The Limits of Consensus

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In a speech before the Environmental Law Institute in October 1995, former Environmental Protection Agency Administrator William D. Ruckelshaus declared that the environmental protection system in the United States was “broken, severely broken, broken beyond the hope of any easy repair.”¹ In an effort to improve this floundering system, Ruckelshaus announced in early 1996 an initiative to achieve a broad-based consensus over environmental reform. The initiative, known as the Enterprise for the Environment, or E4E for short, sought to develop consensus-based recommendations through a series of dialogues with leaders from industry, government, think tanks, and environmental groups. Ruckelshaus chaired the E4E process, which was coordinated with the assistance of the National Academy of Public Administration, the Center for Strategic and International Studies, and the Keystone Center. E4E’s steering committee planned to deliver its findings in early 1997, hoping to take advantage of a window of opportunity for reform-minded action in the opening days of the 105th Congress. Ruckelshaus predicted that E4E would “succeed where other efforts in the past decade have failed.”²

If a window of opportunity ever did open, the moment had passed by the time E4E issued its final report in 1998, a year behind schedule. Few thought it would be easy to reach consensus among the diverse set of E4E participants, but the going proved more difficult than anticipated. Although the first step in fixing anything is to find out what is broken, participants discovered early on that they could not agree on any diagnosis of the

² Senate Committee on Appropriations, Status of Recommendations Made by the National Academy of Public Administration on Reforming the Environmental Protection Agency: Special Hearing, 104th Cong., 2nd sess., 29 February 1996, 20–47.
existing environmental system. Some participants agreed with Ruckelshaus that the current system was badly broken while others, such as environmental group representatives, thought that the current system worked reasonably well.\(^3\) Without relying on a common assessment of the current state of affairs, E4E settled on the more tractable goal of achieving a shared vision of a more ideal environmental system. The objective became still more limited as E4E members abandoned the initial hope of securing agreement on concrete legislative reforms, again because agreement became intractable. What remained was to articulate a set of general aspirations for U.S. environmental law, but even here complete consensus proved elusive. Four of the approximately 30 members of E4E’s steering committee—the Natural Resources Defense Council, Friends of the Earth, Exxon Corporation, and the Reason Foundation—declined to sign the final E4E report. In the end, E4E accomplished notably less than what those who initiated the project anticipated, or at least hoped, it would achieve.

Although the initiative fell short of its more ambitious goals, the E4E report still offers a broadly-shared view of a more effective and efficient system of environmental protection. This view is significant, the report suggests, precisely because it represents a consensus vision that cuts across a wide range of interests. The Environmental Protection System in Transition opens with the claim that “[t]he recommendations in this report are noteworthy not only because of their content, but because of the consensus-building process used to develop them.”\(^4\) The report is correct in this assessment, though for reasons different than the authors had in mind. The substance and the process of E4E offer some noteworthy lessons about the limits of consensus-building in the development of environmental policy.


The E4E report encourages environmental policymakers to do what the E4E participants themselves sought to do, namely seek to build consensus over policy. In doing so, E4E joins a growing chorus of support for collaborative approaches to environmental policymaking. Yet a review of the content of the E4E report, as well as some of the more salient features of its process, instead brings to light a contrasting view. Consensus-building places important limitations on effective policy design. Instead of leading to a call for greater reliance on consensus-building, the experience of the E4E initiative should lead to greater realism about what, if anything, policymakers can reasonably expect to gain from intensive efforts to secure consensus.

**What Is, and Is Not, in the E4E Report**

E4E participants exchanged a broad set of serious ideas for improving environmental protection in the United States. The 68 pages that comprise the body of the E4E report include most of the major proposals currently on the environmental reform agenda. Indeed, probably no other recent report articulates as concisely as this one does the wide menu of choices now under consideration by federal and state governments for improving environmental policy.

