Regulation Negotiation: Lessons Learned from Failure to Reach Agreement, A Case Study of the Pennsylvania Department of Environmental Protection

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This article examines the use of regulation negotiation as an alternative to traditional rule making processes in state level bureaucracies. Direct observation of the Special Protection Water Program regulation negotiations at the Pennsylvania Department of Environmental Protection from January, 1995 through August, 1996, shows that regulation negotiation can only be applied to issues with clearly defined policy alternatives, a limited number of affected parties and a distinct but not imminent deadline. All parties must be willing to bargain or negotiated agreement will not be reached. On a positive note, a survey of regulation negotiation participants revealed that agency administrators, environmental advocacy groups, and the regulated business community all perceive real benefits in the process.

In an age of rampant court challenges to federal and state governmental regulations, the process known as regulation negotiation has been heralded as a viable alternative to traditional rulemaking processes. First introduced to the federal government in the early 1980's, regulation negotiation is now making headway at the state level for such issues as environmental, safety, and land-use regulations. This article focuses upon a particular case study in regulation negotiation, the Pennsylvania Department of Environmental Protection (DEP) Special Protection Water Program Regulation Negotiation (reg/neg). In this instance, the case study is of interest, not for the results produced, but as a lesson in failure to achieve a negotiated agreement.

Methodology

This case study is drawn from in-depth information gathered using the non-participant observation method. The author was allowed to act as an impartial observer of the reg/neg process from August of 1995 through April of 1996. The author attended all general reg/neg sessions, and was given copies of all meeting notes, nonpublic "break-out group" work sessions, and all relevant technical and legal documents circulated by the regulatory agencies and reg/neg participants. As the reg/neg neared completion, the DEP authorized a phone survey of the reg/neg participants. The department wanted to gain some feedback on the process in order to make adjustments for future reg/negs. In March of 1996,

Mary Margaret Golten of CDR Associates formulated a survey to obtain feedback from the participants in the Special Protection Waters Program Regulation Negotiation (reg/neg). The author then used these questions as the basis for a revised survey questionnaire. A Kutztown University Political Science graduate assistant administered the survey using telephone and personal interviews from March through June 1996. In addition to the survey, the author conducted several in-depth telephone interviews immediately following the final reg/neg meeting in August of 1996. All survey respondents and interview participants were identified only as belonging to the business community, the environmental community, or a governmental agency. This anonymity allowed the respondents to share freely their perceptions of the process and of the outcome of the reg/neg.

Certainly the official sponsorship of the survey and the perception of this author as an unbiased observer greatly aided the quantity and quality of the responses. By the time the survey was administered, participants from the business and environmental communities were worried about press leaks occurring prior to the issuing of the final reports. However the participants were also eager to have their side of the story heard. Since the respondents were aware that the survey results would be reported to the DEP, they responded openly to the pros and cons of both the reg/neg process and the particulars of this hotly contested regulatory issue.

What is Regulation Negotiation?

In the past two decades, the federal bureaucracy has experimented with alternative techniques to traditional rulemaking procedures in an attempt to reduce court challenges to legislation and to produce better regulations. Among these techniques is the process known as regulation negotiation or negotiated rulemaking. Regulation negotiation (reg-neg) has been used at the federal level by various regulatory agencies including the Environmental Protection Agency, the Federal Aviation Administration, Occupational Safety and Health Administration, the Nuclear Regulatory Commission and the Federal Trade Commission since the early 1980's. The Negotiated Rulemaking Act of 1990 (P.L. 101-648, 1990) formalized the regulation negotiation procedure in the federal bureaucracy.

Simply put, regulation negotiation is an alternative method for drafting proposed agency rules or regulations, relying upon discussion and compromise among the regulated community, public interest groups, and government officials. The resulting regulations are then placed for public comment following traditional rulemaking process. The philosophy behind the process is that early involvement of affected parties will produce better regulations and reduce court challenges after implementation. (CDR Associates, 1995).

Regulation negotiation consists of two phases, the convening process and the actual negotiations phase. Prior to the convening process, regulations appropriate for negotiation must be carefully chosen, since not all issues readily lend themselves to the negotiation process. During the convening phase, all possible affected stakeholders are identified and notified of the impending negotiations. The list of actual participants is narrowed down using interviews, meetings and public comment to determine the various interests and their representative groups (CDR Associates).

During the negotiation phase, stakeholders share technical information, express opposing viewpoints on the proposed regulations, and draft a final agreement within a specified time limit. This phase demands ongoing commitment of all stakeholders and of the regulatory agency itself (CDR Associates).

Criteria for Success

Successful reg/negs, that is those resulting in some level of agreement among the stakeholders, presuppose certain conditions regarding the issues and participants in the process. First, the agency must carefully select the issue or regulations for negotiation. The EPA has set fairly straightforward criteria for rule selection. The proposed rule must be in the middle range of development, neither in the final stages nor years away from implementation. A distinct deadline for completion of the regulations helps to move the process along. The rule must involve a limited number of stakeholders and issues. For example, complex, multiparty disputes involving unsettled issues of science or technology are generally not good targets for reg/neg. Lastly, the rule must pertain to distinct regulations as opposed to general agency policies (Fiorino, 1988; Fiorino and Kurtz, 1988; Harter, 1982).

Secondly, all affected parties must be identified and then induced to come to the bargaining table. Theory has shown that the stakeholders must have a reason to bargain, either through fear of traditional rulemaking or from a perceived advantage in the reg/neg process, a rough form of cost/benefit analysis. (Nakamura, Church & Cooper, 1991; Langbein & Kerwin, 1985).

