

A NEW SOCIAL CONTRACT FOR GOVERNING INDUSTRIAL RISK IN THE COMMUNITY

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ABSTRACT: Despite extensive regulation of hazardous industrial activities, residents of many communities that host these activities fear risks to their health and safety and suffer impacts that degrade the local environment. The concept of a New Social Contract (NSC) is presented as a supplement to regulation. It would involve company-community negotiation of an agreement, either enforceable or trust based, that provides company commitments to address the local risks and impacts. The concept is then examined with reference to experience with the negotiation of “good neighbor agreements” and the corporate social responsibility movement, and followed by discussion of the negotiation process for securing company commitments and implementation issues. Recommendations based on best practices and lessons learned from relevant experience are then presented for optimal use of the NSC concept.

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I. GOVERNING INDUSTRIAL RISKS AND IMPACTS IN THE COMMUNITY CONTEXT

Despite extensive regulation of hazardous industrial activities, residents of many communities that host these activities fear risks to their health and safety and suffer impacts that degrade the local environment and harm their well-being. The fears are fueled by the frequent occurrence of major accidents and spills at oil refineries, chemical plants, factories, and other industrial sites across the United States,¹ and by information about exposure to pollutants that

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1. “Major accidents” are those that have off-site harmful consequences because they involve fires, explosions, toxic releases, and physical impacts, as distinguished from other industrial accidents that are confined to workforce injuries. In 2012, 125 significant incidents occurred at petroleum refineries in the United States, many of which are located in urban areas. U.S. CHEM. SAFETY & HAZARDOUS INVESTIGATION BD., REP. NO. 2012-03-I-CA, CHEVRON RICHMOND REFINERY PIPE RUPTURE AND FIRE 11 (2014). In addition, since 2009, 27 such events occurred at chemical plants in the United States, causing 75 fatalities, numerous injuries, and other impacts in communities. PRESIDENTIAL WORKING GRP. ON CHEM. FACILITY SAFETY & SEC., EXEC. ORDER

are routinely discharged by company facilities.² In addition, residents are often burdened by local impacts of company operations such as depletion and contamination of water resources, excessive noise, heavy traffic, unsightly company premises, and other nuisances that degrade the quality of life and property values in the community.³

Traditional means of governing these risks and impacts in the community context have failed to add up to an effective system of social control over local facility operations for several reasons:

- The local risks and impacts are context-specific, and being so highly particularized, are not sufficiently addressed by national and state regulatory programs.⁴ In addition, detailed regulatory procedures and hearings at distant locations have the effect of discouraging local public involvement.⁵
- Company presence in the community is often so essential for the local economy that community officials refrain from robust use of zoning by-

13650: ACTIONS TO IMPROVE CHEMICAL FACILITY SAFETY AND SECURITY—A SHARED COMMITMENT app. D (2014). For maps of high risk facilities near schools and hospitals, see *Maps Archive*, CTR. FOR EFFECTIVE GOV'T, www.foreffectivegov.org/maps-archive/ (last visited Mar. 23, 2016).

2. Many industrial facilities raise public health concerns in their host communities because of their routine discharge of toxic pollutants and their fugitive emissions, such as refineries, chemical process plants, manufacturers of electronic products, hydraulic fracturing facilities, and industrial agriculture sites. See, e.g., PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 7 (2008), http://www.ncifap.org/_images/pcfapsmry.pdf; Shaun A. Goho, *Municipalities and Hydraulic Fracturing: Trends in State Preemption*, 64 PLAN. & ENVTL. L., no. 7, 2012, at 3, 3; Enesta Jones, *EPA Proposes Updates to Emissions Standards for Refineries to Protect Nearby Neighborhoods*, U.S. ENVTL. PROTECTION AGENCY (May 15, 2014), <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/d9554914cca0320685257cd9004a2ec4>; *Flame Retardants and PVC in Electronics*, ELECTRONICS TAKEBACK COALITION, <http://www.electronicstakeback.com/toxics-in-electronics/flame-retardants-pvc-and-electronics>. (last visited Mar. 23, 2016).

