NATURAL RESOURCES JOURNAL

Volume 28
Issue 1 *Environmental Dispute Resolutions*

Winter 1988

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Recommended Citation
Lloyd Burton, *Negotiating the Cleanup of Toxic Groundwater Contamination: Strategy and Legitimacy*, 28 Nat. Resources J. 105 (1988).
Available at: https://digitalrepository.unm.edu/nrj/vol28/iss1/7

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Negotiating the Cleanup of Toxic Groundwater Contamination: Strategy and Legitimacy

INTRODUCTION

Toxic pollution of the nation's drinking water supplies has now become a familiar public policy issue. Ongoing studies by the U.S. Environmental Protection Agency (EPA) and various state governments are finding that the extent and severity of groundwater contamination is much greater than had been formerly assumed, both from "non-point sources" such as agricultural run-off and identifiable "point sources" such as manufacturing sites and underground storage tanks.

Several federal statutes have been brought into play in an effort to control the problem, with mixed results. Different statutes delegate implementation authority to different local, state, and federal agencies, creating substantial jurisdictional overlap in some areas, disturbing gaps in others, and a considerable amount of confusion overall. Federal statutes include the Clean Water Act,[1] Safe Drinking Water Act,[2] Resource Conservation and Recovery Act,[3] and Comprehensive Environmental Response, Compensation, and Liability Act (the "Superfund" legislation).[4]

Until the early 1980s there was much more public and governmental

*Funding for the research described in this article was provided by a grant from the University of California's California Policy Seminar; that support is hereby gratefully acknowledged. All inferences, conclusions, and recommendations are solely the author's, however, and are not necessarily shared by the grantor.

1. 33 U.S.C. §§ 1251-1376 (1982).
2. 42 U.S.C. §§ 300(f)-(j)(10) (1982).
3. 42 U.S.C. §§ 6901-87 (1982).
4. 26 U.S.C. 4611-12, 4661-62, 4681-82 (1982), 33 U.S.C. § 1364 (1982), 42 U.S.C. §§ 6911-11a, 9601-15, 9631-33, § 9641, 9651, 9657 (1982); 49 U.S.C. § 1190 (1982). The intent of the "Superfund" legislation is to provide institutional mechanisms for controlling health-threatening toxic environmental contamination first and (if necessary) resolving legal disputes over liability later. There is provision in the act for (1) identifying the most hazardous toxic waste disposal sites nationwide, 42 U.S.C. § 9605 (1982); (2) cleaning up sufficiently serious toxic waste spills as they are discovered, depending on the relative degree of threat they pose, 42 U.S.C. § 9604 (1982); (3) negotiating with parties responsible for a toxic spill to induce them to pay for decontamination in accordance with governmentally imposed standards (*id.*); or, if negotiation fails, (4) paying for decontamination, then suing the responsible party for up to three times the amount of actual cleanup costs, 42 U.S.C. § 9607 (1982). For a comprehensive article on how these negotiation provisions have been used so far and how they might be more productively used in the future, see Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 DUKE L.J. 261 (1985).

attention directed toward the issues of *what* groundwater protection policies should be adopted and *who* (that is, which federal and state agencies) should implement them than on *how* those policies should be carried out. But, by the beginning of this decade, commentators, critics, and scholars were pointing out the shortcomings of the rigorously adversarial "legal rules" model of implementing environmental policy, and were advocating instead the adoption of more consensually oriented negotiation-based strategies for rulemaking, standard-setting, and enforcement. Unfortunately, the EPA's wholehearted embrace of negotiation-oriented enforcement strategies in the early 1980s took place under the administration of officials oblivious to the ethical obligations imposed by informal process. Many of them were eventually forced to resign their posts for actions such as hiring industry consultants to help draft agency regulations, thwarting public involvement in implementation decisionmaking, and impeding legislative oversight of implementation actions. In the judgment of both Republican and Democratic congressional critics and much of the general public, "negotiation" became synonymous with "caving in to industry" or simple nonenforcement of environmental protection statutes. The legitimacy of negotiation as a compliance and enforcement strategy was cast into serious doubt.

Yet the negotiated settlement of disputes over the enforcement of state and federal environmental health legislation continues to be a necessary option. Even ardent environmentalists concede that negotiated compliance and enforcement are critical to the success of environmental policies,[5] in part because regulatory agencies simply lack the resources to take adjudicatory action against all offenders to final judgment. Likewise, some observers in and out of government contend that the adversarial, legalistic implementation of environmental protection policies inhibits the potential for devising creative solutions to pollution problems, generates inefficiencies in the U.S. economy, and impedes our ability to compete effectively in international markets.

Public confidence in an agency's decision to negotiate a compliance agreement with a toxic groundwater polluter rather than rely on adversarial enforcement action might be measurably enhanced if we knew more about how the agencies make such decisions. What factors do they take into consideration? How are negotiations conducted, once that option is chosen? How does an agency determine the point at which an acceptable agreement has been achieved, or at which further negotiation is fruitless? How can legislative overseers and a concerned public evaluate the quality

5. *See* Anderson, *supra* note 4. In this article, "compliance negotiations" refers to negotiation in lieu of filing an enforcement action as an agency policy implementation strategy, while "enforcement negotiations" refers to negotiations to settle an enforcement action already filed.

of an agency's adjudicate/negotiate decisionmaking? These are among the policy issues addressed in this article.[6]

It seems that the more research that is done, the more groundwater contamination problems are found. And given the burgeoning workload created by these problems, negotiated compliance with groundwater protection statutes will remain an indispensable option for the agencies responsible for implementing those laws. But lawmakers, senior agency administrators, and the general public must have some means of being assured that when the nonadversarial enforcement action route is chosen, the agency does so for strategically defensible reasons and in a manner which allows for some modicum of meaningful involvement by interested parties who will be affected by agency decisionmaking.

The assurance of agency rectitude is provided in adversarial proceedings by notice and opportunity for interested parties to participate, the generation of a public record at hearings to which the public is invited, and an appealable order rendered by an impartial tribunal. The drawbacks to adversarial enforcement are: it is time-consuming, costly, cumbersome, and heightens antagonistic relationships between government and industry.

We need some means of evaluating nonadversarial enforcement which will indicate when public suspicion of the negotiation process is warranted and when it is not. The research described in this article lies chiefly in that it provides a rational framework for conducting such evaluations.

A second concern of this work is with the *legitimacy* of an agency's use of power in informal compliance negotiations. This is because—as evidenced by the EPA's initial Superfund implementation problems—when an agency abandons adversarial due process in favor of informal negotiated settlements, it also runs the risk of losing contact with the rich source of legitimacy the due process model provides.

THE LEGITIMACY OF ADMINISTRATIVE GOVERNMENT

Bureaucratic Authority in the Democratic Context

There is a very real paradox inherent in the administration of democratic

6. The primary intent of the policy research described here was to derive criteria for evaluating the bargaining behavior of agency adminstrators responsible for controlling toxic groundwater contamination. While data gathering was confined mostly to case studies of the cleanup of selected "Superfund" sites in Northern California, these observations were not confined to future activity within California. A recent in-depth review of the role of negotiation in Superfund implementation has shown that federal, state, and regional bureaucrats nationwide are regularly called upon to engage in the kind of bargaining behavior described in the following case studies. Anderson, *supra* note 4. Accordingly, the policy recommendations concluding this article are broadly conceived, with direct applicability to any public administrator with the discretionary authority to establish site-specific groundwater decontamination standards and procedures.

government. On the one hand, we take justifiable pride in being heirs to the world's oldest democracy—to a form of government in which the average citizen is the ultimate source of political authority, and (through the choice of elected representatives) the ultimate decisionmaker on questions of what should be the purposes of government and how these purposes should be achieved. On the other hand, we have chosen to assign government the responsibility for performing thousands of tasks considered essential to maintaining our health, safety, prosperity, and welfare—tasks requiring discretionary decisionmaking by public servants *not* elected by the citizens, and *not* directly answerable to the citizenry regarding the effects of their decisions. In the federal work force alone there are nearly three million men and women, only 537 of whom are elected by those they will govern.

This 6,000 to 1 ratio between the day-to-day operators of governmental machinery and the authors of the operating manual is not unique to American federal government; nor is it unique to the 80,000 state and local governments in the United States which are ostensibly controlled by elected leaders, or even to other Western democratic nations. The prophetic German sociologist Max Weber told us several decades ago that, like it or not, complex and highly organized bureaucracies were becoming indispensable mechanisms for the governance of modern industrialized nations.[7] Whether policy is formulated by democratically elected representatives or self-appointed dictators, it must be implemented through bureaucratic organizations.

But, Weber was also quick to point out that simply having the power to act and the organizational means to exercise that power were not enough to assure that institutions will govern effectively. Also present must be the perception by those being governed that their institutions possess the *authority* to govern. And authority, in turn, rests upon the ability to exercise power combined with the public's belief that the power of government is being exercised *legitimately.*

We have graphic recent evidence that even in repressive, dictatorial regimes, once a government has lost all claim to the legitimacy of its use of power, it can utimately lose its power as well. If news accounts of the fall of the Marcos government in the Phillipines are to be believed, precipitating events in the closing days of this drama included the refusal of government employees to carry out orders they felt were illegitimate uses of power. Vote-counters started refusing to falsify election returns, and combat commanders refused to kill thousands of innocent unarmed civilians in the course of suppressing a nonviolent military mutiny. A popular disaffection so strong that it eventually penetrated the bureaucracy itself toppled the government.

7. H. GERTH & C. MILLS, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 232-35 (1948).

The next question to arise then is "How do the governed decide when power is and is not being legitimately used?" Or to put it more academically, "What are the sources of legitimacy from which governmental institutions derive their authority to act?" An equally academic answer is "It depends"—on the governmental institution in question, on the cultural and historical context within which the institution was created, on the attitudes and values of the governed, and on the task the institution is being called upon to perform.

And so we return to the paradox of bureaucratic administration in a democratic society, to focus more specifically on the sources of legitimacy of American bureacracy. We have plenty of company. The growth of American bureaucratic government throughout the 20th century has been paralleled by the growth of an accompanying body of literature warning of the dangers of delegating too much government authority to unelected officials. Presidents like Theodore and Franklin Roosevelt expressed great confidence in the ability of technically expert, apolitical bureaucrats to exercise power rationally, fairly, and effectively; and they urged Congress to keep granting the agencies that power. Detractors worried (as Weber had earlier)[8] that the federal agencies would dominate and overpower the other two branches of government; a commission formed by Franklin Roosevelt to study these concerns warned in 1937 that the independent federal regulatory agencies were becoming a "headless fourth branch of government," and should be abolished.[9] Instead, Congress moved to standardize the procedures for discretionary decisionmaking in the federal agencies, through adoption of the Administrative Procedure Act. First enacted in 1946, this statute guarantees a modicum of due process in agency rulemaking, standard-setting, and rule-enforcement.[10]

But, as the breadth of bureaucratic responsibility has continued to grow since the New Deal, so has public concern over the way the agencies do their work. During the 1960s, critics charged that the agencies had been "captured" by the very interest groups had been established to regulate, and that the democratic ideals of informed citizen participation in decisions affecting their interests were being thwarted by arrogant, indifferent bureaucrats who listened only to the rich and powerful.[11]

Some observers believe that steadily diminishing public confidence in the legitimacy of American bureaucratic government has reached crisis proportions, and that to remedy the situation we must begin by refocusing our attention on the sources of legitimacy of democratic administrative

8. *Id.*

9. PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT WITH SPECIAL STUDIES (1947) [hereinafter THE BROWNLOW REPORT].

10. Federal Administrative Procedure Act, 5 U.S.C. § 551 (1982).

11. Among the more forceful indictments of the "agency capture" phenomenon is in T. LOWI, THE END OF LIBERALISM (1969).

government. Then we must evaluate agency performance in terms of whether it is honoring these legitimizing values in its day-to-day activities.

