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ARTICLE
Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions Through Partnership With Experts and Agents

MARC B. MIHALY*

INTRODUCTION

Many public officials, whether city zoning administrators, city council persons, state air pollution control board members, Environmental Protection Agency (EPA) rule makers, or commissioners of the Federal Energy Regulatory Commission, share a career reality: they spend some substantial portion of their working lives hearing or reading testimony submitted by members of the public, citizens who are not lawyers, not professional stakeholder staff, and not trained experts in the matter at hand. I spent the better part of three decades as an attorney for both environmental citizen advocates and governmental agencies, and have concluded that such citizen participation is essential to our democratic experiment, especially in the current effort to ensure that a representative government can promote the socio-economic reorganization necessary to reduce carbon emissions.

It is my experience, however, that while officials support vigorously the concept of citizen participation, they acknowledge privately that they rarely hear or read testimony from lay participants that changes their mind or adds substance to their

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determinations. In testament to the power of an ideal and a conflicting reality to co-exist, officials show genuine support for the concept of citizen involvement and yet complain about lay testimony in private or wish for less of it. They generally do not pursue the conflict or engage in serious inquiry into the inadequacies of citizen participation, the obstacles to valuable input, or potential for true melioration.

This conceptual fog pervades especially the environmental, land use, and energy arenas, which present decision-makers with questions of both great public interest and great complexity.[1] On the one hand, actors in the environmental endeavor remain dedicated, for reasons both historic and developmental, to the concept of the assertion of lay power, in part through citizen participation, despite recent accusations that the movement has lost its soul to technocratic leadership.[2] However, the daunting complexity of the subject area and the underlying proceedings renders much unassisted lay participation useless. This conflict between the ideal and the real, and the resulting cognitive dissidence, diminishes frank discussion of the barriers to effective citizen participation and a search for potential solutions.

This dedication to the participatory ideal, one I share, influences scholarly inquiry in the same way; reflexive and uncritical support takes the edge off analysis of important questions concerning the obstacles to citizen participation, and the utility of unassisted citizen participation in rulemaking,

1. *See* PANEL ON PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING & THE NAT'L RESEARCH COUNCIL, PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING, 7 (Thomas Dietz & Paul C. Stern eds., 2008), *available at* http://www.nap.edu/openbook.php?record_id=12434 [hereinafter PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING] (noting that "environmental decisions present very complex choices among interests and values, so that the choices are political, social, cultural, and economic, at least as much as the are scientific and technical").

2. *See, e.g.,* MICHAEL SHELLENBERGER & TED NORDHAUS, DEATH OF ENVIRONMENTALISM 6–11 (2004), *available at* http://www.thebreakthrough.org/images/Death_of_Environmentalism.pdf (criticizing environmental leaders' approach of "using science to define [a] problem as 'environmental' and crafting technical policy proposals as solutions," and calling for a "collective step back to rethink everything"). Shellenberger & Nordhaus' analysis misrepresents the environmental movement to date in this and many other respects. *See* Douglas A. Kysar, *The Consultants Republic,* 121 HARV. L. REV. 2041 (2008) (reviewing Shellenberger & Nordhaus' next and similar book BREAK THROUGH: FROM THE DEATH OF ENVIRONMENTALISM TO THE POLITICS OF POSSIBILITY (2007)).

permitting and legislation. The literature falls roughly into two categories. Many participation proponents tend to focus on methods to increase participation in environmental matters without giving sufficient attention to the obstacles. A recent study conducted largely by social scientists is typical; in nearly 250 pages of analysis of public participation in environmental decision-making, fewer than ten are devoted to the formidable problems, which currently make most unassisted citizen participation unhelpful to public officials and ineffectual.[3]

Attorneys suffer from a similar tendency to let the participatory ideal dull their sensibilities. One would think that of all the actors in the decision-making play, the attorneys would have the clearest heads on this issue. It is they, after all, who often bring procedural, substantive and political expertise to lay testimony. However, attorneys seem to experience as much as any participant the distraction derived from the unexamined archetype of citizen participation. One sees it in social situations where attorneys who represent local citizens in environmental and land use matters recount wonderful moments when community clients decimate the opposition with colorful or insightful testimony. Along with another legal aid attorney in the mid-1970's, I represented a group of low-income environmentalists opposed to a large residential "new town" south of San Francisco on a combination of gentrification and environmental grounds. In front of an audience of nearly one thousand attendees, testimony before the planning commission addressed many issues, most related to intensification of use, traffic, and open space. The developer's attorney repeatedly emphasized his client's proposed dedication of hundreds of acres for recreational use. None of my arguments concerning the steepness of the dedicated land and its inappropriateness for passive recreation approached the devastation wrought by my clients who, in their testimony, exclaimed to the planning commissioners: "We think the land proposed for dedication *would* be useful, and here's the user!" They then led a small Billy goat down the central isle of the auditorium. She bleated loudly. Every subsequent mention of the dedication brought laughter,

3. PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING, *supra* note 1, at 52-58, 60-62 (discussing formidable problems which make most unassisted citizen participation unhelpful to public officials and ineffectual).

and, of course, the silent recitation in the listener: "Oh yes, the Billy goat land."

Why do we love to tell such stories? It is because, as is often the case with stories, the desire to perpetuate and strengthen foundational myths animates the telling more than reality. Even professional participants need, at some level, to believe in a special or redemptive value of lay participation. Yet, as most of us who practice public participation law know, in environmental cases members of the general public rarely prepare or present the effective public comment and testimony. It is the class of professionals, usually attorneys and the consultant experts they retain, who conceive, write (or edit), and orchestrate the presentation of public testimony. In their absence, for reasons discussed in this article, testimony frequently misses statutory or regulatory deadlines, fails to raise the issues necessary to exhaust administrative remedies, emphasizes policy issues of concern to the testigant, rather than the decision-maker, and makes points without foundation.

Such shortcomings form some of the basis for the other trend in the literature, an opposition to enhanced citizen participation, some of it scholarly and much political.[4] Rationalists and representatives of economic stakeholders argue that citizen participation, based on intuition rather than science, and intrinsically parochial in nature, must be curtailed to allow government to function, as it should.[5] These critics, motivated by doubts about the intrinsic worth of citizen participation in the scholarly case, or by opposition to its successes in the political case, focus on the incapacities of unassisted lay participation. They fail to evaluate adequately (or oppose), approaches to enhancing the sophistication and effectiveness of citizen participation. [6]

We need to think further than participatory ideals, and yet more sympathetically to participation than its critics. What are

4. *See* PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING, *supra* note 1, at 54-58 (summarizing such opposition).

5. *See* discussion *infra* Part II.B and notes 24-27 and accompanying text.

6. The key is provision of attorneys and experts to citizen advocates. Efforts such as Legal Aid, attorneys' fees statutes, and enhanced standing have been long opposed, with substantial success, by economic and political actors on the right. *See infra* note 223 and accompanying text.

the true obstacles to citizen participation? Is modern environmental decision-making susceptible to effective unassisted lay participation? Who does most of the participation in the environmental arena? This article addresses these issues from a qualitative perspective,[7] and then addresses means to enhance effective participation by lay citizenry, specifically contending that the potential societal benefits of citizen participation accrue where participants partner with experts and agents, usually attorneys.

Part I of this article briefly reviews theories of public participation and contends that, regardless of the underlying political theory applied, the valuable societal benefits of public participation accrue only where the involvement makes a true difference in the decision-making process. Part II examines the developing obstacles to unassisted citizen involvement. I propose that in this era of implementation, environmental decisions present issues sufficiently complex that lay participation cannot successfully affect environmental decision-making unless assisted by attorneys and experts. This complexity combines with the evolution of environmental decision-making, away from traditional public processes, toward contract and private stakeholder negotiations, to render unassisted citizen participation problematic and ineffectual. Utilizing the National Environmental Policy Act (NEPA) as an example of these obstacles, Part III contrasts the participatory ideals embodied in the structure of the Act with the reality of formalized and ineffectual participation regimes designed by compliance bureaucracies and communications consultants. Finally, Part IV examines the benefits of a productive citizen-attorney-expert team in the context of NEPA, in formal environmental proceedings, and in informal processes such as negotiated rulemaking, suggesting regimes by which such representation could be provided.

7. Although a more quantitative analysis would be most beneficial, the diversity of underlying issues, processes, and actors makes many such analyses actually anecdotal and pose daunting obstacles to a meaningful empirical analysis.

I. THE BENEFITS OF PUBLIC INVOLVEMENT IN ENVIRONMENTAL DECISION-MAKING ARE DIVERSE, BUT MATERIALIZE ONLY IF THE PARTICIPATION HAS ACTUAL EFFECT.

A. Theories of Democracy and Participation

We must begin where most thought on participation resides. What are the benefits of public participation? The positives of public involvement are the subject of too many paeans, publications, law review articles, and appellate opinions to cite fully,[8] but they are briefly set out below. Before reaching the benefits, one must start with the theories of participation. These in turn flow from one's view or model of modern democracy.

The model which is sometimes labeled rationalist, scientific, progressive or synoptic, is one of the oldest. It conceives government as led by persons who are neutral and wise, and seeking the common good. The common good, in turn, represents a determinable concept consisting, in its most modern incarnation, of the highest utility for the greatest number of citizens.[9] Advocacy of such a government of mandarins emerged as one line of thought in the post-Civil War Republican Party, matured during the Progressive Era, and found a modern instrumentality in the administrative agencies brought to fruition

8. *See, e.g.*, PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING, *supra* note 1; Mark Stephen Squillace, *Embracing a Civic Republican Tradition in Natural Resources Decision-Making*, (U. of Colo. Law Sch. Research Paper No. 08-02, 2008), *available at* http://ssrn.com/abstract=1082008; Thomas Dietz, *Theory and Method in Social Impact Assessment*, SOCIOLOGICAL INQUIRY 54, 54-69 (1987); THOMAS C. BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS (2002); FAIRNESS AND COMPETENCE IN CITIZEN PARTICIPATION 17 (Ortwin Renn, Thomas Webler & Peter Wiedeman eds., 1995); Ernest Gellhorn, *Public Participation in Administrative Proceedings*, 81 Yale L.J. 359, 361 (1972) (describing the many social advantages of public participation in administrative proceedings); Eliot S. Metzger & John M. Lendvay, Commentary, *Seeking Environmental Justice Through Public Public Participation*, 8 ENVTL. PRACTICE 104 (2006); Scenic Hudson Pres. Conference v. Fed. Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965) (holding that there are many public interests, and that the governmental agency alone could not protect these interests).

9. Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 57 (1996).

in the Roosevelt administrations.[10] Public participation finds value in such a model to the extent that it provides new and valuable factual, theoretical or legal input to these technocratic decision-makers, input which they could not obtain through the exercise of their own expertise.

Commencing in the 1950's (though some say, as early as Madison) and still quite pervasive today, the pluralist ideal contends that the common good does not exist as an independent set of solutions objectively determinable by any leaders, be they wise and knowledgeable, or otherwise.[11] Rather, the common good emerges as a result of the bargaining of the issue-relevant set of economic and social interest groups.[12] Ideal governmental processes provide a forum for the negotiation, and ideal decisions reflect the results of that bargaining.[13] Public participation in such a model means effective representation of all interests relevant to the policy issue in question.

More collectively oriented advocates emphasize that the common good in a democracy represents much more than a solution reached by wise leaders or negotiation to reach an optimized highest good for the greatest number of individuals.

10. KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM, 83, fig. 3.2 (Westview Press 4th ed. 2004) (1982); ROBERT KELLEY, BATTLING THE INLAND SEA (1989) (A brilliant evocation of the scientific element in the pre-Civil War Republican party and its efforts to find solutions to repeated flooding in the Central Valley of California).

11. *See generally,* WILLIAM KELSO, AMERICAN DEMOCRATIC THEORY: PLURALISM AND ITS CRITICS (1978); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform,* 2008 U. ILL. L. REV. 599, 631 (2008).

12. *See* Frank I. Michelman, *The Supreme Court, 1985 Term: Traces of Self-government*, 100 HARV. L. REV. 4, 21 (1986); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985).

13. *See* Tonia Novitz & Phil Syrpis, *Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism*, 35 INDUS. L.J. 367, 372 (2006). Novitz & Syrpis note that

> [t]he central pluralist idea, associated with the notion of participatory democracy, is that diverse entrenched interests do not dissipate on the election of national or local government by majority vote, but continue to exist and can covertly influence policy-making at all levels. This idea leads to a call for representation of interest groups at various levels of government decision-making, so as to ensure that all those directly affected, not only those with the greatest capital or social influence, can be heard.

Id.

For these advocates, contending under various labels, including Civic Republicans or Universalists, the goal of government includes fostering civic values in its citizens, embracing the significant value of the concept of a common good, independent of individual interests.[14] Civic Republicans propose a more complex and iterative view of public participation under which the act of participation in government itself creates and changes values and thus interests, rather than simply reflecting *ex ante* values and interests.[15] In this view, public participation has value not only for the information it imparts to decision-makers, but also from its educational value and transformative effect on the participant.[16]

B. Democratic and Participatory Theories in the Environmental Context

Interestingly, the attributes of ideal public participation necessary under each of these disparate views of democracy[17] do not conflict, but rather overlap. In other words, it is possible to create a cumulated set of elements for a participatory model that includes all of the required elements for each approach, although for each camp the list would be over-inclusive. This complementarity has significance here because one needs all of these loosely defined democratic theories to explain the exceptional value of citizen participation to environmental decision-making in our democracy. None of the theories, alone, will suffice.

The scientific, rationalist model has a special, perhaps unique, place for environmental decision-making because the environmental endeavor contends continuously with the conflict between the existing demands of human society and the biological and physical constraints of the earth. The nature of the natural constraints may be debatable, but such constraints surely do exist as a reality independent of competing socio-economic actors, and are increasingly determinable through the application of

14. Cass Sunstein, *Beyond the Republican Revival*, 97 YALE. L.J. 1539, 1554-55 (1988); *see generally* ERIK OLSON, CIVIC REPUBLICANISM AND THE PROPERTIES OF DEMOCRACY (2005); *Squillace, supra* note 8, at 11-12.

15. *See* Michelman, *supra* note 12, at 27.

16. Sunstein, *Beyond the Republican Revival*, *supra* note 14, at 1545, 1587.

17. I find these three paradigms useful, but there are others. *See, e.g.,* PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING, *supra* note 1, at 49.

established scientific methodologies.[18] It is true that in many other arenas, a government develops policy in light of what are at least perceived as external "realities"—the laws of science and, at least arguably, the observed or mathematically deduced "laws" of economics.[19] But the biosphere imposes constraints that are different in pervasiveness, flexibility and scale. As to pervasiveness, carrying capacity limitations operate at all levels, from tiny landscapes (as to, for example, species protection),[20] to regions (as to water and air pollution prevention),[21] to the planet (as to carbon),[22] forcing the environment onto the agenda of nearly every realm of government. As to flexibility, while society has great flexibility as to the amount of inequality, social and economic misfortune it will absorb, ecological limits simply are what they are, and it is essential that decision-makers discover and understand them. As to results, global warming, and worldwide shortages of potable water, food and energy will present decision-makers with potentialities that transcend most endeavors.[23] Governmental entities that face such realities need, and thus will seek, information that assists them in assessing objective science regarding the impacts of policy alternatives.

It has been frequently contended, however, that it is not citizen participation but instead expert staff and educated public officials who provide the information that assists governmental

18. *See* J. Geider et al., Forum, *Primary Productivity of Planet Earth: Biological Determinants and Physical Constraints in Terrestrial and Aquatic Habitats,* 7 GLOBAL CHANGE BIOL. 849 (2001).

19. TONY LAWSON, ECONOMICS AND REALITY 280 (Routledge 2002) (1997) (explaining how competing policy-oriented groups accept existing economic conditions).

20. Endangered Species Act, 16 U.S.C. § 1531 (2006); Nathan F. Sayre, *The Genesis, History, and Limits of Carrying Capacity,* 98 ANNALS ASS'N AM. GEOGRS., 120 (2008).

21. Clean Water Act 33 U.S.C. § 1251 (2006); Clean Air Act 42 U.S.C. § 7401 (2006); Kyushik Oh et al., *Determining development density using the Urban Carrying Capacity Assessment System*, 73 LANDSCAPE URBAN PLANN. J. 1 (2005).

22. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, IPCC TECHNICAL PAPER VI, CLIMATE CHANGE AND WATER, 74 (Bryson Bates et al. eds., 2008) [hereinafter IPCC], *available at* http://www.ipcc.ch/publications_and_data/publications_and_data_technical_papers_climate_change_and_water.htm. *See, e.g.,* American Clean Energy and Security Act, H.R. 2454, 111th Cong. (1st Sess. 2009); William E. Rees, *Revisiting Carrying Capacity: Area-Based Indicators of Sustainability*, 17 POPUL.ENV'T (1996), *available at* http://dieoff.org/page110.htm.

23. IPCC, *supra* note 22, at 41.

entities in assessing the objective science. The arc of development of the administrative state and its expert commission, from John Francis Adams to Louis Kahn**,** rests on the effort to seed government with expertise.[24] Modern commentators have argued that public participation interferes with such expertise. Such public involvement, they contend, can be counterproductive to the operation of good government, especially in the environmental arena where, for example, lay perceptions of hazardous risk contravene good science,[25] and repeated citizen litigation distorts EPA's priorities.[26] As a believer in good government, I agree with many of these contentions. I have seen the waste of time in content-less, repetitive and lengthy citizen comment. A thoughtful reading of *A Civil Action*[27] leaves one mostly angry at the protagonist attorney, the supposed hero, and at the system that aids and abets his work, as he spends his and his client's time, money, and emotional energy for nothing. The real heroes of the story are the EPA bureaucrats who eventually promulgate effective standards for remediation.

