The Good Neighbor Agreement: Environmental Excellence without Compromise

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I. Introduction

The surge of increasing environmental responsibility has triggered significant changes in the nation's policy toward our environment. Environmental legislation inspired by the 1970s national effort to improve our environment brought some substantial improvements to the state of our environment. The end-of-process control and treatment typical of the legislation, however, failed to bring the expected improvements. Mere compliance with existing environmental legislation now appears to be at a point of diminishing returns. Thus, the proverbial crossroads at which environmental law now finds itself calls for a "reinvention of regulation" that strives for environmental excellence.

The reinvention of regulation places foremost importance on two particular objectives: pollution prevention and environmental justice. A pollution prevention policy coupled with an environmental justice movement that is premised on empowerment through access to information will play a critical role in carrying out the goal of environmental excellence.

With respect to the first objective, Congress passed the Pollution Prevention Act, signifying a shift in focus to pollution prevention. The Act demonstrates Congress' objective that pollution prevention through source reduction be the preferred approach over end-of-process control and treatment. The Act requires the United States Environmental Protection Agency (EPA) to affirmatively execute a strategy that...
promotes pollution prevention. Responding to this mandate, the EPA implemented the Pollution Prevention Strategy. Through this strategy, the EPA intends "to incorporate pollution prevention into [the] EPA's existing regulatory and non-regulatory programs." Implementing the strategy, therefore, will require the EPA to rethink the way it currently allocates its responsibilities and resources.

As to the second objective, the goal of environmental justice is now a priority on the nation's environmental agenda. Specifically, the nation's history demonstrates how minority and low-income populations have disproportionately shouldered the impacts of environmental hazards. Thus far, public participation in shaping environmental policy has generally taken the form of consumer power, in other words, choosing not to purchase environmentally harmful products. Environmental justice, however, demands more than an indirect influence on industry's production process decisions. Environmental justice requires greater and more direct community input by making citizens stakeholders in the decisionmaking process.

To successfully reinvent regulation, new policies must allow industry sufficient flexibility to make the necessary modifications to stay competitive in the market. The increased flexibility, however, does not mean that the EPA should relax its enforcement efforts. Rather, it means that private citizens must step up and also participate to supplement the EPA's regulatory efforts. In sum, reinventing regulation, without compromising the goals of pollution prevention and environmental justice, will require the legal community to explore different alternatives that can establish a lasting and workable relationship between regulators, industry and private citizens.

A. Search For Alternatives

1. Audit Privilege and Immunity Laws

In searching for alternatives, some lawmakers suggested enacting environmental audit privilege and immunity laws. Twenty-three states already have such laws in place, either by policy or by legislation. Two bills that went before Congress, Senate Bill 582 and House Resolution 1884, seemed to follow that trend. These bills sought (1) to establish a federal audit privilege and immunity law for information discovered through compliance audits, and (2) to immunize violators from civil enforcement and criminal prosecution if violations are voluntarily corrected and dis-
closed to regulators.17 The purpose of an audit privilege and immunity law rests on the belief that by treating environmental audits as privileged information, industry will be more apt to voluntarily conduct comprehensive environmental self-audits.18 Self-audits, in turn, benefit the environment and public health because they lead to increased discovery and correction of violations.19

The implementation of audit privilege and immunity laws, however, faces immense opposition and has emerged as a source of great debate.20 For one, the Clinton Administration and the EPA vigorously oppose such laws.21 In fact, the EPA "opposes all state audit privilege/immunity laws in any form."22 Regulators feel that limiting access to valuable information regarding industry's noncompliance hinders effective enforcement of environmental laws.23 Consequently, regulators see audit privilege and immunity laws as detrimental to the environment and public health.24 Furthermore, regulators believe audit privilege and immunity laws act as disincentives for industry to even invest in pollution control if instances of noncompliance can be kept confidential.25

Community and environmental groups pose additional opposition to audit privilege and immunity laws.26 These groups view such legislation as a setback in their effort to increase the citizen's right of access to industry information.27 The legislation, in effect, blocks access to industry's records of compliance with environmental laws.28 The groups feel that "no current legislative initiative goes more to the heart of the public lack of confidence in the business community's commitment to [the] protection of the public health and the environment than the environmental audit privilege debate."29 With mounting opposition to proposed legislation that limits access to industry information, the use of audit privilege and immunity laws as an alternative seems unlikely. In response, other innovative options must be explored.

2. The EPA's Audit Policy

The EPA issued its Final Policy Statement on Incentives for Self-Policing Discovery, Correction, and Prevention of Violations (1995 Self-Policing Policy)30 as a "positive alternative to statutory audit privileges that promote secrecy."31 To qualify under the 1995 Self-Policing Policy, the regulated entity must meet nine conditions: (1) systematic discovery (violations must be discovered through an environmental audit or an objective, documented, systematic procedure or practice reflecting due diligence in preventing, detecting and correcting violations); (2) voluntary discovery (violations must be discovered voluntarily and not under legal mandate); (3) prompt disclosure, (4) independent discovery and disclosure; (5) correction and remediation, (6) recurrence prevention; (7) no repeat violations, (8) exclusion of certain violations (those which result in seri-
ous harm or imminent and substantial endangerment); and (9) cooperation with the EPA.32

As incentives for industry to undertake self-policing, the EPA will refrain from seeking gravity-based penalties, to forgo recommending certain violations for criminal prosecution, and to relinquish the use of environmental audit reports to initiate civil or criminal enforcement actions.33 Thus, in 1996, in most of the forty cases settled under the 1995 Self-Policing Policy, the EPA chose to waive the gravity-based penalties.34 In deciding whether to waive the penalties, the EPA relies on certain certifications made by the regulated entity.35 The regulated entity itself certifies that violations have been corrected, efforts have been undertaken to remedy resulting harms, and steps have been taken to prevent recurrence.36 The EPA’s limited resources, however, could potentially stifle its ability to verify these certifications.37 The EPA’s 1995 Self-Policing Policy largely overlooks the potential external accountability mechanism offered by increased citizen participation and downplays the possibility of increasing the public’s role in the regulatory process.

Where should we go from here? How do we encourage self-policing by industry without compromising environmental standards, that is, without compromising the health of the public and the environment?