Thirdly, once the stakeholders have been lured or forced to the table, all parties must engage in good faith negotiations based upon honest exchange of information, good communication *and* willingness to compromise grounded in self-interest. It is highly unlikely that groups will compromise on issues involving what they perceive to be the fundamental values of their organization. Likewise, the existence of a BATNA (Best Alternative to a Negotiated Agreement) for any group of stakeholders spells death for negotiated agreement. All stakeholders must subscribe

to the viewpoint that they are better off with a negotiated agreement than with a settlement imposed by the courts or legislature or produced by the traditional rulemaking process. Regulatory agency commitment to the regulation negotiation is also crucial to success at this stage. (Burns, 1990; Pritzker, 1990; Amy, 1987; Harter, 1986,1982).

The Pennsylvania DEP Experience

Pennsylvania's foray into the realm of regulation negotiation began as an experiment at several state regulatory agencies. In early 1995, Secretary John Seif, head of the newly created Department of Environmental Protection, directed the Bureau of Water Quality Management (BWQM) to use the reg/neg process to solve a complex issue then dogging the agency. The BWQM needed to create new regulations for the implementation of the federally mandated Special Protection (Antidegradation) Waters Program (DEP Reg-Neg Operating Principles, 7/14/95). This program, first promulgated by the EPA in 1975 and refined in 1983, requires all states to adopt a statewide antidegradation water policy in accordance with the federal guidelines. (48 Federal Register, 1983; 40 Federal Register, 1975). The federal guidelines call for three classes or tiers of water protection. These tiers are designed to limit the amount and type of discharges allowed into any body of water (lake, stream, river, etc.). Discharges include such things as run-off from farm operations, chemicals or metals from manufacturing processes or storm water drainage from residential developments.

Tier 1 is the absolute floor of water quality in the U.S. Waters classified as Tier 1 must be protected to maintain all "existing in-stream uses as of November 23, 1975" (48 Federal Register, 1983) and must meet minimum federal water quality standards. Waters in this class may be degraded to the minimum standard as long as the "existing" uses (for example supporting a specific fish population) are protected. Tier 2 waters are known as High Quality Waters. Waters in this classification exceed basic quality needed to support aquatic life and human recreation. These waters may also be degraded if substantial economic and social justifications are demonstrated (EPA Handbook, 1994). Tier 3 waters are labeled as Outstanding National Resource Waters (ONRW) and include but are not limited to "waters of national and State parks and wildlife refuges and waters of exceptional recreational or ecological significance" (48 Federal Register, 1983). No new or expanded discharges are allowed into these waters (EPA Handbook, 1994).

In compliance with the federal mandate, the state of Pennsylvania developed its own Antidegradation Program (Special Protection Waters) in 1975. The Pennsylvania program consisted of only two levels of waters designated for special protection from increased discharges, High

Quality Waters (HQ) and Exceptional Value Waters (EV) (25 PA Code, Chapter 93). A hastily completed initial survey of all Pennsylvania streams in 1975 created bureaucratic problems. Due to limited departmental resources, many streams were placed into a default category of High Quality, based on existing biological information from all state sources (e.g. PA Fish and Game Commission). At the start of the reg/neg, approximately 54% of Pennsylvania's streams had been assessed by the DEP (formerly DER) Bureau of Water Quality Management with the remainder falling into the default High Quality category (DEP Reg-Neg Observations, 8/17 & 9/19, DEP Handout #1). Petitions for redesignation of streams, either up or downward, were handled by the state Environmental Quality Board as outlined in the formal state rulemaking procedures, Chapter 93 of the *Pennsylvania Code* and the Pennsylvania Clean Streams Law (35 P.S. 691.1-691.1001,1937). Needless to say, this redesignation process could be time consuming for both business and environmental groups.

Herein lay the seeds of the regulation negotiation involving the Pennsylvania antidegradation policy: a two-tier system incompatible with the federal guidelines, an incomplete assessment of all PA streams, and an involved petition process for classifying unassessed or reclassifying assessed streams. In June of 1994, during its three-year review of the program, the EPA rejected portions of the regulations as inconsistent with federal policy. In early 1995, the Raymond Proffitt Foundation, a nonprofit environmental group representing the Lenape Indian Tribe, filed a lawsuit against the EPA for failure to enforce the federal water standards in Pennsylvania. The heat was officially turned up on the DEP to rewrite the Pennsylvania Antidegradation regulations (Reg-Neg Phase I Report, April 1, 1996).

By January of 1995, the DEP, Bureau of Water Quality Management had initiated the reg/neg process through a public hearing and comment session. Stakeholders were identified and ground rules for the reg/neg were in place by June, with the first official meeting set for July 10, 1995. At that time, the deadline for completion of the process was set for September of 1995. The group set the following goals: developing regulatory language for the antidegradation program, redesigning the waterbody designation process, and providing guidelines for exceptions to the antidegradation policy. Developing regulatory language meant creating a three tiered system for classifying Pennsylvania's waterbodies. These three tiers needed to be in strict accordance with the EPA guidelines. The designation process included setting a timeline for classification of streams and water bodies. Perhaps the most controversial issue of the reg/neg involved the exceptions to the regulations. The stakeholders were charged with setting up guidelines for cases where economic de-

velopment considerations outweighed environmental concerns, a policy known as Social and Economic Justification (SEJ). In effect, SEJ allows additional discharges into protected High Quality waterbodies in those instances where the regulations severely handicap or prevent local or state economic development (DEP Reg-Neg Operating Principles, 7/14/95).

