

Environment & Human Affairs



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Class 6.

**Prospects for
Compliance**

Agenda

- o **Review:**
 - Two-party vs. Multi-party
- o **HW2 discussion**
- o **Chapter 7 presentation**
- o **Game: DEC - Riverside**

Introduction

- o **Problems of ensuring compliance**
 - Conditions change
 - Ambiguity in agreement
- o **Compliance problems are incentive not to negotiate**
- o **Trust or lack thereof**
- o **Neutral third parties**

● ● ● | **Introduction**

- **Compliance not always an issue:**
 - mutual simultaneous performance, e.g., purchase
- **Environmental agreements take years**
 - Meaningful changes in key factors that made agreement appear good at the time
 - Parties: Individuals, groups
 - Context – economy, technology, environment
 - Political, administrative
 - Agreement no longer best option for all

● ● ● | **Case Study**

- **Place: Jackson Hole, WY**
 - Teton Mountains, Grand Teton Natl. Park, Yellowstone, Jackson Lake, Snake River
 - Teton County
 - Town of Jackson
- **Stakeholders**
 - Mayor of Jackson
 - Jackson Town Council
 - Teton County Commissioners
 - US EPA

● ● ● | **Case Study**

- **Northwestern Wyoming**
- **County population nearly doubled between '70 and '80**
- **Severely over taxed current WWTP needed to be replaced.**
- **South Park deemed the prime location for reasons including**
 - future growth costs & benefits
- **The county vs. town dispute begins and the EPA becomes involved with their own issues.**

● ● ● | **Case Study**

○ **Problem: Growth**

- Waste Water Treatment Plant (WWTP)
 - Jackson needs more capacity
- Future Development Control
 - County wants to control growth

● ● ● | **Case Study**

○ **Jackson's Wastewater Planning**

- 1969 constructed WWTP
- 1971 over capacity
- No room for expansion
- Propose new plant in South Park on US lands
 - Downhill – gravity feed
 - Room for expansion
- Original site denied by Game and Fish Commission

● ● ● | **Case Study**

○ **Teton County Perspective**

- Planned growth preferred
- Jackson more laissez-faire
- County citizens concerned about growth
- Supported scenic easements
- Proposed comprehensive plan
 - Control growth- 3-6 acre lots
 - Septic systems
 - Preserve scenic vistas

● ● ● **Case Study**

○ **Drafted Environmental Impact Statement**

- US EPA Region 8
- EIS required – NEPA Federal funds
- EPA favored expansion of existing facility
- Sympathetic to county's growth control
- Many sites more cost-effective
- Public Meeting – little opposition

● ● ● **Draft Environmental Impact Statement (DEIS)**

○ **EPA:**

- Favored expansion of the existing facility.
- New republican appointee Green trying to avoid conflict agreed with his staff.

○ **The DEIS concluded...**

- The elk feedground posed serious legal difficulties
- Site located in 100 year floodplain
- Conflicted with Wild and Scenic River Study goals
- Proposal would open up South Park area to more development

○ **EPA announced it did not intend to fund a new plant**

○ **US Department of the Interior agreed with EPA's position**

● ● ● **Case Study**

○ **Town-County Dispute**

- 1977 County Comprehensive Plan draft
- Jackson Council approves South Park site
 - Little consideration to EPA alternatives
 - Wanted south to accommodate development
 - Easements a concern
- First meeting
 - Jackson unconcerned about conflict
 - County wanted compliance with Comp. Plan
 - Both Parties harden position

● ● ● | **Case Study**

○ **Town-County Dispute (cont.)**

- EPA warns funds in jeopardy
- County comes out publicly against South Park
- Jackson stops new county uses of current WWTP
- Lawyers from each side appeal to EPA

● ● ● | **Case Study**

○ **EPA Suggests Compromise**

- New administrator
 - Open to Alternatives
 - Concerned about Jackson's compliance
- Offers two solutions
 - Upgrade existing and limit load
 - Allow South Park with tap restrictions
 - Compromise well received
 - Addressed concerns

● ● ● | **Case Study**

○ **EPA Suggests Compromise (cont)**

- Compliance issue surfaces
 - Tap restrictions address problem
 - Legality enforcement questioned
 - Restriction could change with administration
 - Easements may be harder to obtain
- Complications
 - Development approved before Comp. Plan
 - New EPA sees WWTP as growth control
 - EPA supports South Park site

● ● ● | **Case Study**

○ **EPA Initiates Mediation**

- EPA pressures for South Park compromise
 - Town -
 - if no compromise: \$\$\$ go for expansion of WWTP
 - County -
 - if no compromise: South park approved w/out restriction

