

Building Stakeholder Trust: Defensible Government Decisions – 13110

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ABSTRACT

Administrative decisions must be grounded in reasonable expectations, founded on sound principles, and bounded by societal norms. Without these first principles, attaining and retaining public trust is a Herculean task. Decisions made by governmental administrators must be both transparent and defensible: without the former the agency will lose the public's trust and support (possibly prompting a legal challenge to the decision) and without the latter the decision may fail to withstand judicial scrutiny. This presentation and accompanying paper delves into the process by which governmental decisions can achieve both defensibility and openness through building stakeholder trust with transparency.

Achieving and maintaining stakeholder trust is crucial, especially in the environs of nuclear waste management. Proving confidence, stability, and security to the surrounding citizenry as well as those throughout the country is the goal of governmental nuclear waste remediation. Guiding administrative decision-making processes and maintaining a broad bandwidth of communication are of incalculable importance to all those charged with serving the public, but are especially essential to those whose decisional impacts will be felt for millennia.

A strong, clear, and concise administrative record documenting discrete decisions and overarching policy choices is the strongest defense to a decisional challenge. However, this can be accomplished using transparency as the fundamental building block. This documentation allows the decision-makers to demonstrate the synthesis of legal and technical challenges and fortifies the ground from which challenges will be defended when necessary. Further, administrative actions which capture the public's interest and captivate that interest throughout the process will result in a better-informed, more deeply-involved, and more heavily-invested group of interested parties. Management of information, involvement, and investment on the front-end of the process reaps rewards far more efficiently than attempts to assuage and mitigate the concerns of those parties after the fact and there are a number of tools Savannah River Remediation (SRR) has deployed that render transparency an ally in this context.

The makers, applicators, and beneficiaries of policies and decisions will all benefit from strong administrative records which document decisional choices in an open and transparent manner and from timely, up-front management of concerns of interested parties. The strongest defense to decisional challenges is an ability to demonstrate the basis of the decision and the reason(s) that the decision was chosen over other alternatives. Providing a sound basis for defending challenges rather than avoiding or fighting over them allows the deciding entity the greatest opportunity to produce value for its customer. Often, a transparent process that invites public participation and is open for public review and comment will thwart challenge genesis. An entity that has to devote resources to defending its choices obviously cannot utilize those resources to further its mission.

INTRODUCTION

For years transparency has been the catch phrase for ushering in a new working relationship between the government and the public. If done right it engenders public trust, avoids numerous issues down the road and provides defensible support for decisions that the governmental agencies make. If done wrong the loss of public trust, increasing second guessing, perceptions becoming reality, and increased scrutiny from the media and others occurs and the potential for litigation rises. Therefore it is incumbent upon all the decision makers and stakeholders in the game to act to preserve the concepts and tenets of transparency. Further, transparency is particularly important when addressing nuclear and environmental concerns as the fear of the unknown is great and without this fear being fed by transparency, if left to its own devices the public default provision is one of disbelief and doubt.

DISCUSSION

But before we go any further in the examination of transparency, it is necessary to define exactly what we mean by transparency in the context of government decision making. You have probably heard the concept transparency touted by several politicians and the present administration is no exception. The Obama administration, while not the first administration to do so, touted transparency as a new tool for which to abide. In fact on day one of the 2008 Obama administration, the administration policy on transparency was published¹, and three major points were outlined. (1) Government should be transparent; (2) Government should be participatory; (3) Government should be collaborative. That policy statement defined transparency in terms of its components and elements. It is openness in government promoting accountability and information for citizens about what the government is doing. It is disclosing information rapidly, in forms the public can readily find and using online technologies and soliciting public feedback to identify information of greatest use to the public. In short, it is the efficient facilitation of a continuing dialogue between the government and its citizens.

DOE Secretary Chu has echoed these sentiments in a recent (March 2012)² secretarial policy statement on scientific integrity. The policy which encompasses many points noted that “DOE will facilitate the free flow of scientific and technological information.” With respect to transparency it specifically noted that “transparency and accessibility of scientific and technological information support the continued advancement of a sound science and technology base to guide and inform the nation’s critical public policy decisions.” Finally the Obama administration followed these directives up with another directive and policy change promoting transparency through adopting a presumption in favor of Freedom of Information Act (FOIA) requests. That is, government should not immediately use FOIA exemptions as a means of

¹ United States, Office of the President, Transparency and Open Government (Washington: January 21, 2009)

² United States, Department of Energy, Secretarial Policy Statement on Scientific Integrity (Washington: March 23, 2012)

withholding information. This was spelled out specifically by Attorney General Eric Holder in his Attorney General Guidelines on FOIA.³ There its practical guidelines for implementing disclosure were another victory for transparency. It, among other things, encouraged all agencies to use technology to proactively post records of interest to the public without the requirement of a FOIA request.