3. The term *impacts* is used here to denote actual, or foreseeable and imminent, adverse consequences of an industrial activity and thereby differs from risks that are defined by probabilistic risk analysis as possible harms to exposed populations and ecosystems. Hydraulic fracturing for shale oil and gas is a prime example of an activity that creates both impacts (such as noise, wastewater, and debris) and risks (such as pulmonary illness, seismic events, and groundwater contamination). JOHN R. NOLON, PROTECTING THE ENVIRONMENT THROUGH LAND USE LAW: STANDING GROUND 52–54 (2014); see also EMMETT ENVTL. LAW & POLICY CLINIC, HARVARD LAW SCH., A LANDOWNER'S GUIDE TO HYDRAULIC FRACTURING: ADDRESSING ENVIRONMENTAL AND HEALTH ISSUES IN OIL AND GAS LEASES 24, 34, 37–38, 44–45 (2014).

4. Highly particularized problems are those whose dimensions and other characteristics are shaped by local circumstances and specific attributes of the industrial activity, and thereby require site-specific regulation for their abatement. Because conducting such site-specific regulation would exceed federal and state resources, the abatement function is likely to be delegated to communities. One example is EPA's "deputization" of communities and neighborhood groups for the abatement of fugitive emissions that are causing local air pollution as measured by monitoring equipment installed "at the fencepost" of refineries. See Alec C. Zacaroli, *Clean Air Act: New Developments that Are Redefining the Enforcement Landscape*, 14 Daily Env't Rep. (BNA), No. 205, at B-1–B-2 (Oct. 23, 2015). Other examples include control of stormwater runoff that contaminates rivers and protection of groundwater quality.

5. See Wendy Wagner, *The Participation-Centered Model Meets the Administrative Process*, 2013 WIS. L. REV. 671, 687, 690 (2013).

laws, permit powers, nuisance ordinances, and other local authority that could drive the offending industrial activity elsewhere. Also, community officials often lack expertise and resources.⁶

- Private litigation is usually too costly, especially for low income residents who may be disproportionately exposed. Thus, the potential remedies and deterrent effect of tort law and the assertion of property rights are not gained.⁷
- Company self-regulation is voluntary, variable, and shaped by productivity goals and other interests that take priority over concerns of the community.⁸

As a result, companies and host communities are often locked in a troubled marriage characterized by ongoing tensions, polarization, conflicts, protests, and adversarial proceedings in agencies and courts. In addition to failing to sufficiently address risks and impacts, such a relationship is disruptive of company activities and frustrates community programs for improving quality of life and economic growth.

The troubled relationship also impedes company innovation in facility operations that would enable new processes and improve efficiency and sustainability. A hostile community is more likely to oppose granting the local permits and licenses that are often needed by the company to make its innovations operational.

This article examines an approach to mitigating such problems that would supplement federal, state, and local regulation. It involves company engagement with its host community or groups and other stakeholders in the community to negotiate a “new social contract” (NSC), a negotiated agreement between a company and its host community or groups of residents that defines steps the company has agreed to take in response to the concerns and fears it has engendered. The agreement may be contractual and enforceable, or be officially incorporated in a local permit that requires company compliance, or serve as a written understanding based on trust. In any case, it must be compatible with existing laws, regulations, and the rights of individual residents.

6. See DOUGLAS R. PORTER, *MANAGING GROWTH IN AMERICA’S COMMUNITIES* 6–8, 269 (1997); see also N.Y. CITY BAR ASS’N, *THE ROLE OF COMMUNITY BENEFITS AGREEMENTS IN NEW YORK CITY’S LAND USE PROCESS* 32, 39 (2010), <http://www.nycbar.org/pdf/report/uploads/20071844-TheRoleofCommunityBenefitAgreementsinNYCLandUseProcess.pdf>.

7. The costs include fees for attorneys, consultants, and expert witnesses, preparation of materials, lost work time, and so forth, and increase when discovery is involved and litigation is protracted by defense counsel motions and other tactics.

