APPLICATION OF ENVIRONMENTAL MEDIATION TO ENERGY FACILITY SITING DISPUTES: PROSPECTS & PROBLEMS

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ABSTRACT

The escalating costs of environmental conflict have created incentives for non-adversarial forms of environmental dispute resolution. In recent years, a number of disputes have been succesfully resolved using bargaining techniques such as negotiation and mediation. Many of the techniques used in environmental bargaining have been adopted from collective bargaining, but there are significant differences between environmental and labor disputes that prevent a simplistic transfer of techniques. In particular, environmental disputes are more complex, deal with notions of the "public interest", and, settlements may be difficult to implement.

One approach to the problems posed by environmental bargaining is the participation of government agencies in the bargaining process. Because government agencies often have jurisdiction over the subject matter of environmental disputes, they are in a unique position to implement an agreement to which they were a party. Government agencies also can bring their resources to bear on the complex factual problems in environmental disputes and offer other additional advantages to the bargaining process. While in some cases an agency might not choose to participate in environmental bargaining, the incentives to participate -- especially gaining voluntary compliance with regulations and avoiding conflict -- appear sufficient to insure agency participation in some cases.

Models for agency participation already exist. The consent order, used primarily in antitrust and trade regulation cases, may be altered slightly and adopted for use as an alternative to court judgments in enforcement ac-

tions. Agencies may also pursue formal and bargaining processes simultaneously in permitting or licensing processes, and use the environmental impact statement process as a mechanism for beginning informal discussions with contending parties.

When government agencies participate in environmental bargaining, however, their actions may "trigger" the disclosure provisions of "open meetings" and "right to know laws". Because disclosure of information that the parties want to keep confidential may endanger the bargaining process, it may be necessary to inquire whether an agency may maintain the confidentiality of such information. Both the legislative history and court interpretation of these statutes indicate that a strong argument may be made for confidentiality.

Finally, the participation of government agencies in ad hoc, informal processes may raise concerns about agency abuse of discretion. But where the decisionmaking process is consensual and agencies are required to structure their own rules before entering into a bargaining process, the problem of discretion seems less critical. As a final safeguard against abuse of discretion, court review should be provided for the procedural sufficiency of agency actions in environmental dispute resolution processes.

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INTRODUCTION

The growth of the environment movement in the United States over the past two decades has produced far-reaching changes in our political and economic system. Early this year, for example, construction of a major dam was halted because it posed a potential danger to the habitat of the snail darter, a tiny sand-colored fish whose existence was not even known until 1973.[1] The Council on Environmental Quality (CEQ) estimated that some $40.6 billion was spent on pollution control in 1977, of which $18.1 billion was mandated by various federal and state environmental protection laws.[2] These are just two illustrations of the potent counterforce to traditional economic interests created by the environmental movement. The empowering of environmentalists through legislation -- and, equally important, through judicial interpretation of legislation -- has enabled environmental interests to contend with traditional economic interests; the resulting conflict has been intense, costly, and is spreading.[3]

Environmental conflict[4] is often characterized by "all or nothing" attitudes on the part of disputants. Such disputes are resolved on a "win-

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[1] See "The clash of men and minnow," The Boston Globe, January 21, 1979, Sec. D at 1.

[2] See "Council on Environmental Quality Issues Annual Report," The New York Times, March 1, 1978, p. 14 at 4.

[3] See T. Gladwin, "The Management of Environmental Conflict: A Survey of Research Approaches and Priorities," published as a Working Paper, Faculty of Business Administration, New York University (1978); see also Bowman, "The Environmental Movement: An Assessment of Ecological Politics," 5 Env. Aff. 649 (1976); Marcus, "The disproportionate power of environmentalists," 2 Harv. Env. L. Rev. 582 (1977); Ragsdale, "Ecology and the Role of the Federal Courts," 46 U.M.K.C.L.R. 221 (1977).

[4] I will also use the term "environmental dispute" in this paper. No distinction is implied, the two terms may be used interchangeably.

ner take all" basis following expensive litigation and complex legal maneuvering. In some cases, the nuclear power plant at Seabrook, New Hampshire being most notable, the conflict has broadened to include extra-legal actions such as demonstrations and massive civil disobedience where there was dissatisfaction with the results obtained through legal processes.[5]

In the past few years, however, new approaches to resolving environmental conflict have been attempted and, in some instances, have been successful. Called environmental mediation, or dispute avoidance, or just plain negotiation, these approaches share a critical element: each is an effort to resolve environmental disputes through consensus and compromise rather than by adversarial legal procedures. All of the suggested approaches seek to minimize conflict and foster decision-making that employs bargaining and discussion.[6]

In speaking about environmental mediation and the other forms of conflict resolution, it is critical that we distinguish the principal features of each method. Although there is, as yet, no formal definition of environmental mediation, a working definition has been advanced by Gerald W. McCormick, Director of the Office of Environmental Mediation at the University of Washington's Institute for Environmental Studies:

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[5] See Weinstein, "Seabrook: A Case Study of Environmental Conflict," Energy Impacts Project, Technical Report No. 15, MIT Laboratory of Architecture and Planning (1979).

[6] See O'Connor, "Environmental Mediation: The State-of-the Art," 2 EIA Review 9 (October, 1978); Environmental Comment (May, 1977), which devoted this entire issue to environmental conflict resolution; Environmental Mediation: An Effective Alternative? a report of a conference held in Reston, Virginia, January 11 - 13, 1978, sponsored by RESOLVE, Center for Environmental Conflict Resolution, The Aspen Institute for Humanistic Studies and the Sierra Club Foundation. (Hereafter cited as Environmental Mediation.)

> Mediation is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.[7]

Professor Fuller has identified the crucial role of the mediator in the process of dispute resolution: the mediator has the "capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."[8]

In contrast to mediation, which is characterized principally by the use of, and need for, a neutral third party, "negotiation" is a method for consensual agreement in which only the principal parties participate. The disputants are able to reach a voluntary settlement themselves without the assistance of an intermediary.

To avoid confusion later, I must emphasize that the words mediation and negotiation will have a specific meaning in this thesis. The confusion arises, of course, because even in the process of mediation we ordinarily say that the parties are "negotiating," i.e., they are involved in the give-and-take of bargaining. Further, both negotiation and mediation processes may be utilized in the same dispute. If a negotiation effort between the principal parties fails, a mediator may be invited to join the bargaining sessions in the hope of achieving a settlement. I will attempt to avoid confusion by using the word "bargaining," rather than "negotiation," when

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[7] Environmental Mediation, supra note 6 at 2 .

[8] Fuller, "Mediation -- Its Forms and Functions," 44 So. Cal. L. Rev. 305, 325 (1971).

I describe the process of discussion and compromise that leads to an agreement, and will label agreements either as negotiated settlements or mediated settlements, depending on which process was used.

There is great interest in environmental mediation,[9] due largely to the growing perception that the costs of environmental conflict have become too great, and the recognition, by the contending parties, that victory is seldom assured and too often Pyrrhic.[10] The growing number and intensity of environmental disputes has also placed an added strain on already overburdened courts, creating further incentives to lessen conflict.[11]

Our experience to date with environmental conflict resolution suggests that it may provide an attractive alternative to our current processes. Environmental mediation and negotiation have been able to lower the costs of dispute resolution, and, significantly, lessen the constraints imposed by traditional legal processes on environmental decision-making.[12]

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[9] In addition to the Reston Conference, supra note 6; other recent conferences on environmental dispute resolution include: The American Arbitration Association's "Arbitration Day" held in New York City, May, 1978; the Environmental Law Institute's "NEPA III" Conference held in Reston, Virginia, November 30-December 1, 1978; and a conference sponsored by the Environmental Law Society of Syracuse University held in Syracuse, New York, February 3, 1979: "Negotiation and Mediation -- Alternatives and Traditional Models."

[10] See Weinstein, supra note 5, at 57.

[11] See D. Horowitz, The Courts and Social Policy (1977); "Discussion: Crisis in the Courts," 31 Vand. L. R. 1 (1978); Rifkind, "Are We Asking Too Much of Our Courts?" 70 F.R.D. 101 (the Pound Conference) (1976).

David Bazelon, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit has expressed the fear that in many new areas of agency rule-making, the exercise of substantive review "dangerously taxes the court's competence," in Carter, "Comment: The Environment -- An Agency-Court Battle," 17 Nat. Res. J. 122 (1977).

[12] See pp. 34-35 infra; see also Whitney, "Technical and Scientific Evidence in Administrative Adjudication," 45 U. Cinn. L. Rev. 37 (1976); Boyer, "Alternatives to Administrative Trial-type Hearings for Resolving Complex Scientific, Economic, and Social Issues," 71 Mich. L. Rev. 111 (1972).

Certainly, environmental mediation will not be the solution to all environmental conflict. Its use will neither end litigation nor bring a halt to the continuing battle between environmental and developmental interests. Mediation, and other forms of consensual conflict resolution, will not be applicable to all environmental disputes, perhaps not even to a great many, but the consensus of the participants in a January, 1978, conference on environmental mediation[13] -- the largest and most comprehensive such meeting to date -- was that this new approach to environmental disputes offers enough promise to justify vigorous efforts to apply it to real conflicts.

Because many practitioners of environmental dispute resolution gained their practical experience in conflict management through labor negotiations, a great deal has been learned from the procedures of collective bargaining.[14] But there are significant differences between environmental and labor disputes that militate against a simplistic transfer of techniques from collective bargaining to environmental mediation or negotiation. For example, most labor disputes involve two parties whose interests are clearly defined and who are acknowledged to be the legitimate parties to a bargaining process. An environmental dispute may affect many parties, however, each with a slightly different interest at stake, and all of whom may want to become actively involved in determining the outcome of the dispute.

Many other differences exist,[15] but one that is particularly critical

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[13] See supra note 6.

[14] See Environmental Mediation, supra note 6, at 2-3.

[15] See pp. 35-50 infra.

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is the question of implementing an agreement once it has been reached. In collective bargaining agreements, there is little doubt that the settlement agreed to by the parties can and will be implemented by management. With environmental disputes, implementation is much trickier.[16] Experienced mediators agree that implementation problems are a major concern in consensual settlements of environmental disputes: parties may not have the legal authority to implement their agreement; novel agreements may pose difficult questions of interpretation when implementation is attempted; and disgruntled members of participating organizations may form "splinter groups" and seek to frustrate implementation.[17]

One approach to solving the special problems of environmental disputes is to encourage the participation of government in the bargaining process. In this thesis I will argue that government participation in negotiation and mediation of environmental disputes can help to address some of the particular difficulties encountered in environmental conflict resolution and, importantly, can also provide less costly, speedier, and more innovative solutions to environmental conflict.

Summary

Chapter One traces the forces that have created a demand for envi-

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[16] See pp. 36-40 infra.

[17] Interviews with: Jane McCarthy, Environmental Mediator (currently engaged in research for the American Arbitration Association), New York City, March 2, 1979; David O'Connor, Environmental Mediator (currently associated with Clark-McGlennon Associates), Boston, March 8, 1979; John McGlennon, former Administrator of EPA Region I (currently a principal of Clark-McGlennon Associates), Boston, March 15, 1979.

ronmental conflict resolution, showing how the empowering of the environmental movement, by creating a potent counterforce to traditional economic interests, has produced conflicts which are now imposing costs on institutions, individuals, and society that seem unnecessarily large. Chapter Two considers some of the particular problems of environmental dispute resolution and indicates the potential advantages of government participation in the bargaining process. Chapter Three illustrates some of the methods and contexts available for government participation in environmental dispute resolution. Chapter Four examines legal questions raised by government participation in environmental dispute resolution, focusing on the conflict between government's need to maintain the confidentiality of bargaining and the public's right to know how its government is operating. Finally, in the Conclusion, I present a set of recommendations for action and indicate some worthwhile avenues for further exploration.

CHAPTER ONE

INCENTIVES TO RESOLVE ENVIRONMENTAL DISPUTES OUT-OF-COURT

Introduction

A number of converging forces have created incentives for consensual approaches to environmental dispute resolution. The growth and empowering of the environmental movement over the past two decades is one important factor. When environmental interest groups achieved sufficient legal and political power to delay large-scale development projects or influence major policy decisions, they could no longer be ignored or intimidated. The ensuing conflict has been intense and costly.

Faced with the very real possibility that an important project will be blocked, or at least delayed, business and development interests have a significant incentive to consider negotiations and bargaining as alternatives to protracted agency hearings and lengthy court battles.

The spiraling inflation of recent years has provided an impetus towards bargaining for both sides. Clearly, for business and development interests the escalation of costs due to delay can account for an increased willingness to negotiate rather than risk drawn-out legal battles. In an inflationary era, once capital is committed delay is just too costly. It is less obvious, but equally true, that inflation and other economic ills are pushing environmentalists toward compromise and bargaining. With economic and energy issues now in the forefront, environmental groups recognize that they may not enjoy the degree of popular, and political, support they had just a few years ago. With the support needed for victory no longer so certain, compromise is an acceptable alternative to risking all-out defeat. This trend has been further strengthened by recent changes in

the law that have reduced the ability of environmental litigants to delay proposed developments by appeal to the federal courts.[18] Taken together, these developments have created powerful incentives towards the resolution of environmental disputes out-of-court.

The Growth of the Environmental Movement

Although environmentalism in the United States traces its immediate roots to the nineteenth century,[19] its emergence as a popular national movement dates back only two decades. Beginning in 1962, with the publication of Rachel Carson's Silent Spring, a quick succession of new ideas and disturbing events focused the attention of many Americans on the problems of pollution and resource allocation. Books such as The Population Bomb and The Closing Circle,[20] headlines about smog in Los Angeles and a "dying" Lake Erie, pictures of the disastrous Santa Barbara oil spill, and the popularized notion of "spaceship earth" sharpened public awareness of environmental issues and spurred the clamor for action.[21] Environmental

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[18] See pp.25-27infra.

[19] The Sierra Club, for example, was established in 1892 as a result of John Muir's fight to have Yosemite Valley designated a state park. See Cohn, "The Environmental Ethic," at 13, in Values of Growth (1976).

[20] P. Ehrlich, The Population Bomb (1968); B. Commoner, The Closing Circle (1972).

[21] Consider the following excerpt from the Council on Environmental Quality's (CEQ) first report:

> The public has begun to realize the interrelationship of all living things -- including man -- with the environment. The Santa Barbara oil spill in early 1969 showed an entire nation how one accident could temporarily blight a large area. Since then, each environmental use. . .flashed the sign to Americans that the problems are everywhere and affect everyone.

CEQ, Environmental Quality (1970) at 6.

consciousness spread quickly. The nation marked Earth Day on April 22, 1970, and, on millions of television screens, the Forest Service's fire-fighting Smokey the Bear was upstaged by Woodsey the Owl, advising us all to "Give a Hoot -- Don't Pollute!"

By the late 1960s, environmentalism had clearly gathered sufficient strength and breadth of support to be dubbed a social movement.[22] Further, because its adherents could be found among Republicans and Democrats, liberals and conservatives, it was a movement with the capacity to translate the concerns of its members into legislative action. Between 1969 and 1972, environmentalists scored numerous political victories, capped by the passage of the National Environmental Policy Act (NEPA)[23] the creation of the Environmental Protection Agency (EPA),[24] and the halting of action on major projects, including the Cross-Florida Barge Canal and development of an American supersonic transport (SST).[25] Within several years a significant body of federal environmental law was created,[26] and the states were

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[22] See Bowman, supra note 3, at 651.

[23] 42 U.S.C. § 4321 (1976), as amended.

[24] See Reorganization Plan No. 3 of 1970, President's Special Message to the Congress about Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, Pub. Papers 215-16 (July 9, 1970).

[25] See W. Rosenbaum, The Politics of Environmental Concern (1977) at 6.

[26] E.g, Toxic Substances Control Act, 15 U.S.C. § 2601; Coastal Zone Management Act, 16 U.S.C. § 1451; Endangered Species Act, 16 U.S.C. § 1531; Federal Water Pollution Control Act, 33 U.S.C. 1251; Marine Protection, Research, and Sanctuaries Act, § 1401; Safe Drinking Water Act, 42 U.S.C. § 300f; National Environmental Policy Act, 42 U.S.C. § 4321; Resource Conservation and Recovery Act, 42 U.S.C. § 6901; Clean Air Act, 42 U.S.C. § 7401 (1976).

not far behind.[27]

The actions of the legislative and executive branches became even more significant as a result of developments occurring in the federal courts. In liberalizing the rules of standing[28] and agreeing to take a "hard look" at administrative decisions in environmental cases,[29] the federal courts opened their doors to a flood of environmental litigation that in turn added significant procedural and substantive rights to those already granted by statute.[30] Taken together, these changes in popular perceptions and in legal rights provided environmentalists with enough

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[27] See McQuire, "Emerging State Programs to Protect the Environment: 'Little NEPAs and Beyond," 8 Env. L. Rev. 623 (1977); T. Trzyna and A. Jakela, The California Environmental Quality Act (1974); Frye, "Environmental Provisions in State Constitutions," 5 Env. L. Rep. 500028 (1975); DiMento, "Citizen Environmental Legislation in the States: An Overview," 53 J. Urb. Law 413 (1975).

[28] See SCRAP v. United States, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970); see also Stewart, "The Reformation of American Administrative Law," 88 Harv. L. Rev. 1667, 1723-47 (1975).

[29] See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); EDF v. Ruckelshaus, 439 F. 2d 584 (D.C. Cir. 1971); Calvert Cliffs' Coordinating Committee v. AEC, 449 F. 2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942; Leventhal, "Environmental Decisionmaking and the Role of the Courts," 122 U. Pa. L. Rev. 509 (1974); F. Anderson, NEPA in the Courts (1973); R. Andrews, Environmental Policy and Administrative Change (1976); R. Liroff, A National Policy for the Environment (1976).

[30] The federal courts remain split, however, on a major question regarding the interpretation of NEPA: should the courts examine agency decisions only for their procedural sufficiency (how they decided) or, should the substance of the decision be the subject of judicial review as well (what they decided)? The 8th Circuit has endorsed substantive review. See EDF v. Corps of Engineers (Gillham Dam), 470 F. 2d 289 (1972); Minnesota PIRG v. Butz, 541 F. 2d 1292 (1976). Other circuits have also adopted this view. See Conservation Council of North Carolina v. Froehlke, 473 F. 2d 664 (4th Cir. 1973). Still others have not. See Lathan v. Brinegar, 506 F. 2d 677 (9th Cir. 1974); National Helium Corp. v. Morton, 486 F. 2d 995 (10th Cir. 1973). See also Oakes, "Substantive Judicial Review in Environmental Law," 7 ELR 50029 (1977); Note, "The Least Adverse Alternative Approach to Substantive Review under NEPA," 88 Harv. L. Rev. 735 (1975)

political and legal clout to oppose traditional economic forces, often with great success.[31]

The Costs of Conflict

Clearly, we have reaped substantial benefits from the pollution abatement and resource allocation programs which the environmental movement helped to create. Strict emission standards are in force for auto and industrial air pollution, we are attempting to manage the development of unique coastal areas so that their scenic value and worth as wildlife habitats is not destroyed, and we have become sensitive to the possibly catastrophic environmental impact posed by toxic substances, indiscriminate use of fluorocarbons, and other dangers.

