Volume 2 | Issue 1 Article 4

1991

Binding Parties to Agreements in Environmental Disputes

Lawrence S. Bacow

Michael Wheeler

1991]

BINDING PARTIES TO AGREEMENTS IN ENVIRONMENTAL DISPUTES

LAWRENCE S. BACOW†
MICHAEL WHEELER‡

TABLE OF CONTENTS

I. INTRODUCTION

THE past five years have witnessed growing enthusiasm for negotiation as an alternative to adjudication in resolving envi-

† Professor of Law and Environmental Policy, Massachusetts Institute of Technology. B.S. Massachusetts Institute of Technology, 1972; M.P.P., 1976, Ph.D. 1978 John F. Kennedy School of Government, Harvard University; J.D. Harvard University School of Law, 1976.

‡ Senior Lecturer, Massachusetts Institute of Technology. B.A. Amherst College, 1965; J.D. Boston University School of Law, 1969; LL.M. Harvard University School of Law, 1974.

ronmental disputes. The appeal of this form of dispute resolution can be seen in the increasing use of negotiation in both state and federal statutory schemes and policies.

A number of states have established mediation offices to encourage negotiated resolution of site specific environmental disputes. Some states have gone a step farther and have explicitly included negotiation in their statutory schemes for siting locally undesirable land use activities such as hazardous waste facilities.[1]

The United States Environmental Protection Agency (EPA) has begun to experiment with negotiated rulemaking as an alternative to traditional administrative practice in order to expedite the rulemaking process and to curb subsequent judicial challenges by parties interested in the outcome of the rulemaking process.[2] The courts have also embraced negotiation as a means to encourage settlement of large scale, complex, multiparty lawsuits arising out of Superfund[3] liability.

While negotiation offers the promise of potentially swifter, more efficient resolution of disputes than does traditional adjudication, it is not without its challenges. In many environmental disputes, it is not obvious which parties should be at the bargaining table. This is especially true of non-site specific disputes and disputes in which large, diffuse, non-homogeneous groups are involved. Even if the appropriate parties are identified, the process is open-ended and not necessarily decisive unless the parties are motivated by an externally imposed deadline or by other incentives for them to negotiate and reach agreement.

---

1. *See* Massachusetts Hazardous Waste Facility Siting Act, MASS. GEN. LAWS ANN. ch. 21D, §§ 1-19 (West 1981 & Supp. 1990) [hereinafter Massachusetts Siting Act]; WIS. STAT. ANN. § 144.445 (West 1989); *see also* ME. REV. STAT. ANN. tit. 38, § 2172 (Supp. 1990).

2. For example, in promulgating regulations for the implementation of section 301(h) of the Federal Water Pollution Control Act, EPA employed the informal rulemaking process of section 553 of title 5 of the Administrative Procedure Act. This process allows interested parties to present documented information and arguments without going through the adjudicatory hearing required by the formal rulemaking process. For an analysis of EPA's rulemaking process for the section 301(h) regulations, see LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 280-303 (1984) [hereinafter BACOW & WHEELER]. For a discussion of negotiated rulemaking by administrative agencies, see Perritt, *Negotiated Rulemaking and Administrative Law*, 38 ADMIN. L. REV. 471 (1986); Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986).

3. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9657 (1982 & Supp. V 1987), *as amended by* the Superfund Amendment and Reauthorization Act, 42 U.S.C. §§ 9601-9675 (Supp. V 1987).

Parties that are able to reach an agreement must still confront the question of enforcing that agreement. Absent judicial supervision, they will be on their own to structure their future relationship in order to assure that the agreement reached at the bargaining table is not subsequently disregarded. This problem of binding parties to a negotiated agreement in environmental disputes is the central focus of this Article.

II. WHY CARE ABOUT COMPLIANCE PROBLEMS?

The possibility of non-compliance with a negotiated agreement may in itself prevent the negotiation process from beginning. If the parties fear compliance problems, they are unlikely to come to the bargaining table in the first place. For example, neighbors opposed to a new municipal landfill are unlikely to enter into negotiations with the landfill operator to determine the terms and conditions under which they might be willing to accept the landfill if they believe that the operator will not honor those terms and conditions.

In some cases, the parties' intentions may be entirely honorable but they may lack the legal capacity to enter into a binding agreement. This is especially true of municipalities which may be legally prohibited from contracting away their policymaking powers.[4] Thus, in some cases, deals may be thwarted by the inability of a mayor, for example, to bind his political successor. Similarly, some organizations, such as environmental interest groups, may lack the legal authority or political ability to bind their members. While rare, these legal capacity problems may prevent otherwise efficient deals from taking place.