3. The Good Neighbor Agreement Alternative

This Note explores “Good Neighbor Agreements” (GNAs) as a viable and promising alternative. A GNA is a legally binding agreement negotiated by stakeholders and industry in which the violating industry agrees to reduce or eliminate pollution risks to the surrounding community. GNAs achieve environmental excellence by empowering local stakeholders to effectively bargain with local industries and to jointly engage in creative decisionmaking. This open dialogue ultimately culminates in environmentally superior results in terms of pollution prevention and environmental justice while simultaneously meeting the needs of local industries. Part II outlines the elements of a GNA. Part III examines how GNAs fit in an environmental management system and auditing program. Suggesting the use of the EPA’s existing enforcement tools to implement GNAs, Part IV describes how a GNA can be made legally enforceable and what incentives industry has to enter into a GNA. Part V explains how GNAs advance the goals of pollution prevention and environmental justice. Part VI explores the obstacles and the incentives to the implementation and the enforcement of GNAs on a federal regulatory level.

II. Good Neighbor Agreements (GNAs)

A. Underlying Principles of GNAs

Stakeholder involvement forms the heart of GNAs. The active role of stakeholders through GNAs compensates for the lack of resources the EPA has to effectively “watchdog” all the activities of local industries.38 Essentially, GNAs afford those citizens most affected by the activities of local industries an opportunity to become involved as stakeholders and work for improvements in their community.39


33. See id. at 66,711 (“Gravity-based penalties” represent “that portion over and above the economic benefit, i.e., the punitive portion of the penalty, rather than that portion representing a defendant’s economic gain from noncompliance.”). This type of penalty primarily reflects the seriousness of the defendant’s conduct. See id. at 66,707

34. See Enforcement: Punitive Penalties Waived in Most Settlements with Companies Using Audit Policy, 27 Env’t Rep. (BNA) 1931, 1931 (Jan. 24, 1997).


36. See id.

37. See id. at 66,707.


Specifically, GNAs accomplish citizen involvement through stakeholder audits. Stakeholder audits are opportunities for local stakeholders to inspect and audit facilities themselves or act as an oversight group to an audit. The gained information, in turn, empowers stakeholders to commit local industries to open negotiations. Ultimately, the open discussions characteristic of GNAs yield two critical components in the reinvention of regulation. First, GNAs generate environmentally superior commitments by local industries in the form of pollution prevention strategies. Second, GNAs incorporate expanded industry disclosure requirements and increased access to information, resulting in citizen empowerment and informed citizen oversight of the commitments made by local industries—goals of the environmental justice movement.

The following outlines the major principles of a GNA as defined by Sanford Lewis, the former Director of the Good Neighbor Project for Sustainable Industries and a major proponent of GNAs. These principles work to establish the balanced relationship between local industry and its stakeholders that is fundamental to innovative problem solving.

**An expansive right of access to information:** Stakeholders have a right of access to review company documentation and studies concerning industrial activities with potential effects on the environment and public health. Also, stakeholders have a right of access to audit the local facility's compliance with environmental laws and regulations. This right of access levels the bargaining positions of the industry and its stakeholders. As a result, the opened channels of communication lead to collaboration and produce creative solutions.

**Stakeholder initiative:** Local industry does not impose the GNA on its stakeholders, rather the stakeholders actively seek to bring the GNA about with the local industry.

**Sharing control in the participation process:** Interested stakeholders possess the right to participate equally in the negotiation process, reducing the possibility of a negotiation panel dominated by participants specifically selected by the local industry. Furthermore, comprehensive coverage of issues and concerns follows the shared control of all participants in setting the agenda of discussion.

**Parity in decisionmaking:** The GNA is not signed until each participating stakeholder agrees to the objectives and terms of the agreement. Nothing short of actual consensus with representatives of the local industry will give effect to the GNA.

**Independent experts:** Stakeholders possess the right to have their own independent experts participate on the negotiation panel. By equalizing the technical expertise of both sides, independent experts bolster the bargaining positions of stakeholders on technical matters that are often beyond the average person's understanding.

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40. See Moving Forward Toward Environmental Excellence, supra note 38, at 12.
41. See id.
42. See id.
44. See id.
45. Sanford Lewis, Feel Good Notions, Corporate Power, and the "Reinvention" of Environmental Law 26 (last modified Mar. 17, 1997) <http://www.envirolink.org/orgs/gnp> [hereinafter Feel Good Notions]. Sanford Lewis has now taken a position as Strategic Counsel on Corporate Accountability on behalf of community and environmental organizations, trade unions, trial lawyers and public policy organizations. Lewis still works for the Good Neighbor Project on a limited pro bono and special projects basis.
46. See id. at 20
47. See id.
48. See id.
49. See id. at 19
50. See id. at 19-20
51. See id. at 20
52. See id. at 21
53. See id.
54. See id.
55. See id.
56. See id.
57. See Feel Good Notions, supra note 45, at 21
Shared benefits. A negotiation mode of cooperation and collaboration produces shared benefits in which all participants' interests and needs are somehow met through creative and innovative solutions.  

Holistic content: The GNA attempts a comprehensive multimedia approach to environmental problems.

Best practices: Together, the local industry and its stakeholder strive for economically and environmentally superior solutions.

Enforceable agreements. The GNA is legally enforceable, and its violation allows for legal redress.

B. Examples of GNAs

To date, several GNAs have been entered into between local community groups and industry. In Point Comfort, Texas, a local community group, Calhoun County Resource Watch (CCRW), entered into a GNA with Alcoa Aluminum (Alcoa). The GNA was intended to address the community's concerns over Alcoa's discharge of production process pollutants into Lavaca Bay. The terms of the agreement included an agreement from Alcoa to study "zero discharge" wastewater treatment technology in exchange for which CCRW agreed to delay challenges to federal and state permits pending the outcome of the study. A mutually agreed upon expert conducted the study, and the committee overseeing the study included both local stakeholders and company representatives.

In Manchester, Texas, Texans United and other community groups negotiated a GNA with Rhone-Poulenc (the Rhone-Poulenc Agreement) in response to a petrochemical plant accident on Rhone-Poulenc's facility. Rhone-Poulenc agreed (1) to pay for an audit of its facility by a stakeholder-approved auditor, and (2) to allow members of the community groups to participate in the audit. The Rhone-Poulenc Agreement also provided that Rhone-Poulenc engage in public disclosure of company documents pertaining to the facility's effects on the environment and public health. The agreement ultimately produced a working relationship between Rhone-Poulenc and local stakeholders.

