Valuing Public Participation

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One of the themes that has run through this symposium, as it does through real life, is the role of public participation in environmental regulation. Such participation is usually thought of as an element of environmental regulatory processes, for example, the notice and comment provisions of the federal Administrative Procedure Act\(^1\) and its state analogues. I suggest here that public participation should also be used as one criterion for evaluating the effectiveness of regulatory institutions.

During this symposium, issues of public participation have been discussed in a number of different contexts. Emerging from these discussions is a notion of effective participation, not merely formal participation.\(^2\) By considering effective participation, it is possible to see public participation as not only an often-required element of environmental regulation, but also as an important criterion—necessary but not sufficient—for evaluating the success of environmental regulatory processes. This criterion primarily addresses how regulation works, not necessarily where—at what governmental level—it works. Looking at the “effective participation” criterion might enable one to determine that a particular level or locus of regulation is not working, but I am not sure that it can indicate that a particular level or locus is working.

There is much to said about what “effective public participa-

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2. Public participation, however, is neither a unitary concept nor an unproblematic one. Dean Huffman’s concerns about “stakeholder” participation, and Professor Axline’s concerns about local influence on federal land management decisions, provide two illustrations of some of the difficulties. See James L. Huffman, Land Ownership and Environmental Regulation, 25 Ecology L.Q. 591; Michael Axline, Federal Lands and Invisible Hands, 25 Ecology L.Q. 611.
tion" means, as the presentations of Don Brown, Scott Kuhn and Luke Cole demonstrated, but I am not going to try to do so in any further detail here. In my view, effective participation does not just mean notice published in a newspaper or a public meeting held by agency officials. And it does not just mean the opportunity to comment on a contest that is being played by others, where essentially the public participants are rooting from the sidelines and encouraging those who are actually playing. In this sense, the "transparency" metaphor that has been used during the symposium and that is often used in the literature may be inadequate. Or perhaps it may in some ways be more revealing than intended. Windows and plate-glass doors, for example, are transparent, but they do not allow people to walk safely through them. Transparency thus does not necessarily mean that one can participate; it only means that one can see what is going on.

Another, perhaps more appropriate, metaphor to consider is the "permeability" of regulatory processes. Real participation involves getting inside and mixing it up, engaging with what is going on in the process while it is unfolding, not after it is over. For this reason, the permeability image provides a better guide to thinking about what is effective about effective participation.

There are a number of values that are advanced by thinking about permeability and viewing it as a positive element in evaluating environmental regulatory institutions, as well as an important element in how these institutions work. It is, of course, important to keep in mind Professor Sax's observation earlier today that the more people that are involved, the harder it is to get anything done. But it is also true that doing the wrong thing may not be an improvement.

With apologies to Professor Sax and to the Endangered Spe-

4. See Kuhn, Expanding Public Participation, 25 ECOLOGY L.Q. 647.
cies Act, I think of the permeability criterion as a "pro-
surprises" policy. Surprises are important, though they are very difficult to manage. One encounters surprises in the political arena all the time anyway; in some sense permeability in regulatory processes is a way of at least trying to make the best of the fact that things change. And it is often important that they do.

Consider two non-environmental examples. The first is the fact that the seating policies in cheap eating establishments were not thought to be a matter of concern to any level of government, much less the federal government, until 1960, when African-American college students started sitting in at them. Only then was it noticed that there was a problem. A completely non-regulated, non-governmental process was rapidly identified as an arena that was rather in need of regulation.

The second example highlights the issues of levels of governmental and institutional competence we have been discussing in this symposium. It developed from the purchasing and investment policies of local governments. Initially these policies were not generally thought to have anything to do with the for-