● ● ● | **Case Study**

○ **EPA Initiates Mediation (cont)**

- Compliance with Tap Restriction
 - Not legally binding on future town councils or county commissioners
 - EPA suggests:
 - Joint approval of taps
 - Maximum number of annual taps
 - New taps comply with Comprehensive Plan
 - EPA Enforcement
 - Existing site upgrade taken off the table by EPA

● ● ● | **Case Study**

○ **EPA Initiates Mediation (cont)**

- Mediator suggests proposal
 - 51 taps/year in unincorporated areas
 - Joint control of new tap approval
- County
 - Accepted 51 tap limit
 - Feared annexation of unincorporated areas
 - No assurances of enforcement
- Town
 - Could not bind future council actions
 - Feared legal obligation to provide sewer service

● ● ● | **Case Study**

○ **Jackson Applies Pressure**

- Unhappy with restrictions
- Feared loss of easements
- Challenged 6% growth rate
- Residents requested annexation
- EPA threatened loss of \$\$\$
- County signals willingness to compromise
- US EPA backs away from number of taps/year

● ● ● | **Case Study**

○ **Final Negotiations**

- EPA under pressure
 - Administrator tells each party what they want to hear
 - Jackson out of compliance for 2 years
 - Washington pressuring administrator
- New EPA mediator
 - Convinced each party
 - risked less by compromise
 - Compromise needed soon

● ● ● | **Case Study**

○ **Final Negotiations (cont)**

- Compromises
 - Growth estimates unchanged
 - County responsible for setting tap restrictions
 - Initial number at 51/year
 - Future number determined by Comp. Plan amendments
 - Comprehensive Plan legally binding
 - Amendments must be 2-1 to change
 - EPA review and approval
 - EPA sanctions for enforcement listed
 - All agreed

● ● ● | **Case Study**

○ **Aftermath**

- WWTP built in South Park
- Landowners donated easement for interceptor
- Change on County Commissioner board
- 150 new tap per limit set
- No effective growth limitation

● ● ● | **Compliance Issue**

○ **Problem with binding parties**

- **Municipalities**
 - cannot contract away policymaking powers
 - Can bind themselves to a contract for proprietary acts
 - Policymaking is not for sale
 - Policymaking is for public interest
 - Policymaking must be flexible – things change
- **Large organizations**
 - Face similar issues as government
 - Cannot control membership
 - Can be strength for negotiator
 - (Labor negotiations different)

● ● ● | **Compliance Issue**

○ **Compliance not a problem with:**

- Mutual simultaneous performance with agreement
 - Retail purchase
 - Deal closes quickly
- An exchange of promises for mutual simultaneous performance
 - Deposit
 - Common law protections



Compliance Issue

o Compliance a problem with

- Exchange of Promise for Performance
 - Trust
 - Assurances of performance
- Continuing versus One-Time Negotiations
 - Continual relationship –Brown Paper case
 - Breakdown issue for continual negotiations



Noncompliance

o Intentional

- Cost of breaching < benefits of compliance
- A better deal comes along
- Limited analysis/miscalculation
- Selective repudiation
- Retaliation for perceived breach of agreement
- Costs of breaking normally higher
- Litigation always a risk
- Damage relations



Noncompliance

o Unavoidable Breaches

- One party not able to comply
- Unable to pay – no cash
 - Inconvenience
 - Hardship
 - Impossibility
- Governments must certify funds before agreeing

● ● ● | **Noncompliance**

○ **Unintentional**

- Poor communication
- Poor drafting
- Unwitting blunder
- Simple mistake
- May lead to perception of breach causing other party to intentionally breach

● ● ● | **Enforcement**

○ **Grievance and Arbitration built in**

- Written procedures for clarification
- Labor grievance procedures
- Arbitration on contracts
- Avoids litigation

○ **Structured Implementation**

- Parties have continuing interest in agreement
- Carrots and sticks – continual relationship

● ● ● | **Enforcement**

○ **Contingent agreements coupled with escrow**

- Mutual distrust common
- Money escrow for contingencies
- Third party neutrality

○ **Monitoring devices - inspection/follow up**

○ **Performance bonds-insurance policy**

○ **Penalty clauses - similar to bonds**

○ **Consent decrees - contempt of court**

● ● ● | **Summary**

○ **Compliance**

- Difficult to guarantee
- Deters negotiation

○ **Noncompliance**

- Costly
- Reasons vary

○ **Trust**

- Built / unknown
- Incentives for compliance easier

● ● ● | **Conclusion**

○ *“You can negotiate with the devil if you can make sure he can’t get out of the deal.”*

● ● ● | **Next Time ...**

Mediation techniques