Negotiation leading to an agreement which is subsequently breached is a sterile exercise. It wastes the time and resources of all parties concerned and may be detrimental to future relationships. Because compliance problems may have the effect of negating the accomplishments of the negotiation process, an examination of such problems is of paramount importance to the success of negotiations.

4. For example, contract zoning, the process by which a landowner promises to restrict the use of his property and the municpality in return promises to permit rezoning, has been generally been held to be "an ultra vires bargaining away of police power" and therefore illegal. 101A C.J.S. *Zoning and Land Planning* § 21 (1979). *See also* 1 P. ROHAN, ZONING AND LAND USE CONTROLS ¶ 5.02(3) (1978).

III. A CONCEPTUAL LOOK AT COMPLIANCE PROBLEMS

The best way to understand why compliance problems are common in environmental disputes is to examine why they may or may not arise in other situations. There are four basic agreement scenarios, each of which generates its own compliance problems.

A. Mutual Simultaneous Performance Concurrent With Agreement

Many simple negotiations culminate in mutual simultaneous performance. In a flea market, for example, the parties bargain back and forth, the buyer examines the article for purchase, and if the buyer and seller agree on a price, the deal is closed immediately. Compliance problems do not arise because performance occurs simultaneously with agreement, and the buyer takes the goods subject to the principle of *caveat emptor*. Because performance is rendered at the same time the deal is closed, failure to perform is tantamount to failure to reach agreement.

B. An Exchange of Promises for Mutually Simultaneous Performance

More complicated is the situation where the parties agree to perform their obligations at some time in the future. For example, a deal to sell a used car at an agreed upon price is rarely executed immediately. Typically the buyer will want to have the car inspected, titled and insured, and the seller will want the buyer to present him with cash or a certified check. Separation in time between agreement and performance introduces the potential problem of the executory contract; this may be mitigated by simultaneous performance.

C. Exchange of Promise for Performance

The situation with the greatest potential for compliance problems occurs when one party to a transaction performs immediately while the other party does not perform until some time in the future. For example, a governmental body which issues a permit for a landfill must wait to see if the developer of the landfill will build and operate it in accord with the terms and conditions of the permit. Once one party has rendered performance, the other party has received the bulk of the benefit of its bargain and has little incentive to perform, unless the law, honor, or some concern for future relationships encourages performance.

D. Continuing Versus One-time Negotiation

Compliance problems arise less often when the parties have a continuing relationship. The need to agree in the future acts as a powerful incentive for each side to honor their current commitments.[5] For example, intentional non-compliance is rarely an issue in labor negotiations because members of each side know that they will have to face each other over the same set of issues when the next collective bargaining agreement is negotiated. In this scenario, the possibility of retaliation in the future discourages non-compliance.

In light of the four basic agreement scenarios, it is easy to see why environmental disputes often give rise to compliance problems. In addition to the capacity problems noted above, environmental disputes are invariably about actions to be taken in the future. Performance is never simultaneous with agreement. Moreover, typically one side, often the side which is being asked for permission to depart from the *status quo*, must perform well in advance of the other side. Once the government or the neighbors have acquiesced in the change proposed by the other party (e.g., the dam is built, the forest is cut, the landfill is sited), the damage to the environment has occurred. This damage may be irreversible and the party that has allowed the departure from the *status quo* must wait, often for years, to see if the other party lives up to its promises to mitigate such damage.

In contrast to labor disputes, often the parties to environmental disputes engage each other only once; the proponent of a new hazardous waste facility is unlikely to go back to the same community for permission to build a second similar facility in the future. For the foregoing reasons, compliance often looms large as a problem in negotiating the resolution of environmental disputes.

---

5. The "Brown Paper" case is an excellent example of how the need to work with the other party in the future can provide the necessary motivation for compliance. During the 1970's, the Brown Paper Company (Brown) was the largest source of sulfur dioxide air pollution in New Hampshire. In July of 1979, after 18 months of negotiations, Brown and EPA reached an agreement whereby Brown would spend more than $16.5 million on measures to reduce pollution and in return EPA would relax certain requirements that might otherwise have driven Brown out of business. Due to this need for a continuing relationship with EPA, Brown had a large incentive (its very existence) to comply with the agreement. For an analysis of Brown's negotiations with EPA, see BACOW & WHEELER at 56-70.

IV. NON-COMPLIANCE: A CAUSAL TAXONOMY

Negotiation often begins before the parties sit down at the bargaining table and continues after the agreement is reached. Sophisticated negotiators spend as much time worrying about the incentives to comply as they do about the incentives to negotiate. The model that follows distinguishes three types of non-compliance that may arise in environmental disputes: intentional non-compliance, unavoidable non-compliance and unintentional non-compliance. A better understanding of the causes of non-compliance will lead to a better understanding of the mechanism best suited to address the non-compliance problem.