These benefits are typically not shared equally, however, and neither are the costs of environmental protection. Clearly, substantial costs have resulted from the delays caused by extended environmental litigation and regulatory reviews. Some of these have been borne by business interests. The carrying costs on large-scale land development projects, the opportunity costs associated with often-delayed energy facility projects, and the inflationary impact of rising material and labor costs have fallen heavily on developers, industrialists, and corporate bond and share holders. To the extent that market forces permit, many of these costs have been passed on to consumers (the legendary "average" citizen) in the form of higher prices; but businesses have also had to bear a part of the cost in the form of reduced profit margins.

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[31] See p. 18 supra.

Environmentalists also claim costs from the delay caused by environmental disputes, pointing to the "costs" they have incurred when prolonged legal actions delay implementation of tougher codes and standards or allow development to proceed in areas where the loss of habitats or species is irreversible. Here again, it is the "average" citizen who probably bears most of the costs; at times, tragically, in the form of increased morbidity (or mortality) rates.

Some of the costs of environmental conflict are less obvious. To win a relatively small number of precedent-setting cases, environmental groups have had to devote enormous sums of money to protracted litigation while the larger tasks of public education and political action have been shortchanged.[32] Business and development interests have lost substantial flexibility because capital has been tied up in projects that could not proceed. Government has been forced to expand its regulatory apparatus to handle the additional demands created by drawn-out environmental litigation.[33]

Changes in the Political and Legal Climate

In the past few years, a number of changes in the political and legal climate have accelerated the movement towards compromise and bargaining in

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[32] For example, in 1977, the Natural Resources Defense Council (NRDC) devoted $1.5 million, more than half its total budget, to environmental litigation and associated activities -- primarily scientific support for the litigation. By contrast, NRDC's public education efforts received only one-tenth the funding of litigation, a mere $136,000. Similarly, the Environmental Defense Fund (EDF), in 1977, devoted $854,000, slightly more than half its total budget, to environmental litigation. See Natural Resources Defense Council Annual Report, 1977; Environmental Defense Fund Annual Report, 1977.

[33] See Bardach & Pugliaresi, "The Environmental Impact Statement vs. the Real World", 49 Pub. Interest 22 (1977).

the settlement of environmental disputes. Perhaps most important, business interests have begun to recognize that the empowering of the environmentalists is a reality that they will have to live with; they have begun to alter their behavior accordingly.

An example of this trend towards business' acceptance of the need to negotiate with environmental interests can be seen in a recent publication of the Practicing Law Institute intended for use by corporate counsel. In a section entitled "Negotiations, Compromise, Interaction, and Diverse Interests," the corporate attorney is advised to "meet with environmental groups and government agencies as early as possible" and to "involve them as much as possible" in project planning.[34] Further examples of the growing willingness of business interests to negotiate with environmentalists include the recently concluded work of the National Coal Policy Project, an effort, initiated by business interests, to reach a consensus on a national policy for the development and use of coal[35] and, of course, the very settlements that will be examined in the following sections of this thesis.

The increasing willingness of business and development interests to negotiate is matched by a similar inclination on the part of the environmentalists. Environmentalism -- like any social movement -- was a creature

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[34] See Friedman, "Environmental Checklist," in Environmental Law for the Corporate Counsel (1978) at 335. To be sure, the millenium has not yet arrived. At the end of this same section the author notes that "The need to meet with public interest groups is seen by many corporate executives as interferences with the running of their business."

[35] See Where We Agree: Report of the National Coal Policy Project (1978); see also M. Wessel, The Rule of Reason (1976).

of its time.[36] Current popular concerns are focused on the problems of energy, inflation, and employment. Environmental groups may be fearing some loss of momentum. In this situation, a strategy of compromise is both a good public relations posture and, moreover, a hedge against a clear defeat in a "win-lose" confrontation where popular, and political, support may be insufficient to guarantee victory.[37]

Another push toward out-of-court, voluntary dispute resolution is the growing dissatisfaction with the role of the courts and administrative agencies in environmental decision-making.[38] A number of critics have

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[36] See Bowman, supra note 3, at 657. It certainly seems unlikely that we will again see anything like the federal legislative response to the environmental movement, and not merely because, with many laws already in force, the need is less. The Kennedy-Johnson administrations -- combining "New Frontier" optimism in the nation's ability to solve its problems with "Great Society" beliefs in new programs and increased spending as the solution -- furnished both the precedents and momentum for the environmental legislation of the Nixon-Ford years. Now, with Proposition 13 "fever" sweeping the land, inflation once again shooting upward, and some of our largest cities facing fiscal collapse, fears of increased government spending place a significant restraint on the political system and new programs are eyed suspiciously by voters.

[37] This past summer provided an interesting example of the abandonment of confrontation strategy by an environmental group. The Clamshell Alliance, an activist group protesting construction of a nuclear power plant at Seabrook, New Hampshire, had scheduled an illegal occupation of the plant site for the weekend of June 24, 1978. Plans called for an even larger demonstration than that held the previous year when over 1,400 protestors had been arrested. When it became clear that these plans were leading to a possible violent confrontation with state police and further mass arrests, Clamshell leaders chose to compromise and avoid the conflict. Negotiations between the group's leaders and New Hampshire Attorney General Thomas Rath produced an agreement that gave state approval to a peaceful three-day rally and "Energy Fair" near the plant site. Over 15,000 people attended the rally, there was no trouble, and both sides seemed happy with the solution. See Weinstein, supra note 5, at 44-47.

[38] See Kennedy, "The Causes of Popular Dissatisfaction with the Administrative Agencies," 29 Admin. L. Rev. v (Chairman's Message) (1977); Volner, "Identifying the Causes of Failure of the Regulatory Commissions," 5 Hofstra L. Rev. 285 (1977); Leventhal, supra note 29.

questioned the ability of agencies to deal with the complexities of environmental problems,[39] or even whether government regulation is the correct approach to protecting the environment.[40] Other observers question the wisdom of having the courts settle difficult social and economic disputes in which substantive and not procedural questions are at issue.[41] Some agencies have responded to this criticism by restructuring administrative procedures to emphasize decision-making outside the traditional adjudicatory boundaries.[42] The judiciary is also seeking to redefine its role, considering alternative methods of dispute resolution, including mediation and arbitration.[43]

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[39] See Boyer, supra note 12, at 141; Whitney, supra note 12.

[40] See "Colloquium: The Deregulation of Industry," 51 Ind. L. J. 682 (1976). The recent economics literature has been particularly concerned with the problem of regulation in the environmental field. See W. Baumol and W. Oates, The Theory of Environmental Policy: Externalities, Public Outlays, and the Quality of Life (1975); A. Kneese, Economics and the Environment (1977); R. Dorfman and N. Dorfman (eds.), Economics of the Environment (2d ed. 1977).

[41] See Horowitz, supra note 11; Rifkind, supra note 11; Stewart, supra note 28, at 1772-73.

[42] This trend may be seen both in the use of traditional, but nonadjudicatory, agency procedures such as generic rule-making, and in wholly nontraditional procedures such as mediation. See "Pounds of Cure: General Electric Agrees to PCB Abatement, Cleanup and Research," 6 ELR 10225 (1976) (Mediated settlement of suit brought against G.E. by New York State Department of Environmental Conservation, where mediator was regulatory agency hearing officer and mediation occurred under auspices of the regulatory body).

[43] See Burger, "Agenda for 2000 A.D. -- A Need for Systematic Anticipation," 70 F.R.D. 79 (The Pound Conference) (1976); Sander, "Varieties of Dispute Processing," 70 F.R.D. 111 (The Pound Conference) (1976). The United States Second Circuit Court of Appeals has initiated a pilot project, the Volunteer Masters Pilot Program, which is attempting to lessen the burden on the courts by using volunteer lawyers to "explore the possibility of mediating and settling the controversy. . .seek to clarify and narrow the issues involved. . . ." Additional information on this pilot program may be obtained from: Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation, One Chase Manhattan Plaza, New York, NY 10005.

Finally, although environmentalists have enjoyed great success in prosecuting environmental litigation, a recent Supreme Court decision may limit that success in future cases which attempt to challenge federal administrative decisions on procedural grounds; heretofore an important litigation strategy for environmental groups. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,[44] the Supreme Court considered two decisions of the Court of Appeals for the District of Columbia Circuit invalidating the grant of licenses to nuclear power plants by the Nuclear Regulatory Commission (NRC). The lower court, in each case, found that the NRC failed to adopt procedures which, in the court's opinion, would fully explore and document certain of the potential environmental consequences of the proposed plants.[46] The Supreme Court reversed both decisions in a sharply-worded opinion[47] written by Justice Rehnquist for a unanimous Court,[48] and enunciated the principle that federal reviewing courts, with rare exceptions, are not empowered to require that federal administrative

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[44]98 S. Ct. 1197 (1978). For an extended discussion of the logic of the case, and its potential impact, see "Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.: Three Perspectives," 91 Harv. L. Rev. 1804 (1978).

[45]The potential impact of Vermont Yankee is due, in some part, to the fact that it was the Court of Appeals for the District of Columbia Circuit that was reversed. The D.C. Court had long been receptive to arguments alleging insufficient administrative procedures and, because of its appellate jurisdiction over federal agencies, was uniquely available as a forum for environmental litigation. If one chooses to view this court as standing for aggressive judicial review of federal agency decision-making regarding the environment, then the sharply-worded rebuke of the lower court's reasoning takes on added significance.

[46]See Natural Resources Defense Council, Inc. (NRDC) v. NRC, 547 F. 2d 633 (D.C. Cir. 1976); Aeschliman v. NRC, 547 F. 2d 622 (D.C. Cir. 1976).

[47]Justice Rehnquist criticized the lower court's rulings as "judicial intervention run riot" and at one point called its reasoning "Kafkaesque."

[48]The court voted 7-0, Justices Blackmun and Powell not participating.

agencies employ formal decision-making procedures beyond those specified by Congress in the Administrative Procedure Act (APA)[49] or in specific statutes.[50]

The Court had taken the case, Rehnquist noted, because of its concern that the D.C. Circuit had "seriously misread or misapplied. . .statutory and decisional law against engrafting their own notions of proper procedures upon agencies. . . ."[51] The APA provisions, in the view of the Court, were an authoritative "formula upon which opposing social and political forces have come to rest," precluding judicial imposition of additional procedures.[52] Rehnquist argued that if courts were free to impose their own notions of procedures "perfectly tailored to reach what the Court perceives to be the 'best' or 'correct' result, judicial review would be totally unpredictable."[53] As a result, agencies, unsure as to the standard

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[49]The NRC had utilized notice and comment rule-making procedures under section 553 of the Administrative Procedure Act, in which NRC staff and outside parties submitted written documents, replies, and oral statements, but in which cross-examination and other formalities of an adjudicatory hearing were excluded. The D.C. Court found that these procedures had failed to "ventilate" adequately the critical issue of nuclear waste fuel disposal, and that accordingly, there was not a suffficient basis in the record to sustain the NRC's grant of a license.

Following the ruling in this case (Aeschliman), the NRC ordered a moratorium on all nuclear power plant licensing activities and ordered that all existing licenses and permits be reviewed on a case-by-case basis.

It was this judicial invalidation of notice and comment generic rulemaking under the APA that apparently catalyzed the Supreme Court's response. Although the Vermont Yankee opinion also warns against too much intervention by reviewing courts when judging the results of adjudicatory administrative hearings, the thrust of the opinion is clearly directed toward the judicial role in reviewing agency rule-making processes.

[50]98 S. Ct. 1197, supra note 44, at 1202.

[51]98 S. Ct. 1197, supra note 44, at 1213.

[52]Id.

[53]Id.

a court would apply and fearing reversal, would adopt full adjudicatory procedures in every case, thereby disrupting the statutory scheme enacted by Congress in the APA and losing all the advantages of less formal proceedings.[54]

The Vermont Yankee decision should serve to expand the area of administrative agency discretion and will dissuade reviewing courts, in the future, from attempting "to impose upon the agency its own notion of which procedures are 'best' or more likely to further some vague, undefined public good."[55] While commentators have differed upon the wisdom of the decision, they agree that it limits the procedural formalities that courts may impose on administrative agencies.[56] This, in turn, will tend to reduce the ability of environmental groups to delay a "final" decision through appeal of agency decisions on procedural grounds, up until Vermont Yankee a potent weapon in environmental litigation. Absent this weapon, environmental groups may find dispute resolution -- and compromise -- a more attractive alternative to "win-or-lose" litigation.

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[54] 98 S. Ct. 1197, supra note 44, at 1213.

[55] Id.

[56] See "Vermont Yankee. . .," supra note 44.

CHAPTER TWO

HOW AGENCY PARTICIPATION CAN PROMOTE BARGAINING AND SETTLEMENT IN ENVIRONMENTAL DISPUTES

Introduction

As the costs of environmental conflict have grown, and the forces moving the contending actors towards compromise strengthened, there has been a rapid development of interest in consensual processes as a novel approach to resolving environmental disputes. Several centers for environmental mediation have been opened,[57] private consulting firms have become involved in mediation efforts,[58] and significant research in the field has gotten underway.[59]

Despite this growing interest in environmental dispute resolution -- and the success of many of the initial attempts at resolving disputes using

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[57] Centers for environmental mediation currently in operation include: RESOLVE, Center for Environmental Conflict Resolution, Palo Alto, California; Office of Environmental Mediation, Institute for Environmental Studies, University of Washington, Seattle, Washington; Rocky Mountain Center on the Environment (ROMCOE), Denver, Colorado; American Arbitration Association (AAA) Center for Dispute Resolution, New York, New York; Wisconsin Center for Public Policy, Madison, Wisconsin; Office of Dispute Settlement, Department of the Public Advocate, State of New Jersey, Trenton, New Jersey.

[58] These include: Rivkin Associates, Washington, D.C.; Clark-McGlennon Associates, Boston, Massachusetts; Toner & Toner, San Francisco, California.

[59] RESOLVE has prepared an annotated bibliography, "Selected Readings in Environmental Conflict Resolution," which lists over fifty published or printed articles dealing with various aspects of environmental mediation, including: Case Studies; Conflict and Conflict Management Theory; Environmental Conflict Management; Tools Techniques, and Processes; and the Science Court Concept. RESOLVE has also sponsored research efforts by Scott Mernitz, whose doctoral dissertation at the University of Wisconsin, "Mediation of Environmental Disputes: An Evaluation of its Potential and its Geographic Effects" (1978), will be published by RESOLVE and Praeger this year under a slightly different title.

The American Arbitration Association is funding research conducted by Jane McCarthy, an experienced mediator, through its Center for Dispute Resolution.

environmental mediation[60] -- a number of difficulties inherent in this approach were identified at the Reston conference in 1978. Gerald Cormick told the conference that after reviewing approximately sixty environmental

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[60]There have been significant successes in mediating environmental disputes over the past few years. In particular, Gerald W. Cormick, Jane McCarthy, Leah Patton, and Alice Shorett, of the University of Washington's Office of Environmental Mediation, have mediated a number of disputes in the state of Washington.

In the Snoqualmie/Snohomish case, Cormick and McCarthy voluntarily entered a land use dispute involving plans for flood control in a river valley populated largely by farmers. The farmers were concerned that the proposed dam for flood control would spur uncontrolled development of the river basin, leading to unsightly and damaging sprawl. A published account of their resolution of this dispute is found in Cormick, "Mediating Environmental Controversies: Perspectives and First Experience," 2 Earth L. J. 215 (1976).

In the Interstate I-90 case, Cormick and Patton were appointed by the Governor to mediate a dispute involving the city of Seattle, various environmental and citizens' groups, the State Highway Commission, and the suburban communities of Bellevue and Mercer Island. At issue were plans for a ten-lane interstate highway-transitway combination supported by the suburban communities but opposed by Seattle and the citizens' groups. A brief account of the dispute is available in "Environmental Mediation: Potentials and Limitations," Environmental Comment (May, 1977).

In the Paine Field case, Cormick's group was appointed by the Snohomish County Commission to mediate the planning process for the development of Paine Field, the Snohomish County Airport. Their successful efforts led to an agreement which permits further airport development plans so long as they are compatible with county-wide land use goals and are sensitive to the quality of life of nearby residents. No published account is yet available.

In the Port of Everett case, Cormick's group formed a mediation committee that assists the Port in developing guidelines leading to a Comprehensive Port Plan that reflects Everett's diverse urban needs and the quality and character of the city's future. The plan represents a compromise between those who favored commercial development of the Port and others who sought to protect the Port's recreational facilities and the quality of the environment. No published account is yet available

For published accounts of other successful mediation efforts elsewhere, see M. Rivkin, Negotiated Development: A Breakthrough in Environmental Controversies (1977); O'Connor, "Resolving the Bachmann's Warbler Controversy," Conservation News (August 1, 1977); "Mediation: A Less Costly Alternative to Litigation," National Wildlife Federation, Resources Defense Column (January 12, 1978); Where We Agree: The Report of the National Coal Policy Project (1978); O'Connor, supra note 6; Environmental Mediation, supra note 5, at 35-46.

disputes over a period of three years, he concluded that only six of them were "mediable".[61]

While mediation or negotiation of environmental disputes is certainly not the magical answer to environmental conflict -- and, more importantly, no guarantee of a "good" decision -- our experience with the process to date suggests that it is a useful approach. In this chapter I examine the advantages of government agency participation in bargaining processes. After sketching the different roles an agency may play regarding an environmental dispute, and discussing the pros and cons of participation, I identify some of the special problems of environmental dispute resolution -- by contrasting bargaining in environmental and labor disputes -- and show how the participation of government agencies may mitigate some of these difficulties.

Differing Roles for Agencies -- How Government is Involved

The word "government" needs some definition for my purposes in this thesis. I will use "government" to identify the general institutions which legitimately exercise authority on behalf of the public: the Congress, state legislatures, federal and state courts, the President, governors, etc. I will use "agency" to identify those federal and state regulatory or administrative bodies, created by statute, which often have jurisdiction over the subject matter of environmental disputes. For examples, such agencies would include the EPA, NRC, and the various state environmental protection agencies among others.

