



ARTICLE

## The Negotiable Implementation of Environmental Law

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**Abstract.** Conventional wisdom describes environmental law as a field filled with rigid mandates. Many critiques of the field start with that rigidity as a key premise, and they allege that inflexibility is a central failing or, alternatively, a squandered virtue. Influential reform proposals follow from both allegations.

This Article demonstrates that these premises are often mistaken. Based on literature reviews and interviews with environmental-law practitioners, it shows that flexibility pervades environmental law, and regulators, regulated entities, and other interest groups routinely use negotiations to navigate that flexibility. Indeed, negotiation is so central to the field that one cannot understand environmental law, either in theory or practice, without understanding where negotiations occur, who participates, and what is up for discussion.

Appreciating the centrality of negotiation to environmental law has important benefits beyond descriptive accuracy. The importance of negotiation partially undercuts important critiques of environmental law and complicates the policy prescriptions to which those critiques lead. But that understanding also exposes problems—and potential reforms. Most importantly, environmental regulatory agencies are not handling negotiations with as much transparency, efficacy, or equity as they could and should.

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## Introduction

On the outskirts of an American city, a company wants to build a factory. Its preferred site has developable land, proximity to a trained workforce, and good transportation access, but developing the site will raise environmental challenges. Long ago, the site saw heavy industrial use, and its soil and groundwater are probably contaminated. Since those industrial uses lapsed, wildlife has come back, including some endangered species, and wetlands dot the terrain. Developing the site will require filling wetlands and paving over some of the upland habitat. Once the factory begins operating, it will emit air pollution and discharge treated wastewater into the adjacent river.

For the company's attorneys, addressing these environmental challenges will mean obtaining multiple permits and other regulatory approvals, which in turn will require extended interactions with regulators. Much of that interaction will involve negotiation—which, in this Article, refers to situations in which participants discuss proposals and counterproposals, but not to situations in which a regulator accepts input but makes a unilateral decision. Lawyers and consultants will meet, probably repeatedly, with regulators, send dozens of emails, and spend hours on the phone hammering out the terms of air and water quality permits; the protections for wetlands and upland habitats; the ways in which the company will compensate for the impacts it creates; the extent to which contamination must be cleaned up; and the land use restrictions that will protect the site's future occupants from contamination that remains in the ground. Behind the scenes, regulators may negotiate with each other and perhaps also with environmental groups, other community advocates, and—if the company has enough clout—the project's political supporters. Even after the project is built, some permits will require periodic renewals and the company may be subject to enforcement actions, each generating new negotiating rounds. Environmental law, as it applies to the factory, will be the product of these negotiations.

To many practicing environmental lawyers, this hypothetical scenario would sound routine. Negotiating the terms of compliance with environmental laws is what they do. But theoretical accounts of environmental law tend to miss the part negotiation plays in this story—as does traditional environmental-law education.<sup>1</sup> In much of the discourse of

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1. *See, e.g.*, ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 155-61 (9th ed. 2022) (discussing and comparing regulatory strategies without mentioning negotiation); *see generally* DANIEL A. FARBER, ANN E. CARLSON & WILLIAM BOYD, CASES AND MATERIALS ON ENVIRONMENTAL LAW (10th ed. 2019) (addressing negotiation only briefly and in limited contexts, like habitat conservation plan development). Though coverage of the subject is rare, some legal academics have written thoughtfully about negotiations in particular areas of environmental law. *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 *footnote continued on next page*

environmental-law implementation, negotiation is absent, except in a few celebrated and seemingly exceptional settings.<sup>2</sup> And when scholars and policy advocates do address the roles of negotiation, they tend to default to two competing conceptions. In one—call it the “command-and-control” view<sup>3</sup>—environmental law is centralized and rigid.<sup>4</sup> Its core provisions emerge from top-down federal rulemakings and apply uniformly across large sectors of regulated activity.<sup>5</sup> 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 industries to get away with varying degrees of non-compliance.<sup>6</sup> In the command-and-control view, negotiation exists only in exceptional circumstances.<sup>7</sup> In the slippage view, negotiation is common, but it serves only to decide how far real-world practices can deviate from the law.<sup>8</sup>

As this Article will demonstrate, however, negotiation is a defining feature of environmental law. It recurs across substantive fields. It occurs at every level of policymaking and implementation—not just in legislative processes, where

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B.C. L. REV. 1, 33-69 (2011) (describing federal-state negotiations); 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).

2. See *infra* notes 62-65 and accompanying text. 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). Susskind’s program also has developed excellent environmental-negotiation teaching materials. See *Environmental Dispute Resolution, PROGRAM ON NEGOT.: HARV. L. SCH.*, <https://perma.cc/9BR9-XBGD> (archived Oct. 14, 2022) (to locate, select “View the live page”).
3. See *infra* notes 37-70 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.
4. 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).
5. See, e.g., Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 97-98 (1995).
6. 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).
7. See *infra* notes 63-65 and accompanying text.
8. See *infra* notes 85-89 and accompanying text.

everyone would expect to find it, and in notice-and-comment rulemaking, but also all the way down to the crafting of individual permit terms, even in subfields widely perceived as prescriptive and rigid.<sup>9</sup> And negotiators aren't just deciding degrees of slippage, though sometimes that is their task.<sup>10</sup> Instead, 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 therefore is not an evasion of governing statutory law—or, at least, it *often* is not such an evasion. Instead, it is a core element of the system's design. And while not everything in environmental law is negotiable, enough things are that framing the options for negotiation and specifying the situations when it may occur (or may be avoided) are both core tasks for the designers of environmental-law systems. One cannot understand environmental law, in other words, without understanding the roles of negotiation.

The centrality of negotiation has important and underappreciated implications for the field. For the command-and-control theorists, the implications are straightforward: There is a lot less centralization and rigidity than the theorists allege, and their prescribed fixes may be solutions in search of problems.<sup>11</sup> For the slippage critique, the implications are more nuanced. In most versions of this critique, negotiation is problematic; it is how public agencies give away the store.<sup>12</sup> But that critique misses the constitutive role that negotiations often play. It presumes that the nature of compliance is known to all parties at the outset and that the negotiations just determine how much deviation from those standards will be allowed. In reality, however, there is often neither a predefined legal standard for compliance, nor agreement about the relevant facts, nor even a fixed plan of action. Negotiation helps determine what the law will be, how it will apply, and what it will apply to.<sup>13</sup> Negotiation, in other words, often defines what compliance is, and thus helps create obligations, rather than determining what level of noncompliance is acceptable. It therefore is often a prerequisite rather than an impediment to effective environmental law.

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9. See *infra* Part I; SUSSKIND ET AL., *supra* note 2, at 28 (arguing that environmental permitting includes many opportunities for negotiation).

10. See, e.g., *infra* notes 152-54 and accompanying text (describing negotiations of delayed decisions on endangered species listings).

11. See Farber, *supra* note 6, at 316 (“[A]ttacks on the ‘one size fits all’ nature of regulation also lose some of their force once slippage is taken into account.”).

12. See Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T L. 43, 44-45 (2009) (arguing that agencies use discretion to negotiate away statutory environmental protections).

13. See *infra* Part II.

This description casts environmental-law negotiations in a somewhat positive light, and deliberately so. Negotiation has its benefits. 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. It is difficult to find documentation explaining what is negotiable, what the parameters of the negotiation should be, or how similar negotiations are resolved elsewhere in the same agency. Sophisticated entities can manage that problem; they can hire consultants and attorneys who understand the unwritten rules of the game.<sup>14</sup> But for disadvantaged communities—which often are acutely in need of the protections of environmental law<sup>15</sup>—and for smaller regulated entities, a negotiation-based system can create particularly difficult burdens.<sup>16</sup> Agency staff, meanwhile, often have spotty training in negotiation—a deficiency that also extends to environmental education, legal and otherwise.<sup>17</sup> The absence of training and a lack of systematic guidance within agencies mean that their efforts, while well-intentioned, can be erratic and inconsistent.<sup>18</sup> The absence of documentation also makes it difficult to evaluate current approaches to negotiation, but there is ample anecdotal evidence that negotiation-based systems do not serve the underlying values of environmental law nearly as well as they could or should.<sup>19</sup>

There are potential, if partial, fixes for these problems. Agencies can increase the transparency of negotiations by providing information about settings in which negotiations can occur and subjects that are appropriate for negotiations, and by explaining the kinds of documents and proposals that will help agency regulators, regulated entities, and interested environmental or community groups come to better deals.<sup>20</sup> Agencies also can boost

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14. See Dave Owen, *Consultants, the Environment, and the Law*, 61 ARIZ. L. REV. 823, 830-33 (2019) (describing the services environmental consultants provide).

15. See generally LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001) (describing disparities in environmental harm along racial and socioeconomic lines).

16. See *infra* notes 419-35 and accompanying text.

17. See *supra* note 1 (citing leading environmental-law textbooks). Discussion of negotiation also is absent from classic—and otherwise excellent—articles about teaching students about instrument choice in environmental law. See James Salzman, *Teaching Policy Instrument Choice in Environmental Law: The Five P's*, 23 DUKE ENV'T L. & POL'Y F. 363, 364-66 (2013) (describing prescriptive regulation as “Thou Shalt or Thou Shalt Not” (emphasis omitted)); see also Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 9-10 (providing a typology of regulatory strategies).

18. See *infra* Part IV.B.

19. See *infra* Part IV.

20. See *infra* notes 378-93 and accompanying text.

transparency by providing more information about the outcomes of previous negotiations. Regulatory agencies can also increase their negotiating efficacy, not just by offering more transparency and guidance to their own employees, but by increasing the resources devoted to negotiation training.<sup>21</sup> These reforms can also make regulatory negotiations more equitable, as can mechanisms like intervenor funding and heightened technical support for community groups.<sup>22</sup>

The benefits of these improvements could be substantial, and one category of examples illustrates that importance. As academic and popular-media commentators alike have noted, the United States cannot do its part to address the climate crisis without a massive buildout of new infrastructure.<sup>23</sup> That buildout will probably require navigating many of the negotiation points described in this Article.<sup>24</sup> If these negotiation points can 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.

This Article's analysis proceeds as follows. Part I summarizes conventional accounts of environmental law and shows how these accounts ignore negotiation, relegate it to minor and peripheral roles, or, alternatively, assign it central but deeply problematic places in the environmental-law system. Part II shows how the reality of environmental law contrasts with these conventional views. Drawing examples from core subfields of environmental law, Part II shows that negotiation is a pervasive feature of environmental-law implementation. Because these negotiations generally are poorly documented, Part II relies primarily on interviews with experienced regulators, private firm attorneys, and environmental-group advocates. Part III considers the implications of environmental law's emphasis on negotiation. It shows how negotiation's prevalence partially undermines traditional critiques of environmental law and raises questions about policy prescriptions that arise from those critiques. But Part IV explains how recognizing the prevalence of negotiation should lead to new sets of concerns, with implications for some of the defining challenges of the field. Part IV also explains concrete steps that

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21. See *infra* notes 395-416 and accompanying text.

22. See *infra* note 435 and accompanying text.

23. See Ezra Klein, Opinion, *What America Needs Is a Liberalism that Builds*, N.Y. TIMES (May 29, 2022), <https://perma.cc/ADV9-SMDA>; J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 704-13 (2020); Michael B. Gerrard, *Legal Pathways for a Massive Increase in Utility-Scale Renewable Generation Capacity*, 47 ENV'T L. REP. 10,591, 10,592 (2017).

24. See Gerrard, *supra* note 23, at 10,603-13 (describing legal challenges and multiple legal obstacles).

federal and state agencies and educators can take to bring more transparency, efficacy, and equity to environmental law's many negotiations.

## I. Command, Control, Slip Away

In the late 1960s and the 1970s, in a remarkable outburst of legislation, modern environmental law was born.<sup>25</sup> Within roughly a decade, Congress enacted the classic statutes of the modern environmental-law canon, generally similar to their present forms: the National Environmental Policy Act (NEPA);<sup>26</sup> Clean Air Act;<sup>27</sup> Clean Water Act;<sup>28</sup> Endangered Species Act (ESA);<sup>29</sup> Resource Conservation and Recovery Act (RCRA);<sup>30</sup> Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);<sup>31</sup> and many other less prominent laws.<sup>32</sup> States passed their own environmental legislation.<sup>33</sup> The laws were popular; most passed with overwhelming, bipartisan margins, propelled by a sense that a crisis was at hand and a strong legal response was crucial.<sup>34</sup>

That consensus faded quickly. Within a few years, regulated industries had launched a counterattack. Supported by many academic experts, they argued that while the goals of environmental laws might be salutary, the means were deeply problematic, largely because of excessive centralization and rigidity.<sup>35</sup> Attacks also came from the other side. Environmental advocates, also with academic and political support, argued that a core problem with environmental law was the space between the law on the books and the law in

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25. See RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 67-97 (2004).

26. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4347).

27. Clean Air Act of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. §§ 7401-7671(q)).

28. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251-1387).

29. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1544).

30. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2975 (codified at 42 U.S.C. §§ 6901-6987).

31. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9657).

32. See LAZARUS, *supra* note 25, at 70.

33. See *id.* at 74; see also Comment, *Friends of Mammoth and the California EQA*, 121 U. PA. L. REV. 1404, 1418 (1973).

34. See *id.* at 69.

35. See *infra* Part I.A.

action.<sup>36</sup> Both critiques are at least implicitly about negotiation. The former critique's emphasis on rigidity implies that very little is negotiable, while the latter critique argues that problematic negotiations are pervasive. This Part summarizes these critiques, which remain influential to the present day, along with the policy prescriptions to which they lead.

#### A. Command and Control

According to many prominent critics, a central problem with first-stage environmental law is its emphasis on overly prescriptive, centralized, one-size-fits-all methods of regulation.<sup>37</sup> These critiques came not just from industry, which one might expect to latch on to any critiques that serve its purposes, but also from prominent and influential academics who supported the overall project of environmental law.<sup>38</sup>

For example, a passage written by Richard Pildes and Cass Sunstein encapsulates this critique:

A pervasive source of regulatory inefficiency in the United States is the use of rigid, highly bureaucratized “command-and-control” regulation, which dictates, at the national level, control strategies for hundreds, thousands, or millions of companies and individuals in an exceptionally diverse nation. . . . In the environmental context, command-and-control approaches usually take the form of regulatory requirements of the “best available technology” (“BAT”) . . . . BAT strategies are pervasive in federal law. Indeed, they are a defining characteristic of regulation of the air, the water, and conditions in the workplace.<sup>39</sup>

Likewise, in a classic and often-cited article, Bruce Ackerman and Richard Stewart wrote: “The existing system of pollution regulation . . . is primarily based on a Best Available Technology (BAT) strategy. . . . BAT requirements are largely determined through uniform federal regulations.”<sup>40</sup> A flood of articles

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36. See, e.g., JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 102 (1971) (arguing that informal insider decision-making often trumps legal rules); *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (warning of “important legislative purposes, heralded in the halls of Congress, [but] lost or misdirected in the vast hallways of the federal bureaucracy”).

37. See, e.g., Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENV'T L.J. 130, 131 (2005) (“Contemporary federal environmental regulations are often faulted for their excessive rigidity and centralization.”).

38. See, e.g., DANIEL J. FIORINO, *THE NEW ENVIRONMENTAL REGULATION* 7 (2006); Pildes & Sunstein, *supra* note 5, at 97-98; Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1333-34 (1985).

39. Pildes & Sunstein, *supra* note 5, at 97.

40. Ackerman & Stewart, *supra* note 38, at 1334-35.

emphasized these points.<sup>41</sup> And while that flood has since abated a bit—and other authors have pushed back against these claims<sup>42</sup>—the themes remain prominent in environmental-law discourse.<sup>43</sup> Parsing these critiques reveals three recurring themes that are directly relevant to this Article’s analysis.<sup>44</sup> First, critics emphasized the centralization and the associated inflexibility of environmental regulation.<sup>45</sup> The idea that controls might be tailored on a negotiated and site-specific basis was generally absent from these critiques. Indeed, the idea that controls might be nuanced at all was sometimes absent as well.<sup>46</sup> Instead, traditional environmental regulation “is dichotomous. A regulated entity is either in compliance or it is not. If it is in compliance, it usually has been of little interest to government.”<sup>47</sup>

Second, and similarly, critics emphasized the informational deficits caused by this alleged centralization.<sup>48</sup> As Richard Stewart put it, in a command-and-control system, “[c]entral planners are unable to gather and process the information needed to write directives that respond appropriately to the

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41. See Short, *supra* note 3, at 658-59, 669 (documenting numbers of articles and several recurring themes, including skepticism of traditional regulatory governance); Malloy, *supra* note 4, at 268-69.

42. See, e.g., Wendy E. Wagner, *The Triumph of Technology-Based Standards*, 2000 U. ILL. L. REV. 83, 86, 88, 92-107 (arguing that traditional environmental regulation has been unfairly maligned); Sidney A. Shapiro & Thomas O. McGarity, Comment, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 729 (same).

43. See, e.g., Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENV’T L. 1, 10 (2017) (criticizing “our present regime of nationally determined (largely) uniform standards”); Jonathan H. Adler, *Conservative Principles for Environmental Reform*, 23 DUKE ENV’T L. & POL’Y F. 253, 255 (2013) (criticizing environmental law’s “emphasis on prescriptive regulation and the centralization of regulatory authority in the hands of the federal government”); Jedidiah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1180-81 (2010) (emphasizing, though also partially defending, the rigidity of the Clean Water Act and Clean Air Act); Carol A. Casazza Herman, David Schoenbrod, Richard B. Stewart & Katrina M. Wyman, *Breaking the Logjam: Environmental Reform for the New Congress and Administration*, 17 N.Y.U. ENV’T L.J. 1, 5 (2008) (arguing that U.S. environmental law needs more alternatives to “[h]ierarchical command and control regulatory approaches”).

44. For in-depth reviews of these claims, see generally Malloy, *supra* note 4, and Short, *supra* note 3.

45. See, e.g., Richard B. Stewart, *Controlling Environmental Risks Through Economic Incentives*, 13 COLUM. J. ENV’T L. 153, 154 (1988) (decrying “a massive effort at Soviet-style central planning of the economy to achieve environmental goals”).

46. See, e.g., Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1019 (1995) (stating that under “command-and-control” environmental regulation, “all industries must adopt the same control technology, regardless of the costs and benefits of adoption in the particular case”).

47. FIORINO, *supra* note 38, at 75.

48. See, e.g., *id.* at 6.

diverse and changing circumstances of so many actors in a vast nation with a dynamic economy.”<sup>49</sup> The picture that emerges is of regulators who are steeped in Washington-centered interest-group politics but isolated from, and largely ignorant of, the places actually affected by their regulatory mandates.<sup>50</sup> Negotiation, which necessarily involves localized dialogue, has little place in that picture. Indeed, critics have argued that the “adversarial legalism” they think is baked into American regulatory culture makes it difficult for regulators and regulated entities to communicate at all.<sup>51</sup>

Third, critics proffered—and sometimes continue to proffer—these charges not just for descriptive purposes, but also to support ambitious agendas for legal change. In general, they argue that reforming environmental law requires moving decision-making authority away from centralized and information-starved authorities and into the hands of businesses or more geographically dispersed government entities.<sup>52</sup> That could mean a shift toward market-based regulatory instruments, which reserve to regulators the task of setting overall pollution caps but allow businesses, through the trading of emissions shares, to allocate the burdens of achieving compliance.<sup>53</sup> It also could mean Pigouvian taxes,<sup>54</sup> informational regulation,<sup>55</sup>

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49. Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 31 (2001).

