

ARTICLE

THE NEGOTIABLE IMPLEMENTATION OF ENVIRONMENTAL LAW

by Dave Owen

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I. Introduction

In theoretical accounts of environmental law, traditional environmental-law education, and much of the discourse of environmental-law implementation, negotiation is absent, except in a few celebrated and seemingly exceptional settings.¹ When scholars and policy advocates do address the roles of negotiation, they tend to default to two competing conceptions. In one—the “command-and-control” view²—environmental law is problematically centralized and rigid,³ and negotiation exists only in exceptional circumstances.⁴ In the alternative conception—call it the “slippage” view—the rigid protections exist on paper but not in practice, and environmental-law implementation involves government regulators allowing regulated indus-

tries to get away with varying degrees of noncompliance.⁵ In this latter view, negotiation is common, but it serves only to decide how far real-world practices can deviate from the law.⁶

However, negotiation is a defining feature of environmental law. In many realms of environmental law, the actual standards to be applied are up for negotiation, as are the nature of the actions being evaluated and the interpretation of key facts surrounding those actions. Negotiation helps determine what the law will be, how it will apply, and what it will apply to.⁷ It therefore is often a prerequisite rather than an impediment to effective environmental law. And one cannot understand environmental law without understanding these roles for negotiation. Nor can one appreciate the potential benefits for tailored and creative implementation.

But the pervasiveness of negotiation also should raise concerns, for environmental law may not handle negotiations nearly as well as it should. The centrality of negotiation has developed somewhat organically and with little transparency, so that many key participants in environmental-law implementation have minimal understanding of what is up for negotiation and when, or about how to negotiate well. There is ample anecdotal evidence, which this Article uncovers, that negotiation-based systems do not serve the underlying values of environmental law nearly as well as they could or should.⁸

A massive buildout of new infrastructure will probably require navigating many of the negotiation points described in this Article.⁹ If these negotiation points can

Editors' Note: This Article is adapted from Dave Owen, The Negotiable Implementation of Environmental Law, 75 STAN. L. REV. 137 (2023), and used with permission.

1. See, e.g., Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 427-32 (2004) (describing habitat conservation planning); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. L. REV. 21, 25, 39, 64-68, 73-75, 87-94 (2001) (describing negotiated rulemaking, Project XL, and habitat conservation planning, and asserting that most “initiatives to adjust the established command system . . . have been accomplished through administrative steps taken outside of the existing statutory structure” and that these initiatives have “made a positive but limited contribution”); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 653-61 (2000) (describing negotiated implementation of environmental law in a few specific contexts); see Shi-Ling Hsu, *A Game-Theoretic Approach to Regulatory Negotiation and a Framework for Empirical Analysis*, 26 HARV. ENV'T L. REV. 33, 39 (2002) (describing reservations about negotiated rulemaking and Project XL). Not surprisingly, negotiation specialists have given environmental negotiations more attention; see, e.g., LAWRENCE SUSSKIND, PAUL F. LEVY, & JENNIFER THOMAS-LARMER, *NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS COSTS, AND UNNECESSARY LITIGATION* (2000).
2. See *infra* notes 18, 38 and accompanying text. In the environmental-law field, the phrase “command and control” is widely and imprecisely used. See Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 658-59 (2012) (noting that the phrase “is rarely defined and its meanings and functions have become either submerged or taken for granted”). I use it here because of its popularity among environmental law’s critics.
3. See Timothy F. Malloy, *The Social Construction of Regulation: Lessons From the War Against Command and Control*, 58 BUFF. L. REV. 267, 268-69 (2010) (summarizing and critiquing this rhetoric).
4. See Hsu, *supra* note 1, at 39; Stewart, *supra* note 1, at 25, 39.