An agency will typically be involved in an environmental dispute

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[61] See Environmental Mediation, supra note 6, at 17.

in at least one of three ways. Most generally, an agency may find itself an "interested party" to the dispute; lacking statutory jurisdiction over the matter in dispute, it nonetheless might recognize that the dispute contains elements that are of concern, or the agency may be the governmental body most familiar with the dispute and thus in the best position to represent the interests of the general public. One example of an agency as "interested party" is the recently completed work of the National Coal Policy Project.[62] The Project brought together representatives of environmental groups and industry, then, with the assistance of technical advisors, the groups attempted to reach consensus on the varied issues comprehended by a national policy regarding development and use of our coal reserves. The Project report envisioned an active role for the EPA in future decision-making regarding coal development.[63] Here, absent any statutory authority to participate in a private mediation effort considering a proposed national policy, the EPA might choose to participate as an "interested party," providing the private parties with some notion of the feasibility of their recommendations.

Another role that agencies play is that of "prosecutor." In Chapter Three, the case study of PCB pollution of the Hudson River shows an agency, the New York Department of Environmental Conservation, conducting an enforcement action against the General Electric Company; i.e., the agency was prosecuting the company for a violation of the agency's regulations. In such cases, the agency, by participating in an informal bargaining effort, may be able to fashion a remedy that is particularly adapted to the

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[62] See Where We Agree, supra note 60.

[63] Id. at iv.

violation in question and, in addition, achieve a settlement in much less time than the formal process would have required.

Agencies also act as a "judge", and, in fact, will often be both judge and prosecutor; the agency both brings the enforcement action and conducts the hearings which establish liability. The best examples of agency as judge are perhaps the licensing and permitting activities of the EPA and other federal agencies. In such processes, an applicant seeking a permit is judged by the agency and, if found acceptable, receives his permit.

An agency will become involved in a mediation or negotiation effort in one or more of these ways. The important distinction among them is that in the latter two, prosecutor and judge, the agency has been granted jurisdiction over the subject matter of the dispute by statute. Thus, no matter what agreement is reached by the private parties to the dispute, the agency will ultimately have the power to accept or reject the settlement.[64] Where the agency is an interested party, however, it will not have this grant of statutory authority to decide the fate of the settlement.

Incentive for Agency Participation

A crucial threshhold question in this inquiry is whether an agency would choose to initiate or otherwise become involved in an environmental mediation or negotiation effort. As we see in the following chapter,[65] agencies, in the past, have chosen to participate. But are these cases

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[64] Agency jurisdiction is most critical in the area of implementation. See pp. 36-40 infra.

[65] See pp. 51-71 infra.

merely isolated and singular instances or may we expect other agencies, in different circumstances, to participate as well?

Certainly, there are reasons not to. Because negotiation and mediation are ad hoc, informal processes outside the scope of normal agency procedures, the agency that participates in a bargaining effort may lay itself open to charges that it is exceeding its legitimate authority. Critics may claim that the agency is shirking its duty -- particularly when it is acting as prosecutor -- and, rather than attempting to make "deals" with those who violate environmental laws, should be seeking to enforce the law in the manner officially prescribed. Further, the agency may risk charges that a bargaining effort shows that it has been "captured" by the very interests it is supposed to be regulating.[66]

Agency officials may also be hesitant about offending powerful, elected officials who influence policy, control agency resources through the budget process and suggest appointments. When an agency participates in a large-scale bargaining effort involving numerous parties, its activities may be perceived by some elected officials as an intrusion on their own political "turf": they may view such activities as just the sort of political "log-rolling" which they believe to be their private bailiwick.

Agency officials may also be reluctant to participate in bargaining because it involves a lessened role for themselves. Rather than being the central figure in a formal process, with attendant media coverage throwing a spotlight on agency personnel, the official finds himself engaged in "behind-the-scenes" discussions where confidentiality, not publicity, is

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[66] See Stewart, supra note 28, at 1685; L. Jaffe, Judicial Control of Administrative Action (1965) at 11-14.

the rule. Further, in a consensual process, the agency official neither sits in judgment nor enforces the law (both positions of power and prestige); instead, he becomes merely another actor in an often frustrating and tedious process with no guarantee of success.

To make matters worse, even though the agency is only one party to the bargaining process, because of its high "visibility" it risks being held solely responsible for an unpopular agreement or blamed when settlement efforts break down. An agency may also find it extremely difficult to exit from bargaining sessions, no matter how reasonable the action might be, without being accused of damaging the prospects for settlement.[67]

There are, of course, also advantages to participation. The major advantage of mediation and negotiation as methods for dealing with regulatory problems is that they achieve consensus and voluntary compliance. Agreement among all the affected parties minimizes the risks of extended conflict, potentially adverse publicity, and severe drain on agency resources that often arise out of the adversary mode of formal regulatory processes.[68] Voluntary compliance with agency rules also makes the agency look reasonable and creates a strong impression of competency and capable leadership.

Bargaining also makes it easier to tailor different settlements to the special needs presented by an individual case and thus both encourages voluntary compliance (the regulatee gets a "better deal" through bargaining than was possible through the formal process) and makes for better

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[67] See Susskind and Weinstein, "Towards a Theory of Environmental Dispute Resolution," unpublished draft, MIT (1979).

[68] See Breyer, "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives and Reform," 92 Harv. L. Rev. 552, 582-83 (1979); see also Stewart, supra note 28, at 1772.

solutions -- the "tailored" settlement, not being bound to the more restricted and less flexible procedures of the formal process, has the potential for an innovative or localized solution that benefits both the general public and the regulatee more than a traditional approach.

In any given case, the agency faced with the choice of participating in environmental conflict resolution outside normal agency channels would weigh the potential benefits and risks and make its decision. The potential benefits from a successful mediation or negotiation process -- particularly the avoidance of extended and expensive conflict -- seem to be adequate to convince agencies, at least at times, that participation is the appropriate choice.

Special Problems in Environmental Dispute Resolution

In the Introduction, I noted that there were some special problems with environmental dispute resolution. These problems can be highlighted by contrasting environmental disputes and their resolution with collective bargaining in labor disputes, long a model for conflict management using consensual agreements. In this section, I identify three problems that I consider to be significant -- implementation of agreements, the nature of environmental disputes, and the notion of the public interest -- and indicate how the participation of government agencies in the bargaining process may begin to address them and thus facilitate environmental dispute resolution.

Similarities

Before noting the many differences between bargaining in environ-

mental and labor disputes, it is important to consider what elements they share. If there is not a significant overlap between these two cases, it is futile to contrast their differences.

In both cases, mediation involves the use of third-party intervenors who work from an impartial base. The neutrality and impartiality of the mediator is critical whether it is a labor or environmental dispute. In both cases, the parties must be willing to agree that their goal is to reach a decision through compromise; they should not view bargaining as a "stalling" tactic that will enable them to hold out for an extreme position, or agree to a settlement which they know to be unworkable. The parties must also stand in some relative balance of power. There can be no meaningful bargaining or compromise if one party has nothing to trade.[69] Whether it be an environmental or labor dispute, bargaining efforts require and share these common elements: a neutral mediator, parties with something to trade and a willingness to bargain, and a commitment to reaching a decision through compromise. But despite these shared preconditions to bargaining, there are striking and substantial differences that make environmental dispute resolution a much more difficult process.

Implementation

As was stated in the Introduction, implementation of collective bargaining agreements is rarely a problem. There are numerous reasons for this: first, the parties have entered a well-understood contractual relationship whose terms are clear both to the parties and to the court or

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[69] See Environmental Mediation, supra note 6, at 18-19.

administrative agency -- usually the National Labor Relations Board (NLRB) -- which may be called on to interpret it; second, collective bargaining is repeated in regular cycles, making it difficult for either party to flout an agreement since that will only make the next round of bargaining more onerous and, therefore, likely to be much more costly to both sides; third, and most important, both labor and management are aware that if implementation does not occur, the result, a renewed strike or other "work action," will be costly for both.[70]

With environmental disputes, implementation is much trickier. Agreements in environmental disputes are novel, courts and agencies are unfamiliar with their terms and may interpret them in ways unforeseen by the parties in the event of a question in their implementation. Because the parties to environmental disputes are less readily identifiable than the representatives of labor and management, there is always the possibility that an agreement will be challenged -- and its implementation frustrated -- by an individual or group not included in the process. Also, because environmental groups are less cohesive than labor unions, a group that was involved in a settlement effort may fragment over a proposed agreement, with the newly-created "splinter group" now attempting to halt implementation of the parent group's bargain.

In collective bargaining, moreover, once the principal parties have agreed to the terms of a settlement there is ordinarily no question that the parties have the ability to implement it. Although in rare cases an agreement may be frustrated by government -- for example, because it vio-

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[70] See pp. 43-46 infra.

lates wage guidelines or labor laws -- or, more frequently, rejected by the union rank and file, in the vast majority of labor disputes, the settlement achieved through collective bargaining (both negotiation and mediation) is implemented in due course.

In environmental disputes, on the other hand, whenever the subject matter of a settlement is within the statutory jurisdiction of a government agency, the parties to that settlement are wholly without authority to implement their agreement. For example, even if local residents, environmentalists, and businessmen have negotiated a settlement of a siting dispute involving a new industrial plant, various government agencies may have jurisdiction over the location of the plant (local zoning boards and planning agencies); its mode of operation (a state air quality control board); or disposal of industrial by-products (EPA regulation of hazardous wastes). If these agencies have not been parties to the bargaining process and settlement, they may find that they cannot both honor the voluntary settlement and fulfill their statutory mandate; in such cases the agency, by denying or qualifying necessary permits and licenses, or initiating enforcement actions, may frustrate implementation of the private settlement.

Clearly, then, in the wide range of environmental disputes where agency jurisdiction is likely to be invoked, the participation of the agency in the bargaining process and settlement will make implementation more certain since the agency controls the very means of implementation. But government participation helps to insure implementation in other, less obvious, ways as well.

Government participation fosters implementation by assisting in the

identification of all affected parties and assuring that they participate in the bargaining process.[71] Agency requirements for public participation in government decision-making, for example, provide government officials with a model for, and experience with, including concerned parties in agency procedures. That experience may be transferred from formal to informal processes with little difficulty since the techniques for achieving participation -- adequate notice and providing an opportunity to influence decisions -- remain the same in both cases.

Since the government is likely to participate in a number of different disputes over time, agency participation can foster implementation by introducing an element of the cyclical nature of collective bargaining. Parties may be reluctant to frustrate implementation of a consensual settlement when they know that they -- or others representing similar concerns -- may have to deal with the same official or agency in the future.

Finally, government participation adds to the bargaining process a party whose mandate is to serve the general public interest rather than some particular set of values and concerns. In environmental disputes, it is not unusual to find that all the parties identify their position with the "public interest;"[72] however, because each party really serves only its own vision of the public good, an agreement, while satisfactory to the bargaining parties, will not necessarily be concerned with more general, or diffuse, concerns. While no one, including government, can truly claim to know what will maximize the general welfare, the government is at least

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[71] See pp. 42-43 infra.

[72] See Susskind and Weinstein, supra note 67; see also Stewart, supra note 28, at 1764.

pledged to attempt to work towards the well-being of the whole society. Government participation can thus aid implementation by providing the public with some assurance that an agreement will serve general, as well as particular, interests.[73]

I have argued that the most important contribution that government agencies can bring to environmental dispute resolution efforts is their ability to offer the parties a significant likelihood that a settlement will be implemented. Clearly, where a government agency will have jurisdiction as "prosecutor" or "judge", its participation in the bargaining process and agreement with the terms of the settlement greatly simplifies implementation. Problems, of course, will still remain. A "splinter group" may challenge the agency action that implements the settlement, and it is possible that a reviewing court would rule in their favor. Still, it seems unlikely that a court would often overturn a settlement supported by both the negotiating parties (representing opposing sides of the dispute) and the government agency. And, further, if the agreement were overturned, it may well be for a good reason. Remember, bargaining is not a magical process that guarantees correct outcomes.

The Nature of the Dispute

In a labor dispute, what is at issue is quite clear. Contract terms such as wages, fringe benefits, and work conditions are a common vocabulary shared by the parties. Further, the parties are usually comfortable with

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[73] See pp. 47-50 infra.

comparing competing offers in dollar terms.[74] Such a ready translation of mutually understood terms into an easily comparable currency is not possible in environmental disputes.[75] These disagreements are exacerbated by the scientific content of many environmental disputes. Where scientific judgments enter a dispute, there is an unfortunate tendency for value statements and fact statements to become confused.[76] This clouds the debate in two ways: first, there is insufficient recognition that few "fact" statements are ever value-free; and second, there is a tendency to defer to scientific judgment to sort out the technical issues and make the "right" decision. Working together, these factors obscure discussion in allied, yet opposite, ways. The discussion focuses on science -- when the more critical questions may be those of values. And, at the same time, value judgments are confused with statements of scientific fact.[77]

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[74] When serious disagreement about issues does arise, it is often because the issue in question is not readily translated into dollars: for example, the role of the worker in controlling his work schedule or the introduction of innovative production processes designed to make factory work less tedious and dehumanizing.

[75] Thus, for example, while all parties to an environmental dispute might be able to agree that a proposed plant will emit "x" pounds of oxides of nitrogen per day, there would likely be sharp debate about whether "x" pounds is acceptable. Further, if it were shown that one of the "costs" of "x" pounds of emissions is an increase in human morbidity or mortality, comparison of costs on dollar terms would become morally and philosophically repugnant to many environmentalists; and, the reluctance to compare in terms of dollars alone may extend to almost any type of nonpecuniary environmental impact.

[76] See L. Tribe et al., When Values Conflict (1976); D. Passmore, Man's Responsibility for Nature (1974).

[77] See E. Ashby, Reconciling Man with the Environment (1978). Ashby points out that while it is for the scientists to say whether there is a hazard to the environment and what its causes are, it is for administrators and politicians to decide what to do about the alleged hazard. Id. at 30.

Environmental disputes are also marked by disagreements about the "boundaries" of the dispute, only a slight problem in labor negotiations. In collective bargaining, the limits of the dispute are clear, or can be readily estimated. Thus, the disputants are known,[78] it is clear that the settlement will include only those parties, and there is little question as to the effects of the settlement.[79] In an environmental dispute, there may be disagreement as to geographical boundaries, affected parties, and the relevant time horizon needed to fashion a settlement.

Such disagreements over "boundaries" can arise in at least two ways. There may be disagreements as to the physical characteristics of the matters in dispute. Thus, for example, there may be differing views of what constitutes the natural ecological boundaries of an affected site or system, or the extent to which "spillover" effects will occur.[80] Disagree-

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[78]The National Labor Relations Act [29 U.S.C. § 151 (1976), as amended] provides a system for determining the size ("boundary") of the union bargaining unit in a labor dispute. Section 9b of the Act [29 U.S.C. § 159b (1976)] permits the National Labor Relations Board (NLRB) to "decide in each case" whether the "appropriate unit for purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Thus, for example, the NLRB could decide whether the appropriate bargaining unit for a union in the automobile industry was: (1) all the workers at G.M., (2) all the machinists in the industry; (3) the workers at Ford's River Rouge plant; or (4) the workers in the Parts section of that plant. See generally, R. Gorman, Labor Law (1976) at 66-92.

[79]The major area of uncertainty, typically, is the contract's effect on future employment, i.e., will the settlement be so costly as to curb the company's growth or create incentives towards moving, increased automation, etc.?

[80]There may also be disagreements as to the proper time horizons for measurement. For example, a major issue in the dispute over a proposed co-generation facility in Boston (which called for the use of diesel generators) was the proper time period for the measurement of nitrous oxide emissions. Opponents of the facility were concerned about possible harmful concentrations of only an hour's duration, while the developer was seeking a standard based on average concentrations over a much longer period. See Friedman and Kendall, "Citizen Participation in the Energy Facility

ments may also arise because there is not an easy "match" between the acknowledged boundaries of impacts and the jurisdiction of the political units charged with decision-making about such impacts. In this situation, it may prove difficult to find a workable boundary for either limiting entry into the negotiating process or creating an effective mechanism to implement a settlement.

Another arguable difference between environmental and labor disputes is the nature of their costs. In a labor dispute, the costs of conflict are borne by both contending parties. A strike prevents the employer from earning a profit and the employee from earning a wage. Further, it is not always the employer who can absorb the costs of disagreement more readily. When a strike occurs at the start of a retail merchant's "busy season," or when a manufacturer has a depleted inventory, it may be the employer, not the worker, who will be damaged more by the action. The important things to note are that each side has the ability to inflict costs on the other, but by doing so, must also absorb some -- perhaps even more -- costs himself, and, that there may be costs to a bad agreement as well as a strike. If an exorbitant wage agreement prices a company's products out of the market, both sides suffer; the company loses business and some workers lose their jobs. In an extreme case, of course, the company fails and both workers and employers suffer an extremely high cost for a "bad" settlement or a prolonged strike.

This symmetry in the costs of disagreement -- or a "bad" agreement -- in labor disputes is almost wholly missing from environmental disputes.

Siting Process: A Case Study of the Medical Area Total Energy Plant (MATEP)," Energy Impacts Project, Technical Report No. 17, Laboratory of Architecture and Planning, MIT (1979).

For the relatively minor costs of litigation expenses, an environmental group can inflict millions of dollars in added interest charges and other costs of delay on a developer. On the other hand, the victorious developer will proceed with his project, inflicting real (if impossible to quantify in dollar terms) costs on the environmentalists who see the things they value -- cleaner air and water, a more "natural" use of land, less radioactive material, etc. -- endangered. Thus, instead of symmetrical costs, as is the case with labor disputes, the costs of environmental conflict are skewed in two ways. First, environmentalists can initiate conflict at relatively minor cost to themselves -- contrast this with the costs of a strike action which are borne somewhat equally by both parties. Second, developers do not attach the same value to the costs of environmental "change" as do environmentalists, thus, it is environmentalists alone who bear the brunt of costs -- in environmental degradation -- created by a "bad" settlement, i.e., one that provides insufficient protection for things they value. Working together, these two asymmetries in costs tend to make environmental conflict more prevalent and more intense because conflict costs little to initiate and the costs of defeat are borne almost entirely by the losing party.

One last, critical, difference in the nature of the costs of labor and environmental disputes is the notion of irreversible effects. In collective bargaining, a disastrous strike -- or settlement -- may drive a company into bankruptcy, induce it to leave the state or country, or have devastating impacts on the financial and personal lives of workers, but few of these effects are truly irreversible. Bankrupt firms are reorganized or sold and production continues, Massachusetts loses jobs but Georgia

gains them, and workers are retrained for new job opportunities. Further, most changes that occur are at least theoretically reversible -- allowing for the linearity of time -- so that if one had the desire to move a cotton goods factory back to Lowell, Massachusetts it would only be a question of the necessary means.