50. See Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 343 (1990) (“Bureaucrats in Washington simply cannot gather and process the vast amount of information needed to tailor regulations to the nation’s many variations in circumstances . . .”).

51. See, e.g., FIORINO, *supra* note 38, at 36 (“[A]dversarial legalism is a major barrier to developing . . . cooperation and dialogue between industry and government . . .”).

52. See, e.g., Henry N. Butler & Jonathan R. Macey, *Externalities and the Matching Principle: The Case for Reallocating Environmental Regulatory Authority*, 14 YALE L. & POL’Y REV. (SYMP. ISSUE), 23, 27 (1996) (“[D]ecentralization through either greater reliance on market incentives and economic property rights, or greater state control over environmental policy, or both, appears to hold promise as a source for more flexible, dynamic, and responsive environmental policy.”).

53. See, e.g., Esty, *supra* note 43, at 59; Sunstein, *supra* note 46, at 1019 (“Command-and-control should generally be replaced by more flexible, incentive-based strategies, which invoke privately adaptable rules.”).

54. See Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 100-01 (2015) (arguing that Pigouvian taxes, which are taxes set at a level equivalent to the cost of some externality, are preferable to command-and-control regulation).

55. See, e.g., Cass R. Sunstein, Essay, *Informing America: Risk, Disclosure and the First Amendment*, 20 FLA. ST. U. L. REV. 653, 654-55 (1993) (promoting informational regulation, which requires regulated entities to provide information about their practices rather than to operate in particular ways or meet specific outcome standards); see also Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 261 (2001) (describing how the Toxics Releases Inventory combines elements of informational regulation and self-regulation).

self-regulation,<sup>56</sup> increasing deference to state and local authority,<sup>57</sup> or increasing emphasis on private property rights.<sup>58</sup> Some critics advocate for combinations of these changes.<sup>59</sup> But regardless of the specific prescriptions, a recurring theme is that the rigidity of environmental regulation is a fundamental and pervasive flaw in the system and should be a central focus of reform.<sup>60</sup> That theme continues to reverberate through debates over regulatory instrument choice, including, perhaps most importantly, debates about the appropriate responses to climate change.<sup>61</sup>

Many of these critiques do acknowledge that environmental law is a large and heterogenous field and that not all its programs are centralized and rigid. Indeed, many scholars have also identified, and sometimes lionized, a few areas of implementation, like negotiated rulemaking, where negotiation assumes central importance.<sup>62</sup> But proponents of command-and-control critiques often

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56. See Short, *supra* note 3, at 673 (noting that self-regulation emerged as a fashionable reform proposal in the mid-1990s).

57. See, e.g., Adler, *supra* note 37, at 132 (arguing for increased decentralization, but also noting that state and local governments are active in areas where federal primacy makes more sense); Butler & Macey, *supra* note 52, at 26.

58. See, e.g., TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* 4 (rev. ed. 2001).

59. 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, 347 (2004) (arguing against traditional regulation and for a mix of alternative policies); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 285-89 (1998) (advocating for a combination of devolution to state and local governments and private-sector self-regulation).

60. E.g., FIORINO, *supra* note 38, at 7 (arguing that environmental “[r]egulation became more prescriptive, in the sense of specifying exactly what was to be done and how . . . . The strategy of applying uniform rules to diverse situations often led to unreasonable outcomes”).

61. See, e.g., SHUTING POMERLEAU & ED DOLAN, NISKANEN CTR., *CARBON PRICING AND REGULATIONS COMPARED: AN ECONOMIC EXPLAINER* 15 (2021) (“[Carbon pricing] allows various pollution sources with differing marginal abatement costs to achieve emissions reduction efficiently, whereas regulations tend to treat all pollutions sources alike.”); Richard Schmalensee & David Schoenbrod, Opinion, *Why a Carbon Tax Might Be Best for the Oil Industry, Consumers, and the Climate*, MARKET WATCH (Mar. 10, 2021, 2:09 PM ET), <https://perma.cc/YL42-ZNP8> (“Regulators in Washington often know far less than individual factory owners, homeowners and others how to cut those factories’ and homes’ emissions most cost-effectively . . . .”); Brief of Economists Thomas C. Schelling, Vernon L. Smith & Robert W. Hahn as Amici Curiae in Support of Petitioners at 3-4, *Chamber of Commerce v. EPA*, 573 U.S. 302 (2014) (No. 12-1272), 2013 WL 6673703, at \*3-4 (attacking the alleged economic inferiority, compared to market-based instruments, of an EPA initiative to regulate greenhouse gases).

62. See, e.g., Lobel, *supra* note 59, at 427-32 (describing habitat conservation planning); Stewart, *supra* note 49, at 64-68, 73-75, 87-94 (describing negotiated rulemaking, Project XL, and habitat conservation planning); Freeman, *supra* note 1, at 653-61 (same).

treat these examples as dubiously legal workarounds.<sup>63</sup> The negotiation-oriented reforms were, in Richard Stewart’s words, a “dangerous supplement” to the official system.<sup>64</sup> These accounts also tend to treat the innovations they discuss as narrow departures from standard regulatory approaches.<sup>65</sup> In the normal case, one might think, the negotiation occurs in Congress and, sometimes, in agencies when they promulgate rules, at which point it comes to an end. All that is left is for regulated industry to follow—or, at its peril, disregard—the diktats of the EPA.

These critiques have been influential. Policymakers have often adopted the reformers’ proposals. Though most core structures of environmental law have not changed, environmental law now has more market-based regulatory systems<sup>66</sup> and a greater emphasis on informational regulation<sup>67</sup> and self-regulation.<sup>68</sup> Likewise, even some of the more ambitious environmental-law initiatives of recent years, though coming from federal agencies, have emphasized decentralized, state-based implementation.<sup>69</sup> In academic realms, meanwhile, it became received wisdom, at least among many heavily-cited professors at elite law schools, that environmental law is profoundly dysfunctional, largely because of its emphasis on rigid, ill-informed, and centralized coercion.<sup>70</sup>

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63. 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). An exception is Jody Freeman’s work, which argues that commentators should be more comfortable with negotiated public-private regulatory arrangements. See, e.g., Freeman, *supra* note 1, at 657 (arguing that “detractors worry too much” about negotiated regulations).

64. Stewart, *supra* note 49, at 39.

65. E.g., *id.* at 25 (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”).

66. See Michael Pappas & Victor B. Flatt, *The Costs of Creating Environmental Markets: A Commodification Primer*, 9 U.C. IRVINE L. REV. 731, 741 (2019) (describing the rise of emissions-trading schemes and mitigation banking).

67. See Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 ENV’T & RES. ECON. 587, 588 (1998) (describing the rise of informational strategies).

68. See Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361, 361-62 (2010) (describing the growing emphasis on self-regulation).

69. See William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WISC. L. REV. 1037, 1078-81 (describing the Obama Administration’s Clean Power Plan’s reliance on state implementation and reservations of state discretion).

70. See Short, *supra* note 3, at 684-85, 685 n.273 (noting that these critiques came from some of public law’s most heavily cited figures); Shapiro & McGarity, *supra* note 42, at 743 (describing core elements of environmental law as “academic failure[s],” meaning that  
*footnote continued on next page*

## B. Slippage

For decades, the rigidity critique has been prominent in the discourse of environmental law. But over those decades, a very different critique has also occupied a central role. In this critique, whatever rigidity appears in the law on the books is illusory, and the reality of environmental law involves “slippage”—often negotiated—away from legal compliance.<sup>71</sup>

The roots of this critique go back at least as far as the writings of Joseph Sax, whose ideas helped lay the foundations for modern environmental law.<sup>72</sup> In 1970, Sax published a classic article on the public trust doctrine,<sup>73</sup> which he followed in 1971 with *Defending the Environment*, a book arguing for popular action in support of environmental protection.<sup>74</sup> Sax’s conception of environmental law emphasized private litigation and judicial intervention, and it did so because he believed that government agencies could not be trusted to overcome political opposition to environmental protection.<sup>75</sup>

Within a few years after the publication of Sax’s article and book, environmental law had transformed, with new statutes and agencies occupying much of the field, but his critique lives on.<sup>76</sup> For years, activists, politicians, and academics alike have castigated EPA and other government agencies over missed deadlines, failures to instigate or implement regulatory programs, and enforcement gaps.<sup>77</sup> Many of the cases that fill environmental-law textbooks reflect these themes.<sup>78</sup> According to commentators, the resulting slippage is so pervasive that, as Daniel Farber has put it, we should understand the standards on the books as opening positions in a negotiation.<sup>79</sup>

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they were often unjustly disparaged by academic authors, while also stating that those elements have found “enormous success in the real world”).

71. See, e.g., Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 882-83 (1997) (arguing that short-term pressures inevitably wear down legal mandates).

72. See Holly Doremus, In Memoriam, *In Honor of Joe Sax: A Grateful Appreciation*, 39 VT. L. REV. 799, 801-04 (2015) (describing Sax’s role in building some of the basic architecture of environmental law).

73. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

74. SAX, *supra* note 36.

75. *Id.* at 108; see generally PAUL SABIN, *PUBLIC CITIZENS: THE ATTACK ON BIG GOVERNMENT AND THE REMAKING OF AMERICAN LIBERALISM* (2021) (describing similar anti-government distrust from prominent liberal activists).

76. See Mark Van Putten, Tribute, *Making Ideas Matter: Remembering Joe Sax*, 4 MICH. J. ENV’T & ADMIN. L. 167, 169-72 (2014).

77. See LAZARUS, *supra* note 25, at 87-91 (describing persistent attacks on the EPA).

78. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

79. Farber, *supra* note 6, at 316.

More provocatively, Mary Wood has argued that “agencies have used their discretion to enshrine a permit system that inevitably sinks the statutory goals. The majority of agencies spend nearly all of their resources to permit, rather than prohibit, environmental destruction.”<sup>80</sup>

In contrast to command-and-control critiques, slippage critiques do emphasize negotiation. They argue, as this Article also argues, that prescriptive regimes may be somewhat illusory because what looks like a hard standard often is flexible.<sup>81</sup> Sometimes that flexibility emerges from simple governmental inaction, but often the degree of flexibility is negotiable.<sup>82</sup> And while some commentators take an unequivocally negative view of this bargaining, others see an upside.<sup>83</sup> Slippage, they note, can include negotiating innovative compromises that comply with the spirit if not the letter of the law.<sup>84</sup>

But while the slippage accounts emphasize negotiation, they still cabin it to limited roles. In the conventional telling, negotiation sometimes determines the gaps between the law on the books and the law in action.<sup>85</sup> But the law itself is often fixed; indeed, it may be just as rigid as the critics of command-and-control systems have alleged.<sup>86</sup> Similarly, in the slippage critiques, it is usually the government, not regulated entities, that gives way; the possibility that regulated entities might be the flexible ones is rarely mentioned.<sup>87</sup> In short, what is negotiable is the extent to which determinate legal standards get implemented.<sup>88</sup> That characterization of environmental law unquestionably is accurate in some circumstances.<sup>89</sup> But as the next Part will show, it also leaves out much of environmental law’s reality.

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80. Wood, *supra* note 6, at 252.

81. See Farber, *supra* note 6, at 316.

82. E.g., *id.* at 299, 315.

83. See, e.g., Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (arguing that limited public enforcement, with the consequence that “lots of once-heralded programs . . . get lost or misdirected” by government bureaucracies, is “a good thing”).

84. Farber, *supra* note 6, at 305-06; see David A. Dana, *The New “Contractarian” Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 36.

85. See, e.g., Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1488-1510 (2005) (describing negotiations over the implementation of the ESA).

86. See, e.g., *id.* at 1411 (describing the ESA’s standards as “absolute”).

87. See, e.g., *id.* (focusing on governmental flexibility).

88. See Farber, *supra* note 6, at 320 (“[S]lippage is another name for noncompliance.”).

89. See, e.g., David Striffling, Comment, *Sanitary Sewer Overflows: Past, Present, and Future Regulation*, 87 MARQ. L. REV. 225, 226, 232-34 (2003) (describing the flexibility accorded to sanitary sewer overflows despite what appears to be a clear statutory prohibition).

Like the command-and-control critique, the slippage critiques are rarely just idle descriptions. Instead, they lead to prescriptions for reform, many designed to cabin agency discretion. So, for example, scholars have urged that the remedy for negotiation-based slippage is to take away the flexibility that lets agencies negotiate.<sup>90</sup> That might be done by enacting clearer statutory standards,<sup>91</sup> but because even clear standards can be negotiated away, common reform proposals often include empowering citizens to use petitions and litigation to spur agency action.<sup>92</sup> Both types of measures have become deeply embedded in environmental law.<sup>93</sup> Much less prevalent, amid all the discussion of cabining agencies' discretion, are proposals that might retain the discretion and help improve the negotiating.

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To be fair, not everything written about the roles of negotiation in environmental law aligns squarely with these two critiques. Many commentators have written about specific situations in which negotiations have occurred, often celebrating and sometimes criticizing the creative outcomes those negotiations produced. Negotiated rulemaking,<sup>94</sup> EPA's Project XL,<sup>95</sup> and landscape-scale habitat conservation planning<sup>96</sup> have been

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90. See, e.g., Wood, *supra* note 6, at 252 (blaming agency discretion for poor environmental outcomes).

91. E.g., Houck, *supra* note 71, at 883 ("Tough odds call for precise law.")

92. See David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 387 & n.2, 394-95 (2020) ("[C]itizen suits are lauded as an essential legal innovation because of their capacity to provide a backstop to lax or ideologically antagonistic administrations."); Eric Biber & Berry Brosi, *Officious Intermeddlers or Citizen Experts? Petitions and Public Production of Information in Environmental Law*, 58 UCLA L. REV. 321, 325 (2010).

93. See Biber & Brosi, *supra* note 92, at 327-28; Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 185-86. *But see* Adelman & Glicksman, *supra* note 92, at 388 (arguing, based on empirical data, that citizen suits often fail to play this backstop role).

94. Negotiated rulemaking involves building structured negotiations into the process of developing a rule. See Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1266-68 (1997) (describing negotiated rulemaking processes).

95. Project XL, which came into existence during the Clinton Administration, was a program designed to allow EPA and regulated firms to jointly develop compliance programs. See Thomas E. Caballero, *Project XL: Making It Legal, Making It Work*, 17 STAN. ENV'T L.J. 399, 403-05 (1998).

96. Landscape-scale habitat conservation plans (HCPs) are large-scale plans designed to compensate for otherwise-prohibited "takes" of endangered species through habitat protection. See Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 318-19 (1997) (describing the emergence of regional-scale HCPs).

particularly celebrated examples,<sup>97</sup> but there are others: Collaborative governance of public lands also has garnered extensive attention.<sup>98</sup> Other commentators have written articles with passing references to the roles negotiations play.<sup>99</sup> My claim is not that commentators are oblivious to the fact that some negotiation occurs, and the practitioners who actually negotiate generally know what they are up to. But absent from environmental writing are attempts to map, across the field, where negotiation occurs and what is typically being negotiated, or to consider, on a systemic basis, what implications all the negotiating holds.

## II. The Negotiable Implementation of Environmental Law

This Part surveys the roles of negotiation in the implementation of six of the primary fields of environmental law: hazardous waste site cleanup, endangered species protection, air quality permitting, water quality permitting, and environmental impact assessment, with a short final section on enforcement, partly but not exclusively of hazardous waste management laws. I have chosen these fields because, by convention, they form the core of environmental law.<sup>100</sup> They predominate in environmental-law textbooks and law review articles,<sup>101</sup> and when attorneys think of environmental law or attempt to define its canonical elements, these subfields are the focus.<sup>102</sup> If negotiation is important here, then it is important to environmental law.

Environmental law is a dense field, with complicated regulatory programs and pages of statutory provisions that can “swim before one’s eyes.”<sup>103</sup> The discussion that follows will wade deep into the thickets, and a few thematic observations may help the larger stories emerge from the details. The first key point is that negotiation is an important feature of environmental-law implementation, and it is important in many realms where traditional

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97. See *supra* note 62 and accompanying text.

98. See Martin Nie & Peter Metcalf, *National Forest Management: The Contested Use of Collaboration and Litigation*, 46 ENV'T L. REP. 10,208, 10,209-11 (2016) (describing debates over collaborative approaches to national forest management); JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT 3 (2000).

99. See, e.g., Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 851-52 (2005) (describing the negotiation of an innovative water-allocation tool).

100. Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240 (2014).

101. *Id.* at 1252-53.

102. *Id.* at 1251-59.

103. *U.S. Steel Corp. v. U.S. EPA*, 444 U.S. 1035, 1038 (1980) (Rehnquist, J., dissenting from denial of certiorari).

commentary has not acknowledged negotiation's roles. The second point, however, recognizes that not everything is negotiable. In every subfield of environmental law, there are some matters regulators are less likely to negotiate or do not negotiate at all, even if those matters involve discretionary decision-making. Often, there are compliance pathways that regulated entities choose partly because they avoid the expense and unpredictability of negotiations. Third, and 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. Sometimes lawmakers make those choices through deliberate, top-down decision-making. But often, the decisions that structure environmental law's many negotiations emerge through thousands of individual choices, which accumulate from regulated entities and federal and state regulators at offices across the country. The result is a heterogenous, sometimes pragmatic and innovative, and sometimes counterintuitive patchwork quilt of regulatory approaches.

Before this Article discusses specific regulatory programs, a few words about methodology may be appropriate. For each program, I searched for primary and secondary sources describing when negotiations occur, who participates, and what is typically discussed. For many programs—even those involving extensive negotiation—that documentation was thin. For that reason, the most important sources for the discussion that follows were interviews with regulators, regulated-entity representatives, and environmental advocates. My selection of interview subjects was necessarily opportunistic; finding people (particularly regulators) who were willing to talk about their negotiations with regulated entities was difficult. But I sought to maintain geographic range, though California was a particular focus, and a balance of types of interviewees. To ensure candor, I promised anonymity to all interview subjects, and I conducted four early interviews on background.

**Table 1**  
Interviews Conducted

State <sup>104</sup>	Number Interviewed	Subject Area	Number Interviewed	Role	Number Interviewed
California	15	CERCLA	4	Gov't	19
Florida	1				
Idaho	2				
Kansas	1				
New Jersey	1	Clean Air Act	7	NGO	8
New Mexico	1				
New York	1	Clean Water Act	14	Regulated entity	16
Oklahoma	1				
Oregon	3				
Texas	4	Endangered Species Act	10	Regulated entity	16
Utah	4				
Virginia	1	NEPA	8	Regulated entity	16
Washington	1				
Wash. DC	7				

A. Waste Site Cleanup

For many years, perhaps the most important environmental law, at least if measured by practitioner hours, was CERCLA.<sup>105</sup> Negotiation is central to CERCLA implementation; the statutory design frames and facilitates negotiated outcomes.<sup>106</sup> That, as later sections of this Article will explain, is typical of environmental laws, though in CERCLA the emphasis on negotiation may find its apotheosis. But CERCLA is distinctive in another key sense, which makes it a useful point of contrast: Under CERCLA, somewhat uniquely in the field of environmental law, the roles of negotiation are widely discussed, documented, and understood.