A discussion of the tenor of the ongoing negotiations is important to understanding the resulting difficulties in achieving a negotiated agreement. The reg/neg process stretched well beyond the anticipated deadline of September 1995 and actually concluded in mid-August of 1996. Due to the ongoing Proffitt lawsuit, the entire process was overshadowed by the threat of EPA preemption through a court-imposed settlement. The atmosphere of each session progressed from formal discussion to open discussion to pressured decision-making to vocal disagreement, ending in a standoff between the two competing viewpoints, the business or regulated group versus the environmental community. Federal and state governmental agencies were also stakeholders at the table. DEP participated throughout as an advisor but not as a direct stakeholder in the process. In fact, DEP exhibited full commitment to the process, providing both technical information and agency resources as needed (Reg/Neg Observations 7/10/95, 8/17/95, 9/19/95, 10/16/95, 12/18/95).

The opening sessions of the reg/neg were primarily occupied by defining operating principles for the groups and establishing working relationships through the use of small, mixed-interest working groups. By the fall of 1995, the entire group was moving toward specific definition of terms, in particular, definitions of the three tiers of water quality. Defining terms and then building procedures for classification proved to be no small task due to competing scientific and technical standards of water quality. For example, what factors should be considered in defining the federally mandated, three tiers of water quality degradation? Once classified, how much water quality degradation should be allowed for Tiers 1 and 2? How would this degradation be measured, using biological methods, chemical methods or a combination of the two? Even the EPA experts offered multiple solutions to these questions. There was no single agreed upon scientific method but rather several equally acceptable alternatives, depending upon your viewpoint (Reg/Neg Observations 9/19/95, 10/16/95).

By the end of 1995, the DEP Secretary began to push for some sort of report. The stakeholders agreed to concentrate their efforts upon a preliminary report, highlighting areas of agreement and also underscoring areas of dissent. In the process of negotiating this document, cracks in the cooperative facade of the group began to appear. The stakeholders aligned themselves along traditional divisions, environmentalists versus business and agriculture. By March of 1996, all stakeholders did sign

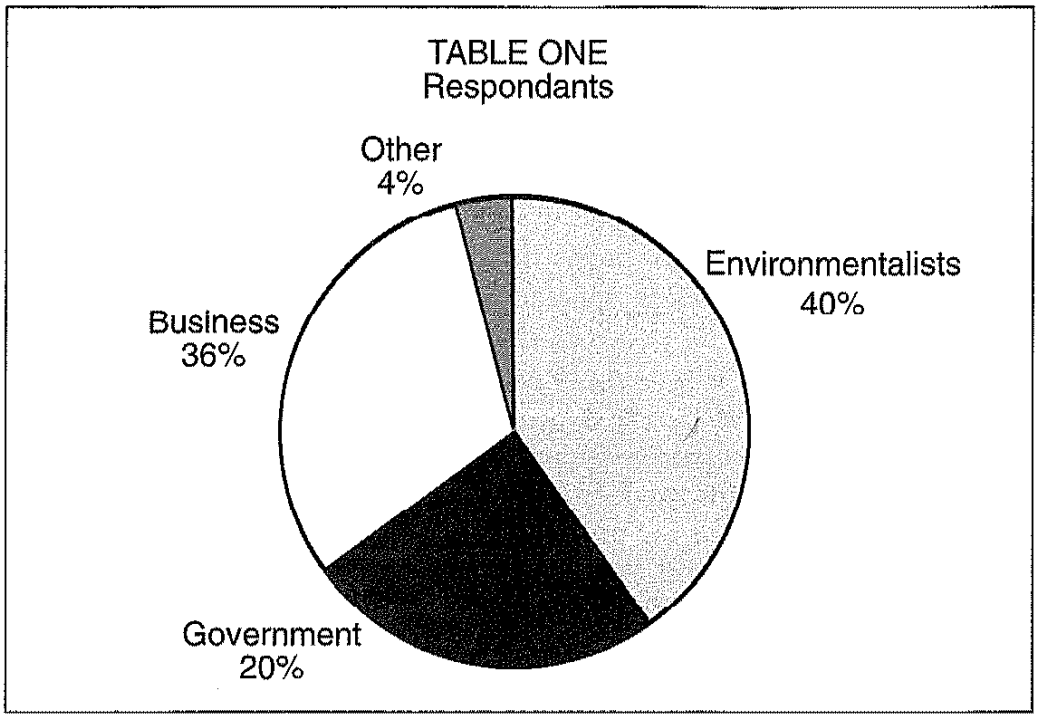
a preliminary final Phase I Report. Substantial areas of disagreement on key issues, however, characterized this document. No agreement was reached on the controversial issue of Tier 3 waters (restricted from degradation and hence basically restricted from development). No definition of social and economic justification (SEJ) for exceptions in Tier 2 waters was provided. Only definitions of Tier 1 and Tier 2 waters and some general scientific standards for their classification were finalized in this report. Stakeholders, instead, deferred the final report and the "tough" issues until the summer of 1996 (Reg/Neg Observations 12/18/95, 3/11/96; DEP Reg/Neg Phase I Report, 4/1/96).