A. Intentional Non-compliance

A party may elect not to comply for a number of reasons. Circumstances may have changed prior to implementation of any phase of a negotiated agreement. Just as the parties may carefully calculate the costs and benefits of settlement prior to reaching an agreement, such calculation is likely to continue while the agreement is still executory. If at some stage a party believes that a breach will be more beneficial or cost effective than performance, that party will have little incentive to abide by the agreement.

A party may repudiate an agreement after it has started to take effect if he has already received the bulk of the expected benefits but has yet to incur the subsequent costs. For example, in a dispute in Jackson, Wyoming in the early 1970's, the town and county differed on how a new wastewater treatment facility would be built.[6] While both sides agreed that a new plant was needed to replace the outmoded facility, the county was reluctant to acquiesce in the construction of a new plant because it feared that the new plant would stimulate excessive growth in rural parts of the county. The obvious solution was for the county to extract a promise from the town to limit development in rural areas, but the county feared that once the plant was built, the town would have little incentive to comply with such an agreement.[7]

Another kind of breach occurs when a party deliberately vio-

6. For an analysis of the Jackson Hole case, see BACOW & WHEELER at 127-43.

7. With EPA Region 8 officials acting as mediators, the town and the county did agree to an annual limit on the number of new sewer taps. The tap limit was raised significantly in the final agreement, however, when the composition of the county commission changed to a pro-growth majority. BACOW & WHEELER at 142-43.

lates an agreement but hopes that others will not detect the breach. For example, a developer who has negotiated the terms of approval for a subdivision from a planning board may try to get away with building a cheaper roadbed than was called for in the permit.

Sometimes parties repudiate agreements that they actually would like to see honored. Typically this occurs when they believe others have already breached. Even if the retaliatory breach is partial, this type of action can invite a similar response, and the entire agreement can unravel. In the case of the developer trying to get away with a cheaper roadbed, the town may withhold building permits for the developer if it believes he is shortchanging the planning board on the infrastructure. If the developer lacks building permits and cannot sell lots, he may be incapable of generating the funds needed to make the promised improvements.

B. Unavoidable Non-compliance

Agreements may be breached due to a party's inability to comply. For example, implementation of new pollution control abatement technology may be delayed if the manufacturer cannot provide the specified equipment in a timely fashion. In Massachusetts, a problem has arisen involving government regulation and monitoring of proposed hazardous waste facilities. Host communities are reluctant to accept promises by the state that such new facilities will be carefully monitored because they fear that the legislature will render the state financially incapable of performing by not consistently appropriating the necessary funds.[8]

C. Unintentional Non-compliance

Unintentional breaches may occur as a result of poor communication in the negotiation process or sloppy drafting of the agreement itself. If a party cannot understand or interpret an ambiguous term of the agreement, his chosen course of action might be perceived by the other party as a breach. Parties should expect disputes over interpretation of negotiated agreements and should provide mechanisms within the structure of the agreement for resolving these ambiguities.

8. The Hazardous Waste Facility Site Safety Council, which performs the monitoring of the hazardous waste facilities, "may receive and expend such funds as are appropriated. . . ." Massachusetts Siting Act § 4.

V. ENFORCEMENT MECHANISMS

Understanding the causes of non-compliance gives rise to a better understanding of enforcement mechanisms. Once a cause of non-compliance is identified, the appropriate enforcement mechanism can be incorporated into the agreement itself. The objective of each of these mechanisms is to render any negotiated agreement self-executing.

A. Structured Implementation

Because environmental disputes often give rise to an exchange of promise for performance, it is important to structure the implementation of the agreement so that the parties have an ongoing incentive to comply. A clever arrangement of "carrots and sticks" may encourage compliance, whereas a lack of foresight may encourage breach midway through implementation. This point is best illustrated by an example.

An operator of a municipal landfill was seeking permission from a town to expand the landfill. The town was reluctant to agree because neighbors had complained of wind-blown litter from the facility. According to the terms of the operator's permit, he was obligated to cover the trash at the end of each day with a layer of dirt to prevent such litter. The neighbors alleged that the operator was negligent in covering the trash due to the time and expense of purchasing fill to cover the daily haul.

After discussing complicated penalty clauses designed to encourage compliance, the parties with the aid of a mediator fashioned an agreement which simultaneously encouraged compliance, discouraged disputes and provided for resources to clean up any litter problem that might occur. The operator agreed to make contributions on an annual basis to a fund which would be used to hire teenagers to clean up wind-blown litter. The fund would be controlled by the town, and at the end of each year any non-expended funds would be distributed equally between the town and the operator.

By placing the funds under the control of the town, this agreement avoided disputes over whether a litter problem actually existed. If the town thought there was a problem, the town had the resources to clean it up. Because non-expended funds were split between the town and the operator, the operator had a financial incentive to control the litter. Similarly, the town had an incentive not to exploit the fund or needlessly bother the opera-

tor about minor problems because it stood to benefit directly if the funds were not expended.