In Philadelphia, Pennsylvania, the Community/Labor Refinery Tracking Committee (C/LRTC) brought a suit against Sun Oil for Clean Air Act violations. As part of the settlement agreement, Sun Oil and C/LRTC negotiated a GNA (the Sun Oil Agreement). The Sun Oil Agreement required Sun Oil to invest five million dollars in improving its refinery to further reduce air emissions. Sun Oil also agreed to implement community environmental projects such as tree plantings, a bike trail and environmental education programs.

In Richmond, California, Chevron Refinery (Chevron) entered into a GNA with the West County Toxics Coalition, Citizens for a Better Environment and People Do! (the Chevron Refinery Agreement) in response to Clean Air Act violations. Chevron agreed to install leak...
less valves, not to claim pollution credits for
valve emissions reductions, to implement air
pollution monitoring prescribed by community-
suggested target chemicals, and to continue
reductions in toxic emissions. 24 Chevron also
agreed to contribute five million dollars over
the course of five years to local communities. 75

In Rodeo, California, the Shoreline Environ-
mental Alliance, Crockett/Rodeo Coalition
and Citizens for a Better Environment negoti-
ated a GNA with Unocal Corporation (Unocal). 76
A provision of the GNA required an
independent safety audit to be paid for by
Unocal. 77 Oversight of the audit was to be con-
ducted by a community-based committee. 78
Among other promises to improve and protect
the environment and public health, Unocal
agreed to broaden its public disclosures, land-
scape and vegetate areas on its property, and
pay for a medical clinic for the diagnosis and
treatment of patients with release-related ill-
nesses. 79

III. Recognizing the Importance of
Environmental Management Systems
and Environmental Audits

GNAs recognize the vital roles environ-
mental management systems (EMSs) and
audits perform in the reinvention of regulation.
EMSs allow for industries to become more
proactive in protecting the environment while
simultaneously becoming more efficient and
competitive in the market. 80 Generally, an EMS
is a set of procedures implemented by an
industry to assess its environmental perfor-
manoe and its compliance with environmental
laws. 81 Furthermore, an EMS often includes an
audit component. 82 An audit is a systematic
and documented review by an industry of its
operations and practices geared toward com-
plying with environmental laws. 83 An audit may
be used to review a facility’s legal compliance,
to assess the effectiveness of the EMS, and to
evaluate any risks posed by production
processes and practices. 84 Essentially, an audit
works as a “snapshot” of a facility’s environ-
mental performance and compliance. 85 To-
gether, the EMS and audit work to identify, cor-
correct and avoid environmental problems, ben-
fiting both the industries engaged in the EMSs
and the citizens affected by the activities of the
industries. 86

A company utilizes an EMS to (1) identify
problematic impacts on the environment from
its products, services and process, (2) mini-
mize those problems, and (3) train its employ-
ees to avoid those problems by engaging in
environmental quality control. 87 A company
approaches environmental management and
compliance as an aspect of asset manage-
ment. 88 As such, the EMS becomes integrated
into the regular business operations of the company.\textsuperscript{89}

In other words, an EMS functions as a proactive risk management tool to cut costs and enhance a company’s internal efficiency and competitiveness.\textsuperscript{90} Environmental management makes such good business sense that many companies already have EMSs and audit procedures in place.\textsuperscript{91} Without environmental management, a company exposes itself to the possibility of stiff civil and criminal enforcement penalties for noncompliance, public pressure and substantial cleanup costs.\textsuperscript{92}

EMSs and auditing offer several legal and economic benefits to industries.\textsuperscript{93} First, environmental management may bring to light opportunities for a company to become more efficient and reduce costs by avoiding waste and improving the use of materials and resources in production processes.\textsuperscript{94} Second, EMSs and audits offer ways to avoid or reduce enforcement penalties for noncompliance.\textsuperscript{95} By reviewing its production processes and practices, a company potentially gains information necessary to avoid future noncompliance.\textsuperscript{96} Third, implementation of an EMS and environmental audits may offer regulatory benefits.\textsuperscript{97} If undertaken voluntarily, regulatory agencies view EMSs and voluntary audits as mitigating factors in civil and criminal enforcement actions.\textsuperscript{98} Fourth, environmental management allows a company to tap into the “green” market, appealing to consumers as environmentally responsible producers.\textsuperscript{99} Fifth, improved public relations arise when a company manifests concern for its impacts on the environment.\textsuperscript{100} Sixth, a company engaged in environmental management appears as a sound investment to current and potential investors.\textsuperscript{101} The rationale is that a company implementing an EMS and performing audits is less likely to be in noncompliance and less likely to incur liability.\textsuperscript{102} Finally, a company may engage in environmental management merely to ease the pressures resulting from the public scrutiny of its processes and practices engendered by right-to-know laws.\textsuperscript{103} Ultimately, a company finds that its investments in environmental management are recouped and lead to more profit in the long-run.\textsuperscript{104}

From the standpoint of affected citizens, the most important facet of EMSs and auditing stems from the likelihood that environmental issues will be diffused throughout the corporate structure.\textsuperscript{105} A company no longer considers environmental concerns as side issues in the planning process.\textsuperscript{106} The infiltration of environmental concerns into all aspects of the production process and corporate practices breeds an environmental ethic in the company’s employees to become more environmentally responsible.\textsuperscript{107} In turn, this environmental ethic may materialize into concrete improvements in the company’s environmental performance.\textsuperscript{108} Additionally, the search for ways to become

\begin{footnotesize}
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\item 89. See Asset Management, supra note 88, at d6.
\item 90. See id.
\item 93. See Harris, supra note 20, at 679.
\item 94. See Cascio, supra note 3, at 288.
\item 95. See Harris, supra note 20, at 679.
\item 96. See id. at 679-80.
\item 97. See Cascio, supra note 3, at 289.
\item 98. See discussion supra Part I A 2.
\item 99. See Reiley, supra note 82, at 546.
\item 100. See id.
\item 101. See id.
\item 102. See id.
\item 103. See id.
\item 104. See Henry R. Balkis & Patrick O. Cavanaugh, What We Need to Know About ISO 14000, 10 Nat. Resources & Envt’l 64, 65-66 (1996).
\item 105. See Cascio, supra note 3, at 288.
\item 106. See Asset Management, supra note 88, at d6.
\item 107. See Cascio, supra note 3, at 288.
\item 108. See Cascio, supra note 3, at 288.
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more efficient and reduce costs may actually induce a company to opt for pollution prevention strategies instead of end-of-process control and treatment. Once industry discovers that pollution prevention can actually improve its competitiveness in the market, surrounding communities will benefit from the resultant improvements in environmental protection.