5. See, e.g., Mary Christina Wood, Essay, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 VA. ENV'T L.J. 243, 252-55 (2007) (asserting that regulatory agencies use their discretion to undercut environmental law); Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENV'T L. REV. 297, 299 (1999).
6. See, e.g., Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1411, 1488-1510 (2005) (describing negotiations over the implementation of the Endangered Species Act); Farber, *supra* note 5, at 320 (“[S]lippage is another name for non-compliance.”); David Striffling, Comment, *Sanitary Sewer Overflows: Past, Present, and Future Regulation*, 87 MARQ. L. REV. 225, 226, 232-34 (2003).
7. See *infra* Part II.
8. See *infra* Part IV.
9. See Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ELR 10591, 10603-13 (July 2017) (describing legal challenges and multiple legal obstacles).

be navigated efficiently and in ways that produce both better economic outcomes for regulated industries and stronger environmental protections, the nation and the world will benefit.

II. The Negotiable Implementation of Environmental Law

Negotiation is an important feature of environmental-law implementation. However, not everything is negotiable. In every subfield, there are some matters regulators are less likely to negotiate or do not negotiate at all. Relatedly, environmental law is filled with policy choices about what will be negotiable, by whom, under what circumstances, and what the alternatives to negotiation will be. The result is a heterogeneous, sometimes pragmatic and innovative, and sometimes counterintuitive patchwork quilt of regulatory approaches.

This part briefly summarizes that patchwork quilt, focusing on regulatory arenas that scholars and attorneys typically view as the core areas of environmental law.

A. Waste Site Cleanup

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) governs contaminated site cleanups, and more specifically, the assignment of liability for investigations and cleanups.¹⁰ In contrast to the other statutory regimes discussed in this Article, there is little novelty in observing that CERCLA implementation emphasizes negotiation. Most practitioners and academics know that CERCLA generates many negotiated settlements. The U.S. Environmental Protection Agency's (EPA's) website states its preference for negotiated resolutions,¹¹ and the agency publishes guidance documents on reaching more effective CERCLA settlements.¹² CERCLA thus illustrates not just the pervasiveness of negotiation in environmental-law implementation, but also a deliberate and open approach to embracing that pervasive role. The former characteristic is typical of environmental law. The latter is not.

B. Endangered Species Act Implementation

When people think of the Endangered Species Act (ESA), they do not tend to think of negotiation.¹³ The statute is legendary for its supposed rigidity. But negotiation matters to every element of this regulatory system, though

to different degrees and in different ways. The timing of listing decisions follows schedules set forth in negotiated settlements.¹⁴ Listing decisions also can lead to negotiated "Candidate Conservation Agreements," and nonfederal property owners can enter into "Candidate Conservation Agreements With Assurances."¹⁵ Once species are listed, ESA §7 compliance often involves negotiations. As one U.S. Fish & Wildlife Service official put it, "formal consultations almost always have negotiations, and a lot of informal consultations also have negotiations when there's the ability to modify an activity."¹⁶ So too does the preparation of habitat conservation plans, which are motivated and governed, respectively, by ESA §§9 and 10. As one attorney summed up ESA implementation, exaggerating only slightly, "it's all negotiation, actually."¹⁷

C. Clean Water Act Permitting

The classic rigidity critiques of environmental law tend to be stated in sweeping terms but are often focused primarily on pollution-control permitting programs.¹⁸ Among these programs, the Clean Water Act's (CWA) National Pollutant Discharge Elimination System (NPDES) permitting program is particularly prominent.¹⁹ Yet, even NPDES permitting also includes substantial elements of negotiation—as do other key elements of CWA implementation. Compliance schedules, variances, water quality-based effluent limits, stormwater permit contents, total maximum daily loads, and permits for filling waters of the United States all routinely involve negotiating. As one private firm attorney explained, describing his representation of municipal wastewater treatment plants, "pretty much in every permit, there's at least one or two really big issues that have to be negotiated."²⁰

D. Clean Air Act Permitting

Likewise, even in Clean Air Act (CAA) permitting, which traditional accounts might lead one to believe is a pinnacle of centralized rigidity, negotiation is crucially important.²¹ For example, new source review is generally carried out by

10. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405; *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009).

11. *Negotiating Superfund Settlements*, ENV'T PROT. AGENCY, Aug. 15, 2022, <https://perma.cc/QHU3-EY6K> ("EPA prefers to reach an agreement with a [potentially responsible party] to clean up a Superfund site instead of issuing an order or doing the work and then recovering its cleanup costs later.")