8. For cases studies and analyses, see generally GREGG P. MACEY & LAWRENCE SUSSKIND, *CONSENSUS BLDG. INST.*, U.S. EPA REP. 300R03004, *USING DISPUTE RESOLUTION TECHNIQUES TO ADDRESS ENVIRONMENTAL JUSTICE CONCERNS: CASE STUDIES* (2003); Gregg P. Macey, *Coasean Blind Spots: Charting the Incomplete Institutionalism*, 98 *GEO. L.J.* 863 (2010) [hereinafter Macey, *Coasean Blind Spots*].

II. DEVELOPMENTS ENCOURAGING THE NEW SOCIAL CONTRACT CONCEPT

Companies, whether long established in the community or seeking entry, focus on compliance with regulations, industry standards, local ordinances and permits. This focus on compliance is often seen by company management as fulfilling its responsibilities to the community, and a reason to avoid doing more. But communities are dynamic and demand more as they undergo changes in demography, land use, values, attitudes, and aspirations, and residents become increasingly knowledgeable and concerned about local risks and impacts.⁹ Residents who are disregarded or disproportionately burdened form coalitions that press for immediate response from companies and regulators.¹⁰

Several developments indicate that negotiation of an NSC could provide a form of engagement for addressing such scenarios. The developments include corporate social responsibility initiatives, regulations requiring company disclosures and information sharing, new concepts of community governance, and experience with negotiation of several types of company-community agreements.

A. Corporate Social Responsibility

Corporate social responsibility (CSR) is a theme promoted by notable private and public organizations to bring about voluntary adoption of progressive corporate policies and practices for human rights as well as environmental and industrial sustainability. Among its main features are company transparency, information sharing, and engagement with stakeholders.¹¹

The broadest set of principles is set forth in ISO 26000, a “Guidance on Social Responsibility” developed by the International Organization for Standardization (ISO) after lengthy deliberations involving stakeholders from eighty countries and corporate, governmental, and civil society organizations.¹² Its purpose is to create a socially responsible organizational mindset and have

9. See generally PORTER, *supra* note 6.

10. See David M. Chavis, *The Paradoxes and Promise of Community Coalitions*, 29 AM. J. COMMUNITY PSYCHOL. 309, 309–11 (2001).

11. Corporate Social Responsibility is generally understood to be the way firms integrate social, environmental, and economic concerns into their values, culture, decision-making, strategy and operations in a transparent and accountable manner. *Corporate Social Responsibility: An Implementation Guide for Canadian Business*, INNOVATION, SCI. & ECON. DEV. CAN., <https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/rs00609.html#s1.2>. (last modified June 5, 2015). For further discussion and critiques, see JOHN MORRISON, *THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE* (2014); Richard B. Stewart, *Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness* (N.Y.U. Working Paper No. 14–30, 2014).

12. INT’L ORG. FOR STANDARDIZATION, ISO 26000:2010 GUIDANCE ON SOCIAL RESPONSIBILITY, <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en>. (last visited Feb. 23, 2016). The Guidance encourages each company to determine its de facto sphere of influence, identify stakeholders, and affirmatively contribute to sustainable development, human rights, enlightened labor practices, and environmental and resource protection.

each company “consider itself as part of, and not separate from, the community in approaching community involvement and development.”¹³

ISO 26000 and other initiatives set forth CSR principles for voluntary adoption that have become widely known and respected, and raise expectations about new norms of business behavior. Large global firms with high public visibility are adapting to this growing body of “soft law,” knowing that if they fall short, they will incur mistrust and be held to account by consumers and investors, and provoke new regulation.¹⁴ Although gaps between promise and performance are apparent, CSR momentum has been established at global and national levels and seems destined to move companies towards greater acceptance of negotiation with communities and interest groups to deal with local risks and impacts.¹⁵

B. Information Disclosure Regulations

Information disclosure regulations also encourage company-community engagement in negotiating agreements that improve public safety and health. The prime example is the Environmental Protection Agency’s (EPA’s) Risk Management Plan Rule (RMP).¹⁶ Pursuant to RMP, companies with specified types and quantities of chemicals on site, and who thereby pose risks of major accidents, must publicly report their accidents and near misses, potential accident scenarios and likely off-site consequences, and their accident prevention and emergency response programs. This information must be made available to EPA and state officials, and to local emergency planning committees (LEPCs) in host communities so that they can negotiate a collaborative ap-

13. *Id.* § 6.8.2.1.