Reinventing regulation redefines the traditional roles of industries, regulators and private citizens. Environmental management is evidence of this transformation. EMSs and auditing programs demonstrate a proactive approach and corporate initiative to improve environmental performance. Corporate initiative stands in stark contrast to the conventional attitude of industries to address environmental problems only after receiving a government directive.

Another transformation prompted by reinvention is the development of partnerships between industries and regulators. With limited government resources to ensure maximum compliance, the EPA relies on industries to assume some responsibility in environmental improvement through self-policing. Industries self-policing their compliance and environmental performance through EMSs and auditing programs. In return, self-policing allows for increased flexibility vis-à-vis the command-and-control scheme.

An additional transformation appears to be in the form of increased citizen participation. A company sometimes undertakes an EMS in response to public pressure and scrutiny. An EMS, therefore, presents an opportunity for actual citizen input into the redesigning of production processes. GNAs potentially provide the procedure by which citizen input can be incorporated into a company's EMS and decisionmaking process. The stakeholders ensure the external accountability of a local industry's EMS and environmental auditing practices. In addition, GNAs allow citizen participation to augment the "watchdog" functions of regulatory agencies. The symbiotic relationship that develops between industries, regulators and private citizens is characteristic of GNAs. To facilitate the implementation of GNAs, however, proponents of GNAs should consider the use of the EPA's existing enforcement tools.

IV. Utilizing Existing Enforcement Tools

A. Supplemental Environmental Projects

Supplemental Environmental Projects (SEPs) are becoming integral in the EPA's enforcement settlements. The EPA already incorporates SEPs in at least five to ten percent of all its enforcement settlements. Due to the increased use of SEPs, the EPA saw the need to expound on its SEP policy. Consequently, the EPA issued the Interim Revised EPA Supplemental Environmental Projects Policy (1995 SEP Policy) to expand and clarify its previous SEP policy. More importantly for purposes of the GNA alternative, the 1995 SEP


118 See Moving Forward Toward Environmental Excellence supra note 38, at 6.

119 Part IV A1 provides the definition of Supplemental Environmental Project (SEP).


Policy provides the EPA with greater discretion and flexibility in entering into enforcement agreements.123

In addition to the EPA, industry, community groups and environmental organizations also strongly support the inclusion of SEPs in enforcement settlements.124 Essentially, SEPs function as alternatives to enforcement penalties in lieu of which the violating company agrees to undertake environmentally beneficial expenditures.125 Furthermore, SEPs provide greater flexibility, when compared to the EPA's traditional enforcement approach, in designing strategies to improve environmental performance.126 For this reason and because of the EPA's increased discretion in entering into SEP agreements, the innovation underlying the GNA alternative fits comfortably within the flexible, creative and corporate voluntarism approach of the SEP scheme.

In following the five-step process established by the EPA, a proposed project qualifies as a SEP if it: (1) meets the definition of a SEP; (2) satisfies all legal guidelines; (3) falls within one of the seven categories of SEPs; (4) imposes an appropriate enforcement penalty; and (5) is clearly defined in the settlement agreement.127

1. **Definition of SEPs**

The EPA defines SEPs as "environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform."128 "Environmentally beneficial projects" advance environmental and public health improvements and protections.129 "In settlement of an enforcement action" indicates that "(1) [the] EPA has the opportunity to help shape the scope of the project before it is implemented; and (2) the project is not commenced until after the Agency has identified a violation."130 "Not otherwise legally required to perform" means the project must be voluntarily undertaken and not required by law.131

GNAs amount to environmentally beneficial projects because they aim to generate environmental commitments from industry to eliminate or reduce pollution risks to the surrounding community.132 One example of a GNA's potential to be environmentally beneficial is the Chevron Refinery Agreement.133 Chevron agreed to reduce its toxic pollution by making improvements to its facility and installing such devices as leakless valves.134 Therefore, GNAs demonstrate immense potential as environmentally beneficial SEPs.

As an after-the-fact undertaking, GNAs satisfy the second condition of being a part of an enforcement settlement.135 Experience has shown that a local industry and its stakeholders embark upon a GNA after the occurrence of environmental violations.136 For example, the Rhone-Poulenc Agreement was a "response to a
petrochemical plant accident resulting in the release of poisonous sulfur dioxide.\textsuperscript{137} The Sun Oil Agreement serves as another example.\textsuperscript{138} The GNA was in response to emissions from the Sun Oil's refinery affecting the health of surrounding communities.\textsuperscript{139} Though a GNA is primarily entered into by a local industry and its stakeholders, nothing appears to bar the EPA from participating in the input process.\textsuperscript{140}

Finally, while legally enforceable once made, no legal requirement exists that industries enter into GNAs with local stakeholders in the first place. Stakeholder initiative, not legal mandate, prompts the formation of GNAs.\textsuperscript{141} Taking the form of a SEP simply adds to the enforceability of a GNA. If a GNA is a condition of a settlement agreement with the EPA, a violation of the GNA will give rise to a legal cause of action. As illustrated, GNAs comport with the EPA's definition of a SEP.