As a result of these policy directives and other established procedures for rulemaking⁴, a supposition one might proffer is that there are several safeguards presently in place ensuring that transparency exists in government decision making.

However, this is not the end of the story as the government and its contractors literally make a number of decisions that lead up to final agency decisions that are outside of the realm of the formal rulemaking decision making infrastructure. In fact, even when in a formal rulemaking ambit or framework this may not preclude or even mitigate a protest to the decision. One such matter involved the Savannah River Site when it faced litigation during the issuance of a final solid waste landfill permit.

In 2007, the DOE sought to obtain from the South Carolina Department of Health and Environmental Control (DHEC) a final permit for the Saltstone Disposal Facility (SDF). The permit had undergone public comment and review and was issued a final permit on June 23, 2007. However, a number of public interest groups including the Natural Resources Defense Council (NRDC) contested the issuance of the permit in a contested case filing before the Administrative Law Court in the State of South Carolina.

Key components of the contested case procedures included an automatic stay of a minimum of 9 months. Further, if left to run its course, a protracted and complex trial was a certainty by virtue of the issues raised by the NRDC and other public interest groups despite very good defenses the DHEC and intervenors, i.e., DOE and Washington Savannah River Company (WSRC) (predecessor to SRR), could have raised. This eventuality would have included costly discovery and a hearing. This permit was also necessary to ensure continued operation of the tank farm operations. Therefore, there were a number of reasons why expedited settlement of this case was important.

In this case, one could be tempted to say transparency did not work. Because despite formal administrative public comments and a public hearing on the permit, litigation and its inherent costs and delays did occur. On one level this would be a correct assumption, but there is a level of complexity here that requires closer examination and discourse. Disposition of the matter actually occurred within three months after the filing of the lawsuit. A number of factors may have been instrumental in producing this result including the fact that public sentiment as

³ United States, Office of the Attorney General, The Freedom of Information Act (FOIA) (Washington: March 19, 2009)

⁴ The use of Notices of Proposed Rulemaking (NPRM's) and Notices of Inquiry (NOI's) for example are designed to generate public interest in the topic of issue.

measured by the support of the Citizens Advisory Board (CAB) and DHEC tacit support assisted in putting pressure on the plaintiffs attempting to prevent operation of the permit. This public support also assisted in coloring the media's editorials on this issue. This public support was garnered and due primarily to the transparent efforts of DOE and its contractor in educating the public on the importance of the permit. Thus the contention is that transparency both prior to and during the litigation and settlement phases was a significant contributor in coloring the issue favorable to DOE and WSRC and achieving a favorable settlement within 3 months.

The elements of transparency deployed by SRR's predecessor and now institutionalized and refined by SRR in conjunction with DOE are many. How do you know if you have a program that is transparent? The examination begins with the ability to answer a few basic questions.

First, most critical is an understanding of who are the stakeholders for any issue. What are their reputations? Have you reached out to them? Have you established a relationship with them? Have you disseminated information to them? Do you understand their issues? Have you engaged in dialogue? Do you have emissaries that can carry a credible message? Is your message simple to understand?

The necessary components of the SRR transparency plan were borne from answers to the previous set of questions, a supportive DOE, the ensuing settlement discussions with the plaintiffs in that contested case and a continuing evolution of experiences when dealing with the public and government. The central tenets to the SRR transparency plan are:

1. Knowing and aligning stakeholders with issues
2. Establishing relationships with stakeholders
3. Dissemination of materials through readily accessible means
 - a. Mailing list
 - b. Web page
 - c. Knowledge meetings⁵
4. Site tours
5. Accessibility of experts
6. Clear messaging
7. Pre-issue response

⁵ Simply put, these are meetings with a stakeholder where the objective is to ensure that stakeholders understand information that is credible and real and to correct any misinformation that may exist.

8. Use of demonstratives e.g., development of board game (“Edventures” showing role of stakeholders at SRR)
9. Engaging in meaningful dialogue

As the above SRR case illustrates, sometimes transparency is not enough to stave off litigation or challenge to specific decisions, but in this case transparency during the settlement discussions phase did expedite the settlement process as tenets 3, 4, 5, 6 and 9 above were deployed to build trust and reach equitable and expedited settlement. Indeed even one section of the settlement decree was titled transparency. Further, as the following discussion asserts, transparency is a bridge to good decision making which can lead to successful defenses of governmental decision making through offensive use of the administrative record.