12. Memorandum from Barry Breen, Dir., Off. of Site Remediation Enfrt (June 17, 1999), <https://perma.cc/G7WT-93DA> (describing "Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites").

13. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

14. See, e.g., Felicity Barringer, *U.S. Reaches a Settlement on Decisions About Endangered Species*, N.Y. TIMES (May 10, 2011), <https://perma.cc/9BYX-UZYG> (describing a settlement involving hundreds of species).

15. *Candidate Conservation Agreements*, U.S. FISH & WILDLIFE SERV. (Oct. 2017), <https://perma.cc/24NQ-BMC2>.

16. Interview with U.S. Fish & Wildlife Service Official (Sept. 13, 2021); see also Interview with Private Firm Attorney (Oct. 4, 2021) ("They are typically heavily negotiated.")

17. Interview with Private Firm Attorney (Oct. 8, 2021).

18. E.g., Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1335 (1985).

19. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607; see Ackerman & Stewart, *supra* note 18; see also William F. Pedersen Jr., *Turning the Tide on Water Quality*, 15 ECOLOGY L.Q. 69, 70-71 (1988).

20. Interview with Private Firm Attorney (Sept. 7, 2021).

21. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.

state permitting entities²² pursuant to flexible standards.²³ The result, typically, is negotiation. Similarly, some of the most important air quality regulations address tail-pipe standards for automobiles, and those standards have sometimes emerged from complex negotiated deals with the automobile industry.²⁴ The CAA's regulatory scheme is too massive to summarize in this Article, but negotiation is not unique to stationary-source permitting and automobile emissions standards. For the Act as a whole, as for other areas of environmental law, negotiation is key.

E. Environmental Impact Assessment

Like most of its fellow members of the environmental-law canon, the National Environmental Policy Act (NEPA) does not appear to be a negotiation-framing statute.²⁵ Nor do its state-law counterparts. But in practice, compliance with environmental impact assessment laws often involves multiple stages of negotiation.

For actions implicating NEPA, the negotiations can start at the outset of the process. The “lead agency” generally must make a series of discretionary decisions, including defining the proposed action, drafting a statement of purpose and need for that action,²⁶ deciding the range of alternatives that it will analyze,²⁷ determining whether it will prepare an environmental impact statement (EIS) at all,²⁸ and deciding how it will describe potential impacts.²⁹ Often, project sponsors have different views about how these questions should be resolved, as, sometimes, do other agencies or officials within the lead agency. The resulting negotiations can address every facet of compliance. NEPA and its state counterparts also can produce extensive negotiations involving other interested parties. These negotiations can be focused and bilateral, but they can also be complicated, multiparty affairs.

F. Enforcement

Enforcement actions open a potential new phase of negotiation.³⁰ Environmental litigation is expensive and often

unpredictable, and parties have incentives to avoid litigating cases to completion.³¹ Negotiating a settlement is an appealing alternative.³² Government agencies have broad discretion to craft terms of settlements. Environmental statutes leave in place agencies' traditional enforcement discretion,³³ which means agencies generally can offer non-enforcement as a carrot to induce negotiated changes.

III. Implications

Negotiation is more pervasive in environmental law than traditional accounts of the field acknowledge. That centrality has implications for traditional critiques of environmental law. The prevalence and nature of environmental-law negotiations partially undercut command-and-control critiques. Negotiation's prevalence similarly undercuts critiques that equate negotiation with slippage.

A. Flexibility and Decentralization

Classic critiques claim that the United States' systems of environmental law are overly centralized and rigid.³⁴ In those critiques, environmental law is a command-and-control system, largely implemented through uniform national standards applied with little regard to the needs of specific facilities or places.³⁵ Closely related to that charge are concerns about informational deficits.³⁶ These views have been influential.

Acknowledging the importance of negotiation undercuts these critiques. Initially, the prevalence of negotiation shows that nearly every major environmental regulatory program incorporates significant elements of flexibility.³⁷ Regulators are taking the general standards and directives of environmental statutes and adapting them to specific situations.