2. Legal Guidelines

A proposed project must follow certain legal guidelines to ensure that the EPA has the constitutional and statutory authority to enter into the settlement agreement.\textsuperscript{142}

Nexus requirement: There must be an adequate nexus between the proposed project and the violation.\textsuperscript{143} A nexus is generally established if the proposed project addresses impacts at the site where the violation occurred or at least within the immediate ecosystem or geographic area.\textsuperscript{144}

The stakeholders in GNAs establish the necessary nexus. GNA stakeholders are usually those citizens most directly impacted by the activities of the local industry.\textsuperscript{145}

Statutory objective: The proposed project must advance the purposes of the statute that is the subject of the enforcement action.\textsuperscript{146}

The right-to-know statutes, Toxic Substances Control Act (TSCA) and Emergency Planning and Community Right-to-Know Act (EPCRA), are the underlying bases for a majority of approved SEPs.\textsuperscript{147} The broadened disclosure requirements of GNAs accomplish the objectives of TSCA, EPCRA, and another similar right-to-know statute, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).\textsuperscript{148} In addition to advancing public disclosure objectives, GNAs further the general objective of most environmental statutes to improve the quality of the environment. Stakeholders work with the local industry to design creative and environmentally superior solutions to address environmental problems.\textsuperscript{147}

Independent of the EPA: The EPA control or management of SEP funds or implementation of the SEP disqualifies a proposed project as a SEP.\textsuperscript{150}

A model GNA establishes a trust fund to be managed by a designated trustee who is presumably independent of the EPA.\textsuperscript{151} In the Unocal Agreement with CBE, for example, Unocal promised to pay a total of $45 million.

\textsuperscript{137} See Sanford Lewis, Precedents for Corporate-Community Compacts and Good Neighbor Agreements 2 (last modified Mar. 4, 1998) <http://www.envirolink.org/orgs/gnap> [hereinafter Precedents for Corporate-Community Compacts].

\textsuperscript{138} See Sun Oil Agreement, supra note 69, at 1.

\textsuperscript{139} See id.

\textsuperscript{140} There are no provisions in the model GNA which explicitly bar participation by the EPA in shaping the agreement. See Model Principles, supra note 39, at 1-3. The EPA exercises the bulk of its discretion in the approval of GNAs as SEPs. See Interim Revised EPA Supplemental Environmental Projects Policy, 60 Fed. Reg. 24,856, 24,857 (1995) [hereinafter 1995 SEP Policy].

\textsuperscript{141} See Feel Good Notions, supra note 45, at 20.

\textsuperscript{142} See 1995 SEP Policy, 60 Fed. Reg. at 24,858.

\textsuperscript{143} See id.

\textsuperscript{144} See id.

\textsuperscript{145} See Moving Forward Toward Environmental Excellence, supra note 38, at 15.

\textsuperscript{146} See 1995 SEP Policy, 60 Fed. Reg. at 24,858. The statutory objective requirement aims at preventing the unauthorized expansion of EPA's discretion and enforcement budget. See Kaschak, supra note 124, at 476.

\textsuperscript{147} See Zimmermann, supra note 121, at 4.

\textsuperscript{148} See Moving Forward Through Evolution, supra note 43, at 6.

\textsuperscript{149} See id.

\textsuperscript{150} See 1995 SEP Policy, 60 Fed. Reg. at 24,858. The EPA may provide oversight over the SEP but cannot itself administer the SEP. See id.

\textsuperscript{151} See Model Principles, supra note 39 at 2. The presumption that GNA funds are independent of EPA control and management of funds relies on the fact that GNAs are primarily entered into between a local industry and its stakeholders. See Feel Good Notions, supra note 45, at 20.
to local community programs. The community groups themselves, not the EPA, act as trustees of the funds and decide how to allocate the funds to meet the needs of the community at large. The primary actors in a GNA, therefore, are the local industry and its stakeholders.6

Written settlement agreement: A written settlement agreement must specifically detail the proposed project. The Good Neighbor Project for Sustainable Industries produces a guide outlining the model principles for a GNA. The model principles provide reasonable assurances that the settlement agreement will specifically detail the nature, terms and scope of the GNA. The detail required for a GNA, therefore, ensures that this requirement will be met.

Rule against augmentation of appropriations. The project may not involve obligations the EPA is legally required to undertake itself or for which appropriations have already been provided to the EPA. In other words, local industry’s efforts pursuant to a GNA cannot be duplicative of what the EPA is already statutorily required to do.

The EPA’s enforcement budget remains uncertain. The scope of GNAs extends to the regulatory functions the EPA lacks the fiscal and human resources, i.e., appropriations, to perform. GNAs simply supplement the EPA’s regulatory functions. That the EPA created environmental databases and instituted public environmental education programs evidences the EPA’s endorsement of the public’s supplemental role in the regulatory process. As shown, a GNA adequately satisfies all of the legal guidelines for a SEP

3. Categories of SEPs

The EPA specified the following seven categories of projects that qualify as SEPs: (1) public health, (2) pollution prevention, (3) pollution reduction, (4) environmental restoration and protection, (5) assessments and audits, (6) environmental compliance promotion, and (7) emergency planning and preparedness.

Stakeholder audits form the main component of GNAs. That component allows GNAs to fall clearly within the assessments and audits SEP category. Through the audits, stakeholders audit the facility themselves or act as an oversight group to the corporate audit. In the assessments and audits SEP category, a stakeholder audit can be either (1) an environmental management system audit, or (2) a compliance audit. While the former focuses on efficiency in the production process, the latter focuses on compliance with environmental laws and regulations.

152. See Precedents for Corporate-Community Compacts, supra note 137 at 8.

153. See id.

154. The terms of a model GNA mention only the following as participating organizations: the company, community organizations, environmental organizations and labor unions. See Model Principles, supra note 39. The EPA’s control over the GNA really only factors in when the local industry does not complete the terms of the agreement satisfactorily. See 1995 SEP Policy, 60 Fed. Reg. at 24,862. If performance is unsatisfactory, the EPA chooses whether or not to impose stipulated penalties. See id.


156. See generally Model Principles, supra note 39, at 1-3.

157. See id. Specifically, among the model principles suggested by the Good Neighbor Project to be incorporated into or addressed in a legally binding GNA are the following: (1) identification of participating organizations; (2) selection of an audit oversight group; (3) selection of an audit expert; (4) clarification of administrative aspects such as funding and supervision; (5) definition of the scope of audit; (6) maintenance of public access to information; (7) handling trade secrecy issues; (8) assurances of good faith implementation; and (9) incorporation of an enforcement clause. See id.