At a key "final" meeting in August of 1996, negotiations broke down. No single final report could be issued and, in fact, many previously agreed upon issues were withdrawn from the bargaining table. Instead of one set of recommendations for proposed regulations, two separate reports were issued: one from the regulated community and one from the conservation stakeholders. By the last week of August, the EPA, under a court order, had preempted Pennsylvania DEP and published its own set of proposed rules for the Special Protection Waters Program. By all accounts, the regulation negotiation process had failed to produce the anticipated results. A concrete agreement could not be reached on proposed regulations and federal preemption was not avoided (Conservation Stakeholders, 8/2/96; EPA Proposed Rules, 8/26/96; Regulated Community Stakeholders 8/19/96).

Failure or Learning Experience?

Should the entire regulation negotiation process be written off as a failure in this instance? What were the hidden problems in the process? What important issues were not addressed? Was the reg/neg totally unsuccessful in bringing the regulated and conservation communities together? Should reg/neg be used again? If yes, under what circumstances? The results of the survey and phone interviews provide some insight into these issues.

Table One illustrates the composition of the survey respondents. Of the twenty-five individuals surveyed, ten came from the environmental or conservation community, five from governmental agencies, and nine from the business or regulated community. In general, participants expressed satisfaction with the way in which the reg/neg was initially convened (93%) but a little more than half (56%) felt that some important groups were missing from the bargaining table. Most notably, they cited the lack of a larger environmental organization such as the Sierra Club. In the in-depth interviews, a representative of the business stakeholders questioned the presence of certain governmental agencies as voting stakeholders. The governmental agencies were perceived as aligning them-



selves with the environmental community. Most respondents felt that the level of individual and organizational commitment to the reg/neg process was good (58%) to very good (21%) (Reg/Neg Survey, 1996).

The major problems cited were deadlines, issue focus, and process. The looming deadline created by the ongoing lawsuit and the associated threat of EPA preemption were seen as shaping the entire reg/neg. Participants explained that too many issues had to be resolved in too short of a time, resulting in vague definitions of standards and hasty, forced compromise. The consensus process, which is central to regulation negotiation tactics, was also greatly criticized. Eighty percent of the respondents supported early and *firm* consensus. The problem, cited again and again, and reaffirmed in the in-depth interviews, was the practice of reaching agreement at one stage and then revisiting the issue, or "reneging" in their terminology, at a later date. For example, the percentage of degradation allowed in High Quality waters was reopened for discussion in the final series of meetings despite the fact that this number had been agreed upon months earlier (Reg/Neg Survey, 1996).

In addition, participants cited problems with the technical expertise of the facilitator and the type and amount of technical information available to the stakeholders. While 60% of those surveyed preferred a facilitator with expertise in the subject matter, governmental representatives, in particular, stated that the facilitator's lack of technical expertise hindered the process. Environmental stakeholders complained of difficulties in obtaining sufficient technical background information and prob-

lems with the transmission of meeting summaries, work group papers, and technical data (Tables Two, Three and Four). Business and governmental stakeholders, on the other hand, felt insufficiently prepared for the reg/neg process itself. As Table Five through Seven illustrate, environmentalists were more comfortable with the reg/neg process than other participants (Reg/Neg Survey, 1996).

On the positive side, the survey corresponded exactly to effects documented in other studies. Among the positive effects cited were improved understanding of each other's viewpoints (92%) and better future working relationships among business, environmental, and governmental groups (100%). All stakeholders surveyed expressed a willingness to participate in the reg/neg process again, and nearly all (96%) would recommend the process to others. In later interviews, it was confirmed that, despite the failure to produce a negotiated agreement, participants still felt the process was superior to the traditional written submission of comments or oral testimony on proposed regulations (Reg/Neg Survey, 1996).

Analysis and Discussion

Does the reg/neg process work? Perhaps a better question is "Was regulation/negotiation an appropriate problem solving technique in this situation?" Obviously, the Pennsylvania DEP Special Protection Water Program reg/neg failed to produce an agreement on recommendations for proposed regulations. The reg/neg did have some beneficial outcomes in terms of potential for increased cooperation in the future between environmental and business stakeholders, potential for better working relationships between governmental regulating agencies and business, and fuller understanding of state and federal regulatory procedures by the business community. But good will and better public relations were simply byproducts of the process. Ultimately, these byproducts are a hard sell to top level political administrators and elected officials seeking concrete results, namely proposed regulations. So what went wrong in this scenario?

Returning to our criteria for success, we can highlight three specific problems with the use of reg/neg for the Special Protection Water Program regulations: 1) complexity and time constraints surrounding the issue, 2) lack of inducement to bargain, and 3) perceived existence of a BATNA.

1) *The issue.* As Fiorino and Kurtz (1988) point out in their study of regulation negotiation at the EPA, an issue is 'ripe' for the reg/neg process when there are clearly defined technical issues with a variety of alternate solutions, hence creating bargaining room or trade-offs. An example might be choosing between chemical versus biological measures of stream water quality. Reg/neg also works best when the issues in-

TABLE TWO

Were there appropriate briefings on the data provided in advance of the negotiations?

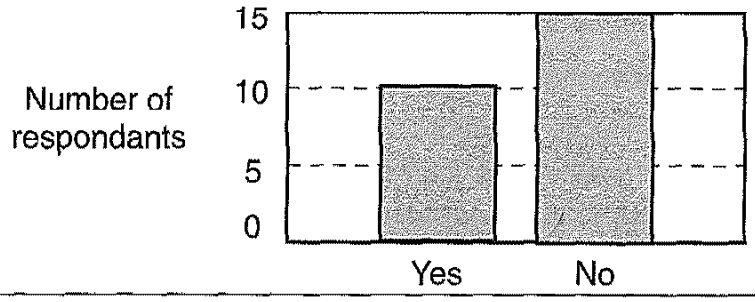


TABLE THREE

ENVIRONMENTALISTS: Were there appropriate briefings on the data provided in advance of the negotiations?