Yet it is my experience, and the experience of many of my colleagues in environmental advocacy, that insider staff and officials frequently need outsider citizen input to make them wise. This is true in part because staff members are not privy to all information, and as argued in this article, good partnerships among citizens, experts and advocates can provide valuable new data and analysis. It is especially the case in regimes where elected officials have values antithetic to good science and priorities heavily weighted towards the expressed positions of economically dominant stakeholders. In such environments, expert staff members are pressured to select among facts and approaches to reach predetermined conclusions. While such an ideologically charged environment may bring to mind a just past federal administration, it characterizes many state and local governments where campaign contributions of economic actors

24. THOMAS K. MCCRAW, PROPHETS OF REGULATION (1984) (providing an excellent history of the rise of the expert commission and its role in the regulatory state).

25. *See* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE TOWARD EFFECTIVE RISK REGULATION, 33-39 (1993).

26. PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING, *supra* note 1, 54-56, 64-66.

27. JONATHAN HARR, A CIVIL ACTION (1996).

create political environments hostile to good environmental science.

I represented a group of citizens untrained in energy matters against a 500kV line proposed as part of the California transmission system.[28] The line was strongly supported by the applicant utility, San Diego Gas and Electric, and, most significantly by the staff of the Public Utility Commission and the California Independent System Operator (the entity that operates the California transmission grid and runs the wholesale electricity market).[29] This expert staff contended that the line was strategically necessary to provide reliable power to San Diego, a region increasingly dependent on imported power due to air quality issues that prevented local power plant construction.[30] These utility experts and agency staff dismissed my clients' concerns as limited to aesthetic and land use issues that would occur anywhere one tried to locate a line. Somewhat to my surprise, my retained experts, one of whom had designed the Los Angeles transmission grid, informed me that the line was not a good project and not necessary for the region. At the end of the two-year process, the hearing officer and the full Commission rejected the application on grounds that the applicant utility had failed to demonstrate that the line was necessary for either reliability or economic purposes.[31] In fact, I believe, the line was proposed not for the interests of the San Diego consumer, but to meet the strategic needs of the utility's parent company.

For every horror story of unintelligent, parochial citizen input, other stories show that such input forces information on staff and decision-makers who would not have faced it otherwise, because they were simply unaware, because they were pressured not to see, or because the information contravened their own ideologies. In this Article, I contend that the difference between repetitive, useless input and valuable input frequently lies in the quality of expertise provided to the citizen participant.

28. San Diego Gas & Elec. Co. (U 902-E), Application 01-03-036 at 2 (Cal. Pub. Utils. Comm'n Mar. 23, 2001) (Application for Certificate of Public Convenience & Necessity).

29. *Id.* at 4-6.

30. *Id.* at 14-71.

31. San Diego Gas & Elec. Co. (U 902-E), Decision 02-12-066 at 75 (Cal. Pub. Utils. Comm'n Dec. 19, 2002) (denying Certificate of Public Convenience & Necessity).

The pluralist view also has its place in the environmental context. While there may exist an objectively determinable environmental good (the rationalist view), choices over the distribution of benefits and burdens of programs leading to that good will reflect bargaining among interests, reflecting the operation of the pluralists' marketplace. Further, the realities of human nature and of governmental operation favor aspects of pluralist views of participation if not the underlying theory of democracy. Good policy flows from processes that give decision-makers the benefit of conflicting views. The environmental arena is marked by pervasive conflict over the application of theories, the underlying data, and disputes over how to incorporate the resulting uncertainty into decision-making. On these matters, as any advocate knows, scientists, economists and other experts develop opinions influenced by ideology and experience. Staff experts, who frequently aggregate around specific views themselves, cannot provide an adequate airing of these conflicts. The coherent articulation of each conflicting view requires a level of effort, expertise and funding most likely to be produced by an interested party. Thus, while the pluralists' relativism may fall before the unyielding realities of the ecosphere, an effective participation model must, as an instrumental matter, provide what the pluralists want—a forum where all relevant parties can assert their agendas.

Finally, the transformative participatory experiences of the Civic Republican model have shaped the environmental movement. My former law partners and I have participated in many campaigns where citizens first become activists, then successful organizers, and finally elected officials themselves—a process which shows a profound psychological change for which successful civic participation served as the agent. The Civic Republicans are correct to assert that participation itself is an educator and a transformative force. In my view, no experience so effectively moves people out of self and family centered lives into the civic world as successful participation in governmental decision-making. The experience makes permanent changes in the outlook and ensuing lives of those who undertake it, creates new ideologies, new groupings of interests, and in turn, changes society itself.

The Civic Republican participatory model gains special relevance in the climate context. The now central environmental effort to slow and then halt the increase in atmospheric CO_2 depends in significant part on the entrant of new groups with new political positions, a result which Civic Republicans contend, and I agree, can flow from participation. The players in the pluralist marketplace tend to represent the same cast that participated in the articulation of the *status quo*. A mere rearrangement of which of those existing actors prevails may have been adequate to continue progress in environmental arenas such as water contamination, control of traditional criteria air pollutants, and hazardous waste contamination. The dimensions of the present climate concern, however, argue for more rapid socio-economic changes, both to reduce carbon emissions and to adapt to inevitable effects of climate change,[32] and such changes require the entrance of new actors.

Scientists are concluding that the threats posed by such carbon emissions are far greater than thought even recently; the problem, in the words of one prominent atmospheric scientist and public official, "has become an emergency."[33] Efforts to address the issue will require international collaboration for structural economic and social change on an unprecedented scale. The provision, for example, of a minimally adequate energy supply to the world's growing population while reducing the current atmospheric carbon load will require a reworking of what we consider a modern economy.[34] A society engaged in such an endeavor needs new participants to contend in a determined manner for a position (here a common good) that is broadly felt and objectively determinable, but not represented with adequate force in the current array of organized interests. When entrenched existing stakeholders dominate governmental processes, the *status quo* prevails, and substantial change becomes problematic.[35] An evaluation of the cap-and-trade

32. *See* IPCC, *supra* note 22, at 45.

33. Elizabeth Kolbert, Profile*, The Catastrophist*, THE NEW YORKER, June 29, 2009, at 39 (quoting James Hansen).

34. E. ADAMS MILLER, COORDINATING GOVERNMENT AGENCY INVOLVEMENT IN CLIMATE CHANGE ISSUES, 2009 WL 1342291, at *1 (2009).

35. *See* PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING*, supra,* note 1, at 61.

provisions of the Waxman-Markey bill indicates that the heavy hand of coal and utility interests weakened the bill to the point that it fails to make the changes necessary to reduce carbon emissions to acceptable levels, yet the bill only narrowly passed the House of Representatives.[36] Any cap-and-trade scheme will be implemented at the federal, state and local level, and at each level, we will need the revised political and regulatory landscape that citizen participation can provide through the creation of new and effective stakeholders.

C. The Composite Benefits of Participation

Assembled here is an aggregation of benefits for a participatory model derived from these varying theories of democracy.[37] Public participation produces benefits to society because it:

- Improves decisions by providing decision-makers with relevant and accurate information;
- Helps decision-makers gauge the nature and depth of public opinion;
- Introduces new concepts that staff or frequent participants may not advance;
- Informs decision-makers of the substance, weight, significance and politics of stakeholder concerns in ways that staff cannot;
- Provides an organizing device and political entrance vehicle for new stakeholders who, in turn, can reorder public priorities and advocate for new governing processes;
- Provides a vehicle for public policy advocacy on the substantive issues which, in turn, may change the politics in question;
- Fosters democratic and civic values;
- Creates new group identities;
- Confers legitimacy on the governmental process;

36. *See* American Clean Energy and Security Act, H.R. 2454, 111th Cong. (1st Sess. 2009).

37. There are of course many other lists. *See, e.g.,* PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING, *supra* note 1, at 44.

- Enhances the depth and detail of news reporting on the subject, thus educating the general public; and
- Counters corruption, collusion, and graft.

Although perhaps tautological, public participation is also an end in itself, viewed as a significant element of a democratic society.[38]

As discussed above, not all democratic theorists care about all these elements. Civic virtue and new group identities lack importance for Rationalists and Pluralists. The search for an objective truth constitutes a dubious effort for Pluralists. But, as discussed above, my view of the operation of democracy in the environmental arena requires a model of public participation that delivers this list of aggregate benefits.

D. Participation Must Effect Process and Outcome to Deliver Societal Benefits

These aggregate benefits, however, begin rather than end the inquiry of this article. When, we must ask, does participation actually deliver the benefits in the composite list? I contend that the benefits of public participation accrue generally where the participation has *effect*. Such effective participation alters the course of the subject process, by material change, or the substantial potential for material change to either the substantive outcome or to the underlying process. Change to the underlying process is significant because it in turn may change the eventual outcome.

Ineffective participation can provide some of the benefits in the composite list, although in an attenuated or ultimately unsuccessful manner. It could be contended, for example, that impotent participation can perform a legitimizing function.[39] If participation is an end in itself, ineffective participation arguably might suffice. Citizens do in fact prefer an ineffective voice to none at all; I have watched many individuals sit through long

38. *See* D.J. Fiorno, *Citizen Participation and Environmental Risk*: *A Survey of Institutional Mechanisms*, 15 SCI. TECH. & HUM. VALUES 226, 239 (1990).

39. "Participants may come to trust an agency when a participation process is conducted with the best of intentions by those officials directly responsible for it, even if the officials who will make decisions ignore what is learned from the process." PUB. PARTICIPATION IN ENVTL. ASSESSMENT AND DECISION MAKING, *supra* note 1, at 52.

proceedings in order to deliver testimony that they (and everyone in the room) knew would have no effect on the outcome, just because they wanted to express themselves. But my continuing relationship with those participants has generally revealed that the experience is frequently the last civic experiment, one leading to deep cynicism about the political system. The legitimacy is thus more of a short-term "hit" rather than a long-term benefit.[40]

Perhaps the legitimizing benefit of the ineffective participation is greater among those who do not participate themselves. While the ineffectual nature of the participation becomes apparent to the disappointed actors; members of the greater public, learning from the media that the matter was the subject of many meetings and contested proceedings, concludes that they too *could* have participated had they so chosen, and thus democracy has been served. However, on some level most observers know they are watching a simulacrum, not the real thing. As a normative matter, I contend that such an elevation of appearance over substance has a slow deleterious effect on civil society.

For most purposes, however, participation must have effect, or the potential to have effect, in order to perform the ideal functions described in the cumulative list of benefits above. Regardless of which theory of democracy one applies, ineffective participation fails most of its functions. It cannot effectively provide useful new evidence or concepts to decision-makers of a rationalist government seeking the public interest; it cannot effectively serve to advance the cause of a new stakeholder in the pluralist marketplace; it cannot provide the momentum for entry to new stakeholders; nor, can it perform the functions of legitimization and prevention of collusion. In the long term, impotent participation will not operate to foster civic virtues, create new identities, or educate the public about how the country really works its way through difficult decisions.

We are then led to the question of what constitutes effective participation. In most complex, controversial, and contested environmental matters, effective participation requires content, presentation, and political acuity. Content matters. With important exceptions such as land use determinations in smaller

40. *Id.* (conceding that such legitimacy will be short lived).

jurisdictions, most environmental decision-makers enter their deliberations with substantial and sophisticated input. Decisions on complex land development or redevelopment proposals, air or water pollution permit appeals, EPA rulemaking, or state Public Utility Commission decisions on a power line approval, both decisions on and off the record, with or without cross examination, all are likely to produce extensive technical testimony.[41] Decision-makers facing renewal of a nuclear plant license, for example, expect regional opposition, but its repeated expression will constitute a mere backdrop to a determination based on a mix of financial, safety, and reliability issues. In most such situations, the participation may be noted, but will not affect the outcome.

It is true that in some situations, content may not matter and participation can have an effect by its mere presence even if it is amateurish, repetitive and without substance. Decision-makers may use participation as a simple (and possibly inaccurate) gauge of public sentiment. The quantity, unilateral nature, or vehemence of citizen testimony may sway a decision-maker in marginal or heavily politicized settings, especially where the ultimate decision-maker is comprised of elected officials. Generally, however, as discussed *infra*, contrary evidence will be produced with the effect that unassisted lay participants who express conclusory opinions unsupported by a substantial factual underlay will have no material effect on the ultimate outcome.

Presentation determines outcome. Citizens who do not understand the rules and customs of the forum will make presentations that have the appearance, if not the substance, of amateurism, and decision-makers will discount the material presented.[42] Effective participants must make an educated guess as to the range of possible outcomes. The decision-maker can tolerate using testimony, comments or other normal inputs to the

41. CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 325 (1997) (evaluating whether the American approach to public law "[h]as promoted . . . democratic governance"). Sunstein notes that "[t]he technical complexity of underlying issues has contributed to the power of well-organized interest groups over the regulatory process." *Id.*

42. *Id.* at 325 (noting that "[i]n practice . . . democratic aspiration has often been defeated. People rarely have enough information to participate at all, or at all well, in the process of government.").

proceeding to move decisions within a defined, if unexpressed range of possible outcomes; but if the desired outcome lies outside that range, the participants must alter the political landscape through sophisticated political and public relations advocacy campaigns, often, but not always, utilizing political consultants.

Strong, accurate content, sophisticated presentation and political acuity are required even where the testimony (or another form of participation) is undertaken primarily for its political impact or organizing potential, rather than its substantive effect on decision-makers. In most environmental conflicts, the existing stakeholders have become sophisticated and experienced actors. They anticipate citizen arguments and know how to counter them. Organizational and political efforts succeed where the proponents know how to make telling points, are armed with good information, and understand the political context and the media. The media—assisted by the stakeholder proponents—will minimize citizen participation lacking in content, good presentation, and political acuity.

Citizen participation needs agents (usually, but not necessarily, attorneys) and experts to provide the sophisticated content, presentation, and political acuity necessary to have effect. Participation without such expertise will fail to change the process or contribute to the outcome of the subject proceeding, and thus will fail its democratic function.[43] As discussed below, environmental decision-makers require technical input, which unassisted lay participants cannot provide. Much of the decision-making in the environmental arena has moved into quasi-private or private stakeholder negotiations, which pose barriers to unassisted lay participation.[44] Even those processes created to facilitate citizen input, such as the NEPA, now provide avenues primarily for experts and agents who use the proceedings to process unassisted citizen input in ways which give it the form of participation without the substance.[45] If citizens partner with experts, however, true effects on process and outcome are possible.[46] Such participation will bring with it the benefits citizen participation brings to society.

43. *See infra* Part II.A.
44. *See infra* Part II.B.
45. *See supra* Part I.B.
46. *See infra* Part IV.

II. THE EVOLUTION OF THE ENVIRONMENTAL ENDEAVOR HAS INCREASED OBSTACLES TO EFFECTIVE CITIZEN PARTICIPATION.

Before discussing approaches to improving citizen participation, we must start with a hard look at the true obstacles to citizen participation, an undertaking that literature on the subject generally does not perform. Unfortunately, as the environmental endeavor has matured, and as we have successfully experimented with alternatives to traditional governmental processes for decision-making, the obstacles to unassisted lay participation have increased.

A. Decision-making Results from Proceedings too Complex or Technical for Unassisted lay Participation. Experts and Attorneys Dominate such Arenas.

The environmental effort has become dauntingly complex, an unavoidable result of its success. Just as environmentalists have desired, the environment is now everything and almost no area of human endeavor lies apart from its reach. The "environment" no longer functions, nor is viewed, as a distinct subject apart from the social and economic world; an environmental issue becomes joined to the underlying natural and social processes it involves.[47] Thus, the human endeavor to protect the environment has emerged as one of the most complex social efforts ever undertaken.[48] The resulting environmental regulation of necessity has

47. *See* SCHELLENBERGER & NORDHAUS, *supra note* 2, at 32-33. Even in their context of their assertion of the limitations of environmentalism, Schellenberger and Nordhaus make the same point:

> The concepts of "nature" and "environment" have been thoroughly deconstructed . . . Why, for instance, is a *human*-made phenomenon like global warming—which may kill hundreds of millions of *human beings* over the next century—considered "environmental"? Why are poverty and war not considered environmental problems while global warming is? What are the implications of framing global warming as an *environmental* problem—and handing off the responsibility for dealing with it to 'environmentalists'?"

Id. at 12.

48. *See generally* PAUL HAWKEN, BLESSED UNREST: HOW THE LARGEST MOVEMENT IN THE WORLD CAME INTO BEING AND WHY NO ONE SAW IT COMING

become as complex as the regulated activity, and now regulation itself is seen as a mere part of the redesign of society necessary to create a sustainable future.

It has often been contended in scholarly literature that lay participation works best in situations where fundamental values are at stake, rather than in complex scientific or policy disputes which often related to implementation.[49] Articulation and the establishment of new values marked the early years of the popular incarnation of the modern environmental movement.[50] Lay participants who often organized in grass roots ad hoc coalitions, led the early environmental efforts, mobilizing political pressure that made possible the odd coalitions behind Congressional legislation in the 1970's to protect air and water quality, endangered species, federal land management, and related resources.[51] In the decades since, however, the increasing complexity of environmental issues has made those situations where values dominate the proceedings ever more scarce. The environmental endeavor has transitioned from articulation of values and standards to an era of implementation, where complex policy, scientific, and economic concerns pervade almost all proceedings.

Experts dominate, and will always dominate, these arenas.[52] As we moved, slowly at first, and more rapidly later, from

(2007) (chronicling the genesis of the environmental movement and its implications for social justice); CAROLYN MERCHANT, THE COLUMBIA GUIDE TO AMERICAN ENVIRONMENTAL HISTORY (2005) (a comprehensive history of American approaches to the environment); RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, 47 (2004).

49. Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency DecisionMaking*, 92 NW. U. L. REV. 173, 226-227 (1997) (describing how "the expertise laden format of the EIS may lead agency decisionmakers to view themselves primarily as facilitating the objective transfer of information, rather than choosing fundamental values or assessing the quality and integrity of the information exchanged.").

50. The environmental ethos is as old as civilization. Here I refer to the period *post* the publication of Rachel Carson's *Silent Spring*. *See* RACHEL CARSON, SILENT SPRING (Mariner Books 2002) (1962).

