decision to expand the turnpike, a coalition of environmental and other public interest groups led by the Natural Resources Council of Maine (NRCM) launched a referendum campaign to require MDOT to focus on means other than new highway construction to manage transportation demand.⁹⁶

The referendum called for MDOT to give preference to demand management strategies that did not involve highway construction, and to consider energy costs, air pollution, environmental impacts, local and regional goals and concerns, and the needs of all citizens in its decision making.⁹⁷ MDOT fought the referendum, arguing that the highway expansion was needed and that the policy requirements in the referendum would mire the agency in red tape.⁹⁸ The campaign, which went on for about a year and a half, was bitter and divisive. In November 1991 the “Sensible Transportation Policy Act” passed by a solid 59-41 percent margin,⁹⁹ leaving MDOT in charge of implementing a law it had vigorously opposed.

After the vote, MDOT Commissioner Dana Connors, who had been a vocal critic of the referendum, announced that “the people have spoken” and indicated his agency would endeavor to meet the requirements of the act.¹⁰⁰ The NRCM and other referendum backers, however, were concerned about whether the act could be successfully implemented by an agency that plainly had doubted its merits and practicability.¹⁰¹ The referendum victory had also helped bolster the position of NRCM and other groups traditionally excluded from transportation planning processes, that they had a right to be involved in the development of state transportation policy.¹⁰²

⁹⁶ Bogdonoff, *Op. Cit.*

⁹⁷ Bogdonoff, *Op. Cit.*; Reitman and Gosline, *Op. Cit.*

⁹⁸ Reitman and Gosline, *Op. Cit.*; Beth Nagusky, principal attorney at NRCM during referendum campaign, pers. com. May 2, 1996; Dana Connors, former commissioner of MDOT, pers. com. December 11, 1996.

⁹⁹ Reitman and Gosline, *Op. Cit.*

¹⁰⁰ Reitman and Gosline, *Op. Cit.*

¹⁰¹ Nagusky, pers. com., May 2, 1996.

¹⁰² Bogdonoff, *Op. Cit.*

A delegation of referendum backers approached the commissioner to propose that all key parties participate in writing the implementing regulations, through the consensus process of negotiated rulemaking.¹⁰³ The suggestion came from Beth Nagusky, then lead attorney for NRCM, who had read some articles by Philip Harter, a leading proponent of negotiated rulemaking, and had heard him speak on the topic. The idea had already gotten some favorable press, apparently the result of an offhand remark by Nagusky, that the case seemed suited to negotiated rulemaking, during an informal conversation with a reporter.¹⁰⁴ MDOT was hesitant at first. The commissioner was confident that his department was fully capable of writing the implementing regulations, and saw some benefit in the agency's moving forward to do just that, as a way to improve department morale and demonstrate the department's capabilities. On the other hand, he also saw a critical need to start healing the divisions that had been created by the rough, bitter campaign, and recognized that negotiated rulemaking could be useful in that regard.¹⁰⁵ He agreed to the proposal chiefly on basis of its potential to begin healing past wounds. MDOT staff was concerned about the prospect of nonexperts being in a position of deciding agency policy, that the process would not necessarily produce the best rule, and that the agency would lose authority over regulations it was responsible for implementing.¹⁰⁶ A conference call between Harter and department staff helped reassure the agency that using the process would not relinquish its authority over the regulations.¹⁰⁷ Eventually the agency agreed, and hired two facilitators to convene a committee and conduct the negotiations.

Key stakeholders

Three key groups had significant interests in state transportation policy and planning: environmental and public interest groups, business interests, and the state transportation agencies.

¹⁰³ Bogdonoff, *Op. Cit.* p. 154.

¹⁰⁴ Nagusky, pers. com. May, 1996, and December 1996.

¹⁰⁵ Connors, pers. com., December 1996.

¹⁰⁶ Tom Reeves, MDOT chief counsel and lead negotiator MDOT in the transportation rule negotiations, pers. com., 12/11/96.

¹⁰⁷ Bogdonoff, *Op. Cit.*

Environmental and other nongovernmental public interest groups (the referendum backers): NRCM spearheaded the referendum effort. The most active environmental group working on transportation issues in the state, NRCM had been frustrated by MTA's proposed remedy to traffic congestion and their own inability to influence transportation policy.¹⁰⁸ They were joined in the campaign by Maine Audubon, and other environmental, alternative transportation, and public interest groups.¹⁰⁹ Referendum backers were concerned about a transportation policy they believed inevitably led to a cycle of increasing reliance on cars--single occupancy vehicle use had increased significantly in the state--with the attendant problems of increasing air pollution and energy use and detrimental impacts on the quality of life. They were concerned that the focus on building or expanding roads encourages sprawl, and that, as people settle in increasingly remote areas, they become increasingly reliant on their cars.¹¹⁰ Increasingly diffuse settlement patterns and reliance on cars, in turn, leads to the demise of village centers, making it necessary for even more people to travel for goods and services no longer available in local villages, and leading to demands for bigger and better roads to handle the increased traffic, and so forth. They were also concerned that the emphasis on auto use ignored the transportation needs of the elderly, disabled, poor, young and others unable to drive.¹¹¹

Business interests: The business community opposed the referendum because they considered the addition to the turnpike necessary. The adequacy of highway infrastructure is considered fundamental to the state's economic interests, as 80 percent of all traffic in the state is over roads and highways.¹¹² Even businesses in the northern part of state that do not themselves travel the turnpike depend on the efficient flow of goods through southern Maine. And businesses dependent on tourism asked whether the state wanted to send a message to tourists that it did not care about seeing them stuck for hours in traffic. As it was, the stretch of turnpike sparking the debate was a bottleneck between two wider

¹⁰⁸ Bogdonoff, *Op. Cit.*

¹⁰⁹ Bogdonoff, *Op. Cit.*

¹¹⁰ Nagusky, pers. com., December 1996.

¹¹¹ Nagusky, pers. com., December 1996.

¹¹² Dana Connors, currently head of the Maine Chamber of Commerce (former head of MDOT), pers. com., December 1996.

stretches of road, and the business community believed engineering studies and traffic projections had established that another lane was necessary.¹¹³ Furthermore, because the proposal to widen the turnpike had already passed review by the state Department of Environmental Protection by the time the referendum campaign got underway, the business community argued that the additional lane had met necessary environmental standards.¹¹⁴

The Maine Better Transportation Association was one of the business groups deeply involved in the campaign, working hard to defeat the referendum. The association advocates for transportation funding on behalf of highway users, primarily, including truckers, highway contractors, and municipalities. Although the association cared most about seeing a new lane added to the turnpike, during the referendum campaign, it focused its criticism on the issue of transportation policy, believing that was the most vulnerable part of the referendum.¹¹⁵ In actuality, it was not as opposed to the planning elements contained in the referendum as its campaign strategy suggested. Some business interests were concerned, though, that scarce state resources not be “consumed in endless planning.”¹¹⁶

Maine transportation agencies: The Maine Department of Transportation (MDOT) has overall responsibility for statewide transportation policy and planning.¹¹⁷ Although it was a proposal by the MTA to widen a road that spurred the referendum effort, MDOT’s transportation planning policy became the chief focus of the initiative campaign to enact the “Sensible Transportation Policy Act.” MDOT opposed the referendum because it thought the proposed widening of the turnpike was necessary, and believed that the policy requirements of the referendum would be costly and ineffective, burdening the department

¹¹³ Maria Fuentes, Maine Better Transportation Association, pers. com., December 1996.

¹¹⁴ Fuentes, pers. com.

¹¹⁵ Fuentes, pers. com. The association also represents air and rail freight companies, but issues relating to highway transportation are their main focus.

¹¹⁶ Bogdonoff, *Op. Cit.* p. 155.

¹¹⁷ Rule for the Sensible Transportation Policy Act, Feb. 1, 1993, p. 5.

with unnecessary red tape.¹¹⁸ At the time, new federal requirements for state transportation agencies were being formulated under the Intermodal Surface Transportation Efficiency Act (ISTEA), and MDOT viewed the referendum as yet another layer of even stronger requirements with which it would have to contend.¹¹⁹ The department staff saw the referendum as a directive coming from outside the agency, from people who did not understand the constraints and requirements under which the department operated, essentially telling the highway engineers how to do their jobs.¹²⁰

Going into the negotiations after the department had “lost” the referendum battle, the commissioner’s paramount concern was to begin healing the rifts that had occurred.¹²¹ Maine has a small population, and the acrimony of the referendum debate had been wearing on all sides.¹²² He was also concerned about restoring morale within the agency, which was low after a year and a half of being the focus of this bitter campaign, and passage of the referendum.¹²³ MDOT staff were interested in being able to communicate the restrictions under which it operated and to ensure the rule that was developed was workable,¹²⁴ as well as achieving a result that would satisfy the various interest groups.

The process

Having decided to try negotiated rulemaking, MDOT advertised a request for proposals from dispute resolution facilitators in Maine newspapers. It received 60 to 70 responses from Maine and other New England states. A review committee of MDOT staff eventually narrowed the choices down to a single team, which they recommended to the commissioner. The commissioner talked to NRCM to get their response to the choice.¹²⁵

¹¹⁸ Connors, pers. com.; Reeves, pers. com.

¹¹⁹ Connors, pers. com., December 1996.

¹²⁰ Reeves, pers. com., December 1996.

¹²¹ Connors, pers. com., December 1996.

¹²² Jane Lincoln, Deputy Commissioner, MDOT, pers. com., December 1996, and Bogdonoff, *Op. Cit.*

¹²³ Connors, pers. com., December 1996.

¹²⁴ Lincoln, pers. com., December 1996; Reeves, pers. com., December 1996; Bogdonoff, *Op. Cit.*

¹²⁵ Reeves, pers. com.

The staff was seeking facilitators who could work with a wide range of people, and selected the team of Ann Gosline and Jonathan Reitman, lawyers with dispute resolution practices in the state. Part of what the selection committee was seeking, and liked about this team, was their difference from the male-dominated, engineering culture of MDOT. Gosline's presence, in particular, was viewed at first with some skepticism by some of the traditional people in the transportation community.¹²⁶ But the selection of this team made the referendum backers very comfortable, because they recognized that Gosline and Reitman were not MDOT insiders. The agency's chief counsel, who was involved in the selection process, as well as serving as the agency's chief negotiator, believes the two gained the confidence of the skeptics over a short period of time.¹²⁷

The facilitators were hired in February, 1992, and over the next two months conducted prenegotiation interviews to assess the conflict and determine who should be involved, and convened a 61-member negotiated rulemaking committee.¹²⁸ The committee, which became known as the Transportation Policy Advisory Committee (T-PAC), included representatives of MDOT, MTA, and NRCM, of course, as well as representatives of Maine Better Transportation Association, Campaign for Sensible Transportation, American Automobile Association, Associated General Contractors, Maine Chamber of Commerce, Maine Council of Senior Citizens, Conservation Law Foundation, Economic Development Council of Maine, Maine Real Estate and Economic Development Association and others.

At the committee's first meeting, in April 1992, Commissioner Connors established several groundrules: The committee had to have its draft rule completed by September, so that he could meet the December 15, 1992, deadline established by the law, taking into account a period for public comment. He also specified that agreement on the rule had to

¹²⁶ Reeves, pers. com.

¹²⁷ Reeves, pers. com.

¹²⁸ Reitman and Gosline, *Op. Cit.*

be by consensus (that is, unanimity), and that the rule had to be viewed as workable by the department.¹²⁹

The facilitators suggested some other groundrules, including a two-tiered structure to allow the large committee function effectively: the full committee would participate in discussions and a smaller steering committee would be responsible for reaching consensus and oversee the drafting of the rule. The facilitators proposed 20 participants to form the steering committee.¹³⁰ Referendum backers questioned the composition of the proposed steering committee, which seemed to them unbalanced against their side. Eventually the group agreed to add three more members representing the referendum backer's point of view.¹³¹

Other groundrules included a "pledge to approach the discussions in good faith and with the goal of reaching consensus on a rule [and] agree[ing] to listen to each others' concerns and consider other members' suggestions in good faith." In addition, to promote the "free and open exchange of ideas, views, and information prior to achieving consensus," members also agreed that "specific offers, positions, or statements made during T-PAC discussions will not be used by other members for any purpose outside the discussions or as the basis for future litigation."¹³²

Once the protocols and general structure of the group were settled, the committee recognized the need for a shared base of information. A subcommittee worked with the facilitators to organize two all-day information sessions. At the start of the first session, the facilitators enlisted the assistance of one of the participants to lead the group in an "ice breaking" exercise. It helped ease tensions and helped members who had been opponents in the referendum campaign to discover areas of common ground.¹³³ The information

¹²⁹ Bogdonoff, *Op. Cit.*

¹³⁰ Bogdonoff, *Op. Cit.* p. 156.