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104. I have listed the state where the interview subject was based. Many subjects had worked in multiple states.

105. See LAZARUS, *supra* note 25, at 107-10 (noting that CERCLA “transformed environmental law” and “generated a huge demand for environmental lawyers”).

106. See Justin R. Pidot & Dale Ratliff, *The Common Law of Liable Party CERCLA Claims*, 70 STAN. L. REV. 191, 196 (2018) (describing statutory amendments designed to encourage settlements); *Incentives for Negotiating Superfund Settlements*, ENV'T PROT. AGENCY, <https://perma.cc/NRE8-MYSA> (last updated Oct. 13, 2021).

CERCLA governs contaminated site cleanups.<sup>107</sup> More specifically, it governs the processes for investigating and cleaning up major contaminated sites where the parties responsible for the contamination are unknown, defunct, or reluctant to act,<sup>108</sup> and it also provides incentives for what are semi-accurately described as “voluntary” cleanups.<sup>109</sup> It governs cleanup processes partly through statutory terms but largely through an encyclopedic set of regulations known as the National Contingency Plan,<sup>110</sup> which in turn is supplemented by extensive guidance documents.<sup>111</sup> CERCLA also governs the assignment of liability for those investigations and cleanups. Section 107 of the statute allows entities—usually EPA, states, or tribes—that carry out cleanups to recover their costs, which can be enormous.<sup>112</sup> Section 113 allows parties—referred to as potentially responsible parties, or PRPs—that contributed to the site’s contamination to bring lawsuits to reallocate costs among themselves.<sup>113</sup> At most sites, few, if any, of these elements are applied in formulaic ways, and governing law leaves ample room for flexibility—which in turn creates space for negotiation.<sup>114</sup>

That negotiation extends to most elements of CERCLA implementation. Rather than being determined through uniform national rules, cleanup standards are developed on a site-specific basis,<sup>115</sup> which means that PRPs and

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107. *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009).

108. *See, e.g., id.* at 605 (describing how the EPA and state authorities led cleanups at a site where the primary owner was insolvent, and how the EPA used administrative orders to compel actions by other potentially responsible parties).

109. *See* Pidot & Ratliff, *supra* note 106, at 208-09 (explaining why “[t]he descriptor is not entirely apt”).

110. 40 C.F.R. pt. 300. The National Contingency Plan also helps implement the Clean Water Act and the Oil Pollution Act. *See National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Overview*, ENV’T PROT. AGENCY, <https://perma.cc/EAR5-M97H> (last updated Mar. 25, 2022).

111. *Superfund Policy, Guidance and Laws*, ENV’T PROT. AGENCY, <https://perma.cc/DD88-E9P3> (last updated Feb. 11, 2022).

112. 42 U.S.C. § 9607(a). Section 107(a)(4)(A) provides for cost recovery by the federal government, states, or tribes, and section 107(a)(4)(B) allows recovery of “any other necessary costs of response incurred by any other person consistent with the national contingency plan.” *Id.*

113. 42 U.S.C. § 9613; *see* *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 162-63 (2004) (describing section 113’s origins and content).

114. Interview with Private Firm Attorney (Oct. 12, 2021) (“[T]here are opportunities for negotiation, really, at pretty much every stage of the process . . .”).

115. *See* 42 U.S.C. § 9621 (“Remedial actions selected under this section . . . shall attain a degree of cleanup . . . at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented . . .”). Section 121 also mandates compliance with “legally applicable” or “relevant and appropriate standard[s]” set under other federal or state laws. 42 U.S.C. § 9621(d)(2)(A). The process of selecting appropriate and relevant

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regulators are often negotiating how clean will count as clean enough.<sup>116</sup> Those cleanup standards are often tied to future plans for, and restrictions upon, uses of the site,<sup>117</sup> which means that regulators and PRPs often negotiate the legal limitations they will place on future site uses and those limitations' implications for cleanup goals.<sup>118</sup> While EPA and DOJ attorneys emphasized in interviews that the overall choice of a remedial approach isn't supposed to be negotiated, such negotiations do sometimes occur.<sup>119</sup> And even when the general selection of a remedy happens without negotiation, turning a general selection into a specific set of engineering and monitoring systems and a timetable for results involves ample discretion and often requires negotiation.<sup>120</sup>

If the process of cleaning up a site is heavily negotiated, the assignment of liability is generally even more so. CERCLA creates no administrative processes for liability assignment, and contests over liability instead must be resolved through litigation or settlements.<sup>121</sup> As in most areas of high-stakes litigation, parties generally prefer the savings and certainty associated with settlements,<sup>122</sup> and the statute further encourages settlements by giving some settling parties shields against lawsuits filed by other PRPs.<sup>123</sup> Consequently, almost every contaminated site cleanup involves extensive and often

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standards "is not rigid, and EPA and a state may adapt it to fit situation-specific factors, as needed." ENV'T PROT. AGENCY, OLEM DIRECTIVE 9200.2-187, BEST PRACTICE PROCESS FOR IDENTIFYING AND DETERMINING STATE APPLICABLE OR RELEVANT AND APPROPRIATE REQUIREMENTS STATUS PILOT 1 (Oct. 20, 2017), <https://perma.cc/YK86-H7WX>. The EPA also can waive the applicability of appropriate and relevant standards. See ENV'T PROT. AGENCY, OSWER DIRECTIVE 9200.4-39, USE OF ALTERNATE CONCENTRATION LIMITS (CLS) IN SUPERFUND CLEANUPS (July 19, 2005), <https://perma.cc/R89L-XFMH>.

116. Interview with Private Firm Attorney, *supra* note 114 ("At each Superfund site, there is a new conversation about . . . the cleanup standards that are applicable for that site.").

117. See ENV'T PROT. AGENCY, OSWER 9355.0-89, INSTITUTIONAL CONTROLS: A GUIDE TO PLANNING, IMPLEMENTING, MAINTAINING, AND ENFORCING INSTITUTIONAL CONTROLS AT CONTAMINATED SITES 2-3 (2012), <https://perma.cc/U78Z-549G>.

118. See *id.* at 2, 4, 8-9, 16 (describing negotiations of institutional controls).

119. Interview with Former Environmental Protection Agency Attorney (Oct. 26, 2021) [hereinafter Interview with Former EPA Attorney] (describing situations in which the attorney saw remedies being negotiated, despite regulatory standards to the contrary); see generally 40 C.F.R. § 300.430(f) (describing procedures for remedy selection).

120. Interview with Private Firm Attorney, *supra* note 114; Interview with U.S. Department of Justice Attorney (Nov. 1, 2021) [hereinafter Interview with DOJ Attorney] ("Schedules definitely get negotiated.").

121. See 42 U.S.C. §§ 9607, 9613.

122. See Pidot & Ratliff, *supra* note 106, at 205-06.

123. 42 U.S.C. § 9613(f)(2) (providing a liability shield to "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement").

multilateral negotiations over the division of liability between the public and the PRPs and, if there are multiple PRPs, among those PRPs.<sup>124</sup> Indeed, the inter-PRP negotiations can come in layers, with initial negotiations to decide the negotiating process followed by negotiations to decide the outcome.<sup>125</sup> As one experienced attorney put it, “you’re [really] negotiating the shape of the table . . . and [then] you negotiate the endpoint to the process.”<sup>126</sup>

That does not mean everything about CERCLA implementation is negotiable. As CERCLA practitioners explained, initial determinations about the scope of site investigations typically are not heavily negotiated.<sup>127</sup> If the EPA or a state determines that a site needs investigating, there is likely to be some professional judgment involved in deciding where investigations should focus, how many soil borings and wells should be drilled, how many samples should be collected, and what they should be tested for.<sup>128</sup> But while regulators will take input on these decisions, they tend to decide what they think is appropriate rather than negotiating plans with PRPs.<sup>129</sup> Attorneys on both sides also noted that the statutory scheme is designed to give the EPA significant leverage in the negotiations, resulting in what one PRP-side attorney described as “seriously constraining negotiations.”<sup>130</sup> Nevertheless, enough elements of CERCLA implementation are negotiable to place negotiation at the core of the regulatory regime.

For CERCLA, in contrast to the other statutory regimes discussed in this Article, there is little novelty in these observations. Most practitioners and academics know that CERCLA generates many negotiated settlements. The EPA’s website states its preference for negotiated resolutions,<sup>131</sup> and the agency publishes guidance documents on reaching more effective CERCLA settlements.<sup>132</sup> CERCLA thus illustrates not just the pervasiveness of negotiation

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124. See William W. Balcke, Note, *Superfund Settlements: The Failed Promise of the 1986 Amendments*, 74 VA. L. REV. 123, 132 (1988) (emphasizing the importance of settlements).

125. See Interview with Private Firm Attorney, *supra* note 114.

126. *Id.*

127. Interview with DOJ Attorney, *supra* note 120.

128. This assertion draws on personal experience. Before law school, I worked on waste site cleanups and was surprised how many judgment calls were necessary, even at small sites.

129. Interview with DOJ Attorney, *supra* note 120; Interview with Former EPA Attorney, *supra* note 119.

130. Interview with Private Firm Attorney, *supra* note 114.

131. *Negotiating Superfund Settlements*, ENV’T PROT. AGENCY, <https://perma.cc/QHU3-EY6K> (last updated Aug. 15, 2022) (“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.”).

132. Memorandum from Barry Breen, Dir., Off. of Site Remediation Enf’t (June 17, 1999), <https://perma.cc/G7WT-93DA> (describing “Negotiation and Enforcement Strategies  
*footnote continued on next page*”).

in environmental-law implementation, but also a deliberate and open approach to embracing that pervasive role. The former characteristic, as the rest of this Part will explain, is typical of environmental law. The latter is not.

## B. Endangered Species Protection

When people think of the Endangered Species Act, they do not tend to think of negotiation. The statute is legendary for its supposed rigidity. In part, that reputation derives from *Tennessee Valley Authority v. Hill*,<sup>133</sup> the classic Supreme Court case holding that ESA section 7's protections must be implemented "regardless of the cost."<sup>134</sup> Other Supreme Court opinions have bolstered the sense that the statute applies without flexibility or mercy—that, in Justice Scalia's memorable description, it "imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use."<sup>135</sup> Political accounts of the statute are similar; former Secretary of Interior Dirk Kempthorne once described the ESA as "perhaps the least flexible law Congress has ever enacted."<sup>136</sup> So too are many academic descriptions.<sup>137</sup> These characterizations are not uniform; since the early days of ESA implementation, some observers have emphasized agencies' ability to find flexibility even in mandates that strike many observers as inflexible and clear.<sup>138</sup> One particular innovation—landscape-scale habitat conservation planning under section 10 of the ESA—

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to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund sites").

133. 437 U.S. 153 (1978).

134. *Id.* at 188 n.34.

135. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 714 (1995) (Scalia, J., dissenting).

136. Dirk Kempthorne, U.S. Sec'y of the Interior, Press Conference on Polar Bear Listing (May 14, 2008), <https://perma.cc/4GJS-52WK>.

137. *E.g.*, Mary Jane Angelo, *Discordant Environmental Laws: Using Statutory Flexibility and Multi-Objective Optimization to Reconcile Conflicting Laws*, 38 STAN. ENV'T L.J. 165, 169 (2019) ("The ESA has been characterized in both the legal literature and court opinions as a particularly rigid and absolutist statute."); Kalyani Robbins, *Awakening the Slumbering Giant: How Horizontal Drilling Technology Brought the Endangered Species Act to Bear on Hydraulic Fracturing*, 63 CASE W. RESV. L. REV. 1143, 1144 (2013) ("[T]he ESA tends to be the least flexible of environmental statutes.").

138. *See, e.g.*, Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141, 183-84 (2012); Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 21 (1997) ("[A]lthough the ESA is often perceived as stringent in its requirements, there is in fact a great deal of flexibility in its application."); STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 70-71, 84-85 (1982) (noting that the Act's implementers have found ample room for flexibility).

also has become a famous example of negotiated governance.<sup>139</sup> But on the whole, conventional wisdom suggests that the ESA is inflexible, and that what flexibility does emerge—outside of habitat conservation plan (HCP) negotiations—comes from deviations from a rigid statutory framework rather than from negotiation within that framework.<sup>140</sup>

Actual practice, however, is different. Explaining that reality is somewhat easier if one starts with an overview of the statute’s requirements. Section 4 of the statute governs decisions to list species as threatened or endangered,<sup>141</sup> and those listing decisions are the gateway to the statute’s other protections.<sup>142</sup> Sections 7 and 9 provide the Act’s substantive protections.<sup>143</sup> Section 7 prohibits federal agencies from taking actions that are likely to “jeopardize” the continued existence of listed species or adversely modify their critical habitat.<sup>144</sup> It also sets forth a process—known as consultation—through which the federal agency taking action and either the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) determine whether jeopardy or adverse modification will occur and how either might be avoided.<sup>145</sup> Section 9 prohibits “takes” of listed species,<sup>146</sup> and prohibited takes include direct killing or wounding of species along with habitat modifications that cause identifiable harm to members of the species.<sup>147</sup> The Act also includes two key exceptions to the take prohibition. Through the section 7 process, federal agencies can obtain “incidental take statements.”<sup>148</sup> Likewise, by developing and implementing habitat conservation plans, which are designed

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139. See *supra* note 62 and accompanying text.

140. See, e.g., Sinden, *supra* note 85, at 1411 (arguing that the ESA’s rigidity is important because of this tendency toward deviation).

141. 16 U.S.C. § 1533.

142. See David J. Hayes, Michael J. Bean & Martha Williams, Comment, *A Modest Role for a Bold Term: “Critical Habitat” Under the Endangered Species Act*, 43 ENV’T L. REP. 10,671, 10,672 (2013) (“[T]he regulatory consequences of listing a species in the first place are . . . far-reaching.”).

143. 16 U.S.C. §§ 1536, 1538.

144. 16 U.S.C. § 1536(a)(2).

145. 16 U.S.C. § 1536(a)-(d); see Melinda E. Taylor & Richard E. Sayers, Jr., *Interagency Consultation and Conservation Duties Under Section 7*, in ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 111, 119-21 (Donald C. Baur & Ya-Wei Li eds., 3d ed. 2021).

146. 16 U.S.C. § 1538.

147. See 16 U.S.C. § 1532(19) (defining “take”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 711-14 (1995) (O’Connor, J., concurring) (emphasizing the importance of proximate causation to the take analysis).

148. 16 U.S.C. § 1536(b)(4); see 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 4-45 to -48 (1998).

to minimize and compensate for takes, private entities and state and local governments can obtain “incidental take permits.”<sup>149</sup>

As explained below, negotiation matters to every element of this regulatory system, though to different degrees and in different ways. As one attorney put it, exaggerating only slightly, “it’s all negotiation, actually.”<sup>150</sup>

### 1. Listing and delisting

For the ESA, the importance of negotiation begins with species listings. In theory, FWS and NMFS can initiate proceedings to list species as threatened or endangered.<sup>151</sup> In practice, however, listings are generally driven by petitions and lawsuits filed by a handful of environmental groups.<sup>152</sup> Consequently, the timing of listing decisions follows schedules set forth in negotiated settlements.<sup>153</sup> As one FWS official explained: “We are often behind the curve, unable to do petition findings in twelve months, and we can be sued, and we have no defense in those sorts of deadline cases. The negotiation comes down to what is, in fact, a reasonable timeframe for us to make that petition finding.”<sup>154</sup>

For some species, listing decisions also involve extensive negotiations with state and local governments, other federal agencies, and private landowners.<sup>155</sup> The ESA directs the FWS and NMFS, when assessing whether a species is threatened or endangered, to consider “the inadequacy of existing regulatory

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149. 16 U.S.C. § 1539(a); see *Permits for the Incidental Taking of Endangered and Threatened Species*, NOAA FISHERIES, <https://perma.cc/UHZ7-SU2G> (last updated May 10, 2022) (describing requirements for incidental take permits). See generally J.B. Ruhl, *How to Kill Endangered Species, Legally: The Nuts and Bolts of Endangered Species Act “HCP” Permits for Real Estate Development*, 5 ENV’T LAW. 345 (1999) (describing HCPs).

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

151. 16 U.S.C. §§ 1532(15), 1533(a); 50 C.F.R. § 402.01(b) (2021); see Biber & Brosi, *supra* note 92, at 332.

152. U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-304, ENVIRONMENTAL LITIGATION: INFORMATION ON ENDANGERED SPECIES ACT DEADLINE SUITS 17 (2017) (noting that two environmental groups filed more than half of the suits).

153. 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-UZXG> (describing a settlement involving hundreds of species).

154. Interview with U.S. Fish & Wildlife Service Official (Sept. 13, 2021) [hereinafter Interview with FWS Official].

155. See Timothy Male & Aimee Ford, *Landowner Incentives*, in ENDANGERED SPECIES ACT: LAW, POLICY & PERSPECTIVES, *supra* note 145, at 203, 211-14; Justin R. Pidot, *Public-Private Conservation Agreements and the Greater Sage-Grouse*, 39 PUB. LAND & RES. L. REV. 165, 192 (2018) (describing negotiated agreements that were designed to avoid a sage-grouse listing).

mechanisms”<sup>156</sup> and “those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species.”<sup>157</sup> Rather than just passively considering these requirements, the services—particularly FWS—will sometimes try to convince states, local governments, other federal agencies, and even private entities to adopt conservation plans that will forestall the need for a listing, or that will provide regulated entities with some certainty about their obligations if a listing does occur.<sup>158</sup> Those efforts often lead to negotiated “Candidate Conservation Agreements,” and non-federal property owners can also enter into “Candidate Conservation Agreements with Assurances.”<sup>159</sup> For FWS, these agreements remain somewhat rare, at least in comparison to the total numbers of listed species.<sup>160</sup> NMFS, meanwhile, does not use candidate conservation agreements at all.<sup>161</sup> But for some species, like monarch butterflies and the greater sage-grouse, FWS has entered into far-reaching, high-profile, and intensively negotiated deals.<sup>162</sup>

Decisions to remove species from endangered or threatened status are similarly negotiated. As one FWS official explained:

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156. 16 U.S.C. § 1533(a)(1)(D).

157. 16 U.S.C. § 1533(b)(1)(A).

158. See Sandra B. Zellmer, Samuel J. Panarella & Oliver Finn Wood, *Species Conservation & Recovery Through Adequate Regulatory Mechanisms*, 44 HARV. ENV'T L. REV. 367, 376-81 (2020) (describing these efforts). Interviewees explained that agreements that forestall listings happen but are rare. As one FWS official noted:

The courts have set the bar very high when we are looking at prospective conservation commitments. Unless we've actually got a conservation agreement that's been in place . . . and really has shown that it's made a difference in the status of the species, it's pretty hard for us to be able to rely upon that to say that listing is not warranted.

Interview with FWS Official, *supra* note 154; see also Zellmer et al., *supra*, at 376 n.57 (citing cases that helped set that high bar).

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

160. See Rebecca Epanchin-Niell & James Boyd, *Private-Sector Conservation Under the US Endangered Species Act: A Return-on-Investment Perspective*, 18 FRONTIERS ECOLOGY & ENV'T 409, 412-14 (2020) (showing numbers of Candidate Conservation Agreements and Candidate Conservation Agreements with Assurances).

161. Interview with National Marine Fisheries Service Official (Sept. 14, 2021) [hereinafter Interview with NMFS Official] (“NMFS does not have any.”).

