COMMENT

IMPLEMENTATING ENVIRONMENTAL LAWS: "NEGOTIATING EVERYTHING"

by John Cruden

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Although I'm teaching right now at George Washington University, I'm fundamentally a practitioner. By that, I mean I litigate. And if you litigate, you negotiate all the time, so it is interesting for me to read a law review article in which Professor Owen describes a world where people are surprised to find that people are negotiating. It reminds me of the movie *Casablanca* when the captain comes into Rick's gambling casino and says, "I'm so shocked—shocked—to find out that there's gambling here." There's a little bit of that tone in those surprised to find out that litigation is more than court presentations, shocked to find out that most cases end up in negotiated settlements.

Yet, I completely understand that it isn't simple to research what all of us are doing in practice. Research tends to be on cases or regulations and negotiations are in the trenches of our practice, happening every day, but not always visible to the public. Also, to be frank, it is one of the reasons why I love this quotation from the article: "In academic realms, meanwhile, it became received wisdom, at least among many heavily-cited professors at elite law schools, that environmental law is profoundly dysfunctional, largely because of its emphasis on rigid, ill-informed, and centralized coercion."[1]

This quotation tells me that many academics are looking at what I think of as the first part of environmental law—how it was created (the statutes) then how it was promulgated (the regulations). This excludes how it is implemented, largely because, frankly, many law professors don't know how the laws guide the practice of environmental law. Far from being "rigid," environmental law provides a forum for the creative, an opportunity to make advances in environmental improvement through agreement, a chance to find and advocate modern pollution abatement techniques and equipment. Professor Owen is a glowing exception to my academic challenges. First of all, he has real world experience. Second, he did something you don't often see in law review articles—he went out and asked practitioners what they thought and what they are doing. That is what sets his article apart.

I am with Beveridge & Diamond, a law firm that only does environmental law. They would be astonished to find out that everybody doesn't know that we negotiate all the time on every issue. As my career now bounds through both government and private practice, I now believe that settlement prowess is the positive tools of a litigator, and often the end game.

The article did a nice job of highlighting some of the major statutes that are the backbone of our practice and the launching point for effective negotiation. Of course, it makes good sense to start with the Comprehensive Environmental Response, Compensation, and Liability Act,[2] known as CERCLA or Superfund, because that is a statute designed for settlements. Yet, in implementation, the standard consent decree, which I helped develop when I was at the U.S. Department of Justice (DOJ), has some areas you can negotiate and some that you cannot in the private world—we want to negotiate everything. But in the public world, governments often have a need for uniformity and a common practice across relevant jurisdictions. That does not eliminate negotiations, but it does put a premium on experienced practitioners who know where to put their emphasis. But remember, my thesis at the outset is that we're negotiating everything.

One of the implications of the law review article that highlights the axiom "wake up . . . people are negotiating" is to understand that promulgation of the law by regulations is not the end point. Rather, the final product, often a permit, is the product of specific facts, a relevant setting, and the application of external forces and needs,

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1. Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 Stan. L. Rev. 137, 149 (2023).

2. CERCLA 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

such as environmental justice. Experienced practitioners are aware of standard clauses from other similar permits that they can bring to the table when negotiating a consent decree, as well as the experience of many other such settlements and the definitions, terms, and phrases that they have found to be reasonable and generally applicable. Certain areas, like dispute resolution, penalty language, and the specifics of contribution protection, which may differ from case to case, can be guided by language that has been used elsewhere in similar circumstances. All this I would term negotiating.

Another point I want to comment on is about "slippage"—the notion that there are lots of government people who don't have the foggiest idea what they're doing.[3] They walk in, and they get killed by people like me and my law firm. Frankly, I didn't see that. I spent a lot of my life in public life, now in private practice, and I think we have a lot of good negotiators in our law firm. A lot of them came out of the government. However, when I led the DOJ Environment Division, I was also quite proud of our litigators and negotiators. Many had years of experience and completed some of the most well-known cases. Accordingly, I would say that the academic community needs to be wary when talking about slippage, without evaluating the facts and circumstances of a particular result. If bad facts make bad law, bad facts can also make settlement for the government difficult, even with favorable statutes. And some of the bigger cases of our time all provide opportunity for someone to find that some particular part of any settlement was inadequate.

