

# Environment & Human Affairs



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Class 9.

## Negotiated rule making

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## Agenda

- Review:
  - Mediation
- HW3
- Chapter 11 presentation
- Play Woodstoves

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## Negotiated rule making Introduction

- Significant environmental disputes can arise over the laws themselves, rather than their application
- When a new law is introduced in Congress or state legislatures, interest groups compete with one another to influence the elected representatives
  - The legislative process itself may be viewed as the sum of many small negotiations
  - The legislative process is only one aspect of policy:
    - agencies have a broad range of power in the implementation of new policy→
    - interested parties are likely to be involved throughout the administrative rulemaking process

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### Case: Water Treatment Rulemaking

- **Most U.S. cities process their municipal wastewater in publicly owned wastewater treatment works (POTW's)**
- **The treatment process creates two products:**
  - solid waste (usually disposed of by incineration or land spreading)
  - treated liquid effluent (usually discharged into body of water)
- **Municipalities that discharge waste into public waters are subject to regulations just as corporations would be.**

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### Water Treatment

- **Two major stages of treatment are widely used:**
  - Primary stage: separates up to 75% of solid matter from the water, depending on the method
  - Secondary treatment: uses organic bacterial processes to further purify waste water
- **Efficient secondary treatment results in effluent composed of few suspended solids;**
- **Inefficient secondary treatment results in effluent composed of larger amounts of organic matter, demanding much oxygen in the receiving water → adverse effects on fish and plants**

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### Water Quality

- **may be influenced by:**
  - depth and tidal flushing of water discharged
  - the amount of toxins evacuated
  - the relative size and isolation of the communities involved.
- **variety of factors influence water quality →**
  - difficult to design one standard to account for all the variables;
  - a uniform standard is much easier to enforce than one that takes into account each case's unique variables

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## Federal Water Pollution Control

- Congress passed such a uniform standard, the **Federal Water Pollution Control Act (FWPCA)** in 1972, at the urging of the EPA.
- Five years later it amended the act to allow waivers for secondary treatment requirement in some cases, resulting in intense negotiations for the implementation of the new policies
- The 1972 FWPCA was influenced by the strictness of the Clean Air Act amendments, and identified two very ambitious and controversial goals for water quality:
  - That discharge of all pollutants into navigable waters be eliminated by 1985
  - An interim goal of water quality that provides for the protection and propagation of aquatic creatures and wildlife to be achieved by July 1983

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## Process

- In order to meet these goals, the FWPCA switched emphasis to a uniform standard to be judged by the pollutants being put *into* the water, rather than on a judgment of water quality, which is much harder to assess and enforce
- Because of the strictness of the new guidelines, many were critical of the Act's possible effects
  - Many communities claimed that secondary treatment of waste was a costly and unproductive burden
  - The Congressionally created National Water Commission (NWC) attacked the zero discharge goal as conceptually unsound, financially extravagant, and potentially damaging to overall water pollution control efforts, because of the competition for scarce resources
  - The National Commission on Water Quality (NCWQ) also agreed with this assessment, asking that waivers be granted to those discharging into oceans on a case by case basis

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## Process

- In response, the EPA appointed a task force in March 1974 to investigate the need for secondary treatment in cases of municipal ocean discharges; it:
  - agreed that ocean discharges were less problematic in terms of the oxygen demands imposed by waste
  - since secondary treatment is the most effective way of removing toxins and metals from the effluent, it was still deemed necessary
  - → recommended that Congress amend the 1972 Act to allow the EPA to extend the 1977 deadline for secondary treatment for cases where cost effectiveness was questionable
- A bill was introduced to this effect, but did not pass

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● ● ● | **Process**

- In early 1977, Congress reconsidered the alleged problems with the 1972 FWPCA, →1977 Clean Water Act (CWA). In hearings preceding the 1977 Act, the EPA and environmentalists shared 3 major concerns:
  - Continued protection of water through better waste treatment
  - That the "domino effect" of granting waivers to some would result in paralyzing the entire program
  - The burdens of administering the waiver system and the expectation that many municipalities would apply simply to delay compliance

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● ● ● | **Process**

- Even with these objections, Congress put a waiver provision in the 1977 Act: Section 301(h), intended to
  - provide narrow opportunity for some dischargers to qualify for waivers,
  - place the burden of proof on the municipality, rather than the EPA, by establishing eight criteria that each entity must meet
- While most municipalities were pleased, the EPA and environmentalists saw this section as a huge step backward to before the 1972 FWPCA

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● ● ● | **The Rulemaking Process for Section 301(h)**

- The EPA viewed the guidelines for waivers as open to interpretation; while they wanted to set the strictest possible guidelines, they could not because of political pressures- some compromise was guaranteed
- The two basic questions were:
  1. Who would be allowed to apply for waivers?
  2. Who would be awarded them?

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## Process

- o Unfortunately, the process involved a broad evaluation of the impacts of effluents with little available data, as well as a very large number of applicants that the EPA would not have the time to wade through
- o Congress limited waivers to communities whose “existing discharge” met the 8 criteria
  - the EPA could potentially limit the number of waiver applications by holding strictly to the language involved.

