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## The many public interests and public decision processes

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In preparing my comments, I found that the task of defining the public interest in public regulation was a challenge in and of itself. I have decided to look at the issue as two separate questions. First, where does the notion of "the public interest" come from? Second, how does one then identify it? I will also make some observations from the perspective of an environmental lawyer who once served as a regulator at the EPA in Washington and who now represents business interests.

Where does the public interest come from? Who is the "public" in determining public interest? In any regulatory or legislative debate, whether at the local, state or national level, there will be many, many interested factions. Some of those factions will be involved in the process, others will be sitting on the sidelines merely observing. Some will be in favor of a particular course of action, some will be against it, and some will be equivocal on the particular issue but interested nonetheless. The hue and cry on these issues will be, both literally and figuratively, all over the map. There will not be a set path to guide the policy makers toward understanding the precise public interest considerations that should prevail on any given issue.

What are the policy perspectives that are pushed by those different factions? Clearly, the perspectives flow on an overall continuum. In the environmental context, on the one end there is the position advocating "environment first, at all costs." This viewpoint often emanates from grassroots organizations that focus on the Not In My Backyard (NIMBY) syndrome. Interestingly, however, this point of view is starting to come from larger organizations such as Earth First! and Greenpeace. Next on the continuum is the position I would characterize merely as environment first. That vantage point is traditionally espoused by the more mainstream environmental organizations, and many would say it carries a blissful ignorance of the ramifications of environmental regulations. Next, in the middle of the continuum, is the motherhood-and-apple-pie view. They want a clean environment plus jobs and economic growth and security. This is probably the view of the silent majority. I would have to say *probably*, because it is somewhat oxymoronic to ascribe views to a group that is largely silent. Nonetheless, given the results of national polls on environmental questions, it appears that the mainstream of America is in that position. People want a clean environment but they also want their jobs. Moving further along on the continuum, we came to a position that espouses sound environmental protection but recognizes economic limits and practical realities. Most businesses likely fall into this portion of the spectrum. They understand the need for environmental laws and regulations, and they are willing to comply with sensible, reasonable environmental protection

standards. At the far end of the spectrum is the point of view espoused by the civil study libertarians. The only good regulation is no regulation.

The environmental policymaker's job is to hear from all of these positions and to define a course of action from an overall societal benefit point of view. That process, however, is made much more difficult in our society because of the presence of well-funded political action committees and trade associations, as well as the increasingly vocal, well-funded and sophisticated efforts by local and national environmental organizations. With that diverse background of views being tossed at the policymaker, how does that policymaker define the public interest?

Let's look at some mechanisms for this. Some of these are obvious, while others are not so obvious. In the legislative forum, there is the hearing process. Whether before a legislative committee or board, interested parties of all points of view present their particular program. This process allows free public debate on all the various outlooks. Second, the volume and the content of mail, telefax, and telegram traffic, as well as telephone calls, help the policymaker define and internalize the various views. How often have we heard on the nightly news that the mail to a politician's office is running three-to-one in favor (or against) XYZ proposal? Editorials and letters to the editor in newspapers and magazines also inform the process. All such input is important to bring the issues into public debate.

Not quite so obvious, but perhaps given even greater weight in the formation of public policy, are the concepts of precedent and analogy. Prior decisions on similar or related public policy issues often both inform the discussion and create limits to innovative solutions. Legislative and administrative bodies build on prior policy decisions. In risk assessment and societal risk management, for example, policymakers often look to decisions made in other contexts to determine acceptable levels of risk for the activity at issue. How a legislative or administrative body resolves the public interest on one issue, however, can create legal and institutional constraints to rethinking and reformulating related issues. In particular, policymakers often are concerned about a domino effect. Options may be put aside, perhaps prematurely, because those options call into question concepts that are the foundation of the overall integrity of a particular program. Decisions in favor of such options would affect other decisions previously made. Hence, the domino effect

The public interest is also determined through the rule-making process. Typically, an agency proposes a regulation and solicits comments in oral or written form. Public comments are received, input is recognized, and the decisions are made. Those decisions must respond to citizens' comments. The decisions do not have to agree with the comments, and they do not have to internalize the point of view espoused, but they will reflect consideration of issues either expressly through a rule preamble or responsiveness summary or as a result of internal agency discussions over points offered by the public.

In the federal arena, major regulations necessarily balance environmental interests and economic interests. That balancing process comes in two forms. First, for major regulations, a regulatory impact analysis predicts the economic effect of the proposal. The second process is the Office of Management and Budget review of the regulations proposed by federal agencies. That process is intended to ensure some balance between economic and environmental concerns, and hopefully,

to place that regulatory scheme at the point of maximum overall public interest. Governor McKernan has tried to install a similar process in the state regulatory scheme by his recent executive order. (See Professor Freeman's reference in previous article.) It is still uncertain how that executive order will be implemented, but it will be an interesting process to watch.