¹³¹ Bogdonoff, *Op. Cit.* p. 156.

¹³² Transportation Policy Advisory Committee, "Goal and Protocol," p. 4.

¹³³ Bogdonoff, *Op. Cit.* p. 156.

sessions provided the opportunity for MDOT to explain the many regulatory, funding, and other constraints under which it operated. Other participants provided information on alternative transportation management strategies from other jurisdictions, and possible models for demand management from other sectors. The shared information proved helpful as talks progressed.¹³⁴

The negotiating process was arduous.¹³⁵ Considerable time was required to agree on how to actually tackle the issues. After the two information sessions, the facilitators asked members to write out their visions of the transportation rule.¹³⁶ The environmentalists, business group and agency produced extremely different ideas. These were put together to see where any common ground existed, and to develop a list of goals. The facilitators' suggestion to break into subcommittees to tackle different issues was rejected by the environmentalists, who feared being "outnumbered and outvoted."¹³⁷ The group tried breaking into subgroups based on shared views on the issues. Still, attempts to translate the goals developed by these "affinity groups" into acceptable rule language failed. The facilitators consulted with Harter, who suggested the facilitators draft a framework document to use as a basis. That idea was rejected by those who thought it would stifle full consideration of all views.¹³⁸ Finally, the three affinity groups that had evolved over several meetings, representing environmental, business, and agency interests, each nominated a couple representatives to form a drafting committee.

The drafting committee hammered out proposed language, in some cases negotiating every word. The facilitators circulated drafts to the full group for feedback, but as the deadline loomed and the drafting committee's task became increasingly time consuming, keeping the full committee informed and involved was increasingly difficult.¹³⁹ The drafting committee members faced the challenge of negotiating the language of the rule while

¹³⁴ Bogdonoff, *Op. Cit.* p. 156.

¹³⁵ Reitman and Gosline, *Op. Cit.*; Reeves, pers. com..

¹³⁶ Bogdonoff, *Op. Cit.* p. 157.

¹³⁷ Bogdonoff, *Op. Cit.* p. 157.

¹³⁸ Bogdonoff, *Op. Cit.* p. 157.

¹³⁹ Bogdonoff, *Op. Cit.* p. 159.

remaining true to their own constituents, reporting back to their constituents, and at times working to convince their constituents to agree to draft language.¹⁴⁰

Six months after the committee began, it reached consensus on a 30-page draft rule. MDOT ushered the draft through the state's notice and comment procedures. The commissioner "traveled around the state explaining the rules and inviting comments. He outlined to the public the basis of the rules and explained that they were not self-executing. Their success relied on the involvement of the public."¹⁴¹ Very few comments were received, and rule was adopted essentially unchanged.¹⁴²

Following through, carrying on

With input from T-PAC members and assistance from Gosline and Reitman, the agency created eight planning regions, outside areas with existing metropolitan planning organizations (MPOs), as called for in the new rule. The structure for regional transportation advisory committees (RTACs) was developed, modeled after T-PAC, and when Commissioner Connors asked for volunteers to serve on the regional committees, 500 people responded.¹⁴³ The RTACs met for the first time in December 1993, and in their first year produced twenty-year plans for their regions.¹⁴⁴ Commissioner Connors (who is no longer with the agency) says that the regional committees have become the department's eyes and ears.¹⁴⁵

During the previous legislative session the department convened chairs of all the RTACs, representatives of the MPOs, as well as some members of the original T-PAC such as NRCM and the Maine Better Transportation Association, to make some adjustments to the rule. This was done in part to forestall suggestions in the legislature to repeal the

¹⁴⁰ Bogdonoff, *Op. Cit.* p. 159.

¹⁴¹ Bogdonoff, *Op. Cit.* p 161.

¹⁴² Reitman and Gosline, *Op. Cit.* p. 8.

¹⁴³ Bogdonoff, *Op. Cit.* p. 162.

¹⁴⁴ Jane Lincoln, pers. com., December 1996.

¹⁴⁵ Dana Connors, pers. com., December 1996.

act.¹⁴⁶ (The deputy commissioner described the changes as clarifications more than substantial changes.¹⁴⁷) More recently, in the last session of the state legislature, the issue resurfaced when a couple conservative Republicans pushed a bill to repeal the act. The Maine Better Transportation Association, which had fiercely opposed the original referendum, joined forces with NRCM to fight the repeal, and the repeal effort was defeated. A representative of the business group explained that her group had bought into the process and the result of the negotiated rulemaking effort.¹⁴⁸ Connors considers the repeal attempt a test of the rule that would have been a great opportunity to derail the endeavor if it did not have support.¹⁴⁹

Discussion

The underlying Issues. Referendum backers raised the issue of fairness, although perhaps not explicitly, both in terms of participation norms and in terms of the distribution of costs and benefits of state transportation planning decisions. Referendum supporters objected to the lack of opportunity citizens had to participate in transportation decisions affecting them, and pointed out that MDOT's focus on highway construction and maintenance failed to address the transportation needs of (or provide transportation benefits to) nondrivers. On the other hand, demands that MDOT pay better attention to local and regional planning goals suggested that some communities had borne unfair costs as a result of state transportation decisions

The referendum backers also questioned the technical assumptions of the department, suggesting that its proposed engineering solution would ultimately feed the state's increasing dependence on cars, leading more quickly than necessary to demands for more roads. Clearly, those who supported turnpike expansion and those who opposed it were framing the issue differently, a not uncommon occurrence when scientific or technical evidence is in dispute. Business interests and the agency believed they had sufficient

¹⁴⁶ Maria Fuentes, pers. com., December 1996.

¹⁴⁷ Jane Lincoln, pers. com., December 1996.

¹⁴⁸ Fuentes, pers. com., December 1996.

¹⁴⁹ Connors, pers. com., December 1996.

evidence, in terms of engineering studies and traffic projections, to establish the need for and feasibility of widening the turnpike for a stretch of 30 miles. The opponents of turnpike expansion objected to the way the problem was framed, arguing that the congestion was part of a wider problem and needed a wider approach to a solution. For its part, during the campaign MDOT disputed the effectiveness or feasibility of the approach embodied in the referendum.

The issue of costs was certainly exploited in the referendum campaign. For instance, an ad produced by referendum supporters suggested that state funds were being diverted from other roads and highways to “gold-plate the turnpike,” a characterization of appropriation and funding mechanisms that referendum opponents disputed. Referendum opponents raised the idea that passage of the referendum would have adverse economic impacts, sending the wrong message to tourists and hampering the flow of goods through the southern part of the state. MDOT was concerned about costs as well as red tape the referendum would impose on the agency (in a turnabout from the usual complaints raised to dispute agency regulations because of the costs they impose).

Elements of the rule. The Sensible Transportation Policy Act Rule establishes policy objectives that include coordination and efficient use of all modes of transportation, and consideration of environmental and land use impacts, as well as economic impacts, in transportation decision making. It provides a framework for developing a statewide transportation plan to be used as MDOT’s basic planning document.

The rule...

- directs MDOT to establish regional transportation advisory committees (RTACs). These regional entities, along with existing metropolitan planning organizations, will provide MDOT with better understanding of regional concerns and priorities, facilitate public participation in transportation planning, and provide input to the statewide transportation plan;

- stipulates components of the statewide plan, including identification of transportation needs, consideration of current and forecasted deficiencies, and an outline of strategies to address them, evaluation of transportation demand management techniques, and implementation of current and emerging technological innovations;
- establishes a deadline of for completion of the initial statewide plan (January 1, 1995) and a schedule for updating it (every five years);
- directs MDOT, in cooperation with existing metropolitan planning organizations and RTACs, to develop and maintain an inventory that describes characteristics, usage and conditions of existing transportation systems in the state.¹⁵⁰

Was it successful? The committee produced a rule that all could accept and produced it on time. Moreover, if, as Susskind, et al. argue, parties involved in a mediation effort should be the ones to determine its effectiveness,¹⁵¹ this one was an outstanding success. Former Commissioner Connors, for one, remains an enthusiastic supporter of what the committee accomplished. Connors hoped, going into the process, to get some healing from it, and believes he got much more, because the process worked. It produced a rule that all parties involved in the process support, as well as contributing to healing and reconciliation. He considers this rulemaking effort, if not quite a show case, then at least a measure for others of what is possible. He believes the results speak to the fundamental importance of attending not just to what you do but how you do it.¹⁵²

The commissioner noted that although he has the highest regard for his department, and believes it is second to none, he could not have hoped for better results than T-PAC accomplished. For, whatever rule the department produced on its own, the rule would not have the same “buy-in,” the same sense of ownership this process provided. The process also allowed the agency staff to show their competence and expertise, during the information sessions and over the course of the negotiations, something that the

¹⁵⁰ Rule for the Sensible Transportation Policy Act, Maine Department of Transportation, Feb. 1, 1993.

¹⁵¹ Susskind and Cruikshank, *Op. Cit.*, pp. 24-33; and Susskind and McMahon, *Op. Cit.*, pp. 140-141.

¹⁵² Connors, pers. com., December 1996.

commissioner had originally thought could be accomplished only by having the department produce the rule on its own.¹⁵³

The commissioner is not alone in his evaluation. Beth Nagusky of the NRCM believes it was a “tremendous success.”¹⁵⁴ And, as noted earlier, one of the key business groups involved, the Maine Better Transportation Association, went to bat along with NRCM to stop an effort by a few legislators to repeal the act,¹⁵⁵ putting their support into action.

In terms of efficiency, the committee met the deadline for the rule. It is clear that the process required a great deal of hard work and commitment from all participants, but in particular, toward the end, from the drafting committee. In terms of fairness, it appears that all the key stakeholders were represented in the process. Tom Reeves, the MDOT chief counsel, who was the departments lead negotiator, believes the facilitators did an outstanding job of convening the committee, and that careful attention in the early phases of the project helped ensure success. In terms of stability, the rule has thus far withstood a challenge from a few state legislators. However, Reeves notes that there are many organized interests vested in the traditional transportation system, and so believes that future efforts to derail the act will occur.¹⁵⁶ On the other hand, a group of T-PAC and RTAC representatives have already been reconvened to make some changes. It appears that the changes were minor, however, and so far the substance of the rule is holding. Time will tell how effective the rule is in curbing the growth of single-occupancy vehicle use and otherwise managing transportation demand. The continuing success of the rule also depends on the continuing commitment and effectiveness of volunteer regional organizations, the RTACs. For the present, the department has in hand a tool it has not had before, a 20-year statewide transportation plan developed by the different regions in the state, to guide its planning decision.

¹⁵³ Connors, pers. com., December 1996.

¹⁵⁴ Nagusky, pers. com., December 1996.

¹⁵⁵ Fuentes, pers. com., December 1996.

¹⁵⁶ Reeves, pers. com., December 1996.

The process had a very positive affect on relationships. Bogdonoff makes the following observations:

- “People sat across from former ‘enemies’ and not only gained mutual respect, developed admiration and even affection for one another.
- “At numerous points one individual came up with the knowledge, trust, or perseverance to move the group forward. Several participants noted ‘how they never knew where the next good idea would come from.’
- “The amount of plain work...became another cause for mutual respect and trust group members ultimately had for each other.”¹⁵⁷

Nagusky cautions, however, that improved relations may be less an asset than it seems for environmentalists, because it may make it harder for environmentalists to stand up for what they are fighting for, when that, rather than cooperation or “going along, is necessary.”¹⁵⁸

Former Commissioner Connors attributes the success of the process to two key factors:

- the people who were involved wanted it to work; and
- the invaluable contribution of the facilitators. They provided not only highly constructive input throughout, but got the right representation on the committee and were central in making the whole thing work out. “Both are incredibly talented.”¹⁵⁹ Others have stressed the value of the facilitators, as well. It was noted, for example, that Gosline was on the phone all the time, checking in with people, floating ideas, reminding negotiators to check back with their constituents.¹⁶⁰

Others believe it was the commitment of the commissioner himself that made the process work.¹⁶¹ Once he committed to using negotiated rulemaking, he clearly put his full

¹⁵⁷ Bogdonoff, *Op. Cit.*, pp. 160-161.