14. MORRISON, *supra* note 11, at 115–17; *see also* Rüdiger Hahn, *ISO 26000 and the Standardization of Strategic Management Processes for Sustainability and Corporate Social Responsibility*, 22 *BUS. STRATEGY & ENV’T* 442, 447 (2013).

15. Many companies now proclaim CSR policies. Of these, some have also adopted new risk management practices and made various commitments to self-evaluation, transparency, information sharing, and greater respect for public concerns about risks. Generally recognized as leading CSR companies are

- Unilever at <http://www.unilever.com/sustainable-living-2014/our-approach-to-sustainability/>;
- Microsoft at <http://www.microsoft.com/about/philanthropies/>;
- Coca Cola at <http://www.cokece.com/corporate-responsibility-sustainability/>;
- Dow Chemical at <http://www.dow.com/sustainability/commit.htm>; and
- BMW at <https://www.bmwusfactory.com/sustainability/social-responsibility/?r=1462480527746#corporate>.

Also, refer to the widely publicized Exxon-Mobil application of self-selected CSR principles in negotiating and undertaking a \$19 billion project to exploit the natural gas resources of Papua, New Guinea. The project involves major investments in human, technical, and commercial support systems. JANE NELSON & KARA VALIKAI, *BUILDING THE FOUNDATIONS FOR A LONG-TERM DEVELOPMENT PARTNERSHIP: THE CONSTRUCTION PHASE OF THE PNG LNG PROJECT 4* (2014), <http://www.hks.harvard.edu/content/download/67818/1244082/version/1/file/PNGLNGreport.pdf>.

16. *See* Clean Air Act of 1990 § 112, 42 U.S.C. 7412(r) (2012); *see also* Risk Management Plan, 40 C.F.R. § 68.150–68.195 (2012); *Risk Management Plan (RMP) Rule*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/rmp> (last updated Apr. 19, 2016).

proach with companies for responding to chemical accidents and mitigating their consequences.¹⁷

Collaborative emergency response programs have been developed in many communities. And in some of these communities, local officials and groups of residents, informed by the RMP reports and additional information disclosed by companies subject to the Community Right-to-Know Act,¹⁸ have also negotiated with companies for specific improvements in accident prevention—for example, in safety management, operations, maintenance, worker training, chemical inventory reduction, substitution of less hazardous chemicals, independent safety audits, and information sharing.¹⁹

Since 9/11, public access to some of the RMP-required information has been restricted because of national security concerns.²⁰ However, the incidence of major accidents at chemical facilities in recent years has led to a Presidential order²¹ and special commission report²² that indicate more robust implementation of RMP is forthcoming.²³

Other EPA programs also encourage negotiated agreements for addressing community issues.²⁴ In addition, many federal and state programs for pro-

17. Clean Air Act § 112; *see also* Memorandum from Dana A. Shea to Senator Frank R. Lutenberg (Nov. 16, 2012) (on file with Congressional Research Center). *See generally Risk Management Plan (RMP) Rule*, *supra* note 16.

18. Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11002 (2012); 40 C.F.R. § 350.1–350.40. *See generally Emergency Planning and Community Right-to-Know Act (EPCRA)*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/epcra> (last updated Feb. 17, 2016).