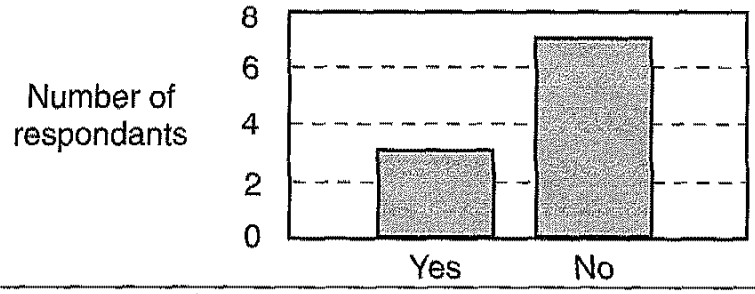


TABLE FOUR

BUSINESS: Were there appropriate briefings on the data provided in advance of negotiations?

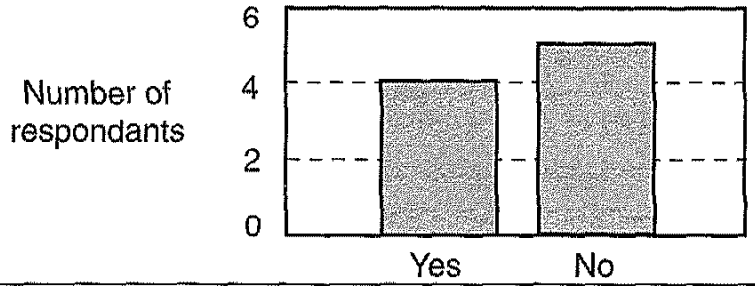


TABLE FIVE

Did stakeholders know enough about the reg/neg facilitation and negotiation process?

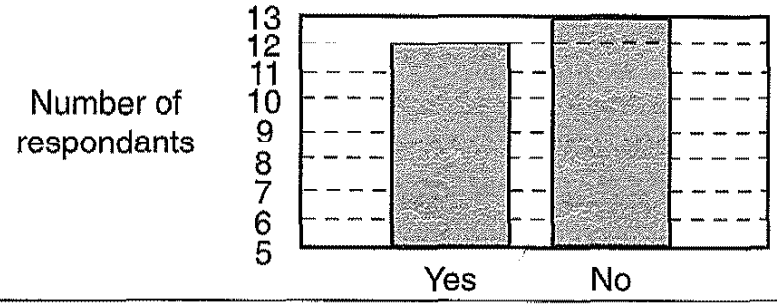


TABLE SIX

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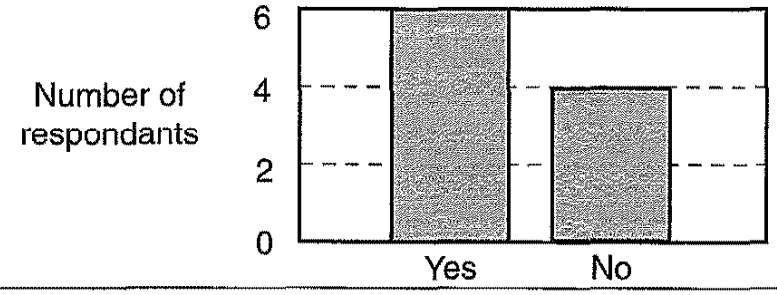

TABLE SEVEN

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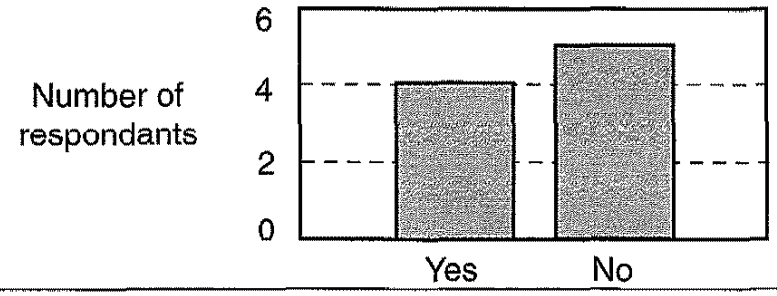

volve implementation or "how to" questions rather than issues of long term policy. Lastly, a specified deadline helps to encourage negotiations but a tight deadline may place undue pressure upon the process (Fiorino, 1988; Fiorino and Kurtz, 1985; Harter, 1982).

The Special Protection Waters Program fails to meet all of the aforementioned guidelines for issue choice. Stakeholders were expected to define three levels of water quality without clearly agreed upon scientific standards for measuring water degradation or base lines for classifying streams for initial water quality levels. In addition, these definitions were not neutral in that stream classification would have long term effects upon land values, economic development, and government enforcement. Stakeholders were being asked to both define policy and then produce regulations to enforce the policy. Add to this the looming deadline imposed by the Proffitt Foundation lawsuit and the threat of EPA preemption and you have the makings of vague policy recommendations in order to facilitate hasty consensus.