An environmental dispute, on the other hand, may involve truly irreversible effects such as species extinction. No means exist to fulfill the desire to see the passenger pigeon, extinct for over 65 years, fly again in its millions. There is a growing acknowledgement that actions which are massive enough, drastic enough, or simply of the right sort will cause environmental changes which are irreversible.[81] And such irreversible effects are often unpredictable. When human interference with the natural environment becomes too great, it can result in an environment no longer appropriate for a complex ecosystem. Such "simplified" environments -- which almost inevitably result from human activities -- tend to be highly unstable, and additional interventions (for example, pest control on land recently cleared for farming) tend to be inherently destabilizing. The result is environmental change that cannot be reversed.[82] The fact that profoundly irreversible effects may occur, and that many are unpredictable, is a cost unique to environmental disputes, and one that environmen-

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[81] See W. Murdock (ed.), Environment: Resources, Pollution and Society (1972), 18-26.

[82] See Murdock, supra. The author notes, for example: "Typically, when tropical forests are removed and the soil exposed [this process is occurring today in Brazil's Amazon region], the mineral nutrients (already poor) are leached by the rain. The soil usually becomes hardened and thereafter the forest will not grow back again, nor can crops be grown. Such irreversible changes will almost always produce a simplification of the environment. Id.

talists will almost always seek to prevent.

The participation of government in the bargaining process can address some of the problems raised by the special nature of environmental disputes. Regulatory agencies, in particular, can provide resources and expertise that will aid in addressing and clarifying the difficult factual disputes that mark environmental conflicts. Funding for environmental dispute resolution efforts, a significant problem in the past,[83] may also be less difficult if agency resources are available. In many cases, agency personnel may be able to provide information and advice which would otherwise have to be contracted for at great expense. Agencies can also be helpful with "boundary" questions since they operate on a state and federal level and can transcend the limitations on decision-making faced by local, private parties.

In many ways, of course, government participation would have little impact on the problematic nature of environmental conflict. Where environmental disputes are marked by extreme ideological stances it is unlikely that government -- or, for that matter, bargaining -- could convince the contending parties to acknowledge the legitimacy of one another's views. Further, government officials are not immune to confusing factual with value-laden statements. Although their relative objectivity may be helpful in recognizing particularly egregious instances of fact-value confusion, they cannot provide value-neutral technical counsel, the problem will persist despite government participation.[84]

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[83] See Environmental Mediation, supra note 6, at 21-25.

[84] See Jaffe, supra note 66, at 25.

Environmental mediation, however, is neither a magical answer to all environmental conflict, nor a guarantee of correct outcomes; but where the contending parties have shown a willingness to talk, government participation may prove helpful. In particular, government can bring to bear resources, otherwise unavailable, that will illuminate factual concerns and can provide a mechanism for enlarging the boundaries of decision-making and implementation.

Serving the "Public Interest" -- Questions of Representation and Legitimacy

Another unique aspect of environmental disputes is that advocates of one position or another claim that they represent not just their own concerns but the "public interest" as well.[85] By identifying symbolically with the public interest, each advocate hopes to discourage political attack and to win popular support. Unfortunately, this tends to confuse and complicate, rather than illuminate debate.[86] While environmentalists may

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[85]Despite the long and serious debate in the social policy disciplines, most scholars would probably agree with the recent observation that "It may be impossible to determine whether the public interest has been satisfactorily defined, let alone when it has been achieved." See DiMento, "Citizen Environmental Litigation and the Administrative Process: Empirical Findings, Remaining Issues and a Direction for Future Research," 1977, Duke L.J. 409, 441 (1977). For most public policy analysts, the search for a unitary public interest has long been recognized as futile. Particular decisions may be viewed as "optimal" because they benefit almost everyone and hurt no one, but policy outcomes cannot in and of themselves be judged as "in the public interest." There are too many dimensions along which different segments of the population must evaluate an outcome. Different populations are likely to have different time horizons, risk orientations, and different values. See Susskind and Weinstein, supra note 67.

[86]The following statement illustrates the problem: ". . .the courts need to recognize that whereas governmental agencies are the representatives of the 'economic' interests, the conservation groups are more apt to represent the 'public interest'." See Tremaine, "Standing in the Federal Courts for Conservation Groups," 6 Urban Law. 116, 136-37 (1972).

feel that they represent the public interest because environmental protection is in "everyone's best interest," a decision-maker facing a difficult environment-development trade-off must balance a great many factors. Once a policy position is cast in terms of support for the public interest, rather than in terms of balancing or accommodating the varied interests of various publics, compromise becomes difficult.[87]

Professor Stewart has noted another set of problems, regarding the legitimacy of "public interest" advocates. Stewart questions "whether a public interest advocate truly represents the interest for which he purports to speak and, ultimately, how that interest is to be defined,"[88] noting that the advocate is often a lawyer who is "not subject to any mechanism of accountability to ensure his loyalty to the scattered individuals whose interests he purports to represent."[89] Stewart fears that, particularly in the context of settlements,[90] "the lawyer will not advo-

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[87]This problem has been addressed by a group organized by the American Academy of Arts and Sciences. They note: ". . .with regard to environmental disputes, value conflicts may have been submerged in the past because of a nearly universal agreement that economic growth and efficiency were desirable ends in themselves, or at least they were important in whatever system of ends might be pursued. In today's much more fluid situation, competing values, recognized by many as equally valid, are receiving widespread support. The result is an inherent tension and moral ambiguity about values -- a classic instance of Hegel's conflict of right against right." See L. Tribe, C. Schelling, J. Voss, When Values Conflict (1976) at xi-xii; see also Marcus, supra note 3, at 582, n.1.

[88]Stewart, supra note 28, at 1764; see generally, Id., at 1762-70.

[89]Id., at 1765.

[90]Id. Stewart notes that "[w]henever representation is undertaken on behalf of an unorganized class, there is a danger that settlements will be reached simply to get the lawyer a fee." See Id., at 1743, n. 354.

cate the interests of the broad constituency supposedly represented, but rather his own interests or those of a few active members of that constituency."[91] Further, in Stewart's view, these problems are only partially alleviated where it is an organization, rather than scattered individuals who are being represented. He notes that, although the lawyer will presumably be responsive to the organization's leadership and the leadership is presumed to be responsive to the membership, "often such organizations purport to represent, and are perceived as representing, a far broader class of individuals than their own members."[92]

The "public interest" problem thus has two aspects. First, when one side sees itself as the only legitimate representative of the "public interest", accommodation becomes difficult. Second, there are real questions as to whether "public interest" advocates can legitimately be said to represent the public.

The participation of government agencies in bargaining may help to address the second problem. Because environmental dispute processes are novel, new rules can be fashioned to guide the participants. A government agency, before agreeing to participate in bargaining, might seek to evaluate the adequacy and fidelity of organizational advocates -- in a manner similar to that used by the federal courts in class actions[93] -- and make its participation contingent on an advocate's meeting some threshhold stan-

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[91] Id., at 1765-66. See also Id., at 1766, n. 460.

[92] Stewart, supra note 28, at 1767.

[93] See the discussion in Stewart, supra, at 1742-43.

dard of accountability in representation.[94]

The first problem is more persistent. In the most serious case, where one side sees the conflict as one of right against wrong, bargaining may well be impossible. In other instances, the presence of government officials in the bargaining process may encourage the parties to take a broader view of their dispute. When one party stresses the "rightness" of its position, it may prove helpful if the agency, rather than the opposite party, notes that there are valid and competing interests that are opposed to the proferred position.

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[94] Such a policy was successfully adopted by Gerald Cormick in his mediation of the Snoqualmie/Snohomish dispute. See note 60 supra.

CHAPTER THREE

THE CONTEXTS FOR AGENCY PARTICIPATION IN ENVIRONMENTAL MEDIATION: MODELS, PRECEDENTS AND PROSPECTS

Introduction

If, as I have argued, agency participation in environmental mediation can aid the process and provide significant benefits to the agency itself, how might an agency participate in bargaining? In this chapter I examine three contexts for agency participation: mediated settlement of an enforcement action based on the consent order model; mediation of a regulatory agency permitting or licensing process; and, the prospects for mediation and other forms of conflict resolution created by the new NEPA regulations. These three contexts for mediation correspond, respectively, to the three roles played by government agencies -- prosecutor, judge, and interested party -- that I defined in Chapter Two,[95] thus illustrating that bargaining may be an available choice for agency action in each of these differing roles.

The first context, mediated settlement of an enforcement action, looks to the model provided by the well-established process of settling government enforcement proceedings through confidentially negotiated consent orders. After sketching the operation of the consent order process in two agencies, the Federal Trade Commission (FTC) and the Justice Department (Justice), I will present a case study of mediation of an enforcement proceeding in the environmental field, and indicate the important differences between the two procedures.

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[95] See supra at 30-32 .

To illustrate the second context for environmental dispute resolution, mediation of a permitting process, I have chosen a case study that exhibits the procedures that agencies may use to combine mediation efforts with more traditional regulatory processes.

Finally, I examine the new NEPA regulations and indicate how they offer agencies an opportunity to assist potentially adversarial parties in avoiding the "necessity" of conflict.

The Consent Order Model

In the American system of justice, the great majority of cases -- including complex civil litigation -- are disposed of by various means prior to trial, i.e., the parties agree to a settlement rather than having a settlement imposed by the court.[96] Settlement is attractive, first, because it is much less costly in time, money and resources than litigation, and second, because it promotes a result that is alligned with the parties' real concerns.[97] The bargaining of the settlement process also helps the parties to maximize the benefits they can obtain at the expense of others: each side must set its own priorities and then trade off less important elements for those of greater import.[98]

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[96] In the 12-month period ending June 30, 1977, no more than 16.3 percent of the cases filed in federal courts reached trial. Some sample percentages by type of case are: Contract actions -- 8.4 percent; Private anti-trust -- 11.8 percent; Government civil rights -- 10.2 percent. See 1977 Annual Report of the Director of the Administrative Office of the United States Courts 189, 317-19, 332-34 (1978).

[97] See Renfrew, "Settling Commercial Litigation: The Role of the Court," in Practicing Law Institute, Settling Complex Commercial Litigation (1978) at 72.

[98] See Breyer, supra note 68, at 582.

Where litigation is complex, settlement has an additional benefit: the litigants and their attorneys have far more -- and more accurate -- information concerning the facts of the case and, critically, the basis of the real dispute, than they can communicate to the court or other trier of fact. The communication problem is twofold: first, the court may need to be educated in the operation of a business, understand the complexities of a long-standing relationship, or comprehend a technical field in order to decide the case; second, the procedures of the adversary process -- particularly the rules of evidence -- create a significant risk that crucial background material will be disregarded in the decision-making process.[99] Lacking a full understanding of the information before it and having excluded other, perhaps crucial, information on the basis of formal rules, the court is in a poor position to render an equitable judgment that acknowledges the real concerns of the parties. In such cases, settlement may permit more innovative solutions and more equitable compromises than the courts; accordingly, where some common ground is available for settlement, the parties will often seek to avoid trial.

Government antitrust litigation -- the civil proceedings brought by the Antitrust Division of the Department of Justice -- is an example of complex litigation in which settlement, rather than judgment, is the preferred alternative.[100] These settlements, known as consent decrees, illustrate the advantages to both parties just noted above. The consent decree is a much less costly alternative than litigation and is ordinarily

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[99] See Renfrew, supra note 97.

[100] See T. Lindstrom and K. Tighe, 1 Antitrust Consent Decrees (1974) at ix.

a much speedier process as well. Further, consent decrees provide an opportunity to minimize risk. No party is ever guaranteed of winning a lawsuit; particularly when there is uncertainty as to the facts of the case or the law is unclear, the consent order offers a known, and acceptable, cost that is often an attractive alternative to risking a costly defeat.[101] Because of these benefits, the consent order process has been used in 80 percent of the government antitrust actions brought since 1957.[102]

In essence, an antitrust consent decree is a contractual settlement to litigation,[103] distinguished primarily by the defendant's agreement to comply with the terms of the settlement in exchange for a provision in the consent order stating that the settlement implies no admission or determination that there has been a violation of the antitrust laws.[104] The other important attribute of the consent order process is that settlement is achieved through confidential negotiations between the parties, a procedure that has never been expressly defined or authorized by statute.[105]

The success of the antitrust consent decree process at the Justice

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[101] See Kalodner, "Consent Decrees as an Antitrust Enforcement Device," 23 Antitrust Bulletin 277, 284-85 (1978). In particular, a consent decree avoids imposition of the treble damages portion of an antitrust judgment. Id; see also infra, at .

[102] See Lindstrom and Tighe, supra note 100.

[103] Note, however, that the consent order is treated by the courts as a "judicial act" rather than a contract. See Lindstrom and Tighe, supra note 100, at x.

[104] The corporate defendant wants to avoid an imposition of liability because an adverse judgment in a suit brought by the government is prima facie evidence of antitrust violations in a later private action for treble damages. See Kaloder, supra note 101, at 285.

[105] See Lindstrom and Tighe, supra note 100, at ix.

Department has led to its adoption in other regulatory settings. For example, over the past fifteen years the consent order procedure has become an increasingly significant factor in the FTC's handling of its caseload in two ways. First, as the law under a particular statute administered by the FTC becomes clearly established, the consent order procedure provides a method of settlement of disputes that avoids the needless time and cost of litigating settled matters of law. Second, where a case presents complicated questions of fact and law, the consent order has been used to create a tailor-made solution that benefits the public and assures the rights of the individual respondent to a far greater degree than could be achieved under the more restricted and less flexible procedures governing formal FTC hearings and decisions.[106]

As with the Justice Department's consent orders, FTC orders provide that no admission or determination of a violation of trade regulation statutes has occurred, and are also negotiated confidentially.[107]

I will now present a case study involving an enforcement action by a state regulatory agency, where the consent order model was adopted to negotiate a settlement between the parties. At the end of the narrative, I'll contrast the differences between that settlement and those obtained through consent orders.

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[106] See T. Lindstrom and K. Tighe, Trade Regulation by Negotiation (1974) at vii.

[107] Id., at 1-2.

The General Electric Case

The General Electric case involved a suit against that company by the New York State Department of Environmental Conservation (Department) which accused G.E. of violating state water quality standards by its discharges of polychlorinated biphenyls (PCB's)[108] into the upper Hudson River.[109]

In 1973, G.E. had applied to the Environmental Protection Agency (EPA) for a permit allowing it to discharge PCB's, pursuant to the requirements of the National Pollution Discharge Elimination System (NPDES).[110] That permit was granted in December, 1974 -- allowing G.E. to discharge an average of 30 pounds per day of PCB's -- but required that discharges be reduced to less than one-quarter pound per day by May, 1977.[111]

In August, 1975, G.E.'s permit became a state Pollution Discharge Elimination System (PDES) permit as the New York State Department of Environmental Conservation took over administration of the program from the EPA as provided under § 401 of the Federal Water Pollution Control Act (FWPCA).[112] The next month, September, the Department sued G.E. al-

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[108] PCB's are a family of chlorinated hydrocarbons, which because of their chemical and thermal stability are in wide industrial use. Although first produced in 1929, their environmental and health hazards weren't appreciated until the mid-1960s. See In Re General Electric Co., 6 ELR 30007, 30013-16 (N.Y. Department of Environmental Conservation, February 9, 1976) (hereafter cited as Interim Opinion).

[109] See "Pounds of Cure: General Electric Agrees to PCB Abatement, Cleanup and Research," 6 ELR 10225, 10226 (1976).

[110] 33 U.S.C. § 1342 (1976).

[111] See Interim Opinion, supra note 108, at 30012-13.

[112] 33 U.S.C. § 1341 (1976).

leging that the PCB discharges were harming fish and had damaged the commercial and sport fishing industries on the Hudson. As a result, the Department claimed, G.E.'s discharges violated applicable water quality standards that prohibit impairment of fishing on the Hudson.[113]

Several groups sought to intervene as parties in the hearings scheduled on the suit: the New York Department of Commerce; the Natural Resources Defense Council; the Hudson River Fishermen's Association; the Hudson River Sloop Restoration; and the Federated Conservationists of Westchester County. On November 19, 1975, the Department issued an opinion allowing intervention by all the groups.[114] Later, a trade group, Associated Industries of New York, Inc., also sought intervenor status, and was admitted as a party in April, 1976.[115]

The hearings were held in the fall of 1975, Professor Abraham Sofaer of Columbia University Law School serving as Hearing Officer. In his Interim Opinion, issued on February 9, 1976, Professor Sofaer found that G.E. was liable for the damage to the fishing industry caused by the PCB discharge,[116] but noted that G.E. had been unaware of the dangers posed by PCB's until recently and that both the Department and EPA had been slow to respond to the problem.[117]

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[113] See Interim Opinion, supra note 108, at 30007, 30012.

[114] Id., at 30007.

[115] In Re General Electric Company (N.Y. Department of Environmental Conservation, September 7 and 8, 1976), 6 ELR 30023 (1976) (hereafter cited as Settlement Agreement).

[116] See Interim Opinion, supra note 108, at 30007.

[117] Sofaer noted that there was "more than superficial appeal" to G.E.'s affirmative defense that the grant of NPDES/PDES permits insulated it from liability under state law. Id., at 30013. See also "Pounds of Cure: . . . ," supra note 109, at 10226-27.

The Department's initial demands on G.E. were quite severe. G.E. was to halt PCB discharges immediately (abatement), undertake a complete cleanup of the contamination it had caused (cleanup), and pay substantial civil penalties. The company felt that these demands were unreasonable, particularly the demand for total immediate abatement and the payment of a penalty, and questioned whether the Department could compel reclamation of the Hudson.[118]

Negotiations on the nature of the remedies for G.E.'s violations thus began with the parties quite far apart. Because of the fairness that Sofaer had shown in his opinion, the principal parties sought his aid in achieving a settlement. Sofaer agreed to mediate if the following guidelines would be acceptable to both parties: Sofaer would perform no function as mediator that might tend to lessen his ability to decide the case in the event the negotiation floundered or its results were challenged by intervenors; all intervenors would be afforded a full opportunity to comment informally on, and to challenge, any agreement worked out by the principal parties; and that any proposed agreement would be presented to Sofaer for review to determine whether its adoption would be recommended as in the public interest. Intervenors were all promptly informed of the mediation effort, and no objection was raised on their part.[119]

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[118] This was the first enforcement action of its kind in New York history and only one of a handful of similar actions ever brought in any state or federal court. It thus involved a number of legal questions that had never been litigated, and many more that had not been definitely resolved. In particular, there was some doubt that G.E. could be required to restore the Hudson. New York law contains no explicit authority for ordering reclamation, except in special circumstances not applicable to this case. See Settlement Agreement, supra note 115, at 30023, 24.

[119] Id., at 30023.