¹⁵⁸ Nagusky, pers. com.

¹⁵⁹ Connors, pers. com., December 1996.

¹⁶⁰ Fuentes, pers. com., December 1996.

¹⁶¹ Fuentes, pers. com., December 1996.

support behind it. He instructed his staff to “make it work.”¹⁶² As the negotiating committee did its work, he did not interfere, although his commitment to the process was apparently clear. As noted, during the notice and comment period he traveled around the state explaining the draft rule and soliciting comment. His support carried through to the establishment of the regional committees and included adding several staff members to work with them.¹⁶³

Shortcomings. There were not many shortcomings of the process. The insecurity of referendum supporters is evident from their opposition to breaking up into small groups and being reluctant to try some of the suggested approaches to writing the rule. I assume that the insecurity stems from having only a few participants in the group with significant skills in negotiation or other group interactions, and the inexperienced members were unwilling to break up in small groups where there would be less support at hand. It may have been helpful, therefore, for the facilitators to provide a training session in negotiated rulemaking, before the talks got underway. I am unaware of one having been conducted. On the other hand, given the thoroughness with which these facilitators tackled their work, it is likely that the participants were given a clear idea of the process and what to expect when the committee was being convened.

So far this case appears to be a clear success. The value of negotiated rulemaking is in the process, that develops a sense of ownership in those who participate, as well as in the substance of the rule, which draws on the expertise and information of all interests that will be affected by the rule. The strength of commitment to a rule, however, cannot be completely measured until it is tested. So far this case has met the test.

¹⁶² Reeves, pers. com., December 1996.

¹⁶³ Bogdonoff, *Op. Cit.*

4. NEGOTIATED RULEMAKING: CONDITIONS, PROCEDURES AND CAVEATS

This chapter provides an overview of negotiated rulemaking, the process used in the three examples described in the previous chapter. Although the focus of this thesis is on the use of negotiated rulemaking by state agencies, the idea of negotiated rulemaking developed in response to the shortcomings of traditional rulemaking procedures at the federal level. This overview draws extensively from the literature on negotiated rulemaking, which is based on federal experience.

Proponents predict that if used appropriately, regulatory negotiations can improve the factual basis of agency regulations, produce more practical regulations by providing the agency with a better understanding of the concerns of affected interests, reduce the time and costs of developing regulations, increase a rule's legitimacy, making it easier for the agency to implement and improving compliance, and reduce the likelihood that a regulation will be challenged in court.¹ Although state agencies face regulatory challenges that are in many ways comparable to those of federal agencies, regulations at the state level are less likely to be challenged in court. Rather than seeking judicial review, an interest group is more likely to contest a regulation through political means.² Thus, reduction in the rate at which regulations are litigated is not as useful a measure of the effectiveness of state agency regulatory negotiations as it may be for federal agencies. However, other objectives motivating federal agencies to try regulatory negotiations apply at the state level, and attempts by stakeholders to contest a rule by way of the legislature or the governor need to be considered, in addition to legal challenges.

The chapter focuses primarily on the prenegotiation phase and procedural elements because they are considered by practitioners to be key to the appropriate use and ultimate

¹ Philip J. Harter, "Negotiated Regulations: A Cure for Malaise," *Georgetown Law Journal*, Vol. 71:1, 1982.

² ACUS, *Negotiated Rulemaking Sourcebook*, 1995, p. 369.

success of regulatory negotiation. A summary of federal negotiated rulemaking activity is also included. The chapter concludes by addressing some criticisms of the process.

BACKGROUND

The idea of negotiation regulations developed in the 1970s and early 1980s in response to the inadequacy of the traditional rulemaking process for dealing with complex, multi-party issues. At the same time the shortcomings of traditional administrative procedures were prompting calls for regulatory reform, environmental mediation and other consensual, negotiated processes were proving successful in settling a range of public disputes.³ A number of federal agencies -- in particular the Administrative Conference of the United States (ACUS), the Department of Labor, and the Environmental Protection Agency (EPA) -- and the academic community began to explore and refine the idea of negotiating regulations.⁴

In 1982, Philip J. Harter, who had investigated the idea on behalf of the ACUS,⁵ published a comprehensive and defining analysis of the prospects for negotiated rulemaking. He argued that negotiation has distinct advantages, in appropriate situations, over the adversarial procedures typical of traditional rulemaking, and proposed criteria for evaluating whether negotiated rulemaking was appropriate for the rule under consideration.⁶ The ACUS issued Recommendation 82-4 that year as well, encouraging agencies to consider using negotiated rulemaking and providing guidelines for doing so.⁷

³ Harter, *Op. Cit.*; Nancy J. Baldwin, "Negotiated Rulemaking: A Case Study of Administrative Reform," unpublished Master's Thesis, Department of Urban Studies and Planning, MIT, 1983, pp. 16-21.

⁴ Henry H. Perritt, Jr., "Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Processes," *Pepperdine Law Review*, Vol. 14:863, 1987, pp. 867-874.

⁵ The ACUS was an independent agency established in 1964 to "promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions." (*Negotiated Rulemaking Sourcebook*, 1995.) Funding for the agency was not renewed in the 1995-96 budget, and the agency closed October 31, 1995.

⁶ Harter, *Op. Cit.* Analogous negotiated processes surveyed by Harter include consensus standards, settlements, public law remediation, the National Coal Project, dialogue groups and environmental negotiations (pp. 32-42).

⁷ Recommendation 82-4, 1 CFR S.305.82-4, Procedures for Negotiating Proposed Regulations; reprinted in, 1995, p. 11. The recommendation was drafted by Harter (Perritt, *Ibid.*, p. 873-874).

KEY FEATURES

The idea of negotiated rulemaking is to bring together representatives of the agency and all the significantly affected interests, at the beginning of the rulemaking process, to negotiate the text of a proposed rule. Participants evaluate their own priorities and make trade offs to achieve outcomes on issues that are most important to them.⁸ Employing the concepts of “principled negotiation” articulated by Fisher and Ury in *Getting to Yes*, negotiators seek to discover and address the interests that underlie positions, invent options for mutual gain, and identify and agree upon objective criteria with which to evaluate options.⁹ Emphasis is placed joint problem solving. The committee of negotiators is assisted by one or more neutrals who have experience as dispute resolution mediators or facilitators,¹⁰ and the agency participates as a one of the negotiators. The goal of the negotiated rulemaking committee is to reach consensus on a draft rule. If consensus is reached, the agency publishes a draft rule based on that consensus.¹¹

Pre-negotiation

Because negotiated rulemaking is not appropriate or feasible for all regulations, a pre-negotiation conflict assessment is also an integral feature of the process. A convener, who generally is contracted from outside the agency or is a staff member not directly involved in the substantive issues of the proposed rule,¹² conducts the assessment to identify stakeholders and key issues.¹³ A convener who is not directly involved in the regulatory program is expected to have better chances of encouraging stakeholders to be frank about their concerns and interests. At the same time the convener is learning about the issues and key concerns from various stakeholders, she explains the idea of negotiated rulemaking and explores the willingness of the stakeholders to participate in such a

⁸ *Negotiated Rulemaking Sourcebook* p. 1.

⁹ Roger Fisher and William Ury, and for the second edition, Bruce Patton, *Getting to Yes*, Penguin Books, (1981, 1991); pp.10-12; Harter, *Negotiating Regulations, Op. Cit.*, pp. 86-88.

¹⁰ ACUS, *Negotiated Rulemaking Sourcebook*, 1995; p. 8.

¹¹ ACUS, *Negotiated Rulemaking Sourcebook*, 1995, pp. 7-8.

¹² The Texas case deviated from recommended procedures, as the representative of the lead agency, the GLO, convened the committee and also was one of the negotiators. Fortunately, the group’s progress in negotiating an agreement appears not to have been handicapped by this fact.

¹³ *Negotiated Rulemaking Sourcebook*, 1995, p. 7; Susan Carpenter and W. J. D. Kennedy, *Managing Public Disputes* (Jossey-Bass, S.F.), 1988, pp. 71-91.

process. The convener reports to the agency, which decides whether or not to proceed. The following conditions are considered by many practitioners to be critical to the success of a negotiated rulemaking process. The convener seeks to determine if these conditions exist, and the agency weighs that information and the convener's recommendation in its determination to proceed or not.¹⁴

- A limited number of identifiable interests will be significantly affected by the rule.
- Negotiations will not require participants to compromise a fundamental value.
- The rule involves a number of issues that parties value differently. The existence of issues that are valued differently allows parties to package issues and make trades to meet different priorities. To achieve mutual gains, parties yield on issues they care less about to achieve gains on issues they care more about.¹⁵
- The agency is willing to commit sufficient resources, including technical assistance, to the negotiated rulemaking committee, and to assign a senior manager to participate in the negotiations.
- Parties view participation in the negotiations as in their best interests. Accordingly, the agency needs to give the negotiators a clear idea of its probable course of action should a negotiated rule not be achieved.¹⁶ In addition, participation should be voluntary. A party required to participate may not do so in good faith,¹⁷ and a party that believes it can do better by pursuing another course of action should be expected to do so.¹⁸

Throughout the negotiation, participants evaluate the extent to which their interests are being met against what Fisher and Ury term the negotiator's "BATNA" -- their best alternative to a negotiated agreement.¹⁹ The freedom of any participant to walk away from the table encourages all the negotiators to seek solutions that will address the concerns of all represented interests and helps ensure that the less powerful interests--who

¹⁴ ACUS, Recommendation 82-4, 1 CFR S.305.82-4, Procedures for Negotiating Proposed Regulations; Recommendation 4 (a)-(g).

¹⁵ Susskind and Cruikshank, *Breaking the Impasse*, pp. 120-122.

¹⁶ ACUS Recommendation 85-5, 1 CFR S.305.85-5, Recommendation 2.

¹⁷ *Negotiated Rulemaking Sourcebook*, p. 39.

¹⁸ Harter (1982), p. 43.

¹⁹ Fisher and Ury, p. 100.

nevertheless may have enough power to block implementation of an agreement--will not be ignored.²⁰

- No one interest dominates the negotiation. “All participants must feel that their concurrence in any agreement is essential.”²¹ Although power among members of a negotiating committee is likely to be somewhat uneven, it has been noted that power is not static and derives from numerous sources. Negotiating skill, good ideas, and moral authority, for example, can be important sources of power that can alter bargaining dynamics from that which might be predicted.²² Fisher and Ury also advise that parties can work to develop and improve their BATNAs as a means to help balance power in negotiations.²³
- The agency is committed, to the maximum extent consistent with its legal obligations, to use the consensus of the committee as the basis for the rule proposed by the agency for notice and comment.²⁴ If the agency expects parties to negotiate in good faith, taking risks and making concessions--not to mention expending considerable time and other resources--in an effort to achieve a mutually acceptable rule, the agency should make a good faith commitment to propose the consensus rule developed by the committee. This does not mean the agency abrogates its legal authority. The agency is represented in the negotiations, and for consensus to emerge, the agency’s negotiator must find the rule acceptable. Moreover, the qualification to support the negotiated rule “to the extent possible consistent with its legal obligations” provides agency flexibility and helps underscore that the agency has not delegated its administrative authority to the committee.

If, after considering the findings and recommendations of the convener with respect to the factors listed above, the agency decides to proceed with a negotiated process, it may

²⁰ Fisher and Ury, p. 106.

²¹ *Negotiating Rulemaking Sourcebook*, p.40.

²² Susskind and McMahon, “The Theory and Practice of Negotiated Rulemaking,” pp. 153-155; Roger Fisher, “Negotiation Power,” *American Behavioral Scientist*, Vol. 27, 1983, p. 153. Fisher proposes six kinds of power useful in negotiations: “1) the power of skill and knowledge; 2) the power of a good relationship; 3) the power of a good alternative to negotiating; 4) the power of an elegant solution; 5) the power of legitimacy; and 6) the power of commitment.

²³ Roger Fisher and William Ury, *Getting to Yes*, Penguin Books, 1991, pp. 102-106.