The E4E report advocates a management-style approach to environmental policy. It calls for greater clarity in environmental goals and rational planning for efficient ways of achieving those goals. Environmental goals, the report urges, should ultimately reflect broad social values and scientific knowledge but not economic considerations. According to the report, properly conceived goals would articulate the desired outcomes of policy in terms of public health and environmental protection, such as keeping drinking water safe or reducing bacteria in drinking water to below a specified level. Once environmental goals have been specified, policymakers would agree on incremental subgoals, or “milestones” as the E4E report calls them. Milestones would establish the pace of social action toward
meeting broader environmental goals, taking into account “cost, equity, the severity of the risk, benefits, feasibility, and other factors.” Milestones would also provide measures against which to assess society’s progress in meeting its overall environmental goals. The performance of the environmental systems would be subject to “cooperative efforts” to make periodic assessments, and the goals, milestones, and policies would always be open to change based on those assessments.

The E4E report endorses most contemporary proposals for reforming environmental regulation. For example, the report encourages the use of performance-based regulation that requires regulated firms to achieve measurable outcomes but gives them flexibility in selecting the means. It recommends the “appropriate” use of market-based policies and economic incentives. It supports efforts to streamline pollution permits by reducing duplicative paperwork and allowing firms to report air and water pollutants on the same forms. It favors the expanded use of so-called “place-based” strategies that integrate resource management efforts across entire ecosystems or watersheds. The E4E report also notes the promising potential of internal environmental management systems to help firms ensure that environmental matters are taken seriously by managers and employees.

These and other reform proposals currently in vogue certainly merit attention from policymakers. Some of them may well yield improvements to environmental policy. Yet by providing just a snapshot of current thinking about environmental reform, E4E has missed an opportunity to make a more significant and lasting contribution to the policy debate. The E4E report is at least as noteworthy for what it is not, as for what it is.

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5 Ibid., page 14.

6 Ibid., page 18.

7 Ibid., page 36.
The E4E report is not specific. The report describes an improved environmental protection system in terms with which few could disagree: “[T]he environmental protection system of the next century must become as efficient and low cost as possible without compromising environmental progress.” Unfortunately, consensus at this level of abstraction limits the E4E report’s ability to serve as a meaningful guide for concrete policy change.

The report recommends that the U.S. “adapt and adjust policies, strategies, and systems based on experience and new information,” that it “generate, disseminate, and rely on the best-available scientific and economic information,” and that it “place authority, responsibility, and accountability at the appropriate level of government.” Yet no one seriously urges government to place authority at inappropriate levels, generate shaky data, or ignore the lessons of experience. The E4E report does not tell us what specifically are the appropriate levels of government, or even what “appropriate” means. It does not discuss the accuracy of certain kinds of information nor how to resolve the tradeoff between the desire to gather additional information and the desire to take action. Finally, the report does not explain how to interpret experience so as to make policy changes. E4E members themselves, recall, could not agree on the lessons to be drawn from the past 30 years of environmental regulation.

Much of the needed direction lies in the details. The report does illustrate its “vision for the future” by showing how some of its recommendations might apply to the problem of nonpoint pollution; however, this discussion is confined to a few pages at the end of the report. In struggling to achieve a broad-based consensus, E4E participants needed to avoid many important but controversial issues. For example, instead of identifying environmental problems that could be effectively solved by the use of

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8 Ibid., page 36.
9 Ibid., page 4.
emissions trading, the report simply recommends using trading when it does not “pose an unacceptable risk” and when it is “technically and economically feasible” to monitor pollutants with “reasonable accuracy.” Adopting abstract principles and vague standards may serve to secure agreement in the face of conflict, but it constrains the usefulness of the report.

*The E4E report is not innovative.* Even though some of the proposals recommended in the report would take the environmental protection system down a new path, E4E did not yield any genuinely new ideas of its own. Its call for more rational environmental planning and decisionmaking echoes a refrain heard since the earliest days of environmental regulation. The specific reform proposals in the E4E report—such as place-based regulation and market-based incentives—have all been conceived by others and articulated more fully in a number of previous policy reports. The E4E report compiles existing reform ideas and lends them additional affirmation, but it does not make any advance of its own.