162. See, e.g., ENERGY RES. CTR., UNIV. OF ILL.-CHL., NATIONWIDE CANDIDATE CONSERVATION AGREEMENT FOR MONARCH BUTTERFLY ON ENERGY AND TRANSPORTATION LANDS (2020), <https://perma.cc/ZX4Y-UNVQ>; FAO, *Candidate Conservation Agreement with Assurances for the Monarch Butterfly*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/J5C3-Y3T6> (archived Oct. 22, 2022); Zellmer et al., *supra* note 158, at 393-398 (describing the complex efforts, which involved state plans and multiple CCAAs, to protect the greater sage-grouse).

[W]e need to have commitments from the state fish and wildlife agencies that [species] will continue to be managed in a way that removes any risk of being put in danger of extinction again. . . . The issues we had with getting gray wolves in the northern Rockies delisted [are] all about negotiating management commitments from the states.<sup>163</sup>

## 2. Section 7

If negotiation is selectively important for implementation of ESA section 4, it is pervasively important under section 7.<sup>164</sup>

Section 7 establishes the ESA's jeopardy and adverse modification prohibitions and requires a process, known as consultation, through which those prohibitions are implemented.<sup>165</sup> As most law students learn it, that process is all about go/no-go determinations. A jeopardy or adverse modification determination can stop a proposed action in its tracks,<sup>166</sup> or at least compel adoption of a "reasonable and prudent alternative[],"<sup>167</sup> while a no-jeopardy–no-adverse-modification determination allows the action to proceed. That view has led to a widespread perception that the jeopardy and adverse modification prohibitions are particularly powerful.<sup>168</sup> But other critics contend that behind the fearsome façade is a paper tiger.<sup>169</sup> In practice, study after study has found that jeopardy and adverse modification

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163. Interview with FWS Official, *supra* note 154.

164. *See* Interview with NMFS Official, *supra* note 161 ("[S]ection 7 and section 10 are probably the two areas where there is the most discussion and negotiation.").

165. 16 U.S.C. § 1536.

166. *See, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172-73 (1978) (concluding that section 7 required "the permanent halting of a virtually completed dam for which Congress has expended more than \$100 million").

167. 16 U.S.C. § 1536(b)(3)(A).

168. *See* *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (describing the "powerful coercive effect" of a biological opinion); William H. Rodgers Jr., *Indian Tribes*, in 1 *THE ENDANGERED SPECIES ACT AT THIRTY: RENEWING THE CONSERVATION PROMISE* 161, 170 (Dale D. Goble, J. Michael Scott & Frank W. Davis eds., 2005) (describing section 7's critical habitat protections as "the highest promontory in the boldest section of the strongest environmental law in the world").

169. *See, e.g.*, Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing a Game Protected Species Can't Win*, 41 *WASHBURN L.J.* 114, 115 (2001) ("[T]he jeopardy standard's reality is a far cry from its promise."); Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 *U. COLO. L. REV.* 277, 321 (1993) (criticizing weak implementation of the statute).

determinations are exceedingly rare,<sup>170</sup> leading some commentators to allege that the prohibitions and process accomplish very little.<sup>171</sup>

What both characterizations miss is that section 7 implementation is largely about negotiating adjustments to proposed projects. Private-sector attorneys and regulators agreed that, as one FWS 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.”<sup>172</sup> Those negotiations typically begin with potential adjustments to the proposed project: “Should it be modified to avoid impact? Should it be modified to minimize impacts on whatever listed species you’re dealing with? That can be a long negotiation.”<sup>173</sup> In consultations, a second phase of negotiation typically involves compensatory mitigation<sup>174</sup> for impacts that cannot be avoided or minimized. That leads to additional negotiations, first over “what is the mitigation package,” and then:

[O]nce you negotiate what the mitigation is, you end up with some really complicated negotiations—sometimes, they take longer than getting the project approved—over the implementation of the mitigation. What’s the language of the conservation easement? . . . Is there any financial security you need to guarantee performance? How much is the endowment?<sup>175</sup>

These negotiations can be multilateral. A consultation always involves an “action agency,” which is the entity that wants to take an action that might

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170. See Michael J. Evans, Jacob W. Malcom & Ya-Wei Li, *Novel Data Show Expert Wildlife Agencies Are Important to Endangered Species Protection*, 10 NATURE COMM’NS 3467, at 3 (2019), <https://perma.cc/CPQ4-XE7N> (providing statistics for the National Marine Fisheries Service); Jacob W. Malcolm & Ya-Wei Li, *Data Contradict Common Perceptions About a Controversial Provision of the US Endangered Species Act*, 112 PNAS 15,844, 15,846 (2015) (providing statistics for the U.S. Fish and Wildlife Service).

171. See, e.g., Houck, *supra* note 169, at 321 (noting that, with few exceptions, “there is no evidence that formal consultation under the Endangered Species Act is stopping the world. Indeed, there is little evidence that it is changing it very much at all”).

172. Interview with FWS Official, *supra* note 154; see also Interview with Private Firm Attorney (Oct. 4, 2021) (“They are typically heavily negotiated.”).

173. Interview with Private Firm Attorney (Oct. 7, 2021); see Interview with NMFS Official, *supra* note 161. The NMFS official explained:

Sometimes, we work with the federal agency to design the project. . . . There are certainly discussions about proposed actions around the timing of it, or the technique they may be using. . . . Whatever terms and conditions or reasonable alternatives we might put into a biological opinion, we do have to make sure that they’re feasible and something the action agency has the authority to do and can actually do.

*Id.*

174. Compensatory mitigation refers to actions that compensate for impacts in one location or time by providing extra environmental benefits at some other place or time. Dave Owen, Essay, *The Conservative Turn Against Compensatory Mitigation*, 48 ENV’T L. 265, 269 (2018).

175. Interview with Private Firm Attorney, *supra* note 173.

adversely affect threatened or endangered species, and NMFS or FWS (or sometimes both) acting in its regulatory capacity.<sup>176</sup> Additionally, if the proposed federal action is the permitting or other approval of a non-federal project, the applicant is also a key participant.<sup>177</sup> In those situations, sometimes the applicant will negotiate directly with FWS or NMFS, with the action agency largely off to the side.<sup>178</sup> Sometimes the negotiation will be primarily between the action agency and the regulatory agency.<sup>179</sup> Environmental groups, interviewees told me, are almost never involved.<sup>180</sup> And sometimes there will be three-way negotiations, with the action agency and the wildlife agency pushing for different sets of project changes, which means negotiating—sometimes contentiously—with each other as well as with the applicant.<sup>181</sup>

Section 7 negotiations may sound complex and burdensome, but another key feature of section 7 negotiations is efforts by applicants, action agencies, and wildlife agencies to streamline the process. As people on all sides of the negotiations explained, project adjustments and compensatory mitigation packages frequently emerge from individual, project-specific negotiations and then become standard practice for similar projects.<sup>182</sup> Sometimes this happens through simple imitation, and sometimes it occurs through “programmatic consultations,”<sup>183</sup> but in either situation, a condition that originally needed to

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176. See generally U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 148 (1998) (defining agency roles).

177. *Id.* at x (defining “applicant”).

178. Interview with Private Firm Attorney (Oct. 20, 2021) (describing a range of approaches, including situations in which the action agency says, “[W]e’re going to make you, applicant, the designated non-federal representative. . . . [Y]ou go and deal with the Fish and Wildlife Service. Let us know how it comes out”).

179. *Id.* (“[I]f we’re talking to the applicant, and the action agency isn’t there, then you get this strange triangulation between the applicant and the federal agency and us.”); Interview with U.S. Forest Service Employee (Nov. 18, 2021) [hereinafter Interview with USFS Employee] (stating that a typical consultation negotiation “just doesn’t involve the applicant”).

180. Interview with NMFS Official (Sept. 21, 2021) (“We don’t bring environmental groups to the table with us.”).

181. Interview with Private Firm Attorney, *supra* note 173 (“They very much negotiate within the scope of their own territories, and when you do get them together in the room and ask them to make tradeoffs, the sparks can really fly.”).

182. Interview with FWS Official, *supra* note 154 (“It definitely happens, and we definitely encourage it.”).

183. “A programmatic consultation is a consultation addressing an agency’s multiple actions on a program, region or other basis.” *Section 7: Types of Endangered Species Act Consultations in the Greater Atlantic Region*, NOAA FISHERIES, <https://perma.cc/3FSR-T4CR> (archived Nov. 5, 2022).

be negotiated on an individualized basis becomes standard practice.<sup>184</sup> Both NMFS and FWS encourage these practices, which they think provide clear expectations, efficiency, and stronger protections.<sup>185</sup> Private-sector attorneys agreed, with caveats, that routinization offers value.<sup>186</sup>

Not everything about a section 7 process is negotiable. FWS and NMFS officials cautioned that they are not willing to negotiate over impacts determinations.<sup>187</sup> The project description and mitigation measures are negotiable, they said, but the assessment of a project's impacts is the agency's to make.<sup>188</sup> Nevertheless, enough things are negotiable that one cannot understand the section 7 process without understanding negotiation's roles. Rather than leading to go/no-go decisions, the process is primarily about negotiating adjustments to proposed actions.<sup>189</sup>

### 3. Section 9

The ESA's other key substantive prohibition—section 9's prohibition on takes—also is implemented largely through negotiations. Direct enforcement of section 9—either by agency staff or through citizen suits—is rare.<sup>190</sup> The

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184. Interview with FWS Official, *supra* note 154 (“[T]hey get developed on an individual case, but if they . . . have general workability, they often get rolled into either standard conditions or, oftentimes, we have programmatic consultations . . . then they’re much more streamlined.”).

185. U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 148, at 2-5 (advocating programmatic consultations); Interview with NMFS Official, *supra* note 161 (“That saves both ends, both our time and the action agency’s time.”); Owen, *supra* note 138, at 171-72, 172 n.201.

186. Interview with Private Firm Attorney, *supra* note 173 (“[T]here can be some inflation involved, but I think predictability is always a good thing for my developer clients. . . . [I]t’s better than having to negotiate everything every time.”).

187. Interview with NMFS Official, *supra* note 180.

188. *Id.* (“[T]hat’s not a negotiation . . . . That’s the core of the analysis for us, and that’s something we do based on the environmental baseline, the status of the species, understanding the proposed action.”). *But see* Interview with Private Firm Attorney, *supra* note 173. The attorney observed:

The debate over the scope of the project really is based on perceived impacts. How far do you have to be away from a red-legged-frog-filled creek to minimize impacts? Is it 250 feet, or is it 500 feet? How close can you build to a Swainson’s hawk nest during the nesting season without causing likely abandonment of the nest? . . . What you’re really negotiating is avoiding and minimizing the impacts, which, of course, is based on the science you produce as an applicant through your consultants and the service’s view on whether they agree with that science or not.

*Id.*

189. *See* Owen, *supra* note 138, at 170-72 (finding that almost all biological opinions discuss project modifications).

190. I cannot find statistics on federal enforcement of section 9, but thin staffing and a reluctance to court controversy have contributed to a perception that, as one environmental group representative put it, “[T]hey’ve essentially taken the position  
*footnote continued on next page*

primary mechanisms through which section 9 is implemented are take-limiting conditions imposed through the section 7 process<sup>191</sup>—which, as the preceding paragraphs discussed, is negotiated—and through habitat conservation plans.<sup>192</sup>

HCPs also are heavily negotiated. As one attorney explained:

“[S]ome of it is quantifying take . . . . Some of it is, at what ratio should that [take] be mitigated? Some of it is, where should that mitigation occur, and then a lot of it is, what standards are in place for the management, operation, monitoring, reporting of mitigation? . . . . Sometimes it’s expressly over a budget. You’ll have a spreadsheet in front of everybody that shows the annual costs of performing it one way versus another. You’re literally going line by line, trying to say what makes sense. . . . A lot of times there’s negotiation over, how do you draw those lines to essentially segregate something that can be worked on pending the HCP . . . ?”<sup>193</sup>

These negotiations become particularly complicated for regional-scale HCPs, which generally provide planning for development over large areas rather than focusing on a specific project.<sup>194</sup> Since their emergence in the 1990s, regional-scale HCPs have become iconic examples of negotiated governance, with many commentators casting them as counterexamples to conventional regulatory techniques.<sup>195</sup> In some senses, they are different; regional-scale HCPs often apply across broad geographic scales rather than to one specific project, involve multiple interests, and result in “super-complicated documents.”<sup>196</sup> But other than the absence of project-specific focus, the differences between regional-scale HCPs and smaller HCPs and even

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that they’re not going to enforce the Endangered Species Act on private lands.” Interview with Environmental Nongovernmental Organization Staff (Aug. 25, 2021). Section 9 citizen suits are rare. See Adelman & Glicksman, *supra* note 92, at 409 n.93.

191. See Owen, *supra* note 138, at 170-72.

192. See Douglas P. Wheeler & Dale Ratliff, *Habitat Conservation Plans*, in *ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES*, *supra* note 155, at 169, 177 (providing statistics on the geographic scope of HCP coverage).

193. Interview with Private Firm Attorney, *supra* note 172; see Interview with Private Firm Attorney, *supra* note 178 (stating that HCP negotiations will typically address the scope of the project, the scope of permit coverage, mitigation measures, and, “in addition to those, the length of the permit . . . the number of species that will be covered . . . adaptive management and the nature of no-surprises [assurances] and how that’s reflected in the implementation agreement”).

194. See, e.g., *Placer County Conservation Program*, PLACER CNTY. <https://perma.cc/36MF-5DZN> (archived Oct. 22, 2022) (providing links to multiple documents making up a major regional-scale HCP).

195. See *supra* note 62 and accompanying text.

196. Interview with Private Firm Attorney, *supra* note 173; see Interview with FWS Official, *supra* note 154 (“There’s no standard HCP out there, so we create something that works for whatever individual situation we have, and some of those can be extraordinarily complex.”).

section 7 consultations are of scale rather than of kind. In all these settings, negotiation is key.

The upshot is that each of the three major pillars of ESA regulation—the listing process, the jeopardy and adverse modification prohibitions, and the take prohibition—involves negotiated decision-making.

### 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.<sup>197</sup> Among these programs, the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) permitting program is particularly prominent.<sup>198</sup> There are elements of truth to the traditional characterizations, for some parts of Clean Water Act permitting really do rely on detailed, formulaic blueprints set through federal regulation.<sup>199</sup> Yet even NPDES permitting also includes substantial elements of negotiation—as do other key elements of Clean Water Act implementation.

The Clean Water Act functions primarily through three overlapping and intertwined regulatory systems. The Act categorically forbids unpermitted “discharge of pollutants” into “navigable waters,”<sup>200</sup> and two of the Act's major regulatory programs involve permitting otherwise-prohibited pollutant discharges. One permit program—often called the 404 program—authorizes permits for the discharge of “dredged or fill material” into navigable waters.<sup>201</sup> The U.S. Army Corps of Engineers issues the permits, most often for activities involving some kind of construction.<sup>202</sup> The other program—the NPDES program—governs the permitting of discharges for all pollutants that are not dredged or fill material.<sup>203</sup> Under the Clean Water Act's cooperative federalism system, nearly all states have received authority to issue NPDES permits, so while EPA provides oversight, day-to-day permit administration is done by

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197. *E.g.*, Ackerman & Stewart, *supra* note 38, at 1335.

198. *Id.*; see William F. Pedersen, Jr., *Turning the Tide on Water Quality*, 15 *ECOLOGY L.Q.* 69, 70-71 (1988).

199. See *infra* notes 207-09 and accompanying text (discussing technology-based effluent standards).

200. 33 U.S.C. §§ 1311(a), 1362(12)(A); see *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

201. 33 U.S.C. § 1344.

202. See Dave Owen, *Regional Federal Administration*, 63 *UCLA L. REV.* 58, 80-83, 82 n.139 (2016) (summarizing the 404 program).

203. 33 U.S.C. § 1342.

state authorities.<sup>204</sup> Intertwining in complex ways with the permitting programs is a regulatory system predicated on state development and implementation of water quality standards.<sup>205</sup>

## 1. NPDES

Most commentators view the NPDES program as the “heart of the Act,”<sup>206</sup> and it clearly is the program commentators are thinking of when they describe the statute as prescriptive and rigid.<sup>207</sup> There are ways in which that description fits. When state permit writers draft NPDES permits for sources like industrial facilities and municipal wastewater treatment plants, they generally begin by identifying industry-specific technology-based standards.<sup>208</sup> Those standards derive from EPA regulations and are often expressed in numeric and non-negotiable terms.<sup>209</sup>

But technology-based standards are only part of the larger picture. When permit writers draft Clean Water Act permits for industrial outfalls and for wastewater treatment plants, figuring out the appropriate technology-based standard is just step one.<sup>210</sup> The permit writers also must decide whether and how much to adjust the permitting limits in order to attain compliance with state water quality standards, which are specific to each waterway.<sup>211</sup> Indeed, in interviews, state regulators and private-sector attorneys stressed that water

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204. See 33 U.S.C. § 1342(b) (authorizing delegation of permitting authority); *NPDES State Program Authority*, ENV’T PROT. AGENCY, <https://perma.cc/6937-S543> (last updated May 17, 2022).

205. See 33 U.S.C. § 1313 (requiring states to set water quality standards and to plan for their attainment).

206. See *Nat’l Wildlife Fed. v. Gorsuch*, 530 F. Supp. 1291, 1304 (D.D.C. 1982), *rev’d on other grounds*, 693 F.2d 156 (D.C. Cir. 1982) (“There is no question but that Congress regarded the NPDES program as the heart of the Act and the most effective means of controlling water pollution.”); 5 WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 5263 (West 2022) (“[NPDES] lies at the heart of the CWA.”).

207. See, e.g., Ackerman & Stewart, *supra* note 38, at 1335 (criticizing the program’s reliance on best-available-technology standards).

208. See ENV’T PROT. AGENCY, NPDES PERMIT WRITERS’ MANUAL 5-1, 5-14, 5-15 (2010) (showing a process flowchart and explaining that EPA has developed standards for fifty-six industrial categories).

209. See *Effluent Limitations Guidelines and Standards (ELG) Database*, ENV’T PROT. AGENCY, <https://perma.cc/X4CH-5PQ4> (last updated May 11, 2021). Starting from this webpage, a user can quickly navigate to numeric standards for specific industries and pollutants.