²⁴ Negotiated Rulemaking Act, Public Law 101-648, as amended by Public Law 102-342, 5 U.S.C. S.563(a).

publish a notice of its intention to convene a negotiated rulemaking committee. This step is required of federal agencies by the federal Negotiated Rulemaking Act, though requirements for state agencies may vary.²⁵ The notice describes the subject and scope of the rule to be developed and lists the interests likely to be significantly affected and the persons proposed to represent those interests. One purpose of the notice is to discover any affected interests that were inadvertently overlooked during the convening process. The notice solicits comments on the proposal and provides information on how persons can apply to be on the committee if they will be significantly affected and believe their interests will not be adequately represented by a person listed in the notice.²⁶

Before actual negotiations begin a facilitator is selected. This may be the convener, who has had the opportunity to learn about interests and issues and establish her credibility with committee members, but it need not be. In the cases of both Ohio and Maine discussed in the previous chapter, for example, the persons who convened the negotiating committees also facilitated the negotiations. Whoever is selected to facilitate must be skilled in dispute resolution techniques, and all members of the committee need to have confidence in the facilitator's neutrality and skill in guiding the process.²⁷ As was the case in two of the state examples, sometimes a team of facilitators is used.

Because negotiated rulemaking participants often have extremely diverse levels of experience as negotiators, the facilitator or someone else with appropriate expertise may conduct a training session before negotiations begin.²⁸ In the Texas negotiated rulemaking, for example, the University of Texas Law School Center for Public Policy Dispute Resolution provided training for the participants.²⁹ Sessions usually include talks on negotiation techniques and simulation exercises; a typical federal agency session runs 4-

²⁵ 5 U.S.C. S.564(a).

²⁶ *Negotiated Rulemaking Sourcebook*, p. 129.

²⁷ *Negotiated Rulemaking Sourcebook*, pp. 129-130.

²⁸ *Negotiated Rulemaking Sourcebook*, p. 193.

²⁹ 9 *TexReg* 6526, August 19, 1994.

6 hours. Although a single training session will not change a novice into an expert, training sessions have proven helpful to individuals and the group as a whole.³⁰

The negotiating committee's first order of business is to establish groundrules, the internal protocols that will govern the negotiations. Groundrules usually include a commitment by members to negotiate in good faith, how consensus will be defined (for example, will it mean unanimity, general concurrence, or something else) and whether the negotiators will be expected to sign a statement of their support of the consensus rule, if one is reached. Groundrules also usually cover interactions with news media, the use of subcommittees, and the decision of whether the committee will be crafting the actual language of a rule or developing general principles and ideas that the agency will shape into a rule for the committee's approval.³¹ For example, the Maine groundrules included the two-tiered structure that allowed the large committee to work effectively, a media strategy (full committee meetings were open to the media and the smaller subcommittee doing the actual drafting would be off limits),³² and the commitment of participants to respect the pace of each member of the committee, among other protocols.³³ In addition to groundrules established by the Maine negotiating committee as a whole, the Commissioner of MDOT set the deadline, stipulated that consensus had to be unanimous, and specified that the agency must view the rule as workable.³⁴

Negotiation and implementation

The attention and effort that goes into the prenegotiation stage--to identify all affected interests and have those interests represented on the rulemaking committee; to assure that a negotiated process is appropriate for the rule in question; to jointly develop protocols by which the committee will operate--along with the assistance of a facilitator or mediator skilled in dispute resolution, help set the stage for joint problem solving and thus increase

³⁰ *Negotiated Rulemaking Sourcebook*, pp. 194-195.

³¹ *Negotiated Rulemaking Sourcebook*, pp. 210-213; Harter, "Negotiating Regulations," *Op.Cit.*, pp. 92-97; Susskind and Cruikshank, pp.108-111.

³² Reitman and Gosline, p.8.

³³ Bogdonoff, p. 156.

³⁴ Bogdonoff, p. 155.

the chances that frequently disputed issues such as the costs, fairness, and the scientific basis of the proposed regulations can be addressed and resolved.

An important concept of principled negotiation is to “attack... the problem, not each other.”³⁵ The shift in focus away from each other and toward the problem, in the context of rulemaking, implies that all parties strive to resolve a mutually shared problem, rather than pitching their arguments to the agency and waiting for the agency to, in effect, pick the winners and losers. Negotiations include opportunities for brainstorming, sessions explicitly devoted to “inventing options” without judging them, committing to them, or being held to them, for the purpose of discovering what possibilities *may* exist.³⁶ And because parties value different factors and issues differently, negotiators seek, with creativity and hard work, to craft a regulation that meets the interests of the different stakeholders.

The scientific basis of the rule can be examined and debated to produce a sounder, more feasible rule than would be produced in an adversarial context by the agency alone. The effort made during the convening stage to involve all relevant interests increases the chances that all relevant factual information will be considered.³⁷ EPA has found, for example, that for rules involving complex technical issues, negotiated rulemaking has proven effective in “bring[ing] to the table as much technical information as possible.”³⁸ The facilitated consensus process is more conducive to information sharing than the traditional adversarial process.³⁹ Representatives of different interests bring to the table information they consider important, and have the opportunity to discuss directly with others questions pertaining to the uncertainty or interpretation of scientific data. Given that the goal of the negotiations is to reach a mutually acceptable regulation, participants

³⁵ Fisher, Ury, and Patton, p. 11.

³⁶ Fisher, Ury, and Patton, pp. 57-63; Harter, pp. 88-89.

³⁷ Harter, pp. 29-31 and 89-90.

³⁸ Thomas, Lee M., “The Successful Use of Regulatory Negotiation by EPA,” *Administrative Law News*, Fall 1987.

³⁹ Lawrence Susskind and Connie P. Ozawa, “Mediating Science-Intensive Policy Disputes,” *Journal of Policy Analysis and Management*, Vol. 5, No. 1 (1985) pp. 32-33; Harter, p. 90.

have less incentive to conceal pertinent facts and use information as a weapon than there sometimes is in adversarial proceedings, and, in fact, a committee's groundrules may stipulate that data not be concealed from the other sides.⁴⁰

The facilitator can be instrumental in ensuring that scientific and technical information is presented so that all participants understand it and that all participants have access to technical assistance. The facilitator also is in a position to challenge and clarify misleading or ambiguous statements.⁴¹

In addition to the information that each negotiator brings to the table, the group may identify gaps in the information base and undertake common research to address questions that stand in the way of consensus.⁴² Joint fact finding can be used to resolve disputed facts and test the distributional impacts of different options. For example, an EPA-sponsored negotiated rulemaking in 1984, to establish the penalties for manufacturers of heavy equipment vehicles or engines not in compliance with Clean Air Act standards, involved the development of a spreadsheet model that allowed negotiators to test the impact of changes to various parameters.⁴³ This negotiating committee also used funds in a common resource pool created by EPA for a study of a proposed program to test engines.⁴⁴

None of the state cases I looked at undertook anything like the engine testing research undertaken by the EPA committee. Although I looked at only three cases, states agencies in general may reasonably be expected to rely more on existing data rather than to commission their own research. State agencies' resources are more limited and their

⁴⁰ According to Harter, the National Coal Policy Project (one of the public policy negotiation projects undertaken in the 1970s) drew upon Milton R. Wessel's "Rule of Reason" for its groundrules, which begin with "data should not be withheld from the other side." Harter, *Negotiating Regulations*, Op. Cit., p. 83.

⁴¹ Susskind and Ozawa, pp. 34-35.

⁴² Susskind and Ozawa, pp. 33-34; Susskind and Cruikshank, pp.113-117; Harter, pp. 89-91; Sourcebook, p. 270.

⁴³ Susskind and McMahon, pp. 145, 161.

⁴⁴ Susskind and McMahon, pp. 145, 161.

regulatory mandates are more limited than those of the EPA, whose standards affect the whole country.

Participants in each of the three state cases profiled brought information as well as their perspectives, insight, and interests to the table, which contributed to the development of mutually acceptable rules. In Maine, participants recognized the need for a shared information base and scheduled several information sessions in which participants made presentations to the group.⁴⁵ In Texas, the participating agencies had technical experts at the table and the industry negotiators occasionally brought in their technical experts to talk with the group.⁴⁶ In Ohio, members of the regulated community introduced important new information that otherwise would not have been considered. The Ohio committee's failure to agree on the interpretation and policy implications of the new information suggests that the group would probably have benefited from joint fact finding to resolve the disputed technical issues. Although they did not do that (possibly because the information was introduced late in the negotiations), the overall legitimacy of the process enabled the group to agree not to challenge regulations and allow commissioner to make the final decision on the disputed issues.

Whether the negotiating committee hammers out the precise language of a rule together or agrees to general concepts that the agency then translates into proposed language of the rule, the committee reviews draft documents as they are developed to ensure the proposed regulations reflect the committee's consensus. The rule agreed to by the negotiated rulemaking committee is then proposed for noticed and comment by the agency,⁴⁷ according to the applicable (federal or state) administrative procedures requirements. Because the process has sought to involve the key stakeholders in developing the rule, comments are expected to be few and minor. The committee may or may not participate in reviewing and responding to the comments, and making any changes to the proposed

⁴⁵ Bogdonoff, p. 156.

⁴⁶ Tom Reavley, personal communication, April 26, 1996.

⁴⁷ *Negotiated Rulemaking Sourcebook*, p. 8.

rule.⁴⁸ At the federal level, the EPA usually disbands the negotiating committee at the conclusion of formal negotiations, while the Department of Transportation maintains the committee through the public comment period.⁴⁹

Judging the result

The anticipated benefits of negotiated rulemaking suggest the criteria for evaluating the result of a reg-neg. Compared to what could be expected from the traditional rulemaking process, a regulatory negotiation should, in general, be expected to produce better information upon which the rule is based, produce a rule that is more practical than what the agency would be expected to produce on its own, provide the opportunity for affected interests to participate meaningfully, improve the exchange of information, decrease the length and cost of rulemaking, increase the legitimacy of the regulations, and reduce subsequent litigation (or, in the case of state reg-negs other challenges to the proposed rule).⁵⁰ To fairly evaluate the outcome, the entire package of results need to be considered; focusing on a single aspect may miss the bigger picture. The success of a negotiated rulemaking effort also can be judged by the volume and tenor of comments received when the proposed rule is published for comment, prior to promulgation of the final rule.

FEDERAL ACTIVITY

As noted, interest in negotiating regulations had been building in the 1970s and early 1980s, spurred by shortcomings of the traditional rulemaking process and the success of analogous negotiated processes. Following the recommendations of the ACUS in 1982, federal agencies began to undertake regulatory negotiations. The first federal agency to use the process was the Federal Aviation Administration (FAA). The FAA convened a committee to negotiate flight and rest time requirements for pilots in 1983, after several failed attempts in previous years to revise outmoded standards through traditional notice and comment procedures. The committee's proposed rule was published in March 1984

⁴⁸ *Negotiated Rulemaking Sourcebook*, p. 230-231.

⁴⁹ *Negotiated Rulemaking Sourcebook*, p. 230-231.

⁵⁰ Harter, *Op. Cit.*

and the final rule was promulgated the following year.⁵¹ In 1983 the Occupational Safety and Health Administration (OSHA) convened a negotiated rulemaking committee to develop a standard for occupational exposure to benzene. Although the committee was unable to reach agreement on a proposed rule, the negotiations narrowed the issues in dispute. The agency issued a proposed rule in 1985 and a final rule in 1987.⁵²

In 1983 EPA launched its Regulatory Negotiation Project, undertaking seven negotiations between 1984 and April 1987. Exit interviews with participants of the first two negotiations, which EPA characterized as pilot projects,⁵³ indicated the following:

[N]early all of the participants in the negotiations concluded that the process worked better and yielded more acceptable regulations than they might have expected under conventional rulemaking. In addition, participants pointed to improved understanding of technical issues, fuller appreciation of the institutional positions of the other parties, and an awareness of the potential for negotiation as an alternative to standard rulemaking. Both negotiations were completed on schedule, with results that the Agency considered more than satisfactory.⁵⁴

Rules developed by EPA using negotiated rulemaking include the following:

- nonconformance penalties for manufacturers of heavy equipment that is out of compliance with the Clean Air Act;
- regulations governing emergency exemptions to pesticide regulations;
- performance standards for residential woodburning stoves;
- regulations to control volatile organic chemical equipment leaks;
- manifests for transporting hazardous wastes; and

⁵¹ *Negotiated Rulemaking Sourcebook*, p.9, pp.383-384.