B. Contingent Agreements

Environmental disputes are frequently marked by the mutual distrust of the parties. Communities are often skeptical when proponents of change claim that their projects will not have a detrimental impact on the environment. One reason for this skepticism is that the proponents of change usually stand to gain if the change is accepted. To solve this problem, the parties might negotiate a contingent agreement in which the proponent of a project would specify the corrective measures it would take if certain specified contingencies were to occur. To ensure that capital is available to pay for the corrective measures, the project proponents might be required to post a bond or a letter of credit.

Again, an illustration might be helpful. One common fear of neighbors of locally undesirable land uses (LULUs), such as landfills and hazardous waste facilities, is that construction of such projects will diminish the value of their homes. Such neighbors usually are skeptical when presented with any evidence to the contrary.

One approach, assuming there are not too many homes involved, would be for the developer of such a facility to guarantee contractually the future value of the neighboring homes. The developer would agree to pay the difference between a future sales price and an index price determined by reference to valuation of homes in comparable areas not adjacent to such a facility. Such a guarantee is inexpensive for the developer, especially if he is confident that the facility will not adversely affect property values. Moreover, the existence of the guarantee gives him an incentive to operate the facility so that it does not diminish housing values. The guarantee also should reduce the anxiety of the homeowners, as they will be fully compensated if the feared harm occurs.

C. Monitoring Devices

Closely related to the contingent agreement strategy is the use of monitoring devices. If the parties enter into a contingent agreement, a mechanism needs to be devised for determining when the contingency occurs. The parties might monitor the situation themselves, or they might engage the services of a neutral third party.

In crafting monitoring agreements it is important to be as specific as possible concerning the methodology to be used to gather and interpret data. Specificity about the methodology of the monitoring scheme helps eliminate subsequent disagreements about data ambiguities and may help control the costs of administering the scheme.

D. Performance Bonds

Commercial contracts often provide for performance bonds that are intended to encourage compliance and to provide a remedy in the event of a breach. The same concept is equally applicable to a number of environmental disputes. For example, it is common for a planning board to require some type of bond posting as part of subdivision plan approval. These boards seek to prevent the developer from dividing up the land and selling each lot before he has built the required infrastructure.

The solution to the board's dilemma is to place a lien on a sufficient number of lots so that if the developer fails to make the improvements, those lots can be sold by the board to pay for the improvements. Performance bonds and liens represent a way of manipulating incentives to ensure compliance while providing an expedited mechanism for bringing relief to the non-breaching party.

E. Penalty Clauses

Conceptually a penalty or liquidated damage clause is similar to a performance bond except that the non-breaching party must resort to a lawsuit to claim the damages. By increasing the transaction costs and the uncertainty associated with obtaining damages, such provisions are a less efficient means of assuring compliance than are performance bonds, monitoring devices or contingent agreements.

F. Grievance and Arbitration Procedures

Rare is the agreement that is not subject to some interpretation. Wise negotiators anticipate disagreements over interpretation of terms and provide for the resolution of such disputes. Agreements structured to govern environmental relationships can provide for grievance and arbitration procedures[9] similar to

9. Section 12 of the Massachusetts Siting Act requires that developers of hazardous waste facilities and communities where those facilities are to be sited

those that exist in collective bargaining agreements.

G. Consent Decrees

Where the parties have entered into negotiations at the urging of a court, they can often look to the court to incorporate their agreement into a consent decree. Judges are often reluctant to do this, especially when they have not participated in fashioning the agreement. The effect of such judicial ratification is to make the contempt powers of the court available to exact compliance with the negotiated agreement.

VI. CONCLUSION

Problems of compliance with negotiated agreements are often miscast as problems of ensuring trust between the parties. If a successful agreement were contingent on mutual trust, few agreements would be reached. A better strategy is to presume mistrust and try to structure around it. With a good understanding of the nature of the particular compliance problems at hand, clever negotiators will often fashion self-executing agreements that give the parties incentives to comply and that avoid future disputes. These are all signs of a well-crafted agreement.

Negotiating the resolution of environmental disputes is usually harder than litigating them. While the litigator need only be an advocate, the negotiator must actually assume the responsibility of trying to solve the problem. This requires understanding not only the interests of one's client, but also the interests of all the other parties in the search for common ground. Moreover, negotiators must be concerned not only with the requirements of the law, but also with how the agreement is likely to be implemented in fact, how it will be paid for, and how it will be sold to the interested parties. This represents a broader range of issues than one typically confronts in the courtroom and makes environmental dispute resolution both challenging and interesting.

---

incorporate into their negotiated agreements provisions for arbitration of any disputes which might arise.