In his aptly titled *Crisis and Legitimacy*,[12] law professor James Freedman argues that the legitimacy of administrative action in American government is classically dependent on four attributes or characteristics: constitutionality, accountability, fairness, and effectiveness. Each of these attributes is embodied by one means or another in formal agency decisionmaking, in the relations between agencies and the legislature, or in court decisions reviewing agency action, as discussed below.

Legitimacy, Administrative Law, and Formal Agency Procedure

Constitutionality

Among the earliest broad delegations of rulemaking and rule-enforcing authority from legislatures to agencies was the creation of the state railroad commissions in the latter half of the 19th century. State lawmakers empowered the commissions to rule on the fairness of rates charged by the railroads, and to set and enforce standards for the safety and convenience of rail service; Congress followed suit with creation of the Interstate Commerce Commission in 1887. Later came the Federal Trade Commission, and—during the Great Depression—a host of new agencies to regulate economic activity and enhance social welfare.

Railroad attorneys and advocates for other regulated interests first challenged the legitimacy of agency authority on constitutional grounds. They charged that delegating so much rulemaking and rule-adjudicating authority to unelected bureaucrats violated the principle of separation of powers among the three branches of government; in rulemaking, the agencies were exercising powers properly reserved to the legislatures; and in rule-adjudication (trial-type enforcement hearings conducted by administrative law judges hired by the agency) the bureaucracy was making decisions constitutionally reserved to the courts.[13]

To summarize an otherwise lengthy historical discussion, the federal courts have not seriously challenged the legislatures' constitutional ability to delegate rulemaking or rule-adjudication authority or administrative agencies since 1937. But the courts do continue to hear a somewhat narrower range of constitutional questions, which may generally be classified into one of three categories: authorization to act, failure to act, and method of action.

Under the first heading comes the challenge that an administrative agency's action was not authorized by the legislature—that the agency

12. J. FREEDMAN, CRISIS AND LEGITIMACY (1978).

13. *See generally* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 439-54 (2d ed. 1985).

has interpreted its statutory mandate more broadly than warranted and is therefore exercising power the legislature did not intend to delegate.[14] Less common but no less significant an issue is the case in which the executive branch either fails or refuses to so something the legislature has ordered it to do.[15]

A third constitutional argument sometimes raised against agency action, is a decisionmaking procedure that has violated the due process rights of one or more interested parties, either by precluding their participation in the decisionmaking process altogether or by affording inadequate opportunities to defend constitutionally protected interests. Due process guarantees, in the Administrative Procedure Act, are intended to deal with the problem before federal agencies; most state legislatures have adopted some sort of threshold procedural guidelines for state agencies to follow as well, although they are often not formally developed as in the federal model.

Effectiveness

A somewhat less serious but far more pervasive criticism of bureaucratic behavior is that of ineffectiveness that the agencies are simply not very good at doing what legislatures tell them to do. While some critics put the blame mostly with legislators, for failing to state unambiguously their intent and/or not appropriating funds sufficient for the agencies to carry out their mission,[16] other observers have focused more on what they see as the inertial, incremental, risk-adverse nature of bureaucratic behavior.[17] When these criticisms are combined with the fact that in environmental regulation the executive branch is being asked to set and enforce standards in the context of high levels of scientific uncertainty and incom-

14. An example of this issue is found in Bob Jones University's appeal from an Internal Revenue Service decision revoking the school's tax-exempt status, for practicing racial segregation as a matter of institutional policy. The U.S. Supreme Court upheld the agency's authority to revoke tax-exemption for this reason absent explicit congressional authorization to do so; while Justice Rehnquist's lone dissenting opinion criticized the agency for (in his view) overstepping its constitutional bounds. Bob Jones v. United States, 461 U.S. 574 (1983).

15. Ex-president Nixon, who held a somewhat exalted view of the executive's constitutional independence, precipitated such a conflict when he ordered the Office of Management and Budget to impound funds Congress had appropriated (over his veto) to implement the Clean Water Act. In subsequent constitutional litigation, the Supreme Court unanimously invalidated Nixon's action. Train v. City of New York, 420 U.S. 35 (1975).

16. *See supra* note 11.

17. FREEDMAN, *supra* note 12, at 31-57. In addition to the very substantial public administration literature on incrementalism, inertia, and risk aversion, the federal courts have likewise wrestled with the problem of when to let an agency take its own time in making environmental decisions. Compare, for instance, Environmental Defense Fund v. EPA, 598 F.2d 62 (D.C. Cir. 1978) [hereinafter EDF v. EPA], *infra* note 19 with Environmental Defense Fund v. Ruckleshaus, 439 F.2d 584 (D.C. Cir. 1971). The length of delay and its rational justification (or lack thereof) relative to the threats posed by inaction seem to the courts to be significant variables.

plete information, agency hesitancy to move quickly and forcefully in some regulatory areas becomes more understandable.[18]

One measure of effectiveness is how much time it takes an agency to get the job done; another is how completely or successfully a policy goal has been achieved, and by what means. Conducting such an evaluation requires a careful review of agency decisonmaking in the implementation process, to determine if appropriate methods were used and available resources allocated in a way which would maximize the probability of achieving the desired goal.

While federal judges have been quite willing to review and correct agency *procedures* for standard-setting, rulemaking, and rule-application, since the late 1930s they have been reluctant to rigorously scrutinize and reverse agency conclusions on the *content* of a rule, standard, or enforcement finding. And if the lower court judges choose to follow the Supreme Court's lead, they may find themselves becoming even more deferential to agency expertise in the future. In a Supreme Court reversal of a circuit court ruling against the Nuclear Regulatory Commission (NRC) in 1978, Justice Rehnquist openly chastized the lower court judges for, in his estimation, forcing ever more elaborate procedures on the agency because they were dissatisfied with the substance of NRC decisionmaking.[19]

Thus the responsibility for gauging the effectiveness of agency action falls considerably harder on legislators and on the general public (including the news media). Except in unusual circumstances like those detailed in *EDF v. EPA* above—when it took five years and a court order to get a rule published, standards for measuring agency effectiveness usually emanate more from public administration scholars and (ideally) legislative overseers than from the courts.

Accountability and Fairness

The modern civil service system—with its merit-based hiring and promotion, and termination only for cause—has rightly been heralded as a dramatic improvement over the spoils system which had previously afflicted American government. Nineteenth century progressive reformers argued that government hiring based on technical ability, and the subsequent shielding of government workers from undue political influence, would

18. Understandable, yes; but (in the public view) acceptable, no. An example of environmentalist and judicial frustration with federal ineffectiveness in toxics regulation maybe found in EDF v. EPA. This 1978 case was the culmination of a five-year struggle to get the EPA to identify and specify allowable discharge levels for toxic substances in surface waters, as mandated by Congress in the 1972 Federal Water Pollution Control Act Amendments. Congressional frustration had also mounted; in rewriting the Act in 1977, lawmakers did by statute what they had earlier told the EPA to do by regulation: specify the substances to be controlled.

19. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

ensure that bureaucratic decisionmaking would be to the ultimate benefit of the public interest broadly conceived, unlike the old patronage system in which *all* public employees owed their jobs to the party in power and could be summarily fired for party disloyalty.

But once this political insulation had been achieved and the bureaucracy developed the ability to exercise substantial discretionary authority without fear of political reprisal, the bureaucrats were faced with the problem of how a democratic society is to make sure that its bureaucracy will remain a humble and obedient servant, rather than become its functional master. Freedman's conclusion seems to be that except for the constitutional constraints outlined above, a limitation on political control of bureaucratic behavior is the price we must pay if we want administrative decisions made in the *public* interest rather than partisan political interest. He finds there to be enough political control over the federal agencies: Congress can reward or punish individual agencies through the budget-making process and oversight investigations, and the president can hire and fire the most senior-level "politically appointed" administrators at will.[20] In this view, there is a subtle but critical distinction which must be maintained between political accountability and political malleability: Bureaucracy must be subject to effective political *control* (the faithful execution of congressional and presidential commands) yet free from political *manipulation* (distortion of the administrative process to achieve wholly partisan political ends). The legislature's job is to tell the bureaucracy what to do, as clearly and unambiguously as possible; and the bureaucracy's job is to do it. Just as the judges must remain free from undue political influence, so must the bureaucrats.

But there is another aspect to the accountability issue, which receives less attention in Freedman's formalistic analysis. It has to do not with the bureaucracy's relationship with the legislature (its immediate source of delegated authority), but with its relationship to the public (in theory, the ultimate source of all government authority). From this perspective, an important source of the legitimacy of bureaucratic power lies in the bureaucracy's relations with the citizens whose interests will be affected by agency decisionmaking. The more closely an agency adheres to traditional democratic principles such as informing the public of impending decisions, and structuring public participation into the decisionmaking process, the greater the agency's claim to legitimacy in its use of power.

Some analysts, who have urged the agencies to "reconnect" with the public by structuring more meaningful citizen consultation into administrative action, describe this aspect of accountability as *responsiveness*.[21]

20. FREEDMAN, *supra* note 12, at 260.

21. P. NONET & P. SELZNICK, LAW AND SOCIETY IN TRANSITION—TOWARD RESPONSIVE LAW (1978).

And as did Freedman, they counsel that being responsive to public concerns in contemplating alternative actions is not the same as "knuckling under" to the most powerful interest group at decision time; responsiveness is not synonymous with malleability.

Legal scholarship aside, over the last 20 years it has been the federal judges who have most effectively and articulately addressed the bureaucracy's need to legitimize its decisionmaking through more meaningful public participation. A host of federal court rulings handed down during the 1960s and '70s ordered the agencies, by one means or another, to make their processes of deliberation and decision more open to the public. The judges evidently hoped that bureaucratic ills like "agency capture" by powerful regulated interests could be remedied by forcing the agencies to make more of their decisions in public and invite more public participation before making these decisions. One commentator has concluded that the federal judiciary forcing the agencies to open up their decisionmaking is one of the most significant transformations American public administration has undergone in this century; it has resulted in a new and democratically appealing "interest group representation" model of administrative law, in which no major agency decision may be considered a sound one unless it is based on a thoughtful consideration of diverse and substantial public input.[22]

By forcing such consideration—whether through public hearings, advisory committees, or other solicitation of a broad range of public views—it is argued that the courts have also enhanced the *fairness* of agency decisionmaking. And in Freedman's view, a heightened perception of agency fairness further legitimizes the use of bureaucratic power. Interested parties at least have the opportunity for their "day in court," even if administrative decisionmakers do not render a wholly satisfactory "verdict." In mandating more formal and open procedures for making decisions affecting the public interest, the courts have made an important contribution toward shoring up public confidence in bureaucratic authority—or at least slowing down the rate of erosion.

THE TREND TOWARD INFORMAL, NONADVERSARIAL PROCEDURE—THEORY AND PRACTICE

Criticisms of Formal Process

As with anything else of value, the opening up of agency procedure in the interests of fairness and responsiveness has not been cost-free.

22. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). Of course, Congress has not been altogether silent on these issues either. The 1966 Freedom of Information Act, and its 1974 amendments, as well as the Government in the Sunshine Act of 1974, 5 U.S.C. § 552 (1982), substantially updated the Administrative Procedure Act by formally mandating greater access to agency policymaking processes.

Since the courts played a major role in the opening process (and later Congress by structuring elements of court decisions into Administrative Procedure Act amendments and various environmental statutes), they mandated reforms which have had the effect of "legalizing" agency decisionmaking, according to subsequent critics. By forcing the agencies to adopt threshold due process standards, they have measurably enhanced the role of lawyers in the bureaucracy and in respresenting the interests of those affected by bureaucratic decisionmaking. This in turn has tended to increase the time necessary to reach a decision, the volume of the evidentiary record which must be accumulated prior to taking significant action, and has influenced the content and the tone of the decisions themselves.