Here is my example. While leading the negotiation of the multibillion dollar resolution of the *Deepwater Horizon* oil spill, I built my negotiations on three trials, multiple court of appeals trips, and years of Agency evaluations of natural resource damages. Our ultimate settlement, well over $20 billion, was announced by Attorney General Loretta Lynch as the largest of its type ever in history, not just of environmental law but of law in general. However, before the settlement was final, we did public hearings in six different locations, including the one I led in the District of Columbia. While many of the speakers applauded the result, others thought there were ways that we could have been better, particularly in geographical areas they cared about. My only point is that coitizing "slippage" is often "in the eye of the beholder."

The article also addresses and promotes transparency, which always sounds good but does have practical implications. It is often said that negotiations cannot be done in a fishbowl, meaning that the give and take of any set of transactions requires some level of protection from public disclosure. That is particularly true in areas like DOJ, where virtually every consent decree goes out for public comment before it becomes final. Further, it is incumbent upon those in the private sector who are negotiating to come to any negotiating session prepared to discuss all terms, but placing the majority of their time on those terms most important to the client.

The problem, though, as Professor Owen wisely points out, is that there isn't really a repository of settlement documents. It would be good if there were nongovernmental organizations or others that would put in one place all the environmental impact statements or all the permits for stormwater, which are worth emulating. Many law firms have their own repository of such documents, and they are quite valuable. The one place that the article misses is that DOJ has a repository of consent decrees,[4] because all the consent decrees subject to public comment are available. And those of us in private practice access the consent decrees that are out for public comment. Those consent decrees provide valuable information on common terms, standard language, and organizational matters.

A quick word about training. At DOJ, we did negotiation training, and often did moot courts for particular settlements. When I was Assistant Attorney General, we devoted one entire day on alternative dispute resolution, bringing in leading mediators to give us advice on good techniques. However, I don't want to let professors off the hook, because there should be a place in law schools, just like there is for trial practice, for the common and extraordinary important set of skills vital to reach a negotiated outcome that all parties can accept.

The equity component of the article challenged me the most—where does equity fit into negotiations? I'm a big proponent of environmental justice. When you're negotiating a permit, you have a client and you're trying to make that work. If you're the government, you're trying to figure out how to meet water quality standards, utilize and meet Best Available Technologies,[5] and how to meet applicable law in a way that is going to survive challenges. You're not always thinking about environmental justice or the role of equity. Yet, that is vital.

Let me tell you two places where equity matters come immediately to my mind. When I first started out at DOJ, we did consent decrees that were largely based on seeking a finding of liability, a penalty (sometimes pretty massive), and injunctive relief. The process has evolved. For example, in negotiating the resolution of the Volkswagen emissions scandal, as probably most of you know, we created a mitigation fund to support states in their effort to reduce the same pollutants that Volkswagen cars illegally emitted. Mitigating the effects of pollution as part of applicable settlements is also a way that communities can

3. Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 Stan. L. Rev. 137, 140 (2023):

> In one—call it the "command-and-control" view . . .—environmental law is centralized and rigid. . . . In the alternative conception—call it the "slippage" view—the rigid protections exist on paper but not in practice, and environmental-law implementation involves government regulators allowing regulated industries to get away with varying degrees of non-compliance.

4. *See, e.g.*, Environmental Protection Agency, Civil and Cleanup Enforcement and Case Settlements, https://www.epa.gov/enforcement/civil-and-cleanup-enforcement-cases-and-settlements (last updated May 23, 2024).

5. *See, e.g.*, Environmental Protection Agency, Setting Emissions Standards Based on Technology Performance, https://www.epa.gov/clean-air-act-overview/setting-emissions-standards-based-technology-performance (last updated Aug. 8. 2023).

be involved and receive some of the benefits of a particular resolution. And this is not a political statement, just a true statement, that during the Donald Trump Administration, they did away with Supplemental Environmental Projects. They are back now and are another way of involving the community.[6]

As a final point, I would like to highlight discussion of enforcement in the article. It included two or three pages on enforcement, but that is really the heart of negotiation. I would like to see a study of the notice letters that DOJ is required by policy to send before bringing an enforcement case. It would be interesting to know the success rate of these pre-filing demand letters, that almost always result in important negotiations. It would be instructive to have an academic review of what happens with those letters. And when there is a settlement, there is a notice-and-comment process, which is another way for communities to be involved, because once a comment is submitted, it has to be taken to the judge before a consent decree can be entered.

In sum, I thought this article was good. I liked it. I thought part of it was challenging, and I particularly appreciate that Professor Owen went out and gathered real-world input.

6. *See* Environmental Protection Agency, Supplemental Environmental Projects (SEPs), https://www.epa.gov/enforcement/supplemental-environmental-projects-seps (last updated May 9, 2024).