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## Process

- o EPA was bound by regularized rules of informal rulemaking
  - they were required to identify parties who would be affected by the implementation of the CWA to hear concerns; however,
    - the recent decision in the *Home Box Office v. the FCC* case had greatly restricted the conduct of *ex parte* communications in such situations
    - most conversations had to be public, placing greater strain on all negotiations

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## The Preliminary Public Meeting

- o The first preliminary Public meeting of the EPA task force on implementation was held in February of 1977, with 37 representatives, each with their own agenda. There were different concerns with the granting of waivers:
  - Many cities worried about the definition of “existing discharge,” because they had planned to modify their outfalls in ways they thought would be in line with the new standards
  - Eastern cities were concerned with depth requirements of ocean dumping, because their shorelines were shallow but, as they believed, had strong tidal flushing

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## Process

### oOther concerns:

- Smaller territories (Guam and American Samoa) felt they should receive exemptions from the standards on account of their isolation and poverty
- Environmental groups in attendance sought to constrict, rather than widen, the standards to minimize eligibility for waivers

### oThis public meeting achieved no real consensus among the parties

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## The Preliminary Concept Paper

### o Tom Jorling, leader of the EPA task force, sought to develop as strict a set of criteria for waivers as possible but did not want the procedure to become a confrontation with the municipalities

#### o The task force's Preliminary Paper:

- Decided to focus on the strict interpretation of "existing discharge" to exclude municipalities who had planned to implement changes from the process
- Set surrogate parameters for biochemical oxygen demand and solid waste
- Defined the "balanced indigenous population" of wildlife and fish strictly
- Set extensive requirements for chemical and biological testing of toxic waste

### o Public reaction to the Preliminary Paper was almost entirely negative, drawing fire from environmental groups as well as municipalities

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## The Proposed Regulations

- o The EPA released the draft of regulations about two weeks after the release of the preliminary concept paper, with few changes; however, the EPA did ask for opinions
- o Most parties involved reacted negatively again, with the same concerns
- o By taking a strong stance on the use of secondary treatment, the task force hoped to make applicants provide hard data that the EPA could use to rewrite proposed regulations instead of having to accumulate it themselves

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## The Proposed Regulations

- EPA sought still to limit the number of applications for waivers so that adequate time could be spent on each case;  
→ the EPA was attacked by both environmentalists and municipalities
- Congress commenced hearings immediately following the release, with no invitees favorable to the EPA's position
  - Senator Gavel insisted that the waiver provision in section 301(h) was designed to help cities who were planning implementation of new treatment measures
  - Political pressure made the EPA realize they would have to give some ground, but they wanted to make the fewest possible concessions
  - The EPA decided to broaden the "existing discharge" definition to include those POTWs that had been involved in the initial lobbying

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## Final Regulations

- **Final Regulations were published on June 15, 1979. With these regulations the EPA:**
  - Responded to political pressure by changing definition of "existing discharge"
  - Required applicants to demonstrate that modified discharges would be safe enough to not affect wildlife, fish or humans adversely
  - Withdrew requirement for applicants to demonstrate compliance with secondary treatment levels for 65 toxic waste materials, but required them to monitor effluent levels for presence of toxins

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## Final Regulations

- **With these regulations the EPA:**
  - Enacted a separate policy for native Alaskan villages, the territories, and Puerto Rico, leaving the matter open for later resolution
  - Required primary wastewater treatment of all applicants
  - Specified that all POTWs already applying second treatment to wastewater were not eligible for a waiver, to prevent backsliding
  - Only dischargers who had submitted preliminary requests for waivers would be considered, effectively limiting the maximum of applications the EPA would have to review to 200

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## Outcomes: Views of the Interested Parties

- o Although the EPA had to make some concessions, it did limit number of total waiver applications to 70
- o The west coast cities fared well, having 47 of initial waiver applications
- o East coast dischargers received all the things they asked for, i.e. eliminating depth and location restrictions

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## Outcomes: Views of the Interested Parties

- o The native Alaskan Villages, Puerto Rico, and the territories had a successful outcome
- o Only the small dischargers were fairly unsuccessful, because they are required by regulations to perform expensive testing which is a greater burden n them, even though their output of pollution is usually smaller than other municipalities

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## Reform

- o Regulators realize the rulemaking process will entail some bargaining, but wish to remain in control of decision-making process
  - This attitude often results in agencies assuming a stricter posture at the outset of process because it is assumed they will have to give ground
  - EPA's actions regarding section 301 (h) is a good example of this
  - Because of the public nature of the negotiating in the Case Study, negotiations were strained and both municipalities and environmental groups challenged the EPA in court
  - Nonpublic negotiation might have allowed parties more room to explore options and find outcomes

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## Reform

- o **Authors believe that Richard Stewart’s negotiation-oriented rulemaking process would offer a number of advantages, including:**
  - An extension of an agency’s informational and analytical capabilities
  - Fostering agency understanding of compliance burdens
  - Promotion of technically sound and efficient regulations
- o **However, it is most likely to be successful in very specific instances, and many private parties may be hesitant to participate.**

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## Legal Consideration

- o **Negotiation as an alternative to traditional rulemaking:**
  - Describe legal underpinnings of traditional administrative procedure
  - Arise from statutory laws or cases
  - Statutes and court decisions can be modified with relative ease whereas fundamental constitutional precepts, like due process and separation of powers are less amenable to change

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## Legislative proposals

- o **Interest in regulatory negotiation was expressed in Congress**
- o **Several bills have been filed**
- o **None have been adopted**
- o **Example is the Regulatory Negotiation Act of 1980 (p. 318-322)**

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## Next Time ...

**Institutionalizing negotiations**

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