⁵² *Negotiated Rulemaking Sourcebook*, p. 382.

⁵³ Daniel F. Fiorino, "Regulatory Negotiation as a Policy Process," *Public Administration Review*, July/August 1988.

⁵⁴ Fiorino and Kirz, pp. 29-30.

- national emission standards for coke oven batteries.⁵⁵

In addition, the agency has based other rules on agreements that were achieved in negotiations where the committee was unable to produce a consensus on the entire rule,⁵⁶ including worker protection standards for agricultural pesticides and rules on the inspection and abatement of asbestos-containing materials in schools. The asbestos rule was challenged in court by one of the groups that had been on the negotiating committee, representing former manufacturers of asbestos building materials. The rule withstood the challenge, and the agency believes the scope of the litigation was substantially narrowed by the negotiations.⁵⁷ According to the ACUS, the EPA is the “most consistent and committed” user of the process, accounting for approximately one third of federal agency negotiated rulemaking activity.⁵⁸

In 1985 the ACUS issued a second recommendation reconfirming the advantages of negotiated rulemaking for some rules.⁵⁹ As more agencies used the process, a track record developed;⁶⁰ by 1990 eight federal departments and agencies had used negotiated rulemaking and by 1995 thirteen had (Table 1).⁶¹ Congress demonstrated its support of the process by passing the Negotiated Rulemaking Act of 1990.

THE NEGOTIATED RULEMAKING ACT OF 1990

The Negotiated Rulemaking Act was enacted to provide a framework for the conduct of negotiated rulemaking and to encourage agencies to use the process in appropriate

⁵⁵ *Sourcebook*, 1995, pp. 387-395; also Kathrin Day Lassila, “See You Later, Litigator,” *Amicus Journal*, Summer, 1992, pp. 5-6; and Lee M. Thomas, “The Successful Use of Regulatory Negotiation by EPA,” *Administrative Law News*, Vol. 13, No. 1, Fall 1987, pp. 1, 3-4.

⁵⁶ *Negotiated Rulemaking Sourcebook*, 1995; p. 9.

⁵⁷ *Negotiated Rulemaking Sourcebook*, 1995, p. 390.

⁵⁸ *Negotiated Rulemaking Sourcebook*, 1995; p. 9.

⁵⁹ Recommendation 85-5, 1 CFR S.305.85-5.

⁶⁰ Statement of Senator Carl Levin before the House Subcommittee on Administrative Law and Governmental Relations on H.R. 3052, the Negotiated Rulemaking Act, August 10, 1988. Levin sponsored S. 1504, the companion bill of H.R. 3052, in the Senate.

⁶¹ *Negotiated Rulemaking Sourcebook*, 1990 and 1995 editions.

Table 1. Federal agencies that have used negotiated rulemaking

Federal departments and agencies that had used negotiated rulemaking by 1990:

Dept. of Agriculture	Dept. of Transportation
Dept. of Education	Environmental Protection Agency
Dept. of Housing and Urban Development	Federal Trade Commission
Dept. of Labor	Nuclear Regulatory Commission

Federal departments and agencies that had used negotiated rulemaking by 1995,
in addition to those above:

Dept. of Health and Human Services	Federal Communications Commission
Dept. of the Interior	Interstate Commerce Commission
Farm Credit Administration	

Source: *Negotiated Rulemaking Sourcebook*, 1990 and 1995 editions.

situations.⁶² It provides guidelines for agencies to determine if the process is appropriate for the rule in question and outlines procedures for convening a committee and conducting committee activities, and indicates how the process relates to, and conforms with, requirements of the Federal Advisory Committee Act (FACA) and the notice and comment requirements of the Administrative Procedures Act. Although it was originally set to expire in November 1996, it was permanently reauthorized in October 1996, under provisions of the Administrative Dispute Resolution Act of 1996.⁶³

The reauthorization by Congress reflects support for regulatory negotiations that has continued since the statute was enacted in 1990. In 1992, for example, McGarity's

⁶² Pub. L. No. 101-648, as amended by Pub. L. No. 102-354, Title 5, U.S. Code, S. 561, and by Pub. L. 104-320.

⁶³ Public Law 104-320, Administrative Dispute Resolution Act of 1996. Sec. 11. Reauthorization of Negotiated Rulemaking Act of 1990.

discussion of the “ossification” of the rulemaking process includes regulatory negotiation on a short list of “ossification avoidance devices.”⁶⁴ While noting that the process is not suitable for all regulations,⁶⁵ nor a “magic cure for the ills of ossification,” he concludes that negotiated rulemaking is “a very useful tool that should be in every regulatory agency’s toolbox.”⁶⁶ A report of the Vice President’s National Performance Review published in 1993 encourages greater use of consensus-based approaches to regulation as one of the ways to improve regulatory systems.⁶⁷ In another 1993 report, “Risk and the Environment: Improving Regulatory Decision Making,” the Carnegie Commission on Science, Technology, and Government includes regulatory negotiation on its list of suggestions to improve rulemaking practices. “Join[ing] the many students of the subject who advocate the use of [negotiated rulemaking],” the commission suggests that “agencies ... attempt to negotiate rules where it is possible to do so without prejudicing underrepresented third parties.”⁶⁸

NOT A CURE-ALL

While arguing the benefits of negotiated rulemaking in his 1982 essay, Harter stressed the need to ensure the process was appropriate for the rule under consideration and the need to avoid “the ‘hot tub’ view of negotiation [that] if only we strip off the armor of an adversarial hearing, everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand.”⁶⁹ Not only is it important to be sure that the process is appropriate, it is also critical for all participants to be as prepared as possible. Although participants will be reminded and encouraged to think in terms of finding a mutually acceptable agreement, it is expected that each participant also will be pursuing his or her own interests as well.

⁶⁴ Thomas O. McGarity, “Some Thoughts on ‘Deossifying’ the Rulemaking Process,” *Duke Law Journal*, Vol. 41, No. 6, June 1992, pp. 1438-1440.

⁶⁵ This is commonly acknowledged, as noted earlier, and the reason that a careful conflict assessment is conducted prior to undertaking the process.

⁶⁶ McGarity, p. 1440.

⁶⁷ National Performance Review: Improving Regulatory Systems, Accompanying Report of the National Performance Review, Office of the Vice President, Washington, DC, September 1993, pp.29-33.

⁶⁸ *Risk and the Environment: Improving Regulatory Decision Making*, a report of the Carnegie Commission on Science, Technology, and Government, June, 1993; p. 111.

⁶⁹ Harter, p. 31.

Amy argues that negotiated rulemaking and other environmental mediation processes may be misused to co-opt or diffuse opposition, or lull or pressure environmentalists into accepting compromises that are against their interests.⁷⁰ He criticizes the tactic of facilitators of encouraging negotiators to think about things differently, suggesting that the result, if not the intention, may be that negotiators abandon their interests, rather than gaining fresh insights or moving off their original positions. Because there will always be differences in negotiating skill and experience, he worries that the process will perpetuate and legitimate power imbalances. And, because the facilitator's job is to achieve consensus, Amy argues they may be willing to ignore significant disparities in negotiating power as they forge ahead to agreement.⁷¹ The concern is that weaker parties will get trampled, under the guise of meaningful participation. These are important concerns, and it is useful for environmentalists to approach with some skepticism any process embraced by the corporate giants he lists as supporters of environmental mediation.⁷²

While skepticism may be a healthy approach to negotiations, one also must consider one's options. If fundamental rights are at stake, proponents of negotiated rulemaking maintain that the negotiating table is not the appropriate forum for resolution of the dispute. If a negotiated process is undertaken, Fisher and Ury argue the need for all negotiators to be as prepared as possible when they enter the process, and to assume that negotiators will be pursuing their own interests in the talks. The value of preparing and having clear idea of one's best alternatives to negotiation is to avoid making unacceptable concessions. One's BATNA becomes one's walking away point, the bottom line.⁷³ Susskind and Cruikshank provide guidelines for public officials, citizens, and business interests to analyze prospects and develop strategies when each of these groups is considering participation in a public dispute negotiation.⁷⁴

⁷⁰ Douglas J. Amy, *The Politics of Environmental Mediation*, Columbia University Press, 1987.

⁷¹ Amy, *Op. Cit.*

⁷² Amy, *Op. Cit.* pp. 98-101. According to Amy, Atlantic-Richfield, Dow Chemical, U.S. Steel and Union Carbide "have ... invested money in promoting environmental mediation."

⁷³ Fisher and Ury (and Patton), p. 99-102. Fisher and Ury resist equation of a BATNA with a bottom line, but the two are analogous.

⁷⁴ Susskind and Cruikshank, pp. 193-223.

In “Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation,”⁷⁵ Rose-Ackerman criticizes negotiated rulemaking, and in particular the endorsement of regulatory negotiation in the National Performance Review, chiefly on the basis that it is not appropriate for all regulations and that regulation itself is not appropriate for addressing all pollution problems. She argues that market-based incentives are more widely applicable to solving pollution problems. The title of her piece and thrust of her argument, I argue, suggest an unnecessary and unfortunate tension between negotiation and other regulatory tools. Far from arguing that negotiated rulemaking is the only answer, proponents stress the need to assess the rule under consideration to ensure that negotiation is appropriate for it.

While maintaining that regulators should apply market incentives to control pollution, Rose-Ackerman does not explain how the agency will determine the ultimate regulatory goal of the market manipulation or decide the degree to which market should be manipulated, should the issue be contested. Equating a negotiated public policy dialogue with an interview of consumers about their preferences,⁷⁶ she accepts the notion that people behave and think the same as public citizens and as private consumers, a view that many find debatable and unacceptable, as noted in the first chapter. She makes a valid point that “the choice between regulatory negotiation and incentive systems should depend on the nature of the regulatory task.”⁷⁷ I believe it is a point that few advocates of regulatory negotiation would contest.

Amy and Rose-Ackerman and other commenters who question the usefulness, applicability and possible unintended consequences of negotiated rulemaking play a useful role by re-emphasizing the need for agencies to seek the best approach for the situation, and for all of us to pay attention. Like many things, negotiated rulemaking is susceptible

⁷⁵ Susan Rose-Ackerman, “Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation,” *Duke Law Journal*, Vol. 43, No. 6, April 1994, pp.1206-1220.

⁷⁶ Rose-Ackerman, p. 1219.

⁷⁷ Rose-Ackerman, p. 1218.

misuse and shoddy practice. Because it is a very public process, it is likely to be less susceptible than some other approaches.

CONCLUSION

In practice, regulatory negotiations have, on the whole, met theoretical expectations. Experience to date shows that a negotiated approach provides advantages over conventional notice and comment rulemaking when used in appropriate circumstances. The theoretical basis for negotiated rulemaking and guidelines for its use developed at the federal level have been demonstrated to be appropriate for state level reg-negs. Although most experience with the process so far has been at the federal level, there is no reason state agencies should not avail themselves of this important regulatory tool.

5. CONCLUSION: A TOOL FOR STATE AGENCIES

Negotiated rulemaking is, as McGarity stated, a tool that every regulatory agency should have in its toolbox.¹ It offers a means to resolve some of the difficult regulatory problems faced by state and federal environmental agencies. The three state cases demonstrate that the process works in a range of settings at the state level, and despite shortcomings in the execution of the process in some cases, enabled participants to produce regulations that were acceptable to affected interests. Negotiated rulemaking provides a forum, missing from the traditional notice and comment process, to bring different interests together in a non-adversarial setting for the purpose of shaping a regulation that will work. The process provides the agency and affected interests an opportunity to consider and deal with the persistent and debatable issues that are at the heart of many regulatory disputes-- issues relating to the costs, distributional impacts, and uncertainty of the scientific or technological basis of a proposed regulation. A summary of findings and recommendations follows.

Negotiated rulemaking, when used in appropriate circumstances, can be a better vehicle than the traditional process for resolving the common, contentious issues identified in the first chapter.

If the conflict assessment has been done appropriately, the significantly affected interests should be represented in the talks. If the facilitator is doing her job, the representatives will have the opportunity to participate meaningfully. Thus, the process serves a commonly accepted notion of fairness, that parties to a conflict have an opportunity to participate meaningfully in decisions that affect them.² In Maine, the conflict assessment produced a 61-member negotiating group, yet this very large group was able to agree on a structure that allowed it to function effectively and members to participate meaningfully.