2) *Lack of inducement to bargain.* Regulation negotiation is based upon the principle of self-interest: both sides have something to gain and something to win. The key to successful negotiations is compromise founded on good communication and good faith bargaining. Regulation negotiation, however, assumes that both sides will approach the table willing and able to compromise. But what about those "fundamental values" of the organization which simply cannot be negotiated? Studies have shown that it is highly unlikely that agreement can be reached when the issue involves disagreement on the fundamental values of the stakeholders' organizations (Burns, 1990; Pritzker, 1990; Amy, 1987; Harter, 1986,1982).

In this instance, the fundamental values of the two main camps came into direct conflict. The environmentalists are strongly committed to the highest level of protection for the state's water resources, even if this protection entails foregoing development on some choice pieces of real estate. While the environmental groups are not anti-development per se, they push for the use of the best technology available for environmental protection, regardless of cost. As stated in the in-depth interviews, environmentalists feared the use of Social and Economic Justification (SEJ) standards as an easy way around the regulations. They feared that simply justifying the planned development through economic development benefits would substantially weaken water quality protection (Reg/Neg Survey and Interviews, 1996).

The business or regulated community, on the other hand, is committed to development for profit. This is not to say that the regulated community supports development at any cost but business is willing to base regulations for water quality degradation on the business principle of cost/benefit. This would mean allowing for development and potential

water degradation on some properties while totally foregoing development in other areas deemed as Exception Value watersheds. Thus in terms of the reg/neg outcome, the regulated community was looking for an uncomplicated permit and development process in order to limit overall development costs (Reg/Neg Survey and Interviews, 1996).

To the outside observer, compromise may appear possible. To the participants, seated at the table, perception of the intransigence of the "others" dominated. Business saw the environmentalists as totally unwilling to make any "reasonable" compromises on the issues of SEJ while the environmentalists saw the regulated community as committed to weakening water protection through the creation of loopholes. In the end these perceptions hardened and resulted in the total breakdown of the reg/neg (Reg/Neg Survey and Interviews, 1996).

Charges of failure to negotiate in good faith were also made by both sides. Specifically, business felt that the environmentalists undermined the negotiations in the final meeting by introducing last minute changes and by reneging on prior agreements such as the formulas for High Quality Water classification and the agreed upon standards of Exceptional Value Waters. Environmentalists stated that they felt pressured into agreement on the interim report and were frankly not satisfied with the biological and chemical standards used for measuring degradation and water quality. Both sides felt that neither group kept to the original areas of consensus. (Reg/Neg Survey and Interviews, 1996).

In this case, the conflict of fundamental values is particularly volatile in that it involved some fairly high stakes. Referring back to the EPA standards, once a body of water is classified as Tier 3, it is absolutely protected from development. This translates into a considerable loss for any business or individual holding large tracts of undeveloped land, particularly in the center of the state. Tier 2 classification allows the leeway for development if, and only if, Social and Economic Justification exists. If environmentalists win the battle over definition and application of classifications, they can ensure protection of vast areas of Pennsylvania wilderness, currently held in private ownership. If the business community defines the classification system and controls the definition of SEJ, the development process could be greatly streamlined as compared to present procedures.

3) *Perceived existence of a BATNA.* The existence of a real or perceived BATNA, Best Alternative to a Negotiated Agreement, makes regulation negotiation impossible, because it simply removes the incentive to bargain. If the groups belief that they have another out, why compromise? In this case study, environmentalists perceived the ongoing Proffitt Foundation lawsuit as a very effective BATNA. This is confirmed in several instances. Although invited to the reg/neg, the major environmental

groups, most notably the Sierra Club, declined to participate in the regulation negotiation, citing the ongoing lawsuit. In the in-depth interviews, environmentalists specifically stated that the lawsuit provided a fall back position, an alternative to compromise with the business community during the reg/neg process (Reg-Neg Observations, 7/10/95, 8/17/95; DEP Phase I Report 5/1/96; Reg/Neg Interviews, 8/96). Environmental groups were not making a clear choice between the burdensome, traditional rulemaking process and regulation negotiation. The courts still remained as an alternative (Melnick, 1983).

In contrast, the regulated community feared preemption by the EPA or imposition of regulations through rulemaking by the DEP. As gleaned from the interviews and surveys, business firmly believed that the alternative to a negotiated settlement would be less flexible and more burdensome regulations. The business stakeholders strongly expressed the perception that the environmental regulatory bureaucracy, at both the federal and state level, was out of touch with the needs of business (Reg/Neg Survey and Interviews, 1996). For the regulated community, there was no BATNA. As for the environmental community, they had twenty-five years of experience with using the court system to ensure enforcement of existing standards and to push for more stringent regulations than those promulgated by government regulatory agencies. It made sense to place their trust in the courts rather than in an, as yet, untried process at the state level.

Thus, these facets of the Special Protection Waters Program regulation negotiation — complexity of the issue, time constraints, challenges to fundamental group values, and the omnipresent BATNA — made this a poor choice for negotiated settlement.

Implications for Policy Makers

What are the implications for policy makers? Is regulation negotiation applicable at the state level? The answer is a most definite yes, but with some major limitations and specific guidelines. The following suggestions are compiled from the case study survey and prior research on the effectiveness of regulation negotiation:

1) *Limit the issue.* This means limiting both the scope and number of issues addressed. Regulation negotiation cannot be used to hammer out solutions to complex problems. It cannot be used to define technical solutions where the experts have not yet defined clear technical standards. In this example, the biologists and environmental scientists could not agree upon a single method for determining the amount of water quality degradation taking place. They could not agree upon a definition of water quality (biological standards versus chemical standards), and they could not agree upon a definition of waterbody (e.g. whether

or not to include streams, ground waters, tributaries). The negotiable issue of how much water quality degradation to allow could not be addressed since the underlying standards where so ill defined. This issue did not fit the concept of "ripe" for decision.