210. NPDES PERMIT WRITERS’ MANUAL, *supra* note 208, at 6-1.

211. See 33 U.S.C. § 1311(b)(1)(C) (requiring NPDES permits to include “any more stringent limitation, including those necessary to meet water quality standards”); 33 U.S.C. § 1313(c) (requiring water quality standards); NPDES PERMIT WRITERS’ MANUAL, *supra* note 208, at 6-1 to 6-42.

quality standards generate much of their work. As one regulator explained, “Most of our permits are really based on affecting water quality and best professional judgment rather than the effluent limits.”<sup>212</sup>

That work usually involves negotiation. States often use formulas and modeling to set these water-quality-based effluent limits (WQBELs) and sometimes the formulas and models leave little flexibility.<sup>213</sup> But often, choosing WQBELs requires some exercise of judgment, and those exercises will be negotiated.<sup>214</sup> For example, determining the area in which compliance will be measured is a common negotiating point.<sup>215</sup> The timing of compliance is also often negotiated, both because of potential flexibility in permit terms and because the statutory and regulatory provisions governing the NPDES program allow for variances in compliance schedules.<sup>216</sup> The “scope and frequency of the monitoring program” also can be negotiated, and the exact language to be used in the permit is often a point of discussion.<sup>217</sup> Underlying all of these negotiations are questions about what levels of control are

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212. Interview with State Water Quality Regulator (Oct. 21, 2021); *see* Interview with Environmental Organization Attorney (Aug. 21, 2021) (“[W]e rarely talk about technology-based limits because they’ve been eclipsed by the water-quality-based limits these days. Not in every industry, but in a lot of them.”).
213. *E.g.*, Interview with State Water Quality Regulator (Sept. 2, 2021) (describing statistical analyses and stating that “[t]here might be some interpretation on the results of the analysis, but overall . . . the approach for doing the analysis is spelled out in regulation, and the results of the analysis are . . . rarely challenged by dischargers”); Interview with State Water Quality Regulator (Oct. 22, 2021) (“They’re largely fixed. The limits themselves are generally tied to some type of formula relationship to the underlying water quality standards.”).
214. Interview with State Water Quality Regulator (Aug. 23, 2021) (saying that negotiation occurs “when we exercise discretion,” and that WQBELs involve discretion in a variety of ways); Interview with State Water Quality Regulator (Oct. 25, 2021) (“Where we are looking at water-quality-standards-based limits, there are times that we have quite a bit of back-and-forth.”).
215. Interview with State Water Quality Regulator (Sept. 2, 2021), *supra* note 213 (“[S]ome discharges have mixing zones in the receiving water, and [negotiators address] how much of a dilution factor is allowed by the permit.”); Interview with State Water Quality Regulator (Sept. 14, 2021) (identifying mixing zones as a negotiation point in “a majority of the permits”).
216. Interview with State Water Quality Regulator, *supra* note 215 (stating that negotiations over compliance schedules “tend to be fairly common”); Interview with State Water Quality Regulator (Oct. 25, 2021), *supra* note 214 (“[W]e can’t necessarily negotiate . . . what final compliance looks like, but we can negotiate . . . the landmarks to get the facility where they need to be.”).
217. Interview with State Water Quality Regulator (Sept. 2, 2021), *supra* note 213; Interview with Association Representative (Oct. 7, 2021) (identifying “monitoring and reporting” as frequent negotiation issues).

feasible.<sup>218</sup> Consequently, 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.”<sup>219</sup> Likewise, a state regulator observed that “it’s very rare where we send a draft . . . to an applicant, or even an existing permittee, and they just say, ‘okay, fine. We’ll take it.’ There is always something.”<sup>220</sup>

Negotiation is similarly important, if not more so, to NDPES permits for stormwater discharges. Partly because the Clean Water Act has been successful in controlling pollution from wastewater treatment plants and industrial outfalls, and partly because stormwater pollution is such a pervasive and difficult problem, stormwater regulation has become a primary focus of Clean Water Act implementation.<sup>221</sup> Within the NPDES system, the EPA and the states accomplish that regulation through two types of stormwater permits: industrial permits<sup>222</sup> and, for mid-sized and larger municipalities, municipal separate storm sewer system (MS4) permits.<sup>223</sup> Both types involve negotiation. For MS4 permits, the governing legal standards are decidedly vague,<sup>224</sup> and court decisions have led regulators to use a “maximum-extent-practicable” standard for judging whether a permit is sufficiently demanding.<sup>225</sup> The

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218. Email from Environmental Organization Representative to author (Oct. 19, 2021, 6:46 PM PST) (on file with author) (“The focus is the feasibility and costs of implementing additional controls.”); Interview with Association Representative (Oct. 21, 2021) (“[E]ssentially, the negotiation is, ‘Hey, we will meet this number that you have given us as a numeric limit, but we cannot do it in five years. We can, potentially, get there in ten years.’”).

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

220. Interview with State Water Quality Regulator (Oct. 21, 2021); *see* Interview with State Water Quality Regulator (Aug. 23, 2021), *supra* note 214 (“It’s the rare exception that we ever put something out in a take-it-or-leave-it fashion.”).

221. *See* COMM. ON REDUCING STORMWATER DISCHARGE CONTRIBUTIONS TO WATER POLLUTION, NAT’L RSCH. COUNCIL, URBAN STORMWATER MANAGEMENT IN THE UNITED STATES 1 (2009) (describing how the addition of stormwater controls has grown the NPDES program).

222. *See Stormwater Discharges from Industrial Activities*, ENV’T PROT. AGENCY, <https://perma.cc/CR65-T3UK> (last updated Sept. 15, 2022).

223. *See Stormwater Discharges from Municipal Sources*, ENV’T PROT. AGENCY, <https://perma.cc/MAT3-F5JN> (last updated Oct. 19, 2022).

224. *See* 33 U.S.C. § 1342(p)(3)(B)(iii) (stating that permits “shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants”).

225. *Defs. of Wildlife v. Browner*, 191 F.3d 1159, 1165-66 (9th Cir. 1999) (holding that MS4 permits need not comply with water quality standards).

resulting flexibility leads to a need to define what will count as compliance.<sup>226</sup> Consequently, state regulators and local governments routinely wind up negotiating the terms of MS4 permits, sometimes with the active participation of environmental groups and of non-profit associations that represent stormwater managers.<sup>227</sup> Industrial permits can be more rote, but both regulators and outsiders said that negotiations do occur.<sup>228</sup>

## 2. Section 404

Negotiating is also central to section 404 permitting, which is the other key Clean Water Act permitting scheme. For most projects, the Army Corps uses what are known as general permits, which apply to large classes of projects.<sup>229</sup> By design, these are one-size-fits-all permits; applicants get the benefit of a highly streamlined process if they are willing to forgo most individualized tailoring.<sup>230</sup> But the terms of general permits are often negotiated through discussions with affected states.<sup>231</sup> For projects that are more complicated or have larger impacts, the Army Corps uses individual permits, and these permits require negotiations somewhat similar to (and sometimes intertwined with) those that occur under section 7 of the ESA.<sup>232</sup>

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226. Interview with State Water Quality Regulator (Sept. 2, 2021), *supra* note 213 (explaining that, because of the maximum-extent-practicable standard, and because “there can be a lot of variation between municipalities as to how sophisticated their stormwater best management practices program is, there can be negotiations about what’s acceptable, what’s not”); Interview with Association Representative (Oct. 5, 2021) (“When there’s ambiguity, by definition there’s going to be some kind of . . . informal negotiation, like, ‘Hey, we’re going to do this. How does that seem to you, regulator?’ ‘Oh, okay, that seems okay.’”).

227. Interview with State Water Quality Regulator (Aug. 23, 2021), *supra* note 214 (“There’s an extensive amount of negotiation that goes into municipal stormwater permitting in particular.”); Interview with Private Firm Attorney, *supra* note 219 (“[T]here’s a lot of negotiation that goes on there. A lot of it is through coalitions or bigger industry groups . . .”).

228. Interview with State Water Quality Regulator, *supra* note 212 (describing limited negotiations for industrial stormwater permitting); Email from Environmental Organization Representative, *supra* note 218 (stating that “[g]eneral permits themselves are negotiated” and “[a]ny individual permit would be negotiated as well”).

229. See 33 U.S.C. § 1344(e) (authorizing the use of general permits); RYAN W. TAYLOR, FEDERALISM OF WETLANDS 94 (2013) (finding that 95% of the permits issued over a multiyear study period were general permits).

230. Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 162-63, 169-72 (2014).

231. See Owen, *supra* note 202, at 98.

232. See Interview with Private Firm Attorney, *supra* note 172 (describing the relationship between the Clean Water Act section 404 and ESA section 7 processes, but also noting that “[t]he Corps has a fairly rigid set of things that it wants to mitigate for . . . Those  
*footnote continued on next page*

Applicants and the Corps (and, sometimes, state regulators) often negotiate over the nature of the project, with the goal of avoiding impacts to aquatic resources and, therefore, the need for a permit, or at least minimizing those impacts.<sup>233</sup> They also negotiate compensatory mitigation, which often is done on a site-specific basis, sometimes with discussions involving multiple agencies in addition to the Corps.<sup>234</sup>

### 3. Water quality standards and TMDLs

Clean Water Act negotiation extends beyond the statute's permitting programs. The Act empowers states to set water quality standards, subject to EPA review and approval, and provides several mechanisms for putting those standards into effect (one mechanism, which this Article has already discussed, is the adjustment of NPDES permits).<sup>235</sup> Each element of the water quality standards program tends to be negotiated. States can adjust their standards, and the development of new water quality standards can sometimes lead to multiparty and multiyear negotiations.<sup>236</sup> States implement water quality standards partly by developing waterway-specific pollution budgets, known as "total maximum daily loads" (TMDLs).<sup>237</sup> TMDLs can be "hugely negotiated" or "all about negotiation," according to regulators and nongovernmental attorneys.<sup>238</sup> Additionally, states implement their water quality standards by imposing conditions on federal authorizations for activities involving

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rarely, in my experience, match up with what the [Fish & Wildlife] Service wants to address").

233. See Interview with State Water Quality Regulator (Aug. 23, 2021), *supra* note 214 ("[T]hat whole issue of avoid, minimize is a big part of negotiation. What's the footprint of the project, and can't you come up with something different?").

234. See Owen, *supra* note 202, at 100-04 (describing localized discretion in selecting compensatory mitigation).

235. 33 U.S.C. § 1313.

236. See Interview with State Water Quality Regulator (Aug. 23, 2021), *supra* note 214 (describing multiyear, multiparty, facilitated negotiations over water quality standards); Interview with State Water Quality Regulator, *supra* note 215 ("That is where the bulk of our negotiations occur.").

237. See generally OLIVER A. HOUCK, ENV'T L. INST., THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION (2d. ed. 2002) (describing the history and functions of the TMDL program).

238. Interview with State Water Quality Regulator, *supra* note 215; Email from Environmental Organization Representative, *supra* note 218 ("Meetings happen for months . . . before a draft is even finalized.").

discharges.<sup>239</sup> These, too, can lead to both site-specific and programmatic negotiations.<sup>240</sup>

In summary, negotiation arises in almost every element of the Clean Water Act's regulatory scheme. That does not mean everything about Clean Water Act implementation is negotiable. Interview subjects stressed that some issues really are settled by governing federal or state law,<sup>241</sup> and that, in other areas, issues that once required negotiation have now become routinized.<sup>242</sup> But even if there are some areas where negotiation is not allowed or not needed, negotiation remains central to water quality protection.

#### D. Clean Air Act Permitting

When commentators have criticized environmental law for being excessively centralized and rigid, another key target has been the Clean Air Act.<sup>243</sup> The Clean Air Act also has been a central focus of reform efforts; nowhere else has the turn toward market-based regulatory systems been as prominent or as influential.<sup>244</sup> The Act is also hugely consequential,<sup>245</sup> and its importance is only growing as climate change becomes increasingly dire.<sup>246</sup> Yet even in Clean Air Act permitting, which traditional accounts might lead one to believe is a pinnacle of centralized rigidity, negotiation is crucially important.

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239. See 33 U.S.C. § 1341 (requiring state water quality certifications for federally authorized activities involving discharges).

240. See Owen, *supra* note 202, at 98 (describing programmatic negotiations); Interview with State Water Quality Regulator, *supra* note 220 (“[I]f somebody needs an individual 404 permit, they’re going to need an individual [Department of Environmental Quality] permit that serves as the 401, and yes, those are negotiated. It’s generally a three-party negotiation, because we want to end up being consistent with the Corps.”).

241. *E.g.*, Interview with State Water Quality Regulator, *supra* note 215 (“Technology-based effluent limits don’t leave us a lot of room for negotiations or, really, flexibility.”).

242. See Interview with Private Firm Attorney, *supra* note 219 (“[O]ftentimes, you might be on your fifth or sixth permit, right? The issues have sort of worked themselves out.”).

243. *E.g.*, Ackerman & Stewart, *supra* note 38, at 1335. See generally BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR: OR HOW THE CLEAN AIR ACT BECAME A MULTIBILLION-DOLLAR BAIL-OUT FOR HIGH-SULFUR COAL PRODUCERS AND WHAT SHOULD BE DONE ABOUT IT (1981) (critiquing the interest-group politics that led to rigid controls on coal-fired power plants).

244. See Richard Schmalensee & Robert N. Stavins, *Lessons Learned from Three Decades of Experience with Cap and Trade*, 11 REV. ENV'T ECON. & POL'Y 59, 60-66 (2017) (describing Clean Air Act trading programs).

245. See OFF. OF AIR & RADIATION, ENV'T PROT. AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, at 7-7 to 7-8 (2011), <https://perma.cc/QD8G-5DU4> (quantifying enormous costs and substantially more enormous benefits).

246. See generally INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT ON CLIMATE CHANGE AND LAND (Valérie Masson-Delmotte et al. eds., 2019).

For new stationary sources<sup>247</sup> of air pollution, the Clean Air Act prescribes two overlapping regulatory programs. Stationary sources must comply with “[n]ew source standards of performance”<sup>248</sup> and go through a separate process called “new source review.”<sup>249</sup> New source performance standards are set nationally,<sup>250</sup> and attorneys and regulators told me that compliance with these standards rarely involves significant negotiation—unless alleged violations lead to enforcement actions.<sup>251</sup> In contrast, new source review is generally carried out by state permitting entities<sup>252</sup> pursuant to flexible standards.<sup>253</sup> The result, typically, is negotiation.

Those negotiations typically happen in two phases. They often begin before an application is even submitted. As one attorney explained, “the first thing you do is . . . sit down and have a pre-application meeting,” which “lays groundwork for later negotiation if it needs to happen.”<sup>254</sup> Sometimes the regulators will simply accept the proposed project description—what follows is just a discussion of specific permit terms, perhaps with draft permit documents going back and forth between the applicant and the permit

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247. The Clean Air Act uses the term “stationary source” to cover nonmobile sources like power plants and factories. *See* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 n.2 (1984).

248. *See* 42 U.S.C. § 7411(f).

249. *See* 42 U.S.C. § 7502(c)(5) (requiring new source review in nonattainment areas); 42 U.S.C. § 7475 (requiring preconstruction permits for facilities “in any area to which this part applies”); *New York v. U.S. EPA*, 413 F.3d 3, 11-13 (D.C. Cir. 2005) (describing the evolution of and relationships between the new source standards of performance and new source review programs); *Ala. Power Co. v. Costle*, 636 F.2d 323, 364-66 (D.C. Cir. 1979) (explaining that the “to which this part applies” language from section 7475 covers facilities built in prevention of significant deterioration areas).

250. *Demonstrating Compliance with New Source Performance Standards and State Implementation Plans*, ENV’T PROT. AGENCY, <https://perma.cc/C8GA-T6CW> (last updated Feb. 2, 2022).

251. Interview with Private Firm Attorney (Nov. 5, 2021) (“In enforcement cases, certainly, the interpretation and application of new source performance standards can be very much up front.”).

252. *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).

253. *See* 42 U.S.C. § 7479(3) (defining the “best available control technology” standard, which applies to new source review in attainment areas, *see* 42 U.S.C. § 7475(a)(4), as “an emission limitation . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility”).

254. Interview with Private Firm Attorney (Aug. 30, 2021).

writer.<sup>255</sup> Sometimes, however, regulators and the project proponent may negotiate the nature of the project proposal, with regulators seeking changes in the project description that would lead to reduced environmental impacts.<sup>256</sup> All of this “happens largely out of the public eye.”<sup>257</sup>

A second phase of negotiation can arise when the draft permit is released for public review.<sup>258</sup> At this stage, at least for major projects with high levels of emissions, opponents can object to projects, triggering administrative and possibly judicial review—and, often, negotiations.<sup>259</sup> Those negotiations typically involve community groups with localized concerns that can be addressed without stopping the project (national environmental groups often object because they are categorically opposed to projects, which means there is little benefit to negotiating).<sup>260</sup> Those local groups often negotiate for adjustments in project operations or for community benefit agreements.<sup>261</sup> Sometimes the two phases blend into one. In California, for example, where regulated entities expect high levels of regulatory and community oversight, they may try to negotiate understandings with environmental and community groups prior to bringing proposals to regulators.<sup>262</sup> In other states, interviewees told me that such proactive engagement with environmental groups “does not happen.”<sup>263</sup>

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255. *Id.* The attorney noted that she will sometimes ask for a more stringent permit than regulators initially propose if she thinks that will make the permit more defensible. *Id.*

256. Interview with Private Firm Attorney (Aug. 22, 2021) (describing “what constitutes the project that is proposed” as “a fundamental question that we always face”).

257. Interview with Community Group Attorney (Oct. 18, 2021).

258. The Clean Air Act requires public hearings on permits for “[m]ajor emitting facilities.” 42 U.S.C. § 7475(a)(2).

259. Interview with Community Group Attorney, *supra* note 257.

260. Interview with Private Firm Attorney, *supra* note 251 (“It also helps . . . if you’re dealing with local counsel that aren’t being brought in for national agendas. . . . You’re not typically, if ever, going to be able to get [national groups] to not oppose a coal-fired power project.”).

261. Interview with State Air Quality Regulator (Sept. 17, 2021) (“Oftentimes, hearing requesters or fence-line communities don’t necessarily have concerns with regard to things that [the state agency] can look at . . . [T]hey want more meetings with the plant manager. They want more effective landscaping and screening around the facility . . . [W]e can get folks together, talk about solutions that might be outside the [state agency’s] jurisdiction.”); Interview with Community Group Attorney, *supra* note 257 (“[I]n our settlements, we’re looking at better controls, so pollution reductions, better monitoring, and usually some sort of community benefit.”).

262. Interview with Private Firm Attorney, *supra* note 256 (“[S]ometimes our job as project proponent . . . is to create the engagement between the agency and the stakeholders where the agency might otherwise prefer just to do a decision on its own.”).

263. Interview with Community Group Attorney, *supra* note 257.

Though stationary-source permitting has received abundant academic attention, it is just part of the Clean Air Act's regulatory scheme. The entire scheme is too massive to summarize in this Article, but a few brief examples should illustrate that negotiation is not unique to stationary-source permitting. Some of the most important air quality regulations address tailpipe standards for automobiles, and those standards have sometimes emerged from complex negotiated deals with the automobile industry.<sup>264</sup> Another key element is the development of state air quality plans. Those, too, often involve negotiations, as states and the EPA discuss whether a plan meets statutory standards and can be approved.<sup>265</sup> Many elements of Clean Air Act implementation are *not* negotiated, or are negotiated only at policymaking levels but not as the law applies to individual companies or facilities. The Act's market-based regulatory systems, for example, can obviate the need for site-specific negotiations; facilities that want flexibility can make trades instead. But 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, which requires analysis of the environmental impacts of federal government actions, does not appear to be a negotiation-framing statute.<sup>266</sup> Nor do its many state-law counterparts.<sup>267</sup> But in practice, compliance with environmental impact assessment laws often involves multiple stages of negotiation.

NEPA and its state-law counterparts encode a simple premise: Governments should study and disclose the environmental consequences of their actions before those actions occur.<sup>268</sup> To that end, NEPA requires preparation of "environmental impact statements" before any "major Federal

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264. 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>.

265. See Ryan, *supra* note 1, at 64-66; Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENV'T L. 1647, 1690-91 (1991).

