COMMENT

THE ART AND SCIENCE OF ENVIRONMENTAL NEGOTIATION

by Ben Grumbles

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I. Shining a Light on the Art and Science of Environmental Negotiation

Black letter law is implemented in countless shades of gray, with interpretation and negotiation at virtually every step of the way. Prof. Dave Owen's article digs deep, beyond the obvious, to underscore that negotiation is not a dark art but a necessary skill that deserves more attention and training. He catalogs the importance, prevalence, and pitfalls of negotiation, providing examples of what is negotiable, when and by whom, how it happens and what results, and whether it can be good or bad on the scale of rigid "command and control" versus flimsy "slippage."[1] Professor Owen's analysis is thorough and balanced on the "centrality of negotiation" and how it impacts outcomes in the world of standards, permits, cleanup, conservation, and enforcement.[2] He also underscores the value of and need for improving the transparency, effectiveness, and equity of negotiation, particularly in state agencies.[3]

States are the nation's implementation stations for environmental law. The 50 states, the District of Columbia, and the territories carry out the majority of U.S. federal environmental programs, typically ranging from 70% to 95%, depending on how you count delegated and partially delegated programs.[4] Customizing and implementing "national standards with neighborhood solutions" is what state and local environmental agencies do, and negotiation is at the heart of it.

Editors' Note: Ben Grumbles' Comment is based on his remarks at the Environmental Law and Policy Annual Review conference. See 2023-2024 Environmental Law and Policy Annual Review Conference, available at https://www.eli.org/events/2024-environmental-law-and-policy-annual-review-elpar-conference.

1. Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 Stan. L. Rev. 137, 150-51 (2023).
2. *Id.* at 141.
3. *Id.* at 143-44.
4. ECOS, *National Environmental Protection: The Role of States* [ECOS General Hill Leave Behind], https://www.ecos.org/wp-content/uploads/2024/04/ECOS-General-Hill-Leave-behind-to-share-16-Jan-2024.pdf (last updated Jan. 16, 2024).

II. The Centrality of Negotiation

Professor Owen identifies examples under the National Environmental Policy Act (NEPA) and environmental impact analysis; Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Endangered Species Act (ESA); Clean Air Act (CAA); Clean Water Act (CWA); and enforcement programs where negotiation is used to flesh out the standards and requirements or to fill in blanks and customize solutions.[5] This happens at both federal and state levels, as well as at points between and below (such as regional and local). Particularly useful are the specific examples where interpretation, customization, and creative problem solving come into play, such as: habitat conservation plans under the ESA, the CAA New Source Review, sectorwide greenhouse gas reductions, moving beyond technology-based controls under the CWA to water quality-based effluent limits, narrative criteria, mixing zones, and total maximum daily load calculations. The CWA's always controversial §404 program revolves around key negotiation points such as "practical alternatives" and compensatory mitigation and related questions of onsite vs. offsite, in-kind vs. out-of-kind, and fees in lieu of mitigation measures.[6]

III. Command & Control, Flexibility & Slippage

Professor Owen is right to point out that negotiation between the regulator and the regulated often leads to better, more creative solutions. Complex challenges involving multiple parties, with downstream or downwind communities, require innovative and customized solutions that rely on more than just federal commands or controls spelled out in regulations.

One of the best examples in the clean water arena, from decades ago, is the 1994 Combined Sewer Overflow (CSO) Policy, an informal regulatory negotiation that helped the

5. 42 U.S.C. §§4321-4370h, ELR STAT. NEPA §§2-209; 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405; 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18; 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618; 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
6. 33 U.S.C. §1344, ELR STAT. FWPCA §404.

U.S. Environmental Protection Agency (EPA), states, communities, and environmental organizations make progress in preventing and controlling releases that weren't explicitly or adequately addressed in the statute or implementing regulations. The resulting framework—specifying minimum controls and long-term control plan provisions—included a good balance of flexibility and accountability and was so widely used that the U.S. Congress eventually embraced it by explicitly requiring in 2000 that every permit, order, or consent decree involving CSOs under the CWA "shall conform" to the 1994 CSO control policy.[7]

One of the best examples today of the need for urgent and artful negotiation is "permit streamlining": getting billions of dollars for clean energy projects and transmission lines approved in months or years rather than decades. Finding the right mix of collaboration, efficiency, and equity among multiple parties, whether in the legislative, regulatory or nonregulatory context requires skillful negotiation.

IV. On Transparency, Effectiveness, and Equity

Professor Owen is right to suggest improvements while recognizing each has certain legal, practical, and financial constraints. Greater transparency in government agencies isn't always so simple; confidentiality agreements, disruptive political forces, and the basic desire at times not to negotiate through the media all lead to a certain amount of "secrecy" when negotiating. Of course, more frequently providing after-the-fact analysis of what was negotiated and why to the public should be encouraged. It leads to more informed and impactful results in future negotiations, too.

Machine learning, artificial intelligence, and other forms of information technology can help lead to more effective negotiation. In the end, though, machines are not the negotiators, at least not yet. It's people, sometimes very inexperienced or unskilled, who negotiate.

On equity, greater inclusion and engagement with underserved communities will help. Knowledge is power, but access to knowledge is not a given. Professor Owen understands that and suggests various ways to increase community access to agency decisionmaking such as increased agency funding for technical assistance and the use of outside foundations and philanthropic organizations. I agree and would supplement with more detail on three action areas:

1. **Classes and clinics on negotiation**. We need more of these. Law schools and agencies should continue to focus first on the basics of environmental programs from black letter law to foundations of standards, permits, enforcement, and finance. However, negotiation skills need more attention and support to bring the basics to life and help future and current practitioners deliver better environmental results. For example: improving timing and detail of negotiated outcomes, much greater investment in training and use of trained facilitators, and increased assistance for better access to information and a more informed process.
2. **Agency "centers" for negotiation and dispute resolution**. State agencies frequently don't have the resources or desire to add new offices, but they do often look at how to realign for better results. A center of excellence for negotiating skills and training within any agency for the benefit of all of its media offices (such as air, water, land, and chemicals) and its enforcement office makes sense. EPA established an office for alternative dispute resolution within its Office of General Counsel many years ago and a separate enforcement and compliance assistance office serving all the other offices. EPA offices have moved around and changed names over the years, but the needs for alternative dispute resolution and effective negotiation skills continue to play a central role.
3. **Funding and technical assistance for increased community engagement and access to power**. This has been one of the lessons learned from the re-authorization of Superfund in 1986 where Congress included a relatively new concept at the time: $50,000 technical assistance grants to communities to more effectively participate in design and selection of cleanup remedies. It is a model that has been applied to other programs over the years and led to more meaningful engagement by communities and their leaders.

7. 33 U.S.C. §1342(q)(1); ELR Stat. FWPCA §402.