A corollary to this flexibility is a surprising level of creativity. Environmental practitioners routinely described situations in which negotiation allowed them, or other people they work with, to come up with creative solutions to environmental challenges.

The prevalence of negotiation also undermines arguments about informational deficits. In their classic form, these arguments are premised on the assumed absence of direct communication between the regulators who make meaningful decisions and the people who are actually

22. See Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 819 (2008) (describing state and federal authority over stationary source permitting).

23. See 42 U.S.C. §7479(3).

24. See Jody Freeman, *The Obama Administration's National Auto Policy: Lessons From the "Car Deal,"* 35 HARV. ENV'T L. REV. 343, 344-45 (2011); see also Coral Davenport, *Defying Trump, 5 Automakers Lock in a Deal on Greenhouse Gas Pollution*, N.Y. TIMES (Aug. 17, 2020), <https://perma.cc/LQK9-QGN8>.

25. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209; see §§4321-4347 (making no mention of negotiation).

26. 40 C.F.R. §1502.13 (2021); see *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997).

27. See 40 C.F.R. §1502.14 (2021).

28. See, e.g., *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1077 (D.C. Cir. 2019) (describing, and rejecting, the U.S. Army Corps of Engineers' decision against preparing an EIS for a major utility line project).

29. See 40 C.F.R. §1502.16 (2021).

30. See Freeman, *supra* note 1 (describing this centrality); Interview with Private Firm Attorney (Aug. 30, 2021) (describing enforcement as involving “negotiation all over the place”).

31. See Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV'T L. REV. 117, 126 (2020) (describing these incentives); Robert L. Glicksman et al., *An Empirical Assessment of Agency Mechanism Choice*, 71 ALA. L. REV. 1039, 1055 (2020) (finding that settlements occurred in the “vast majority” of a sample of environmental enforcement cases).

32. See James J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 60-61 (2016) (explaining the basic rationales for settlement).

33. See Antonin Scalia, Paper, *Responsibilities of Regulatory Agencies Under Environmental Laws*, 24 HOUS. L. REV. 97, 105 (1987) (describing agencies' enforcement discretion).

34. See Malloy, *supra* note 3 (summarizing these critiques).

35. See *supra* note 18 and accompanying text.

36. See *supra* note 1, *infra* note 38 and accompanying text.

37. See *supra* Part II.

affected.³⁸ But negotiation is communication, and such communication is constantly occurring at multiple levels of governance.

If the prevalence of negotiation undercuts many of the premises of these classic critiques, it also undercuts their conclusions. Because much of environmental law is negotiated on a site-specific basis,³⁹ policymakers may not need to resort to environmental trading systems or self-governance to allow regulated entities to tailor regulatory burdens to their particular opportunities and needs. Permit writers are already doing that.

B. *Slippage and Discretion*

Another classic critique of environmental law treats its supposed rigidity as an often-squandered virtue. In this telling, the agencies that implement environmental law routinely allow regulated entities to ignore environmental law's strict mandates.⁴⁰ Sometimes, in these critiques, negotiation is a key mechanism through which gaps open between the protective laws on the books and the less protective law in action. But a closer look at the roles of negotiation demonstrates that while negotiation can be a mechanism for slippage, even people who strongly support vigorous environmental regulation should sometimes view regulatory negotiations in a positive light.

The idea that negotiation can lead to better environmental solutions is not new to the environmental literature. Commentators have described many examples of innovative and valuable negotiated outcomes.⁴¹ My additional contribution is to point out how pervasive these improvements are and how ingrained they are in the day-to-day grind of environmental regulation.

While acknowledging the roles of negotiation complicates both slippage critiques and the associated reform proposals, it does not necessarily undercut those proposals. Common responses to fears of slippage include advocating for petition rights, citizen suit provisions, and other measures that allow nongovernmental entities to demand stronger regulation even when government agencies are reluctant to provide it.⁴² Sometimes, those measures may short-circuit regulatory negotiations, but often external oversight and negotiation will be compatible.