51. LAZARUS, *supra* note 48, at 92.

52. SUNSTEIN, *supra* note 41, at 325 (finding "[t]he technical complexity of underlying issues has contributed to the power of well-organized interest groups over the regulatory process."); Rossi, *supra*, note 49, at 225 (observing that it is "[m]ore likely that interaction, to the extent it occurs, is confined to those who are the primary conveyors of scientific information—agency and nonagency

articulation of basic values, to fundamental legislation, and then into implementation, organizations of attorneys, scientists, and, later, economists and social scientists, such as the Natural Resources Defense Counsel, the Environmental Defense Fund, and the Sierra Club Legal Defense Fund (now Earthjustice) emerged.[53] This implementation endeavor requires solutions as sophisticated as the processes addressed, an effort that lies at the very boundaries of our social and scientific capabilities.[54]

The concerned citizen, the angry homeowner, or the consumer may predominate again when new issues arise, but not for long. In the 1980's, a decade after air and water quality efforts had moved from the domain of activists to experts, citizens led the fights to raise national consciousness over toxic contamination.[55] It is my observation, however, that the citizen activism on toxics quickly gave way to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and its implementation, first by cadres of new lawyers and then, somewhat to the dismay of lawyers, to teams of consulting scientists. As lay participants develop new issues, the movement into implementation, and the accompanying rise of expertise, occurs with increasing swiftness. The effort to address carbon, for example, originated from diffuse grass roots reactions to and propagation of scientific observation on a global scale, the epitome of lay effort.[56] However, the endeavor quickly transitioned to one led by the expert staff and advocates of

experts, or powerful interest groups who can afford to finance their own scientific research.").

53. *See* Natural Resource Defense Council, http://www.nrdc.org/ (last visited Dec. 20, 2009); Environmental Defense Fund, http://www.edf.org/home.cfm (last visited Dec. 20, 2009); Earthjustice, http://www.earthjustice.org (last visited Dec. 20, 2009). *See also* Stewart L. Udall, Symposium: the National Park System, *Foreward*, 74 DENV. U. L. REV. 569, 570 (1997) (describing the conditions that "sparked the creation of aggressive national environmental law groups such as the Environmental Defense Fund and the Natural Resources Defense Council).

54. LAZARUS, *supra* note 48, at 47.

55. Zygmunt J.B. Platter, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything is Connected to Everything Else,* 23 HARV. ENVTL. L. REV. 359, 382 n.54 (1999).

56. Dylan Golden, *The Politics of Carbon Dioxide Emissions Reduction: The Role of Pluralism in Shaping the Climate Change Technology Initiative*, 17 UCLA J. ENVTL. L. & POL'Y 171, 188-89 (1998-1999).

stakeholder non-profits, states, and nations. Only those schooled in the arcane details of wholesale energy markets can fully understand why some versions of cap-and-trade would be so much less effective than others.[57] This is appropriate to the issue; the growing complexity of both modern life and of environmental solutions requires the most sophisticated decision-making processes we can devise, and those in turn should require the most knowledgeable expert input we can provide.

It is in these decision-making arenas that this palpable need for expertise collides with our participatory ideals. We are committed to citizen participation, and the more important the decision, the more we desire to know that the ordinary person can make a difference. But the situational exigencies prevail: however strong our cultural and political beliefs may favor such unassisted lay participation, in practice it is the expertise that matters.[58] Decision-makers, whether administrative law judges, corporate leaders or governmental officials, need expertise, and know that they need it. The solution for those of us who believe in the value of citizen participation lies not in a naïve embrace of unassisted lay citizen advocacy, but rather in the ability to combine the energy and political value of a grass roots group with the expertise necessary to craft a message that will alter the course of an environmental decision-making process.

B. The Evolution of Environmental Decision-making Away from Legislation Towards Contract and Private Stakeholder Negotiations Makes Unassisted Lay Participation Problematic and Ineffectual.

We have traditionally associated public decision-making with legislative, regulatory and quasi-adjudicatory activity subject to a

57. Marc B. Mihaly, *Recovery of a Lost Decade (or is it Three?): Developing the Capacity in Government Necessary to Reduce Carbon Emissions and Administer Energy Markets,* 88 U. OR. L. REV. (forthcoming 2009).

58. *See* Yen-Chu Weng, Ph. D. candadite, University of Wisconsin-Madison, Conference Paper at the Human Flourishing and Restoration in the Age of Global Warming Conference: The Dynamics of Public Participation in Ecological Restoration: Analysis of Expert—Volunteer Relationships in Three Institutional Settings (Sept. 5, 2008) (discussing the unequal power hierarchy between lay and expert participation resulting in superficial public participation).

rich tradition of public participation. Government, whether federal, state or local, pursues environmental initiatives through the creation of laws and regulations, and then through the application of laws and regulations to a regulated private sector. While it is true that the opportunities for participation in the legislative arena at the federal and state level are usually constrained to orchestrated committee testimony, the adoption of regulations, and rulemaking, whether formal or informal, and permitting proceedings are all subject to public input.[59] At the local level, legislative efforts are equally open to participation.[60]

However, in the last few decades, the environmental arena has experienced a significant migration of decision-making away from these traditional regulatory and legislative arenas into consensual activities, sometimes private-private and often public-private.[61] They usually take an initial form as a complex, multi-party negotiation. The results of the effort are then memorialized in some form of memorandum or contract. These new forms of decision-making may mark an exciting evolution in polity and an interesting departure from prior models of government and collective action.[62] They may provide new and flexible alternatives to rulemaking, regulatory, and administrative forums;[63] but they also operate to reduce opportunities for effective public participation.[64]

What is the origin of this move towards agreement memorialized by contract, and the resulting decrease in the relevance of public input? To a large extent, the move flows from

59. Administrative Procedure Act, 5 U.S.C. § 553 (2006).

60. CAL. PUB. RES. CODE § 21003.1a (West 2009).

61. This migration commenced with negotiated rulemaking as a response to frustration with the time, expense, and failure of legitimacy in traditional rulemaking, but now has spread to other forms and forums, *see* discussion *infra* Part IV.C. *See also* Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 7 (1982).

62. *See id.*

63. *See id.*

64. *See* William Funk, *When Smoke Gets In Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 ENVTL. L. 55 (1987) (arguing that negotiating regulations subverts public participation and the public interest); *see also infra* text accompanying notes 192-98; *but see* Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (arguing that consensual rulemaking increases the legitimacy of agency rulemaking).

the internal evolution of the underlying subject area. In land use, water policy, endangered species, and multiple use discussions, for example, stakeholder negotiations are on the increase because of the substantive development of those areas of environmental endeavor.[65] Some of these are discussed more specifically *infra*.

However, other factors that are common to all environmental issues are at play. As discussed *supra*, environmental decision-making has moved generally away from policy formulation where legislation and rulemaking, with their established notice, hearing and participation elements, predominate. As we move to implementation, the internal dynamics of complexity, the breadth of the environmental concern, the level of detail, and the interdisciplinary nature of the issues operate to favor less formal stakeholder processes. Implementation encourages resolution by methods responsive to multiple parties, multiple issues and to changing circumstances. This, in turn, creates an advantage for efforts which start without established procedures, are responsive to complexity, and retain flexibility to adapt to the evolving situation; all of which are factors that favor negotiated solutions over more formal and thus "hard wired" processes such as legislation, regulation, or adjudication.[66]

The rise of environmental expertise itself, aided by NEPA and its progeny,[67] contribute to this movement towards negotiated solutions. These statutes primarily empowered sophisticated stakeholders, who, operating through environmental professionals, have mastered the process, and have long ago decided who should be at the negotiating table and who they can safely ignore.

Consider an example relating to the nation's (now more than fifty year) effort to regulate air pollution. The Clean Air Act (CAA) Amendments of 1970 contained the first federal mandate that states act to reduce levels of air pollution in polluted areas (now called "non-attainment areas") down to contaminant levels set by the Environmental Protection Agency as necessary to

65. *See* Rossi *supra* note 49.

66. *See* Harter, *Negotiating Regulations, supra* note 61, at 29-30 (describing advantages of negotiations over traditional rulemaking, including flexibility to compromise and responsiveness to complicated competing interests). *See also infra* Part IV for a more detailed examination of experts and agents in the context of Negotiated Rulemaking.

67. See *infra* Part III.

protect the public health.[68] In the initial years of the act, most actors did not understand the implications of the legislation, but they quickly learned. For example, in 1972, a federal district court first considered the question of whether the CAA should be interpreted to also mandate the maintenance of the relatively pristine air quality in clean air areas (a concept called at the time "non-degradation", now referred to in the statute as "non-deterioration").[69] Despite the now-obvious impacts of such a policy on power generators who locate plants in clean air areas, no electric utility participated as amicus curiae in the case. By the time the case reached the Supreme Court, however, stakeholders had begun to understand the implications of the issue; multiple representatives of the utility sector submitted amici curiae briefs,[70] and then, along with environmental groups, participated in the process which led to amendments to the CAA incorporating non-deterioration provisions.[71]

Over the next thirty years, these groups frequently interacted on this and the entire range of clean air related issues.[72] Environmentalists coalesced at the national level into established environmental organizations financed through national memberships and foundations, with staff attorneys and scientists specializing in the CAA as well as other environmental issues.[73] These groups in turn collaborated by subject area through the

68. Clean Air Act, 42 U.S.C. § 7409(b) (2006).

69. Sierra Club v. Ruckleshaus, 344 F.Supp 253 (D.C. Cir. 1972).

70. *See, e.g.,* Brief of Amicus Curiae, Edison Elec. Inst., Ruckelshaus v. Sierra Club, No. 72-804 (D.C. Cir. Mar. 1, 1973), *available at* 1973 WL 172586; Brief Amici Curiae on Behalf of the State of Ariz. and Ten Named Pub. Utils., Ruckelshaus v. Sierra Club, No. 72-804 (D.C. Cir. Feb. 27, 1973), *available at* 1973 WL 172678.

71. *See* 42 U.S.C. § 7473 (1977). The 1977 Clean Air Act Amendments allowed deterioration of air quality in "attainment areas" by providing for maximum allowable increases of certain air pollutants in those areas. *See also id.* §§ 7470-7474 (1977).

72. An example of this would be the negotiations between the Texas utility and Environmental Defense Fund leading to a reduction in the number of coal plants. *See, TXU: A Green Deal as Big as Texas,* 38 No. 2 SOLUTIONS 1 Apr. 2007, *available at* http://www.edf.org/documents/5973_0307Solutions.pdf.

73. *See* LAZARUS, *supra* note 48, at 47; Donna E. Correll, *No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability*, 24 RUTGERS L.J. 773, 773 n.1 (1993) (citing a chart from *Green With Fear*, THE ECONOMIST, Apr. 21, 1990, at 31) (showing an increase in membership of several environmental organizations from 1970 to 1990).

evolution of formal coalition partnerships.[74] Similarly, the "regulated community" organized itself. The National Association of Manufacturers, the Electric Power Research Institute, and the major utilities each developed departments with expertise in air pollution issues. These groups and environmental groups interacted constantly, through negotiation, adjudication, rulemaking and repeated litigation.

In such situations, negotiation becomes an increasingly attractive tool. Most major issues addressed repeatedly over decades through litigation, legislation and rulemaking, become settled law. Entrenched industry stakeholder and environmental groups long ago committed each other's agenda and playbooks to memory and in many cases have reached comparable levels of sophistication and capability. In addition to the psychological and cultural reasons favoring negotiation among such mature parties, the depth of understanding of each other's positions and history of settled prior outcomes means that parties are less likely to take unsustainable positions that a court would predictably strike down or a familiar agency refuse to support. The remaining situations involve fine differences about which no one could predict the outcome of submission to a neutral decision-maker, especially where the parties themselves are far more familiar with the subject matter and each other's needs and positions than a court could likely become even after thorough briefing. For such sophisticated parties, deeply familiar with each other, the option of litigation is unattractive: "We can't agree so let's submit it to someone who knows nothing about the matter to decide." Such parties rarely find such adjudication by uninformed neutrals acceptable except when agendas are set for political or strategic reasons unrelated to the underlying issues, such as, for example, delay. Thus in many situations, for each party the "best alternative to a negotiated solution" or "BATNA," becomes less attractive compared to agreement through negotiation, facilitated or direct.[75] The facilitation itself has improved. Alternative dispute resolution is more widely

74. *See, e.g.,* The Coalition for Clean Air, http://www.coalitionforcleanair.org/ (last visited Dec. 20, 2009).

75. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 104 (Bruce Patton ed., Penguin Books 1991) (1981).

understood and available.[76] A class of alternative dispute resolution professionals has defined and consolidated its customs and rules.[77] Federal and many state laws encourage dispute resolution.[78]

Ultimately it is unclear, and will likely remain unclear, as to why these stakeholder agreements have proliferated. They may flow from the education of the actors just described, the evolution of the underlying subject, or from the intrinsic demands of implementation. These alternative forms may be stimulated in part by the increasing rigidity or paralysis of government abetted in part by public participation requirements,[79] creating a conscious effort to flee the perceived burdens of such participation, or by a desire to streamline or reform government. Whatever the cause, these stakeholder agreements (exciting as they may be) have the effect of reducing participation by the general public.[80]

76. The organized environmental movement first resisted, then participated in Alternative Dispute Resolution (ADR). Professor Harter relates for example, that the Chair of the Equal Employment Opportunity Commission once informed him that using mediation to resolve a complaint would be immoral, but that the agency is among the largest users of mediation in the Federal government. Interview with Phillip J. Harter, Univ. of Missouri Sch. of Law, in Montpelier, Vt. (June 10, 2009) (on file with author) [hereinafter Harter Interview].

77. *See* Uniform Mediation Act § 1 (2003).

78. *See* Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 571-584; Negotiated Rulemaking Act of 1996, 5 U.S.C. §§ 561-570; Massachusetts Hazardous Waste Facility Siting Act, MASS GEN. LAWS. ch. 21D §§ 1-19 (2009) (encouraging negotiation).

79. See *infra* Part IV.D.

80. *See* Michael McClosky, *Problems With Using Collaboration to Shape Environmental Public Policy*, 34 VAL. U. L. REV. 423 (2000) (arguing that "over-reliance on [collaboration] can displace traditional sources of legitimacy"); *but see* Jody Freedman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60 (2000) (arguing that stakeholder collaboration increases legitimacy because it produces mutually acceptable solutions that affected parties devised).

1. The Land Use Example: The Evolution of the Subject Creates an Impetus for Negotiated Agreements and Contracts, and a Reduction in the Role of Lay Public Participation.

In the land use arena, for example, the confluence of factors intrinsic to the field favors contract as a device for applying public policy to the use of land.[81] Cities still plan and zone, but these devices are increasingly procedural, defining the means and outer limits for public-private contractual agreements. Zoning as it was originally conceived served to separate uses. Cities created zoning regulation to protect housing from the externalities of industrial uses and the traffic and noise associated with commercial uses; and then to insure that industrial uses could thrive without the complaints of homeowners.[82] Such zoning efforts also separated the wealthy and the housing ideal (single family homes) from housing forms deemed less desirable (such as apartments).[83]

These legislative forms determined the cast of characters and the locus of decision-making. Elected officials made the basic decisions as to what uses went where via the legislative act of zoning. The process was relatively open, simple and public. Zoning addressed policy questions sufficiently fundamental that the value of public input was apparent to both the public and decision-makers. The zone is itself defined with some precision conforming uses, and leaves only structural details to discussions between builders and building officials; and nothing of significance to the general public was left to negotiate.[84] Any

81. *See* Marc B. Mihaly, *Living in the Past: the Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1, 40-41 (2007).

82. *See* Laurence C. Gerckens, *American Zoning and the Physical Isolation of Uses*, 15 PLAN. COMM'RS J. (1994), *available at* http://www.plannersweb.com/articles/ger065.html (noting that "[t]he physical separation and isolation of dangerous, odoriferous, or unsightly practices, such as tar boiling, soap making, fat rendering and dead carcass cremation, was viewed at that time as a reasonable governmental response to the unacceptable impositions of one otherwise legal activity upon another.").

83. It was in substantial part revulsion to apartments (and probably the people who inhabited them) that swayed the Supreme Court majority in *Village of Euclid v. Ambler Realty Co.* to support the zoning concept. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (noting "very often the apartment house is a mere parasite").

84. *Id.* at 366 (describing the zoning scheme in the *Village of Euclid*).

other uses that might be desirable somewhere in the zone, but whose location could evoke public controversy such as schools, stores or group homes in a residential zone, were left to a category of "conditional" uses that needed action by a planning commission or city council.[85] These quasi-adjudicatory hearings usually involved simple up or down land use decisions in which the unassisted public could easily participate, and still do.

Modern ideas about land use have created processes much less receptive to lay participation. The evolution of land use, especially in urban areas since the 1970's has increasingly reflected an opposing ideal to that which animated traditional land use regulation: a return to the mix of uses within one area seen typically in 19th Century land uses that predated zoning.[86] City planners as well as architects, landscape architects and developers contended that separated uses tended to deaden the resulting development.[87] Separated types of use reduced the opportunity to mix populations,[88] so residential areas became dead during the day and downtowns dead at night. Residential populations had to make automobile trips to commercial districts for the simplest errands.[89] Mixing residential and commercial areas gained popular support as people found they enjoyed living in areas activated by office or similar uses during the day, and both the residential population and the commercial uses found convenience and economic benefit in the presence of the other.[90]

This process has accelerated as the land use sector has made such mixed use the rule rather than the exception, and where

85. *See* PETER W. SALSICH JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION: A LEGAL ANALYSIS AND PRACTICAL APPLICATION OF LAND USE LAW 377 (2d ed. 2003).

86. *See* Nicole Stelle Garnett, "*No Taking Without a Touching?" Questions from an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 770 (2008) (comparing colonial cities like "William Penn's Philadelphia" to today's planned unit developments).

87. *See* Mihaly, *Living in the Past*, *supra* note 81, at 35.

88. *See* Andres Duany & Elizabeth Plater-Zyberk, *The Neighborhood, the District and the Corridor, in* THE NEW URBANISM xvii (Peter Katz ed., 1994).

89. *Id.* at xx.