19. DOUGLAS S. KENNEY ET AL., EVALUATING THE USE OF GOOD NEIGHBOR AGREEMENTS FOR ENVIRONMENTAL AND COMMUNITY PROTECTION 1 (2004); GREGG P. MACEY & LAWRENCE SUSSKIND, *Case 4: Seeking Good Neighbor Agreements in California*, in MACEY & SUSSKIND, *supra* note 8, at 20 [hereinafter MACEY & SUSSKIND, *Seeking Good Neighbor Agreements*]. These studies of “good neighbor agreements” negotiated between companies and communities or citizens’ groups reveal that the willingness of companies to engage and negotiate such matters depends on several factors. These factors include (1) the intensity of community concerns about facility accidents often stimulated by disclosure of RMP information; (2) the incidence and scale of accidents and near misses at their facilities; (3) the investigations by EPA or the national Chemical Safety Board; and (4) the consideration of whether companies need permits from the communities for continued or expanded operations. For deeper analysis of the determinants of company involvement in “fenceline bargaining” with a community or citizens’ group, *see also* Macey, *Coasean Blind Spots*, *supra* note 8, at 871–73.

20. 42 U.S.C. § 7412(r)(7)(H)(v) (2012) prevents public disclosure of any information about the off-site consequences of an accidental release unless the facility owner or operator makes such information available to the public without restriction.

21. Exec. Order No. 13,650, 3 C.F.R. § 320 (2014).

22. PRESIDENTIAL WORKING GRP. ON CHEM. FACILITY SAFETY & SEC., *supra* note 1.

23. Michael Weller & Heather M. Palmer, *EPA Considering Major Changes to Risk Management Program*, NAT’L L. REV. (Aug. 11, 2014), <http://www.natlawreview.com/article/epa-considering-major-changes-to-risk-management-program>; *see also* Mark N. Duvall, *Wide-Ranging Federal Plans to Address Chemical Process Safety and Security*, BEVERIDGE & DIAMOND, PC (Aug. 13, 2014), <http://www.bdlaw.com/assets/htmldocuments/2014-08-13%20BD%20News%20Alert%20-%20Plans%20to%20Address%20Chemical%20Process%20Safety%20and%20Security.pdf>.

24. Stimulus for negotiation as a contextually shaped approach to local risks is also being provided by other types of EPA programs. For example, its Environmental Justice Collaborative Program funds nonprofit and tribal engagements with the industry to negotiate and “implement solutions that significantly address environmental and/or public health issues in American commu-

protecting natural resources set minimum standards and invite or allow local action to establish more protective requirements through zoning and other land use controls. Many communities have therefore acted to protect local groundwater quality and recharge, watershed areas that source their water supplies, wetlands that function as flood controls, and streamflow and habitat for fish and wildlife. To accomplish such goals, communities have used their authority over land use to set generic requirements and by negotiating with developers for ad hoc, site-specific protection of such resources.²⁵

C. New Concepts of Governance

New concepts of governance envision collaborative company-community engagement. These involve reforming social contract theory, and adopting the “social license to operate” (SLO) concept. Social contract theory has long been accepted as a contractual rationale for democratic governance and “the linchpin of relationships between individuals and between individuals and government.”²⁶ It provides that individuals exercise restraint and heed the rights of others in exchange for the promise by those whom they have selected to govern that well-ordered relationships will be established and issues that arise will be resolved by means consistent with norms of fairness and justice.

But the concept does not include the corporate entity nor envision the relationship between a company and its community. As powerful members of a community, companies create public benefits and costs and thereby play a significant role in governing host communities and their residents. This de facto system of private governance is implemented by managers, boards, and shareholders mainly on the basis of each company’s economic interests and fails to provide a direct and accountable relationship with the individuals who comprise the community, notwithstanding that the individuals can petition legislators or regulators to intervene on their behalf or assert their individual rights in courts against those who govern the community. The missing link of a direct and accountable relationship between such members of the public and the companies that play a large role in governing their lives is cause for the claim that “rethinking the social contract remains one of the most urgent imperatives of our time.”²⁷

nities.” News Release, U.S. Env’tl. Prot. Agency, EPA Awards Mississippi Conference of Black Mayors a 2014 Environmental Justice Collaborative Problem-Solving Cooperative Agreement (Sept. 16, 2014), <https://yosemite.epa.gov/opa/admpress.nsf/0/6D6550DCFEF7059785257D550061FE0>. Local issues addressed by such negotiated collaborations include residual air pollution risks that persist despite Clean Air Act regulation, low-income residential lead exposure, and rehabilitation of community dump sites. See *Grants & Programs*, U.S. ENVTL. PROTECTION AGENCY, <https://archive.epa.gov/compliance/environmentaljustice/grants/web/html/index.html> (last updated Feb. 21, 2016).