The larger point is not that negotiated slippage is a myth or that antislippage reforms are unjustified. Instead, the

key points are that a significant amount of negotiation is not slippage-related and that a key goal of reforms should be to enhance and channel this negotiation rather than to limit it.

IV. Improving Regulatory Negotiations

The previous part placed environmental law's emphasis on negotiation in a positive light, and deliberately so. Negotiation has its benefits. But there is another side to the story. Environmental regulators' embrace of negotiation is uneven, underinformed, and poorly documented, which leads to a range of negative secondary consequences—and to some potential solutions. To address these consequences, a negotiating regulatory system ought to adhere to three basic principles. First, government should provide more transparency than private-sector negotiators typically offer. Second, government should negotiate effectively. Third, government should negotiate equitably.

With hundreds of agency offices handling thousands of negotiations every year, and with variation in approaches between regulatory programs, within those programs, and even among individual staff members at the same offices, a comprehensive account of existing negotiation practices at agencies is impossible.⁴³ Indeed, within that broad range of programs and participants, many negotiations probably are handled well. However, the evidence produced by this Article suggests several problems with environmental law's approaches to negotiations.

A. *Transparency*

A foundational administrative-law assumption is that regulated entities and other interested parties are entitled to know when government agencies are making important decisions, what criteria will inform those decisions, and how nongovernmental interests can have a voice in those choices.⁴⁴ Negotiated processes will sometimes require exceptions to those general principles; confidentiality can be important. But occasional exceptions should not stop agencies—and, sometimes, legislators—from providing clear information about situations in which negotiations are possible.

In most of the program areas described by this study, governing statutory law says nothing about the circumstances in which legislators hope to see negotiated outcomes (waste site cleanup is the key exception). Agency implementing regulations likewise say hardly anything about negotiations. Even handbooks and guidance documents governing situations in which negotiation is common are often silent about those negotiations. The U.S. Fish & Wildlife Service & National Marine Fisheries Service handbook on endangered species consultations, for example, uses the word “negotiate” only twice, both

38. *E.g.*, Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 343 (1990) (describing the information deficits faced by “[b]ureaucrats in Washington”).

39. *See supra* Part II.

40. *See supra* note 5 and accompanying text.

41. *See, e.g.*, Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 41-55 (1997) (describing two successful exercises in negotiated rulemaking); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 847-51 (2005) (describing negotiations leading to the creation of the “Environmental Water Account” for California's Bay-Delta estuary); Dave Owen & Colin Apse, *Trading Dams*, 48 U.C. DAVIS L. REV. 1043, 1073-80 (2015) (describing an innovative and negotiated dam-removal project).

42. *See generally* JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 102 (1971) (advocating for such measures).

43. Interview with Private Firm Attorney (Oct. 8, 2021) (“[S]ome of this is even within an office, right? Obviously, you're working . . . with individuals.”).

44. *See Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027-28 (D.C. Cir. 1978) (explaining the values served by transparency).

times in reference to negotiating extensions for document deadlines.⁴⁵ EPA's NPDES Permit Writers' Manual says nothing at all.⁴⁶ Nor does its New Source Review Workshop Manual.⁴⁷ More generally, I am not aware of any source—prior to this Article—that has attempted to provide a general map of the situations in which environmental regulators negotiate.

Additionally, many negotiated environmental documents are not readily available. For example, no searchable database of non-EIS NEPA documents exists.⁴⁸ And even if the documents are available, the role of negotiation is often hidden from view. Permits generally do not document the ways in which the project proposal was modified—likely through negotiations—at the initial draft stage.⁴⁹ Likewise, the role of negotiation in NEPA compliance is often opaque.

The negotiating state does not need to be a hidden collection of black boxes, and several straightforward reforms would help address its opacity. Agencies could revise regulations, handbooks, and guidance documents to specify what they are willing to negotiate, what they are not willing to negotiate, what general goals the agency seeks to achieve in its negotiations, and what kinds of information outside parties should bring to facilitate effective negotiations. And agencies should also be willing, within the boundaries of reasonable confidentiality limitations, to document the outcomes negotiation has produced. Transparency efforts would help regulated entities and community groups better understand the outcomes they should expect; agency staff could learn about the agreements other staff are reaching, which could generate better and more consistent agreements; and academics and policymakers who are interested in negotiated outcomes would have much more data to work with.