Thus, as procedure became more open in terms of who could participate, it also became somewhat more rigid, more complex, and more time consuming in terms of *how* that participation was to be structured. Likewise, the growing necessity of professional representation in agency proceedings and the amassing of ever more elaborate evidentiary records increased the expense of effective participation in agency decisionmaking as well. Even those who recognized the importance of adequate interest group representation as a legitimizing influence on bureaucratic behavior perceived the trade-offs at hand. Open, fair, responsive process was also cumbersome, costly, and lengthy. Ironically, the result in some cases was that at the same time procedural barriers were being lowered, economic ones were being raised (namely, participation costs.).

Rise of Negotiated Policy Implementation

By the late 1970s critics of the "due process revolution" were arguing that the trade-off was sometimes too great—that better decisions were not emanating from elaborate new processes, and that more informality, flexibility, and efficiency were sorely needed.

According to this argument, elaborate traditional processes should be complemented by "alternate decisional processes" such as negotiated standard-setting and other decisionmaking alternatives to formal advocacy (for example, technical advisory committees for fact verification).[23] By the early 1980s, several federal agencies had begun to heed this advice, and had brought interested parties together for negotiated rulemaking in areas such as occupational safety and health, airline regulation, and fair trade.[24]

23. Stewart, *Regulation, Innovation, and Administrative Law*, 69 CALIF. L. REV. 1259, 1338 (1981).

24. *See* Sachs, *An Alternative to the Traditional Rulemaking Process: A Case Study in the Development of Regulations*, 29 VILL. L. REV. 1505 (1984); Koch & Martin, *F.T.C. Rulemaking—Through Negotiation*, 61 N.C.L. REV. 275 (1983); and Note, *Rethinking Regulations: Negotiation As An Alternative To Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981).

As it turned out, however, the concept of negotiated policy implementation evidently meant very different things to different federal agency administrators. In rulemaking and standard-setting, most administrators have worked with consensus-based methods as an adjunct to rather than a total replacement of more traditional processes.[25] But in rule-application in the situation described below—the EPA from 1981 to 1983—the use of informal negotiation-based methods precipitated a legitimacy crisis of such proportions that the Agency's administrator and several of her senior subordinates were eventually forced to resign their posts (one of them going from high federal office to federal imprisonment).

Problems of Legitimacy in the Negotiated Implementation of Toxic Waste Cleanup Programs

To understand how this crisis of public confidence in the EPA arose during the early 1980s, it will be helpful to view these events from the perspective of Freedman's legitimacy criteria as described above. The effectiveness, fairness, responsiveness, and (ultimately) the constitutionality of agency action were called into such serious question that, at the behest of Congress, key figures in the agency were replaced and a significant new emphasis on the ethics of federal administrative service was called forth.

Effectiveness

One of the more commonly cited principles of legal negotiation and settlement is that a negotiator's effectiveness is measurably enhanced by his or her ability to impose sanctions on an adversary if agreement is not reached.[26] Unfortunately, during the same period that EPA Administrator Burford was publicly emphasizing her agency's new intention to "solve things informally, nonconfrontationally,"[27] she was also cutting back sharply on the EPA's ability to undertake adjudicative enforcement if negotiations failed.

Such steps included abolition of the EPA's Office of Enforcement[28] and the centralization of all major enforcement decisionmaking in Washington rather than in the field.[29] In addition, the EPA's chief enforcement counsel was relieved of independent enforcement authority,[30] and—in keeping

25. *Id.*

26. *See, e.g.*, G. WILLIAMS, LEGAL NEGOTIATIONS AND SETTLEMENT 84-86 (1983); C. KARRASS, THE NEGOTIATING GAME 183-93, 196-98 (1970), *reprinted in* H. EDWARDS & J. WHITE, THE LAWYER AS A NEGOTIATOR 122-29 (1977).

27. *See supra* note 4.

28. Gorsuch *Abolishes Office of Enforcement*, N.Y. Times, June 13, 1981, at 8, col. 1.

29. Kurtz, *Since Reagan Took Office, EPA Enforcement Actions Have Fallen*, Washington Post, Mar. 1, 1983, at A6, col. 1.

30. Shabecoff, *Environmental Enforcement Chief Stripped of Power*, N.Y. Times, Sept. 25, 1983, at 11, col. 6.

with administration-wide budget reduction goals—much of the EPA's enforcement staff was either re-assigned or terminated (a practice eventually halted by the Senate).[31]

Understandably, an abrupt decline in enforcement action accompanied these reductions. A survey prepared by the House of Representatives in late 1982, compared EPA enforcement activity during the last year of the Carter administration with the first full year's enforcement under Administrator Burford, found an 84 percent drop in the number of cases referred by the EPA to the Justice Department for court enforcement. Also discovered were a 78 percent reduction in adjudicatory actions filed by the EPA itself and a 40 percent drop in the dollar amount of penalties collected.[32]

EPA critics likewise came to believe that when negotiation *was* used to settle enforcement disputes, the settlements were sometimes on terms so unreasonably favorable to regulated industries that the public interest was not being adequately served. As an example, the "Superfund" legislation (discussed in detail below) authorizes the EPA to negotiate with parties responsible for toxic environmental contamination for the containment and cleanup of toxic materials.[33] If agreement is reached, the responsible party finances remedial action; if there is no agreement, EPA remedies the problem and then sues the responsible party for costs plus damages. But, during the early days of Superfund implementation, detractors charged that in the name of expeditious, informal settlement, EPA was in some cases asking dumpers to pay only a fraction of actual cleanup costs before relieving them of future financial liability;[34] public funds would then be required for any further cleanup effort.

Responsiveness and Fairness

The due process, interest-group representation model of administrative law, ensures a threshold level of fairness and responsiveness in formal agency decisionmaking through notice of impending action, opportunity to comment on or participate in public proceedings, reasoned consideration of such commentary, and the right-of-appeal from final action. But in informal, negotiation-based decisionmaking, the only parties present are those invited by the agency. The legitimacy of informal process therefore depends heavily on how well administrators can incorporate public notice and involvement at some meaningful level into nonadversarial, off-record proceedings.

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31. *Senate Votes to Bar EPA from Diminishing More Staff*, N.Y. Times, Sept. 25, 1983, at 11, col. 6.

32. Kurtz, *supra* note 29.

33. *See supra* note 4.

34. Testimony of Congressman Levitas, Before the House Public Works Subcommittee, as reported in Kurtz, *Negotiation Approach Was Dictated by Burford, Lavelle Tells House Unit*, Washington Post, Feb. 25, 1983, at A2, col. 4.

Here again the EPA developed legitimacy problems during the early 1980s: first by discouraging broad public involvement in its actions, and secondly by appearing to grant regulated industries unprecedented access to its inner circles of authority. As an example of the first problem, in 1982 the EPA slashed its public participation budget as part of an ongoing, agency-wide cost reduction program.[35] But at the same time it was hiring as special advisors attorneys whose industry clients' interests were being directly affected by closed-door EPA standard-setting meetings and enforcement negotiations in which these attorneys participated—thus raising serious conflict-of-interest problems.[36]

Compounding the charge that the EPA was providing unwarranted industry access to its innermost deliberations was the fact that the agency was hiring program directors who—given their backgrounds—could hardly be expected to vigorously and even-handedly enforce environmental laws. The most graphic case in point was that of Rita Lavelle, the California businesswoman hired to manage the Superfund program.

The Superfund legislation directs the EPA to establish a "national contingency plan" for the cleanup of hazardous wastes, including the identification of those sites posing the greatest public health risks.[37] In 1981, Ms. Lavelle visited EPA offices in Washington, D.C. as an executive of the Aerojet General Corporation, which had been identified as a responsible party at toxic contamination sites in California subject to Superfund enforcement. Her intent was to convince the EPA to take her company's spill sites off the Superfund high-risk contamination list; a few months later she found herself directing the cleanup program she had been seeking on Aerojet General's behalf to circumvent.[38]

As a result of hiring practices and conflict of interest problems such as these, the appearance grew that the EPA had become highly responsive to one sector of American society (toxic polluters) but markedly unresponsive to others. And the reduction of EPA financial support for public participation, combined with increased exclusive industry access to sensitive levels of agency standard-setting and enforcement decisionmaking, challenged traditionally held standards of fairness in agency procedure—formal or informal.

Constitutionality

Defenders of informal EPA actions during the early days of the first

35. *Budget Curb on Public Participation*, N.Y. Times, June 15, 1982, at 26, col. 1.

36. Kurtz, *EPA Adviser Participated in Regulatory Meetings Affecting Client*, Washington Post, Feb. 24, 1983, at A3, col. 1; Russakoff, *EPA Part-timer's Firm Target of Hazards Suit*, Washington Post, Mar. 3, 1983, at A2, col. 4.

37. 42 U.S.C. § 9605 (1982).

38. Thornton, *President Warned of "Evidence"—Rep. Dingell Asks For Consideration of EPA Criminal Case*, Washington Post, Mar. 3, 1983, at A1, col. 1.

Reagan administration argued that Administrator Burford was doing no more than faithfully carrying out campaign promises made by the President. Mr. Reagan had vowed in 1980 that if elected he would "lighten the heavy hand" of regulation on American business, and seek to foster more cooperative government-industry relations. Environmental regulation in particular was often cited as an area in which adversarial approaches needed to be tempered, and the efficiencies of alternative implementation methods more carefully considered.

And indeed, the earliest, most vocal critics of the Reagan administration environmental policies were political opponents of the president and his party. Early criticisms of EPA Administrator Burford's actions inevitably took on the appearance of partisan sniping. Further, Burford and other high administration officials were under orders to achieve unparalleled reductions in federal spending—orders a largely Democratic Congress had given (at the president's request) to the federal bureaucracy in the form of the Omnibus Budget Act of 1981.[39] Some observers felt the EPA was being unfairly condemned by the party which lost the White House support for doing its job (lightening regulatory burdens and cutting costs) too innovatively and too well.

During the latter half of 1982 and early 1983, however, members of Congress on both sides of the aisle approached a turning point in the debate over the propriety and efficacy of behavior within the EPA. The conflict of interest charges were too numerous and appeared too well founded; the toxic cleanup program mandated by the "Superfund" legislation had yet to demonstrate any significant results;[40] and there was growing suspicion that EPA was manipulating this important public health protection program to reward political friends of the Reagan administration and punish its enemies.

Congessional oversight hearings on the implementation of the Superfund legislation and the 1976 Resource Conservation and Recovery Act (RCRA—the federal government's other principal hazardous waste law)[41] had been proceeding since late 1980.[42] But by 1982 House investigators were intensely frustrated with what they viewed as Administrator Burford's lack of cooperation in providing subpoenaed EPA documents regarding RCRA and Superfund implementation. By this time separate House subcommittees were investigating conflict of interest allegations against Superfund administrator Lavelle and others, Superfund political manipulation charges, and contentions that EPA personnel had knowingly destroyed

39. A striking retrenchment of federal budgetary policy, the substance of the act and commentary first appeared in the N.Y. Times, June 27, 1981, at 1, col. 8.

40. 38 CONG. Q. ALMANAC, 452-53 (1982).

41. *See supra* note 2.