10. Habitat Conservation Plan Assurances ("No Surprises") Rule, 63 Fed. Reg. 8859 (1998) (to be codified at 50 C.F.R. pts. 17 & 17.222) ("The No Surprises policy... provides regulatory assurances to the holder of a Habitat Conservation Plan (HCP) incidental take permit issued under section 10(a) of the ESA that no additional land use restrictions or financial compensation will be required of the permit holder with respect to species covered by the permit, even if unforeseen circumstances arise after the permit is issued indicating that additional mitigation is needed for a given species covered by a permit."). See also Joseph Sax, The Ecosystem Approach: New Departures for Land and Water, Closing Remarks, 24 Ecology L.Q. 883 (1997).
12. See generally Taylor Branch, Parting the Waters: America in the King Years, 1954-63, at 272-302, 323-241 (1988). In the first prosecution for sitting in at a "white" lunch counter to reach the Supreme Court, the Court held that the African-American students' convictions for disturbing the peace were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment." Garner v. State of Louisiana, 368 U.S. 157, 163 (1961).
13. Title II of the Civil Rights Act of 1964 provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodations, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (1998). The Supreme Court construed the statute as "remov[ing] peaceful attempts to be served on an equal basis from the category of punishable activities" and concluded that it abated sit-in convictions where appeals were pending at the time of the Act's passage. See Hamm v. City of Rock Hill, 379 U.S. 306, 308 (1964).
eign policy of the United States, until the international move-
ment for economic sanctions on South Africa made the connec-
tion between the independent purchasing and contracting power
in local governments and national and international policy con-
siderations.\textsuperscript{14}

Although one can certainly encounter many nasty surprises,
I would like to suggest that one should not be totally against
surprise as a structuring principle for regulatory institutions.
There are at least four benefits for both members of the public
and regulators in valuing the actual permeability of an institu-
tion or process to effective public participation.

One fairly obvious, but also quite significant, benefit is the
promotion of genuine participation, which is a value in itself.
The second is that such permeability can allow for substantively
new ideas and new connections to enter regulatory processes
and to affect the agency's scientific and policy deliberations.
Third, real permeability may mobilize more or different or better
government resources than would have been brought to bear on
a particular problem if the regulatory process were left simply to
trundle along on its own. Fourth, the idea of valuing permeabil-
ity accepts the fact that change is always going to occur, and
does not see change as some unpleasant external force to be
held at bay as long as possible.

There are examples from this symposium in each of those
categories. First, there is the question of whether participation
makes any difference. Luke Cole related the experiences of resi-
dents of Buttonwillow, California, describing how their partici-
pation, indeed exhaustive participation, under provisions of the
Tanner Act\textsuperscript{15} appeared to make no difference whatsoever to the
outcome of the permitting process for the expansion of a nearby
toxic waste dump.\textsuperscript{16}

Second, there is the question of what difference participation
can make.\textsuperscript{17} Scott Kuhn discussed the problems in Los Angeles

\textsuperscript{14} The sanctions put in place by local and state governments included laws re-
stricting purchasing from companies doing business in South Africa; divestment of
public pension funds from companies doing business in South Africa; and with-
drawal of public funds from banks doing business with South Africa. By the end of
1991, 94 cities, 24 counties, and 27 states maintained some form of sanctions. See
Richard Knight, Revisiting South Africa: Holding Together on Apartheid, THE
RECORDER, Dec. 3, 1991, at 9. For a review of sanctions policy at the federal level,
see LAWYERS COMMITTEE FOR HUMAN RIGHTS, 1988 PROJECT SERIES NO. 1, UNITED

\textsuperscript{15} CAL. HEALTH & SAFETY CODE §§ 25199-25199.14 (1997).

\textsuperscript{16} See Cole, supra note 5.

\textsuperscript{17} The role of participation in helping to develop the empowerment of the people
with an air pollution emissions trading system based on buying and scrapping old cars.\textsuperscript{18} There, the regulatory agencies had not noticed on their own that perhaps this wonderful market incentive of scrapping old cars in return for pollution credits—which were used to avoid the installation of marine vapor recovery systems in an area where most residents are Latino—was not working as advertised. This case seems to indicate at the least a failure of the feedback system within the regulatory mechanism. Instead of officials within the system raising the potential environmental justice concerns with this outcome of emissions trading, only the intervention of the affected public forced the agencies to take a new look at the relationships among car scrapping, marine vapor recovery systems, and public health.

The efforts of the public to participate have revealed that the process underlying this emissions credit trading system is not very permeable. In order to bring the problems of this system to the light of day, community groups had to file three lawsuits against refineries participating in the emissions trading program,\textsuperscript{19} and one major Title VI complaint with the U.S. EPA.\textsuperscript{20} This is not exactly preventative participation. But in their ability to force a reconsideration of the merits of a regulatory program, these actions provide a good example of the kind of substantive impact that effective participation can have.

