

Balancing Environmental and Industrial Concerns in Delaware

The Problem

To outsiders, Delaware's Coastal Zone Act may sound conventional enough, perhaps something to protect sand dunes along the state's Atlantic Coast. In fact, the 1971 act is sweeping legislation dealing with matters of air, water, and land management along almost the entire sloping sweep of the state's coastline, from the Delaware River in the north through the Delaware Bay to the Atlantic Ocean in the south. In the words of mediator-lawyer Gregory Sobel, it "is a powerful land use law prohibiting new heavy industry from being built in Delaware's coastal region, while allowing existing heavy industry to continue operating."



Along the Delaware Coast

Principles of Consensus Building

- Arriving at a common information base about the source(s) of a problem
- Separating the people from the problem
- Focusing on interests instead of positions
- Brainstorming win-win options
- Reaching a solution that serves everyone's interests

One notable hitch existed, however, in applying the law. For more than 25 years after passage of the Coastal Zone Act, there were no formal regulations to implement it. Instead, the state's Department of Natural Resources and Environmental Control (DNREC) used an informal, undefined regulation system that pleased neither environmentalists nor industry representatives who disagreed frequently over the law's implementation. Several attempts along the way to adopt formal regulations were unavailing.

Strong differences existed between industry and environmentalists over the department's efforts to interpret and apply the law to individual permit applications. Industry said DNREC's case-by-case approach was working; environmentalists were not as pleased with the department's implementation of the law.

The Process

In a new attempt to draft regulations, DNREC officials hired Sobel, director of the Massachusetts-based Environmental Mediation Services, and colleagues from the Consensus Building Institute to assess whether a new effort to draft regulations would be feasible. As defined by Sobel, conflict assessment is a tool for agencies

and others considering whether to initiate an intensive negotiation process to "determine who has a stake in a dispute, what their interests are, and whether the situation is appropriate for consensus building." Sobel emphasizes that "the time and financial costs of negotiations are so significant that the parties should attempt consensus processes only if they have carefully analyzed the situation in advance."

In Delaware's case, the initial assessment was that the situation was not then ripe for a successful consensus-seeking process because some industry representatives believed DNREC's case-by-case approach was preferable to what might result from a negotiated process. The conflict assessment team pointed out that if Governor Tom Carper announced he would establish new regulations that would be substantially different from the existing, informal rules and, at the same time, stressed his preference to create those regulations through a consensus process, all key parties likely would be willing to participate in negotiations.

Governor Carper and DNREC Secretary Christophe Tulou made such an announcement in 1996. All invited participants agreed to join the Delaware Coastal Zone Regulatory Advisory Committee. The 20

members of the group represented an array of interests, among them the Sierra Club, the Delaware Nature Society, Dupont Corporation, the Chemical Industry Council, unions, the farming community, and DNREC.

In the negotiations, industry's interest was in maintaining the economic viability of companies in a rapidly changing global marketplace. The environmentalists' main interest was the long-term environmental health of the coastal zone. Government representatives wanted to reconcile differences and finally be able to promulgate regulations.

The advisory committee held three two-day negotiating sessions between the fall of 1996 and December 1997. At first, the process involved representatives discussing each others' interests, then brainstorming options to meet those interests. Through a series of trade offs, an agreement was developed between industry and environmentalists that allows industry the flexibility to add and change products and processes while assuring environmentalists that continuous environmental improvements will be made to the coast. Industry is allowed to increase production capacity so long as it does so within its existing footprints in the coastal zone. This approach is accomplished through a procedure for allowing "offsets" in permits to industry.

An offset allows some projected environmental degradation that can be "offset" through other measures that are taken to improve the environment. As a means to ensure that this approach actually results in environmental improvement in the coastal zone, the group proposed that DNREC develop a set of environmental goals and indicators and establish a committee to monitor how the offset policy is carried out.

The Result

In December 1997 negotiators crafted a final draft MOU and by March 1998 all committee members had signed it, and then presented it to Governor Carper who also signed the agreement. As is required in negotiated rulemaking, a full public comment process followed. The draft regulations were published and hearings were held around the state. Many members of

the advisory committee spoke in favor of the regulations; no members opposed them. For the first time in the long history of Delaware's Coastal Zone Act, government, industry, environmentalists, organized labor, and agricultural interests all supported the same set of rules. The regulations were formally adopted in April 1999 and are now in force.

In a case study, Sobel says the key to the Delaware settlement is that the new regulations "ensure continuous environmental improvement in the coastal zone while at the same time providing industry with the flexibility to remain competitive in the global marketplace."

Lessons Learned

If the powers that be are willing at the onset to commit to implementing whatever agreements the groups develops, there is greater incentive for stakeholders to work together toward developing implementable solutions.

A conflict assessment is an essential step to take before proceeding with a consensus process.

(This case study is based on a chapter prepared by Gregory Sobel for publication in *Negotiating Environmental Agreements*, edited by Lawrence Susskind, Paul F. Levy and Jennifer Thomas-Lerner, forthcoming from Island Press.)

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