266. See 42 U.S.C. §§ 4321-4347 (making no mention of negotiation).

267. For an overview of state environmental assessment laws, see DANIEL R. MANDELKER, ROBERT L. GLICKSMAN, ARIANNE M. AUGHEY, DONALD MCGILLIVRAY & MEINHARD DOELLE, NEPA LAW AND LITIGATION § 12.2 (2d ed. 2021).

268. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining NEPA's purposes); *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.*, 764 P.2d 278, 282-83 (Cal. 1988) (explaining the purposes of the California Environmental Quality Act (CEQA)).

actions significantly affecting the quality of the human environment.”<sup>269</sup> Those impact statements must discuss alternatives to the proposed action as well as the action’s potential environmental impacts.<sup>270</sup> NEPA does not mandate any particular environmental outcome,<sup>271</sup> but some state environmental impact assessment laws, like the California Environmental Quality Act (CEQA)<sup>272</sup> and New York’s State Environmental Quality Review Act,<sup>273</sup> also require state and local actors to avoid or mitigate significant environmental impacts if it is feasible to do so.<sup>274</sup>

On their face, these requirements may not sound like frameworks for negotiation, and sometimes they are not.<sup>275</sup> When a federal agency pursues an agency-generated project, with neither a private project proponent nor other interested groups, there is little to negotiate with anyone else. But many projects covered by NEPA involve granting approvals to a nonfederal entity—sometimes a state or local government, but often a private actor—which means there is at least one other entity with a stake in the process.<sup>276</sup> Additionally, some projects, even if not directly proposed by a specific private proponent, are of concern to a wide range of interests. Often, these concerns get sorted out through negotiations, with the NEPA process providing a framework.<sup>277</sup> The same dynamics occur—sometimes with even more intensity—under state law.<sup>278</sup>

For actions implicating NEPA, the negotiations can start at the outset of the process. The “lead agency”—which is the federal agency with primary responsibility for NEPA compliance<sup>279</sup>—generally must make a series of discretionary decisions, including defining the proposed action, drafting a

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269. 42 U.S.C. § 4332(C).

270. *Id.*

271. *Robertson*, 490 U.S. at 350.

272. CAL. PUB. RES. CODE §§ 21000-21177 (West 2022).

273. N.Y. ENV’T CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2022).

274. CAL. PUB. RES. CODE § 21002 (West 2022); N.Y. ENV’T CONSERV. LAW § 8-0109(1) (McKinney 2022).

275. Every interview subject I spoke with described some NEPA-related situations and subjects that generally do not generate negotiations. *See, e.g., infra* notes 288-89 and accompanying text (providing examples).

276. *See* MANDELKER ET AL., *supra* note 267, § 8:20.

277. Interview with U.S. Forest Service Employee (Nov. 29, 2021) (“I see a lot more negotiation on the internal projects than I do on the external . . . Internally, we’re negotiating all the time on, ‘Is this a priority?’ ‘Should we even do this?’ ‘Should we do this project or this project?’ ‘Whose is more important?’”).

278. *See infra* notes 292-303 and accompanying text.

279. 40 C.F.R. § 1501.7 (2021).

statement of purpose and need for that action,<sup>280</sup> deciding the range of alternatives that it will analyze,<sup>281</sup> determining whether it will prepare an environmental impact statement (EIS) at all,<sup>282</sup> and deciding how it will describe potential impacts.<sup>283</sup> On each of these questions, there may be disparities of interest between the project proponent and the agency, and with project opponents or other interested parties. The project proponent may want one project description, for example, but the agency may argue that a different version of the project would be easier to permit.<sup>284</sup> The project proponent may want a highly focused statement of purpose and need and a narrow range of alternatives, while the agency may believe that a broader analysis will be more defensible in litigation.<sup>285</sup> Governing law is unlikely to point to a clear resolution of these disagreements, because the statute itself is brief and vague,<sup>286</sup> and its implementing regulations, though significantly wordier, still leave key terms undefined.<sup>287</sup>

All this discretionary decisionmaking does not always generate negotiation; sometimes the lead agency will resolve these disputes unilaterally, as it clearly has the power to do.<sup>288</sup> In other settings, there is no real disagreement and therefore no need for negotiation.<sup>289</sup> But often, negotiations will occur. As one former NEPA consultant put it, “[t]here’s a ton of

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280. 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) (“The ‘purpose’ of a project is a slippery concept, susceptible of no hard-and-fast definition.”).

281. See 40 C.F.R. § 1502.14 (2021); see, e.g., *High Country Conservation Advocs. v. U.S. Forest Serv.*, 951 F.3d 1217, 1220-22 (10th Cir. 2020) (describing, partially upholding, and partially rejecting the Forest Service’s selection of alternatives for analysis).

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

283. See 40 C.F.R. § 1502.16 (2021).

284. E.g., Interview with Bureau of Land Management Employee (Nov. 15, 2021) [hereinafter Interview with BLM Employee] (describing how negotiations motivated by avoiding the need for a full EIS will often lead to changes in project descriptions).

285. See *Simmons*, 120 F.3d at 666-67 (chastising the Army Corps for deferring to the project proponents’ narrow view of project alternatives).

286. See 42 U.S.C. § 4332(C) (providing the statute’s mandates in relatively few words).

287. See, e.g., 40 C.F.R. § 1508.1 (leaving “significant” undefined).

288. See, e.g., Interview with BLM Employee, *supra* note 284 (“We would not negotiate about, ‘Is this significant?’ That’s our call.”).

289. See, e.g., Interview with USFS Employee, *supra* note 179 (“[F]or proponent-driven stuff . . . there’s usually very little disagreement about what the purpose and need of a project is . . .”).

negotiation that goes on both formally and informally on most NEPA decisions.”<sup>290</sup> He added:

In every NEPA document I’ve ever worked on that responded to a request from a permittee or applicant, that party was intimately involved in formulating the proposed action, in developing reasonable alternatives, and in refining the purpose and need language. If other alternatives were suggested during scoping, the permittee was also always involved in discussions of whether those alternatives were viable (and they always wanted to negotiate down the scope of the review) . . . . [I]f a permittee is paying for field surveys, modeling, or document preparation, they insist in being involved in defining the scope of work rather than turn over their checkbook to an agency.<sup>291</sup>

Attorneys practicing under state environmental impact assessment laws described even more pervasive negotiating.<sup>292</sup> Under state environmental impact assessment laws, and in contrast to most NEPA processes, the project proponent often prepares and submits the environmental review document to the lead agency, which then makes decisions about the sufficiency of the document before deciding to proceed with the project.<sup>293</sup> Or, alternatively, the lead agency may retain primary control over the document, but the project proponent may select and pay for the consultant that prepares that document and provide input on its contents.<sup>294</sup> In either situation, attorneys explained, the fact that private parties “have a pen” means they have more leverage to negotiate than they would have under NEPA.<sup>295</sup>

The resulting negotiations can address every facet of compliance. They may begin with negotiations over the choice of the consulting firm that will prepare the studies.<sup>296</sup> Choosing whether to prepare a full environmental study or some streamlined form of review is often a key negotiating point, with project proponents sometimes resisting agency decisions to prepare full studies and sometimes warning the agency that streamlined review isn’t likely

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290. Email from former National Environmental Policy Act Consultant to author (Oct. 25, 2021, 9:07 PM PST) (on file with author).

291. *Id.*

292. *See* Interview with Private Firm Attorney (Oct. 14, 2021); Interview with Private Firm Attorney (Oct. 15, 2021).

293. *See, e.g.*, N.Y. STATE DEP’T OF ENV’T CONSERVATION, *THE SEQR HANDBOOK* 65 (4th ed. 2020) (noting that the applicant may choose to prepare the environmental review).

294. Owen, *supra* note 14, at 847 n.177 (2019) (describing contractual arrangements between CEQA consultants and lead agencies).

295. Interview with Private Firm Attorney (Oct. 14, 2021), *supra* note 292.

296. Interview with Private Firm Attorney (Oct. 15, 2021), *supra* note 292 (“I’m doing this right now on a big project . . .”).

to be defensible.<sup>297</sup> And, as with NEPA, the content of the study, the drafting of responses to public comments, and the choice of mitigation measures often create multiple opportunities for negotiation.<sup>298</sup>

So far, most of the negotiations I have described involve the project proponent and the lead agency. But NEPA and its state counterparts also can produce extensive negotiations involving other interested parties. In California, for example, interested parties will use comments on the draft and the associated threat of legal action to try to secure changes to the proposed project.<sup>299</sup> Local governments often use the environmental review process to gain leverage to compel financial payments that would mitigate increased infrastructure or governance costs.<sup>300</sup> Labor unions use the threat of litigation—or actual filed cases—as leverage to compel project developers to enter into union contracts.<sup>301</sup> Not all stakeholders are interested in negotiating, and sometimes the agency finds it simpler to let the challenges play out.<sup>302</sup> But while the pressure points may differ from federal to state and from agency to agency, for many parties, the environmental review process provides a framework and a series of leverage points for multiple stages of negotiation.<sup>303</sup>

These negotiations can be focused and bilateral, but they can also be complicated, multiparty affairs. Forest Service staff, for example, described using multi-stakeholder collaborations to identify and discuss management options for national forests.<sup>304</sup> These processes are designed to address the requirements of multiple statutes, not just NEPA; the National Forest

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297. *Id.* (“[F]irst point of negotiation is often around, ‘What is the CEQA document itself?’ . . . It’s not always the case that we’re pushing for some lesser level of CEQA and the agency wants to do more. I would say it’s maybe fifty-fifty on that kind of split.”).

298. *Id.* (“[O]ften as mitigation measures are initially drafted, they do pose real feasibility concerns.”).

299. I have done this while representing potential plaintiffs and responded to such comments while representing potential defendants.

300. *See, e.g., City of Marina v. Bd. of Trs. of the Cal. St. U.*, 138 P.3d 692, 703-04 (Cal. 2006) (describing an impacted community’s argument—which the court accepted—that CEQA provides authority for “a negotiated payment”).

301. Interview with Private Firm Attorney (Oct. 15, 2021); *see* M. Nolan Gray, *How Californians Are Weaponizing Environmental Law*, ATLANTIC (Mar. 12, 2021), <https://perma.cc/WHK3-K89J> (describing “greenmailing” by labor unions and others).

302. Interview with USFS Employee, *supra* note 179 (“Our attorneys are paid for, so go ahead.”).

303. *See* Interview with Private Firm Attorney (Oct. 15, 2021), *supra* note 292.

304. Interview with USFS Employee, *supra* note 179 (“[S]ometimes there’s interest groups involved or stakeholder collaboratives that’ll form, and they’ll ask the agency to meet with them . . .”). *See generally* Martin Nie, *Place-Based National Forest Legislation and Agreements: Common Characteristics and Policy Recommendations*, 41 ENV’T L. REP. 10,229 (2011) (describing collaborations).

Management Act,<sup>305</sup> for example, typically plays a key role.<sup>306</sup> The negotiations also address basic choices about what the agency should do with its land, and those would arise even in the absence of governing statutory frameworks. But the NEPA process, interviewees explained, provides the framework and a focus for the discussions.<sup>307</sup>

#### F. Enforcement

Except for CERCLA, the discussion so far has focused on pre-enforcement phases of compliance. But in nearly all these fields, enforcement actions open a potential new phase of negotiation.<sup>308</sup>

A few factors give rise to the importance of negotiation in enforcement. Environmental litigation, like most litigation, is expensive and often unpredictable, and parties on both sides have incentives to avoid litigating cases to completion.<sup>309</sup> Negotiating a settlement is often an appealing alternative.<sup>310</sup> Additionally, government agencies have broad discretion to craft the terms of settlements. Environmental statutes leave in place agencies' traditional enforcement discretion,<sup>311</sup> which means agencies generally can offer nonenforcement as a carrot to induce negotiated changes. If agencies do bring enforcement actions, most environmental statutes and implementing policies allow for ranges of penalty levels, with additional possible adjustments to account for the benefits of avoided litigation risk, leaving ample room for

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305. Pub. L. No. 94-588, 90 Stat. 2949 (1976) (codified as amended in scattered sections of 16 U.S.C.).

306. See Brett M. Paben, *The Collaborative Forest Landscape Restoration Program: A Panacea for Forest Service Gridlock or a New Name for Old Saws?*, 20 BUFF. ENV'T L.J. 107, 113-27 (2013).

307. Email from former National Environmental Policy Act Consultant, *supra* note 290 ("NEPA is the framework for coordinating compliance with and disclosure under multiple laws."); Interview with USFS Employee, *supra* note 179 ("NEPA doesn't require it, but that's typically where [discussions] happen.").

308. See Freeman, *supra* note 1, at 660-61 (describing this centrality); Interview with Private Firm Attorney, *supra* note 254 (describing enforcement as involving "negotiation all over the place").

309. See Seema Kakade, *Remedial Payments in Agency Enforcement*, 44 HARV. ENV'T L. REV. 117, 126 (2020) (describing these incentives); Robert L. Glicksman, David L. Markell & Justin Sevier, *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).

310. See J.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).

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

parties to negotiate dollar amounts.<sup>312</sup> Government agencies can also include “supplemental environmental projects” (SEPs), which are environmentally beneficial projects that the enforcement target would not otherwise need to pursue, in lieu of collecting some penalties.<sup>313</sup> The possibility of SEPs opens up extensive additional opportunities for crafting creative settlement terms.<sup>314</sup>

Similar opportunities exist when enforcement happens through citizen suits.<sup>315</sup> Some citizen suits are filed by individuals or groups who want and expect to stop a project in its tracks, and in that circumstance, there is little to negotiate.<sup>316</sup> But often—particularly with lawsuits against existing facilities—litigants want changes in practices or some sort of mitigation effort,<sup>317</sup> and they may attempt to begin settlement discussions as soon as they file the case.<sup>318</sup> Even when a litigant’s opposition to a project is more categorical, the litigant may prefer a compromise to potentially losing or to running out of money to litigate the case, and may take a settlement that provides something less than complete victory.<sup>319</sup> For defendants, a negotiated agreement may provide more economic certainty than litigation, as well as the chance to avoid

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312. *See, e.g.*, 42 U.S.C. § 6928 (capping some types of penalties but leaving discretion beneath those caps); OFF. OF ENF’T & COMPLIANCE ASSURANCE, ENV’T PROT. AGENCY, REVISIONS TO THE 1990 RCRA CIVIL PENALTY POLICY 41 (2003), <https://perma.cc/4RTM-PF4A>.

313. ENV’T PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY: 2015 UPDATE 1 (2015).

314. *Id.* *See generally* Kakade, *supra* note 309 (describing the potential benefits of and controversy surrounding SEPs); Interview with Private Firm Attorney, *supra* note 254 (describing extensive negotiation of SEPs, and saying: “Companies like SEPs, because they like to feel like their money isn’t going to waste”).

315. *See* Thompson, *supra* note 93, at 206-07 (describing environmental group incentives to settle and the emergence of SEPs from citizen suits).

316. *See* Interview with Private Firm Attorney (Nov. 5, 2021).

317. *See, e.g.*, Interview with Community Group Attorney, *supra* note 257. The attorney explained:

[Y]ou’re looking at, what are they [going to] pay in terms of penalties to the government, and how much are they [going to] put into community-type projects. The community project might be funding for the volunteer fire department that responds to fires at [the] . . . facility, or maybe it’s [air] filters for the local elementary school, or . . . [a] mobile health clinic.

*Id.*

318. *E.g.*, Interview with Environmental Group Attorney (Oct. 20, 2021) (describing her organization’s preference to include joint site visits, at which experts from each side can discuss management improvements, as part of a typical settlement negotiation).

319. *See, e.g.*, Robert W. Adler, *In Defense of NEPA: The Case of the Legacy Parkway*, 26 J. LAND, RES., & ENV’T L. 297, 297-98, 307 (2006) (describing a compromise that brought extended NEPA litigation to an end).

admitting fault.<sup>320</sup> Consequently, for citizen suits, as for government-filed suits, negotiation is routine.<sup>321</sup>

The importance of settlements means that compliance-related negotiations often come in a series of stages. Consider, for example, a Clean Water Act NPDES permit, which commentators sometimes use as a prime example of environmental law's rigidity. Some of the original terms of that permit likely would be negotiated, and those negotiations would cover a range of subjects, including how compliance might be measured.<sup>322</sup> If, after the permit issues, compliance issues arise, the regulating agency and the permittee may negotiate again over whether the monitoring results actually indicate noncompliance and what should be done about the problem.<sup>323</sup> The result might be a consent decree, which, by setting a timetable for delayed compliance, effectively functions as a negotiated variance for the facility.<sup>324</sup> And because NPDES permits must be renewed on five-year cycles, the enforcement negotiations may feed directly into negotiations over the next round of permitting.<sup>325</sup> For both the regulators and the regulated, the discussions may never really end.

### III. Implications

The previous Part demonstrates that negotiation is more pervasive in environmental law than traditional accounts of the field acknowledge. That conclusion supports this Article's most basic point, which is that understanding environmental law requires understanding the roles of negotiation. This Part goes beyond that basic point and considers how negotiation's centrality affects traditional critiques of environmental law. The Part explains why the prevalence and nature of environmental-law negotiations partially undercut command-and-control critiques. It then

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320. Interview with Private Firm Attorney, *supra* note 254.

321. *See, e.g.*, Interview with Environmental Group Attorney, *supra* note 318 (“[A]lmost ninety percent of our litigation results in settlement negotiations and a settlement agreement.”).

322. *See supra* notes 213-20 and accompanying text.

323. *See* Interview with Private Firm Attorney, *supra* note 219.

324. *See* ENV'T PROT. AGENCY, EPA GENERAL ENFORCEMENT POLICY NO. GM-17, GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES 2, 10 (1983), in U.S. ENV'T PROT. AGENCY, 2 GENERAL ENFORCEMENT POLICY COMPENDIUM at OR.1-1 (1994) (observing that “[a] consent decree may operate as a release from liability for the defendant for the violations addressed by the decree” and stating that the consent decree should set compliance deadlines); *see also* Tracy Hester, *Consent Decrees as Emergent Environmental Law*, 85 MO. L. REV. 687, 702-04 (2020) (describing the centrality of consent decrees to environmental law).

325. *See* 33 U.S.C. § 1342(b)(1)(B) (limiting permits to five-year terms).

explains why negotiation's prevalence similarly undercuts—again, partially—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.<sup>326</sup> 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.<sup>327</sup> Closely related to that charge are concerns about informational deficits.<sup>328</sup> If environmental rules are nationally uniform and are set primarily by Washington-based bureaucrats, then local needs will often go unheard, or will be understood only by state and local regulators whose hands are tied by national regulatory regimes.<sup>329</sup> This view has been influential. Pushes for increased use of environmental trading systems, additional devolution of authority to state and local governments, informational regulation, and self-regulation all arise at least partly from the sense that the alternative is centralized inflexibility.

Acknowledging the importance of negotiation undercuts these traditional critiques in multiple ways. Initially, the prevalence of negotiation shows that nearly every major environmental regulatory program incorporates significant elements of flexibility.<sup>330</sup> Whether regulators are crafting the terms of new-source-review permits to fit the needs of individual stationary air pollution sources<sup>331</sup> or are developing site-specific mitigation measures as part of biological opinions,<sup>332</sup> they are taking the general standards and directives of environmental statutes and adapting them to specific situations. This is happening constantly, and throughout implementation of environmental law.