After a number of serious negotiating sessions, the principal parties agreed on the basic format for settlement. These terms were then communicated to the environmental groups that had intervened and a meeting arranged between the environmental representatives, their attorneys, Department attorneys and Sofaer. The agreement was fully discussed and questions were raised that led to changes in the terms of the final settlement. After consulting with their boards of directors, all the environmental groups agreed to accept the negotiated settlement.[120]

Further negotiations then occurred between the principal parties to work out the details of the agreement and, once again, the environmental groups were consulted. Subsequently, all the other intervenors were informed of the settlement and agreed that it should be accepted.[121]

Under the terms of the settlement, the Department agreed to drop its claims for civil penalties and for immediate total abatement. In return, G.E. agreed to spend $3 million on treatment facilities and to phase out PCB use entirely by July 1, 1977. The Department further agreed to drop its demand that G.E. completely clean up the PCB's that it had discharged into the Hudson. In exchange, G.E. agreed to contribute an additional $3 million to a cleanup program for PCB's, or if that were impractical, for other substances chosen by the Department. In addition, G.E. pledged to spend $1 million on research on PCB cleanup and on the environmental effects of proposed PCB substitutes. Finally, the Department committed itself to match G.E.'s $3 million contribution to a PCB cleanup program.[122]

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[120] Settlement Agreement, supra note 115, at 30023.

[121] Id.

[122] Id., at 30024.

There are a number of similarities between this mediated settlement and the consent order process. Negotiations took place because both parties acknowledged the legal uncertainties in the case and desired to avoid a costly and time-consuming process of judicial review, both factors that figure greatly in consent orders. Further, as is often the case with FTC consent orders,[123] General Electric's conduct had been essentially innocent and it objected strenuously to having a judgment imposed that would be a determination of liability.[124] Finally, the mediated settlement was innovative and equitable, freeing the parties from the rigid demands of formal processes in a manner identical to the consent order.

The major distinction between this case and the traditional consent order is quite crucial: the role played by the intervenors in the case. Here, as had been agreed, when the preliminary negotiations resulted in a basic format for settlement, Professor Sofaer communicated the terms to the intervenors and they were afforded an opportunity to question and comment on the proposed settlement. As negotiations continued, the environmental intervenors in particular were kept informed of the state of the bargaining sessions and consulted for their opinion. This notion of including intervenors or, more generally, interested and affected third parties in the settlement process is the crucial alteration of the consent order model for the particular needs of environmental dispute resolution efforts.

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[123] See Lindstrom and Tighe, supra note 106, at vii.

[124] Although it had polluted the Hudson, for nearly 45 years G.E. had been unaware of the hazards that PCB's posed, and, until September, 1975, both state and federal authorities had permitted the PCB discharges.

Consent orders have not ordinarily involved third parties because the public is much less active in antitrust and trade regulation than in enforcement of environmental regulations.[125] In the case of environmental mediation,[126] however, to maintain the consensual decision-making concept that lies at the heart of the process requires that settlement of an enforcement action involve intervenors as well as the regulator and regulatee. Of course, agencies may settle an enforcement action without involving intervenors, but that would not be a consensual agreement to resolve environmental conflict as defined in this thesis and would certainly lessen the probability that a settlement would go unchallenged.

"Separate but Parallel Tracks" for Agency Action -- The Brayton Point Case

Brayton Point Station is an electric generating plant whose four units deliver 1600 MWe to New England. The plant is located in Somerset, Massachusetts; nearby is the city of Fall River and Narragansett Bay. In June, 1977, New England Power Company (NEPCO), which operates the plant, received notice from the Department of Energy (DOE) that it intended to prohibit the burning of oil in three of the units at Brayton Point and require that NEPCO convert those units to burn coal instead.[127] DOE was

[125] Of course, this is not always the case; in particular, consumer activists have been involved in FTC consent orders regarding media advertising directed at young children.

[126] It is also important to note the crucial role in this settlement played by Professor Sofaer. In many ways, Sofaer's role resembled that of a federal judge attempting to achieve settlement of a case before trial. See Renfrew, supra note 97, at 72-76.

[127] See Conversion to Coal at Brayton Point (Final Report to the New England Energy Task Force, presented by The Work Group on Conversion to Coal at Brayton Point) (October, 1978) 19 (hereafter cited as Brayton Point).

acting under authority granted by the Energy Supply and Environmental Coordination Act of 1974 (ESECA),[128] which Congress had passed in response to the oil embargo of 1973-1974.[129]

DOE estimated that conversion of Brayton Point to coal would lead to an annual increase of more than $6 million in NEPCO's net cost for producing electricity. The additional cost would be due largely to the expense involved in meeting the necessary standards for compliance with air pollution controls. To comply with the emission limits of the State Implementation Plan (SIP) under the Clean Air Act, NEPCO would have to burn expensive low sulfur coal and would likely have to install flue gas desulfurization equipment ("scrubbers").[130]

NEPCO challenged the DOE estimates. It estimated that the cost of conversion would be much greater than anticipated and was particularly opposed to any conversion plan that would require the use of "scrubbers".[131] NEPCO announced that it was prepared to contest the DOE Prohibition Order in court.[132] For NEPCO, the DOE Prohibition Order created a serious problem: to comply, it would have to burn coal at the plant but make sure

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[128] Pub. L. No. 93-319, 88 Stat. 246 (1974), as amended, 15 U.S.C. § 792 (1976).

[129] The Act required the Federal Energy Administration (now DOE) to identify those power plants with the greatest potential for conversion to coal. Brayton Point was one of five New England power plants identified by DOE, and was by far the largest: as much oil would be saved by conversion of Brayton Point as by the four other plants put together. See Brayton Point, supra note 127, at 18.

[130] See Brayton Point, supra note 127, at 20.

[131] NEPCO estimated that installation of "scrubbers" would cost $153.8 million (in 1975 dollars). Id.

[132] Id.

that the emissions did not violate either state or federal air quality standards, yet at the same time it would be trying to avoid a significant increase in the cost of electricity or reduction in the efficiency of the plant.[133]

The Prohibition Order process is quite complex. The Environmental Protection Agency (EPA) must certify that a converting plant can meet applicable emission limits and protect both primary and secondary air quality standards while burning coal. DOE must prepare a comprehensive Environmental Impact Statement (EIS) and also certify that conversion is economically practicable. The Governor of the state, here Massachusetts, must give his prior written concurrence before the Prohibition Order goes into effect; that concurrence is then included in the Notice of Effectiveness issued by DOE which completes the process.[134] Thus, the ESECA program was not merely complex, but it divided regulatory responsibilities among a number of state and federal agencies and had no established mechanisms for resolving conflict.[135]

It appeared that the prospects for conversion of Brayton Point in a manner that would satisfy all concerned parties, NEPCO, the regulatory agencies, and energy consumers, were very poor. The ESECA program was new and unclear, and its relationship with other regulatory programs, parti-

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[133] Brayton Point, supra note 127, at 20; see also Id., at 22-23.

[134] Id., at 20.

[135] In this case, the situation was made even more complex because of the contradictory nature of Massachusetts regulations contained in the State Implementation Plan that permitted some large power plants to burn cheap, high sulfur content oil. Id., at 21-24.

cularly those concerned with air pollution, often appeared contradictory.[136] Further, the principal parties were uncertain of one another's motives for opposing or promoting conversion and were apparently becoming so mired in the legal and technical complexities of the process that they were unable to approach the possibility of conversion in a constructive manner that would encourage progress rather than stalemate.[137]

At this point, the Center for Energy Policy, a non-profit organization concerned with the resolution of energy and environmental disputes, suggested to the principal parties that they enlist the services of a mediator in an effort to achieve a consensus as to how conversion would be accomplished.[138] In April, 1977, the Center for Energy Policy organized a meeting attended by officials of NEPCO, DOE, EPA and the Massachusetts Department of Environmental Quality Engineering (DEQE) to examine the prospects for conversion. The meeting was pivotal, producing a number of crucial agreements on how to proceed towards conversion. NEPCO agreed that the addition of some new equipment to control particulate emissions[139] might be required to make conversion environmentally practical. Regulatory agency officials agreed that economic considerations might preclude the use of "scrubbers" or low sulfur coal.[140]

DOE agreed to participate in the mediation process, but also made clear that it would continue to pursue conversion through the ESECA pro-

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[136] Brayton Point, supra note 127.

[137] Id., at 40.

[138] See Id., at 43.

[139] Electrostatic precipitators.

[140] See Brayton Point, supra note 127, at 27.

cess; DOE had thus introduced the notion of "separate but parallel tracks." While continuing with the formal conversion process -- issuance of a Prohibition Order, preparation of an EIS, and cooperation with the EPA in obtaining certification under the SIP -- Doe would also participate in and cooperate with the mediation effort that was attempting to arrange a voluntary conversion.[141]

As an illustration of how this notion of "separate but parallel tracks" operated, DOE, in addition to preparing an EIS which examined conversion under the plans generated by the formal process, prepared a second EIS which examined conversion under the revised plan being considered in the mediation process. Further, DOE encouraged the EPA to analyze the prospects for certification under each of the plans being considered: the formal process and the mediation effort. Thus, both agencies were able to fulfill their statutory responsibilities while still cooperating with and supporting the mediation effort that was working towards a voluntary conversion.[142]

A period of long and arduous negotiation followed, but by March, 1978, an agreement had been reached on all issues. Under the agreement, NEPCO will install additional pollution control equipment which will reduce its emissions of particulate matter. The Massachusetts DEQE will promulgate a new regulation for the control of air pollution from Brayton Point which will set sulfur and particulate emission limits for at least ten years.[143] Thus, the essence of the plan is to achieve certainty as to

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[141] Brayton Point, supra note 127.

[142] Id.

[143] Id., at 8.

both the emissions from the plant and the economic effect of the regulations under which conversion will take place. The agreement expressly provided that mediation will be considered as a means to resolve any future disputes over conversion to coal at the plant.[144]

The most interesting aspect of this case history is the introduction of the notion of "separate but parallel tracks" for agency action. DOE was able to recognize the clear advantages to be gained by a voluntary conversion, and was eager to participate in the mediation process that could achieve it. At the same time, both DOE and EPA officials were concerned about fulfilling their regulatory responsibilities as "judge" under the ESECA process. DOE was able to see that there was nothing inherently contradictory about pursuing both paths towards conversion simultaneously. Even more important, both DOE and EPA took the necessary action -- preparation of an alternative EIS and SIP certification -- to assure that they could promptly fulfill their regulatory responsibility were the mediation effort successful. This model for agency participation in environmental mediation efforts appears to be extremely promising. It insulates the agency from charges that it is shirking its duty, yet permits cooperation with less formal processes that could provide an agreement that is both voluntary and innovative.

Another interesting aspect of both the Brayton Point and PCB cases is that each involved an action that was initiated by the agency, rather than by a developer or environmental group. Is there any reason to believe that environmental dispute resolution may be more difficult where

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[144] Brayton Point, supra note 127.

the agency plays a less active role? I think so. At times there are distinct advantages to environmental opponents using formal proceedings. First, new groups may want to use a formal process to create credibility for themselves, i.e., to show developers that they have the resources and expertise to inflict costs on an opponent through litigation and delay. Such credibility, in fact, may be a required condition precedent to participation in informal processes.[145] Second, even older groups may seek to reestablish their credibility by participating in formal procedures, and may also desire to achieve a dramatic court victory because the attendant publicity may boost fund-raising efforts.[146]

When an environmental group has initiated an action, or is playing a major role as an intervenor in a developer-initiated proceeding -- usually a permit or license application -- the incentives to bargain may be less, for the two reasons indicated, than where the agency has initiated the action. In the latter case, it is often the agency which is taking the lead as the "defender" of the environment (e.g., an enforcement action) and so the environmental groups' role is less critical, and less likely to garner headlines or threaten developers, than when it is they who are leading the fight. But, as I have noted throughout this thesis, environmental dispute resolution through bargaining is not the answer to all environmental conflict. Even if bargaining and settlement occurs only in enforcement-type settings, that still may be a significant advance in lessening the costs of environmental disputes and fashioning better solutions.

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[145] It gives the environmental group something to trade: its foregoing litigation. See Stewart, supra note 28, at 1771.

[146] See Id., at 1772.

The Agency as "Interested Party" -- Opportunities for Mediation, Conflict Avoidance and Conflict Anticipation Under the New NEPA Regulations

In late 1978, the Council on Environmental Quality (CEQ) published its final regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA).[147] Effective on July 30, 1979, these new regulations have three principal aims: to reduce paperwork, to reduce delays, and to produce better decisions.[148] One approach to these aims adopted by the new regulations seeks to make the Environmental Impact Statement (EIS) process under NEPA a framework for bargaining, right from the outset of the feasibility assessment process.

Two sections of the new regulations provide the opportunity for bargaining: Section 1501.2,[149] requires agencies to integrate the NEPA process with other planning at the earliest possible time; while under Section 1501.7,[150] a "scoping" process is required that provides a formal mechanism for agencies, in consultation with affected parties, to identify significant issues which must be discussed in the EIS. In this section, I'll examine the way in which these sections will operate and indicate the opportunities they provide for agency participation in various dispute resolution efforts.

Section 1501.7 -- The "Scoping" Process

The concept of "scoping" was intended by the CEQ, and importantly,

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[147] See 43 Fed. Reg. 55978 (1978).

[148] Id.

[149] 40 C.F.R. § 1501.2.

[150] Id., at § 1501.7.

was perceived by most of the commenters on the draft regulations,[151] as a means for early identification of what are -- and what are not -- the important issues deserving of study in the EIS.[152] A major purpose of the scoping process is to encourage affected parties to identify the crucial issues raised by a proposal before an environmental impact statement is prepared in order to reduce the possibility that matters of importance will be overlooked in the early stages of a NEPA review. Scoping is also designed to conserve agency resources (by avoiding analysis of issues which no one believes are important) and, since scoping requires the lead agency to allocate responsibility for preparing the EIS among affected agencies, it sets the stage for a more timely, coordinated, and efficient federal review of a proposal.[153]

Although the scoping process is mandatory,[154] important elements of the process are left to agency discretion.[155] The agency decides, within stated limits, when the scoping process occurs,[156] and the regulations provide only the most general guidelines regarding who should be involved in the process,[157] and how the scope and the significant issues to be analyzed

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[151] Commenters included representatives of business, labor, state and local governments, and environmental groups. See 43 Fed. Reg. supra note 147, at 55980.

[152] Id., at 55982.

[153] Id.

[154] "There shall be an early and open process for determining the scope of issues. . . ," Id., at 55993.

[155] Id., at 55982.

[156] Id.

[157] Id.; 40 C.F.R. § 1501.7(a)(1)

should be determined.[158] The agency is also given discretion to integrate the scoping process with any other early planning meetings the agency has.[159]

Section 1501.2 -- Early Planning Under NEPA

The CEQ regulations call for integration of the EIS process with other planning "at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts.[160] Under this new regulation, a federal agency may consult with local and state officials, potential applicants (for federal permits), and interested private persons and organizations "before Federal involvement."[161]

The purpose of this early planning provision is to assure the full cooperation and support of federal agencies for efforts by private parties and state and local entities in making an early start on studies for proposals that will eventually be reviewed by the agencies.[162]

Prospects

In the view of Charles Warren, Chairman of the CEQ, these new regulations "attempt to make the EIS a framework for bargaining," and provide a "promising new opportunity for the skills that mediation involves" to

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[158] See 43 Fed. Reg. supra note 147, at 55982; 40 C.F.R. § 1501.7 (a)(2).

[159] Id.; 40 C.F.R. § 1501.7(b)(4).

[160] Id., at 55992.

[161] Id.; 40 C.F.R. § 1501.2(d)(1)-(2).

[162] Id., at 55981.

help us prevent conflict in some cases.[163] Warren states that these new regulations envision bargaining that "does not fall under the strict definition of 'mediation' in the sense that contending parties invite a third person as referee. Yet, it could quite conceivably become so, if the field develops to the point where federal agencies find it advisable to retain mediation specialists on their staffs, or if private applicants find third parties more acceptable to environmental opponents."[164]

In my view, even if formal mediation never arises directly from the scoping and early planning negotiations under the new regulations, these new processes offer agencies the opportunity to practice less formal methods of dispute resolution such as "conflict assessment" or "conflict anticipation." Such early negotiations can be preferable to mediation in the view of one practitioner "because it enables interested parties. . . to work together before intense fear and distrust have developed and before serious costs have been incurred."[165]

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[163] See Environmental Mediation, supra note 6, at 14.

[164] Id., at 15.

[165] Id., at 26.

CHAPTER FOUR

AGENCY PARTICIPATION IN ENVIRONMENTAL DISPUTE RESOLUTION: THE LEGALITY OF CONFIDENTIAL BARGAINING

Introduction

There are a number of legal questions raised when government agencies seek to participate in environmental dispute resolution. In this chapter, I will examine one of these questions in depth, the issue of confidentiality, and briefly sketch the issues raised by two other major questions: the desirability of expanded agency discretion and the appropriate scope, if any, for judicial review of consensual settlement of environmental disputes.

In the past fifteen years, both the Congress and the legislatures of all fifty states have enacted legislation that mandates "open meetings" for most government bodies[167] and gives the public and press the "right to know" how government decisions are made. But, as I will show, practitioners experienced in bargaining procedures believe that confidentiality is a critical element in the process -- unless meetings are held behind closed doors and the discussions remain confidential, they feel, bargaining becomes impossible.[168] If the open government legislation of recent years applies to agency participation in environmental resolution efforts, then the confidentiality necessary to the success of bargaining efforts will be threatened and settlements endangered.

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[167] The federal statute, the Administrative Procedure Act (APA), and most state laws, do not apply to the executive, cabinet secretaries, the legislature, or the courts.

[168] See pp. 75-77 infra.

The most direct threat to confidentiality is posed by the government in the Sunshine provisions of the APA,[169] that require federal government meetings to be open to the public. As the case study I will present shows, frank discussion simply does not occur when the fragile, interpersonal, dynamic, bargaining that is at the heart of both negotiation and mediation is exposed to public scrutiny.

A second, less direct, threat to confidentiality appears in the Freedom of Information Act,[170] also part of the APA, which requires that federal agencies disclose to the public the records of agency action in their files. The problem with this "right to know" statute is that future bargaining will likely be discouraged if the parties know that their deals, trades, posturing, or just plain ignorance will inevitably be exposed. The potential embarrassment, loss of face, and disclosure of "roads not taken," that would result from making bargaining records public would prove a strong disincentive to participation. Finally, I will briefly describe the relationship of the Federal Advisory Committee Act[171] to the confidentiality concerns just noted.

AGENCY DISCRETION AND JUDICIAL REVIEW

The participation of government agencies in ad hoc informal processes (such as bargaining in environmental dispute resolution) raises some critical legal and political questions regarding the desirable extent of

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[169] 5 U.S.C. § 552 (1976).

[170] Id., at § 552b (1976), as amended.