The report also explicitly adopts a “go slow” approach to environmental reform. It treats its recommendations as stepping stones to an improved environmental system, preferring marginal environmental improvement instead of an innovative overhaul of existing environmental law. “Stepping stones lead to evolutionary, not revolutionary, change,” Ruckelshaus has written of the E4E report. Incrementalism certainly has its

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10 Ibid., page 40.


virtues and in the case of environmental reform such an approach may well be justified, if not inevitable. However, if the U.S. environmental system is really seriously degraded, it may well take more abrupt action to fix it. Sometimes it takes more than stepping stones to cross a river.

_The E4E report is not analytical._ Nothing in the E4E report reveals whether a set of stepping stones or a whole bridge is needed to do the job. The lack of attention to the problems associated with existing environmental regulation ultimately constrains the value of the report. In the absence of any analysis of the nature and extent of existing problems, it is impossible to judge whether the ideas in the report, as attractive as they may seem, will in fact lead to improvements as E4E predicts. It is even possible that some of the ideas would exacerbate certain problems. For instance, Ruckelshaus claims in the preface that a central problem with the current system is excessive conflict in the policy process. The recommendation for continuous reassessment of environmental policy will almost surely not reduce, and may actually expand, the level of conflict in the process.

The report fails to show how its recommendations relate to identifiable problems nor how they compare with other alternative ways of addressing the same problems (including the status quo). Moreover, the report conveys little sense of priority among its more than 30 recommendations. Where should policymakers put most of their effort? The report simply asserts that “[u]nless all of the elements of the vision are pursued together, progress toward a better environmental future is unlikely, and the U.S. role as an international leader in environmental policy will diminish.”[^13] This seems a dubious claim. To maximize the attainment of environmental protection and economic efficiency, policymakers need know how to allocate their limited time and resources. E4E does not provide that guidance.

The E4E report offers many serious proposals for reforming the environmental protection system, but it fails to provide much information that is detailed, new, or analytical to direct productive change in environmental policy. The deficiencies of the report can hardly be thought to stem from a lack of knowledge or ability on the part of E4E participants. E4E involved leaders of extraordinary experience and know-how, including four former EPA administrators. It also drew on the staff and resources of several leading institutions dedicated to the analysis of environmental policy. The weaknesses of the E4E report do not stem from the individuals or organizations involved in its development. Rather, the limitations of E4E grow out of the process by which the report came to be. The E4E report is a political document, drafted to capture the assent of a diverse group of interests. As a document produced through a consensus-building process, the E4E report sheds some light on what might be expected from other similar efforts at consensus-building.

The Limits of Consensus

Nearly every contemporary policy report urges regulators to build consensus with industry and other affected organizations. The E4E report is no exception. The call for “[e]ffective stakeholder participation permeates E4E’s vision of an improved environmental protection system.” The report admonishes government officials to “engage stakeholders” in implementing the recommendations contained in the report. To improve environmental information, the report recommends a “collaborative process” that

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14 Most of the reports cited in note 11 recommend greater use of consensus-building and other so-called stakeholder processes.

15 Enterprise for the Environment, note 4 above, page 50.

16 Ibid., page 6.
would seek “consensus on key parameters and on a fair, accessible, consistent reporting mechanism.” It recommends a shift to performance-based environmental management centered on measures developed collaboratively with affected organizations. The corporate environmental management systems supported by E4E would have outside groups working collaboratively to make decisions that would affect firms’ operations. Pilot projects and other policy experiments encouraged in the report would include appropriate “stakeholder-based processes.” Market-based environmental policies, such as emissions trading, “must include opportunities for meaningful stakeholder participation in the design, implementation, and evaluation phases.” The report also favors place-based environmental strategies that offer local organizations and citizens “a constructive way to build consensus on environmental protection issues.”

E4E acknowledges that consensus-building proceedings are not without their problems. To its credit, it calls for further study of what leads to successful collaborative dialogues. It also notes that “such dialogues can be resource intensive, very slow, and quite contentious” and that they “may need extensive support in terms of information, technical assistance, and facilitation if they are to be successful.” Yet the report brushes aside these considerations as “potential difficulties.” The benefits of collaboration, in contrast, are treated as real and “widely recognized.”