25. For useful guidance, see MODEL LAND USE MGMT. CODE § 9.3 (GA. DEP’T OF CMTY. AFFAIRS 2007), <https://www.dca.ga.gov/development/PlanningQualityGrowth/programs/documents/Part9cDesignGuidelines.pdf>.

26. ALLEN L. WHITE, BUS. FOR SOC. RESPONSIBILITY, TELLUS INST., IS IT TIME TO REWRITE THE SOCIAL CONTRACT? 3 (2007), http://www.tellus.org/publications/files/BSR_AW_Social-Contract.pdf.

27. *Id.* at 19.

Recognizing the need for a collaborative relationship between corporation and community, especially with regard to industrial conduct of hazardous activities, academics and the mining industry have jointly developed the SLO concept.²⁸ SLO is based on the premise that a company's operations and destiny ultimately depend on public acceptance, and thereby calls for companies to be mindful that their policies and practices must be focused on meeting societal expectations that extend beyond their compliance with regulations.²⁹

SLO has advanced beyond theory to become an operational form of corporate social responsibility (CSR). According to Nelsen, it has become

a set of concepts, values, tools and practices that represent a way of viewing reality for industry and stakeholders. Its purpose is to create a forum for negotiation whereby the parties involved are heard, understood and respected. SLO is a means to earn accountability, credibility, flexibility and capacity for both stakeholders and industry.³⁰

The SLO model, by requiring company engagement with stakeholders, brings about transparency, information sharing, public participation, and a collaborative approach to problem-solving that seeks to satisfy all parties. Its proponents also point to a cascade of societal benefits such as community empowerment, enhanced protection of the rights of indigenous peoples, increased attention to sustainable development, and by reducing the likelihood of future conflicts, leads to greater investor confidence in economic development.³¹

D. Experience with Company-Community Negotiation of Mutually Beneficial Agreements

Finally, there is *experience with company-community negotiation of mutually beneficial agreements* to be considered. These agreements are of two types:

- A negotiated agreement that facilitates a developmental project that has public benefit features by determining what the developer must do to secure community acceptance of its project. Negotiation between the developer and the community or neighborhood associations deals with adjustments to project design to reduce its adverse impacts and enhance its public value, and the developer's payment of fees for the project's impacts on community services and infrastructure, and the costs involved in licensing and community administration. In addition, negotiation often brings about the developer's pledge to contribute to economic and social programs in the community, train and hire local

28. MORRISON, *supra* note 11, ch. 2.

29. Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 307 (2004).

30. Jacqueline L. Nelsen, Editorial, *Social License to Operate*, 20 INT'L J. MINING RECLAMATION & ENV'T 161, 161 (2006); *see also* Jennifer Howard-Grenville et al., *Constructing the License to Operate: Internal Factors and Their Influence on Corporate Environmental Decisions*, 30 LAW & POL'Y 73, 77 (2008).

31. Jason Prno & D. Scott Slocombe, *Exploring the Origins of Social License to Operate in the Mining Sector: Perspectives from Governance and Sustainability Theories*, 37 RESOURCES POL'Y 346, 349–52 (2012).

workers, and address community concerns about the project's social and environmental impacts that may arise after project completion.

- A negotiated agreement that establishes commitments by a company that address specific concerns about health, safety and environmental risks and impacts in its host community that arise from its current and future operations. Reciprocal commitments by the community participants in the negotiation are often involved, as well as company pledges to pay for various economic and social needs or betterments in the community.