[171] Id., at App. I.

agency discretion in decision-making and the need for, and scope of, judicial review, or other processes, to check that discretion. Under the APA, federal agencies are granted only two formal procedures for decision-making, either adjudicatory proceedings[172] or notice and comment rule-making;[173] the Act is silent as to such procedures as negotiation and mediation. Yet, as any knowledgeable observer of American administrative agency practice can testify, informal and highly discretionary processes form the vast bulk of action taken by agencies.[174] In light of this fact, a number of commentators argue that this vast area of discretionary action must be circumscribed and regulated, while at the same time note the practical difficulties in their schemes.[175]

One of the common elements in various proposed schemes for limiting agency discretion is the use of the courts to review agency decisions.[176]

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[172] 5 U.S.C. § 554 (1976).

[173] Id., at § 553. The acceptance by the federal courts in recent years of so-called "hybrid rule-making" has been severely criticized by the Supreme Court in the Vermont Yankee case. See supra note 44.

[174] Most scholars estimate that 80-90 percent of agency actions are informal and discretionary. See K. Davis, Discretionary Justice (1969) at vi. See also Stewart, supra note 28, at 1671-88. Stewart notes that there is an enormous range of agency discretion pertaining to choices such as: who is prosecuted and how vigorously; who is offered settlement, and on what terms, after litigation has commenced; and the working out of agency policy by negotiation with regulated firms. Id., at 1687.

[175] See Davis, supra note 174; Sofaer, "Judicial Control of Informal Discretionary Adjudication and Enforcement," 72 Colum. L. Rev. 1293 (1972); Jaffe, supra note 66.

[176] See e.g., Zimmer and Sullivan, "Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests," 1976 Duke L. J. 163, 206-224 (1976).

This can be a difficult and involved question when, as here, we are dealing with an innovative practice that differs markedly from formal agency procedures. Once agencies begin to engage in environmental dispute resolution, we must deal with such issues as the necessity for review of consensual processes, the standards of review, the capacity of the courts to conduct such review, and the effect of review on the process.

In the Conclusion of this thesis, I address many of these problems and present my proposals for dealing with the allied problems of agency discretion and judicial review. For the moment, however, the question is whether the confidentiality of bargaining processes can be maintained when the participation of government agencies "trigger" the provisions of the APA's open meetings and freedom of information provisions.

BARGAINING IN THE SUNSHINE -- AN INHIBITED PROCESS

Underlying the argument against open bargaining sessions for mediation or negotiation of environmental disputes is the experience of those who have attempted to bargain in the "sunshine". For example, Gerald Cormick has noted that the mediation process leading to settlement of the I-90 dispute[177] was televised, but the greatest progress took place when the TV cameras were turned off. Only then could the parties talk in a more relaxed atmosphere.[178]

In a more recent case, we can clearly see the problems posed when environmental mediation has no "clouds" to hide behind. Howard Bellman,

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[177] See supra note 60.

[178] Environmental Mediation, supra note 6, at 32.

a mediator with the Wisconsin Center for Public Policy, was invited to assist in resolving a five-year-old dispute over conflicting sites for the new $51 million Madison Area Technical College (MATC).[179] In that dispute, Madison city officials have argued for a downtown campus, citing problems of transportation and urban sprawl. They say the city would be stuck providing thousands of dollars for extending city services if a suburban location is chosen. But members of both the MATC board and the state vocational education board favor a suburban site in the town of Burke, because they feel the rural location would provide better access to outlying areas of the Madison vocational school district.[180]

When Bellman attempted to bring the feuding parties together in a closed session to discuss the differences, reporters from two local newspapers and a radio station refused to leave the room, citing Wisconsin's open meetings law as the basis for their position.[181] Bellman declined having the reporters removed by the police -- fearing that this would create a cause celebre that would overshadow the MATC question[182] -- but also refused to continue the meeting in open session. Bellman noted: "On the basis of the work I have done on this case and on the basis of

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[179] Telephone interview with Cynthia Sampson, Wisconsin Center for Public Policy, Madison, Wisconsin, April 20, 1979. (Hereafter cited as Sampson Interview).

[180] "C-T demands open MATC meeting," The Capital Times (Madison), January 24, 1979, at 1.

[181] "Reporters halt meeting; court opinion sought," The Capital Times (Madison), January 26, 1979, at 1.

[182] Sampson Interview, supra note 179.

what I have learned about the process of negotiation over a number of years, bargaining reasons indicate that a closed meeting is required. If it is not held as a closed session, the bargaining will not be effective -- negotiations will not be a success."[183]

It soon became evident to Bellman that any attempt to close MATC bargaining sessions to reporters would only lead to additional publicity and a suit against the city and MATC board by one of the newspapers.[184] Trying both to avoid a media crusade and continue the negotiations, Bellman chose to meet with the parties in small groups. By keeping the groups quite small, Bellman was able to avoid invoking the open meetings law since the prerequisite quorum of a government body was never present.[185]

But in mid-April, 1979, the talks broke down completely. In Bellman's view, the problem was directly related to his inability to bring all the parties together in one room for bargaining. Without these closed negotiating sessions involving all the public bodies, Bellman found that he could not build the commitment to the negotiating process he felt was necessary to make the mediation process work.[186]

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[183]"Reporters halt meeting; court opinion sought," The Capital Times (Madison), January 26, 1979, at 1.

[184]The Capital Times newspaper was adamantly opposed to the closed negotiating sessions. Its editor wrote, "Both the City Council and the MATC board claim the purpose of the talks is to 'conduct other public business, which for competitve or bargaining reasons, require a closed session.' That is lawyers' doubletalk for freezing the taxpayers out of a meeting in which a handful of men behind closed doors decide how to spend $51 million of public funds." See "Public business in secret," The Capital Times (Madison), January 25, 1979.

[185]Sampson Interview, supra note 179.

[186]Sampson Interview, supra note 179.

SUNSHINE ACTS: MUST BARGAINING BE OPEN TO THE PUBLIC?

In 1976, the Congress enacted the Government in the Sunshine Act.[187] In the words of the House Report, "this legislation represents a further, logical step in the continuing process of opening governmental decision-making to the public at the Federal and State levels."[188] As will be seen with the Freedom of Information Act,[189] state legislatures had first enacted similar statutory schemes, and today all fifty states have legislation requiring that certain meetings of governmental bodies be open to the public.[190]

Scope

The Sunshine Act is not as broad as the Freedom of Information Act; the mandate to open meetings to the public applies only to an agency "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate. . . ."[191] Thus, the Act does not apply

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[187] Pub. L. No. 94-409, 90 Stat. 1241 (1976); 5 U.S.C. § 552b (1976). (Although the Act is codified in various sections of Titles 5 and 39 U.S.C., it is only the Act's open meetings provisions found in 5 U.S.C. § 552b that we consider here.)

[188] H.R. Rep. No. 880, pt. 1, 94th Cong., 2d Sess. n.6 at 4 (hereafter cited as House Report).

[189] 5 U.S.C. § 552(a)-(e) (1976).

[190] See "Where's the Sunshine? Inadequacy of Pennsylvania's Open Meeting Law," 82 Dick. L. Rev. 719 (1978) for a compilation of the fifty state statutes at 719, n.4; the provisions of the state statutes then in effect are summarized in Hollow and Ennis, "Tennessee Sunshine: The People's Business Goes Public," 42 Tenn. L. Rev. 527, 535 n.34 (1975).

[191] 5 U.S.C. § 552(a)(1) (1976).

to single-headed federal departments such as Defense, HEW, HUD or to single-headed federal agencies like the Environmental Protection Agency. The Senate Government Operations Committee, which reported the bill, explained the reasons behind this distinction:

> Multiheaded agencies operate on the principle of give-and-take discussion between agency heads. There is a tradition of public dissent; though the agency takes a final action, it does not necessarily speak with one voice. The agency heads are high public officials, having been selected and confirmed through a process very different from that used for staff members. Their deliberate process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decision-making.
> The single-headed agency acts differently. Only the single head is ultimately responsible for agency actions, while the staff functions as extensions of the head. Opening staff meetings presents many complications, not the least of which is determining which of the innumerable staff meetings that occur every day should be open. While these difficulties may not be insurmountable, they require a different approach than that used in [the Act].[192]

The Committee then went on to estimate that some forty-seven federal agencies, including most of the regulatory agencies, would come under the Act.[193]

The Sunshine Act requires that "every portion of every meeting of an agency shall be open to public observation,"[194] unless it falls within an exemption. Exemptions are permissive rather than mandatory, and a strong presumption in favor of openness exists.[195] The Sunshine Act shares

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[192] S. Rep. No. 354, 94th Cong., 1st Sess. (1975) at 16-17 (hereafter cited as Senate Report).

[193] Id., at 15-16.

[194] 5 U.S.C. § 552b (b) (1976).

[195] See Senate Report, supra note 192, at 3, 20; "The Government in the Sunshine Act - An Overview," 1977 Duke L. J. 565, 567 n. 11 (1977).

a number of exemptions with the Freedom of Information Act; both exempt from disclosure the following information:[196] classified information (relating to national defense and foreign policy);[197] personnel matters;[198] matters exempted by statute;[199] trade secrets and confidential business information;[200] matters constituting an unwarranted invasion of personal privacy;[201] investigatory records;[202] and bank reports.[203] In addition, the Sunshine Act provides for three other exemptions: matters concerning criminal accusation or formal censure;[204] disclosures which would be pre-

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[196] Insofar as the exemptions of the Sunshine Act follow those of the Freedom of Information Act, they should be accorded similar judicial interpretation. Senate Report, supra note 192, at 20. Thus, discussion of the effect of the exemptions on bargaining is found in the Freedom of Information Act section. See pp. infra.

[197] 5 U.S.C. §552b(c)(1)(1976); see generally K. Davis, 1 Administrative Law Treatise, 2d ed. (1978) ch. 5: "The Government in the Sunshine Act - An Overview," 1977 Duke L. J. 565 (1977); Hirschorn, "Sunshine for Federal Agencies," 63 A.B.A. J. 55 (1977); Cox "A Walk Through Section 552 of the Administrative Procedure Act: the Freedom of Information Act; the Privacy Act; and the Government in the Sunshine Act," 46 Cinn. L. Rev. 969, 981-87 (1977); Wickham, "Let the Sun Shine In!: Open Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government," 68 Nw. U. L. Rev. 480 (1973) (hereafter cited as Wickham I).

[198] 5 U.S.C. § 552b(c)(2)(matters that "relate solely to the internal personnel rules and practices of an agency").

[199] Id., § 552(c)(3).

[200] Id., § 552(c)(4).

[201] Id., § 552(c)(6).

[202] Id., § 552(c)(7).

[203] Id., § 552(c)(8).

[204] Id., § 552(c)(5).

mature and harmful in certain circumstances;[205] and information relating to litigation, arbitration, or adjudication.[206]

Conflicting Interests

These specific exemptions indicate that the value of open government is not absolute, other legitimate interests may be threatened by a strict rule of openness. All Sunshine legislation, both state and federal, has acknowledged the need to promote an accommodation between potentially conflicting interests.[207]

Where compromise and consensus are a necessary part of the governmental process, closed debate has significant advantages. This was the case during the Constitutional Convention of 1787, according to constitutional scholar Paul Freund:

> Secrecy, it is fair to suppose, promoted free and candid debate within the convention, and vitally encouraged the shifts in voting, the great compromises, calculated ambiguities and deliberate lacunae that made possible in the end a masterful charter. . . .[208]

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[205] Id., § 552(c)(9) ("disclose information premature disclosure of which would --
(A) (relates to financial institutions)
(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action. . . .")

[206] Id., § 552(c)(10).

[207] See Note, "Government in the Sunshine: Judicial Application and Suggestions for Reform," 2 Fla. St. U. L. Rev. 537, 552 (1974); Recchie and Chernoski, "Government in the Sunshine: Open Meeting Legislation in Ohio," 37 Ohio St. L. J. 497, 507 (1976); Note, "Open Meeting Statutes: the Press Fights for the 'Right to Know'," 75 Harv. L. Rev. 1199, 1203 (1962).

[208] Freund, "On Prior Restraint," Harvard Law School Bulletin, August, 1971 at 3, quoted in Bassett v. Braddock, 262 So. 2d 425, 426-7 n. 4 (Fla. 1972).

This need for privacy, particularly during the early stages of debate, is an institutional need whose denial is likely to diminish the quality of final decision-making, and, ironically, work against the very public interest that openness was meant to serve. The case has been well-stated by Professor Douglas Wickham:

> [I]n the early stages of working out a particular problem, it makes a good deal of sense for any governmental body to retain a zone of privacy within which its members can air internal disagreements. A position, once publicly taken, is not easily changed; and it seems undesirable to encourage the adoption of "first thoughts" by requiring that all collective governmental thinking be done in public. Few subordinates would feel free to offer constructive ideas for fear of appearing to be in opposition to the eventual decision of the final authority. The value competing against a "right to know" then is not a "right to secrecy", but an assurance of some insulation from the intense heat of public pressure. Priorities must be determined, decisions made, and programs implemented. Absolute openness will detract from the overall public interest in informed and rational governmental decisions.[209]

If we can now say that the public's interest in open meetings is not absolute, are there any arguments favoring closed meetings when government officials participate in environmental bargaining?

Mediation in the Shade -- Reason and Precedent

While Professor Wickham has been one of the more vocal proponents of open meeting legislation,[210] he notes that there are "situations upon which there is some consensus that openness is undesirable."[211] Among

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[209] Wickham I, supra note 197, at 481-82 (footnotes omitted).

[210] See Wickham I, supra note 197; Wickham, "Tennessee's Sunshine Law: A Need for Limited Shade and Clearer Focus," 42 Tenn. L. Rev. 557 (1975) (hereafter cited as Wickham II).

[211] Wickham I, supra note 197, at 485.

these is collective bargaining:[212] "Commentators have long recognized the infeasibility of conducting collective bargaining negotiations in public. The give-and-take of compromise involves too much loss of face to expect the participants to bargain freely before outside observers."[213] Collective bargaining negotiations simply cannot effectively be carried out if open to the public, and much the same can be said for environmental negotiation or mediation since they too are ultimately based on the "give-and-take" of bargaining.

In a number of states, the need for privacy in collective bargaining has been recognized by the legislature and the state open meetings statute will specifically exempt collective bargaining sessions.[214] The Michigan statute is illustrative, allowing closed meetings "For strategy and negotiation sessions connected with the negotiation of a collective bargaining agreement when either negotiating party requests a closed hearing."[215]

Most states, however, have not provided for such an exemption. In Florida, for example, whose sunshine law[216] is one of the most stringent,[217] allowing for no exemptions to the open meeting requirements other than

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[212] Wickham I, supra note 197, at 490.

[213] Wickham II, supra note 210, at 564.

[214] Arizona, California, Idaho, Illinois, Kentucky, Michigan, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Washington, and Wyoming had provisions as of 1976.

[215] Open Meetings Act, Sec. 8, M.C.L. § 15.261 et.seq. (West Supp. 1978); see Wexford Cty. Prosecuting Atty. v. Pranger, 268 N.W. 2d 344 (Mich. C.A. 1978).

[216] Fla. Stat. Ann. § 286.011 (West 1975).

[217] The statute is criticized for its lack of exemptions, especially for personal matters, in Note, "Government in the Sunshine: Promise or Placebo?" 23 U. Fla. L. Rev. 361, 371 (1971).

those mandated by interpretation of the state constitution, the state supreme court refused, for many years, to recognize any implicit exemptions.[218] But in 1972, the court reversed itself in the case of Bassett v. Braddock,[219] finding that policy considerations of pragmatism and fairness[220] led it to find labor negotiations exempt from the open meetings requirement.

In Bassett, the state court construed Florida's constitutional guarantee of the right of employees to bargain collectively as exempting the negotiations from sunshine requirements, since "meaningful collective bargaining in the circumstances here would be destroyed if full publicity were accorded at each stage of the negotiation."[221] The court found "impressive, uncontroverted testimony by respectable national authorities in the field. . ." that collective bargaining would be futile if held under the spotlight of public scrutiny.[222] The court reasoned that there would be no problem "so long as the ultimate debate and decisions are public and the 'official acts' and 'formal action' specified by the statute are taken in open 'public meetings'. This affords the adequate and effective protection to the public on the side of the 'right to know' which was intended."[223]

The court in Bassett also held that the officials of the public

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[218] See e.g., Bd. of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971).

[219] 262 So. 2d 425 (Fla. 1972).

[220] See Comment, "Government in the Sunshine: Another Cloud on the Horizon," 25 U. Fla. L. Rev. 603, 608 (1973).

[221] 262 So. 2d 425, at 426.

[222] Id.

[223] Id., at 427.

agency could instruct and consult with its negotiators in private.[224] This further extension of the right to privacy is important because the formulation of strategy by the bargaining parties is an integral part of the negotiating process. Were negotiating sessions closed and strategy sessions open, little would be gained.

Other courts have followed the lead of Florida. In Talbot v. Concord Union School District,[225] the New Hampshire supreme court was considering the defendant school board's refusal to permit the plaintiff, a reporter, to attend the bargaining committee's sessions. The parties had agreed that none of the exceptions to the New Hampshire Right to Know Law[226] were applicable and the issue presented to the court was whether the committee's bargaining sessions were within the purview of the Act.

The court clearly understood the nature of the competing interests, noting that there were "two legislative policies which bear on this issue. The first policy is that of the Right to Know Law, which is to protect the democratic process by making public the decisions and considerations on which government is based."[227] The second was the collective bargaining statute which recognizes the right of public employees to negotiate with the government.[228]

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[224] 262 So. 2d 425, at 428; see also City of Winter Haven v. Florida Pub. Emp. Rel. Comm., 358 So. 2d 1374 (Fla. App. 1978)(Discussions and consultations of the chief executive officer of a public employer with the legislative body relative to collective bargaining are exempt from open meetings law).

[225] 323 A.2d 912 (N.H. 1974).

[226] RSA 91-A:3 (Supp. 1973)

[227] 323 A.2d, supra note 225, at 913.

[228] Id.

The court found no guidance in the legislative history of the Right to Know Law, but reasoned that "it is improbable that the legislature intended the law to apply in such a fashion as to destroy the very process [i.e., collective bargaining] it was attempting to open to the public."[229] Accepting the holding of Bassett, the court agreed that there was "substantial authority" in support of the position that the "delicate mechanisms of collective bargaining would be thrown awry if viewed prematurely by the public."[230]

In another decision,[231] following Bassett and Talbot, the Iowa supreme court found that it would be impermissible to allow a school board to unilaterally determine that negotiating sessions be open "since bargaining in public would tend to inhibit, if not destroy, the bargaining process."[232] The Iowa court found particularly persuasive the fact that

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[229] 323 A. 2d, supra note 225, at 913.