90. For a discussion of the reasons for, and benefits of, returning to mixed residential and commercial areas, *see* AM. PLANNING ASSOC., THE PRINCIPLES OF SMART DEVELOPMENT 8 (1998) (describing the safety and economic benefits of mixed use areas); JOHN A. DUTTON, NEW AMERICAN URBANISM (2000) (describing growth and benefits of the New Urbanism movement).

acolytes of Jane Jacobs have successfully argued for highly mixed uses that defy traditional categories.[91] Today, in all regions of the country, cities, suburbs, exurbs, and the edge city, members of the public live, work and recreate in development forms that simply did not exist fifty years ago. Shopping centers are being torn down and replaced (a process transcending "infill" and frequently called "refill") with developments with ground floor retail, a mix of ownership and rental residential above, public buildings such as city halls and libraries (now serving as customer-drawing "anchors" as effective as the prior department stores or big box retail), together with open space shared among public and private uses.[92] Hotels now include residential uses, public spaces, and quasi-public commercial uses such as restaurants, health clubs, and rental meeting space. In most metropolitan regions, large developments frequently include a mix of residential, commercial, office and light industrial uses.[93]

The confabulation of all these uses in one building or project creates challenging complexities on the physical and financial front that are increasingly impenetrable to the ordinary citizen. Each development type has its own users, structural and space design needs, economic performance and resulting financing profiles. The combination requires sophisticated architecture, planning and financial structures. These efforts involve large staffs of architects, landscape architects, planners, traffic and environmental consultants, and debt and equity players.[94] Some

91. JANE JACOBS, THE DEATH AND LIFE OF THE GREAT AMERICAN CITY (1961). A prescient book that advocated dense mixed uses and traditional street grids to activate streets and recreate the vibrancy of the older urban centers that the City Beautiful and other elements in the 19th and early 20th century land use community had hoped to replace with a greener, car-centered utopian vision. The New Urbanist movement, following Jacobs' ideals, has generated intense interest in the architectural and planning community. *See also* DUTTON, *supra* note 90, at 15.

92. *See, e.g.,* Mihaly, *Living in the Past, supra* note 81, at 28-32 (discussing the successful redevelopment of San Francisco's ferry building and GAP headquarters).

93. *See* Todd W. Bressi, *Planning the American Dream, in* THE NEW AMERICAN URBANISM: TOWARD AND ARCHITECTURE OF COMMUNITY xxv, xxv-xxxv (1994) (discussing planned development in Boston's Back Bay and Seattle's Capital Hill and the basic design features of the New Urbanist Movement); see, *e.g.,* DAVID WANN, DEEP DESIGN: PATHWAYS TO A LIVABLE FUTURE 132 (1996) (examining redevelopment on the replaced Denver Stapleton Airport).

94. *See generally* Mihaly, *Living in the Past, supra* note 81, at 28-41.

especially capable jurisdictions mirror that expert work with review by internal staff.[95] In most of the smaller cities, towns and counties, the public entity must rely entirely on the work of the development team. Even staff capable of substantive project review cannot typically revise the project to meet regulatory or policy concerns, but must return it to the development team for modification.[96]

Thus, whether the public process occurs in the quasi-adjudicatory setting of permit review or the legislative setting of master or general plan review and rezoning, the matter reaches the public only when the pie is baked. The salient details and true drivers of the project frequently are invisible to the public. These intertwined uses often require joint ventures among developers of different uses, and resulting debt and equity structures that operate to determine many of the project's design elements and phasing. Yet, few project proposals reveal such detail, and if they did, few members of the public would understand what they saw. The public cannot participate in the internal negotiations which lead to the precursor documents which operate to define the project, such as the formation of the partnership or joint venture, agreements among equity participants, the request for proposals sent by development teams to different lenders, the agreements among lenders, the resulting loan documents, nor the developer's economic, planning, traffic and environmental studies leading to the proposed land uses and intensities in the development application.[97] Nor does the public participate in negotiations between the development team and city staff.

These projects do of course surface for public review in the form of plan amendments, re-zoning or land use permits. The public presentation of the result provides an opportunity for public involvement, but one that is fraught with practical difficulties so as to render the public forum a failure as a place

95. *Id.* The San Francisco Port Authority and Redevelopment Agency was given the task of planning the new redevelopment of the ferry terminal, thus internal staff was carrying this out this function.

96. *Id.*

97. In projects with substantial federal involvement or in states with "little NEPA's," an EIS or other public document will detail environmental impacts, but strategic use of that information to modify projects in a material way requires representation and experts. *See* discussion *infra* Part IV.

where serious issues might be joined. The citizens who wish to have effect face two obstacles: they are too late and the issues are two complex. To be sure, it is easy enough to oppose some of the uses or densities on aesthetic, traffic or other environmental grounds, but this "first" public forum occurs after months or years of negotiation over project formulation. At this late stage, such testimony usually presents decision-makers with an unappetizing all-or-nothing option rather than presenting a road map for a less damaging alternative. It is well within the capability of the general public to oppose the development altogether, but outside of cases involving major environmental constraints, the decision-makers, legislators at this final decision point believing that the process to date has resolved the complex socioeconomic tradeoffs, usually will treat such total opposition as an unsophisticated and untenable response. The interdependency of uses and the realities underlying the effort make it difficult to respond to such positions without re-conceptualizing the proposal, an effort so great that it generally does not occur absent citizen expertise or a well-financed opposition effort using retained experts, agents familiar with the issues, and commencing much earlier than the formal process.

Frequently, the true details of the permitted development and public concessions to the developer find their home not in relatively accessible plans and zoning statutes, but in a development contract between the project proponent and the permitting jurisdiction which may guarantee development rights over a period of time,[98] and define project elements, project phasing, and public financing. Such development agreements constitute a form of contract that has substantial advantages over regulation for both cities and developers.[99] Confronted with a concerted anti-tax movement and successful campaigns to otherwise limit government income, cities want development to finance and provide infrastructure that the government

98. *See, e.g.,* Mihaly, *Living in the Past, supra* note 81, at 40-41. *See also* MARY BETH CORRIGAN ET AL., TEN PRINCIPLES FOR SUCCESSFUL PUBLIC/PRIVATE PARTNERSHIPS 10 (2005).

99. Many states and local jurisdictions have enabling legislation providing for the use of such development agreements and defining their general contents. *See, e.g.,* CAL. GOV'T CODE §§ 65864-69.5 (West 2009).

traditionally provided.[100] City officials need a vehicle that allows them to define project elements with precision so they can condition rights to develop on developer contributions to public goals related to the project. Developers, in turn, also prefer such contracts because the long-term right to their development proposal renders it easier for them to raise and commit capital for large projects with substantial infrastructure.[101] Such contracts form part of the project documentation available to the public, but are so long and complex as to be inaccessible to anyone who has not been a party to their negotiation.[102]

This combination of increasing sophistication regarding the built environment along with reduced public participation becomes especially acute where the public weal itself is a protagonist in the land use effort. In the modern land use arena, many of the major land use changes in central cities result from public-private development efforts. Large scale new towns, the redevelopment of military bases, old airports, and large, decayed industrial areas present land use opportunities for cities as well as developers. Sometimes the permitting jurisdiction may own the land involved; in others the parcels are owned or controlled by a private party, but in either case the public ceases to be a passive regulator, and instead has its own goals it desires to accomplish through the development. Such motivating policies could include production of affordable housing, job creation, revitalization of deteriorated areas where the free market has failed to produce development, rehabilitation and use of historic

100. MIKE E. MILES, ET AL., REAL ESTATE DEVELOPMENT: PRINCIPLES AND PROCESS (4th ed. 2007); CORRIGAN, *supra* note 98, at 10-11.

101. *See* CAL. GOV'T CODE § 65864(a) (West 2009) (recognizing that lack of certainty in development approval stymies private investment).

102. Contracts frequently contemplate 20 year or longer effective terms, periods sometimes expressly keyed to the duration of project debt instruments. The documents themselves, frequently multi-volume, are drafted to guide the parties during project implementation and in the event of later disputes. They contain detailed recitals of obligations and the conditions thereto. While they may contain financial provisions relating to division of revenue from the project and the financial obligations of the parties, they rarely contain evidence of the economic models upon which the negotiations were based. They are utterly impenetrable to someone who does not have some other guide to the nature of the deal. *See, e.g.,* Mihaly, *Living in the Past, supra* note 81, at 40-41.

buildings or districts, creation of parks or recreational facilities, or preservation of sensitive environmental habitats.[103]

Cities, sometimes through their redevelopment agencies [104] or other public development entities, become partners in the development effort. Often they start by owning the land (as in a military base [105] or a now replaced in-city airport site [106]), or they use their capabilities to assemble small, undevelopable parcels, often the artifacts of land uses of prior eras, into land which can be re-subdivided and sold for modern land use. They may select private developers to undertake project planning or even the actual "vertical" development. Alternatively, if the land is privately owned, cities may play a key financing role, through property tax-based financing or grants. These arrangements operate such that cities become *de facto* or *de jure* partners in the effort.

Admirable efforts to enhance the efficiency of these public-private efforts have rendered them extremely complex. As the public and the private entities each identify what they do best, they tend to assign roles accordingly, and the casualty is the boundary between traditional public and private regimes. Streets may be designed by a city, built by a developer, and partly owned by each. Parks may be city designed, publicly financed, publicly regulated, but privately constructed and owned. Public land may be sold, then leased back, and even released again. These relationships usually cannot be contained in traditional

103. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 722 (2006).

104. *See, e.g.,* Saint Paul Minnesota, Housing and Redevelopment Authority (HRA), http://www.stpaul.gov/index.asp?nid=1268 (last visited Dec. 20, 2009).

105. *See generally* Base Realignment and Closures Act, 10 U.S.C. § 2687 (2006). For a more complete discussion on how the Base Realignment and Closures Act helps further local redevelopment on old military bases, *see* James A. Kushner, *Planning for Downsizing: A Comparison of the Economic Revitalization Initiatives in American Communities Facing Military Base Closure with the German Experience of Relocating the National Capital from Bonn to Berlin*, 33 URB. LAW. 119, 126 (2001) (discussing the shift from federal to local authority and stakeholders for redevelopment planning); Harrry M. Parent, Commentary, *BRAC to the Future; Managing Past Encroachment, Present Growth, and Future Land Use around Military Instillations*, 60 PLAN. & ENVTL. L. 3 (2008) (discussing local planning in association with population changes in communities due to recent military base closure).

106. *See, e.g.*, WANN, *supra* note 93, at 132 (examining redevelopment on the replaced Denver Stapleton Airport).

regulatory documents, and are instead embodied in a complex contract between a government and a team of developers. Such development agreements, purchase and sale agreements, disposition and development agreements and owner participation agreements (for redevelopment), or other contracts can take large teams several years or more to negotiate, with the result contained in multi-volume documents.[107]

These contracts are rarely negotiated in public. The resulting final draft agreements are presented *post hoc* to the public as part of the project approval documentation, but the public itself has no role during the long and arduous negotiation process. City managers do strive to summarize key issues on an ongoing basis, but those summaries are presented to councils as privileged documents and discussed in executive session. The public sees and can comment on the document only when the negotiation is complete and a draft contract emerges. Some cities have specific ordinances specifying this arrangement.[108] Many others rely on state legislation provisions that except negotiations for certain land purchases from notice and open meeting requirements. Reliance on such exemptions may be equally problematic since many such contracts either contain no sale and purchase, or such a transaction forms a small part of the overall panel of negotiated issues.[109] Many jurisdictions simply negotiate in private without any specific authority. In any case, the public plays no part. If a jurisdiction does allow public attendance and involvement, the negotiation tends to be a sham, and the true negotiation occurs in other ways.

Even after the contracts emerge for public review, it is extremely rare that anyone can penetrate the documents sufficiently to propose meaningful change. The contracts are simply too long and too complex; the text is designed to produce ultimate clarity in the event of a subsequent dispute on a specific

107. Even geographically limited infill development often involves substantial documentation. The transit oriented development at a station on the San Francisco Bay Area light rail system is six volumes long and includes many ancillary documents and over 100 exhibits. Telephone Interview with Leslie Browne (July 13, 2009) (on file with author).

108. *See, e.g.*, CITY OF PASADENA, CAL. ZONING CODE art. 6, ch. 17.66.040(g) (2005)**,** *available at* http://www.ci.pasadena.ca.us/zoning/P-6.html#17.66.

109. *See, e.g.*, Open Meetings Act—Exceptions, 5 ILL. COMP. STAT. 120/2(c)(5-6) (2008).

issue, not to tell the "story" of the underlying deal in a manner accessible to third parties. Councils themselves rarely understand the elements of the contract, and rely instead on a report by the city manager or similar official who in fact cannot fully comprehend the document either, and in turn relies on the conclusions of the jurisdiction's negotiating team. As any transactional attorney knows, it is next to impossible to penetrate a complex transactional document by reading its contents from one end to the other. Even an expert reviewer familiar with the transaction type could master such documents only through arduous work, and it is uneconomical to address a long document in that manner. Instead, such reviewers talk to the negotiators to get context and direction.[110]

It belabors the obvious to say that this process remains as a practical matter opaque to the general public. Lay participants cannot mount a serious inquiry into the merits of these arrangements absent sophisticated legal and economic advice, and even then the assistance would require accessibility to information and processes that are *de facto* not open to the general public or its representatives. In short, as land use becomes what many consider "better," that is more interrelated, more designed in recognition of the interdependency of the activities people undertake in their lives, the general public has less and less to say about the result. This is one of the decision types most resistant to citizen participation. Partnership with attorneys and experts, discussed later in more depth, will help, but only if the effort is commenced very early in the project planning process and sustained throughout the planning and regulatory process.

2. Other Environmental Areas Face Similar Trends Toward Solutions Negotiated by Stakeholders in Private without Meaningful Roles for the Lay Public.

This tendency towards complexity, negotiation and contract in lieu of legislation, and the concomitant reduction in meaningful involvement of the lay public, extends beyond land

110. I negotiated such documents throughout the 1990's. These issues are discussed in detail in, Mihaly, *Living in the Past, supra* note 81.

use to other areas of environmental effort. Stakeholder dominated processes, whether created *de jure* or otherwise, seem to be on the rise. Some are created pursuant to federal, state or local statute. Some arise from informal processes among potential claimants to a common resource. In either case, for the potential lay participant, the barriers to entry are almost always higher; the processes are less transparent and accessible than in traditional governmental decision-making.

These difficulties persist even where the process is sponsored by a governmental entity. For example, consider recent efforts to address growing competition for scarce water resources in the Western United States, a discussion driven by the competing needs of agriculture, growing population centers, and "in-stream" use of water to protect fish and their habitat, as well as current drought and apprehension over the near future effect of global warming on snow pack accumulation and temperature.[111]

For more than a century, water rights in the Western United States have been memorialized in complex water adjudications or water contracts between federal or state water projects and consumers.[112] Public involvement in these depended on the forum. The judiciary is transparent to the public, but operates without public participation, except those who achieve party or *amicus curiae* status. Water adjudications were open to the public and the press, but driven solely by the claimants and their attorneys. The water contracts were negotiated in private, but they were for the most part bi-party and fairly easy to comprehend, even if sometimes intricate in detail. Once negotiated, they were adopted by agencies through processes that, for the most part, were open to public comment or testimony.[113]

111. *See* Mark Lubell et al., *Watershed Partnerships and the Emergence of Collective Action Institutions*, 46 AM. J. OF POL. SCI. 148 (2002), *available at* http://www.des.ucdavis.edu/faculty/ lubell/Research/WatershedFinalText.pdf.

112. For a comprehensive history of water rights in the American West, *see* JOSEPH SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 280-316 (West, 3d ed. 2000) (origin year); ROBERT G. DUNBAR, FORGING NEW RIGHTS IN WESTERN WATERS (1983).

113. Bryan J. Wilson, *Westlands Water District and its Federal Water: A Case Study of Water District Politics*, 7 STAN. ENVTL. L.J. 187 (1987/1988) (describing the process by which a California District obtained contracts to purchase water). *See also* CAL. WATER CODE §§ 120-142 (West 2009).

That scenario has evolved as parties struggled with increasing demand for a scarce resource and new claimants came to the table. The application of public rulemaking to such processes became interminable. Water adjudication consumes decades. Parties have used litigation with such success that the stakeholders have mutually paralyzed each other, so no movement occurs as long as traditional fora are employed. In order to escape these encrusted public processes, the stakeholders increasingly turn to large-scale negotiations, usually memorialized by contract or that neutral and ambiguous term, "memoranda of understanding" (MOU).[114] Some of these agreements are public while others remain purely private.

The recent resolution of conflict among stakeholders concerning the water in the American River in northern California provides an example of such a negotiation and agreement.[115] The water in the American River, which flows from the Sierra Nevada into the Sacramento River at the City of Sacramento, has long been the subject of controversy prototypical of recent water disputes. Farmers use the water to irrigate their fertile fields. Without the water, they could not grow the agricultural produce now dominant in the Central Valley. At the same time, the City of Sacramento and other urban centers sharing the water experienced rapid growth. Increasing comprehension of the environmental needs of anadromous fish in the river caused regulators to divert water for in-stream purposes in support of the fish and their habitat. Appropriations have been marked by conflict among users and between those users and organized environmental groups.[116]

Legislation (and adjudication) typically provided the forum where such competing social and economic needs were resolved. In this case, however, the stakeholders elected to abandon the public arena and resolve competing needs to American River water through negotiation. It is unclear how much the parties

114. *See, e.g.*, The Sacramento Area Water Forum, Memorandum of Understanding for the Water Forum Agreement (2000), http://www.waterforum.org/PDF/SEC_1.PDF [hereinafter Memorandum of Understanding].

115. *See* Water Forum, The Agreements, Water Forum Agreement, http://www.waterforum.org/agreement.cfm (last visited Dec. 20, 2009).