Agreements that facilitate new development projects are now prevalent across the country. Commonly known as “Community Benefits Agreements” (CBAs), they are often negotiated by the developer with neighborhood groups that have enough influence to stall or stop a private development or prevent a government subsidy to the developer.³²

A prominent bar association's report summarizes arguments for and against CBAs. They enable neighborhoods to play a meaningful role in community development, and thereby promote their interests in jobs and the distribution of project benefits. Developers favor CBAs when they can be used to gain community support for projects and the award of local permits, and reduce the likelihood of future demands and litigation. Community officials may favor CBAs as a means of facilitating economic development and securing benefits for the community more readily than what they could accomplish with their authority and as a way of avoiding political controversies.³³

But legal and policy issues are also raised by the CBA approach. A neighborhood group's interests may be inconsistent with broader community interests, or it may not “drive an appropriate bargain” and gain fewer benefits than what local officials could achieve. Their CBA approach may interfere with land use plans and zoning, and their demands may “chill appropriate development.” CBAs may be difficult to monitor and enforce because of vagueness, or may be invalid if found to be contract zoning, an impermissible exaction, or a form of extortion under state law.³⁴

Nevertheless, the CBA model flourishes, and in some states is known as a Development Agreement³⁵ or a “Host Community Agreement” (HCA). In New York state, for example, HCAs have been used as an instrument of public policy to facilitate the development of new landfill projects, wind energy

32. N.Y. CITY BAR ASS'N, *supra* note 6, at 2; *see also* Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 UCLA J. ENVTL. L. & POL'Y 291, 293–94 (2008); PUB. LAW CTR., SUMMARY AND INDEX OF COMMUNITY BENEFIT AGREEMENTS 2 (2011) http://www.law.tulane.edu/uploadedFiles/Institutes_and_Centers/Public_Law_Center/Summary%20and%20Index%20of%20%20Community%20Benefit%20Agreements.pdf.

33. N.Y. CITY BAR ASS'N, *supra* note 6 at 36–37. A CBA may therefore serve as a shield against nuisance actions and prevent the imposition of new regulatory requirements. It may also reduce concerns about financial risk among potential investors.

34. *Id.* at 37–45.

35. MODEL LAND USE MGMT. CODE § 8-3 (GA. DEP'T OF CMTY. AFFAIRS 2007), <https://www.dca.ga.gov/development/PlanningQualityGrowth/programs/documents/Part8cDevelopmentAgreement.pdf>.

farms and other power generating facilities, and privately funded roads. Despite the legal issues noted earlier, ethical concerns that HCAs allow developers to buy their way into communities, and the absence of statutory authority for towns to negotiate HCAs, neither the legislature nor the courts in New York have restrained their use.³⁶

Another example of their purposeful use by government is provided by the Expanded Gaming Act in Massachusetts.³⁷ This law requires that a developer who intends to apply for one of the few state licenses to be issued for a gambling casino must negotiate an HCA with a prospective host community. This negotiation process includes the applicant's commitment to pay fees for several types of community impacts, and stipulates responsibilities of the community and developer to address potential social, environmental, and other problems.³⁸

The other type of negotiated agreement, usually referred to as the "Good Neighbor Agreement" (GNA), has spontaneously occurred in communities troubled by the risks and impacts associated with a company's existing operations or its proposed expansion of activities. In some respects, it resembles the CBA and HCA models, can raise similar legal, political and ethical issues, and also affords opportunities for the community or stakeholder groups to secure company payments for various betterments.³⁹

However, studies of the GNA experience show that negotiations are driven by concerns about risks and impacts, and that the GNA model provides a logical extension of CSR, ISO 26000, SLO and other approaches that are intended to advance the cause of company-community engagement and nego-

36. Daniel A. Spitzer et al., *Host Community Agreements for Wind Farm Development*, N.Y. ZONING L. & PRACTICE REP. (Thomson Reuters, N.Y.), Mar./Apr. 2009, at 1, 3–6 (The validity of the HCA model is supported by "a wide range of authority . . . in New York law, not only in the exercise of the police powers delegated by the Legislature, but also in a town's proprietary powers over the use of town-owned property," have long been used by municipalities, and such contractual arrangements have become standard operating procedures for enforcing project conditions under state environmental law.); see also Charles Gottlieb, *Regulating Natural Gas Development through Local Planning and Land Use Controls*, N.Y. ZONING L. & PRACTICE REP. (Thomson Reuters, N.Y.), May/June 2012, at 1, 1–3.