B. Effectiveness

Environmental regulators also should be effective negotiators. Yet, many indicators suggest that agency staff members are poorly prepared for this task.

The most direct evidence of problems involves the training of government negotiators, which interviewees repeatedly described as a “trial by fire.”⁵⁰ Some started negotiating without receiving any formal training.⁵¹ Oth-

ers had valuable training,⁵² but they wanted more—and, if they were supervisors, they also wanted more training for their staff.⁵³ The only systematic and robust training programs described were EPA's program for CERCLA lawyers and the U.S. Department of Justice's (DOJ's) trainings for its litigators.⁵⁴

Resources available to government negotiators also vary markedly. Some agencies have sufficient budgets to staff negotiations and hire outside facilitators.⁵⁵ But government and nongovernment interview subjects generally agreed that government negotiators are chronically under-supported.⁵⁶

Additionally, academic institutions appear to be falling short. Many law schools provide environmental-law education, and many provide negotiation training, but the two do not always meet. Additionally, many of the people doing the negotiating—particularly on the government side—lack legal training.⁵⁷ Agency staff often have degrees in environmental sciences or environmental engineering, where the focus is on technical content rather than negotiating techniques.⁵⁸

These deficiencies have consequences. Some environmental group representatives were frustrated at regulators' willingness to give away leverage,⁵⁹ while industry representatives argued that regulators should be better educated about industry needs and business models.⁶⁰ But a deeper theme, common to most of the critiques, was that the administrative state's ambivalent embrace of negotiating is reflected in the performance of its negotiators.

These are at least partially fixable problems. State and federal legislators could appropriate more money to staff and train regulatory agencies.⁶¹ Compared to the overall cost of running a state or federal government, the additional investments could be quite modest, and the benefits could be substantial.⁶² Hiring negotiation specialists also can help. Even if the U.S. Congress and state legislators do not want to set up independent offices, they can bolster training, consider hiring regulators from deal-making

45. U.S. FISH & WILDLIFE SERV. & NAT'L MARINE FISHERIES SERV., CONSULTATION HANDBOOK: PROCEDURES FOR CONDUCTING CONSULTATION AND CONFERENCE ACTIVITIES UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT 4-7, 5-3 to -4 (1998).

46. See ENV'T PROT. AGENCY, NPDES PERMIT WRITERS' MANUAL 5-1, 5-14, 5-15 (2010).

47. ENV'T PROT. AGENCY, NEW SOURCE REVIEW WORKSHOP MANUAL: PREVENTION OF SIGNIFICANT DETERIORATION AND NONATTAINMENT AREA PERMITTING (1990).

48. See *Environmental Impact Statement (EIS) Database*, ENV'T PROT. AGENCY, <https://perma.cc/W9AV-AUK7> (archived Oct. 22, 2022) (providing access to EISs but not other NEPA documents).

49. Interview with Community Group Attorney (Oct. 18, 2021) (noting that these negotiations “happen[] largely out of the public eye”).

50. *E.g.*, Interview with State Water Quality Regulator (Oct. 25, 2021).

51. *E.g.*, Interview with U.S. Forest Service Employee (Nov. 29, 2021).

52. *E.g.*, Interview with State Water Quality Regulator (Oct. 25, 2021), *supra* note 50.

53. *E.g.*, Interview with State Water Quality Regulator (Sept. 14, 2021).

54. Interview with DOJ Attorney (Nov. 1, 2021).

55. See, e.g., *Learn About Environmental Collaboration and Conflict Resolution*, ENV'T PROT. AGENCY, Oct. 6, 2022, <https://perma.cc/YAR8-86R3>.

56. *E.g.*, Interview with State Water Quality Regulator (Sept. 14, 2021), *supra* note 51.