116. Telephone Interview with Tom Gohring, Executive Dir. of the Water Forum, (June 30, 2009) (on file with author).

were motivated by fatigue with their battles in the public forum and how much they were attracted to the increasing use of sophisticated multi-party dispute resolution. Whatever the motivation, discussions among the stakeholders in this large and long-standing dispute began informally under the auspices of the City of Sacramento. The parties to the negotiation then formalized the effort as the Sacramento Area Water Forum, a completely voluntary negotiation among stakeholders who essentially convened themselves.[117] The effort slowly accreted funding, and a technical and legal staff was formed, lent by stakeholders in the discussions. The stakeholders convened negotiations on a more or less monthly basis, and subcommittees formed and met as well. The process continued for three years, and produced a draft MOU that allocated the American River water among all users.[118]

It is most significant that, although any individual or organization could determine to commit the resources and attend as a stakeholder, in no normal sense was the public a participant or even an observer. Individuals did not attend. Although no means existed to enforce privacy, the culture of the proceedings discouraged public participation. Meetings were not noticed, and they were frequently held at times and in locations not amenable to public participation. Public testimony was not affirmatively promoted by the participants, no specific provision for it was made, and with very limited exception, none in fact occurred.[119]

Once a draft MOU emerged, a public process began. Since the stakeholders included public entities and the federal government was an observer, MOU participants agreed to perform a joint environmental impact statement (EIS)/ environmental impact report (EIR) under NEPA and California

117. *See* Sarah Connick, *The Sacremento Area Water Forum: A Case Study,* (Univ. of Cal. Berkeley, Inst. of Urban and Reg'l Dev., Working Paper No. 2006-06, 2006), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1051&context=iurd*; see also* Water Forum, About the Water Forum, http://www.waterforum.org/about.cfm (last visited Dec. 20, 2009).

118. Memorandum of Understanding, s*upra* note 114.

119. Interview with Christy H. Taylor, former partner, Shute, Mihaly & Weinberger, in Montpelier, Vt. (Oct. 11, 2008) (on file with author) (Ms. Taylor represented the Water Forum, in California) [hereinafter Taylor Interview].

Environmental Quality Act (CEQA).[120] The extensive comments received originated almost entirely from the stakeholders and other organizational entities. The proposed final MOU adopted by the participants reflected responses to these commenters. Almost none of the comments, and none of the changes, originated from the general public.[121]

C. The Dynamics of Evolved Environmental Decision-making Frequently Favor Resolution by Small Groups Operating in Private.

Everyone who has negotiated a difficult contract or made a decision on a complex matter knows that conflict in these situations presents itself in layered, intricate ways, some not initially apparent. As negotiation peals back initial concerns, new issues emerge. These negotiations require solutions that weave a fabric of compromise on multiple points, usually taking enough effort to tax the patience and time of those involved. In such negotiations, parties develop assurance that they understand other parties' agenda, and may engage in problem solving at a level which harnesses the perspectives of each party in finding ways to meet the needs of the others. Sometimes the parties reach agreement only because an atmosphere of mutual trust evolves over time, allowing intuitive leaps and a focus on ultimate goals rather than initially perceived means.[122]

These processes favorable to solutions of complex problems cannot occur in a public setting. The slow pace and small group

120. *See* Water Forum, Environmental Impact Report (EIR), Draft E.I.R., http://www.waterforum.org/EIRdocs.cfm (last visited Dec. 20, 2009) (scroll down to view Draft E.I.R.); *Id.* (scroll down to view Final E.I.R.). *See also* Water Forum, Final Environmental Impact Report on the Water Forum Proposal, http://www.waterforum.org/EIRdocs.cfm (last visited Sept. 8, 2009).

121. Taylor Interview, s*upra* note 119.

122. *See* Jeffrey G. Miller & Thomas R. Colosi, *Understanding Negotiation and Effective Communication, in* ENVTL. LAW INST., FUNDAMENTALS OF NEGOTIATION: A GUIDE FOR ENVIRONMENTAL PROFESSIONALS 5 (1989) (discussing the ability of small group negotiations to foster trust); Philip Harter, *Experienced Practitioner Offers Guidance to Participants in Negotiated Rule Making*, 1991 FED. AGENCIES & ADR 173 (noting that "[s]everal participants [in stakeholder collaborative decision making] have said that the working relationships that were established during the negotiations gave them an understanding of the other side . . . Moreover, the negotiations usually significantly narrow the issues in controversy so the parties can focus on those that really separate them.").

size required makes public participation problematic. One can design small, highly structured negotiations where a larger group observes, as in large diplomatic negotiations, but in those situations, even the observers are usually stakeholder staff, and even then, the more delicate discussions move to completely private settings.[123] Any environmental practitioner involved in complex discussions will recognize this dynamic.

For example, I represented a homeowners association opposing a large development. Their homes lay at the end of a pastoral valley. Residents and visitors accessed their neighborhood by leaving the interstate, driving along a long and bucolic two-lane road through agricultural land, at last arriving at their residential community. The development proposed to replace the agricultural land with many hundreds of homes. The public process, approval of a general plan amendment and planned development permits, yielded no compromise; the approvals were forthcoming, and the community group commenced what would likely be prolonged litigation. Negotiations ensued and continued for months. The community representatives, the city and the developer's representatives formed a small working group, met frequently, came to understand each other's agendas, and developed a certain amount of trust.

The discussion required the community group to determine the true core of its position, redefining and refining what the existing homeowners really needed. They came to understand that it was, of course, not the development itself they opposed, but certain of the development's effects, in this case traffic, the destruction of their two-lane country road, and the loss of their open space "view-shed" in the lower valley. In response, the developer fashioned the solution in a complex series of landscaped setbacks, a landscaped boulevard, a limit on the length of the widened roadway, and a contractual guarantee that the road would not be widened in the future. The group retained a financial expert who evaluated the project. The expert determined that some of the proposed solutions were too expensive and others were in fact financially feasible.

This process required a small group and confidential discussions. For representatives of the community group, private

123. *See* Harter, *Negotiating Regulations, supra* note 61, at 84-85.

negotiations were necessary to force the painful and prolonged process of abandoning perceived grounds of opposition and substituting more narrow grounds that were amenable to solution. The three community members of the negotiating group became expert in the relevant planning and development issues, and developed positions which took time to sell to those members who were less involved. For long periods in the negotiation the attendees articulated ideas which would have dismayed others in their respective groups. The dynamics of such situations involve the eventual resolution of tensions between members of the community group who attend the negotiations, develop familiarity with the issues, and trust for the opposing party, and the slow education those members who have not been privy to the discussions.[124] This deliberative process would have been impossible in a larger group or an open forum.

For the developer in this case, the confidentiality of the setting and eventual familiarity with opposing parties, proved essential as well. Raising the options just mentioned posed substantial risks. What if the developer had proposed expensive landscape buffers, housing areas pulled back from the road, and future limits on development implied in the two-lane guarantee, only to find these proposals formed the floor of any public consideration of the development proposal, with no guarantee of settlement in return? Exploration of such options can only occur in private settings.

It may now fly in the face of accepted convention to suggest that a closed forum provides a superior setting for land use and environmental decision-making, but surely this flows from the situational practicalities, the nature of human beings, and is not new in the American experience. The United States Constitutional Convention was a closed negotiation. The public had ample opportunity to comment from pre-convention through ratification. The pre-convention public debate, usually in the form of publications, such as the *Federalist Papers* and responses

124. *See* CHRISTOPHER W. MOORE, MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 166-210 (1996) (discussing the trust and cooperation that is built during the process); David. A. Straus, *Managing Meetings to Build Consensus, in* CONSENSUS BUILDING HANDBOOK 287 (Lawrence Susskind, Sarah McKearnan & Jennifer Thomas-Larmer eds., 1999) (discussing how to build trust in negotiation meetings).

thereto, as well as the ratification debates made the Constitution one of the most public documents of its century. However, when it came to structuring the negotiation of the draft itself, the conveners chose a private session without public testimony or other citizen participation, and most observers believe the document would otherwise not have emerged.[125] Madison, Washington and the other designers of the session likely knew all too well the breath of issues to be addressed, and the need to reach agreement on all of them. They agreed that no one issue was deemed decided until all were determined and thus understood the correlative need for efficiency.[126] Finally, each of them had experienced the intensity of opinion surrounding the questions to be debated and knew that positions raised in open session would produce quick reactions and counter reactions that would in turn circle back on the delegates pressuring them to modify position before compromise could be fully explored.

These situational and subject-matter exigencies thus lead to small, closed fora as an option the participants view as superior to a more traditional public processes that at least nominally encouraged participation. The outcome may be superior, and for the lay participants involved, formative of civic virtue, but the process is private, and intrinsically closed to outside lay participants who are not stakeholders. Thus, only those citizen's involved in the negotiation participate in the decision, and they will likely need representation and expertise during the process, or their efforts will be as ineffectual as in other processes.

III. THE CASE OF THE NATIONAL ENVIRONMENTAL QUALITY ACT AND ITS STATE PROGENY: THE

125. *See, e.g.*, CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION (1986) (noting that the document and its key intrinsic compromises emerged during the convention itself, and that extended negotiation occurred with no opportunity for testimony or comment of the many drafts considered during that famous summer of 1787). *See also* CHRISTOPHER COLLIER & JAMES COLLIER, THE DECISION IN PHILADELPHIA: THE CONSTITUTIONAL CONVENTION OF 1787 83-84 (1987).

126. This is a fundamental tenet of negotiation and collaboration. *See* Harter, *Experienced Practitioner Offers Guidance to Participants in Negotiated Rule Making, supra* note 122, at 183 (observing that "[t]he quest of the enterprise . . . is to reach agreement on an entire package . . . Thus, no decisions are final until the end and everything remains tentative, subject to change.").

RISE OF EXPERTISE AND ITS USE AS A PARTNERSHIP WITH CITIZEN PARTICIPATION.

Nothing illustrates the contrasts between the participatory ideal and the realities of the participatory process better than the decision-making process of NEPA [127] and the state equivalents, the "little NEPA's", of which the CEQA [128] is one of the most articulated.[129] NEPA and CEQA also provide the context for discussion of the necessary combination of citizens and experts needed to navigate this contrast between ideal and real in ways that lead to effective public participation.

A. The Creation, at Least De Jure, of New Participatory Rights and Roles.

For environmental advocates, commentators, and in fact, for the courts, these statutes embody the participatory ideal.[130] Both NEPA and CEQA require that government decision-makers create and then use thorough reports to evaluate the environmental impact of projects or actions prior to approval.[131] Both popular and scholarly literature recognize NEPA and its progeny as revolutionary in many respects: the concept elevated the environment to the forefront of many governmental processes,

127. National Environmental Policy Review Act of 1969, 42 U.S.C. §§ 4321-4375 (2006).

128. California Environmental Quality Review Act, CAL. PUB. RES. CODE §21000 (West 2009).

129. As of 1995, sixteen states, the District of Columbia, and Puerto Rico have NEPA-like statutes. This article discusses the federal NEPA statute and utilizes the California statute CEQA as an example of a NEPA-like statute at the state level. *See generally* Joshua Yost, *NEPA's Progeny: State Environmental Policy Acts*, 3 ENVTL L. REP. 50090 (1973); Philip Weinberg, *A Powerful Mandate: NEPA and State Environmental Review Acts in the Courts*, 5 PACE ENVTL. L. REV. 1 (1987).

130. Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Law Adaptations From NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207 (1992) (citing Peter Borrelli, *Environmental Ethics—The Oxymoron of Our Time*, AMICUS J., Summer 1989, at 39, 41 (book review) (describing NEPA as the environmental "Ten Commandments" and "the environmental bill of rights...")); *see also* EVA H. HANKS & JOHN L. HANKS, *An Environmental Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970).

131. 42 U.S.C § 4322(c) (2006); CAL. PUB. RES. CODE § 21080 (West 2009).

and the applicable statutes mandate integrated reviews that cut across disciplines and bureaucratic boundaries.[132]

1. The Transfer of Information to Lay Participants.

The applicable statutes, regulations, guidelines and abundant case law set forth in detail the structure and content of these environmental reports, the EIS in the case of NEPA and the EIR under CEQA. These environmental documents must address all potentially significant environmental impacts of the proposal[133] and a reasonable range of feasible alternatives, including the alternative of no project at all.[134] Impacts analyzed include those where the impact of the subject project may be small, but together with similar projects, may be cumulatively significant.[135] The analyses must include measures that could mitigate environmental impact, whether the agency charged with the report has the power to implement them or not.[136] For substantial projects, multi-volume reports may run to thousands of pages.[137] This sort of integrated, public environ-mental analyses had never occurred prior to NEPA, a much-discussed sea change in the history of the environmental movement, and a concept emulated in other countries.[138]

To be sure, prior to NEPA, the Administrative Procedure Act (APA) and other federal and state statutes contained processes by

132. *See, e.g.*, Harvey Black, *Imperfect Protection: NEPA at 35*, 112 ENVTL. HEALTH PERSPECTIVES 292 (2004) (describing NEPA's revolutionary beginnings and evolution).

133. *See* Hanley v. Mitchell, 460 F.2d 640 (2d Cir. 1972).

134. *See* Nat'l. Res. Defense Council v. Morton, 458 F.2d 827, 838 (D.C. Cir. 1972).

135. *See* 40 C.F.R. § 1508.7 (2009) (defining "cumulative impact"); *see also* U.S. ENVTL. PROTECTION AGENCY, OFFICE OF FED. ACTIVITIES, CONSIDERATION OF CUMULATIVE IMPACTS IN EPA REVIEW OF NEPA DOCUMENTS (1999), http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf.

136. *See Morton*, 458 F.2d at 834.

137. *See, e.g.,* Federal Energy Regulatory Commission (FERC), Environmental Impact Statements (EISs), http://www.ferc.gov/industries/lng/enviro/eis/2008/01-11-08-eis.asp (last visited Dec. 20, 2009) (a recent final Environmental Impact Statement for a liquefied natural gas terminal exceeding 2000 pages).

138. *See* Black, *supra* note 132, at A293 (noting that "more than 100 other countries have adopted NEPA-like statutes"); MICHAEL MASON, ENVIRONMENTAL DEMOCRACY 79-83 (1999) (discussing integrated approach of the Canadian Environmental Protection Act (CEPA) and the Netherlands Environmental Policy Plan (NEPP)).

which government published proposals and took public comments, and had some basic responsibility to acknowledge and respond (and still do),[139] but the NEPA process represented both a quantitative and qualitative departure from these rulemaking and similar endeavors. NEPA and its progeny opened up an entire range of governmental decisions that had never been subject to public participation, requiring that environmental reports accompany a broad array of decision-making types, not just rulemaking and administrative adjudication.[140] Also, more than rulemaking, the environmental report represents a substantial transfer of information from government to the general public.[141] Rulemaking begins with the publication of a proposed rule,[142] and while usually (but not necessarily) accompanied by an agency narrative explanation or annotation,[143] the effort contains nothing like the level of detail in the EIS. The EIS or EIR essentially turns over to the public the relevant body of environmental expert thought on the project. This includes extensive recitation of the basic scientific information, explanation of methodologies, source references, and appended source documents.[144] If a project would cause impacts on air quality, for example, the report must model the impacts, detail the results with appropriate diagrams, charts, isopleths or tables of pollutant concentration, *and*, most significantly, introduce the reader to the modeling, and frequently, append data in detail (though rarely—and importantly—the model itself).[145]

139. 5 U.S.C. § 552(a)(4)(A)(i) (2006).

140. NEPA requires to Federal agencies to compile an environmental report for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (2006). Pursuant to a foundational opinion of the California Supreme Court, CEQA applies to governmental approvals of private projects. *See* Friends of Mammoth v. Bd. of Supervisors of Mono County, 502 P.2d 1049 (Cal. 1972).

141. *See* Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1119 n.21 (D.C. Cir. 1971) (Justice Skelly Wright's early judicial treatise on the contours of NEPA highlights the important purposes of the EIS, including transfer of information to the general public).

142. 5 U.S.C. § 553(b) (2006).

143. 5 U.S.C. § 553(c) (2006).

144. 40 C.F.R. §§ 1502.3-1502.18 (2009).

145. 42 U.S.C. §4332 (2006); CAL. PUB. RES. CODE §21157(b) (West 2009); *see also* Envtl. Defense Fund v. Hardin, 325 F.Supp. 1401, 1403-04 (D.C. Cir. 1971).

2. The Financial Subsidy of Citizen Participants.

As any project proponent will readily attest, these documents constitute a significant project expense, and for large projects, the effort runs well into the seven figures.[146] While much of that may go to the writing and production of the document, the majority of the expense represents the effort of numerous experts, either on agency staff or consultants retained to evaluate the project. EIS or EIR preparation teams typically may include experts who specialize in air quality, water quality, transportation analysis, specific flora and fauna impacts, archeological resources, design, and wind and shadow analyses, and other disciplines as required.[147] These consultants charge professional rates, but the charge is born by the sponsoring governmental or private entity, not the readers.[148] Thus, NEPA and little NEPAs worked a true revolution in participation. For the first time, government (and in the case of CEQA, the private sector through government) was required to transfer the fruits of their expertise to the public *at no cost*. The impact of this subsidy cannot be overstated since the cost of acquiring the information would be prohibitive to most lay participants.

146. *See, e.g.,* FREQUENTLY ASKED QUESTIONS ON THE STATEWIDE LARGE-CAPACITY FERRY ENVTL. IMPACT STATEMENT 4 (2008) (questioning "[h]ow much does the EIS cost . . . ? The contract for the preparation of the EIS is $1.3 million"); U.S. Army Corps of Engineers, PEIS for Oyster Restoration in Chesapeake Bay Including the use of Native and/or Nonnative Oyster, http://www.nao.usace.army. mil/OysterEIS/ (last visited Dec. 20, 2009) (noting that "[t]he preparation of the environmental impact statement . . . [will have] an estimated cost of $4,000,000.").

147. Robert Eli Rosen, *Complicating Law's Legitimation Processes*, 25 LAW & SOC. INQUIRY 973, 978 (2000) (explaining how the Bureau of Reclamation hired planners, biologists, and social scientists to better handle NEPA procedures); Eric Biber, *Too Many Things to do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 37 (2009) (finding that "the requirement that agencies conduct NEPA analyses may force the agency to hire staff who are expert at producing those analyses. Those staff are likely to be professionally trained in fields such as biology, toxicology, public health, pollution control, and other areas.").