¹ McGarity, *Op. Cit.*, p. 1440.

² Sturm, pp. 1391-1392; Albin, p. 226.

The nonadversarial nature of the forum does not dissolve the differences that exist between interest groups, and does not mean the participants will not, or should not, actively be pursuing their interests. It does mean that the focus of the group's energies will be on attacking the problem, that is, producing a regulation that all parties can accept, rather than expending needless time and resources on undermining the positions of the agency or other affected interests.

Having affected interests together in a nonadversarial setting improves the likelihood of getting pertinent information from the participants and a better sense than the agency would likely have on its own of their priorities, concerns, and perspectives on issues of costs and the distributional impacts of a proposed regulation. At the same time, it affords the opportunity for participants to scrutinize data and uncover and debate the legitimacy of underlying assumptions, consistent with Sturm's observation that "participation serves the instrumental value of enhancing the prospect of a reasoned and accurate decision."³ The facilitator helps keep negotiators on track, focused on the problem and moving forward. In each of the state cases described earlier, information sharing was a critical element. And the facilitators in each case were critical to the success of the talks. One of the Texas negotiators, for example, reckoned that without the assistance of the facilitator, talks would have become "hopelessly mired."

The challenges of state environmental agencies are on a par with those of their federal counterpart, in terms of complexity and contentiousness. As the EPA has found regulatory negotiations to be a useful tool and an improvement over traditional process, more state agencies probably would, too, if they tried it. State agencies may have less incentive to innovate, however.

As the Title 5 case in Massachusetts shows, state environmental agencies can face extremely complex and contentious regulatory challenges. And, as the three state cases show, regulatory negotiations can produce an acceptable outcome in cases where the

³ Susan Sturm, "A Normative Theory of Public Law Remedies," *The Georgetown Law Journal*, Vol. 79 (1991), p. 1392.

shape of an acceptable rule was not apparent to the agency working alone. According to the ACUS, however, regulations of state agencies are litigated less frequently than federal regulations, because of the existence of safeguards such as oversight committees and because disaffected interests are more likely to appeal to the legislature or governor for redress than to challenge the agency in court.⁴ With fewer court challenges to face, state agencies may be less motivated to seek alternatives to the traditional notice and comment procedures than the EPA was, with 80 percent of its regulations being challenged in court,⁵ when it first tried negotiated rulemaking in 1984.

In addition, according to the ACUS, some state agencies have informally consulted with affected stakeholders to build consensus for proposed agency actions since the turn of the century.⁶ It could be that such processes are relatively effective in identifying points of controversy in many cases, so that agencies see less need to undertake or even consider a full blown negotiated rulemaking process.

While some states do have negotiated rulemaking laws, such laws are not needed to use the process. Moreover, simply having a law on the books may not do much to encourage agencies to actually try it. Nevertheless, a state statute, as with the federal law, can provide guidance to agencies in determining whether the process is appropriate for the rule under consideration, procedures for conducting a reg-neg, and how the reg-neg process relates to the state's administrative procedures requirements.

As noted, the three states whose cases are reviewed in chapter 3 did not have any laws pertaining specifically to negotiated rulemaking. As I started to look for examples of state agencies that had used the process, I contacted several states with negotiated rulemaking statutes, but was not able to identify examples of its actual use in those states. As noted in the introduction, I specifically sought examples of the process in which a neutral facilitator

⁴ *Sourcebook*, p. 369.

⁵ "An Assessment of EPA's Negotiated Rulemaking Activities," EPA Program Evaluation Division, Office of Management Systems and Evaluation, and Office of Policy, Planning and Evaluation; December 1987. Reprinted in *Sourcebook* (1995).

⁶ *Sourcebook*, p. 369.

conducted the meetings and the agency participated as one of the negotiators; a final rule also had to have been promulgated. (Although these procedural stipulations fit the definition of the process advocated by many practitioners and the ACUS, and are considered part of the definition of negotiated rulemaking described here, some state statutes have framed the term more generally to include a range of negotiated or consultative procedures involving stakeholders.) My failure to find examples in states with a reg-neg statute may have been due to the absence of a central clearinghouse for such information. In Nebraska, for example, the office of the senator who had sponsored the state's 1994 reg-neg law was unaware of actual use of the procedure⁷ and the legal counsel for the state Department of Environmental Quality, who had testified in support of the reg-neg bill, said that his agency had not formally conducted a negotiated rulemaking.⁸ Leads to several other Nebraska agencies also proved fruitless.

The Montana Consensus Council provided a case summary of a negotiated resolution to a public lands dispute. However, according to the summary, state agencies did not participate directly in negotiations, but, rather, were presented with a proposal developed through negotiations of the private interests in the dispute.⁹ Accordingly, this case did not meet the criteria I had established for examples.

New York's Department of Environmental Conservation (DEC) conducted a negotiated rulemaking that had the elements I sought except that it had not been promulgated. Without that critical step it was impossible to judge whether stakeholder concerns had been adequately addressed by the negotiating committee. The DEC had undertaken the negotiations, on regulations of dry cleaners that use the chemical perchloroethylene,

⁷ Personal communication, Laurel March, office of Senator David Landis, March 1996. According to March, the Department of Social Services had received a petition to conduct a negotiated rulemaking, according to provisions in the Nebraska law. In response, the department agreed to hold informal, informational hearings. Apparently the petitioner did not pursue a request for a more comprehensive process (memo from Laurel March to author, March 7, 1996).

⁸ Mike Linder, Nebraska Department of Environmental Quality, personal communication, April 8, 1996; and Hearing Testimony on LB 1043, Committee on Government, Military, and Veterans Affairs, February 2, 1994.

⁹ "Recreational Access to State School Trust Lands in Montana: A Case Study in Collaborative Problem Solving," a Transboundary Initiative Working Paper for Public Comment, October 1994.

pursuant to an executive order issued by Governor Cuomo in 1992. The executive order is modeled after the federal negotiated rulemaking act and, in addition, directs the DEC to negotiate a rule pertaining to air quality as well as one other rule, as demonstrations.¹⁰ After receiving training at RESOLVE's Center for Environmental Dispute Resolution in Washington, DC, a member of the DEC staff from outside the air quality program office served as convener and facilitator. The facilitator's evaluation of the process (which also was mandated by the executive order) provides a good deal of insight into the process.¹¹ Unfortunately, before the draft rule was formerly proposed, in January 1995, New York got a new governor, who issued a moratorium on all new regulations. Although the moratorium has since expired, some other procedural deadlines have passed, and as of October 1996 the draft rule had not been published as a proposed rule. The facilitator believes the negotiations went well and produced a viable rule, but is uncertain as to how some stakeholders may respond once the rule is finally proposed, because of the long time that has elapsed.¹²

I contacted several other states with negotiated rulemaking statutes, but, as noted in the introduction, the first three cases I identified that met my criteria were in states without reg-neg laws; and my search stopped there.

Barriers to use of the process by state agencies include doubts that the rule in question warrants a significant deviation from usual procedures; general lack of familiarity with the process or even its existence; concerns about costs of the undertaking; concerns about the potential complexity and uncertainty of the process, including potential loss of control over the process and relinquishment of legal authority.

¹⁰ Executive Order 156, signed by Governor Mario M. Cuomo, June 8, 1992.

¹¹ "Report of the Negotiated Rule Making Committee for 6 NYCRR Part 232 - Dry Cleaning Facilities That Use Perchloroethylene," submitted to the Commissioner of the New York State Department of Environmental Conservation and to the Director of the New York State Office for Regulatory and Management Assistance, January 1995.

¹² Lenore Kuwik, DEC Division of Regulatory Services, personal communication, March 28, 1996 and October, 22, 1996.

Resistance to using negotiated rulemaking probably stems from some combination of these factors.

In two of the state cases, Maine and Ohio, the agencies faced a combination of being extremely challenged by the rule writing task in front of them and coincidentally hearing the suggestion of negotiated rulemaking from a source that merited their attention. Just being stymied was not enough. The Ohio DEP extended its public comment period for about a year, pondering what to do, when it heard through the department's legal staff about the Ohio Commission's dispute resolution demonstration project. The dispute resolution demonstration project not only presented the idea of a negotiated approach to resolving the widely disparate views expressed in comment letters, but also offered the prospect of technical assistance in organizing it and funds to help defray costs. The Commissioner of MDOT was committed to trying to bring formerly warring parties together again after the bitter referendum campaign, and presumably had questions about the task of writing a rule his agency had vigorously opposed. Meanwhile, the idea of negotiated rulemaking had gotten some positive play in at least one editorial, and a coalition of referendum backers suggested it. Still, the department had concerns about loss of control over the process and outcome, which were alleviated by a conference call between agency staff and Philip Harter. Just to be sure, the commissioner reasserted his agency's authority when the negotiating group was convened, stressing that any rule would have to be deemed workable by his agency. Considering the reconciliation task he saw in front of him the commissioner probably was less concerned about costs than the other agencies, once he accepted the process could work.

In Texas, the representative of the Texas General Land Office (GLO), Ingrid Hansen, was concerned about having a process that was as transparent as possible, with the resulting legitimacy the transparency could confer. She knew of a negotiated rulemaking conducted by the Coast Guard to develop an oil spill response plan, and believed that the process would work for developing the damage assessment protocols.¹³ Hansen was involved in the legislative negotiations that produced the amendments to the state's Oil Spill

¹³ Ingrid Hansen, personal communication, April 26, 1996.

Prevention and Response Act, and made the suggestion in the course of those talks. The suggestion was supported by the GLO legal counsel and not opposed by any other parties, and did not receive much attention. As a result of her suggestion, the OSPRA amendments included a stipulation that the damage assessment protocols be developed using negotiated rulemaking.¹⁴ The cost of conducting the negotiated rulemaking was of some concern to the GLO, which as lead agency sponsored the negotiations, but of greater concern was the costs to nonprofit organizations to participate. The GLO managed to provide some travel costs for the representatives of the two Galveston Bay organizations. For future negotiated rulemaking endeavors, Hansen thinks it is critical to have a resource pool to assist nonprofits with the costs of participation.

State experiences reconfirm the central importance of the convening process and role of the neutral facilitator.

Negotiated rulemaking derives legitimacy and instrumental value from the meaningful participation of affected interests. Identification of affected interests during the convening process is thus critical to the success of the negotiation. Conveners need to recognize that some interests will be less visible and less organized than others and that identifying these groups is a key challenge. In some cases, anyway, the views of the better-organized interests are by definition more likely already to be known by the agency.

As others have advocated and the federal law required, agencies should publish an announcement of the intention to convene a negotiated rulemaking committee to enhance the prospects that all key interests will be identified. Also, because less organized interests are less likely to review the state register of agency actions, the agency should consider publishing the announcement in a newspaper of general circulation and trade publications, as appropriate. The negotiating committee needs to stay open to the possibility that interest groups may come forward and request to participate after negotiations are underway.

¹⁴ Letter from Ingrid Hansen to author; April 26, 1996.

Having a skilled neutral facilitator, or a team of neutrals, was key in the state cases to keeping talks moving forward. As predicted by theory and previous experience, the facilitators kept negotiators focused on the problem, rather than on the agency or each other.

How the Title 5 revisions may have turned out had DEP undertaken a negotiated rulemaking process is, of course, impossible to say. Negotiations are always fluid and dynamic, and as participants have observed, outcomes are difficult to predict. However, negotiated rulemaking is designed to address some of the difficulties the agency faced, and a number of elements of negotiated rulemaking would probably have proven beneficial.

A comprehensive, statewide conflict assessment would have helped identify a broader range of affected interests, including some of the stakeholders who emerged late in the process with newly articulated concerns and objections. The existing advisory committee consisted of many of the same individuals and constituent organizations that had served on advisory committees in 1978, during the previous revision of the environmental code, and that had reviewed drafts of the consultant's technical report for the most recent revisions. The agency would likely have benefited from the input of additional perspectives early on, to get a more comprehensive understanding of the impacts and perceptions of the proposed revisions.

A shift in focus away from lobbying or attacking the agency and toward attacking the problem of pollution caused by onsite septic systems would have been a more productive expenditure of interest group energies. Organizations represented on the department's advisory committee were among its most vocal critics. It is not apparent that some interest groups felt any sense of responsibility for developing a code that would be *mutually* acceptable.