The third point, also illustrated by the civil rights complaints before the U.S. EPA, is that, too often, whatever regulatory authority there is, in whatever levels of government are relevant, sits in very little boxes. It is a commonplace that the U.S. EPA can not even get cross-media programs together, much less what I am advocating here, which could be characterized as cross-idea programs. The actual history of civil rights enforcement at the U.S. EPA is illuminating. The federal government has been a guarantor of civil rights over here; the U.S. EPA has been an en-

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\textsuperscript{18} See Kuhn, \textit{supra} note 4. Harry Seyardarian also discussed this problem from his perspective as Associate Regional Administrator of Region IX of the U.S. EPA. Harry Seyardarian, \textit{Address at Ecology Law Quarterly's Symposium, Power, Politics, and Place: Who Holds the Reins of Environmental Regulation} (Feb. 20-21, 1998).

\textsuperscript{19} The cases pending at the time of publication are: Communities for a Better Envt. v. Unocal, Civ. No. 98-5175 DT (BQRx) (C.D. Cal.), Communities for a Better Envt. v. Ultramar, Civ. No. 98-5174 DT (BQRx) (C.D. Cal.), Communities for a Better Envt. v. Chevron, Civ. No. 98-5173 DT (BQRx) (C.D. Cal.).

vironmental regulator over there. It is perfectly clear that never the twain were even going to think about each other until environmental justice organizations started pushing the federal government to take a serious look at the relationship between the two programmatic areas.\textsuperscript{21} In practice, this has meant looking at Title VI of the Civil Rights Act of 1964\textsuperscript{22} and noting that the U.S. EPA has some concrete legal responsibilities, which require a commitment of resources greater than one person to handle all of the EPA's civil rights complaints nationwide.\textsuperscript{23} After much effort, there are now two federal expertises being mobilized on the vital question of how environmental protection is working or not working in the particular circumstances in which communities of color are largely implicated.\textsuperscript{24} I would venture to state that, without permeability of the process to outsiders, no one within the relevant federal agencies would have seen, at least not in this century, that those two clear federal competencies and clear federal mandates could be brought to bear in the same place at the same time.

My final point is about change. Although change is inevitable, people nevertheless fear it.\textsuperscript{25} Things change, sometimes a great deal in a short period of time. Sometimes change is more gradual. It is a mistake for regulatory institutions and regulators to try to hold off change by keeping out the public. Public participation as one indicator of change ought to be seen by regula-

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\textsuperscript{23} This was the state of affairs several months after the promulgation of the Executive Order, supra note 21. See Luke W. Cole, \textit{Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964}, 9 \textsc{J. Envtl. L. & Litig.} 309, 392 (1994).

\textsuperscript{24} Nevertheless, the EPA has only resolved one Title VI complaint on the merits. \textit{See Select Steel Complaint (EPA File No. 5R-98-R5) Oct. 30, 1998}. In February 1998, the agency issued its Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits. \textsc{Environmental Protection Agency, Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits} (Draft Feb. 1998). As this article goes to press, the Interim Guidance is being reconsidered in light of numerous comments, submitted by trade associations, state and local government agencies, businesses, legal organizations, and grassroots environmental justice groups.

\textsuperscript{25} This was made very clear in the discussion of winners and losers in the Truckee-Carson River Basin. \textit{See, e.g.}, A. Dan Tarlock, \textit{The Creation of New Risk Sharing Water Entitlement Regimes}, 25 \textsc{Ecology L.Q.} 675.
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tory agencies and institutions as part of their own survival mechanisms. The more interpenetrated what is happening on the outside is with what is happening on the inside, the more chance the institution has of not waking up one morning and discovering that it is totally out of date, totally out of touch, or just totally doing the wrong thing. It is plainly very difficult to understand how to work out this kind of permeability and interpenetration of genuinely effective public participation in regulatory institutions. There are obviously significant short-term or even medium-term costs associated with it. But the long-term results of a process that is much more open to actual, substantive, and effective public participation would be better environmental protection, lower transaction costs, and certainly less dumping of both transaction costs and poor environmental outcomes on those who can least afford either of them.