What is the administrative record? An administrative record file is a collection of documents which form the basis for an agency's decision. For example, in an environmental cleanup matter documents relied upon to make the case for the selection of a response action at a Superfund site. This does not mean that only documents which support a response decision are placed in the administrative record. Relevant documents that were relied upon in selecting the response action, as well as relevant documents that were considered but ultimately rejected, are included. The administrative record also acts as a vehicle for public participation in selecting a response action.⁶

Administrative record files may be added to as relevant documents are generated or received by the EPA. The administrative record is not complete until it contains a decision document (e.g., Record of Decision (ROD) or Action Memorandum.⁷

The administrative record is an important complement to transparency. It takes the best of transparency and uses it to defend a decision. Therefore the more transparent i.e., the more the foundation is clearly laid out for the decision with supporting evidence the greater the chance of success in the event of challenge to the decision.⁸ This is made possible because the courts have established an arbitrary and capricious standard of review for certain agency decisions. This is

⁶ US EPA, Pacific Southwest, Superfund Sites. United States Environmental Protection Agency. December 21, 2012 <<http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf>>.

⁷ Ibid.

⁸ It should be noted that there is a delicate balance between transparency and the deliberative process. The potential chilling effect that could occur when all government decision making documents are exposed or exposed earlier than required can create a chilling environment in which the government would have difficulty in doing its job. While the deliberative process and its accompanying privilege are beyond the scope of this paper, it is a concept that must be accounted for when developing a transparent program.

the lowest level of review a court can give to a government decision. Strictly speaking the standard is arbitrary, capricious or an abuse of discretion or otherwise not in accordance with law. What is deemed offensive use of the administrative record occurs when sufficient information exists in the administrative record to support a decision. Thus offensive use of the administrative record can be successfully deployed by using it to support decision making by the government knowing that judicial support will be there if the record is complete. The administrative record is therefore both a sword and a shield parrying third party attacks and shielding government decisions as long as the arbitrary and capricious review standard is met.

The seminal case of *Citizens to Preserve Overton Park v. Volpe* 401 U.S. 402 (1971) establishes this level of review and the elements courts will look to establish that this standard has been met. In *Citizen*, then local citizens of Overton Park banded together to block the Secretary of Transportation (Volpe) from building a highway through Overton Park. Overton Park was approximately 340 acres of walkways trails, green areas and a zoo in central Memphis, Tennessee. After losing at the district and appellate court levels, citizens appealed to the U.S. Supreme Court which held that there was not enough evidence in the record to make a determination.

This “not enough evidence” meant not just data but also an explanation of the why they made the decision. It also established that certain Agency decisions are judicially reviewable but that the review is limited to ensuring that Agency acts are within the scope of their authority and that decisions are not arbitrary, capricious or an abuse of discretion. Thus the framework was set for the standard of review under the Administrative Procedures Act (APA). A close examination of the factors outlined in the case would reveal that elements in a good transparency program align with the requirements of successfully defending a challenge to an Agency decision. This would include (1) providing enough information to the public (2) making a rational determination based on the evidence presented and (3) documenting an explanation of why the decision was made.

In a case closer in context to our collective experiences, *Vermont Yankee Nuclear Power Corp. v. NRDC* 435 U.S. 519 (1978), the NRDC sued attempting to halt the licensing of a nuclear power plant in Vermont. The Atomic Energy Commission (AEC) (which was the predecessor to the NRC) prepared an EIS which had to consider alternatives to the building the plant. NRDC argued that the AEC did not consider energy conservation as an alternative. The Supreme Court disagreed and said it is within the discretion of an individual agency to interpret NEPA laws. This is important because the Court is establishing the latitude an Agency has to interpret its own rules. In the context of aligning with transparency, it illustrates that putting forward a position with validation for that position (one central tenet of transparency) is likely to be upheld if judicial review were likely to ensue.

Finally, in *Chevron U.S.A. Inc. v. NRDC* 467 U.S. 837 (1984) a Clean Air Act case in which EPA changed the definition of source from an earlier definition, NRDC challenged the change arguing that EPA did not have the authority to change the definition. As an affected party, Chevron impleaded into the case on EPA’s side. The Appellate Court agreed with the NRDC and found that EPA did not have the authority to change the definition. The US Supreme Court reversed stating that courts must defer to the opinion of an Executive Agency in certain cases. In outlining its rationale, the court stated if Congress has not specifically and directly spoken, the

Agency interpretation is reasonable and there is a basis for making the decision then the court should defer to the Agency. The Court further elaborated on the rationale for the ruling stating that the Agency understands the technical specifics and possible implications much better than the courts ever could. This deference to Agency expertise is an important element in preserving government decision making and once again aligns with the transparency tenet of public accessibility to experts in the field.