A negotiating committee could have undertaken joint fact finding to resolve disputed points of science and technology. With the agency as a participant, the agency's technical staff could have participated directly in support of the agency's interests, rather than as referee (and target).

The issue of unorganized interests presents an obvious problem in this case. Private property owners who have onsite sewage disposal systems are not organized as such, and some of their concerns did not surface in a dramatic way until after the revised code took effect. The representation of missing or unorganized interest on a committee may not be an insurmountable problem, but it certainly would pose a challenge.

CONCLUSION

Harter concluded his comprehensive 1982 analysis of the value of negotiated rulemaking with the modest suggestion that it was "worth a try." Since then it has proven to be well worth trying and using, a valuable approach to regulations when used appropriately. Criticism of the process stems in part from the potential for it to be used in the wrong circumstances, as when fundamental values or rights are at stake, and in part because it does not offer a solution to all regulatory problems. The ad hoc nature of the conflict assessment and convening portion of the process will remain susceptible to missteps and oversights, so that attention and diligence will always be critical at the outset of a reg-neg. The openness of the process provides for self-correction of such oversights, though, as previously unidentified interests have the opportunity to hear about a rulemaking endeavor and come forward to participate.

The fact that negotiated rulemaking is not the only tool or even the main tool in the toolbox is not a legitimate criticism of its high value in certain regulatory contexts. In his discussion of the challenges of regulatory reform, Stewart warned against expecting or accepting "simplistic remedies."¹⁵ This includes, I believe, expecting to discover or develop any all-purpose approach to regulation. The challenge for those who believe the

¹⁵ Stewart (1975), p. 1813.

process can benefit the quality of regulatory decision making, when used appropriately, is to make more agencies aware of its potential benefits so that, even if they do not make use of it often, they think of it when the appropriate, contentious situation arises, and know where to turn for more information.

BIBLIOGRAPHY

- Administrative Conference of the United States. *A Guide to Federal Agency Rulemaking* (2nd edition). Prepared for the Office of the Chairman by Benjamin W. Mintz (Columbus School of Law) and Nancy G. Miller (ACUS), 1991.
- Administrative Conference of the United States. *Negotiated Rulemaking Sourcebook*. Prepared for the Office of the Chairman by David M. Pritzker (ACUS) and Deborah S. Dalton (EPA). Washington, DC: U.S. Government Printing Office, September 1995. (The *Sourcebook* reprints many of the essays on negotiated rulemaking cited here.)
- Administrative Conference of the United States. Recommendation 82-4, 1 CFR S.305.82-4, Procedures for Negotiating Proposed Regulations.
- Administrative Conference of the United States. Recommendation 85-5, 1 CFR S.305.85-5, Procedures for Negotiating Proposed Regulations.
- Albin, Cecilia. "The Role of Fairness in Negotiation," *Negotiation Journal*, July 1993.
- Amy, Douglas J. *The Politics of Environmental Mediation*. New York: Columbia University Press, 1987.
- Arrandale, Tom. "A Guide to the Environmental Mandate Maze." *Governing*, Vol. 8, No. 5, February 1995.
- Austin, Susan A. "The National Oceanic and Atmospheric Administration's Proposed Rules for Natural Resource Damage Assessment Under the Oil Pollution Act." *Harvard Environmental Law Review*, Vol. 18:549, 1994.
- Bacow, Lawrence S. "The Technical and Judgmental Dimensions of Impact Assessment." *Environmental Impact Assessment Review*, Vol. 1, No. 2, 1980.
- Bacow, Lawrence S. and Michael Wheeler. *Environmental Dispute Resolution*. New York: Plenum Press, 1984.
- Baldwin, Nancy J. "Negotiated Rulemaking: A Case Study of Administrative Reform." Unpublished Master's Thesis, Department of Urban Studies and Planning, MIT, 1983.
- Bazon, David L. Bazon. "Science and Uncertainty: A Jurist's View." *Harvard Environmental Law Review*, Vol. 5:209, 1981.
- Bingham, Gail. *Resolving Environmental Disputes: A Decade of Experience*. Washington, DC: The Conservation Foundation. 1986.
- Benenson, Bob. "A Mature 'Green' America Spawns...Grass-Roots Anti-Regulatory Rebellion," in "GOP Sets the 104th Congress On New Regulatory Course." *Congressional Quarterly Weekly Report*, Vol. 53, No. 24, June 17, 1995.
- Bogdonoff, Sondra. "Consensus Building to Write Environmentally Responsive Rules for Maine's New Transportation Policy," in *Mediating Environment Conflicts*. J. Walton Blackburn and Willa Marie Bruce, editors. Westport, CT: Quorum Books, 1995.
- Boston Globe* (editorial) "The cost of clean water," November 5, 1993 .
- Boston Globe* (editorial) "Paying the water bill," March 26, 1995.
- Breyer, Stephen. *Breaking the Vicious Circle*. Cambridge: Harvard University Press, 1993.
- Breyer, Stephen G. *Regulation and Its Reform*. Cambridge: Harvard University Press, 1982.
- Carnegie Commission on Science, Technology, and Government. *Risk and the Environment: Improving Regulatory Decision Making*. New York, June 1993.
- Carpenter, Susan and W. J. D. Kennedy. *Managing Public Disputes*. San Francisco: Jossey-Bass, 1988.
- Carroll, Matt. "Tinkering with Title 5," *Boston Globe*, June 11, 1995.
- Carroll, Matt. "Yearly cost of septic law seen at \$20M," *Boston Globe* (Business), June 1, 1996.
- Cassidy, Tina. "Homeowners, brokers say Title 5 Needs Changes--Fast," *Boston Globe*, September 21, 1995.
- Chandler, David. "State unveils more flexible rules to stop septic pollution," *Boston Globe* (Metro). September 9, 1994.
- Council of State Governments. *The Environment Comes of Age: State Environmental Issues*, Lexington, KT, June 1977.

- Dabilis, Andy. "D-Day is nigh for impact of septic rules: complying with Title 5 expected to be expensive for homeowners," *The Boston Globe* (Northwest Weekly) March 26, 1995.
- DeFeo Wait and Associates, Inc. for the Commonwealth of Massachusetts Department of Environmental Protection. *Technical Evaluation of Title 5: The State Environmental Code 310 CMR 15.00*. March 1991.
- Deisler, Paul F., Jr. "The risk management-risk assessment interface." *Environmental Science and Technology*, Vol. 22, No. 1, 1988.
- Department of Commerce, National Oceanic and Atmospheric Administration, 1 CFR Part 990. Notice of proposed rulemaking. *Federal Register*, Vol. 59, No. 5, January 7, 1994, p. 1062.
- Dimento, Joseph F. *Environmental Law and American Business*. Plenum Press, 1986.
- Dumanoski, Diane. "60% of waters in Mass. still polluted," *The Boston Globe* (Metro), June 13, 1993.
- Dunlop, John T., editor. *Business and Public Policy*, Division of Research, Graduate School of Business Administration, Harvard University, Boston, 1980.
- Environmental Protection Agency Program Evaluation Division, Office of Management Systems and Evaluation, and Office of Policy, Planning, and Evaluation; An Assessment of EPA's Negotiated Rulemaking Activities, December 1987.
- Fiorino, Daniel J. and Chris Kirz. "Breaking Down Walls: Negotiated Rulemaking at EPA." *Temple Environmental Law & Technology Journal*, Vol. 4, 1985.
- Fisher, Roger. "Negotiation Power." *American Behavioral Scientist*, Vol. 27, 1983.
- Fisher, Roger, and William Ury, and (for the second edition) Bruce Patton, *Getting to Yes*, Penguin Books, 1981, 1991.
- Gore, Vice President Al. *Creating A Government that Works Better and Costs Less: Improving Regulatory Systems*, Accompanying Report of the National Performance Review, September 1993.
- Graham, John D. "Science and Environmental Regulation," in *Harnessing Science for Environmental Regulation*. John D. Graham, editor. New York: Praeger Publishers, 1991.
- Gray, House Chair Barbara E., The Joint Committee on Natural Resources and Agriculture. Cover letter to colleagues accompanying *Legislative Report on the 1995 Revisions to Title 5: The Commonwealth's Clean Water Rules*, February 6, 1996.
- Gusman, Sam. "Selecting Participants for a Regulatory Negotiation." *Environmental Impact Assessment Review*, Vol. 4, No. 2., 1983.
- Hansen, Ingrid. "Innovative Procedures for Natural Resource Damage Assessment," 1995 Oil Spill Conference.
- Hardin, Garret. "The Tragedy of the Commons." *Science*, Vol. 162, 13 December 1968.
- Harter, Philip J. "Negotiating Regulations: A Cure for Malaise." *Georgetown Law Journal*, Vol. 71:1, 1982.
- Harvard Law Review*. "Ask a Silly Question...: Contingent Valuation of Natural Resource Damages." Vol. 105: 1981, June 1992.
- Harvard Law Review*. "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking." Vol. 94:1871, 1981.
- Hattis, Dale and David Kennedy. "Assessing Risks from Health Hazards: An Imperfect Science." *Technology Review*, May/June 1986.
- Howe, Peter J. "Sides still far apart on septic system rules," *Boston Globe*, June 9, 1995.
- Howe, Peter. "Weld to ok measure on Title 5 Study Panel," *Boston Globe*, June 20, 1995.
- Howe, P., J. Jacoby, S. Lehigh, B. Mohl, F. Phillips and A. Walker. "Weld aides fret over fallout from new septic system rules," *Boston Globe*, June 18, 1995.
- Hyman, Eric L. "The Valuation of Extramarket Benefits and Costs in Environmental Impact Assessment." *Environmental Impact Assessment Review*, Vol. 2, No. 3, 1981.
- Kelman, Steven. "Cost-Benefit Analysis and Environmental, Safety, and Health Regulations: Ethical and Philosophical Considerations," in *Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics and Methods*, Swartzman, Liroff, and Croke, editors. Washington, DC: The Conservation Foundation, 1982.
- Kindleberger, Richard. "Sewage plan will face fight," *The Boston Globe*, December 26, 1992.

- Kuwik, Lenore R. "Facilitator's Evaluation of the Negotiated Rule Making Process for 6 NYCRR Part 232 -Dry Cleaning Facilities That Use Perchloroethylene (Dry Cleaning Facility Emissions)." Report submitted to Langdon Marsh, Commissioner of the New York State Department of Environmental Conservation, July 1994.
- Kuwik, Lenore R. "Using the Negotiated Rule-Making Process in New York- Lessons Learned and a View of the Future." *New York State Forum on Conflict and Consensus Newsletter*, Vol. 1, No. 2 (1994).
- Landis, Senator David. Committee Statement, LB 1043, Adopt the Negotiated Rulemaking Act, Hearings before the [Nebraska] Committee on Government, Military, and Veterans Affairs, February 2, 1994.
- Lave, Lester B. and Eric H. Males. "At risk: The framework for regulating toxic substances." *Environmental Science and Technology*, Vol. 23, No. 4, 1989.
- Leiss, William and Christina Chociolko. *Risk and Responsibility*. Montreal & Kingston: McGill-Queen's University Press, 1994.
- Lioy, Paul J. "Assessing total human exposure to contaminants." *Environmental Science and Technology*, Vol. 24, No. 7, 1990.
- Liroff, Richard A. "Federal Experience: Cost-Benefit Analysis in Federal Environmental Programs," in Swartzman, Liroff, and Croke, eds., *Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics and Methods*. Washington, DC: The Conservation Foundation, 1982.
- Lobel, Ira B. Negotiated Rulemaking in New York, Part II." *New York State Forum on Conflict and Consensus Newsletter*, Vol. 2, No. 1.
- Massachusetts Department of Environmental Protection. Response to comments received following the Title 5 public information meetings, February 1993.
- Massachusetts Department of Environmental Protection. Summary of key policy issues in the revision of Title 5, 11/17/92.
- Massachusetts Department of Environmental Protection. Response to comments following the Title 5 public information meetings, 15 June, 1993.
- Massachusetts Department of Environmental Protection. Questions and answers to proposed revisions to Title 5, June 15, 1993.
- Massachusetts Department of Environmental Protection. Executive Summary: Proposed Revisions to Title 5, undated; circa Fall 1993.
- Massachusetts Department of Environmental Protection. Summary & Comparison of Major Revisions to Proposed Clean Water Rules (Title 5), Spring 1994.
- Massachusetts Department of Environmental Protection. Summary of Major Revisions to Clean Water Rules (Title 5), September, 1994.
- Massachusetts Department of Environmental Protection. New Clean Water Rules (Title 5) Summary of Major Provisions, 310 CMR 15.000 (undated, circa 9/23/94).
- Massachusetts Department of Environmental Protection. Public Notice: [DEP] gives notice of its intent to revise Title 5 of the State Environmental Code, 310 CMR 15.000, as promulgated on September 23, 1994; (undated, circa December 1994).
- Massachusetts Department of Environmental Protection. Revisions: 310 CMR 15.000, Effective November 3, 1995.
- Massachusetts Joint Committee on Natural Resources and Agriculture. *Legislative Report on the 1995 Revisions to Title 5: The Commonwealth's Clean Water Rules*, February 6, 1996.
- Marston, Ed. "How the West Won't Be Won." *Audubon*, Vol. 97, No. 2, March-April 1995.
- Mazur, Allan. "Disputes Between Experts." *Minerva*, Vol. 11, 1973.
- McFarling, Usha Lee. "A cesspool, septic compromise," *Boston Globe*, April 24, 1994.
- McGarity, Thomas O. "Some Thoughts on 'Deossifying' the Rulemaking Process." *Duke Law Journal*, Vol. 41, No. 6, June 1992.
- McLaughlin, Jeff. "Consensus is sought on septic rules," *Boston Globe*, Metro, June 5, 1994.
- Nelkin, Dorothy and Michael Pollak. "Problems and Procedures in the Regulation of Technological Risk." in *Societal Risk Assessment: How Safe is Safe Enough*, Richard C. Schwing and Walter A. Albers, Jr., editors. New York: Plenum Press, 1980.