[230] Id.; see authorities cited in the opinion. Contra, Littleton Educ. Ass'n v. Arapahoe City School Dist., 553 P. 2d 793 (Colo. 1976) (Distinguishes Bassett on grounds that in Florida public employees have a constitutionally protected right to bargain collectively which was held to be infringed by mandating open sessions, while Colorado has neither constitutional nor statutory provisions for collective bargaining in the public sector.)

The Colorado court in this case avoided any discussion of the competing interests at stake, simply finding that citizens "should have an opportunity to become fully informed." (at 798). Further, the court appears to have misread Bassett. The Florida constitutional provision at issue (Art. I § 6) guaranteed collective bargaining for employees. In the absence of implementing legislation, the Florida court applied the guarantee to the school teachers because "To do otherwise could well deny the public employees' rights to bargain collectively." (at 426).

[231] Burlington Community School Dist. v. Public Employees Relations Bd., 268 N.W. 2d 517 (Iowa 1978).

[232] Id., at 523.

several state labor boards have ruled that a public employer's unilateral demand that negotiating sessions be opened amounts to bad faith on the part of the employer since the bargaining process would be virtually destroyed.[233]

Further authority in favor of the general proposition that collective bargaining sessions need not be opened to the public is found in the Bassett case where cited opinions of the Attorneys General of Massachusetts and Wisconsin state that there is no violation of their respective sunshine laws where labor negotiations are held behind closed-doors.[234] Also, the American Bar Association's Committee on State Labor Law found that "the record indicates a prevailing belief that the presence of the public and/or the press at negotiating sessions will most likely inhibit the free exchange of views and tend to freeze negotiations into fixed positions."[235]

Conclusion

Read together, the statutory history of the Act, the views of distinguished scholars, and the statutes and cases from a number of states that exclude collective bargaining from "Sunshine" provisions, argue strongly, I feel, for the proposition that bargaining sessions in environmental mediation and negotiation processes may legitimately be closed. This position is only strengthened when we examine the earlier Freedom of Information Act and see how the courts and scholars have interpreted

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[233] Burlington Community School Dist. v. Public Employees Relations Bd., 268 N.W. 2d 517 (Iowa 1978); see state board rulings listed here.

[234] See 262 So. 2d, supra note 219, at 427 n. 9.

[235] Id., at 427.

its exemptions.

THE FREEDOM OF INFORMATION ACT

History

The original Administrative Procedure Act of 1946 did little to change the tradition of federal agency control of access to information in their files. Section Three of the Act[236] provided that matters of official record would be available to the public subject to several qualifications: the matters must be of official record; items covered by various "secrecy" statutes were unaffected; access to information was to be in accordance with published agency rules; persons seeking access had to show that they were properly and directly concerned; and agencies could hold documents "confidential for good cause" as they saw fit.[237]

The first call for a fundamental change in this general pattern of agency secrecy came from the press, which for years had felt frustrated by its inability to learn more about the operation of the federal government. In 1953, the American Society of Newspaper Editors commissioned a study of governmental secrecy that,[238] when published, heightened the interest of both the press and legislators in secrecy in the Executive departments and agencies. Over the next dozen years, support for greater

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[236] 5 U.S.C. § 1002 (1964).

[237] Id.

[238] H. Cross, The Public's Right to Know (1953). The author, Harold Cross, was counsel for the New York-Herald Tribune and a professor at Columbia University. See H. Rep. No. 1497, 89th Cong., 2d Sess., reprinted in [1966] U.S. Code Cong. and Ad. News 2418, 2419 (hereafter cited as House Report).

public access to government files grew in both the House and Senate.[239]

In February, 1965, Freedom of Information Act legislation was introduced in Congress.[240] Senator Long (D.-Mo.), who introduced the Senate version, quoted James Madison in explaining the philosophy behind the proposed law:

> Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.[241]

To assure the public access to information, Long explained that the "purpose of the present bill. . .[is] to establish a general philosophy of full agency disclosure. . . ."[242]

But Long also recognized that:

> [At] the same time that a broad philosophy of 'freedom of information ' is enacted into law, it is necessary to protect certain equally important rights of privacy. . .
>
> and
>
> . . .also necessary for the very operation of our Government to allow it to keep confidential material. . .[243]

Long concluded that: "It is not an easy task to balance the opposing

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[239] See Note, "Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 N.D. Lawy. 417 (1956).

[240] H.R. 5012, 89th Cong. 1st Sess. (1965); S.1160, 89th Cong. 1st Sess. (1965).

[241] S. Rep. No. 813, 89th Cong. 1st Sess. 2-3 (1965). (hereafter cited as Senate Report).

[242] Id., at 3.

[243] Id.

interests, but it is not an impossible one either."[244]

The problem of balancing "the opposing interests" is addressed in the Freedom of Information Act[245] (FOIA) by means of nine specific exemptions from the general mandate of full agency disclosure: national defense; internal personnel practices; matters exempted by statute; trade secrets and confidential business information; certain types of interagency and intra-agency memoranda; matters constituting an unwarranted invasion of personal privacy; investigatory records; bank and other financial institution reports; and certain geological data pertaining to wells.[246]

Despite the availability of these exemptions, the FOIA had been vigorously opposed by the federal agencies,[247] and passage of the Act did not magically open previously closed doors.[248] Congressional dissatisfaction with agency reluctance to provide information when requested by the public, coupled with the legislators' distaste for a series of federal court decisions that had upheld agency nondisclosure,[249] eventually led to

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[244] Senate Report, supra note 241, at 3.

[245] Pub. L. No. 89-487, 80 Stat. 250 (1966), 5 U.S.C. § 552 (1976).

[246] 5 U.S.C. § 552(b)(1)-(9) (1976).

[247] See Note, supra note 239, at 417.

[248] See H.R. Rep. No. 92-1419, 92d Cong, 2d Sess. (1972).

[249] See, e.g., EPA v. Mink, 410 U.S. 73 (1973) (allowing courts to defer to expert agency judgment in military secret cases under the (b)(1) exemption); see also Aspin v. Dept. of Defense, 491 F. 2d 24 (D.C. Cir. 1973); Ditlow v. Brinegar, 494 F. 2d 1073 (D.C. Cir. 1974) cert. denied, 419 U.S. 974 (1974); Center for National Policy Review on Race and Urban Issues v. Weinberger, 502 F. 2d 370 (D.C. Cir. 1974); Weisberg v. U.S. Dept. of Justice, 489 F. 2d 1195 (D.C. Cir. 1974) (all four of these cases dealt with the (b)(7) exemptions for agency investigatory files).

a movement to amend the Act.[250] The Congress was particularly concerned about the "overuse" of exemptions; long delays in providing information; and a general agency attitude of noncompliance.[251] To address these concerns, the proposed amendments tightened the language of exemptions (b)(1) (national defense) and (b)(7) (investigatory records), placed strict limits on the timing of agency compliance,[252] provided for disciplinary action against an officer or employee who violates the Act,[253] and allowed a court to assess attorney fees and other litigation costs against the government when a complaint was successfully prosecuted.[254] Although vetoed by President Ford, Congress overrode his veto and the amendments became law on February 19, 1975.[255]

The Act and Environmental Mediation

Under the FOIA, "any person"[256] may request records of a federal agency and, unless those records fall within one of the nine exemptions to the Act, the agency must make the records "promptly available."[257] If an agency has participated in an environmental mediation effort, the re-

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[250] See Note, "Developments Under the Freedom of Information Act -- 1974," 1975 Duke L. J. 416 (1975).

[251] House Report 92-1419, supra note 248.

[252] 5 U.S.C. § 552(a)(6) (1976).

[253] Id., at (a)(4)(F).

[254] Id., at (a)(4)(E).

[255] Pub. L. No. 93-502; 88 Stat. 1561 (1974).

[256] 5 U.S.C. § 552(a)(6) (1976).

[257] See K. Davis, 1 Administrative Law Treatise, 2d. ed. (1978) ch. 5, for a full description of the operation of the Act.

cords of its participation (e.g., transcripts of meetings, memoranda regarding negotiations, documents furnished by other parties, letters to other concerned agencies, etc.) could be made public if not covered by an exemption.[258]

Public accessibility to agency records or orders regarding an environmental mediation effort should be encouraged to the extent such accessibility is limited to final orders and statements of policy regarding agency action (or, inaction). However, permitting public access to agency records of the negotiation sessions themselves, or to the agency's internal deliberative process, or confidential information furnished by private parties, destroys the privacy of mediation and thus discourages future mediation efforts.[259]

The principal danger of openness in the bargaining process, as has been noted, is that it inhibits the "give-and-take" associated with bargaining and makes meaningful negotiation difficult.[260] The negotiating parties simply don't want their private bargaining process exposed. Further, if agency records of negotiation and deliberation were available, agency officials may become hesitant to participate in environmental media-

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[258] § 552(a)(2)(B) requires each agency to make available for public inspection and copying "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

§ 552(a)(2)(A) requires each agency to make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

Reading the two sections together, it seems likely that any agency action (or, in some cases, inaction) stemming from an environmental mediation effort would trigger the Act.

[259] See pp.75-77 supra.

[260] See ABA Committee on State Labor Law_____.

tion for fear that their tentative ideas, erroneous opinions, or just plain ignorance would be made public. The drafters of the FOIA recognized this problem: "It would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny."[261] Finally, legitimate privacy interests or confidential information could be endangered by public access, leading private parties to avoid mediation efforts involving government agencies. In short, if forced to "operate in a fishbowl,"[262] it is doubtful that environmental mediation efforts could succeed.

The Exemptions

If the privacy of negotiations is to be maintained, we must determine whether any of the nine exemptions available under the Act would be applicable to the records[263] of an agency which had participated in an environmental mediation effort. The exemptions most likely to be of use are: (b)(4)[264] (confidential business information); (b)(5)[265] (inter-

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[261] Senate Report, supra note 241, at 9, quoted in EPA v. Mink, 410 U.S. 73, 87 (1973).

[262] Id.

[263] It would be possible, of course, for an agency to participate in an environmental mediation effort and avoid compliance with the FOIA by simply not putting anything in writing; the Act applies only to written records. This is not wholly impractical either: for example, all notes, minutes, resolutions, etc. could be produced and controlled by private parties, and all agency deliberations could be oral.

[264] 5 U.S.C. § 552(b)(4) (1976). "trade secrets and commercial or financial information obtained from a person and privileged or confidential."

[265] Id. at (b)(5). "inter-agency or intra-agency memorandums (sic) or letters which would not be available by law to a party other than an agency in litigation with the agency."

agency and intra-agency memoranda); and (b)(7)[266] (investigatory records).

Exemption (b)(4)

The purpose of exemption (b)(4) is the protection of a legitimate private need, the ability of private parties to discuss with government confidential matters that have not been made public.[267] The drafters of this exemption specifically included negotiation and mediation efforts as examples of processes where confidentiality concerns outweigh the public's need to have access to agency records:

> This exemption would assure the confidentiality of information obtained by government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. . . .This exemption would include. . .negotiation positions or requirements in the case of labor-management mediations.[268]

The legislative intent in this area is apparently so clear, that no case has arisen in which the issue of access to mediation records under the FOIA has been litigated. But, were a case to arise in the context of environmental mediation, we can look to other authority besides the Act's legislative history to sustain a finding of nondisclosure based on this exemption.

The exemption covers three distinct types of material: (1) trade

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[266] 5 U.S.C. § 552(b)(7) (1976). "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication; (C) constitute an unwarranted invasion of personal privace:. . . ."

[267] See House Report, supra note 248, at 2427.

[268] Id.

secrets;[269] (2) commercial information;[270] and (3) financial information.[271] The latter two must be confidential or privileged and obtained from a person outside the federal government. The term "confidential" in the context of the (b)(4) exemption requires a subjective analysis of whether the matters are customarily held in confidence, according to the Act's drafters.[272]

The courts, in interpreting this subjective test, have established certain objective criteria to test whether a matter deserves confidential status. One statement of the objective test is found in National Parks and Conservation Assn. v. Morton:[273]

> [C]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.[274]

Deterrence of future submissions of information to the federal agency is the first aspect of this objective test. In other words, the

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[269] Because the law as to what constitutes trade secrets is fairly well-settled, we will not discuss it at length here. See R. Milgrim, Trade Secrets (1976).

[270] See Note, "Public Disclosure of Confidential Business Information under the Freedom of Information Act," 60 Cornell L.R. 109 (1974).

[271] Id.

[272] See Senate Report, supra note 241, at 9 ("to protect the confidentiality of information. . .which would customarily not be released to the public by the person from whom it was obtained. . . .")

[273] 498 F. 2d 765 (D.C. Cir. 1974) (confidential treatment of profit and loss figures); see Comment, "National Parks v. Morton," 88 Harv. L. Rev. 470 (1974).

[274] Id., at 770.

court recognizes that confidential information may not be shared with federal agencies if the agencies cannot keep such information from public view.[275] This would appear to acknowledge the validity of the House Report's concern that mediation, negotiation and other bargaining processes should be exempt from the Act. Shielding such matters by use of the fourth exemption would safeguard the confidentiality of information provided to federal agencies in negotiations and encourage the mediation process. At the same time, it should not be too difficult for the agency to define a set of standards for disclosure that would assure the public that this exemption would not be abused.[276]

The second aspect of the Morton court's test, information that could harm a private party's competitive position, provides a further safeguard to maintaining the confidentiality of the mediation process. It guarantees the private party that its most sensitive information, and, potentially most costly if revealed to the public, would certainly be safeguarded.[277]

Taken as a whole, the legislative history of the Act and the position of the courts and agencies regarding exemption (b)(4) indicates that it alone would offer a significant guarantee of confidentiality to the environmental mediation process. Congress clearly foresaw that mediation efforts assisted by federal agencies would be imperiled by the disclosure

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[275] See Pennzoil v. FPC, 534 F. 2d 627 (5th Cir. 1976) (In deciding whether information should be disclosed, the Commission first had to consider whether disclosure would significantly aid it in fulfilling its function).

[276] The EPA already has a set of sophisticated regulations which allow it to withhold information for "reasons of business confidentiality" if satisfactory showings are made. See 40 C.F.R. § 2.201(e).

[277] See Pennzoil v. FPC, supra note 275.

provisions of the Act, and the courts have agreed that the Act should not apply to confidential business information if disclosure would impair the ability of a federal agency to obtain such information in the future. Finally, agencies have shown that they can draft regulations which both safeguard confidentiality and provide the public access to information in their files.

Exemption (b)(7)

In its present, amended, form, (b)(7) applies to all documents whose purpose is to assist an agency inquiry into specific conduct which might be found to have violated a statute or regulation administered by that agency.[278] The exemption applies both to civil and criminal violations.[279]

In the context of environmental mediation, the (b)(7) exemption would most likely apply where the government agency and a private party were attempting to negotiate compliance with a regulation or a remedy for a violation. In these cases, the justification for nondisclosure would rely on one of the following subsections: (A) (interference with enforcement proceedings); (B) (deprives a person the right to an impartial adjudication); and (C) (an unwarranted invasion of privacy).[280]

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[278] In the original FOIA, this exemption was very broad -- the exemption formerly read: "investigatory files compiled for law enforcement purposes except to the extent available to a party other than an agency;" see 5 U.S.C. § 552(b)(7) (1970). Dissatisfaction with the wholesale exclusion of records from disclosure under (b)(7) led to its amendment in 1974, the effect of which was to narrow the exemption significantly. See Kramer and Weinberg, "The Freedom of Information Act," 63 Geo. L. J. 49 (1974); Ditlow v. Brinegar, 494 F. 2d 1073 (D.C. Cir. 1974).

[279] See Davis, supra note 257, at 435.

[280] 5 U.S.C. § 552(b)(7)(A)-(C) (1976).

It is difficult to say how the courts would approach the issue of agency nondisclosures based on this exemption.[281] Still, a reasonable formula appears in a case involving nondisclosure by a civil regulatory agency, exactly the type of agency that would participate in environmental mediation. In Retail Credit Co. v. FTC,[282] the court identified the elements an agency should be required to demonstrate to justify nondisclosure: (1) that the documents were compiled for law enforcement purposes; (2) that the information will be used in a present, or future proceeding; and (3) a showing that disclosure would interfere with enforcement proceedings or constitute an unwarranted invasion of personal privacy.[283] Thus, where the mediation was addressing possible violations of agency regulations, an agency showing that disclosure would harm the mediation effort should, under this formula, be sufficient to justify nondisclosure. Of course, most likely the same result could have been obtained by using the more general (b)(4) exemption.

Exemption (b)(5)

Another exemption that will be of great use to an agency seeking to

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[281] Most of the courts which have considered the exemption faced a request from a hearing respondent or other litigant. See Note, "Backdooring the NLRB," 8 Loy. L. J. 145 (1976). In the case of a mediated settlement, of course, a nonparty would be seeking disclosure.

[282] 1976-1 CCH Trade Cas. No. 60727 (1976).

[283] Id. See also Getman v. NLRB, 450 F. 2d 670 (D.C. Cir. 1971) (cited by this court as outlining the considerations relevant to determining whether disclosure would constitute a clearly unwarranted invasion of personal privacy). Interestingly, the Retail Credit court failed to note that the standard in Getman, involving a (b)(6) exemption ("clearly unwarranted invasion of personal privacy"), was stricter than the standard in (b)(7)(C) ("an unwarranted invasion of personal privacy").

maintain the confidentiality of the environmental mediation process is (b)(5), which permits federal agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency." Because the language of (b)(5) clearly refers to the traditional concepts of discovery proceedings, the courts have used those concepts in interpreting this exemption.[284]

The legislative history of the Act states that the fifth exemption is intended to preserve the process of agency decision-making from the natural muting of full and frank discussion which would occur if all internal communications were made public. An agency cannot "operate in a fishbowl."[285]

The cases that have arisen under (b)(5) make clear that the fifth exemption protects the deliberative materials produced in the process of making agency decisions.[286] Where such deliberative materials are written communications or the written records of oral conversations or interviews, they are clearly encompassed by the "memorandums or letters" language in the exemption.[287]

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[284] See e.g., Renegotiation Bd. v. Grumman Aircraft Corp., 421 U.S. 168 (1975); NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975). Note, however, that in the civil discovery context the position of the party seeking discovery is often dispositive of his ability to override a privilege claim. The FOIA, on the other hand, does not contemplate that the individual need of the plaintiff will be considered as a factor in determining whether disclosure is proper. See House Report, supra note 248, at 2426; NLRB v. Sears Roebuck Co., supra, at 149 n. 16.

[285] House Report, supra note 248, at 2427.

[286] See e.g., EPA v. Mink, 410 U.S. 73, 87 (1973); NLRB v. Sears Roebuck & Co., supra note 284; see also, Davis, supra note 257, at 405.