17 Ibid., page 24.
18 Ibid., page 26.
20 Ibid., page 30.
21 Ibid., page 40.
22 Ibid., page 45.
23 Ibid., page 50.
24 Ibid., page 49.
25 Ibid., page 50.
These benefits, the report states, include generating new ideas to improve the quality of decisions, reducing the overall time and expense of policymaking (even though the report also concedes the opposite point), and increasing the subsequent acceptability of policy decisions.27 The report acknowledges that collaboration can take the form of “a wide variety of processes ranging from formal regulatory negotiations to informal consensus-building dialogues to information-sharing meetings.”28 While many methods of public participation can generate new ideas as well as increased governmental responsiveness, the various procedures have at least one important difference. Some elicit public input and dialogue without any pressure to reach consensus, while others expressly aim for a consensus among all participants. The E4E process and other processes, such as negotiated rulemaking, are distinctive in that they focus solely on the pursuit of consensus.

What is to be gained from a search for consensus? The answer appears to be much less than the recommendations in the E4E report might lead readers to believe. Engaging the public in ways that do not aim at consensus can result in many, if not all, of the benefits attributed to consensus-based processes. Searching for consensus is not only hard, but it may place burdens on policymakers without leading to corresponding social benefits. Judging from the E4E experience, as well as from recent empirical research, consensus-building processes are not well suited to meeting at least three of their major objectives.

Consensus-building does not ensure better decisions. Proponents of consensus-building sometimes claim that it yields more effective policy decisions. They argue that

26 Ibid., page 49.
27 In support of these claims, the report cites the Presidential/Congressional Commission on Risk Assessment and Risk Management, note 11 above.
28 Enterprise for the Environment, note 4 above, page 49.
the process of negotiating a consensus will lead affected parties to reveal useful
information, learn more about the issues, and develop innovative alternatives that can
accommodate competing goals. While any serious engagement with the public will
undoubtedly promote learning and the exchange of ideas, the additional benefits from
seeking a consensus are less clear. Consensus-building shifts the ultimate goal away from
reaching a quality decision and moves it toward reaching an agreeable one. A consensus
among a select group will not always equate to socially optimal policy.

The limitations of the E4E report illustrate some of the problems that can affect
the quality of consensus-based decisions. The members of E4E could not reach agreement
on concrete legislative proposals, so they ultimately settled on a set of broad statements,
such as maintaining environmental quality at low cost, to which (almost) all of the parties
could agree. Consensus-building processes run this risk. They can lead to policies that are
based on cumbersome compromises of principles, the lowest common denominator, or
the most tractable but least important issue. Similarly, some aspects of consensus-based
processes may actually inhibit genuine innovation. E4E participants could reach
agreement on changes that had already been tried or advocated elsewhere, but truly
innovative ideas generate uncertainty about how each party will fare and can make
agreement more difficult. E4E reinforced areas of common agreement about the direction
of environmental policy but it did not advance the policy debate with new ideas or
concrete proposals for improved policy.

There is an extensive body of literature advocating consensus-building. See, for example, P.
L. Susskind and G. McMahon, “The Theory and Practice of Negotiated Rulemaking,” Yale Journal on
Regulation 3, no. 1 (1985): 133–65; and J. Freeman, “Collaborative Governance in the Administrative

Even the authors of studies otherwise construed to support consensus-building accept the potential
divergence between a consensus among select policy actors and what is ultimately best for society. L.
Langbein and C. Kerwin, “Regulatory Negotiation Versus Conventional Rulemaking: Claims, Counter-
Claims, and Empirical Evidence” (School of Public Affairs, American University, 1998, photocopy), 31–
**Consensus-building does not save time.** Reaching consensus takes time. The E4E report was originally slated to be released in early 1997 but was not issued until a year later. The E4E experience is consistent with the results of other consensus-based procedures, such as negotiated rulemaking. Regulations developed through negotiated rulemaking take as long, if not longer, to develop as do other rules.\(^{31}\) More importantly, negotiated rules demand much more concentrated amounts of staff time and organizational resources. One study found that participants in negotiated rulemakings were three times more likely to complain that the policy process demanded too much time, effort, and money.\(^{32}\)

The time and expense of these procedures will affect the pace of policy development if policymakers greatly expand their use of consensus-building. If government needs to rely on these processes regularly and secure consensus before taking important action, decisionmaking may slow down significantly. Although the E4E report recognizes that consensus-building takes time and effort, this recognition should be taken into account in considering the report’s overall push to have collaborative processes permeate the policy process.