159. See EPA’s FY 1996, supra note 12, at 3.


161. See id.

162. See EPA’s FY 1996, supra note 12, at 3.


164. See generally Model Principles, supra note 39, at 1-3.

165. See Moving Forward Toward Environmental Excellence, supra note 38, at 12.

166. See 1995 SEP Policy, 60 Fed. Reg. at 24,859. It is important to note that the stakeholder audit is intended simply to be a starting block to negotiate for further commitments from industry. See Feel Good Notions, supra note 45, at 21-22.
Using the information obtained from the audits, stakeholders negotiate for commitments from the local industry to engage in the best practices "environmentally, safety-wise and economically." Therefore, GNAs often lead to improvements in public health, pollution prevention, pollution reduction, environmental restoration and protection, and emergency planning and preparedness. Thus, a GNA can easily be crafted to fit any one of a number of SEP categories.

4. Calculating an Adequate Enforcement Penalty

In calculating an enforcement penalty, the EPA maintains three civil penalty policy objectives: (1) deterrence, (2) equitable treatment of the regulated community, and (3) immediate resolution of environmental concerns. Generally, the enforcement penalty imposed should exceed the economic benefit reaped from violating the relevant environmental statutes. The calculation of both economic benefit and gravity factors leads to deterrence of both current violators and potential violators. Consideration of economic benefit levels the playing field for those in the regulated community who have financially and significantly invested in environmental compliance. The EPA also takes into account several mitigation factors: (1) benefits to the public or environment at large, (2) innovation, (3) environmental justice, (4) multimedia impacts, and (5) pollution prevention.

GNAs, in effect, carry out the objectives of civil penalties. With stakeholder oversight, a local industry is sufficiently deterred from further noncompliance. Likewise, GNAs secure redress from violators and offset the advantages gained over nonviolators from the noncompliance. For example, a GNA can include a provision requiring the industry to make investments equal to the economic benefit attained from the violation, and thus investment can be used to train those stakeholders participating in the audit. Such redress can ensure the equitable treatment of the regulated community. Also, stakeholders achieve immediate resolution of environmental concerns by obtaining enforceable commitments from the local industry to rectify the environmental problems. Hence, GNAs present an alternative means of achieving the objectives of the EPA's civil penalty policy.

GNAs exhibit all of the mitigating factors the EPA will take into consideration when calculating enforcement penalties. Furthermore, the possibility of one hundred percent penalty mitigation arises if the SEP involves a pollution prevention strategy. Since the goal of GNAs is zero toxics and zero discharge, a local industry that enters a GNA with its stakeholders will have a deterrence value. The more the penalties will have a deterrence value, the more the penalties will have a deterrence value. The severe monetary consequences for the violator

167 See Feel Good Notions, supra note 45, at 21-22
168 See, e.g., Unocal Agreement, supra note 76, at 1 Unocal agreed to pay for a medical clinic. See id.
169 See, e.g., Alcoa Agreement, supra note 62, at 1 Alcoa agreed "to study 'zero discharge' wastewater treatment technologies for discharge to Lavaca Bay." Id
170 See, e.g., Chevron Refinery Agreement, supra note 73, at 1. Chevron agreed to continue reducing toxic emissions. See id.
171 See, e.g., Unocal agreement, supra note 76, at 1 Unocal agreed to landscape and vegetate Unocal property. See id.
172 See, e.g., Sun Oil Agreement, supra note 69 at 1 Sun Oil Company agreed to implement the Emergency Notification System to warn the surrounding community in the event of an accident. See id.
175 See id. Gravity-based penalties are directly correlated to the degree of harm caused by the violating industry. The EPA levies a penalty commensurate with the need to deter violations of similar magnitude in the future. Therefore, the greater the harm to the community, the more the penalties will have a deterrence value. The severe monetary consequences for the violator
176 See id
177 See id at 24,861
178 See Moving Forward Toward Environmental Excellence, supra note 38 at 12
179 See Moving Forward Through Evolution, supra note 43 at 6
180 See id
181 See Feel Good Notions, supra note 45, 20-22
182 See 1995 SEP Policy, 60 Fed Reg at 24,861
holders increases its chances of mitigating its enforcement penalties by up to one hundred percent. 183

5. Specifically Detailed Settlement Agreements

The Good Neighbor Project for Sustainable Industries publishes a guide providing specific details for structuring GNAs. 184 Incorporating the provisions suggested by the organization ensures that the GNA is sufficiently defined to meet the EPA’s requirement that a SEP be specifically detailed in the settlement agreement.

B. Other Enforcement Tools

While the focus of this Note is on GNA SEPs, other potential regulatory vehicles exist for implementing a GNA. Alternative enforcement tools include Project XL and the Environmental Leadership Program.

1. Project XL

Project XL 185 is an effort by the EPA to experiment with new strategies that provide regulated entities with sufficient flexibility to remain competitive in the market while also ensuring better environmental results than would have been attained under existing approaches to environmental protection. Among the pilot projects that qualify under Project XL are those that focus on community-based reinvention efforts. 186 The success of such projects centers on the collaboration between community stakeholders, industry and regulators in setting a common agenda. 187

The features of a GNA fall squarely within the criteria considered by the EPA in selecting a pilot project. First, the EPA gives greater consideration to proposals that receive the most support from community stakeholders. 188 Building on the principles of participatory community planning and consensus-based goals, GNAs are, therefore, likely to receive widespread approval from the EPA. Second, pilot projects must demonstrate a potential to achieve “cleaner results.” 189 Striving for best practices such as pollution prevention, GNAs exhibit the potential to attain environmentally superior results. Third, pilot projects must engage in a multi-media approach. 190 Underlying most GNAs is the principle of holistic content, which means that the GNA must attempt a comprehensive multimedia approach to environmental problems. Finally, the EPA requires that projects incorporate environmental justice goals within their agendas. 191 Through the empowerment of local stakeholders in the decisionmaking process of local industries, GNAs provide an effective tool to advance the goals of environmental justice. GNAs qualify as pilot projects and could be conducted within the Project XL scheme

2. Environmental Leadership Program

The Environmental Leadership Program (ELP) 192 evolved from the desire to test new and innovative compliance approaches such as third-party auditing to ease the regulatory burden on both industry and the regulatory agencies. The incentive for industry to participate in the ELP is a special recognition of those companies exhibiting true national leadership through their commitment in developing superior environmental management systems that advance pollution prevention. 193 One factor in