148. Steven Ferrey, *Gate Keeping Global Warming: The International Role of Environmental Assessments and Regulation in Controlling Choices for Future Power Development*, 19 FORDHAM ENVTL. L. REV. 101, 139 (2009) (noting that "[t]he federal government pays the EIS preparation costs for all government-sponsored projects, and for most other projects the agency shifts responsibility and financial obligations for the Environmental Assessment to the private project sponsor.").

3. The Role of Commentor.

NEPA also created a public role that went beyond receipt of information; it created a new participatory role for the public, that of commentor. While the APA evolved to include an analogous comment and response component,[149] NEPA and its progeny have created new formalized commentor rights. NEPA and little NEPAs require agencies to prepare these documents in draft form.[150] The public then has time, though usually not enough time, to respond to the EIS or EIR in the form of written or oral (and then transcribed) comment, and then, in yet another revolutionary requirement, both the federal and state versions mandate a detailed response to the comments.[151] If someone suggests a new impact, the documents must confront their point. Under CEQA, if a commentor proposes a different alternative or mitigation measure, the final report must either take on the analysis of the proposal or explain why it is statutorily unnecessary.[152]

If in the modern world, information is power, then NEPA has empowered the general public, creating the potential for new and sophisticated forms of public participation. Most citizens, organized or not, lack the means to create the information in an EIS. They rarely have access to the elements of the project definition necessary to carry out sophisticated analysis of its impact or develop alternatives. NEPA requires that the EIS describe the program or project in detail.[153] Citizens could in concept retain a cadre of experts to analyze the environmental impacts of a program or project, but it is unlikely that alone, or in *ad hoc* or small groups, they could pay the cost of generating the information. NEPA and its progeny give them the information without cost. Even if citizens submitted the analysis in the form of testimony, most processes would allow a reluctant agency to receive the information and ignore its content. NEPA forces a response (although as discussed *infra* not necessarily a change in

149. 5 U.S.C.§§ 553(b)-553(c) (2006).

150. 40 C.F.R. § 1502.9(a) (2009); CAL. PUB. RES. CODE §21091 (West 2009).

151. 40 C.F.R. § 1502.9(b) (2009); 40 C.F.R. §§ 1503.1–1503.4 (2009); CAL. CODE REGS. tit. 14, § 15088 (2009).

152. CAL. CODE REGS. tit. 14, § 15088(c) (2009).

153. 42 U.S.C. § 4332(c) (2006); 40 C.F.R. § 1502.11 (2009).

result). In sum, no American statutory system transfers so much information to the public. No other statute mandates an informed dialogue between citizenry and government. The central issue is how to empower citizens to make effective use of the information provided.

B. The Reality of NEPA: The Creation of a New Class of Environmental Professional and the Rise of Expertise.

Despite this *de jure* empowerment, NEPA and the little NEPA's have operated to create a new forum for expertise more than empower the general public, and in the process these statutes have given rise to a new class of professionals.[154] This is where NEPA has worked its most profound change, an outcome that may appear paradoxical if viewed in light of NEPA's focus on public participation, but is in fact most predictable in light of the need for expertise in environmental decision-making.

NEPA has created a new role for environmental consultants, both attorneys and other experts, and it is they who participate in the process, and they who "consume" the participation rights. The preparation of the environmental documents themselves requires expert consultants. Agencies that typically undertake projects that may affect the environment have developed NEPA or CEQA compliance departments with specialists in the relevant disciplines, writers, editors, and production staff.[155] In those states, such as California, where little NEPA's apply not only to governmental projects, but to private projects subject to a governmental discretionary permit, major project proponents either have such staffs dedicated to environmental document production or, more typically, supplement their internal capabilities with a retained consulting firm. For many such consulting or engineer-

154. *See* Josh Ashenmiller, Paper Presentation at the annual Law and Society Ass'n meeting: Apres NEPA, Le Deluge: Citizen Suits and the Reported Demise of the Interests (May 27, 2004) (describing the rise of public-interest firms as an unintended consequence of NEPA).

155. *See, e.g.*, U.S. DEP'T OF ENERGY, ORDER 451.1B, NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE PROGRAM, (2000), *available at* http://www.gc.energy.gov/NEPA/nepa_documents/TOOLS/ORDERS/o4511b.html (ordering, inter alia, the creation of a system of DOE NEPA compliance officers).

ing firms, preparation of environmental documents constitutes a major or even the sole source of their work. These firms in turn sub-contract with a legion of environmental specialists.

NEPA and its progeny increase the funds flowing to environmental specialties, and may be the reason that many of these sub-contractors exist. The substantive design of programs or projects might employ some of these specialists, but the environmental documents create a substantial new market for their services that may exceed the market for experts who design the project itself. The actual construction of a road, for example, would likely require one-time employment of a single traffic consultant by the sponsoring government or contractor. Many different development projects will generate vehicle trips that use that road, however, and in jurisdictions which require an environmental document for such private projects, each environmental analysis must determine project contribution to the road in a separate environmental document based on the work of a consultant team created for that project. Design of a multi-story commercial building requires an architectural firm, but its accompanying environmental document may require employ of traffic consultants who prepare cumulative scenarios addressing the transportation impact of the subject project together with all similar projects.

Even where project proponents or programming agencies in environmentally sensitive jurisdictions would employ such expertise in program or project design itself, as opposed to in the environmental document, the original impetus came from the need to render the project attractive in light of the requirements of NEPA or CEQA. CEQA, for example, requires that project approvals include adoption of mitigation monitoring plan that identifies all feasible mitigation measures, and determines where in the approval and operational life of the project such mitigation will apply.[156] Environmental consultants working for the EIR preparer develop the mitigation measures, and more consultants working on the project itself incorporate the measures into the project.

This demand for consultants works its way backward into the professional schools which respond by producing more planners,

156. CAL. PUB. RES. CODE § 21081.6 (West 2009).

wildlife biologists, traffic engineers, hydrologists and environmental studies graduates than they otherwise would.[157] The faculties from these schools teach in response to the demand, offering courses to prepare students for a career connected with these documents. The class of professionals who produce these documents self-identify as environmental consultants and organize themselves into trade organizations such as the Association of Environmental Professionals.[158] They offer seminars and conferences to their members, all addressing the issues surrounding environmental analysis, the preparation of environmental documents, and surviving the public comment process and rigors of forensic work in the possible ensuing litigation.[159] This professional sub-class, almost non-existent before NEPA, now extends to those who work on projects in environmentally conscious jurisdictions *without* an environmental impact-reporting requirement. These jurisdictions require a similar substantive project analysis,[160] often designed by professionals produced by curricula in turn created by the environmental reporting requirement. These planners, engineers, and other professionals consciously mimic the substantive provisions of NEPA that require environmental analysis and the integration of mitigation measures into project design.

NEPA also created roles for another key group of consultants: attorneys. Attorneys attacked or defended EIS and EIR documents on legal grounds, beginning shortly after NEPA and CEQA were enacted. These cases, usually brought in

157. The National Association of Environmental Professionals offers itself in part as "a resource for structured career development from student memberships to certification as an environmental professional." National Association of Environmental Professionals, http://www.NAEP.org/ (last visited Dec. 20, 2009).

158. *Id.*

159. *Id.* (advertising its annual conference and a NEPA working group for its members).

160. This is the case, for example, in Austin, Texas, where no state little NEPA exists, but "preserving the environment is as natural as breathing." Austin-Bergstrom International Airport, http://www.ci.austin.tx.us/austinairport/projsumnr.htm (last visited Dec. 20, 2009). "City codes require that site plan applications be reviewed for land use . . . environmental and safety considerations" despite the lack of a Texas NEPA equivalent. Austin City Connection, http://www.ci.austin.tx.us/development/spinfo1.htm (last visited Dec. 20, 2009).

summary proceedings on the basis of violation of statute or implementing guideline or regulation, focused on establishing the basic outlines of the judicial interpretation of the federal or state statute.[161] The case law and legal literature today is rich indeed, addressing in multiple opinions issues such as the legally adequate discussion of environmental impacts,[162] and the nature of the burden of establishing environmental significance.[163] Appellate laws addresses how decision-makers and reviewing courts act in the face of conflicting substantial evidence on the issue of environmental significance,[164] what constitutes "environmental"[165] or a "significant environmental effect,"[166] whether the statutory reporting obligation applies to government projects alone or to approvals of private projects,[167] and what is the definition of a "cumulative impact."[168]

161. *See, e.g.,* Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971); Envtl. Defense Fund v. Tenn. Valley Auth., 468 F.2d 1164 (6th Cir. 1972).

162. San Joaquin Raptor/Wildlife Rescue Ctr. v. Regents of the Univ. of Cal., No. F041622, 2003 WL 21457054 (Cal. Ct. App. June 24, 2003) (holding that the EIR was legally adequate because it sufficiently identified, assessed, and mitigated the project's impacts); Laurel Heights Improvement Ass'n of San Francisco v. Regents of the Univ. of Cal., 764 P.2d 278 (Cal. 1988). (holding an EIR to be insufficient due to its failure to adequately consider alternatives).

163. 40 C.F.R. § 1508.27 (2009); Dinah Bear, *NEPA at 19: A Primer on an "Old" Law with Solutions to New Problems*, 19 ENVTL. REP. 10060, 10064 (1989),*available at* http://www.nepa.gov/nepa/regs/iii-11.pdf (explaining how courts have refrained from clearly defining "environmental significance" and have rather chosen to decide the issue on a case-by-case basis).

164. *See* Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972) (holding that EIS should be prepared where there is a substantial dispute as to the size, nature, or affect of a major federal action).

165. *See id.* at 827 (holding that environmental effects that are potentially significant include noise, traffic, overburdened mass transportation systems, crime, congestion and availability of drugs).

166. *See* Hiram Clarke Civic Club v. Lynn, 476 F.2d 421 (5th Cir. 1973) (finding that "significant environmental effects" include *all* potential environmental effects, not only adverse ones).

167. Silva v. Romney, 473 F.2d 287 (5th Cir. 1973) (holding that a private activity requires and EIS where a significant nexus exists between a federal agency and a private entity); Found. on Econ. Trends v. Heckler, 756 F.2d 143 (D.C. Cir. 1985) (holding that a private party can be enjoined where its action could not lawfully take place without federal agency approval).

168. *See* Fritiofson v. Alexander, 772 F.2d 1225, 1241 n.10 (5th Cir. 1985) (noting that "[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be

But NEPA created new roles for attorneys as well. As early as 1980, agencies hired my firm and others to "design" environmental review and to insure that environmental documents complied with the statute and evolving case law. Project proponents hired private environmental counsel to participate in project design with an eye towards the environmental review process, to participate in the earliest stages of environmental document design, to work with public agencies and consultants to the extent permitted by law, to file comments on their own document if appropriate, to propose findings if required, and finally to participate in defense of the document if challenged in court.[169]

Project proponents, permitting authorities, sponsoring governments, and major intervenors constitute the clients for these attorneys and experts. They make sophisticated use of the opportunities for scoping, formulation of new proposed alternatives to the project, and elaborate comment to bolster the direction they desire for the underlying project.

C. Process Substitutes for Reality: The Use of NEPA to Create Sham Participation.

It is not as if citizen participants are absent. Lay participants also write comments, submit them orally and in writing, and see written responses to their comments in the final document. However, a class of professionals has emerged to facilitate and to contain this unassisted citizen participation.[170] A subset of communications or public relations consultants now

evaluated together." (citing Piedmont Heights Civic Club v. Moreland, 637 F.2d 430, 439 (5th Cir. 1981))); 40 C.F.R. §1508.7 (1978) (defining "cumulative impact").

169. I worked throughout the 1980's and 1990's with and opposite developers' counsel on these processes for California projects. Provisions of CEQA kept counsel for project-proponents at arms length during the preparation of an EIR (usually paid for by their clients) to protect the objectivity of the analysis. In fact, project proponents influence the documents by making their views known during scoping and, if necessary, by offering formal comments. Once the project is approved, agencies frequently seek project proponents' advice during preparation of required findings, and may allow or require counsel for the project's sponsor to take the lead in litigation defense and bear most of the cost of the litigation.

170. *See* Ashenmiller, *supra* note 154.

specialize in providing decision-makers or project proponents with tools to create public participation programs. A public university for example, may retain such consultants. A city formally reviewing consultant teams to develop a complex project on city land may look favorably on a development proposal that includes a public participation communication consultant who will coordinate the public participation effort. A project proponent may hire public relations experts to assist in their private efforts to achieve public acceptance for the project.[171] These consultants use various means to compile lists of interested parties among the public including adjoining property owners. They arrange the logistics for community meetings, facilitate agency workshops, and even provide support to public hearings. They also prepare project newsletters and other mailings for the public.[172]

Such activities can occasionally have positive effects that enhance public participation. I have seen such consultants convince their clients of the depth of public opposition or the seriousness of a particular public concern. But, more frequently, the decision-maker has no belief that these workshops or hearings will alter the nature of the project. Their expectation, conscious or unconscious, anticipates a bifurcated input consisting of the real staff and expert testimony which will inform the decision, and the testimony of the general public which is something to be contained in a consultant-organized process consistent with legal requirements, and then lived through. Agencies expressly or impliedly instruct the communications consultant to insure that no one can contend he or she was not consulted, to insure that the appearance is one of exhaustive consultation and hearing, and to comply with every legal requirement.

In many cases, the project proponent may hope (and in some cases may issue instructions such that) the consultant will identify nodes of opposition, and neutralize them by identifying

171. As counsel for citizen groups, I dealt frequently with such contractors. For cities engaging in the regulatory function of project review, I reviewed proposals containing such subcontractors, and in cases where I represented governmental entities as a project proponent, I worked as part of a team including such contractors.

172. *Id.*

wedge issues that divide the opposition effort or minor concessions that make it difficult to continue effective advocacy concerning the project. Some complex stakeholder negotiations include a similar "public participation element," but these efforts, with their email lists, list serves, newsletters, parallel public forums with choreographed breakout groups, have the same effect as such participatory programs in purely public processes; they almost never produce effect on the main course of the negotiation. The public is being processed, nothing more.

Without so intending, and indeed usually intending vigorously the opposite, environmental impact report consulting firms frequently perform a form of the same sort of packaging to participation. They facilitate and run early "scoping meetings," required by NEPA,[173] where community members are asked to provide their view of the environmental concerns that should be addressed in the draft EIS. They attend the hearings where public testimony on the document is recorded, and they collate by subject matter both the written and oral public comment.

While these activities perform a useful function for the sophisticated participant,[174] for the unassisted lay participant they usually provide the appearance of participation without the substance. Many of the NEPA/CEQA functions can be used to neutralize participation. In my experience, professional EIR/EIS preparers possess strong environmental sentiments, believe projects should be designed to mitigate environmental impacts, and are devoted to the objectivity of their craft. However, they operate in an environment where the likelihood of eventual litigation shapes almost all stages of their work, and where both the entity that pays them (the project sponsor) and that directs them (the regulating entity), sometimes one in the same, are strong proponents of the underlying endeavor. Thus, consultants in many cases write carefully worded responses to public comments to provide the legally necessary information without answering the underlying concern expressed.[175] Depending on

173. 40 C.F.R. § 1501.7 (2009).

174. *See infra* Part IV.

175. From the start of the process, the litigation-induced environment operates to make consultants behave as if they were attorneys (and sometimes induce attorneys to become professional consultants). This combines with the scientific drive for precision to make the language in the environmental

their objectivity versus responsiveness to the project proponent, consultants may respond to express or implied instructions to draft, or agencies themselves may draft documents to avoid, to the extent feasible, supplying project or program opponents with real information, which could lead to the revelation of new impacts or to realistic proposals to alter the project.[176]

The location of EIS/EIR administrative responsibilities within decision-making agencies reveals something about the value given the public input. Most large agencies have separate internal divisions that deal with environmental impact analysis and manage the necessary consultant contracts.[177] Public communications efforts are frequently managed by ombudsmen or similar offices within agencies.[178] There exist arguable bureaucratic reasons for such specialization, but, while these sub-entities may themselves become enclaves of environmental sentiment and proponents of public involvement, through their bureaucratic separateness they serve the purpose of isolating the actual decision-makers in the agency from the process of environmental analysis and public input. Generally, the more managed the process, the less it matters to the ultimate decision, which arguably in some cases, is the goal of the agency decision-makers.

In this environment, citizen testimony exists without effect, and neither constitutes a successful element of democracy nor

document, the response to comments, as conservative as possible, often making the document less comprehensible if more precise.

176. Capable project counsel realize there are limits to these efforts if one is to survive legal challenge, but devices for avoiding clear discussion of environmental negatives are legion. Simply encouraging the desire of a traffic consultant to be as precise as possible by qualifying her conclusions, for example, may make the results invisible to a lay person's review. The most significant of these options relates to the design of project alternatives to avoid discussion of practical and environmentally superior options, and thus renders the proposed project as attractive as possible. *See infra* Part IV.A.

177. For example, the City and County of San Francisco has an Office of Environmental Review. While the director of this office reports to the Planning Director, all environmental review is carried out via a separate bureaucracy. Environmental reviews of energy proposals are carried out within a separate office of the California Public Utilities Commission. *See* ORDER 451.1B, *supra* note 155.

178. *See* Coalition of Federal Ombudsmen, Historical Perspective, http://ombudsman.ed.gov/federalombuds/history.html (last visited Dec. 20, 2009) (discussing the growth of the office and its role within federal agencies).

serves the purpose of legitimization. Citizen activists may lack subject matter expertise, but they tend to have substantial, political expertise, and they know when they are being managed. I have seen citizens plead with an impassive commissioner, assigned to the unpleasant task of sitting with apparent interest through an early public hearing associated with the power line proceeding before the California Public Utilities Commission discussed *infra*. One individual urged "please tell us that you haven't made up your mind already." The official, who in my view, had no intention of voting against the line in any case, and thus *had* made up his mind, promised that he had not prejudged the case. I do not believe the audience believed him.[179]

This sort of participation is corrosive, not conducive, to our polity and our democracy. Advocates of participation contend that public involvement is not just an instrument of legitimization of government, but is an end in itself, a desirable element of democracy.[180] This proposition suggests that the inverse is true as well: if real participation is an intrinsic social positive, a manifestation of democracy, then unreal participation is a social negative and the manifestation of something other than democracy. The impotency of unassisted lay testimony not only fails the promise of democracy, but also actively erodes the Civic Republican ideals. Citizens who organize, come together, participate, and fail to effect results do not develop a sense of empowerment or new group identity.