Mechanisms are emerging to ensure that citizens have meaningful opportunities to participate in the environmental policy-making process. Many citizens are frustrated by the plethora of technical and legal jargon that is spewed forth by consultants and lawyers. Increasingly the government is providing these citizens with third-party technical assistance. In the Superfund program, for example, EPA provides Technical Assistance Grants (up to $50,000) to communities and to organizations in communities that are affected by the Superfund cleanup process. The citizens retain environmental consultants who can help them understand the technical aspects and health implications at the local site, and who help the citizens have a meaningful presence in the decision-making process.

Another way to identify the public interest is through the referendum process. However, as was seen in the recent transportation policy referendum, that avenue can be somewhat divisive. (It also does not necessarily guarantee that the decision is based upon a thorough review of all the facts.) A decision-making process in that context often turns on the catchy phrase: who has the best slogan, the best sound bites, and the best TV ads. That, from my perspective, is not the best decision-making process and does not necessarily bring "the public interest" to the fore.

In the last ten years, the public interest occasionally has been determined is by a process called "regulatory negotiation rule making," or more commonly known as Reg-neg. The Administrative Council of the United States, a federal agency, set up in 1982 to work on various administrative matters is a primary proponent of this concept. Since its initiation, the EPA, FAA, Department of Interior and several other federal agencies have used the Reg-neg process to bring together various interested parties to discuss mutual problems in a setting that really does try to encourage creative solutions and cooperative problem-solving. Technical data and information from the various parties' positions are shared. Of course, the agency embarking on this process still retains the ultimate authority and it cannot abdicate that responsibility to promulgate the regulation. The agency is merely saying, in effect, "We have various policy and regulatory options that are available to us. We are willing to share our authority to choose among those options with those who come to the table and especially with those that must ultimately live with the rules."

This background leads to three points about the policy-making process from a business perspective. First, there is not something that can be identified as the singular "public interest." My experience with negotiated rule-making at EPA has shown me that there are many different public interest considerations in each issue. The key is to achieve a balance of those competing, and often equally valid, interests. If only environmental concerns are preeminent in every policy decision, modern life as we know it would be regulated out of existence. On the other hand, if unfettered industrial growth and development were to occur, modern life as we know it would be polluted out of existence. We need to find some balance. As a slight aside, the term "public interest group" is something of a misnomer. The position that is brought to the table by any particular organization, or environmental organization in particular, is merely one point of view out of many. It does not necessarily represent the public interest.

Second, there is a problem with the process as now structured. Through one or more of the avenues that I discussed previously, we have all had opportunities for input into the laws and regulations that are in place. Those statutes, in general, are designed to achieve a balance between sound economic policies and environmental protection. They are intended to be objective standards against which the ongoing or proposed activities of the regulated community can be measured. Currently, however, many businesses feel that their activities are not measured against those standards but, instead, are measured against "one issue" points of view in an adversarial process. To environmental groups, keeping that process adversarial is an advantage. They must continue to find issues to champion, whether against the regulators or the regulatees. Without such targets, the reason for their existence fades and, more importantly, their fund-raising efforts will flag. This adversarial process works against the balance that policymakers are seeking. Distrust is bred, interests diverge, polarization occurs and "public interest" really becomes a misnomer.

Last, the balance in this process is not only abused, it really can be severely skewed by a group representing only a minority view. The NIMBY syndrome is certainly a classic example of this. Opponents of a particular project first raise legitimate concerns about a proposed project. These concerns often can be addressed by upfront negotiations, by tight adherence to regulations, and perhaps, by imposition of various conditions on a particular project. Once those concerns fail to stop the project, then the more subtle strategies of delay are initiated. Calls for additional hearings and requests for new data and more study are made. The need for the project is questioned. The so-called "what if" scenarios - the worst case scenarios designed to heighten latent fears and anxieties - are raised. These subtle strategies inevitably find a way to deny necessary approvals. As a result of this NIMBY syndrome, the unwanted but often socially necessary activity is not undertaken. Little or no thought is given, however, to the larger impact of that result. This parochial view ignores the larger societal needs for the project or activity. The larger societal need for disposal of waste, production of power, or manufacture of goods does not go away just because one locality, one organization, one individual, or group of citizens successfully precludes that activity or project in that area.

There is a better way to set public policy than kowtowing to the group that screams the loudest. A collaborative process that identifies issues and works to resolve the issues early in the process through participation of all interested parties, is critical. The regulatory negotiation process is an example. Policymakers, starting in a neutral position, can then attempt to build flexibility into that process. Once environmental goals are set in this collaborative process, flexibility will allow business to harness creativity and new ideas to meet those goals.

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