CONCLUSION

These three cases illustrate that courts have increasingly given government decision-making more discretion and protection from overruling when the basis for the making the decision has been reasonable, buttressed with supporting data and documented with articulated reasons for making the decision. In short, the government decisions have a good shot at being upheld and are more defensible when these criteria are met. This roadmap comports with all of the tenets of a good transparency program. As a result the good that can come from having a transparent program is beneficial in both the short term and long term. That is to say the possible dividends reaped by transparency continue to payoff long after the initial investment from maximizing public involvement to providing a defensible government position should litigation or other challenge occur. The shaded area of Figure I illustrates the best possible position to be in when the tenets of transparency intersect with the requirements of an administrative record.

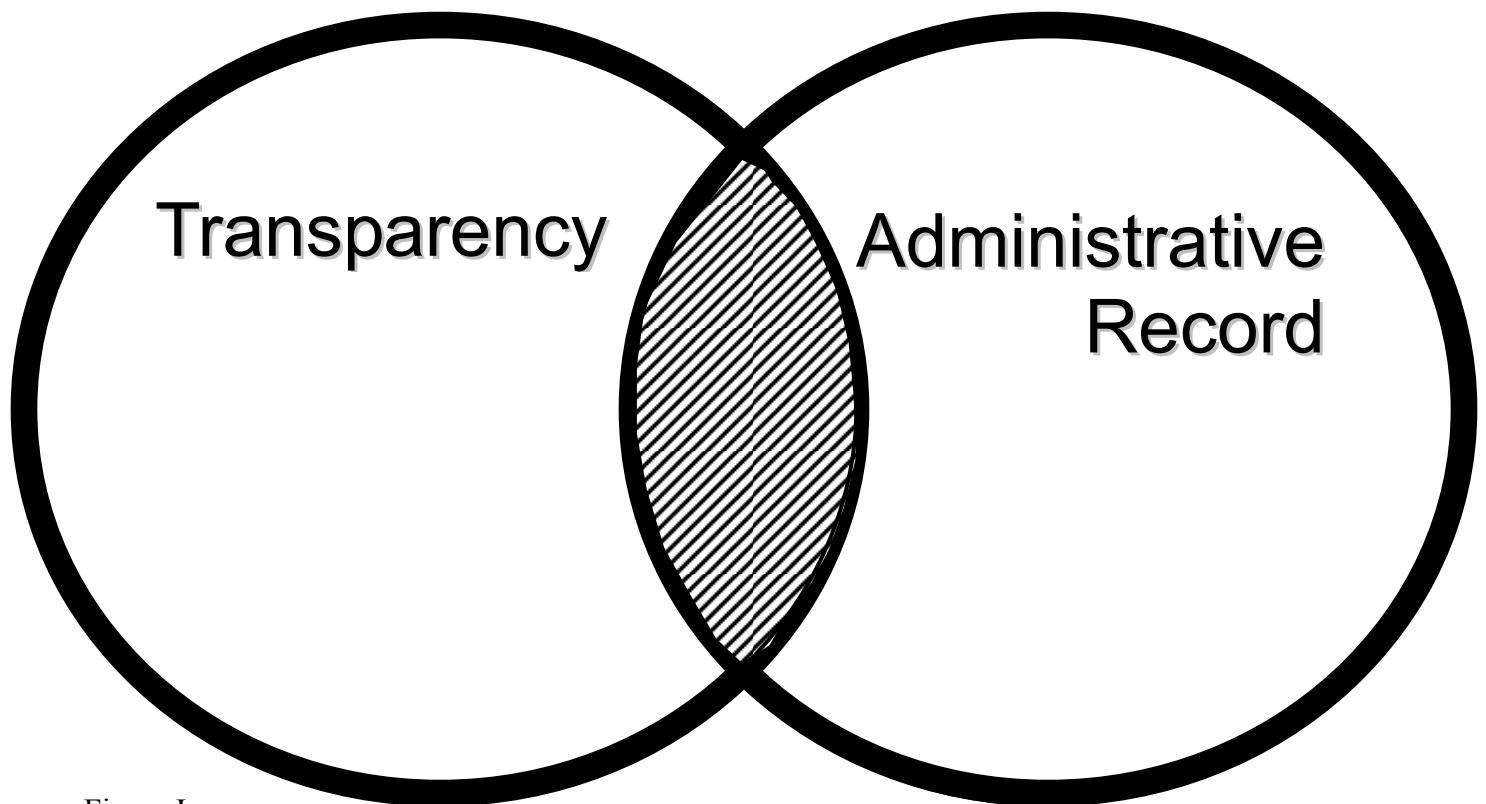


Figure I.

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