A corollary to this flexibility is a surprising level of creativity. Traditional critiques of environmental law often portray the field as sclerotic; centralization and rigidity, the critics allege, make innovative governance difficult, and when innovation does occur, it often flounders.<sup>333</sup> Yet nearly everyone I spoke to described situations in which negotiation allowed them, or

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326. See Malloy, *supra* note 4 (summarizing these critiques).

327. See *supra* notes 37-47 and accompanying text.

328. See *supra* notes 48-51 and accompanying text.

329. See FIORINO, *supra* note 38, at 77-78 (“[T]he people who know the most about the business are not the ones making the rules; they are responding to rules imposed on them from outside.”).

330. See *supra* Part II.

331. See *supra* notes 247-63 and accompanying text.

332. See *supra* notes 164-89 and accompanying text.

333. E.g., Stewart, *supra* note 49, at 21-22.

other people they work with, to come up with creative solutions to environmental challenges.<sup>334</sup> Additionally, many of these creative solutions developed in a bottom-up way.<sup>335</sup> Standardized conditions in biological opinions are a good example; they often arise out of project-specific negotiations and eventually, through acceptance by regulators and action agencies, become routinized across classes of similar projects, with efficiency benefits for all involved.<sup>336</sup> There are limits to the creativity, of course; many interview subjects wished it happened more often and argued that getting government regulators to be creative was hard work.<sup>337</sup> But the interviews left no doubt that coming up with innovative, context-specific solutions is an important element of existing systems of environmental regulation.

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 affected.<sup>338</sup> That critique might seem plausible; if decisions happen in Washington, D.C. but the problems are mostly elsewhere, then decision-makers necessarily will be underinformed.<sup>339</sup> But negotiation is communication—one cannot negotiate

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334. *E.g.*, Interview with State Water Quality Regulator (Aug. 23, 2021), *supra* note 214 (describing how the possibility of negotiation-based flexibility induces regulated entities to support monitoring programs that fill major data gaps); Interview with Private Firm Attorney, *supra* note 114 (describing the use of multilateral negotiations to achieve economically and environmentally beneficial outcomes of CERCLA cleanups); Interview with FWS Official, *supra* note 154 (“[W]orking collaboratively with action agencies and applicants generally produces better and more durable outcomes.”); Interview with Community Group Attorney, *supra* note 257 (emphasizing the value of situations in which air-quality-permit applicants “can actually talk, and understand, ‘What are the things the community is facing?’”).

335. *See, e.g.*, Interview with Water Quality Regulator, *supra* note 215 (describing a municipal NPDES permit that involved the construction of a treatment facility for otherwise-untreated agricultural wastewater); Interview with State Air Quality Regulator, *supra* note 261 (describing, as a hypothetical but typical example, negotiations of restrictions on the times when trucks would access a facility near a neighborhood school).

336. *See supra* notes 182-86 and accompanying text.

337. *E.g.*, Interview with Association Representative (Oct. 4, 2021) (“EPA thinks there’s a lot of flexibility in how you write permits, and we think there is, but in between there’s the permit writer. It doesn’t seem to translate.”); Interview with Environmental Organization Attorney, *supra* note 212 (“They’re pretty bureaucratic. They’re not proactive in trying to find [negotiated] solutions.”).

338. *E.g.*, Stewart, *supra* note 50, at 343 (describing the information deficits faced by “[b]ureaucrats in Washington”).

339. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 576-77 (1985) (Powell, J., dissenting) (asserting that federal laws and regulations are implemented by isolated, inaccessible bureaucrats). *But see* Owen, *supra* note 202 (describing decentralized federal-agency decision-making).

without exchanging information about the circumstances and challenges the other negotiating parties face—and such communication is constantly occurring at multiple levels of governance.

Both regulators and regulated entities value these communications. Regulators repeatedly emphasized that they often lack expertise in the operations of the facilities they regulate, and they need to—and do—communicate with operators to find out what kinds of regulatory restrictions and mitigation measures will be feasible.<sup>340</sup> As one explained, “the back-and-forth helps us better understand a facility, because we certainly don’t know them as well as the operators and owners do.”<sup>341</sup> That such communication exists does not mean, of course, that regulated entities feel perfectly understood; as later parts of this Article will explain in more detail, their attorneys often complained that regulators do not know regulated businesses nearly as well as they should.<sup>342</sup> But they attributed those problems primarily to inexperience and a lack of sufficient training, not to centralization.<sup>343</sup>

If the prevalence of negotiation undercuts many of the premises of these classic critiques, it also partially undercuts the conclusions to which those critiques lead. Because much of environmental law is negotiated on a site-specific basis,<sup>344</sup> 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 already are doing that.<sup>345</sup> Nor do we necessarily need more devolution to state and local governments to achieve site-specific tailoring. Already, because of cooperative federalism programs, almost all of the permit writers negotiating the terms of NPDES and Clean Air Act permits work for state agencies.<sup>346</sup> And even in programs where federal authorities still write the permits, those

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340. *E.g.*, Interview with NMFS Official, *supra* note 161 (“We’ll have a lot of discussions with the facility about . . . when they’re bringing water in, when they’re discharging water, what they can do to lower the temperature of the water, because we’re not experts in how you operate a power plant, but we do know whether the water temperature is too high.”).

341. Interview with State Water Quality Regulator, *supra* note 212.

342. *See infra* note 413 and accompanying text.

343. *See* Interview with Private Firm Attorney, *supra* note 254 (critiquing permit writers’ training).

344. *See supra* Part II.

345. *See supra* notes 210-20, 232-34, 252-63 and accompanying text (describing tailored approaches to air and water quality permitting).

346. *See NPDES State Program Authority*, ENV’T PROT. AGENCY, <https://perma.cc/9U4F-TX5A> (last updated May 17, 2022); *Learn About New Source Review*, ENV’T PROT. AGENCY, <https://perma.cc/N3NB-XRLL> (last updated Dec. 13, 2021) (“Most [new source review] permits are issued by state or local air pollution control agencies.”).

permits typically are issued by staff who work in field or regional offices, and who often craft permit terms through localized negotiations.<sup>347</sup>

To say that the arguments for markets and devolution are not as strong as their proponents have suggested is not to say, however, that those arguments are completely flawed. Because not everything in environmental law is negotiable, there are some situations in which a trading system or some other reform could create welcome flexibility.<sup>348</sup> Additionally, alternative regulatory systems may sometimes provide a better form of localized tailoring than negotiated permit writing. For example, because trading will sometimes involve exchanges between facilities, while negotiations often focus on one facility at a time, trading may provide efficiency advantages that negotiated permitting cannot.<sup>349</sup> Similarly, the transaction costs associated with markets might be lower. The relatively seamless environmental markets of economic theory are quite different from the practical realities,<sup>350</sup> but negotiation can also be time-consuming.<sup>351</sup> Consequently, even a market with real-world transaction costs may be smoother—if carefully crafted and managed—than a system of facility-by-facility permit negotiations.

The larger point is not that markets, devolution, and other traditionally favored reforms lack justifications. Instead, it is that some traditional arguments for these reforms are much too simple. The reforms may make sense, but they should be justified, if at all, through comparisons to the complex, negotiation-driven processes of traditional environmental regulation, not to caricatures of isolation and rigidity.

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347. See Owen, *supra* note 202, at 97-105 (describing Army Corps permitting).

348. New Source Performance Standards and NPDES technology-based permitting are two prominent examples of regulatory regimes that generally do not invite negotiation, except during enforcement. See *supra* notes 207-09, 251 and accompanying text. Yet, as Jonathan Skinner-Thompson pointed out in comments on an earlier draft, even the former program may generate negotiations around applicability determinations and letters of comfort.

349. See *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 936-40, 943 (D.C. Cir. 2021), *rev'd on other grounds*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (describing the differences between the Obama Administration's Clean Power Plan, which determined potential emissions reductions by assuming the ability to shift energy generation among different types of facilities, and the Trump Administration's Affordable Clean Energy Rule, which calculated a lower level of potential emissions reductions partly because it considered only reductions at each regulated facility).

350. See Pappas & Flatt, *supra* note 66, at 747-66.

351. See, e.g., Interview with Former EPA Attorney, *supra* note 119 (describing multiyear Superfund negotiations: "It was brutal. I mean, physically brutal . . . We'd hammer at each other all day . . .").

## B. Slippage and Discretion

Another classic critique of environmental law treats its supposed rigidity not as a central vice but 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.<sup>352</sup> Sometimes they do so by simple inaction, and negotiation is not to blame.<sup>353</sup> But 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. Reformers therefore often call for measures that will cabin agency discretion and thus limit regulators' ability to negotiate compliance away.<sup>354</sup>

Hardly anyone familiar with environmental law doubts that this story is sometimes accurate. The field is filled with accounts of government programs that went under- or unenforced or that agencies never began implementing in the first place,<sup>355</sup> and with tales of deliberate efforts by political leaders to undercut regulators' ability to govern.<sup>356</sup> But a closer look at the roles of negotiation demonstrates that while negotiation can be a mechanism for slippage, its roles are more extensive and complicated, and that even people who strongly support vigorous environmental regulation should sometimes view regulatory negotiations in a positive light.

This claim derives partly from the reality that negotiations are often necessary to define what will count as compliance. Not every environmental regulation is as clear as a technology-based standard in a NPDES permit. Instead, in many circumstances, the requirements of environmental law must be fleshed out in site-specific ways.<sup>357</sup> In theory, regulators could do that unilaterally by simply issuing directives to regulated entities—and sometimes they do.<sup>358</sup> But in many circumstances, regulators cannot understand the nature of the proposals before them, the likely impacts of those proposals, or the possibilities for adjustments without some dialogue with regulated entities.<sup>359</sup> Those discussions can turn into negotiations—often, the line is

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352. See *supra* notes 71-81 and accompanying text.

353. See Farber, *supra* note 6, at 299.

354. See *supra* notes 90-93.

355. See generally HOUCK, *supra* note 237 (chronicling years of government reluctance to draft and implement TMDLs).

356. See Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 591-623 (2021).

357. See, e.g., 40 C.F.R. § 1508.1 (leaving “significant”—which is a crucial term for NEPA implementation—undefined).

358. See, e.g., *Sackett v. EPA*, 566 U.S. 120, 124-25 (2012) (describing EPA's issuance of an order directing landowners to stop filling wetlands).

359. See *supra* notes 340-41 and accompanying text.

blurry—and the result can be better-informed regulatory decision-making. As one regulator emphasized:

We're not going to be successful if we don't interact with the people we're regulating. We need to understand what they're doing. They need to understand where we're coming from, what our priorities and goals are, what their goals are, how they're meeting [or] working to meet those goals. . . . [Y]ou can't tell people what to do without telling them the why. . . . The permit's going to be better quality; it's going to be more implementable.<sup>360</sup>

As that last line suggests, better-informed decision-making can often lead to better outcomes. Essentially everyone I interviewed could identify specific situations in which negotiated outcomes produced improvements over the project descriptions regulated entities initially brought to the table and over the initial regulatory restrictions proposed by regulators. The examples come from all types of regulatory programs: collaborative, multi-PRP arrangements to expedite Superfund cleanups,<sup>361</sup> integrated stormwater-wastewater-groundwater-recharge permits,<sup>362</sup> community benefits agreements to mitigate the impacts of air-polluting facilities on disadvantaged communities,<sup>363</sup> and highway-department vegetation-management practices that would better protect butterflies<sup>364</sup> were just a few of the many examples. In some circumstances, the resulting agreements accomplished things that agencies never could have ordered on their own but that were more affordable for regulated entities and more valued by affected communities.<sup>365</sup> In other circumstances, negotiations led to new regulatory approaches that became standard agency policy.<sup>366</sup> But across a range of settings, negotiation often led to what participants on all sides described as better results.

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.<sup>367</sup> My additional

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360. Interview with State Water Quality Regulator (Oct. 25, 2021).

361. Interview with Private Firm Attorney, *supra* note 114.

362. Interview with State Water Quality Regulator (Sept. 2, 2021), *supra* note 213.

363. Interview with Community Group Attorney, *supra* note 257.

364. Interview with Environmental Group Representative (Oct. 12, 2021).

365. *E.g.*, Interview with State Air Quality Regulator, *supra* note 261 (describing settlements with environmental justice communities).

366. *See supra* notes 182-86 and accompanying text (describing the emergence of standardized mitigation measures in ESA consultations).

367. *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); Freeman & Farber, *supra* note 99, at 847-51 (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).

contribution is to point out how pervasive these improvements are, and how ingrained they are in the day-to-day grind of environmental regulation. It is not just a few high-profile events, like regional-scale habitat conservation plans or major enforcement settlements, that produce important negotiated decisions. Instead, these negotiations are occurring on a daily basis across broad swaths of environmental law, with the aggregate effect of thousands of negotiated project adjustments and mitigation measures likely adding up to profound differences in economic and environmental outcomes.<sup>368</sup> And often, somewhat conversely, regulated entities' preference to *avoid* negotiation, and the time it entails, produces environmental benefits, as those entities adjust their projects to avoid creating environmental impacts that might trigger regulatory requirements and associated negotiating processes.<sup>369</sup>

A last factor explaining why advocates of vigorous environmental regulation might take a more positive view of negotiation is the common alternatives to negotiation. As multiple interview subjects noted, regulators who do not negotiate will not necessarily opt for stronger regulation.<sup>370</sup> Sometimes they will just rubber-stamp whatever proposals regulated industries present to them, whether or not they comply with governing legal requirements.<sup>371</sup> One dischargers' association representative's description captures this reality: "Let's just be honest about it, that there are some states where the regulators don't require as much. . . . I think the regulators are just generally less engaged. Again, they don't have the resources, so I think it's more that the permittees kind of drive the show."<sup>372</sup>

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

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368. See Owen, *supra* note 138, at 187 (finding that project adjustments are pervasive results of ESA consultations); Adler, *supra* note 319, at 301-02 (arguing that environmentally beneficial adjustments are common results of NEPA compliance).

369. See *supra* notes 182-86 and accompanying text (discussing standardized endangered-species-protection conditions); Biber & Ruhl, *supra* note 230, at 181-82 (describing the appeal of general permits).

370. See Interview with Environmental Group Representative, *supra* note 364 (describing the repeated and problematic use of a "bad template" for HCPs); Interview with Association Representative (Oct. 5, 2021); see also Owen, *supra* note 138, at 193-94 (explaining how the option of negotiating mitigation measures can extend a regulatory program's reach).

371. See Dave Owen, *Little Streams and Legal Transformations*, 2017 UTAH L. REV. 1, 41 (2017) (quoting a state regulator describing agencies' reluctance to stop development).

372. Interview with Association Representative, *supra* note 370.

government agencies are reluctant to provide it.<sup>373</sup> Sometimes those measures may short-circuit regulatory negotiations; indeed, that may be the point.<sup>374</sup> But often external oversight and negotiation will be compatible. A citizen suit may help kick-start a fruitful negotiation, and sometimes even the threat of such a suit can strengthen government negotiators' hands, potentially leading to better environmental outcomes.<sup>375</sup> External accountability measures also can enhance environmentally beneficial negotiations *within* regulated entities. As one private firm attorney explained, environmental groups' work "sometimes is a benefit because it allows the people within an organization to be able to achieve . . . things that they were hoping to achieve anyway, and maybe it just hit some roadblocks. . . . That's where the real traditional negotiating comes in."<sup>376</sup>

For these reasons, 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 argued that an awareness of the importance of environmental negotiations partially undercuts some classic critiques of environmental law. But that does not mean all is well with the negotiating state. As this Part explains, environmental regulators' embrace of negotiation, though sometimes enthusiastic, is also uneven, underinformed, and poorly documented. At times, it seems more like a clandestine affair than an acknowledged and thoughtful relationship, which leads to a range of negative secondary consequences—and to some potential solutions.

Understanding these problems is easier if one begins with some basic and common-sense principles to which a negotiating regulatory system ought to adhere. The discussion that follows therefore begins with three premises. First, government should provide more *transparency* than private-sector negotiators typically offer. Typically, that will mean telling the public—and the government's own staff—what is negotiable, under what circumstances, and by whom. Second, government should negotiate *effectively*. That means, among other things, that regulatory negotiations should be staffed by appropriately trained negotiators who have sufficient resources to do their work well. Third,

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373. See generally SAX, *supra* note 36 (advocating for such measures).

374. See Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 117 (2005).

375. See Sinden, *supra* note 85, at 1411 (arguing that the ESA functions this way).

376. Interview with Private Firm Attorney, *supra* note 219.

government should negotiate *equitably*. That means helping groups with lesser sophistication and financial resources participate in negotiations.

Evaluating whether all environmental regulatory negotiations adhere to these principles is a task far beyond the scope of one article. 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 is impossible.<sup>377</sup> Indeed, within that broad range of programs and participants, many negotiations probably are handled well. But even with those caveats, the evidence produced by this Article suggests several problems with environmental law's approaches to negotiations.

#### A. Transparency

In some circumstances, opacity about negotiations is an effective strategic choice. A used-car dealer or mattress-store owner may prefer that customers not realize how negotiable prices really are; the business will strike better deals. But government agencies are not used-car dealers. In the United States, providing transparency in agency decision-making processes is a core goal of administrative law.<sup>378</sup> 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.<sup>379</sup> Negotiated processes will sometimes require exceptions to those general principles. For example, some degree of confidentiality within negotiations can ensure open exploration of solutions.<sup>380</sup> But occasional exceptions should not stop agencies—and, sometimes, legislators—from providing clear information about situations in which negotiations are possible.

Environmental regulators rarely receive or provide that sort of information. 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). Instead, Congress has created frameworks for thousands of negotiations without

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377. Interview with Private Firm Attorney, *supra* note 150 (“[S]ome of this is even within an office, right? Obviously, you’re working . . . with individuals.”).

378. See William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. (SPECIAL EDITION) 171, 171 (2009).

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

380. See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003) (“There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations.”).

acknowledging that those negotiations will occur. Agency implementing regulations likewise say hardly anything about negotiations. Some guidance documents provide more coverage. The NMFS-FWS joint handbook on HCP preparation discusses effective negotiations,<sup>381</sup> for example, and the Council on Environmental Quality has issued guidance on NEPA collaborations.<sup>382</sup> But these are outliers. Even handbooks and guidance documents governing situations in which negotiation is common are often silent about those negotiations. The FWS-NMFS handbook on endangered species consultations, for example, uses the word “negotiate” only twice, both times in reference to negotiating extensions for document deadlines.<sup>383</sup> The EPA’s *NPDES Permit Writers’ Manual* says nothing at all.<sup>384</sup> Nor does its *New Source Review Workshop Manual*.<sup>385</sup> An enterprising reader who understands that discretion often begets negotiation might read these documents and infer where negotiating opportunities lie, but not always—particularly if different agencies or offices implement similar regulatory regimes in different ways.<sup>386</sup> 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. This Article should not be novel, and the fact that it is provides further evidence of a systemic problem.

Ideally, transparency efforts would extend beyond describing situations in which negotiations can occur and would also provide information about the outcomes of past negotiations. That would be helpful on multiple fronts: Regulated entities and community groups could 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. There are also potential downsides; the prospect of increased transparency can inhibit discussions.<sup>387</sup>

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381. U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., HABITAT CONSERVATION PLANNING AND INCIDENTAL TAKE PERMIT PROCESSING HANDBOOK 2-7 (2016) (“[S]uccessful HCP planning often requires consensus building, negotiation, and integration of numerous interests . . .”).