2) *Identify all relevant viewpoints but limit the number of groups at the bargaining table.* An agreement, negotiated without the most important participants is, of course, useless. The professional facilitators and the Pennsylvania DEP staff seemed to have identified the major representatives of the environmental and business community in the state. However, the loss of the Sierra Club, at the table (they were invited but declined to attend due to the ongoing lawsuit), created the proverbial BATNA; the environmentalists could and would settle this issue in the courts, if necessary.

3) *Provide sufficient training and information both in terms of the technical issues and the regulation negotiation process itself.* The survey revealed that, in Pennsylvania at least, the regulated community felt unfamiliar with the reg/neg process itself while the environmentalists, who had been involved in several other state reg/negs, were very comfortable with the process. This, by the way, is contrary to other research findings (Nakamura, Church and Cooper, 1991; Amy, 1987; Bingham, 1986) in which business is found to be most proficient in the negotiation process. At any rate, all parties must be thoroughly trained in the concepts of negotiations, consensus, and compromise.

In addition, all participants must have access to a variety of technical information from outside, neutral experts such as research universities. Stakeholders must also provide and readily share their own data and research on technical issues. Information aids in formulating concrete alternatives for negotiation.

4) *Make use of an outside, professional negotiation firm.* While the research emphasizes use of professional negotiators without technical expertise in the subject matter (Nakamura, Church and Cooper, 1991; Amy, 1987; Bingham, 1986), our survey shows that stakeholders preferred negotiators with some understanding of the technical issues. The use of an outside firm also ensures the perception of neutrality of the process by the stakeholder

5) Allow the program agency to maintain an active role in the reg/neg. Program staff of the participating agency are strongly encouraged to take an active role in the entire process, either as full participants or by offering input and providing data. Support for the outcomes of the reg/neg must also be demonstrated at the highest levels of the bureaucracy. Stakeholders must have the sense that their recommendations carry some policy weight so that the process is not the proverbial exercise in futility. In Pennsylvania, the DEP reg/neg received written support from the Sec-

retary as well as guarantees that the department would use any regulations suggested by the reg-neg stakeholders to formulate the proposed regulations.

6) *Set definite deadlines for the reg/neg process.* The key however is to place time limits but not time constraints. The entire DEP reg/neg was permeated with the feeling that "something had to be done" as soon as possible. As pointed out previously, this rush to consensus contributed to the demise of the final agreement.

7) *Beware of the existence of a BATNA.* As soon as any of the stakeholders have an alternative to a negotiated agreement, they will take it. Without the incentive to bargain, consensus cannot be generated. As long as any party feels they can achieve their goals through the traditional rulemaking process or through the courts, they will, logically enough, choose the path of highest gain with the least compromise.

Regulation negotiation or mediated dispute resolution in general relies upon a theoretical approach to policy implementation known as the "systems changing" theory. Challenges to policy implementation are seen as the result of certain patterns of interaction and certain power relationships among institutional interests in society. In this theory, government's role is to reallocate responsibilities, obligations and power among interest groups. Regulation negotiation is a natural outgrowth of this theory. It is viewed as a low cost method of changing old patterns of behavior, of changing existing power arrangements. At the bargaining table, all interests are given equal power in creating the policy outcome. All participants are equally expected to give up something, to alter their entrenched viewpoints (McDonnell and Elmore, 1987; Nakamura, Church and Cooper, 1991).

How does this theory apply to the DEP case study? The entire premise of the Antidegradation Policy Reg-Neg was based upon the restructuring of alliances and adversarial relationships in Pennsylvania. An "us versus them," business versus all environmental interests (government and private) mentality had to be altered in the early stages of the reg-neg. While the survey results highlight some success in changing interest group perceptions and attitudes toward one another and toward the DEP, the reg/neg failed to alter the basic power structure. In this instance, not all groups were on a level playing field. The environmental groups maintained an outside source of bargaining power, namely the courts.

Beyond the Pennsylvania Experience

The observations and recommendations arising from this Pennsylvania based case study are validated by comparable experiences with Alternative Dispute Resolution (ADR) throughout the United States. A number of studies at the federal, state and local level suggest conditions

for reaching negotiated agreement similar to those derived from the DEP reg/neg (Fischer, 1997; Manring, 1994; Hunter and Brisbin, 1991). This DEP case study, however, focuses upon regulation-negotiation as a subcategory of consensus building, decision-making techniques. Regulation-negotiation, while sharing many of the characteristics of dispute mediation, is not simply a means for interpreting and applying existing administrative rules. Regulation-negotiation carries the additional burden of creating the rules governing any future disputes among the participants. In fact, these new regulations will affect the interaction between and among stakeholders and government for years to come. The regulation-negotiation process, therefore, must be carefully crafted not simply to reach agreement, but also to ensure the proper balance among governmental, business and public interest groups. Given both the monetary and political costs of the regulation negotiation process, the failure to produce a set of water quality regulations in Pennsylvania can serve as a cautionary example for other states considering the reg-neg process.

Regulation negotiation is not the answer for every issue. It is time consuming and resource intensive. In this case study, the process took nearly a year and a half and involved major time commitments on the part of the stakeholders and DEP personnel. It can produce seemingly intangible benefits in terms of improvement in working relationships among agencies, environmental groups, and the regulated community. This conclusion was borne out by the survey and interview results and by the DEP's willingness to continue using reg/neg. However, improved relationships and the potential reduction or avoidance of future lawsuits are not readily quantifiable outcomes. It can therefore be difficult to justify the cost/benefit ratio of regulation negotiation. When, as in this case, a regulation negotiation fails to produce a single set of rules, it can be even harder to sell the process to top level agency officials.