- New York State Register*, June 24, 1992. Executive Order 156 Establishing a negotiated rule making program. Signed by Governor Mario Cuomo and Secretary of State Gerald C. Crotty, June 8, 1992.
- New York State Department of Environmental Conservation. "Report of the Dry Cleaning Negotiated Rule Making Committee For 6 NYCRR Part 232 - Dry Cleaning Facilities That Use Perchloroethylene." Report drafted by a working group of the committee and approved by the full committee; submitted January 5, 1995 by Judith S. Schreiber, Ph.D., Negotiating Committee Member for the New York State Department of Health and Lenore R. Kuwik, Facilitator, January 1995.
- Ohio Environmental Protection Agency. Summary of the Construction and Demolition Debris Law and Rules. Memorandum from Don Slivka through Barbara Brdicka to Interested Parties.
- Pappano, Laura. "State weighs new rules on septic woes," *Boston Globe*, (West Weekly) November 21, 1993.
- Pappano, Laura. "A tamer reaction for septic rules," *Boston Globe* (West Weekly) June 1994.
- Perritt, Henry H., Jr. "Administrative Alternative Dispute Resolution: The Development of Negotiated Rulemaking and Other Process." *Pepperdine Law Review*, Vol. 14:863, 1987.
- Phillips, Frank and Peter J. Howe with Matt Carroll. "State plans effort to quiet the roar over septic rules," *Boston Globe*, June 8, 1995.
- Reitman, Jonathan W. and Ann R. Gosline. "Transportation Planning Model for the Future: Maine's road from referendum to reform." *Consensus*, No. 22, April 1994.
- Rodgers, William H., Jr. "Benefits, Costs, and Risks: Oversight of Health and Environmental Decisionmaking." *Harvard Environmental Law Review*, Vol. 4, No. 2, 1980.
- Rose-Ackerman, Susan. "Consensus Versus Incentives: A Skeptical Look at Regulatory Negotiation." *Duke Law Journal*, Vol. 43, No. 6, April 1994.
- Russell, Milton and Michael Gruber. "Risk Assessment in Environmental Policy-Making." *Science*, Vol. 236, 17 April 1987.
- Sagoff, Mark. *The Economy of the Earth*. New York: Cambridge University Press, 1988.
- Schulz, George P. "The Abrasive Interface," in *Business and Public Policy*, John T. Dunlop, editor. Graduate School of Business Administration Harvard University, 1980.
- Sit, Mary. "Fallout from septic failures," *Boston Globe*, Real Estate, May 7, 1995.
- Sit, Mary. "Sewage disposal showdown," *Boston Globe*, Real Estate section, February 26, 1995.
- Slovic, Paul. "Perception of Risk." *Science*, Vol. 236, 17 April 1987.
- Starr, Chauncey. "Introductory Remarks," in *Societal Risk Assessment: How Safe is Safe Enough*. Richard C. Schwing and Walter A. Albers, Jr., editors. New York: Plenum Press, 1980.
- Stevens, Jeffrey B. and Deborah L. Swackhamer. "Environmental pollution: A multimedia approach to modeling human exposure." *Environmental Science and Technology*, Vol. 23, No. 10, 1989.
- Stewart, Richard. "The Reformation of American Administrative Law." *Harvard Law Review*, Vol. 88, 1975.
- Sturm, Susan P. "A Normative Theory of Public Law Remedies." *The Georgetown Law Journal*. Vol. 79, No. 5, June 1991.
- Sullivan, Timothy J. "Difficulties of Mandatory Negotiation," in *Resolving Environmental Regulatory Disputes*. Lawrence Susskind, Lawrence Bacow, Michael Wheeler, editors. Cambridge, MA: Schenkman Publishing Company, 1983.
- Susskind, Lawrence. "Mediation and the Accountability Problem," *Vermont Law Review*, Vol. 6, No. 1, Spring 1981.
- Susskind, Lawrence, Lawrence Bacow, and Michael Wheeler, editors. *Resolving Environmental Regulatory Disputes*. Cambridge, MA: Schenkman Publishing Company, 1983.
- Susskind, Lawrence and Jeffrey Cruikshank. *Breaking the Impasse*. Basic Books, 1987.
- Susskind, Lawrence E. and Louise Dunlap. "The Importance of Nonobjective Judgments in Environmental Impact Assessments." *Environmental Impact Assessment Review*, Vol. 2, No. 4, 1981.
- Susskind, Lawrence and Gerard McMahon. "The Theory and Practice of Negotiated Rulemaking." *Yale Journal on Regulation*, Vol. 3:1, 1985.

- Susskind, Lawrence and Connie P. Ozawa. "Mediating Science-Intensive Policy Disputes." *Journal of Policy Analysis and Management*, Vol. 5, No. 1, 1985.
- Swartzman, Daniel. "Cost-Benefit Analysis in Environmental Regulation: Sources of Controversy," in *Cost-Benefit Analysis and Environmental Regulations: Politics, Ethics and Methods*.
- Swartzman, Liroff, and Croke, editors. Washington, DC: The Conservation Foundation, 1982.
- Texas Register*. 9 *TexReg* 6525, August 19, 1994.
- Texas Register*. 9 *TexReg* 6525, June 1994.
- Texas Register*. 9 *TexReg* 7911, October 4, 1994.
- [Texas] Conference Committee Report. S.B. 1049. A bill to be entitled an act relating to the prevention of, the damage, cleanup, and costs related to, and liability for oil spills in coastal waters of the state..., 05/27/93.
- Thomas, Lee M. "The Successful Use of Regulatory Negotiation by EPA." *Administrative Law News*, Vol. 13, No. 1, Fall 1987.
- Thurow, Lester C. *The Zero-Sum Society: Distribution and the Possibilities of Economic Change*. New York: Basic Books, Inc., 1980.
- U. S. Code Congressional and Administrative News*. 101st Congress, Second Session. Oil Pollution Act, P.L. 101-380, Sec. 1006. p. 495.
- U. S. Code Congressional and Administrative News*. 101st Congress, Second Session. Legislative History, Oil Pollution Act of 1990. p. 728.
- U. S. Department of Commerce, National Oceanic and Atmospheric Administration, 15 CFR Part 990. Notice of Proposed rulemaking. *Federal Register*, Vol. 59, No. 5.
- Wilson, Richard and E. A. C. Crouch. "Risk Assessment and Comparisons: An Introduction." *Science*, Vol. 236, 17 April 1987.
- Wong, Doris Sue. "Revisions to Title 5 unveiled," *Boston Globe*, August 2, 1995.
- Wong, Doris Sue. "State Retreats on Septic Systems," *Boston Globe*, August 3, 1995.
- Yeager. *Limits of law*. Cambridge University Press, 1981.

LETTERS CITED

- David Begelfer, Davis, Malm & D'Agostine, representing the NAIOP (the Association for Commercial Real Estate) to Daniel Greenbaum, Commissioner, DEP, December 23, 1992.
- Marcia Benes, Executive Director, The Massachusetts Association of Health Boards, Inc., Plainville, MA, to Leo Roy, Executive Office of Environmental Affairs, June 19, 1994.
- Jeffrey R. Benoit, Massachusetts, Coastal Zone Management Office, to Brian Donahoe, DEP, December 24, 1992.
- Christine Braley, Home Builders Association of Massachusetts, Inc., to Brian Donahoe, DEP, November 30, 1993.
- Timothy W. Brennan, Executive Director, Pioneer Valley Planning Commission to Brian Donahoe, November 29, 1993.
- Garen M. Bresnick, Home Builders Association of Massachusetts, to Brian Donahoe, DEP December 24, 1992.
- Charles W. Cook, Berkshire County Regional Planning Commission to DEP Division of Water Pollution Control, November 30, 1993.
- Joseph E. Costa, Buzzards Bay Project, to Daniel Greenbaum, DEP, November 3, 1993.

Charles H. Dauchy, an environmental consultant, to Brian Donahoe, DEP, December 22, 1992

Alexandra Dawson, Massachusetts Association of Conservation Commissions, to Brian Donahoe, DEP, December 16, 1992.

Gregory Erickson, Director of Public Health, Town of Wilmington, to Brian Donahoe, Director, DEP Division of Water Pollution Control, December 21, 1992.

Karen S. Fung to Division of Water Pollution Control, November 24, 1993.

John P. Gusha, Chairman, Holden Board of Health to Brian Donahoe, DEP, November 11, 1993.

Bob Kimball [DEP CERO] through James Fuller to Beth Nicklas, [DEP] June 9, 1994, Title 5 - Regional comments on proposed revisions.

Louise B. Kress, member of Boxford Board of Health, prepared Testimony for Department of Environmental Protection on Proposed Revision to Title V, June 1, 1994.

John S. Marini, President, Home Builders Association of Massachusetts, to the Honorable Argeo Paul Cellucci, Office of the Lt. Governor, May 27, 1994.

George R. Northrup, Sunderland, MA, to John Vivieros, DEP Water Pollution Control Div., Jan. 25, 1995.

Philip B. Posner on behalf of 1000 Friends of Massachusetts to Brian Donahoe, Division of Water Pollution Control, November 30, 1993.

Thomas B. Powers, Acting Commissioner, DEP, to Lieutenant Governor Paul Cellucci Re: Title 5 Revisions/ Homebuilder's Association letter, June 3, 1994.

Thomas Powers, Acting Commissioner, DEP, to Massachusetts Office of the Secretary of State, Re: Revisions to Title 5 of the State Environmental Code, 310 CMR 15.000 from, September 2, 1994.

Kenneth R. Ramsay to Director, Division of Water Pollution Control, October 27, 1993.

Roland Foley to Brian Donahoe, DEP, November 24, 1993.

Fran Sculley, Town of Rowley Board of Health re DEP hearing on Title V revision, September 29, 1995.

Dean Spencer, Acting Director, Division of Water Pollution Control, to Marilyn Contreas, Senior Analyst, Executive Office of Communities and Development, Re: Notice of proposed regulatory revisions - Title 5 of the State Environmental Code, 310 CMR 15.00; August 24, 1995.

Margaret Sreibel, Chair, and Mary Forbes, Franklin County Commission to Secretary Trudy Coxé, November 29, 1993.

Louis J. Wagner, Massachusetts Audubon Society, to Brian Donahoe, DEP, November 23, 1993.

Guy A. Webb, Development Director, Builders Association of Central Massachusetts, Inc., to Senator Matthew J. Amorello, July 14, 1994.

Peter Webber, Department of Environmental Management, to Brian Donahoe, DEP, November 30, 1993.

6485-22