[287] See Concord v. Ambrose, 333 F. Supp. 958 (ND Cal. 1971).

The major distinction that the courts have used to describe what should be protected from disclosure under exemption (b)(5) is that between "factual" and "deliberative" materials, exempting only the latter.[288] Nevertheless, factual information will be protected when it is "inextricably intertwined with policy-making process,"[289] and the courts will only sever factual material from deliberative memoranda if it does not compromise the deliberative process.[290]

Another distinction has been drawn "between predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision, which are exempt from disclosure, and postdecisional memoranda setting forth the reasons for an agency decision already made, which are not."[291] This distinction is also supported by the Act's legislative history.[292]

In a recent case, Mead Data Central, Inc. v. U.S. Dept. of the Air Force,[293] the court devised a more functional test than either the fact-

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[288] See e.g., EPA v. Mink, 410 U.S. 73, 89-90 (1973).

[289] Soucie v. David, 448 F. 2d 1067, 1077-78 (D.C. Cir. 1971); see also Washington Research Project, Inc. v. HEW, 504 F. 2d 238, 249 (D.C. Cir. 1974) (purely factual matter may be exempt if inextricable without compromise of deliberate process).

[290] Id. Note, however, that even when factual material is "severable" so that disclosure is possible under (b)(5), such material still may be withheld under exemption (b)(4); see Fisher v. Renegotiation Board, 355 F. Supp. 1171 (D.C. D.C. 1973).

[291] Renegotiation Bd. v. Grumman Aircraft Corp., 421 U.S. 168, 184 (1975).

[292] See House Report, supra note 248, at 2422-23.

[293] 566 F. 2d 242 (D.C. Cir. 1977).

policy or pre-post decisional distinctions, stating that: "A decision that certain information falls within exemption five should. . .rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency."[294] Applying that test to the facts before it, the court found, in a case involving negotiation of a government contract, that the (b)(5) exemption applied to the records of agency deliberations regarding its negotiation position,[295] but not to an agency record of the "summary of the offers and counter-offers made by each side" in the negotiations.[296]

In distinguishing between the records of agency deliberations and recorded summaries of the actual negotiations, Judge Tamm overruled the district court, provoking a dissent from his own colleague, Judge McGowan. Tamm argued that there was a clear difference between the records of an agency's "internal self-evaluation of its contract negotiations" and "[i]nformation about the 'deliberative' or negotiating process outside an agency," with only the former deserving exemption under (b)(5).[297] Judge McGowan found this distinction "untenable", noting that "[e]ven a bare recitation of the offers and counter-offers between . . .[the parties] . . .cannot help but reflect internal agency decisions and negotiating strategy."[298]

Additional support for Judge McGowan's position can be found in the

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[294] 566 F. 2d 242 (D.C. Cir. 1977), at 256.

[295] 566 F. 2d, supra note 293, at 257.

[296] Id.

[297] Id.

[298] Id., at 264.

dicta of the Tamm opinion. In a different fact situation from the case at hand, Judge Tamm noted, "Perhaps it could be shown that the threat of disclosure of negotiation proceedings would so inhibit private parties from dealing with the Government that agencies must be permitted to withhold such information. . . ,"[299] and stated that the courts would not require disclosure where an agency could ". . .show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA."[300] Thus, both the logic of the McGowan dissent and Judge Tamm's admission that an agency could withhold the records of a negotiation process upon a sufficient showing indicate that a strong argument could be made against disclosure of mediation proceedings under exemption (b)(5).

Conclusion

It appears that an agency can fashion a strong argument for non-disclosure of documents which constitute the record of an environmental mediation process where disclosure of the documents would violate agency or third party concerns regarding confidentiality. In such cases, the public's right to know must be balanced against a number of critical factors: (1) the confidentiality and privacy concerns of private parties; (2) the confidentiality of the governmental deliberation process; (3) the government's ability to obtain confidential information if it cannot assure that confidentiality will be maintained; and (4) whether disclosure will frustrate the operation of government.

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[299] 566 F. 2d supra note 293, at 258.

[300] Id.

In judging disclosure requests under the FOIA, the courts must attempt to avoid the twin pitfalls of arbitrary disclosure or an equally arbitrary secrecy. Environmental mediation should not become a blanket justification for an agency to keep records from the public view; on the other hand, to force agency disclosure of confidential information (and thus make it impossible to obtain in the future) or expose the records of sensitive bargaining sessions and hard-fought agency debates on negotiating positions, will likely discourage any agency participation in environmental mediation. While a policy of selective disclosure may be difficult, it is not impossible, and the courts are quite capable of deciding when an agency has justified withholding records on the basis of the "specific and detailed proof"[301] which it has provided.

THE FEDERAL ADVISORY COMMITTEE ACT[302]

Unlike a federal agency, which has a statutory function, is composed of government employees, and has substantial independent authority, a federal advisory committee is a group of individuals, comprised of non-agency employees[303] "established or utilized" by one or more federal agencies, or by statute or Presidential order, in the interest of obtaining advice or recommendations for a federal agency or for the President.[304]

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[301] 566 F. 2d, supra note 293, at 258.

[302] Pub. L. No. 92-463, 86 Stat. 770 (1972), as amended Pub. L. No. 94-409, § 5(c), 90 Stat. 1247 (1976), 5 U.S.C. App. I (1976).

[303] Some federal employees may serve on some committees, but no advisory committee may be comprised wholly of federal employees. See 5 U.S.C. App. I § 3(2) (1976).

[304] Id.

Examples of such advisory committees are: President's Council on Physical Fitness and Sports; Federal Advisory Council on Occupational Safety and Health; and the United States Tax Court Nominating Commission.[305]

For the purpose of this thesis, it is not necessary to discuss the general purpose and operation of the Act.[306] The same concerns for the public's right to know that were expressed in the Freedom of Information Act and the Government in the Sunshine Act underlie this legislation, and I will merely note that advisory committees are subject to both the open meetings provisions of the Sunshine Act[307] and the disclosure requirements of the FOIA.[308]

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[305] See Exec. Order No. 12110, 44 Fed. Reg. 1069 (1978).

[306] See Marblestone, "The Coverage of the Federal Advisory Committee Act," 35 Fed. Bar J. 119 (1976); Marblestone, "The Relationship Between the Government in the Sunshine Act and the Federal Advisory Committee Act," 36 Fed. Bar J. 65 (1977).

[307] See 5 U.S.C. App. I §§ 10(a)(1) and (d); 5 U.S.C. § 552(b) (1976).

[308] See 5 U.S.C. App. 1 § 10b; 5 U.S.C. § 552(b) (1976).

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

I have argued in this thesis that bargaining processes -- both negotiation and mediation -- may often be attractive alternatives to adversarial processes for the resolution of environmental conflict. In particular, these informal processes may lower the costs of dispute resolution, achieve agreement in less time than formal procedures, and offer more innovative and "tailored" solutions than are possible through litigation.

Environmental dispute resolution through bargaining does have problems, however. In particular, it may be difficult to implement a consensual agreement, negotiated or mediated by private parties, when the subject matter of the agreement is within the jurisdiction of a government agency. Also, the complex nature of environmental disputes and notions of the "public interest" that arise in environmental conflict can make agreement difficult. I have argued that the participation of government agencies in the bargaining process may help to address these problems.

In earlier chapters, I showed that the incentives for agency participation -- most notably achieving voluntary compliance and conserving agency resources -- should, theoretically, be sufficient to encourage agency participation in some cases. I also indicated some models for agency participation in environmental dispute resolution and showed how traditional procedures, such as consent orders, could be adopted for use in environmental cases.

Finally, I addressed the legal issues involved in maintaining the confidentiality of bargaining processes when government agencies partici-

pate. There, I showed that strong policy arguments could be made for maintaining confidentiality for bargaining purposes and that there was support for that argument in the legislative history of the statutes, in the works of scholars, and in the courts.

What remains for discussion is the issue I mentioned briefly in Chapter Four, the allied questions of agency discretion and judicial review. In this Conclusion, I will examine these questions and provide recommendations for agency practice that address the real policy concerns they raise. Finally, I will indicate some directions for further inquiry in the area of environmental dispute resolution.

The "Problem" of Agency Discretion

There is great room for concern whenever a proposed policy hints at an expansion of discretionary power for government. As Professor Jaffe has noted, "We may grant that power is benign and without it we can do nothing. But it is also malign, fearsome, hateful, and dangerous."[309]

The recent national experience of Watergate is but the latest example of "hateful and dangerous" power being used against the public by government officials. The problem with discretionary use of power is that, absent rules and standards for its guidance, power may be exercised arbitrarily and capriciously so that "the imperfections of human nature are often reflected in the choices made."[310]

But there are also advantages to discretion. With the wise use of

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[309] Jaffe, supra note 66, at 322-23.

[310] Davis, supra note 174, at v.

discretionary power, a decision-maker can "take into account the need for tailoring results to the unique facts and circumstances of individual cases."[311] Thus, in the view of Professor Davis, we must not confuse the existence of discretionary power with the abuse of discretionary power.[312]

By proposing a greater role for government agencies in informal, unstructured, and consensual bargaining processes, I am clearly envisioning a grant of additional discretionary power to the agencies. In fact, I have argued that such discretion is often necessary to address the novel and complex problems posed by environmnental disputes. The question now, of course, is how to prevent this additional discretion from being abused.

First, what does it mean to "abuse" discretion? Professor Davis provides an example:

> The Assistant Attorney General in charge of the Antitrust Division institutes a prosecution against a corporation. His successor, disagreeing with his prosecution policy, dismisses the prosecution, without stating facts, without stating reasons, without publicly relating the case to policies developed in other similar cases, and without any public statement of the basic policies involved.[313]

The abusive element here seems to be the absence of any justification for the choice made; thus, there is no basis whatever for determining whether the new prosecutor had acted in a reasonable, considered, and ethical manner in dismissing the case. But the provision of a "reason" -- even one that appears to be sufficient -- is not enough to guarantee that discretion is not abused. Commenters have noted that a requirement that choices

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[311] Davis, supra note 174, at 17.

[312] Id., at 19.

[313] Id., at 11; see also Id., at 9-12.

be substantiated by statements of reasons for the choice, absent the possibility of further inquiry, "may degenerate into self-serving boilerplate."[314] In other words, if the decision-maker knows that no one will peer behind the stated reasons justifying his choices, he may simply invent some reasonable statement that supports his choice, knowing that his true reasons will remain unearthed.

In the context of agency participation in bargaining processes, this concern regarding an abuse of discretion may, at first, appear to be justified. After all, I have argued that the confidentiality of the process should be maintained and so the very records that could be used to challenge an agency statement of its reasons for a decision would be unavailable; in such a situation wouldn't the agency be free to fashion whatever self-serving statement it desired? Where would be the check on agency decisions?

At closer examination, however, I feel that these problems recede somewhat. In a consensual choice process there is a basic check on agency discretion provided by the concerns of other parties and the need for their agreement in a settlement. Here we have no agency official arbitrarily deciding on a policy; rather, contending parties with opposed interests are included in the process and provide an important check on agency discretion at every stage of the proceeding. But what if the neces- representation of diverse interests is not present? Is there a check on an agency if it participates in bargaining with only a few, hand-chosen

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[314] Zimmer and Sullivan, supra note 176, at 216.

parties and then attempts to pass the settlement off as representing the consensus of all affected parties? How does the agency determine who is an affected party? Does anyone examine that choice?

These questions indicate that problems remain even when the consensual nature of the bargaining process assures that blatant agency abuse of discretion is unlikely. In this next section, I address these concerns.

Structuring and Checking Discretion

Professor Davis believes that there are two basic ways to control agency discretion: "structuring" and "checking". Structuring includes agency statements of its plans, policies, rules, and decisions. Checking involves both administrative and judicial supervision and review.[315] By utilizing both these methods, to varying degrees, agency discretion can be appropriately confined without being destroyed.[316] I am recommending, therefore, that agency participation in environmental dispute resolution efforts should be preceded by clear statements, on the part of the agency, of the rules that are to be used in such an effort, and that courts should be empowered to review agency actions to determine whether these announced rules have been followed.

An agency should be required to state the procedures it uses to judge when its participation in an environmental bargaining effort is worthwhile.

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[315] See Davis, supra note 174, at 55-56.

[316] Professor Davis is clear in stating that errors are made in the direction of too much confinement of discretionary power as well as too little. See Davis, supra note 174, at 52.

The agency should be able to indicate the steps it will take to assure all affected parties will be represented at the sessions. Agency planning for environmental dispute resolution efforts -- for example, resource allocation and personnel availability -- should be announced. Further, this information should be published in the Federal Register and procedures established for receiving comment on the proposals. These announcements and publications will serve to erect a structure for agency participation that is open to public and legislative scrutiny.

When agreements are reached in bargaining efforts, the agency should announce them and, with due regard for confidentiality concerns, produce as complete a record of the process as possible. There should be an opportunity for public comment on the proposed settlement and the agency should provide for administrative review and consideration of such comments.

In short, I am advocating that the agencies confine their own discretion within appropriate limits as stated in rules published in advance of any agency participation in environmental dispute resolution processes. In addition, agencies should publish notice of their intent to participate in any particular bargaining effort and take steps to insure that the parties affected by such a process are included in the bargaining. At this point, I am unprepared to suggest substantive guidelines for identification of affected parties or to suggest when, and under what circumstances, affected parties should be excluded from the process. These are questions that need further examination.

These prospective rules should be fully reviewable as normal administrative procedures comprehended in the rule-making provisions of the APA. In this way, a reviewing court will be able to determine whether

the rules proposed by the agency are themselves unreasonable or an abuse of discretion. It may also be desirable to consider court review of agency decisions regarding participation of affected parties in bargaining sessions, a task that courts have some competence with through their regulation of class representatives in federal class action litigation.[317]

The issue that now remains is whether there should be judicial review of the bargaining process or the settlement itself. I have stated throughout this thesis that environmental bargaining efforts are no guarantee that settlements will be "good" and, leaving aside for the moment the philosophical debate as to what is "good", there is clearly an interest in preventing the implementation of "bad" settlements. But what is a "good" settlement and what is a "bad" settlement?

Many courts, when faced with this type of question, claim that they can only determine whether proper procedures were followed, i.e., if the accepted process has been followed, they will presume that the outcome is acceptable. Thus, in the case of environmental bargaining, the court would determine whether an agency followed its own rules and standards, whether the decision was reasoned and supported by evidence, and whether the action taken by the agency was within the range of discretion it had created for itself. Such review is altogether proper, I feel, and should occur in those instances when a consensual settlement is opposed by outside parties. In fact, opposition by outside parties is probably a good indication that something may be amiss. But what of judicial review of the substance of

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[317] See Stewart, supra note 28, at 1743.

the decision, the terms of the settlement itself? Should this occur? Should the court go any further if it finds a decision to be reasonable and supported by the evidence?

It is not immediately apparent that court review of the substance of agency decision-making would be "better" than a system that left the settlement with the discretion of the agency where consensual processes are at work. In fact, courts have generally adopted a laissez-faire attitude towards consent decrees and settlements, almost always holding them immune from third party attack.[318] But this may be a changing concept. In 1974, with passage of the Antitrust Procedures and Penalties Act,[319] Congress for the first time provided for court review of antitrust consent settlements to determine if they are in the "public interest". What concerned the Congress was that the Justice Department and defendants could enter into a settlement that would be opposed to larger public concerns.

The Act requires the court to make a "public interest" determination before entering a proposed decree and authorizes the use of a number of devices in reaching this determination.[320] These include: a "competitive impact statement" furnished the court by the Justice Department; publicity for the decree and the statement; a sixty-day comment period; the use of expert witnesses; the use of a special master or outside consultants;

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[318] See Zimmer and Sullivan, supra note 176, at 208.

[319] Pub. L. No. 93-528, § 2, 88 Stat. 1706, 15 U.S.C. § 16(b)-(h) (1976).

[320] Id., at § 16(e).

solicitation of additional information; and a provision for intervention.[321] Thus, the Act provides for a full range of judicial devices whose aim is to determine whether the "public interest" has been served. But, the Act has been soundly criticized for its failure to identify just what the "public interest" might be and to define it.[322] Since, in my view, any unitary concept of the "public interest" is absurd, what the Act is really attempting to do, I feel, is to insure that consent decrees in antitrust cases are not wholly opposed to more general concerns. Should such a procedure be used for consensual agreements to environmental disputes?

I think not. If a reviewing court will look long and hard at the procedures used by the agency in reaching settlement, and is satisfied that the agency has followed its own announced rules, I feel that the agreement should be allowed to stand. I am simply not persuaded that the formal adjudicatory process of judicial review can provide a better substantive answer than that furnished by a well-conducted bargaining process. It is not obvious to me that the public's interest would be better served by the availability of substantive court review. The costs of overseeing agency decisions would simply outweigh the benefits. In fact, one of the main advantages of consensual agreements, the efficient use of agency resources, would be lost by requiring elaborate agency defenses of its actions. Further, the mere threat of bringing such litigation before a court would likely induce the agency to reject the consensual agreement and thus avoid

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[321] 16 U.S.C. § 16(f) (1976).

[322] See Zimmer and Sullivan, supra note 176.

the onerous process of substantive review. Finally, I doubt the competence of the courts to make such decisions, and fear the drain on scarce judicial resources that would result from a review that attempted to determine the "public interest". I feel that procedural review is sufficient, when combined with announced agency restrictions on its own discretion, to guard against possible abuse.

Additional Questions and Directions for Further Inquiry

In this thesis, I have only begun to address the questions posed when we attempt to use consensual agreements for resolving environmental disputes. While the issue of confidentiality for bargaining processes now seems clear to me, there is still a great deal of work that remains on the issues of the scope of agency discretion and means for insuring that discretion is not abused. In particular, I need to devise more precise recommendations for agency "structuring" of its own bargaining processes and for agency and court "checks" on agency discretion.

Another very useful area of inquiry is the possible need for statutory changes to facilitate the participation of government agencies in bargaining processes. Will amendment of the Administrative Procedure Act be the best way to accomplish this, or would it be preferable to restructure the procedures mandated by substantive statutes?

A great deal remains to be learned about both how to identify "negotiable" disputes and how best to approach the bargaining process once it has begun. Can we learn how to predict what is a "negotiable" dispute? If not, will that serve as a powerful disincentive to agency participa-

tion because of the agency's aversion to a risky enterprise? If the bargaining process does get underway, how should it proceed? Is there some general way of approaching environmental disputes or is each conflict unique and amenable to resolution only on its own particular terms?

Finally, we need to know much more about the role of mediation in the bargaining process. The mediator may represent the last chance to achieve settlement, yet, at present, we know very little about what constitutes effective practice. An exploration of the current processes of the Federal Mediation and Conciliation Service in the area of labor negotiations seems to be called for.

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