Regulation negotiation is not a magical alternative to the traditional rulemaking process. It can be an effective tool of regulatory policy making, but the key to its success lies in the choice of issues, the structure of the reg/neg, and the commitment of the government agencies involved. Unless faced with major legal or legislative change, traditional adversarial rulemaking will continue to dominate policy implementation. Regulation negotiation will remain a second choice for interest group participation in the rulemaking process.

References

Amy, Douglas J. 1987. *The Politics of Environmental Mediation.* New York: Columbia University Press.

Bingham, Gail. 1986. *Resolving Environmental Disputes: A Decade of Experience.* Washington, D.C.: Conservation Foundation.

Burns, Robert E. 1990. "The Evolving Role of Dispute Resolution in Administrative Procedures." *Natural Resources and Environment* 5: 26-28, 53-54.

CDR Associates. 1995. "Regulation Negotiation: Guidelines on When and How to Use Them." Boulder, Colorado.

Fiorino, Daniel J. 1988. "Regulatory Negotiation as a Policy Process." *Public Administration Review* 48 (July/August): 764-772.

Fiorino, Daniel J. and Chris Kurtz. 1985. "Breaking Down Walls: Regulatory Negotiation at EPA." *Temple Environmental Law and Technology Journal* 6 (Summer): 29-40.

Fischer, John. 1997. "Consensus-Building Case Focuses on Used-Oil Changers." *Public Management* 79(April): 17-20.

Harter, Philip J. 1982. "Negotiating Regulations: A Cure for Malaise." *The Georgetown Law Journal* 71: 1-117.

. 1986 "The Role of Courts in Regulatory Negotiation, A Response to Judge Wald." *Columbia Journal of Environmental Law* 11: 51-71.

Hunter, Susan and Richard A. Brisbin. 1991. "The ideology of dispute process in state agencies." *The Western Political Quarterly* 44(September): 698-726.

Langbein, Laura, and Cornelius M. Kerwin. 1985. "Implementation, Negotiation and Compliance in Environmental and Safety Regulation." *The Journal of Politics* 47: 854-880.

Manring, Nancy. 1994. "ADR and Administrative Responsiveness: Challenges for Public Administrators." *The Public Administration Review* 54(March/April): 197-203.

McDonnell, Lorraine M. and Richard Elmore. 1987. "Getting the Job Done: Alternative Policy Instruments." *Educational Evaluation and Policy Analysis* 6: 133-152.

Melnick, R. Shep. 1983. *Regulation and the Courts: The Case of the Clean Air Act.* Washington, D.C.: The Brookings Institute.

Nakamura, Robert T., Thomas W. Church, Jr., and Phillip J Cooper. 1991. "Environmental Dispute Resolution and Hazardous Waste Cleanups: A Cautionary Tale of Policy Implementation." *Journal of Policy Analysis and Management* 10: 204-221.

Pritzker, David M. 1990. "Working Together for Better Regulations." *Natural Resources and Environment* 5: 28-31, 51-53.

Pennsylvania Department of Environmental Protection. 1995. "Special Protection Waters Regulation Negotiation Operating Principles." Harrisburg, PA.

Pennsylvania Department of Environmental Protection Regulation Negotiation. July 10,1995; August 17, 1995; September 19, 1995; October 16, 1995; December 18, 1995; February 5, 1996; March 11, 1996. Observations by author, Chamber of Business and Industry Building, Harrisburg, Pennsylvania.

Pennsylvania Department of Environmental Protection Regulation Negotiation Committee. April 1,1996. "Regulation Negotiation Phase I Report."

Harrisburg, Pennsylvania.
Pennsylvania Department of Environmental Protection Regulation Negotiation Conservation Stakeholders. August 21, 1996. "Conservation Stakeholders' Report: Antidegradation Regulatory Negotiation."
Pennsylvania Department of Environmental Protection Regulation Negotiation Regulated Community Stakeholders. August 19, 1996. "Final Recommendations Submitted by the Regulated Community Stakeholders."
Pennsylvania General Assembly. 25 *Pennsylvania Code*, Water Quality Standards, Chapter 93.
_____. Clean Streams Law, Act 394, *Pennsylvania Code* (1937) 35 P.S. 691-691.1001.
Survey of Pennsylvania Department of Environmental Protection Special Protection Waters Program, Regulation Negotiation Stakeholders. March 1 - August 26, 1996. conducted by the author and Robert J. Brenkacs.
Telephone Interviews by author. August, 1996. Pennsylvania Department of Environmental Protection Special Protection Waters Program, Regulation Negotiation Stakeholders.
United States Congress. *Negotiated Rulemaking Act of 1990. Federal Register.* P.L. 101-648.
United States Environmental Protection Agency. November 28, 1975. "Water Quality Standards," 40 *Federal Register*, 55340 41.
United States Environmental Protection Agency. November 8, 1983. "Water Quality Standards," 48 *Federal Register*, 51400, 40 CFR 131.12,
_____. August 1994. "Water Quality Standards Handbook, Second Edition," Washington D.C.
_____. August 26, 1996. "EPA Proposed Rule on Pennsylvaniaís Water Quality Standards." Memorandum. Washington D.C.