183. See Feel Good Notions, supra note 45, at 21-22.
184. See supra notes 138-39 and accompanying text.
187. See id. at 59,570.
188. See id.
189. See id. Stakeholders negotiate with industry and regulators about what should constitute “cleaner results.”
190. See id.
191. See id.
192. Environmental Leadership Program, 58 Fed Reg. 4802, 4805 (1993). Unlike Project XL, which permits some degree of flexibility in exchange for the attainment of environmentally superior results, pilot projects under the Environmental Leadership Program (ELP) are required to improve compliance within existing regulatory requirements. See generally id.
193. See 58 Fed. Reg. at 4802-03.
the EPA's determination of the "best" company is community involvement.194 Companies are strongly encouraged to permit community involvement in the identification, implementation and evaluation of pollution prevention practices.195

As such, GNAs provide the potential means for a company to qualify under the ELP. In stressing the goals of pollution prevention and local stakeholder involvement, GNAs meet two primary requirements of ELP pilot projects. Local stakeholders can conduct the third-party audits of the facilities and work with the local industries to design environmentally superior solutions that exhibit a commitment to significantly improving the protection of the environment and the public health. In return for entering into GNAs and engaging in creative negotiations with local stakeholders that produce concrete benefits, a local industry can receive recognition from the EPA as a national leader. The ELP, therefore, offers another means for implementing the GNA alternative.

V. The GNA SEP Alternative: An Opportunity for Reinventing Regulation

The GNA SEP alternative possesses the potential to be implemented on the regulatory level. Currently, when a violating company conducts an audit as part of its SEP, no obligation exists requiring the company to implement any of the resulting audit recommendations.196 Nonetheless, the company receives credit for the SEP.197 GNAs, however, can provide the necessary external accountability mechanism in the SEP scheme.198 Stakeholders can ensure that the company implements the audit recommendations produced from the negotiations following the stakeholder audit.199 Stakeholder participation in GNAs, therefore, can bolster the EPA's use of SEPs as an effective enforcement tool.

A. Prospect for the GNA SEP

The future outlook of the GNA SEP alternative appears bright. The expansive use of SEPs by the EPA occurred in part from its increased emphasis on environmental auditing and pollution prevention.200 Furthermore, the EPA negotiated several settlements containing innovative SEPs, which promoted environmental justice and encouraged community involvement in industry's decisionmaking process.201 For example, the EPA entered into a settlement agreement with Puerto Rico Electric Power Authority (PREPA) in which PREPA agreed to spend one million dollars to hire an independent environmental review contractor to provide assistance to local community members.202 The independent contractor kept the community informed about the local industry's compliance and provided training and independent technical expertise.203 Therefore, the EPA's changing attitude toward SEP goals appears conducive to GNAs.

There are many incentives to undertake a GNA as a SEP despite the possibility that the cost of implementation might exceed any penalty mitigation allowed by the EPA.204 Among the incentives are those associated with EMSs and environmental audits.205 Another is the good will established with the EPA and the public.206 Because GNAs include a consideration of pollution prevention, the GNAs will also likely minimize future compliance costs and

194. See id. at 4808.
195. See id.
197. See id.
198. See Public Policy Analysis, supra note 117, at 1.
199. See Moving Forward Toward Environmental Excellence, supra note 38, at 12.
200. See Lawrence, supra note 173, at 10,174.
202. See id
203. See id
204. See Growth Expected in Program, supra note 120, at 2692
205. See discussion supra Part III
206. See Zimmermann, supra note 121, at 3
correspondingly minimize future violations.\footnote{207} Next, a local industry avoids the "potentially substantial costs and risks associated with protracted litigation."\footnote{208} Also, the local industry and its stakeholders can work together to identify and correct inefficiencies in the production process. In turn, the corrections produce cost-effective improvements and make the company more competitive.\footnote{209} Moreover, resulting expenditures potentially count as capital costs subject to tax breaks.\footnote{210} Finally, the possibility of extra consideration in financial assistance programs for industries participating in GNAs provides another possible incentive.\footnote{211}

The increased efficiency in the production processes, cost-cutting improvements to its facility, tax breaks and other monetary benefits might generate too much economic benefit for the local industry. The EPA disqualifies a SEP if it results in a net positive cash flow.\footnote{212} If, however, the local industry commits not to deduct the SEP cost from its taxes, the GNA may exhibit the necessary net negative cash flow to qualify as a SEP.\footnote{213} A GNA SEP, therefore, "can be a win-win proposition for the public and alleged violator."\footnote{214}

\section*{B. Obstacles to Widespread Use of GNA SEPs}

Legal obstacles still exist which might prevent a GNA SEP from being a win-win proposition. Representative John Dingell (D-Mich.) and the General Accounting Office (GAO) have questioned the EPA's legal authority to even enter into SEPs.\footnote{215} This skepticism reflects the legal history of SEPs, which is marred by executive and legislative resistance.\footnote{216} The language of the Miscellaneous Receipts Act\footnote{217} lies, in part, behind the resistance. The Act requires "an official or agent of the Government receiving money for the Government from any source [to] deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."\footnote{218} The EPA's exercise of discretion to use SEPs to mitigate enforcement penalties seems to undermine the purpose of the Act, which is to maintain Congress' control over the public purse.\footnote{219}

Another objection arises when SEPs appear to exceed redress of the actual violations and attempt to carry out other statutory goals. This is especially true when penalties are allegedly diverted from the Treasury to benefit third parties.\footnote{220} Third-party status raises the possibility that no direct connection or actual injury resulting from the violation exists.\footnote{221} As a result, the EPA's use of SEPs creates the sense that it is attempting to circumvent its appropriations.\footnote{222}