382. COUNCIL ON ENV’T QUALITY, COLLABORATION IN NEPA: A HANDBOOK FOR NEPA PRACTITIONERS (2007).

383. U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., *supra* note 148, at 4-7, 5-3 to -4.

384. *See* ENV’T PROT. AGENCY, *supra* note 208.

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

386. *See* Owen, *supra* note 202, at 92-105 (describing regional variation in regulatory approaches).

387. As one attorney explained, “I do sometimes feel like the regulatory lawyers are worried about agreeing to something [that] their other clients won’t like, because . . . once you  
*footnote continued on next page*

But overall, the literature on negotiations suggests that transparency can help otherwise-disadvantaged participants, limit parties' willingness to stake extreme positions, and, on the whole, lead to more efficient negotiations with more widely acceptable outcomes.<sup>388</sup>

Here, as well, existing documentation falls well short. Many negotiated environmental documents are not readily available. For example, no searchable database of non-EIS NEPA documents exists.<sup>389</sup> 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.<sup>390</sup> Likewise, the role of negotiation in NEPA compliance is often opaque. As one federal employee explained, his agency routinely engages in early-stage discussions with applicants for approvals, and those discussions often lead to environmentally beneficial project adjustments.<sup>391</sup> But rather than describing those adjustments as alternatives to or mitigation measures for the proposed project, the agency (with the applicant's agreement) will often write them into the project description, which means, as he explained, that “you'd not see the choices that the [agency] was faced with and never see the progress we made through that negotiation.”<sup>392</sup>

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get it in one permit, then everyone is going to argue that it's now [best available control technology].” Interview with Community Group Attorney, *supra* note 257. A famous historical example illustrates a similar threat, though in a different context. See Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345, 386, 410-13 (2000) (quoting James Madison while arguing that the closed nature of the United States' constitutional convention made participants' positions more fluid and promoted bargaining).

388. Research on the effects of transparency on regulatory negotiations is minimal, but research in other fields (along with the everyday experience of anyone who has bought a house since sale-price information became widely available) suggests that transparency can have a moderating effect on bargaining positions, reduce the power of the parties that previously could be opaque, and lead to greater convergence in outcomes. See, e.g., Nora Franzen, Andreas Ziegler, Giorgia Romagnoli, Valesca P. Retèl, Theo J.S. Offerman & Wim H. van Harten, *Affordable Prices Without Threatening the Oncological R&D Pipeline—An Economic Experiment on Transparency in Price Negotiations*, 2 CANCER RSCH. COMM'NS 49, 54 (2022); Sara Hagemann & Fabio Franchino, *Transparency vs Efficiency? A Study of Negotiations in the Council of the European Union*, 17 EUR. UNION POL. 408, 409 (2016).

389. 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).

390. Interview with Community Group Attorney, *supra* note 257 (noting that these negotiations “happen[] largely out of the public eye”).

391. Interview with BLM Employee, *supra* note 284.

392. *Id.*

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. Saying, explicitly, things like “we are always willing to discuss potential project changes that will streamline permitting” or “while protection of species is a non-negotiable goal, we are willing to consider a variety of ways of achieving that goal” may sound basic, but could be helpful.<sup>393</sup> And agencies should also be willing, within the boundaries of reasonable confidentiality limitations, to document the outcomes negotiation has produced. Again, saying something like, “the applicant initially proposed 24/7 operation of the facility, but through negotiations we agreed to limit shipping traffic at night” could inform the agency, the applicant, and the interested public alike.<sup>394</sup>

## B. Effectiveness

Negotiating effectively is hard. It takes time; it requires detailed knowledge of opportunities and challenges that define the range of possible solutions; it can require creativity; and it demands interpersonal skills that, for most people, do not come easily.<sup>395</sup> For all these reasons, training and experience matter, as does providing negotiators with the time and support they need to succeed.<sup>396</sup> Yet on all these fronts, environmental regulatory systems often fall short.

The most direct evidence of problems involves the training of government negotiators. When I asked regulators how they learned to negotiate, the

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393. See Interview with Environmental Group Representative, *supra* note 364 (describing the text of the letter he would want a FWS director to write to his staff: “When [regulated entities] don’t know what we want, that drives far more frustration than us wanting too much”).

394. There is a countervailing possibility that more transparency could inhibit negotiators’ willingness to make concessions, particularly where they are worried about establishing some sort of precedent. As one attorney explained, “I do sometimes feel like the regulatory lawyers are worried about agreeing to something [that] their other clients won’t like, because . . . once you get it in one permit, then everyone is going to argue that it’s now [the best available control technology].” Interview with Community Group Attorney, *supra* note 257.

395. See Amy J. Cohen, Review Essay, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 L. & SOC. INQUIRY 503, 526 (2008) (reviewing *THE NEGOTIATOR’S FIELDBOOK: THE DESK REFERENCE FOR THE EXPERIENCED NEGOTIATOR* (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006)).

396. See *id.* at 529 (“Decentered, flexible, and responsive institutions are only as effective as the people comprising them.”).

recurring answer was “trial by fire.”<sup>397</sup> Some government employees started negotiating without receiving any formal training.<sup>398</sup> Others had such training, and they described it as valuable,<sup>399</sup> but they wanted more—and, if they were supervisors, they also wanted more training for their staff.<sup>400</sup> The only systematic and robust training programs I heard described were the EPA’s program for CERCLA lawyers and the United States Department of Justice’s trainings for its litigators.<sup>401</sup> Otherwise, a more typical description came from a private firm Clean Air Act attorney, who described state permit writing as “a training ground for new college graduates,” with the actual training often provided by the experienced attorneys sitting on the opposite side of the negotiating table.<sup>402</sup>

The resources available to government negotiators also vary markedly. Some agencies have sufficient budgets to staff negotiations and even to hire outside facilitators.<sup>403</sup> One striking anecdote, for example, involved the hiring of an outside facilitator for negotiations between two federal agencies—a step that one agency’s representative described as highly effective.<sup>404</sup> But both government and nongovernment interview subjects generally agreed that government negotiators—particularly at the state level—are chronically under-supported.<sup>405</sup> “They’re young,” one attorney explained, “they’re eager, they want to do a good job, but they’re not properly resourced.”<sup>406</sup> Likewise, a FWS official, though generally positive in his assessment of the agency’s

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397. *E.g.*, Interview with State Water Quality Regulator (Oct. 25, 2021), *supra* note 214.

398. *E.g.*, Interview with USFS Employee, *supra* note 277 (“Zero. Most of our leadership probably also have zero when they are selected for these positions.”).

399. *E.g.*, Interview with State Water Quality Regulator (Oct. 25, 2021), *supra* note 360 (“That training is amazingly helpful.”). Government employees also stressed the importance of mentoring. *E.g.*, Interview with NMFS Official, *supra* note 161 (“We do try and pair our more junior staff with more senior staff.”).

400. *E.g.*, Interview with State Water Quality Regulator (Sept. 14, 2021), *supra* note 215.

401. Interview with DOJ Attorney, *supra* note 120. Other training programs do exist. *See, e.g.*, John S. McCain III National Center for Environmental Conflict Resolution, UDALL FOUND., <https://perma.cc/TXU6-8CJG> (archived Oct. 22, 2022). Interviewees generally complained of a lack of access to training, not of an absence of potential training resources. *E.g.*, Interview with USFS Employee, *supra* note 277.

402. Interview with Private Firm Attorney, *supra* note 254; *see* Interview with Association Representative, *supra* note 218 (“[O]ftentimes, these permit writers at the state level have tremendous turnover, so they’re new.”).

403. *See, e.g.*, *Learn About Environmental Collaboration and Conflict Resolution*, ENV’T PROT. AGENCY, <https://perma.cc/YAR8-86R3> (last updated Oct. 6, 2022).

404. Interview with BLM Employee, *supra* note 284.

405. *E.g.*, Interview with State Water Quality Regulator (Sept. 14, 2021), *supra* note 215 (“We are not sufficiently staffed.”).

406. Interview with Private Firm Attorney, *supra* note 254.

training programs, noted that “oftentimes, we’ve got a GS-9 biologist sitting across the table from three people in \$1,500 suits.”<sup>407</sup>

The deficiencies of agency-provided training and resources might be ameliorated by better education. Here, however, 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. Legal textbooks generally do not document situations in which negotiation is a key part of environmental-law implementation, except, perhaps, in their discussions of enforcement proceedings, and students can complete an environmental-law curriculum without negotiating anything.<sup>408</sup> Additionally, many of the people doing the negotiating—particularly on the government side—lack legal training.<sup>409</sup> Agency staff often have degrees in environmental sciences or environmental engineering, as do the environmental consultants who handle much of the work from the regulated-entity side, and education in those realms tends to focus on technical content rather than negotiating techniques.<sup>410</sup>

These deficiencies have consequences. In interviews, nongovernmental interviewees were generally critical—sometimes scathing—in their assessment of the effectiveness of government negotiators.<sup>411</sup> The specifics of their complaints varied. Some environmental group representatives were frustrated at regulators’ willingness to give away leverage,<sup>412</sup> while multiple industry representatives argued that regulators should be better educated about industry needs and business models.<sup>413</sup> 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. As one private-firm lawyer summarized the problem:

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407. Interview with FWS Official, *supra* note 154.

408. See *supra* note 1 and accompanying text. For useful teaching resources, see *Environmental Dispute Resolution*, note 2 above.

409. Interview with Private Firm Attorney, *supra* note 254. (“Most negotiation on [air quality permitting] is done by consultants, not by lawyers.”).

410. 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).

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

412. *Id.*

413. *E.g.*, Interview with Private Firm Attorney, *supra* note 172 (arguing that government negotiators “need to understand how these . . . pieces of infrastructure actually work and are actually financed”); see also Interview with Private Firm Attorney, *supra* note 219 (“I don’t think the regulators are getting the right training, and they certainly don’t understand the agencies they’re regulating . . .”).

Government officials, in the ESA context, are not good negotiators, and I would say the number one reason for that is that they don't view their role as being a negotiator, even, in fact, when they're doing it. Instead, they view their role as, "we're the decision-maker. We have our agenda . . ." Then they end up getting pulled into a negotiation. I'm not sure they recognize that's what's happened or that's what they're doing.<sup>414</sup>

Again, these are at least partially fixable problems. One of the most important fixes would be for state and federal legislators to appropriate more money to staff and train regulatory agencies.<sup>415</sup> 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.<sup>416</sup> Flexible, engaged governance is often more time-consuming than either rubber-stamping regulated entities' requests or regulating by diktat,<sup>417</sup> and increased investment in agency capacity can make such flexible and engaged governance possible. Hiring negotiation specialists also can help. The Texas Commission on Environmental Quality, for example, has an office of dispute resolution, which provides the free services of experienced mediators to permit applicants and community groups seeking to resolve permit appeals.<sup>418</sup> Even if Congress and state legislators do not want to set up independent offices, they can at least bolster training, consider hiring regulators from backgrounds where deal-making is part of the relevant education, and work to establish a culture of negotiating openly and effectively rather than with a variable mix of diffidence, reluctance, and secrecy.

### C. Equity

A final key concern about the ways environmental regulators negotiate involves equity. The fear is straightforward: A system that relies on negotiation, which is a labor-intensive process in which soft factors like relationships and leverage (along with race and gender) can matter a great deal, is likely to favor parties with more experience in the field and financial

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414. Interview with Private Firm Attorney, *supra* note 178; *see also* SUSSKIND, LEVY & THOMAS-LARMER, *supra* note 2, at 1 ("[T]he parties involved often do not realize they are taking part in negotiations.").

415. 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).

416. *See* 42 MARK FEBRIZIO & MELINDA WARREN, REGULATORS' BUDGET: OVERALL SPENDING AND STAFFING REMAIN STABLE (2020) (providing figures on overall costs for federal regulatory agencies).

417. *See* Interview with Association Representative, *supra* note 370 (describing states where "the permittees kind of drive the show").

418. *See Alternative Dispute Resolution for Contested TCEQ Matters*, TEX. COMM'N ON ENV'T QUALITY, <https://perma.cc/8TZA-47HG> (archived Oct. 22, 2022).

resources.<sup>419</sup> That is particularly true if there is little transparency about the circumstances in which negotiation occurs. If one must have insider knowledge not just to effectively play the game, but also to know that the game is even being played, the field will be even more skewed.<sup>420</sup> The resulting problems could affect anyone who interacts with environmental regulation, but they are particularly concerning for smaller and/or less experienced regulated entities and for environmental justice communities.<sup>421</sup>

Measuring the extent to which these problems occur is difficult, but both regulators and attorneys representing regulated parties agreed that smaller, less resourced entities face disadvantages in negotiation-based systems. As one regulator explained, in response to a question about whether it is easier for larger companies to navigate regulatory negotiations: “It absolutely is. They have more resources and more . . . capacity to deal with developing a plan while maintaining their operations.”<sup>422</sup> A private firm attorney likewise noted that when less resourced or experienced entities just submit applications and wait for regulators to act, without attempting to negotiate, “they will lose control and the ability to manage and finesse their proposal.”<sup>423</sup> Another regulator explained: “The smaller the entity, the more difficult this is, because . . . they often don’t have the resources to do the studies that would help them. It is frustrating at times because we may be forced to do something more strict than we would like to do.”<sup>424</sup> These challenges have solutions; even smaller business entities can hire experienced consultants and lawyers, and regulators emphasized that they try to support less sophisticated applicants.<sup>425</sup> But there

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419. See, e.g., Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304, 304 (1995) (finding disparities based on race and gender); see also Cohen, *supra* note 395, at 531; Katherine Levine Einstein & David M. Glick, *Does Race Affect Access to Government Services? An Experiment Exploring Street-Level Bureaucrats and Access to Public Housing*, 61 AM. J. POL. SCI. 100, 100-01 (2017) (“[A]n ample literature suggests that, in the absence of clear rules designed to preclude discrimination, bureaucrats with discretion can act according to their own biases.”).

420. See generally Mirit Eyal-Cohen, *The Cost of Inexperience*, 69 ALA. L. REV. 859 (2018) (explaining disadvantages faced by entities that are less experienced with regulatory processes).

421. There are multiple and contested definitions of environmental justice. See generally Clifford J. Villa, *Remaking Environmental Justice*, 66 LOY. L. REV. 469 (2020) (describing evolving and competing definitions of the phrase). Here, I am using the phrase “environmental justice community” to refer to communities that have suffered from some combination of racial and economic disadvantage and disproportionate environmental harms.

422. Interview with FWS Official, *supra* note 154.

423. Interview with Private Firm Attorney, *supra* note 178.

424. Interview with State Water Quality Regulator (Aug. 23, 2021), *supra* note 214.

425. See *id.*; Interview with State Regulator (Sept. 21, 2021) (“[W]e would strongly encourage them to get an agent to act on their behalf. Then . . . we would very quickly put them in  
*footnote continued on next page*”)

nevertheless was widespread agreement that negotiation favors entities with more experience and resources.

Similarly, interview subjects agreed that while negotiation creates opportunities for disadvantaged communities and other environmental advocates, the burdens of negotiation are real. Sometimes those burdens arise from not knowing when negotiations are occurring or not being able to attend. For example, one former government attorney described an extended Superfund negotiation in which:

We [had] this great big hotel ballroom, and these long meetings in the middle of the day. They're almost exclusionary by design. Who are the people that have all this free time in the middle of the day to participate in these negotiations in the ballroom in downtown . . . ? They're not community members. . . . [They were] largely the people who had a financial interest in the outcome of the negotiations—largely the cleanup contractors.<sup>426</sup>

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. As one small NGO's attorneys explained:

When negotiations do occur, it is difficult to ensure sufficient resources are available . . . to counteract the large stake that regulated industries have in negotiations . . . . We're often the only NGO voice in the room with expertise to present a different perspective than the industry participants. And we know that when we don't make the time to show up, that perspective isn't heard . . . [and] we're accused of not participating in the stakeholders' process and raising issues at the last minute after permit provisions have already been worked out.<sup>427</sup>

Sometimes a lack of access to technical expertise becomes a barrier to effective participation.<sup>428</sup> Some environmental groups have highly sophisticated technical experts on staff, but others do not, and even the ones that do have such expertise often are "spread so thin," as one NGO put it.<sup>429</sup> Additionally, as one environmental justice attorney explained, "there's not this pro bono concept in engineering. Even low-bono-type engineers are still \$200 an hour, and so it's really hard to get expert help."<sup>430</sup>

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contact with a [subject] matter expert [to whom] we would emphasize, internally, 'look, this is . . . a mom-and-pop. Their profit margin is thin—razor thin. Could you do some handholding . . . ?'").

426. Interview with Former EPA Attorney, *supra* note 119.

427. Email from Environmental Organization Representative, *supra* note 218.

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

429. Email from Environmental Organization Representative, *supra* note 218.

430. Interview with Community Group Attorney, *supra* note 257.

While these problems clearly exist, it is hard to know whether a shift away from negotiated decision-making might ameliorate them. The harsh reality is that most decision-making processes tend to favor experienced and well-resourced actors. The same access challenges described above have often been identified for judicial,<sup>431</sup> legislative,<sup>432</sup> and more formalized administrative decision-making.<sup>433</sup> 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.<sup>434</sup> Figuring out how those factors balance out would be difficult without much more evidence of outcomes from different types of decision-making processes.

But even if it is unclear how much negotiation causes or exacerbates equity problems, it is somewhat clearer, and probably more important to ask, how governmental approaches to negotiation can reduce those problems. The transparency reforms described earlier are one important step. Similarly, training programs can emphasize techniques to help involve community groups and regulated entities with fewer resources in negotiations—and to help them succeed in those negotiations. Intervenor funding, which already is important in contaminated-site cleanups and state public utility commission proceedings, also can be effective.<sup>435</sup> More broadly, 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.

## Conclusion

Environmental-law implementation is built on negotiation. One would not know this from reading most of the classic accounts of the field, or perhaps

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431. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97-104 (1974).

432. See Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1089 (2021) (explaining how gerrymandering can lock racial minorities out of political power).

433. See Sheila Foster, *Environmental Justice in an Era of Devolved Collaboration*, 26 HARV. ENV'T L. REV. 459, 464-71 (2002).

434. See Interview with Community Group Attorney, *supra* note 257 (noting that negotiation allows her clients to obtain benefits they would not otherwise receive).

435. See NAT'L ASS'N OF REGUL. UTIL. COMM'RS, STATE APPROACHES TO INTERVENOR COMPENSATION (2021); see also Skinner-Thompson, *supra* note 428, at 439-40.

from a typical environmental-law education. But in all the field's major programs, and at multiple stages of regulatory implementation, regulators, regulated entities, and sometimes environmental advocacy groups negotiate over the design of proposed actions and the obligations created by governing law. More generally, because some elements of implementation are negotiable and some are not, determining the potential subject matter and parameters of negotiation is central to the design of environmental-law systems.

As this Article has shown, recognizing this centrality of negotiation has important implications for the field. The prevalence of negotiation undercuts—albeit partially—critiques alleging that decentralization of regulatory authority, either through markets or some form of devolution, is necessary to bring flexibility and innovation to the field. Similarly, the nature of regulatory negotiations undercuts—though again partially—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.