42. 42 U.S.C. §§6901n., 6901-07, 6911-16, 6921-31, 6941-49, 6951-54, 6961-64, 6971-79, 6981-87, 6981n. (1982).

subpoenaed evidence and otherwise obstructed ongoing investigations.[43]

Finally, in the closing days of 1982, the House of Representatives signalled to the nation that a constitutional crisis of confidence had arisen over the EPA's management of hazardous waste programs. On December 16, the House took the unprecedented step of voting to find a cabinet level official —EPA Administrator Ann Gorsuch Burford—in contempt of Congress for refusing to cooperate in its implementation investigations. Three months later she resigned her post, along with about a dozen aides and senior subordinates, who either voluntarily left or were fired.[44] Ms. Burford, had earlier dismissed Superfund Administrator Rita Lavelle, who was soon indicted on charges of perjury and obstructing a congressional investigation. In December 1983, a federal court found Lavelle guilty of lying to Congress concerning her foreknowledge of the extent of Aerojet General Corporation's Superfund liability while administering the program. She was sentenced to six months' imprisonment and fined $10,000.[45]

By this time Reagan administration officials were painfully aware of the chronic legitimacy problems engendered by the EPA's informal, closed-door implementation decisions unaccompanied by sensitivity to the ethical propriety of those actions. As a result, the capacity for moral leadership figured strongly in the choice of a new EPA administrator.

Accepting the job on an interim basis in the Spring of 1983 was William Ruckelshaus, the first person to head the EPA after President Nixon created it in 1969. Among Mr. Ruckelshaus' first steps on resuming the postion was the reinstatement of practices on which the legitimacy of EPA informal action had formerly been based. He and his newly hired subordinates announced that they intended to facilitate the "fullest possible public participation" in future agency decisionmaking; and that in impending enforcement actions, there would be contact only between the attorneys (for the EPA and the responsible party) working on those cases, with no outside interference or involvement by EPA political appointees.[46]

NEGOTIATING THE CLEANUP OF TOXIC GROUNDWATER CONTAMINATION IN CALIFORNIA

Californians had particular cause for concern over the foundering of Superfund implementation and EPA's legitimacy crisis in the early 1980s. Daily revelations in the national press concerning the EPA's problems were being paralleled by daily revelations in the California press regarding toxic contamination of the state's groundwater. In addition to the threat

43. 39 CONG. Q. ALMANAC 332 (1983).
44. *Id.*
45. *Id.*
46. *Id.* at 333.

posed by the notorious Stringfellow Acid Pits to the drinking water in southern California's Riverside County, two sites in populated areas further north were causing growing alarm among regulators and the public alike.

First was the discovery of carcinogenic contamination of groundwater used for drinking on and near the property of the Aerojet General Corporation in Rancho Cordova, a suburb of Sacramento. A major aerospace research and product development firm, the company is also a significant feature of the Sacramento-area economy. Among contaminants found in the groundwater and soil (and some related surface water supplies) were rocket fuels and synthetic organic solvents used in metal-cleansing.

Two years later in the San Francisco Bay Area's lower Santa Clara Valley ("Silicone" Valley—birthplace of the state's micro-electronics industry) high concentrations of toxic solvents used in micro-electronics manufacture began to contaminate drinking water wells in this urban area. In the early days of Superfund implementation, both the Sacramento and Santa Clara Valley area leaks were quickly added to the list of high priority cleanup sites being created under the federal act. And as the failure of closed-door informal negotiated implementation of Superfund was becoming more and more evident at the national level, northern California residents naturally grew concerned regarding the use of such approaches by federal, state, and local officials responding to problems there.

Case Studies

In examining the use of the federal Superfund legislation and California's water quality control legislation[47] to regulate toxic groundwater

47. Unlike most federal environmental protection statutes, the Superfund legislation does not delegate implementation authority directly to the states, but rather authorizes working agreements between the EPA and appropriate state agencies responsible for implementing state statutes with goals which overlap with the Superfund program. In California's unique system of shared bureaucratic authority, the California Department of Health Services sets general drinking water standards with regard to allowable concentrations of toxic and hazardous substances, often relying on federal guidelines, CAL. HEALTH & SAFETY CODE §§ 25100-25245 (West 1984). However, the state's principal water pollution control program is embodied in the Porter-Cologne Water Quality Control Act of 1969, as amended, CAL. WATER CODE §§ 13000-13270 (West 1984). In this Act, the legislature divided the geographically diverse state into nine regions, and assigned implementation authority to nine separate regional water quality control boards, each of which is empowered to adopt its own site-specific cleanup standards when forcing polluters to remedy incidents of toxic groundwater contamination. When supervising the cleanup of sites which are on the Superfund national priority list (and California hosts well over 100 of them) the regional boards coordinate their enforcement activities with the EPA, in an effort to ensure that decontamination actions they mandate under the Porter-Cologne Act will also constitute compliance with the federal Superfund Program, CAL. DEPARTMENT OF HEALTH SERVICES, GROUNDWATER AND DRINKING WATER IN SANTA CLARA COUNTY: A WHITE PAPER 23 (Oct. 5, 1984) [hereinafter WHITE PAPER] In the case studies developed in this research, the Sacramento Valley Regional Water Quality Control Board had jurisdiction over the Aerojet General case, while the San Francisco Bay regional board oversaw the cleanup effort at the Santa Clara Valley's IBM plant.

contamination—particularly the role of negotiation—two core questions must be answered. The first is "How were these laws used to solve the problems at hand?" And the second is "Why were they used this way?" The first is addressed below, and the second is discussed in the following section on analysis.

The Aerojet General Case

Sacramento-area residents first learned of toxic chemical leaks at the Aerojet General plant in Rancho Cordova in mid-1979—via an *information* leak from a worker at the site.[48] The Central Valley Regional Water Quality Control Board initiated an investigation which discovered five different toxic dump sites on Aerojet Generals's property and pervasive groundwater contamination underlying them.[49] The most prevalent and worrisome contaminants were synthetic organic solvents used as degreasing agents and rocket fuels. The regional board ordered the company to cease polluting the groundwater in June 1979.[50]

Given the enormity of the problem and the responsible party's disinclination to freely share information,[51] the California Attorney General's office filed suit against the Aerojet General Corporation under the state's water quality control act, (state and federal Superfund legislation had not yet been enacted[52]) on December 27, 1979. However, at the time of filing, then-Attorney General George Deukmejian announced that the real purpose of the suit was to elicit information and stimulate cleanup activity. He also expressed faith in the negotiation process, citing the state's desire to "reach agreement on the problem without prolonged and expensive litigation."[53] In addition to the state action, several Rancho Cordova-area residents also filed suit as contaminants allegedly emanating from the Aerojet General site made their appearance in local drinking water wells.

During the following year, Aerojet continued its legal resistance to the regional water board's and attorney general's actions, while reports of worsening water quality in the neighborhood of the plant continued to come forth. Amid these developments and similar cases elsewhere in the country, Congress adopted the Comprehensive Environmental Responses,

48. *Hundreds Warned Wells May Be Contaminated*, Sacramento Bee, Aug. 23, 1979, at A1. *Worker Tip Lead To Cordova Water Pollution Discovery*, Sacramento Bee, Oct. 25, 1979, at B1.

49. *State Seeks Aerojet Toxic Data*, Sacramento Bee, Aug. 11, 1979, at B1; *First Real Proof Against Aerojet General*, Sacramento Union, Sept. 18, 1979, at A3; *Study Lists Five Chemical Dumps at Aerojet*, Sacramento Bee, Oct. 25, 1979, at A1.

50. Letter to Lloyd Burton from Tom Pinkos, Supervising Engineer, Sacramento Valley Regional Water Quality Control Board (Aug. 7, 1986).

51. *Aerojet Silence Criticized*, Sacramento Bee, Nov. 21, 1979, at B1.

52. *See supra* note 47.

53. *California Files Suit on Toxic Wastes in Sacramento County Groundwater*, Los Angeles Times, Dec. 27, 1979, at 11-3.

Compensation, and Liability Act in 1980[54] (Superfund); and a year later, when the EPA compiled its first Superfund-mandated list of the nation's most hazardous toxic waste sites, it rated the Aerojet General-Rancho Cordova site as the worst in California (34th nationally).[55]

At about the same time, the state and Aerojet redoubled their negotiation efforts.[56] More active and thorough planning of cleanup activities was also undertaken, although by the end of 1981 the state had still not found the company's decontamination plan adequate.[57]

But in return for cooperating more fully in problem study, cleanup, and negotiated settlement, the company required a significant concession. Aerojet wanted assurances from the attorney general and the regional board that no information it was relinquishing on the nature and extent of contamination at its sites would be given to the public, except for public health warnings required by state law.[58] Both agencies agreed.

Unfortunately, what this meant was that during negotiation only the most alarming information was made public, as more drinking water contamination was discovered and more wells were capped. Furthermore, all this was happening at the same time that the national press was full of allegations that Rita Lavelle, a former Aerojet executive and then-administrator of the federal Superfund program, was manipulating implementation of the law to reward political friends and punish enemies.

Meanwhile Aerojet cleanup negotiations in Sacramento proceeded confidentially, while the public was occasionally confronted with facts like discovery that volatile organic chemicals in Rancho Cordova-area groundwater were seeping into the surface waters of the American River just upstream of the City of Sacramento's drinking water intake. The press also learned during this time that Aerojet may have been aware of (but ignored) its contamination problems as far back as 1954.[59]

Rumors of an impending settlement started surfacing in late 1984. But it was not until early 1986—more than six years after the state's original enforcement action was filed—that government officials and the Aerojet General Corporation finally came to agreement. Since the state suit and EPA involvement had been consolidated into one federal civil action, the

54. Comprehensive Environmental Responses, Compensation, and Liability Act of 1980, 26 U.S.C. §§ In., 4611-12, 4662-62, 4681-82 (1982); 33 U.S.C. §§ 1364 (1982); 42 U.S.C. §§ 6911-11a, 6901-15, 9631-33, 9641, 9651, 9657 (1982); 49 U.S.C. § 11091 (1982).

55. *Federal Hazardous Waste List Names Aerojet General in First Place*, Sacramento Union, Oct. 24, 1981, at A2.

56. *Aerojet General Settlement With State Is Goal*, Sacramento Bee, May 9, 1981, at B2.

57. *Aerojet Cleanup Plan is Rejected*, Sacramento Bee, Nov. 14, 1981, at B1.

58. Interview with Tom Pinkos, Supervising Engineer, Central Valley Regional Water Quality Control Board, in Sacramento, Cal. (Jan. 21, 1986).

59. *Warning Memos on Aerojet General Waste Disposal Date to '54*, Sacramento Bee, May 25, 1983, at A1.

settlement took the form of a consent decree, filed in U.S. District Court for the eastern District of California on January 15, 1986.[60]

In return for the state and federal governments' agreement to drop their suits, Aerojet General promised to further investigate the extent of toxic environmental contamination, define the most appropriate cleanup technologies, and take all measures necessary to remedy the public health threat at its 8,500-acre Rancho Cordova plant and immediate environs. In addition to the $27 million Aerojet had already expended in investigation and cleanup and future expected costs, the company's parent corporation obligated itself to provide up to $45 million more for remedial work if Aerojet went bankrupt.[61] Aerojet also agreed to pay state agencies and the EPA in excess of $7 million in past and future government investigatory and enforcement costs.[62]

Santa Clara Valley

Located at the southern apex of the San Francisco Bay, the lower Santa Clara Valley was an area devoted to orchards and farmland until post-World War II urbanization transformed it into a busy commercial and industrial center. Its largest city is San Jose, now the most populous in the entire San Francisco Bay region. Further down the valley are Sunnyvale, Mountain View, and Palo Alto, where invention of the semi-conductor and related devices gave birth to the state and the nation's microelectronics industry.