57. Interview with Private Firm Attorney (Oct. 4, 2021).

58. See SHIRLEY VINCENT, NAT'L COUNCIL FOR SCI. & ENV'T, INTERDISCIPLINARY ENVIRONMENTAL EDUCATION: ELEMENTS OF FIELD IDENTITY AND CURRICULUM DESIGN 21-22 (2010) (describing environmental studies curricula).

59. Interview with Environmental Group Representative (Aug. 25, 2021) (describing one federal agency as “a horrible negotiator”).

60. *E.g.*, Interview with Private Firm Attorney, *supra* note 57.

61. Establishing protocols for peer review of negotiating practices also could help. See Daniel E. Ho, *Does Peer Review Work? An Experiment of Experimentalism*, 69 STAN. L. REV. 1, 79-82 (2017) (describing benefits of regulatory peer review).

62. See MARK FEBRIZIO & MELINDA WARREN, REGULATORS' BUDGET: OVERALL SPENDING AND STAFFING REMAIN STABLE (2020) (providing figures on overall costs for federal regulatory agencies).

backgrounds, and establish a culture of negotiating openly and effectively.

C. Equity

This study also uncovered evidence that regulatory negotiations are not as equitable as they should be. Both regulators and attorneys representing regulated parties agreed that smaller, less resourced entities face disadvantages in negotiation-based systems. Some of those disadvantaged entities are regulated businesses; others are environmental or community groups.

The challenges arise for a variety of reasons. Sometimes, would-be participants do not know when negotiations are occurring or are not able to attend. In other circumstances, environmental and disadvantaged-community advocates are invited to the table but cannot staff extended negotiation processes, particularly if multiple processes are occurring at the same time. Sometimes, a lack of access to technical expertise becomes a barrier to effective participation.⁶³ Some environmental groups have highly sophisticated technical experts on staff, but others do not, and others are “spread so thin.”⁶⁴

One obvious possible reform—turning away from negotiating—might do more harm than good. The harsh reality is that most decisionmaking processes tend to favor experienced and well-resourced actors. Consequently, disadvantaged communities and other public-interest advocates might not achieve better outcomes under a system of bright-line, non-negotiable rules, or under a system in which agencies simply take a range of perspectives under advisement and then issue decisions without negotiating with anyone. Negotiation might be worse, just because it

often takes longer, but the dialogue and engagement it creates will also sometimes provide advantages.⁶⁵

But other things can be done. The transparency reforms described earlier are one important step. Similarly, training programs can emphasize techniques to help community groups and regulated entities with fewer resources get involved and succeed in negotiations. Intervenor funding also can be effective.⁶⁶ Openly acknowledging the centrality of negotiation could help environmental law move beyond a circumstance in which only the experienced and the connected know enough to see through the myth of a rigid, inflexible system.

V. Conclusion

Environmental-law implementation is built on negotiation. One would not know this from reading most of the classic accounts of the field, but in all the field’s major programs, regulators, regulated entities, and sometimes environmental advocacy groups negotiate over the design of proposed actions and the obligations created by governing law.

Recognizing this centrality of negotiation has important implications for the field. The prevalence of negotiation undercuts critiques alleging that decentralization of regulatory authority is necessary to bring flexibility to the field. Similarly, the nature of regulatory negotiations undercuts claims that placing flexibility in the hands of regulators will inevitably lead to the weakening of environmental law. But even if recognizing negotiation’s importance should soften some critiques, it supports others. Most significantly, and largely because environmental law has not openly embraced its close relationship with negotiation, the transparency, efficacy, and equity of environmental negotiations could substantially improve.

63. See Jonathan Skinner-Thompson, *Procedural Environmental Justice*, 97 WASH. L. REV. 399, 413-14, 432-33 (2022).

64. Email from Environmental Organization Representative to author (Oct. 19, 2021, 6:46 PM PST) (on file with author).

65. See Interview with Community Group Attorney, *supra* note 49 (noting that negotiation allows her clients to obtain benefits they would not otherwise receive).

66. See NAT’L ASS’N OF REGUL. UTIL. COMM’RS, STATE APPROACHES TO INTERVENOR COMPENSATION (2021); see also Skinner-Thompson, *supra* note 63, at 439-40.