IV. USING EXPERTS TO ASSIST CITIZEN PARTICIPATION.

As discussed *supra*, public participation without expert assistance in the process of environmental decision-making gives an appearance of participation without substance. As Professor Harder says, in such situations "participation is not participation,

179. Conversations with my clients, one of whom uttered the quoted question, indicated deep cynicism about the statement. At the end of the formal administrative proceeding on the power line itself, the assigned administrative law judge ruled against the line. The assigned Commissioner who had made the above quoted statement voted against the project until he determined it would pass in any event and then changed his vote.

180. Fiorno, *supra* note 38, at 239.

but is merely an opportunity to transmit views."[181] Members of the public miss statutory or regulatory deadlines and fail to exhaust their legal remedies sufficiently to meet standing requirements. Their comments do not compete on a technical level with the input of stakeholder and staff, proponents, and organized stakeholders. The process of environmental review serves primarily as a *post hoc* rationalization for a previously determined project design or rule formulation, and participation consultants or staff integration of the unassisted lay citizen into a process designed to give the appearance of participation without effect on the decision-makers. Sophisticated representation and use of experts can change this trajectory. A thoughtful partnership of citizens and experts can move the participatory effort from a mere expression of position to an effective force, one that reverses unstated agreements among project proponents and the agency, and brings citizens to the bargaining table with some significant power to exercise.

Presentations to government are undertaken for a variety of purposes, sometimes articulated and sometimes not. Frequently, the goal is in fact the transmission of the information in the testimony. The presentation may also be part of a complex advocacy effort which goes beyond the communication of substantive position. Possible goals include placing political pressure on a swing vote, creating the foundation for political change in the make-up of the subject decision-making body, or simple delay, especially if the underlying endeavor involves time-sensitive financing arrangements. Regardless of the motive, the potential effectiveness is qualitatively changed for the better by use of substantive experts, both because of the information produced and for the impression created by the expert presence *per se.* Agents familiar with the forum add to this partnership; they provide strategic assistance, organizational advice, and may coordinate elements of the participation. These are usually attorneys, but may be other types of professional advocates.

The following section illustrates the nature of such a partnership using the NEPA process as an example. As discussed *infra,* NEPA, as evolved, poses formidable barriers to truly

181. Professor Harder, Presentation for Vt. Law Sch. in Montpelier, Vt. (June 5, 2009).

effective citizen participation, but if used in conjunction with partnership of citizens, agents, and experts, the same statutes can also create citizen power. This illustration is followed by a more general discussion of the nature of such a partnership, and questions of funding.

A. NEPA Redux: Effective Citizen Participation EIS/EIR Process by Use of Expertise.

One must start with the hard reality that in the usual case today few parties participate in the environmental review process simply in order to produce environmental information. In the case of physical projects, proponents use it to produce political and legal justification of the project design. Opponents hope to use the process of environmental review to alter or stop approval of the project, to catalyze political opposition and sway a swing vote, or simply to create delay in the hope that political efforts or time will allow the situation to re-coalesce in a pattern more favorable to the advocates. Where environmental review is conducted in connection with planning, formulation of policy or rules, again stakeholders want to use the documents to influence the outcome directly or politically. In any case, all parties view the document through the lens of potential litigation, either defensively if they prevail in the proceeding or offensively if they should not. It is the rare citizen who possesses genuine, neutral curiosity regarding the environmental impacts of a project, and only the very occasional project proponents who anticipate the likelihood that newly revealed information could cause them to alter the subject project.

Nor is the environmental documentation the usual source for environmental information used to design the subject project or animate the subject planning or policy determination. Two or three decades ago, agencies and project developers frequently lacked the internal environmental capacity to incorporate appropriate environmental features or mitigation measures into the project or policy design, and thus relied, or were, in the eventuality forced to rely to some extent on the information produced in the EIS or EIR. Today that is rare; proponents know at the start the likely array of environmental mitigation or alternations. Well before the draft EIS or EIR is produced, proponents, private or public, possess or separately retain the

expertise necessary to anticipate almost all likely environmental issues, and make the trade-offs among environmental issues, capital and operating cost based on internal, technical and political calculus. The project, including its environmental components or lack of them, is "baked" separately from and usually in advance of the environmental review process.

In my own practice and in consultation with other counsel involved in document "design," I found that this separation of functions flows from the logistics of project review as much as any anti-environmental animus. Even for those project or policy proponents motivated in significant part by concern for the environment, the nature and timing of the environmental review process make it dauntingly difficult to utilize the effort for the very purposes the law intends—to encourage iteration and adoptions of environmentally superior alternatives and incorporate environmental mitigation measures into design. The project and environmental review schedules conflict, and the personnel involved in the two efforts are different. Private projects are designed prior to commencing the public review process. The developer needs internal staff and consultants loyal to it, and privy to considerations which will never become public. Public projects, whether concrete public development projects or processes such as a new set of regulations for a federal agency or a new land use plan for a city, involve teams of staff or outside experts assembled early and frequently consulted for strategic purposes.

Environmental review, by contrast, is undertaken by separate staff dedicated to that purpose, or by consulting EIS or EIR consultants that specialize in the preparation of such documents. Regulations or practice strive to separate the environmental document production from undue influence by the project proponent, if private. Thus, while it may be theoretically desirable that the two groups overlap, trust each other, or produce information in a format or on a schedule that would allow the preparation of the environmental document to inform the design of the project, it does not occur. The environmental review processes, attendant public disclosure requirements, and the culture of environmental review staffs make the review process public and permeable, discouraging early or frank

exchange of information between project and environmental review teams.

Thus, participation must begin and end with the understanding that the intent is to *use* the environmental review process to open up a closed and largely completed process, not simply to await its revelatory outcome. Some citizen participants posses such a frank and instrumental understanding from the start; they know that they desire to stop or alter a project they consider environmentally unacceptable in its current form, or to delay the project pending a possible political shift. Many citizens however, commence the process with a faith that revelation of adverse environmental information in the document will achieve their purpose. The first role for expertise, whether attorney, planner or other individuals with prior experience, involves disabusing such participants of the value or raw information. Agencies and project proponents usually know how to prepare documents that, while legally adequate, present adverse information in ways that support rather than derail the project's public trajectory, whether by the manner in which the information is presented, by clever incorporation of the information into mitigation measures which will delay confrontation with the more difficult questions, or by mis-designed alternatives to the project. Thus, true change to the course set by project proponents requires strategic use of the process rather than participation in it.

Such a successful NEPA citizen effort requires the collaboration of experts and attorneys. The experts must have excellent credentials, and likely have participated in the EIS or EIR process before. The attorney or other agent must understand the nuances of underlying environmental process. A successful use of the NEPA process to alter the course of a project, to comment *with effect,* requires, as in most complex efforts, those who have been there before.

In the early scoping process, for example, agencies (or project proponents acting through the agencies) structure the required "alternatives to the project" for analysis in the full document.[182] Agencies, simply though the pursuit of administrative

182. 40 C.F.R. §1508.25(b) (2009); 40 C.F.R. §1502.14 (2009); CAL. CODE REGS. tit. 14, § 15126.6 (2009).

commitment to what staff perceives as the best project, will frequently create alternatives that show the project as proposed in its best light. Environmentally superior alternatives can be made unnecessarily extreme, financially unrealistic, or designed to bundle environmentally superior elements with environmentally or socially undesirable elements. In complex endeavors, containing dozens or even hundreds of potential elements, alternatives for consideration must consist of groupings of sub-options. These bundles can be "designed" to advantage one approach over another. Environmental review of energy supply options, for example, might disadvantage wind by bundling it with solar which is similarly intermittent and more expensive rather than natural gas, and might create an unrealistic transmission scenario. An early opposition effort involves pointing out the tactic, and structuring and proposing other environmentally superior alternatives that may be more realistic.

The successful "invention" and advocacy of an alternative, one that may be quite unwelcome to agency staff or existing stakeholders, must be so convincing that the agency or proponent's counsel will advise that a conservative litigation prevention strategy requires inclusion of the alternative in the environmental document. Iteration and advocacy of such an "alternative" strategy involves prior analysis of impacts to ensure the alternative indeed has fewer impacts, no fatal non-environmental impacts and can meet the underlying project objective. The analysis typically requires consultants to create a true alternative vision for the proposed project and to demonstrate its superiority and financial feasibility. An alternative to a land use plan, for example, would involve land use planners, traffic engineers, and development economists. Essentially, the effort assembles a parallel staff for the citizen led position. The alternative can be presented during scoping or as a comment on the draft EIS or draft EIR.

During the time the agency (or its consultants) is preparing the draft document, the community advocates or environmental group, assisted by its attorney, finalizes the assembly of this team of consultants, prepares budgets and contracts, all so that when the draft EIS or EIR emerges, the team can prepare and submit

comments by the deadline, often sixty days or less.[183] Citizen leadership and attorneys determine which portions of the draft report go to which consultants, review their written material, and compile a substantive and procedural response submitted as a public comment. In the case of a large project where the environmental document may be thousands of pages long, the resulting citizen comment and its appendices can be hundreds of pages and cost the client tens of thousands of dollars in expert and attorney effort. Such trenchant comments, produced at the same or better level of expertise as the original document can actually alter the course of events, either slowing the agencies progress, forcing it to alter the project, galvanizing opposition within the agency, changing a swing vote on a commission, or, in the event of an inadequate response to the document, provide the basis for judicial invalidation.

B. The Role of the Citizen in Partnership with Attorneys and Experts: Civic Virtue In this Context.

Does the dominance of attorneys and experts in such a complex intervention dull the transformative nature of the participatory experience or otherwise reduce the likelihood of the entry of new groups into the political process?[184] Certainly, it could, and some proponents of the Civic Republican ideal caution against represented participation on those grounds.[185] There is a dearth of systematic quantitative research on this question; such research which would be difficult to conduct due to the variety of participatory efforts, the frequently multiple actors within the

183. CAL. PUB. RES. CODE § 21091 (West 2009) (discussing how the CEQA requires a minimum of 30 days); 40 C.F.R. § 1506.10 (2009) (discussing how NEPA requires a minimum of 45 days for comments).

184. *See* Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act's Process for Citizen Participation*, 26 ENVTL. L. 53, 67-68 (1996) (asserting that lay participation forces policy makers to adopt language that lay persons understand—thus creating dialogue that invites more to participate. Expert participation, on the other hand, encourages the use of technical language that lay participants find so impenetrable).

185. *Id.* at 90 (noting that "[i]n general, the synoptic format encourages passivity and over reliance on experts. Agencies present material in a way that discourages participation. At best, citizens walk away from the process feeling they lack the ability to participate. At worst . . . citizens may become increasingly cynical and distrustful of government.").

groups involved, and the breadth and likely contradictory accounts of the lay and expert participants.

It is not difficult to imagine a negative outcome, however, based simply on the usual model where an attorney represents a relatively unsophisticated client. The relationship consists largely of a flow from client to attorney of basic sensory or experiential information, and payment. The attorney relates to the forum alone unless it involves the client's testimony, and even there, the client may simply present the lines written, or at least designed by the attorney. It is contemplation of this sort of passive participation that animates Civic Republican opposition to representation.[186]

Yet, for all the reasons discussed, unrepresented participation usually leads nowhere. Fortunately, while representation, if poorly done, can detract from the civic experience, collaboration between citizens and a team of attorneys and experts can animate participation and transform the individuals involved into political participants in ways neither they nor their experts imagined.

At the outset, it must be recognized that although citizens involved in environmental disputes may lack subject matter expertise, they usually are intelligent, active, experienced in life, and politically sophisticated, or rapidly become so. Frequently, I found their intelligence and political judgment surpassed that of their representatives and their experts. The lay participants must, of necessity, take the lead in such major tasks as political or community organization, building alliances and coordination among groups, raising funds, and frequently, on site fact-finding. The citizen role, however, should extend into collaboration on strategy, tactics, and the use of experts. It is the very application of a citizen's pre-existing capabilities and experience to the acquisition of those skills—how to design a regulatory intervention—that can transform a single-issue and first-time participant into a continuing activist who may enter electoral life or take appointive office.

The citizen-attorney-expert relationship must take the form of dialogue where the exchange determines the strategic course.

186. *See id. See also* Weng, *supra* note 58 (discussing the unequal power hierarchy between lay and expert participation resulting in superficial public participation).

The opposition to the proposed San Diego Gas and Electric Valley Rainbow 500kV interconnect[187] provides an example. My role was to advise the incipient group of citizen participants who knew nothing about the transmission and distribution grid, energy regulation, or the politics of state energy planning. I told them that in the then political climate in California (during the power crisis provoked by the combination of poor restructuring and Enron market manipulation),[188] pure opposition to the entire power corridor was unlikely to show success, and that we would be forced into an "elsewhere" argument, pushing the line to the least visible alternative within their valley. They needed to hear this information, but I needed to hear the response it evoked: the group told me that they were not interested in undertaking a locational fight for two reasons. First, they felt determined to support the economic development of the region and the state, and thus believed that if our own independent investigation revealed that the power line was necessary on reliability and economic grounds, it should be built regardless of visual and property impact. Second, from a tactical perspective, they indicated that an effort to push for one route over others would divide the community and undermine the fundraising and political effort necessary for success. Thus, for them, the case could only proceed if our experts determined that the line was unnecessary to the grid, which in fact, somewhat to my surprise, is what occurred.

Some of the citizen participants must acquire substantive expertise in order to provide the political and policy direction the attorney and expert team needs at critical junctures in the work. They work with the attorney and consultant team, and over the course of preparation of testimony and meetings with staff or project proponents, they learn to structure the course of the proceeding. Strategic choices usually need inputs that go beyond the expertise of the attorney or experts; such decisions integrate litigation and presentation issues with which the attorney is

187. San Diego Gas & Elec. Co. (U 902-E), Application 01-03-036 at 6 (Cal. Pub. Utils. Comm'n Mar. 23, 2001) (Application for Certificate of Public Convenience & Necessity); San Diego Gas & Elec. Co., Application No. 04-06-011 at 37, (Cal. Pub. Utils. Comm'n 2001).

188. Timothy P. Duane, *Regulation's Rationale: Learning From the California Energy Crisis,* 19 YALE J. ON REG. 471 (2002).

familiar with goals, financial capabilities, and political questions the participants must decide.

Participants must come to understand the underlying subjects because they will eventually find themselves in situations where they need the knowledge. In many cases, the participatory effort leads not to a result, but a new process. Forcing one's way to the table leads to the table, and then the true negotiation begins. Such negotiations rapidly reach the moment when agencies and project proponents need to know *what the citizen participants want,* not in general, but with all the specificity that real change to a project or process demands. Nothing presents more difficulties than answering that question, an effort that requires the combination of self-understanding and subject matter expertise that only a citizen who has participated in the ways discussed here can provide. While attorneys and experts may staff the formulation of goals, presenting alternatives, setting likely boundaries of success, it is the citizen leadership that must make the educated choices as to trade-off and compromise.

Perhaps the most direct connection between representation and the development of civic virtue is the very fact of success. It is transforming and empowering to watch an agency adopt one's comments, to find oneself *really* at the table negotiating the *actual* outcome of a project or process. As witness to such profound personal change, I believe that the mere act of participation without effect, that some contend is enough, is in fact a pale second, bearing no relationship to the real thing.

C. Citizen Participants Similarly Need Attorney-Expert Assistance in Alternative Governance Processes.

Advocates of public participation and innovation in governance have in the last few decades articulated and experimented with new processes to facilitate participation. While these devices make participation easier and more broad-based, they do not substitute for the need to incorporate expertise and representation in the participatory effort, and may in fact pose greater barriers to citizen entry and successful participation than more traditional processes. Regardless of the innovative

forum or new technology, the factors discussed in this article remain in place.

For example, the movement for processes loosely labeled "collaborative governance" embraces a suite of changes designed to bring the insights of alternative dispute resolution to traditional governmental processes.[189] Seeking ways both to empower stakeholders and to maintain governing momentum in subject areas characterized by prolonged controversy, politicization of regulatory issues or stalemate, advocates for reform urge the creation of stakeholder groups to supplement formal processes, usually early in the proceedings or even before the proceedings commence. These efforts, such as ad hoc committees or consensus committees, or discussions and negotiations with no label at all, range in origin, form, and formality; some efforts are convened through unilateral efforts of a project proponent, some by potential stakeholders, and others by the regulatory entity. If convened through the latter, the agency may provide an option or a mandate of pre-application procedures, extended notice periods, and informational sessions. The staff of the regulatory body may or may not have a role in sponsoring (as in informational sessions) or participating in the process.[190]

This effort, in its most articulated form, takes the form of negotiated rulemaking. After almost a decade of formulation,[191] the process is now articulated in the federal law.[192] Whether undertaken pursuant to federal law, or formal or informal action

189. *See e.g.,* Jody Freeman, *Collaborative Government in the Administrative State*, 45 UCLA L. REV. 1, 6-7 (1997) (discussing various EPA negotiations that convene stakeholders and EPA staff "facilitates" the negotiation process).

190. Sean F. Nolon*, Lawyer as Process Advocate: How to Encourage Collaboration in Land Use Decision-making,* 27 PACE ENVTL. L. REV. 103 (2009).

191. William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest,* 46 DUKE L. J. 1351 (1997) (discussing evolution and early history of the Negotiated Rulemaking Act and creation of federal legislation); Harter, *Negotiating Regulations, supra* note 61; Harter, *Experienced Practitioner Offers Guidance to Participants in Negotiated Rule Making, supra* note 122; Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 48 S. TEX. L. REV. 987, 987-88 (2008) (discussing the history of the ADR movement and early formation).