About half of the valley's 1.4 million residents rely directly on groundwater as their primary drinking water supply, while others are served by systems which import water from the Sierra Nevada Mountains or the Sacramento-San Joaquin Delta. However, these water importers pump much of their incoming surface supplies into the aquifer underlying the valley, as a means of low-cost storage and to recharge the water table. About 300 large wells, serving the major water suppliers, provide 86 percent of the groundwater used in the valley for nonagricultural purposes.[63]

Although a variety of commercial and industrial activities support the valley's economy, since the late 1960s micro-electronics/data processing technology has been the fastest growing and generally the most profitable. As of 1984, there were several hundred firms in the valley involved in some aspect of research, development, or production of devices com-

60. United States v. Aerojet General Corp., California v. Aerojet General Corp., *Consent Decree*, CIVS-86-0063. Filed Jan. 15, 1986 [hereinafter *Consent Decree*].

61. *Id.* at 133-34.

62. For a synopsis of the decree, see *EPA, State and Aerojet Settle on An Investigation and Cleanup Plan*, EPA REGIONAL BULLETIN No. IX (Jan. 1986).

63. WHITE PAPER *supra* note 47, at 3.

prising this technology. One reason valley residents welcomed such development is that—relative to industrial plants elsewhere in the Bay Area (like oil refineries, metalworks, and chemical manufacturers)—the microelectronics industry was fairly "clean." The only hazardous materials employed in large quantities were synthetic organic solvents used to achieve the high state of cleanliness necessary in component manufacture; these were kept out of public view in large underground storage tanks after use, awaiting final off-site disposal.

The first evidence that the industry might not be as clean as popularly thought came in 1981, with the discovery of high concentrations of one of these solvents in a San Jose-area public well; the chemical involved was 1,1,1 trichloroethane (TCA), a degreasing agent. The California Department of Health Services and EPA advise remedial treatment of any drinking water carrying more than 200 parts per billion (ppb) of TCA;[64] while the south San Jose well was contaminated with 5,800 ppb—about 30 times the DHS action level.[65]

Public health investigators had suspected drinking water contamination, because of an earlier discovery of a leaking underground solvent storage tank at the nearby Fairchild Camera and Instrument Company. Soon thereafter, company engineers discovered similar problems at the International Business Machines (IBM) Corporation's South San Jose production facility. Since most micro-electronic component manufacturers in the area used solvent storage techniques similar to Fairchild's and IBM's, county and state health officials initiated a survey of other public water supplies proximal to all those firms. Meanwhile, the San Francisco Bay Regional Water Quality Control Board began its own underground tank leak detection study among south bay industrial plants, and by 1984 had discovered 93 contaminated sites in the Santa Clara Valley.[66] Toxic groundwater pollution at each site was serious enough to trigger regional board jurisdiction under the state water quality act and EPA authority under the Superfund legislation.

Given the huge regulatory burden the regional board now faced, its staff resolved to adopt one implementation protocol for *all* toxic sites on the Superfund list, rather than making individual decisions on whether to negotiate voluntary compliance or take adjudicatory enforcement action in each case. The protocol adopted by the board staff was embodied in a March 1984 memorandum to the board's executive officer.[67] The pro-

64. EPA, National Primary Drinking Water Regulations, Volatile Synthetic Organic Chemicals, 49 Fed. Reg. 24,330 (1984).

65. WHITE PAPER, *supra* note 47.

66. *Id.* at 11, and Table 6.

67. Internal memo from Don Eisenbertg and Adam Olivieri, Special Projects Section to Roger James, Executive Office, San Francisco Bay Regional Water Quality Control Board, *Regional Board Consideration of Groundwater Contamination Cases*, File No. 1210.39 (Mar. 6, 1984).

tocol first identified the various implementation options available under the state's clean water act (waste discharge requirement, cease and desist order, cleanup and abatement order, or referral to attorney general for civil litigation.[68] Then it recommended that as a matter of staff policy, the first action in each case should be the issuance of waste discharge requirements. The executive officer adopted the recommendation, as did the regional board itself.

This would turn out to be one of the more significant policy decisions made by the regional board. For to take any form of adjudicatory action (C&D order, CAO, or attorney general referral) would be to characterize the responsible party as a violator of environmental law. On the other hand, to issue waste discharge requirements (WDRs) for each contaminated plant essentially meant treating each of those companies as a lawful applicant for permission to discharge pollutants into the groundwater.

Soon after discovering the underground solvent leakage, IBM on its own initiative sank several monitoring wells at its South San Jose facility to measure the intensity of groundwater pollution and the shape, size, rate of flow, and direction of migration of the contaminant plume seeping into the aquifer. The company also dug several interception wells at locations it considered to be at the leading edge of the plume, to extract the polluted water, cleanse it, and then discharge it into ditches and canals draining into San Francisco Bay.

In December 1984, the regional board issued a waste discharge requirement ruling on the IBM case which alleviated the company of additional responsibility for defining and containing the contaminant plume, beyond those measures IBM was already taking.[69] IBM and Fairchild had already spent close to $40 million in voluntary investigation and cleanup efforts, and the board noted that contaminant residues left in the groundwater—primarily traces of TCA and freon—were much lower than the "action levels" for those chemicals suggested by the California Department of Health Services as requiring remedial treatment.

Just one month later, however, a coalition of environmental organizations, labor leaders, and local governments in Santa Clara County appealed the regional board's WDR ruling on the IBM case to the State Water Resource Control Board (statewide parent agency of the regional boards). Charging that the regional board had not required IBM to do enough and that it had resolved complex questions of scientific uncertainty consistently in the company's favor, appellants asked the state board to

68. *See* CAL. WATER CODE, *supra* note 47.

69. San Francisco Bay Regional Water Quality Control Board, *Waste Discharge Requirements for Hazardous Materials Cleanup: IBM Corp., San Jose, Santa Clara County*, Finding No. 8 (Dec. 1984).

order the regional board to require more extensive monitoring and possibly to mandate more thorough decontamination of drinking water in the San Jose area.[70]

Analysis of Regional Board Decisionmaking

To understand why regional board officials handled the Aerojet General and IBM cases in the way they did, it is helpful to think of them as being faced with the need to answer two basic policy questions. The first was "What level of decontamination should be achieved?"; and the second was "By what regulatory means?" Should board personnel require that polluted groundwater be rendered entirely free of contaminants the responsible party had leaked, or only clean enough to comply with current federal or state standards for "acceptable risk?"[71] And will the agency be most likely to achieve that goal through negotiation (establishing reasonable waste discharge requirements in consultation with the responsible party), or through adjudicatory action (issuance of a cease and desist or cleanup and abatement order, and/or civil litigation)?

As it turned out, neither the Sacramento Valley nor San Francisco Bay regional boards addressed these questions sequentially. Site-specific cleanup standards were not set *before* adjudicate/negotiate decisionmaking by the boards; those standards were a principal bargaining issue, and were in fact set *during* the course of implementation/enforcement negotiations in both cases.

Figure 1 depicts the adjudicate/negotiate decisionmaking situation facing both regional boards. The numbered squares represent "decision points" encountered by the regulator; the circles with upper-case letters are "chance nodes" (actions taken either by the regulated interest or by a court); and the circles within squares are "negotiation end-points", at which negotiations terminate either in agreement or adjudicatory action. The numbered triangles to the far right represent alternative decisional outcomes. The flow of events through time is from left to right.

If, for example, after first learning of toxic contamination, the agency decides to attempt negotiated compliance with the responsible party, without filing an enforcement action, eventually a compliance agreement will or will not be reached (negotiation end-point A). If agreement is achieved,

70. Citizens for a Better Environment and Silicon Valley Toxics Coalition v. San Francisco Bay Regional Water Quality Control Board (petition for review of Action and Failure to Act in *re* IBM, Before the Cal. State Water Resource Control Board)(Jan. 17, 1985).

71. For suspected carcinogens, the Cal. Dept. of Health Services' standard-setting policy is that, based on bioassay extrapolation data, an individual experience no more than 1×10^{-6} lifetime risk of developing cancer by reason of exposure to the regulated substance. CAL. DEPT. OF HEALTH SERVICES, CARCINOGEN IDENTIFICATION POLICY, SECTION : METHODS FOR ESTIMATING CANCER RISKS FROM EXPOSURES TO CARCINOGENS (Oct. 1982).

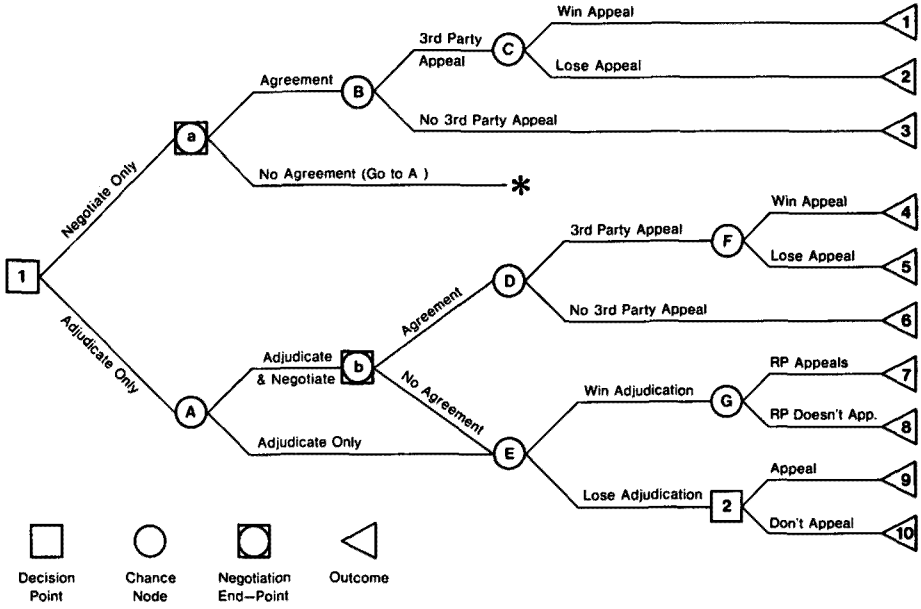

FIGURE 1. TOXIC WASTE REGULATOR'S DECISION SITUATION

it may or may not be appealed by a third-party (for example, concerned citizens' group, industry organization, union) who did not participate in the settlement talks; the possibility of this event is depicted at chance node B. If a third-party does appeal, after an appellate hearing (chance node C) the agency will either have its negotiated compliance agreement upheld (outcome 1) or rejected (outcome 2) by an adjudicatory authority. If no third party challenges the negotiated agreement, the case is closed (outcome 3). If, however, negotiations fail at negotiation end-point a, the agency then moves to an adjudicatory mode.

Suppose, on the other hand, that at the initial negotiate/adjudicate decision point (1), the agency decides its goals will best be achieved through adjudication. Then at chance node A the responsible party may decide to either negotiate a settlement (end-point b) or contest charges through adjudication only (chance node E). If there is negotiation after charges are filed and agreement is reached, a third-party may challenge the agreement (chance node D). At hearing (chance node F), the agency's negotiated settlement may either be upheld (outcome 4) or rejected (outcome 5). If no third party appeals the settlement, the case is closed (outcome 6).