In response, the EPA stresses that SEPs are not substitutes for penalties and that violating industries must pay, at the minimum, penalties equivalent to the economic benefit reaped from the violations.\footnote{223} Moreover, the EPA drafted the legal guidelines of the 1995 SEP Policy

\begin{footnotesize}
\footnote{207}{See id. at 3-4.}
\footnote{208}{Quan B. Nghiem, Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act, 24 B.C. ENVTL. AFF. L. REV. 561, 566 (1997).}
\footnote{209}{See supra note 173, at 10,181.}
\footnote{210}{See id., at 474 n.76.}
\footnote{211}{See generally, IOWA CODE ANN. § 15A.4 (West 1997).}
\footnote{212}{See Interim Revised EPA Supplemental Environmental Projects Policy, 60 Fed. Reg. 24,856, 24,861 (1995) [hereinafter 1995 SEP Policy].}
\footnote{213}{See id.}
\footnote{214}{Precedents for Corporate-Community Compacts, supra note 137, at 4.}
\footnote{215}{See Lawrence, supra note 173, at 10,176.}
\footnote{216}{See Nghiem, supra note 208, at 562.}
\footnote{217}{31 U.S.C. § 3302(b) (1994).}
\footnote{218}{Id.}
\footnote{219}{See GENERAL ACCOUNTING OFFICE DECISION, B-247155 (July 7, 1992), available at 1992 WL 726317}
\footnote{220}{See Steven A Herman, EPA's Revised Supplemental Environmental Projects Policy Will Produce More Environmentally Beneficial Enforcement Settlements, 10 No 6 NAAG NAT'L ENV'TL. ENFORCEMENT J. 9, 9 (1995) [hereinafter EPA's Revised Supplemental Environmental Projects Policy].
Third-party status can occur when the EPA brings a suit against a violator, but those directly affected by the violator's effects on the environment are residents in the surrounding community.}
\footnote{221}{See GENERAL ACCOUNTING OFFICE DECISION, supra note 219, at 726317.}
\footnote{222}{See id.}
\footnote{223}{See EPA's Revised Supplemental Environmental Projects Policy, supra note 220, at 9-10.}
\end{footnotesize}
to address these objections.\textsuperscript{224} Observance of the required legal guidelines establishes the EPA's legal authority to enter SEPs.\textsuperscript{225} The nexus requirement ensures that a sufficient relationship exists between the project and the violation.\textsuperscript{226} In fact, most stakeholders participate in a GNA SEP because they are directly affected by the activities of local industries.\textsuperscript{227} The other SEP requirements further limit the EPA's ability to exceed its appropriations: (1) the EPA's enforcement action is confined to the objective of the statute at issue; (2) the EPA can have no role in controlling or managing the SEP funds; (3) the SEP must sufficiently outline its terms; and (4) the SEP may not involve any obligations which the EPA is legally required to carry out itself.\textsuperscript{228} The 1995 SEP Policy, therefore, provides reasonable assurances that the general rule against augmentation of appropriations will not be violated.\textsuperscript{229} If anything, a GNA SEP allows "mitigation projects to put money back into the affected environments rather than the general treasury."\textsuperscript{230}

Furthermore, statutory provisions clearly delegate authority to the EPA in determining the amount of penalties to assess on the violating industry.\textsuperscript{231} The discretion stems from the criteria the EPA is to consider in setting penalties.\textsuperscript{232} Common to several environmental statutes is that the EPA must take into account other factors or matters that justice may require.\textsuperscript{233} This language allows the EPA considerable discretion to include GNA SEPs in enforcement settlements.\textsuperscript{234}

One further objection to the use of the GNA SEP alternative is that a SEP dilutes the deterrent effect of enforcement actions.\textsuperscript{235} Allowing the violating industry to propose and craft its own SEP amounts to giving it the discretion to determine its own punishment.\textsuperscript{236} The participation of stakeholders in the GNA, however, ensures that the violating industry makes an effort to prevent future noncompliance. Furthermore, the required consent of all participating stakeholders to a GNA rebuts the argument that the violating industry exercises sole discretion in its punishment.\textsuperscript{237}

Lack of technical assistance to local stakeholders poses a practical obstacle to the success of the GNA alternative. In fiscal year 1996, only 2 out of 347 of the EPA's enforcement actions resulted in SEPs that included funded technical assistance programs for local communities.\textsuperscript{238} Stakeholder involvement in the GNA process is hindered by the inability to understand the technical issues.\textsuperscript{239} Nevertheless, reasons for optimism exist. First, stakeholders are aggressively and successfully negotiating with local industry to share resources and technical expertise to ensure more equality in the negotiations process.\textsuperscript{240} Second, in its recent policy recommendations, the EPA recommended that industry provide more information and financial and technical assistance to encourage community driven strategic planning.\textsuperscript{241}

\textsuperscript{224} See Nghiem, supra note 208, at 571.


\textsuperscript{226} See id.

\textsuperscript{227} See Moving Forward Toward Environmental Excellence, supra note 38, at 15.

\textsuperscript{228} See EPA's Revised Supplemental Environmental Projects Policy, supra note 220, at 9-10.

\textsuperscript{229} Id.

\textsuperscript{230} Kaschak, supra note 124, at 466.


\textsuperscript{232} See Lawrence, supra note 173, at 10,179.


\textsuperscript{234} See Droughton, supra note 231, at 813.

\textsuperscript{235} See Nghiem, supra note 208, at 569.

\textsuperscript{236} See id.

\textsuperscript{237} See Feel Good Notions, supra note 45, at 26.


\textsuperscript{239} See Feel Good Notions, supra note 45, at 14.

\textsuperscript{240} See Harris, supra note 20, at 708.

\textsuperscript{241} See Environmental Protection Agency, Report to the President's Council on Sustainable Development 16 (1996).
Hence, the changing dynamics between industry, regulators and private citizens signal the hopeful prospect of implementing the GNA alternative on the regulatory level.

**VII. Conclusion**

GNAs are consistent with the objectives advanced by the reinvention of regulation. The scope of a stakeholder audit, *at a minimum*, involves a consideration of opportunities for pollution prevention. Therefore, GNAs are an affirmative effort to comply with the nation's pollution prevention policy. Also, GNAs place critical importance on empowering those citizens affected by the activities of local industries. GNAs provide a structure that allows environmental and community group initiatives to offset the relative power of industry.

The two key reinvention objectives of pollution prevention and environmental justice are just the beginning of what GNAs can potentially accomplish.

The innovative use of SEPs to implement the GNA alternative on the regulatory level merits serious consideration by regulators. It creates working relationships between regulators, industry, community groups and environmental organizations while simultaneously bulwarking the enforceability of GNAs. These changing dynamics, in turn, lay the foundation for the reinvention of regulation. By reinventing regulations, environmentally superior solutions can be designed that go beyond mere compliance.

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243. *See id.*
244. *See Feel Good Notions, supra* note 45 at 18-20.
245. *See id. at* 25.