192. Negotiated Rulemaking Act of 1996, 5 U.S.C. § 561 (2006); Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 (2006).

by state agencies, negotiated rulemaking involves the assembly by a sponsoring governmental entity of what some convener [193] deems to constitute the group of stakeholders representing all relevant interests, the creation of a structured forum, up-front agreement by potential participants to stay with the process and support the result, and participate in the process itself in good faith.[194] The parties negotiate a rule or aspect of a rule, and produce a public report on the outcome, which is presented to the agency as part of its subsequent statutory formal or informal rulemaking.[195]

These additions to the suite of governance devices can operate to reduce the barriers to entry described in this article, but not necessarily.[196] Someone has to convene the negotiating group, and then make determinations on who may subsequently participate. Under the Negotiated Rulemaking Act, only those selected by the convener can participate.[197] The outreach can be undertaken in ways that encourage participation of a full variety of interests including individual and loosely organized groups of citizens, but the outreach can be designed to discourage such participation. Determinations by conveners are not subject to judicial review.[198] Individual citizens or ad hoc citizen groups may not be permitted to participate. Citizen participants may come late to a process of which they were unaware. Such groups may be slow to organize, coalescing as part of reactive process that takes time. The very consensual dynamics of the process may cause those stakeholders already 'inside' to join the convening agency or private proponent in opposing the new entrants. In that event, participants will need to fight their way in, again, with the assistance of representation and expertise.

193. 5 U.S.C. § 563(b) (2006).

194. 5 U.S.C. § 563(a)(3)(b) (2006); *see also* Freeman, *supra* note 189.

195. 5 U.S.C. § 566 (2006); *see* Harter, *Negotiating Regulations, supra* note 61; Harter Interview, *supra* note 76; *see also* Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L. J. 32, 40-41 (2000) (describing the success of negotiated rulemaking).

196. *See* Funk, *When Smoke Gets In Your Eyes, supra* note 64 (arguing that negotiating regulations subverts public participation and the public interest); *but see* Freeman & Langbein, *supra* note 64 (arguing that consensual rulemaking increases the legitimacy of agency rulemaking).

197. 5 U.S.C. § 565(a) (2006).

198. *See* Nat'l Res. Defense Council v. EPA, 859 F.2d 156 (D.C. Cir. 1988).

Expertise and strategy will prevail in the negotiation itself, perhaps even more so than a traditional forum. While the informal nature of stakeholder negotiation may present the appearance of a more novice-friendly environment, the absence of formalized structure and fluidity of process all present opportunities for experts and agents familiar with the forum to structure the negotiation *ad hoc* in ways that advantage one stakeholder position or another. The negotiation or other informal processes can take more time, and more unstructured time than formal processes, taxing the resources of citizens who have full time employment elsewhere, and requiring expenditure of more resources for experts or attorneys. While administrative proceedings are notoriously expensive, prolonged and active negotiations are usually even worse. No *ex parte* or other rules apply; parties meet with each other and caucus, and experts from different interests discuss options in side meetings. These meetings may have no notice or minutes. Citizens need to bring the same expertise and persistent professional presence to these various sub-negotiations as the organized stakeholders.

Nor is the negotiation the end of the matter. While it is more likely that an agency that employs negotiated rulemaking intends to take the results into account, nothing in the law guarantees this result. By law, agencies must retain discretion to act after the required formal process.[199] The agency, for good reason, may elect a different route than recommended by the negotiants.[200] Nothing protects the participants from an agency's strategic use of the process to give the appearance of participation without giving it substantive effect. Citizens need a team of experts and attorneys or other agents capable of presenting their case fully before the final trier of fact.

More fundamentally, the stated goal of the negotiation process, consensus among stakeholders, may operate to the detriment of citizens who hope to influence an agency to pursue the interest of the broader public, especially if that interest

199. Harter, *Negotiating Regulations, supra* note 61, at 20; *see* Administrative Conference of the U.S., Procedures for Negotiating Proposed Regulations, 1 C.F.R. § 305.82-.84 (2009). For a concise history of the process leading to the Negotiated Rulemaking Act *see* Funk, *Bargaining Toward the New Millennium, supra* note 191, at nn. 2-7 and accompanying text.

200. *See* USA Group Loan Servs., Inc. v. Riley, 82 F.3d 708, 714-15 (7th Cir. 1996).

involves denial of a project or adoption of a rule or policy not advocated by any of the more powerful stakeholders. In the land use arena, for example, many environmental habitats cannot support a proposed project in any form, or cannot support a size or density of development that makes financial sense for the instant proponent developer. In those cases, no consensus process will work. The regulatory entity should find its way, through presentation of evidence and deliberation, to disapproval of the project, a result unlikely to emerge from stakeholder negotiations. It is certain that a wise project proponent may use negotiations to take the temperature of the political environment and conclude that it should abandon a project, but more frequently, the developer will lack that flexibility if pre-committed to the project due to internal politics or financial status (for example, the developer that owns the subject property in fee rather than having optioned it), and in that case may attempt to use the negotiations to co-opt citizens or cause the fragmentation of opposition.

In the case of negotiated rulemaking, this intrinsic conflict between stakeholder goals and the public interest sought by citizens can be severe, especially in cases of environmental concerns such as climate where society must make fundamental changes to address realities increasingly apparent to the scientific community. The current efforts to enact cap-and-trade legislation reveal the paralysis that an over-empowered group of current stakeholders can impose on government. In rulemaking environments, the informal pressure established stakeholders exercise may already be too great; negotiated rulemaking gives those forces an additional forum. This is especially the case where the rule-maker staff joins the negotiation as equal negotiants. Citizens may be enamored initially of an informal opportunity to dialogue with agency staff, but, again, it is the more sophisticated stakeholders who know how to utilize that connection in ways that can influence the final rulemaking body to abdicate its responsibility to pursue the interest of the broader pubic. More than a decade ago, Professor Funk raised this issue: "the incentives to make negotiated rulemaking . . . undermine and subvert the principles underlying traditional administrative law by elevating the importance of consensus among the parties

above the law, the facts, or the public interest."[201] This negotiation forum, then, possesses all the same challenges for citizens as the more formal processes, in addition to those processes, and thus requires that their effort be undertaken in partnership with a team of experts and agents familiar with the forum involved.

Other processes such as stakeholder advisory groups and deliberative polling, though innovative and useful, do not change the fundamental calculus. Advisory groups can be powerful influences, devices for true participation, if they have a source of funds and the independence necessary to retain their own representation and expertise. Funding is rare, and even where funding is available, independence is a difficult issue to navigate when those funds are provided by the sponsoring government or project proponent. Absent that expertise, such advisory groups or boards become dependant on agency staff. Deliberative polling[202] involves much larger groups of lay participants who meet, answer questions, receive information, and then answer questions again. This process is subject to all the sorts of manipulation discussed in this article unless the information provided is in some form independent, an outcome difficult to arrange in most situations.

Finally, many agencies have offices that assist lay participation in the presentation of environmental issues, sometimes labeled ombudsmen.[203] These solutions have thrived in other countries. [204] Many models already exist here. These include bureaucracies or portions thereof dedicated to representation of consumer interests in public utility proceedings.

201. Funk, *Bargaining Toward the New Millennium, supra* note 191, at 1387.

202. James S. Fishkin, *Consulting the Public—Thoughtfully*, 12 DISP. RESOL. MAG. 11, 11-12 (2006) (the creator, and owner of the trademark for "deliberative polling" defining "deliberative polling); The Center for Deliberative Democracy, Deliberative Polling, http://cdd.stanford.edu/polls/ (last visited Dec. 20, 2009).

203. Gregory R. Bockin & Scott N. Flesch, *From Problem Solver to Policeman: The Ombudsmen Role in Army Compliance Agreements*, ARMY LAW., Oct. 2005, at 53, 56 (describing how the army implements ombudsmen and "[s]tate and international governments also assist small businesses and individuals by employing ombudsmen in varying capacities."); Utah Office of Property Rights Ombudsman, http://propertyrights.utah.gov (last visited Dec. 20, 2009).

204. Elizabeth Barrett Ristroph, *How Can the U.S. Correct Multi-National Corporations' Environmental Abuses Committed in the Name of Trade*, 15 INT'L. & COMP. L. REV. 51, 27, 83 n.153 (2004) (explaining how a system found in Italy would be a good model for "environmental ombudsmen").

For example, the Vermont Department of Public Service is itself charged with the representation of consumer interests on energy and telecommunication issues.[205] The California Public Utilities Commission possesses within it the Division of Ratepayer Advocates, which reviews proceedings and selectively intervenes to represent what it perceives as ratepayer concerns.[206] At a broader level, the California Attorney General is charged by statute not only with the representation of state agencies in court but also generally with taking steps necessary, including intervention in any proceeding, on behalf of the people of the state to protect the state's environment.[207]

These approaches depend on enthusiasm for the subject matter of the current political regime. The California Attorney General's office in the early 1970s had an independent environmental unit to carry out its obligations to protect the environment.[208] The attorneys in that unit intervened in appellate cases and initiated proceedings to set environmental precedent, to create new paths for environmental enforcement and to create new approaches to environmental law.[209] Cases frequently involved partnership with citizens who shared environmental goals. These efforts were sustained under a moderate Republican, and Democratic Attorney Generals who supported such work, but, the effort was frustrated and the unit disbanded under an attorney general hostile to the environmental endeavor.[210]

The work of the California Public Utilities Commission (PUC) Office of Ratepayer Advocates illustrates other problems. This small group of advocates within the California PUC bureaucracy has the power to dedicate substantial resources to selected interventions in PUC proceedings where it deems

205. VT. STAT. ANN. tit. 30, § 2 (2009).

206. *See* CA.gov, Welcome to the Division of Ratepayer Advocates, http://www.dra.ca.gov/dra/ (last visited Dec. 20, 2009).

207. CAL. GOV'T. CODE § 12606 (1971).

208. *See* PETER WATHERN, ENVIRONMENTAL IMPACT ASSESSMENT: THEORY AND PRACTICE 179 (1990).

209. *Id.*

210. *See id.* (explaining that California Attorney General George Deukmejian dismantled the environmental unit of the California Attorney General's office). I worked in the Environmental Unit of the California Attorney General's office during this dismantling.

important consumer interests are at stake.[211] Despite that charge and effect, the Office has been consistently under-funded, and the more aggressive its representation of consumer interests, the more it becomes isolated within the PUC staff bureaucracy.[212] It also provides an escape valve whereby the rest of the PUC staff effort is relieved of the need to represent consumer interests.[213]

Any ombudsman effort will need to address these typical problems. How does one maintain staff élan in the face of consistent hostility? How does one maintain funding and independent integrity? How should we avoid the tendency of bureaucracy to leave citizen concerns to ombudsmen offices? Who selects the ombudsman and staff and how should we insulate such positions from political manipulation over time?

Recently, technological improvements have facilitated each of these modern governance reforms. Deliberative polling can be done remotely; governments are broadcasting meetings and opening blogs to facilitate citizen comment. Under President Obama, the White House has created a website and a blog.[214] The President himself has encouraged the use of Facebook [215] and Twitter[216] to facilitate citizen participation. It is self-evident that these technological improvements will make participation easier, but do nothing to ensure that the government listens to the input or gives this participation effect. The complexities, possibilities for agency manipulation, and the need for expertise described herein remain.

D. Providing Funding for Experts and Representation to Citizen Participants.

If we believe in the underlying purpose of public participation, we must equip citizens with the agents and experts

211. CAL. PUB. UTIL. CODE § 309.5 (West 2009).

212. Interview with Steven Weissman, former administrative law judge for the Cal. Pub. Utils. Comm'n, at Vt. Law Sch., South Royalton, Vt. (July 7, 2009) (on file with author).

213. *Id.*

214. *See* The White House Blog, http://www.whitehouse.gov/blog/ (last visited Dec. 20, 2009).

215. *See* Facebook, President Barack Obama, http://www.facebook.com/barack obama (last visited Oct. 12, 2009).

216. *See* Twitter, Barak Obama, http://twitter.com/BARACKOBAMA (last visited Dec. 20, 2009).

they need to make their participation authentic and effective. With the assistance of such expertise, citizens can usually find ways to participate in stakeholder negotiations and the other quasi-public forums where environmental decision-making increasingly occurs. Assisted by these experts and attorneys, lay participants can fulfill most of the multiple purposes of public participation set forth in the aggregate list in Section I *supra*,[217] providing relevant and objectively valuable information to a decision-making process sought by the rationalists, and providing new stakeholder views in the pluralist stakeholder negotiation.[218] The use of expertise and representation to attain the Civic Republican virtues presents a more complex terrain, possibly discouraging, but potentially enabling the formation of new civic identity depending on the nature of the relationship, as is discussed above.

The provision of sophisticated representation and expertise requires a system to compensate participants for the actual costs associated with the participation effort, typically fees and costs of experts and attorneys, as well as filing, copying and travel expenses.[219] Some private project proponents have come to recognize that discussions with serious and empowered stakeholders provide such a substantial return in the form of project facilitation that they fund the representation and experts necessary for the lay participants. For example, a private developer of power lines in Wisconsin offers such expertise to

217. *See supra* Part I.C.

218. *See supra* Part I.B and accompanying footnotes. That is, where ideas can compete on their merit, rather than on the funding behind them. It seems as if some have confounded the former with the latter; they think that an idea must not have worth if it cannot find a funder. My proposal here is aimed at equalize the funding to insure true competition.

219. *See e.g.,* U.S. Envtl. Protection Agency, Collaboration and Partnerships, http://www.epa.gov/innovation/collaboration/Local_Regional%20Partnerships/EnvironmentalJusticeCollaborativeProblem-SolvingModel.htm (last visited Dec. 20, 2009) (discussing the environmental justice community example of Spartansburg,, South Carolina); CAL. PUB. UTIL. CODE § 1801 (West 2009) (stating that "to provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the commission."); 65-407-840 ME. CODE R. § 7 (Weil 2009).

affected individuals and groups.[220] The innovative participatory devices in collaborative governance may provide a vehicle where a special concern for citizen participation animates the sponsoring agency to fund the effort, to provide a quasi- independent expert to staff a citizen advisory committee, or to provide assistance to lay citizens in a negotiated rulemaking.

In my role as counsel to community groups on land use issues, I entered prolonged and complex negotiations with developers. In most such cases, the expense of a well-conducted and expert-supported negotiation exceeded the resources of my client. I was required to explain to counsel for the developer that we could only negotiate if the developer paid for my time and expert fees. More thoughtful developers decided to invest the funds, usually, but not always, with an outcome superior to litigation. Note, however, that the suggestion that developers fund the negotiations was frequently met with incredulity: "What? You mean you want us to pay for our lawyers *and* your lawyers?" Sometimes the concern was simply money, but more frequently the developer was animated by precisely the knowledge that underlies this article; without representation, lay participants are powerless, but with expertise and representation, they can make a difference. Developers with less foresight (or depending on the situation, with more foresight) had counted on exploiting the difference in expert resources. As discussed above, negotiations only work where compromise is, in light of all risks and benefits, a better outcome than a "no" for the project.

To democratize effective participation, we need go beyond these negotiated funding approaches to find a broadly applicable funding mechanism. Such an endeavor would go beyond existing federal and state attorneys' fee statutes[221] in that compensation would have to be available for participation in quasi-legislative and quasi-adjudicatory proceedings in state and local proceedings and selectively in federal rulemaking and administrative adjudication. Compensation would flow initially to the

220. Am. Transmission Co. Representative, Panel Remarks at the U.S. Dep't of Energy—Nat'l Ass'n of Regulatory Util. Comm'rs Electric Reliability Forum Conference (Feb. 27, 2007) (discussing this methodology).

221. *See* CAL. PUB. UTIL.CODE § 1801 (West 2009); 65-407-840 ME. CODE R. § 7 (Weil 2009).

participant, not the attorneys, and include compensation for experts and the true out-of-pocket expenses of the participants. The effort would not be inexpensive. In some cases, such as those involving regulated industries, provision of municipal services, or other arenas that administer ratepayer funds or funds from fees or services, compensation could flow from the subject fund or regulated entity. In many proceedings, the expense would come from the budget of the agency sponsoring the proceeding, and in those circumstances would ultimately be born by the taxpayer. A few states undertake this effort in public utility commission proceedings under the theory that, where the public already pays for utility representation, it serves the process and the public to provide similar support to intervenors.[222]

I believe that in the current political climate such a broadly based system likely would be infeasible, especially at the local level except in those cases where the cost could be transferred to a well-funded project proponent or a special-fund effort. A serious effort at such democratization of representation through subsidy of attorneys and experts was attempted in the 1970's, but rolled back during the Reagan presidency precisely because of its successes.[223] Nonetheless, it is what we must do if we truly want to democratize our administrative state.

CONCLUSION

Governance in modern industrial democracy is complex, and environmental governance is especially complex. Effective participation in environmental governance requires expertise and representation. The difficulties and expense of providing such

222. *See, e.g.,* CAL. PUB. UTIL.CODE § 1801.3(d) (West 2009). These statutes present many difficulties, of which the most serious is the need for citizen advocates to front the cost of experts and attorneys until the end of the proceeding. Even where the statutes provide for an early determination of eligibility for compensation, the amount and the final approval occur at the conclusion and depend on various standards, typically based on subjective determination of the contribution of the party to the proceeding.

223. Some legislative remnants of the effort remain. *See* Federal Advisory Committee Act, 5 U.S.C. app. 1 § 7(d)(1)(a) (2006) (permitting payment to intervenors at the hourly rate equal to a Federal civil service rating of GS-18). These provisions remain, but are largely unused. *See also* 5 U.S.C. § 504(a)(1) (2006) (provision for compensation of successful litigants against the government in limited circumstance).

expertise to lay participants should not mask its necessity to a vibrant democracy. The archetype of self-sufficient and unassisted citizen participation contributes an intellectually counter-productive disconnect between the ideal of participation and the realities of modern life, between our agrarian and anti-intellectual heritage and the complex industrial society in which we all participate. The assertion that public participation is alive and well in the absence of assistance by experts and attorneys also advantages those whose interests are served by minimizing the effects of disparity in resources. If public participation matters, we must begin with the understanding that it becomes most truly effective when conjoined with representation and expertise.