If the agency and responsible party fail to reach agreement after charges are filed, after an adjudicatory hearing (chance node E) the agency may

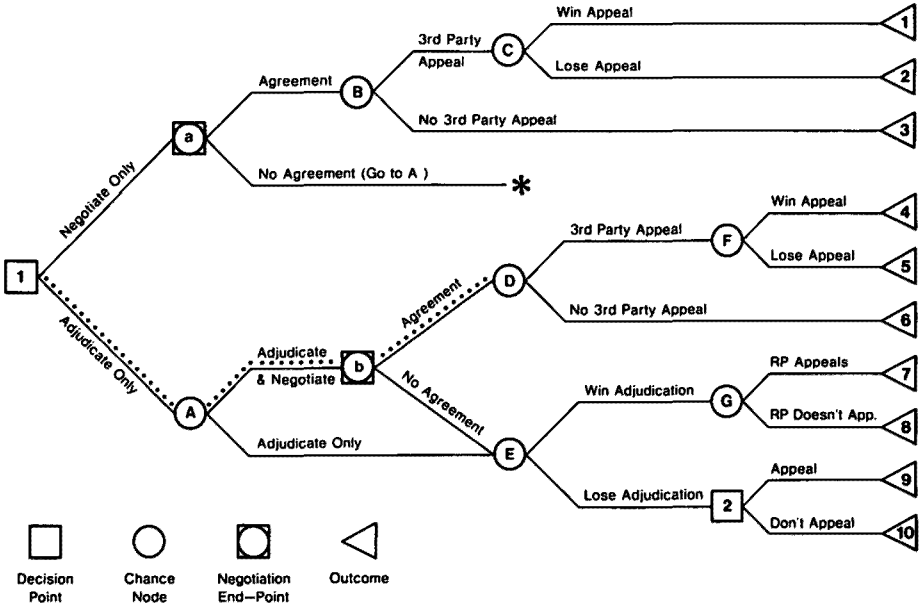

FIGURE 2. STATE OF CALIFORNIA & E.P.A. v. AEROJET-GENERAL CORP. (Central Valley R.W.Q.C.B.)

win its case against the responsible party (RP), at which time the RP either will appeal (outcome 7) or will not (outcome 8—case closed). But if the agency loses at adjudicatory hearing, then it must decide (at decision point 2) whether to appeal (outcome 9) or not (outcome 10). To save space and confusion, the results of appellate action by either the RP (beyond outcome 7) or the agency (beyond outcome 9) are not depicted.

Central Valley

Figure 2 uses the decision tree to illustrate the Central Valley regional board's decisionmaking in the Aerojet General case. Decision point 1 occurred in the autumn of 1979. Central Valley board officials said two considerations featured prominently in their decision to refer the case to the attorney general rather than seek negotiated compliance.[72] First, the threat both to the public health (Sacramento-area drinking water) and to other beneficial uses of water was both immediate and serious. And secondly, the board staff felt that the apparent responsible party (Aerojet General) was not cooperating adequately in the provision of information

72. Interviews with William Crook, Executive Officer, Paul Jepperson, Supervising Engineer, and Tom Pinkos, Supervising Engineer, Central Valley Regional Water Quality Board, in Sacramento, Cal. (Jan. 21, 1986) [hereinafter Crook, Jepperson & Pinkos].

or in emergency containment to consititute compliance with the State's water quality act.

But after referral to the attorney general's office, the state bureaucracy's decisionmaking became more complex. The regional board essentially became the attorney general's client in this case, with the result that the regional board's decontamination strategy and the attorney general's litigation strategy inevitably began to influence each other.

The regional board desperately needed information on the identity of the contaminants, their concentration, and their direction and rate of flow through the groundwater in order to devise an effective cleanup program; the attorney general wanted the same information in order to prove that Aerojet had violated the law. Moreover, several private citizens and small businesses in the Rancho Cordova area who felt they had been harmed by groundwater contamination filed multi-million dollar damages actions against Aerojet, and they wanted access to the same information the state did.

It was within this context that the regional board and the attorney general finally agreed that, in return for the information they wanted from the company, they would share none of it with the public, press, or other litigants except as required by law to avert public health endangerment (for example, the issuance of drinking water advisories).[73] Since the attorney general had announced on the day he filed the suit his intention to settle out of court as soon as a certain threshold level of investigation and cleanup had been achieved, the bargaining agenda between Aerojet and the state was already set: How much information had to be generated, how would that information be used, and how clean must the contaminated water be rendered?

The *State of California and U.S. EPA v. Aerojet General Corp.* consent decree shows that, pending culmination of studies on the extent of contamination and final cleanup technology feasibility, government negotiators would require Aerojet to render contaminated water no cleaner than the 200 ppb suggested standard adopted by EPA and DHS.[74] When asked why this interim figure was chosen, regional board staff cited current scientific uncertainty over the adverse health effects of TCA and the technical/economic difficulties involved in getting the water cleaner.[75] Since Aerojet was playing litigation "hardball", state enforcement personnel were also unsure of whether a court would uphold their authority to adopt a figure substantially below 200 ppb, since adverse health effects below this level have not been proven.[76]

73. The information "blackout" did not apply to data the regional board staff gathered on its own initiative, either at or near the plant site. Letter from Tom Pinkos, *supra* note 50.

74. *Consent Decree, supra* note 60.

75. Crook, Jepperson & Pinkos, *supra* note 72.

76. *Id.*

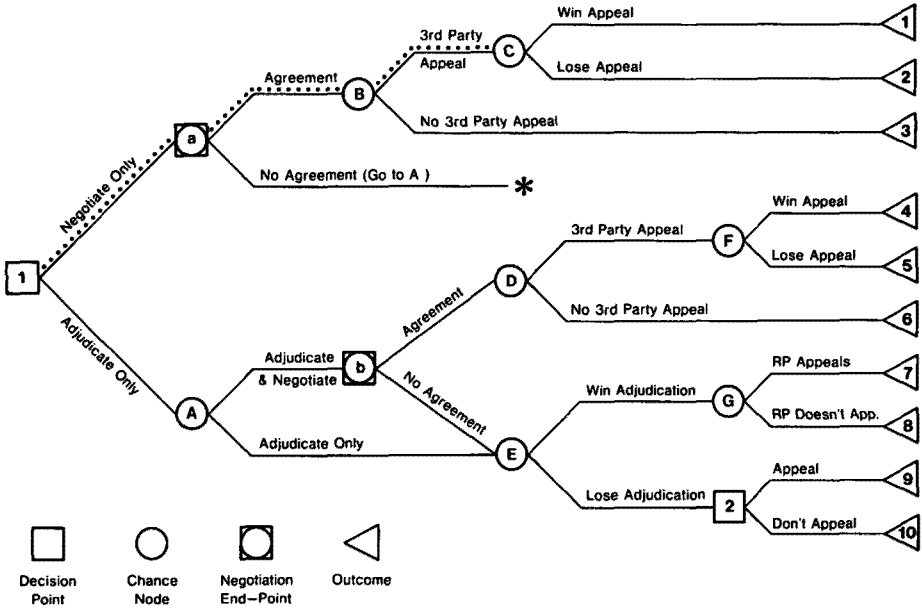

FIGURE 3. In Re I.B.M., SANTA CLARA COUNTY
(San Francisco Bay R.W.Q.C.B.)

At the time of this writing, it is unclear whether any third-party will appeal the terms of the consent decree (Figure 2, chance node D). Since this suit is separate from the dozens of damages actions private citizens have filed against Aerojet, those private suits are still pending.

Santa Clara Valley

In contrast to the Aerojet General case, Figure 3 shows a different approach and different outcomes in the S.F. Bay regional board's IBM case. When asked why, at decision point 1, staff resolved to negotiate waste discharge requirements rather than file an adjudicatory action, they had several responses.[77] First, they all stressed IBM's immediate and complete cooperation in identifying the source and extent of groundwater contamination, and in devising effective means for controlling it. Second, the public health threat was not as grave as some other situations in their experience; that is, the kinds and concentrations of chemicals generally did not pose as immediate or substantial a known danger as some other sites under the board's jurisdiction. Third, in addition to IBM's willingness to do all necessary cleanup, it also had the financial ability to do

77. Interviews with Stephen Morse, Senior Engineer, Lawrence Kolb, Supervising Engineer, and Roger James, Executive Officer, San Francisco Bay Regional Water Quality Control Board, in Oakland, Cal. (Feb. 25, 28, 1986 and Mar. 7, 1986) [hereinafter Morse, Kolb & James].

so; aside from the regional board staff time involved in review of IBM's remedial investigation and cleanup measures, the cleanup process was being conducted (in the board's view) expeditiously and at little cost to the state.

In further exploring the S.F. Bay regional board's stated policy preference for regulating *all* Superfund sites through the waste discharge requirement process (in which the responsible party's engineers essentially negotiate a site-specific cleanup standard with the staff), board personnel offered several reasons. Overall, they view their ultimate goal as getting as much contaminant as possible out of the groundwater as quickly as possible. In their experience, setting a waste discharge requirement was mostly a matter of regional board engineers interacting with the responsible party's engineers, whereas any form of adjudicatory enforcement action was mostly "our lawyers fighting with their lawyers." They pointed out that just as much engineering staff time goes into an adjudicatory enforcement (research, depositions, interrogatories, testimony) as in setting and reviewing waste discharge requirements, but with no tangible results (that is, no decontamination occurring during much of the adversary process). In sum, bargaining over a WDR was more efficient and effective, in their view.

Lastly, the S.F. Bay regional board staff also acknowledged institutional incapacity insofar as enforcement is concerned. Confronted with the responsibility for overseeing the nearly one hundred nationally rated Superfund cleanup sites within their jurisdiction, board officials estimated that their enforcement staff was not large enough to effectively adjudicate more than about 15 percent of those cases anyway. In other words, unless the state was willing to massively augment regional board enforcement and review staff (which at that point it was not), the success of the board's cleanup program was critically dependent on the good will and voluntary compliance of the responsible parties.

In defense of its position, S.F. Bay regional board officials referred to the language of both federal and state statutes which authorize taking cost into consideration in site-specific standard-setting, and then they pointed out that TCA levels were already far below what the state health department and the EPA currently consider to be health-threatening. Reference was also made to a device known as a "cost-degradation curve," which the S.F. Bay regional board has used as a conceptual aid in deciding the level at which to set site-specific standards.

Figure 4 is a reproduction of such a curve from regional board policy guidelines.[78] It generally depicts a situation in which as higher levels of

78. SAN FRANCISCO BAY REGIONAL QUALITY CONTROL BOARD, REGIONAL BOARD STAFF GUIDELINES . . . TO IDENTIFY WATER QUALITY OBJECTIVES FOR HAZARDOUS MATERIAL SITE CLEANUP, Appendix, Fig 2 (Mar. 9, 1983).

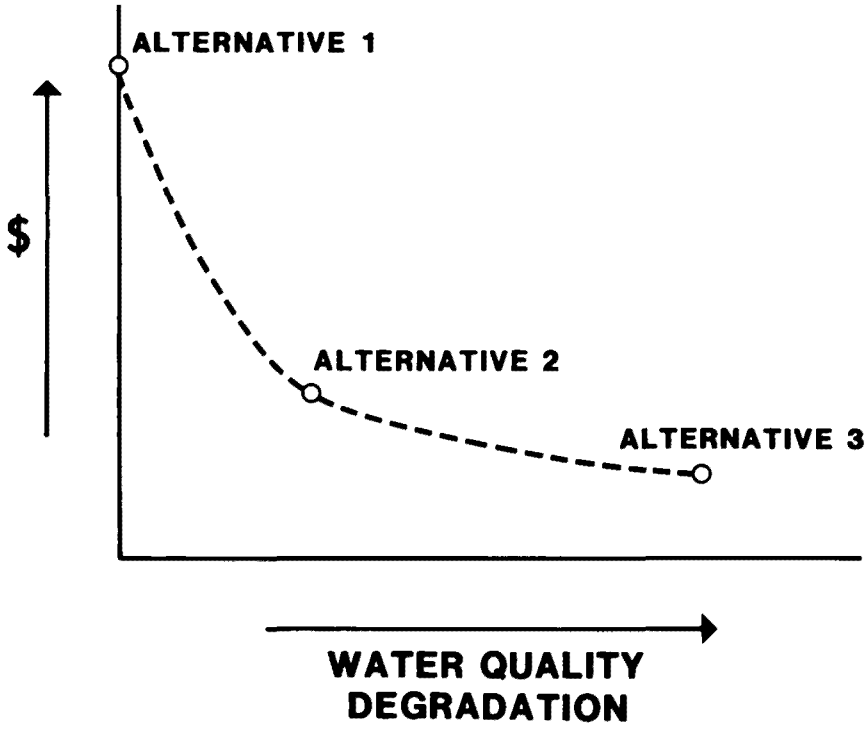

FIGURE 4. SAMPLE COST/DEGRADATION CURVE, SAN FRANCISCO BAY R.W.Q.C.B. STAFF GUIDELINES (March 1983)

decontamination are achieved, so does the per-volume-unit cost of achieving them. Once the threshold level of decontamination of a given chemical has been reached (200 ppb in the case of TCA), board officials then consider the question of how much cleaner they should order the water to be as entirely within their own discretion. For example, if in the IBM case Alternative 3 in Figure 4 represented the 200 ppb contamination level, the S.F. Bay board staff might set a site-specific cleanup standard at any point along the curve to the left of Alternative 3. Appellants in the IBM case want that standard set at or near the Alternative 1 position; the regional board in this case opted for something between one and three, as they did not consider the costs which would have been imposed on IBM by Alternative 1 to be justifiable.