**Consensus-building does not reduce conflict.** The E4E report correctly acknowledges that striving for consensus does not mean that consensus can always be achieved nor that conflict will always be eliminated.\(^{33}\) The E4E process, after all, could not resolve important conflicts. E4E participants ultimately sidestepped the most intractable disputes and they glossed over others with broad language acceptable to all sides. The

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33 Enterprise for the Environment, note 4 above, page 49.
report openly admitted that participants could not overcome disagreements. For instance, while E4E participants endorsed the general idea of environmental management systems, they agreed only on a “continuing dialogue” because policies to encourage such systems have “both strong proponents and strong critics.”

Furthermore, the process of bringing diverse interests together to build trust and cooperation did not keep some E4E participants from finding themselves at odds with each other over contemporaneous policy debates such as EPA’s ambient air quality standard revisions or global warming. Trust and cooperation that arise at the negotiating table do not necessarily translate to other settings nor diffuse throughout the organizations formally represented in a negotiation.

Reaching a consensus on policy language does not mean that serious conflict will not persist. The EPA’s reformulated gasoline regulation, heralded by some as a “successful collaboration,” turned out to be anything but successful in terms of eliminating conflict. The regulation elicited extensive public and media criticism, prompted four separate court challenges, led the American Petroleum Institute to file a formal administrative challenge, and resulted in an adverse ruling of the World Trade Organization that forced the EPA to revise the regulation. Somewhat surprisingly, affected parties overall file court challenges to EPA’s negotiated rules more frequently than they do rules formulated using more conventional procedures that do not depend on consensus.

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34 Ibid., page 28.
35 Greer, note 3 above, page 38.
36 Political scientist Edward Weber singles out the reformulated gasoline regulation as a successful case of consensus-building but neglects to mention all the subsequent conflict the regulation engendered. Weber, note 30 above, pages 14–15.
37 Coglianese, note 31 above, pages 1,290–94.
38 Ibid., pages 1,296–1,309.
Why would consensus-building processes generate litigation and conflict? As the E4E experience suggests, a consensus can still fail to resolve specific conflicts. Ironically, consensus-based processes can also add new sources of conflict that do not exist with other methods of policymaking. Conflicts emerge over who will participate in the consensus-based negotiations. If the negotiations lead to a consensus, conflicts emerge over the meaning of the agreement or the extent to which the final policy decision complies with that agreement. Consensus processes can also raise expectations about the amount of control organizations have over the policy decision, and these heightened expectations may make it harder for organizational representatives, or their principals, to overlook unfavorable aspects of the final policy. None of these additional sources of conflict arise outside the context of negotiated processes.

**Conclusion**

If consensus-building did eliminate conflict, save time, and always led to better policy, enthusiasm for it would be deserved. In the absence of these benefits, public managers who follow E4E’s recommendation to “engage stakeholders” would be better served by avoiding consensus as their main objective. Procedures that involve members of the public in a dialogue about policy, but that do not hold out the expectation for any consensus, can yield the same kinds of benefits attributed to consensus procedures without creating complications like those illustrated by E4E.

An additional risk with consensus-building is that public managers will begin to pursue consensus for its own sake. They may commit themselves to time-consuming processes on tractable issues when the same resources would be better used for outreach or analysis on less tractable but more important issues. They may come to rely on stakeholder processes as their sole measure of good public policy, even though these processes can almost never be fully representative and can face constraints from group
dynamics. They may also find themselves caught up in the inertia of negotiations even when they doubt, or should doubt, that the resulting agreement will meet the proper legal standards and serve the public interest. Rather than viewing conflict as the problem and consensus as the solution, public managers should instead focus squarely on the substantive problems facing the environment and regulated firms. They should decide when and how to engage in public dialogue based foremost on what will serve the overall public interest, not on what will lead to a consensus among those inside the policy loop.

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