Since this concept was first set forth in 1983 (EPA alluded to a similiar construct in its 1984 drinking water regulations[79]), it has drawn attention from supporters and detractors alike. Skeptics point out that in many cases the data on per-unit treatment costs are generated by the toxic

79. *See supra* note 64.

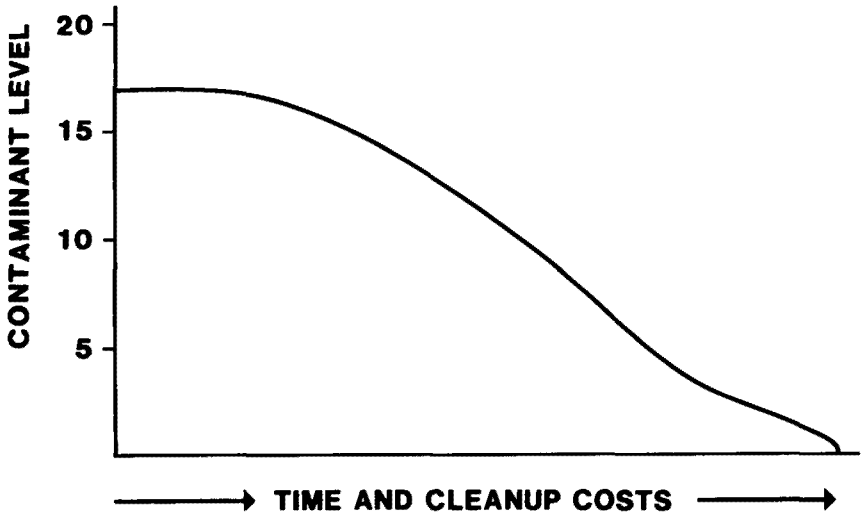

FIGURE 5. SAMPLE TIME/COST/DEGRADATION CURVE, FROM SAN FRANCISCO BAY R.W.Q.C.B. STAFF INTERVIEWS (1986)

polluters themselves; since they will be paying the bills, they have every incentive to make stringent decontamination standards look more costly to achieve than they might actually be. Also, after two years of working with the concept, one S.F. Bay board official has commented that in many of the Santa Clara County cases they are dealing with now, the curve actually looks more like that depicted in Figure 5. In his view, the hardest bargaining usually occurs at the outset of the case, as responsible parties are being urged to dig enough monitoring and interception wells to adequately define and contain the contaminant plume. The other principal issue—what the final site-specific cleanliness standard should be—essentially boils down to a question of when the responsible party should be allowed to turn off the pumps on the interception and extraction wells (the wells pulling contaminated water out of the ground for treatment). The longer the wells operate in this 3-dimensional model, the cleaner the groundwater becomes *and* the higher the costs are for the responsible party. Conversely, the sooner the wells are shut down, the more money the responsible party saves, and the greater the contaminant concentration remains in the groundwater.

Comment

In both the IBM and Aerojet General cases, bargaining between the responsible parties and government officials played a highly significant role in cleanup goal-setting along each of the decision paths in Figures

2 and 3. Third parties not privy to the negotiation process have subsequently attacked the IBM decision as an abuse of S.F. Bay regional board discretion, while it is as yet unclear whether Sacramento-area residents intend to challenge the just-filed settlement of the six-year-long Aerojet General case. Public mistrust of and disagreement with the S.F. Bay board's action in the IBM case is obviously substantial, or environmental groups, unions, and local governments served by the Santa Clara aquifer would not be appealing the board order. Early press reaction to the Aerojet General settlement has also not been favorable; it remains to be seen whether an appeal from this negotiated judgment will be mounted, although board personnel see this as a real possibility if the decree is not modified.[80] There is, in sum, substantial public suspicion regarding the use of negotiation to remedy incidents of groundwater contamination in these cases.[81] It is to that task, and the related one of formulating policy recommendations based on these criteria, that we now turn our attention.

EVALUATIVE CRITERIA AND POLICY RECOMMENDATIONS

A central concern of this research (and one facing any public official using bargaining in discretionary decisionmaking) is how to imbue agency actions reached through informal negotiation with some of the same attributes of legitimacy which can usually be acquired only at the cost of lengthy and formalized administrative due process. As discussed earlier in this paper (based on the work of Freedman), those attributes are constitutionality, effectiveness, responsiveness, and fairness.

The constitutionality of negotiated administrative dispute settlement is

80. Telephone interview with Tom Pinkos, Supervising Engineer, Central Valley Regional Water Quality Control Board, in Sacramento, Cal. (July 1, 1986).

81. At press time, the author learned that the original consent decree has indeed been rejected, owing largely to two significant events which occurred while the proposed decree was still under consideration in 1986. First, Congress amended the Superfund legislation through adoption of Pub. L. No. 99-499, the Superfund Amendments and Reauthorization Act (SARA) of 1986. The amendments pegged Superfund cleanup standards to those established under other federal environmental statutes, thus somewhat narrowing agency discretion in setting site-specific cleanup requirements. It also empowered state governments to set tougher cleanup standards than those promulgated by the EPA, yet have them enforced under Superfund authority.

Second, California voters—alarmed at the seeming slowness and ambiguity in state agency toxic substances standard-setting and cleanup procedures—approved Proposition 65. This ballot initiative ordered the governor to expeditiously adopt human health protection standards for a wide variety of toxics, many of which have not yet been subject to standard-setting by the EPA. As the initiative is worded, these state standards may well be considerably more stringent than those adopted or to be adopted by the EPA.

Concerned that increased state authority under SARA combined with anticipated rigid new state standards under Proposition 65 would uncontrollably expand its cleanup liability, the Aerojet General Corporation withdrew its consent to the decree as originally proposed. As of winter, 1988 negotiations over a new decree were still under way. Telephone interview with James Hanson, Environmental Engineer, Toxics and Waste Division, EPA Rgn. 9, San Francisco, Cal. Jan. 26, 1988.

a rich and complex enough subject to warrant separate treatment in another article. Our concern here will be limited to criteria for evaluating when negotiation is or is not being used effectively, responsively, and fairly.

Effectiveness Criteria

A starting point in determining whether an agency is or is not using negotiation effectively is to determine if the agency was well-advised to undertake negotiation in the first place (Figure 1, decision point 1). When asked how they generally decide between adjudication and negotiation once they learn of groundwater contamination, administrators interviewed during the course of this research said they take into account factors like: (1) past history (if any) of board dealings with the responsible party (RP), (2) magnitude of the contamination problem, (3) promptness of reporting contamination and responsiveness to cleanup suggestions, and (4) RP intent. If it is the first time the RP has caused contamination or if it has fully and voluntarily complied with board directives in the past, if the contamination does not require an immediate and substantial public expenditure for cleanup, if the RP promptly and fully reports the contamination and immediately makes a good faith effort to clean it up, and if there is no evidence of intent to contaminate or to conceal evidence of contamination, the administrators' tendency seems to be to negotiate compliance rather than opt for adversarial enforcement. Conversely, if there is a history of enforcement problems with the RP, if catastrophic environmental damage is caused, if the RP delays in reporting contamination or declines to make good-faith investigation and cleanup efforts, or if the RP willfully or negligently contaminated the environment and attempted to conceal the problem, then (in the view of respondents in this research) adjudication is usually indicated.[82]

Ideally, the agency administrator at decision point 1 in Figure 1 (the initial adjudicate/negotiate decision juncture) will think through the possible outcomes involved in following either path, and then (based on answers to questions such as those raised in the preceding paragraph) will be able to assign rough probabilities (at each range node) for the achievement of desired outcomes via the available paths. So one criterion for evaluating an initial adjudicate/negotiate decision is whether there is a rational basis for an agency decisionmaker's judgment that there is a higher probability of achieving a desired level of cleanup through negotiation than through adjudication. Just as lawyers routinely make probabilistic estimations of their chances of winning a case if it goes to trial,[83]

82. Crook, Jepperson & Pinkos, *supra* note 73; Morse, Kolb & James, *supra* note 78.

83. *See, e.g.*, R. BEHN & J. VAUPEL, QUICK ANALYSIS FOR BUSY DECISIONMAKERS, 133-62 (1982).

so must agency decisionmakers be capable of and ready to make rationally defensible estimations of their chances of achieving desired cleanup objectives either through negotiation or adjudication.

Beyond agency action taken at decision point 1 in Figure 1 (the initial adjudicate/negotiate decision), it is obvious from the paths traced in Figures 2 and 3 that negotiation played a significant role in both cases beyond this first juncture. Bargaining in the Aerojet General case commenced *after* an initial decision to adjudicate by the state, it was much more prolonged than in the IBM case, and (at this writing) it has not yet settled the case. Another important efficacy criterion, then, is the length of the time taken to achieve settlement between the agency and the responsible party, if negotiation is attempted. But in addition to a simple measurement of time from the discovery of toxic contamination to the successful conclusion of cleanup negotiations lies the question of why delay in settlement, if any, occurred. Can it be attributed to causes such as RP recalcitrance, an excessive agency caseload (insufficient personnel), or jurisdictional confusion, and lack of interagency coordination?[84] So a second general efficacy criterion involves the three closely related questions of how long cleanup negotiations lasted, why any appreciable delays may have occurred, and what was done about them.

A third significant, quantifiable measurement of the relative effectiveness of agency bargaining is the site-specific cleanup standard for various pollutants achieved through negotiation. As we have seen, for example, initially there was an approximate forty-fold difference in allowable TCA concentrations at the two sites studied in this research (about 5 ppb at the IBM site and 200 ppb at Aerojet). However, federal and state officials have been careful to point out that the Aerojet figure represents an interim guideline, subject to downward revision after its investigation is completed.[85]

Fairness and Responsiveness

In determining whether an agency has negotiated a decontamination agreement in a manner which is genuinely responsive to public concerns regarding the protection of their health and safety, the question of public access to information looms large. Site-specific responsiveness criteria include the answers to questions like "How much was the public told about a toxic contamination incident?" "When?" And "By whom?" The

84. Regarding coordination difficulties, see *Months After EPA Settlement, Ohio Cleanup Has Yet to Begin*, Washington Post, Feb. 26, 1983, at A11. According to respondents, the state and regional water boards, Department of Health Services, and Regional IX EPA officials have been experiencing interagency coordination problems of their own, *See* Crooks, Jepperson & Pinkos, *supra* note 72; and Morse, Kolb & James, *supra* note 77; WHITE PAPER, *supra* note 47.

85. *See supra* note 50.

same questions hold true for public information regarding compliance negotiations with responsible parties.

However, agencies in the cases studied found themselves operating in largely a reactive mode, insofar as the flow of public information was concerned. As currently structured and staffed under state budget authority, none of California's regional water quality control boards has a permanent, full-time public information or community relations officer responsible for fully informing the general public on incidents of toxic waste exposure.

This reactive bureaucratic stance was quite in keeping with policy at the EPA during the tenure of Administrator Burford, when she was making fatal budget cuts in its public participation and information programs.[86] But when William Ruckleshaus briefly reassumed directorship of the agency, one of his first moves was to establish a program to reinstate the "fullest possible public participation" in agency decisionmaking on such issues as Superfund site cleanup.[87]

In part because of this renewed budgetary emphasis, the Region IX EPA offices formulated a detailed community involvement plan for Santa Clara Valley Superfund sites.[88] Included in this program was a million-dollar grant to the S.F. Bay Regional Water Quality Control Board; some of these funds were earmarked for the hiring of temporary public information officer.

In the Sacramento area, the EPA and the state also developed an extensive program for soliciting public comment on the proposed court settlement of the Superfund enforcement suit that the state originally filed against Aerojet General. In this case, an additional impetus to inform and consult the public came in part from political leaders bothered by the lack of public participation earlier in the negotiation process. In response to concerns expressed by Sacramento assemblyman Lloyd Connelly to the California attorney general, the state and the EPA wrote a 120-day public comment period into the agreement, to be completed before making final the proposed settlement decree. During this time EPA and state officials held informational workshops for the public in affected communities. When appropriate, some of these comments may be adopted as substantive modifications to the final settlement, if the state and Aerojet agree and the judge so rules.[89]

One purpose of the EPA community involvement plan was to help the

86. *See supra* note 35.

87. *Infra* note 88.

88. EPA, *Community Involvement Plan, South Bay Area*, Region IX, Hazardous Site Control Div., Santa Clara County, Cal.) (Apr. 15, 1985). *See also* Peterson, *Ruckleshaus Tightens EPA Ethics*, Washington Post, May 20, 1983, at A13, col. 1.

89. *See supra* notes 52 & 59.

regional boards shift from reactive to pro-active modes of action, regarding public access to information on site-specific regulation of toxic environmental contamination.[90] But as important a criterion as the provision of timely, accurate, unsolicited public information is, agency obligations to enhance the responsiveness and fairness of its negotiating behavior in toxic contamination cases may need to go beyond a pro-active public communications effort. When significant questions of public health and safety are at issue, perhaps true responsiveness and fairness connote some form of meaningful public participation in the *making* of bargained settlements, rather than the public simply being informed of the existence of settlement negotiations before, during, or after the fact.

Thus a final criterion for evaluating the legitimacy of agency negotiating behavior concerns the degree to which agency personnel identified interested and concerned parties in the communities affected by decontamination decisionmaking, and then attempted to integrate their participation into the decisionmaking process.

Exactly how concerned citizens should be involved in agency deliberations is a question which has been stirring considerable controversy and some interesting experimentation lately. In matters concerning not the cleaning up of spilled waste but the siting of new hazardous waste treatment facilities, both Massachusetts and California have adopted novel approaches. A recently enacted Massachusetts statute mandates bargaining between state and local government officials and would-be developers of hazardous waste facilities over questions of plant siting and operations. If negotiations fail, the state has preemptive authority to arbitrate a final siting decision.[91]

Local pre-emption legislation has so far been viewed as *politically* toxic by the California legislature, and such an approach has not been adopted there—despite the best lobbying efforts of the state's chemical manufacturing and treatment industries.[92] But the state is experimenting seriously with noncoercive multi-lateral mediation among local and state government officials, would-be facility developers, and concerned citizen groups over new facility siting in southern California.

The supporters[93] and critics[94] of "environmental mediation" nationally seem equally ardent in their views; there is also a growing literature

90. EPA, INVOLVEMENT PLAN, *supra* note 88.

91. MASS. GEN. LAWS ANN., chs. 210, 40A (West 1979). For an explanation and discussion of the law, see Bacow & Milkey, *Responding to Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, RESOLVE (Winter/Spring 1983).

92. Morell, *The Siting of Hazardous Waste Facilities in California*, 25 PUBLIC AFFAIRS REP. No. 5 (UC Berkeley, Inst. of Gov't Studies (1984)).

93. A. TALBOT, SETTLING THINGS (1983).

94. Schoenbrod, *Limits and Dangers of Environmental Mediation: A Review Essay*, 58 N.Y. U. L. REV. 1453 (1983).

recommending additional cautious experimentation and research with this technique.[95] But Central Valley Regional Board administrators said Aerojet General was totally resistant to public involvement in negotiations, for fear that confidentiality would be breached and sensitive information would find its way to the plaintiffs' future private suits against the company. Agency officials also doubted whether most "concerned citizens" had either the technical expertise or the time to devote to a very extensive and involved negotiation process. Further, the board felt that *it* was constitutionally charged with responsibility for protecting the public interest; and that direct citizen involvement might well hinder rather than help the negotiation process, especially when there is pending litigation.[96]

But if simple press release-style public information programs are put at one end of a public involvement spectrum and direct public participation in negotiations at the other, there is still plenty of room for innovative agency action in between. For instance, unless a public agency has made some binding assurance of confidentiality in bilateral compliance negotiations with the RP, agency officials can act as "information intermediaries." In addition to disseminating updates on settlement negotiations to the press, agency officials can (1) identify third parties (individuals, community organizations, local government officials) who feel they have the most "at stake" in settlement negotiations; (2) consult with these parties either individually or as a group as negotiations with the RP progress; and (3) carry any concerns or suggestions from third parties back to the negotiation process, as a way of structuring those responses into bargaining deliberations without citizens having to be present.

Different observers recommend identifying these "stakeholders" by different means, as well as acknowledging the difficulty of doing so at all.[97] One threshold criterion for consultation is certainly the ability and intent of a disaffected third party to effectively appeal a negotiated settlement if that party did not feel adequately consulted during negotiations.

Summary of Evaluative Criteria

There are about a half-dozen criteria which overseers and observers can use to evaluate the relative legitimacy of administrative bargaining with polluters over toxic waste decontamination. Stated as questions:

1. Based on the responsible party's behavior, was the agency rationally justified in deciding if and when to negotiate compliance rather than adjudicate?
2. How much time elapsed between discovery of toxic contamination

95. Amy, *The Politics of Environmental Mediation*, 11 ECOLOGY L. Q. 1 (1983).
96. Pinkos, *supra* note 68; Pinkos, *supra* note 50
97. *See supra* notes 92-95.

and the conclusion of compliance negotiations? If significant delays in compliance occurred, why did they happen and how were they resolved?

3. What site-specific cleanup standards for individual toxic contaminants were adopted and implemented?

4. How thoroughly, when, and by what means did the agency inform the public both of the existence of a toxic contamination threat and of agency intent to remedy the threat through consensual means?

5. Did the agency keep the public apprised of the progress (or lack thereof) of compliance negotiations?

6. Did the agency attempt (a) to identify significant "stakeholders" (for example, groups of concerned citizens, local government officials, community organizations) with an interest in the outcome of settlement negotiations; (b) to solicit their views and responses regarding compliance talks with polluters; and (c) to integrate those views and responses into the settlement agreement?

Taken together, these questions can provide a useful yardstick for measuring whether an agency has enhanced or detracted from the legitimacy of its use of power in conducting compliance talks with toxic polluters. For them to be used effectively over time, though, requires that a data base of settled cases be established as a starting point in the comparative evaluation of future case handling—a suggestion discussed in conclusion below.

Concluding Policy Recommendations

First, *create a data base of cases settled through compliance negotiation*. Somewhere in the case files of the agencies responsible for controlling toxic groundwater contamination is site-specific information for each incident on (1) when contamination was discovered, (2) the nature and extent of contamination, (3) who the responsible party was, (4) what remedial measures were taken, (5) what site-specific, pollutant-specific cleanup standards were adopted, and (6) the time elapsed from contaminant discovery to achievement of those standards (final cleanup). Unfortunately, although part of the public record, such information is often difficult to come by and is not organized into a standardized, accessible format.

Comparative evaluation of future agency bargaining effectiveness would be made much easier if there existed a standardized reporting format for all settled cases, with data supplied for the six categories listed above. Although the circumstances of each contamination site are to some extent unique, there are likewise many similarities among them. Comparative examination of factors like extent of contamination, standards adopted, and time needed to achieve them could provide a useful reflection on

"how good a deal" an agency was able to make in compliance talks and how efficiently the bargain was monitored, once made. In addition to providing a criterion for external review, such a data base would also provide an invaluable "institutional memory," for an agency to use in monitoring its own performance and the past behavior of responsible parties. If the data show consistently rapid effective compliance by some RP's and consistent delay and resistance by others, agency negotiators can use this information in rationally justifying adjudicate/negotiate decisions in the future.

Second, *use a "media report card" to update the public on agency compliance activities.* Regional board personnel interviewed for this research reported that one problem with the negotiation process was its use as a delaying tactic by some responsible parties.[98] Polluters would miss deadlines for the submission of needed information and hold off on contracting for cleanup work until the failure of a negotiation seemed imminent and adjudication inevitable. Only then would they reluctantly, half-heartedly respond to agency directives, in the hope of achieving weaker standards and more time.

One way for an agency to remedy this behavior without having to constantly resort to the threat of litigation is by regularly informing the public of the comparative bargaining behavior of the responsible parties with which it is working. Perhaps every 30 to 60 days agency personnel could report to local news media on which responsible parties were making good-faith efforts to follow agency cleanup directives and which ones were resisting them. In addition to keeping the public informed of the status of ongoing cleanup efforts, such a technique might persuade otherwise recalcitrant polluters that the public relations liability engendered by "poor grades" in periodic agency reports to the media might not be worth whatever benefits would be achieved through purposeful delays in compliance.

Third, *develop an ongoing, permanent, pro-active public involvement capability as an integral component of all compliance activities.* EPA funding of the S.F. Bay Regional Board's community involvement program has certainly exerted some legitimizing influence on agency action in the Santa Clara Valley. However, the program is also post-hoc (established *after* third parties appealed the IBM decision) and temporary (federal funds are running out; state funds are not budgeted). Eventually policy makers must come to grips with the fact that public involvement in informal agency action directly affecting public health and safety is not a public relations luxury, to be trimmed away or deleted completely when budgets get tight. As the EPA learned in 1983, some form of

98. Morse, Kolb, & James, *supra* note 77.

effective community participation has become a virtual necessity in establishing the legitimacy of informal agency action. Eschewing the due process model of policy implementation cannot be equated with relieving the agencies of all responsibility for public notice and participation. To do so would be to undercut the very values the due process model has sought to reinforce; and it would drastically erode any remaining public confidence in how public agencies use their power. Traditionally, whenever an agency loses that confidence it then finds itself subject to a major legislative overhaul.

Just what kind of public involvement is appropriate to a given agency handling a given case remains an open question. Described earlier was a public involvement continuum, with a pro-active public information program at one end, direct "stakeholder" participation in informal compliance talks at the other, and the agency as an "information intermediary" somewhere in between. At the very least, it is incumbent on the agency and its overseers to recognize that *some* form of involvement is necessary, and then tailor the specific form to individual cases.

CONCLUSION

Ideally, we are in the process not of retreating from the due process model but evolving beyond it—advancing to legitimized informal action when possible and falling back on formal due process when necessary. Some of the authors cited here have discussed this ideal as the evolution from "autonomous" to "responsive" law.[99]

On a more mundane and strategic level, we are also talking about cheaper, simpler, faster ways to achieve policy implementation goals than traditional due process affords us. It is clear by now that how well we succeed will depend in large part on how well agency administrators understand the ethical implications of their bargaining behavior. If we equate ethical administrative behavior with that which enhances the legitimacy of an agency's use of power, we may finally come to see that genuinely fair, responsive informal process and cost-effective implementation are not separable or discordant objectives. Ethics and efficiency are and will remain inextricably intertwined.

99. P. NONET & P. SELZNICK, *supra* note 21.