37. MASS. GEN. LAWS ch. 23K, §§ 4, 15(8) (2012); 205 MASS. CODE REGS. 123 (2016).

38. The city of Everett and a developer entered into such an HCA and the developer was subsequently licensed by the state to open a gambling casino in that city. The terms of the HCA show the mix of many financial, social, and environmental commitments made by the developer as a result of negotiating with the city. Surrounding Community Agreement between Mohegan Sun Mass. LLC and City of Everett (May 2, 2014), <http://massgaming.com/wp-content/uploads/Everett-Mohegan-Surrounding-Community-Agreement.pdf>. Also shown are the state's commitments to support and assist the project in obtaining permits and other approvals. See About, MASS. GAMING COMMISSION, <http://massgaming.com/about/> (last visited May 6, 2016) ("The mission of the Massachusetts Gaming Commission is to create a fair, transparent and participatory process for implementing the expanded gaming law.").

39. See generally KENNEY ET AL., *supra* note 19; MACEY & SUSSKIND, *Seeking Good Neighbor Agreements*, *supra* note 19; Sanford Lewis & Diane Henkels, *Good Neighbor Agreements: A Tool for Environmental and Social Justice*, 23 SOC. JUST. 134 (1996); Macey, *Coasean Blind Spots*, *supra* note 8; Barbara Scott Murdock & Ken Sexton, *Promoting Pollution Prevention through Community-Industry Dialogues: The Good Neighbor Model in Minnesota*, 36 ENVTL. SCI. & TECH. 2130 (2002).

tiation of mutually beneficial outcomes. It therefore serves as the inspiration and basic design for a New Social Contract (NSC) approach, and together with knowledge gained from the broad field of dispute resolution, is further examined in the following discussion of the NSC approach.⁴⁰

III. BASIC FEATURES OF THE NEW SOCIAL CONTRACT MODEL

The NSC, like the GNA, has two main features: company-community engagement in a *negotiation process* to establish company commitments that are mutually accepted responses to community or citizens' group concerns, and a *written agreement* that documents these commitments and mandates their performance.

Application of the NSC model must, of necessity, be consistent with existing laws, regulatory programs and property rights, and supplement these other means of community governance. Thus, the negotiated agreement would require modification whenever new laws, regulations, or judicial decisions conflict with or preempt any of its provisions,⁴¹ and should include a severability clause that provides that if parts of the agreement are subsequently determined to be inconsistent or illegal, the remainder of the agreement will remain in force.

Participation in negotiation requires threshold commitments by all parties to establish a common agenda, procedures, information-sharing responsibilities, and means of financing and managing the process.⁴² When several citizens' groups or other local stakeholders want to participate, a crucial threshold issue is determining who should be at the table for negotiation. This issue requires a "stakeholder assessment" process to exclude those groups or other stakeholders who are not representative of community interests or unwilling to make the threshold commitments, as practiced in the field of environmental dispute resolution.⁴³ And, if multiple groups or stakeholders from the community are accepted, it is essential that a professional mediator be selected to

40. The studies by Kenney and his coauthors, Macey & Susskind, and Lewis & Henkels, cited in *supra* note 39, provide extensive information and analyses of the GNA experience, and provide a foundation for discussion of the NSC model in this article.

41. See Geoffrey C. Hazard, Jr. & Eric W. Orts, *Environmental Contracts in the United States*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 71 (Eric W. Orts & Kurt Deketelaere eds., 2001) (explaining that the discussed environmental contracts are the result of negotiations between the EPA and industry).

42. These issues are dealt with in several books on dispute resolution including LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION (Lawrence Susskind ed., 1984); THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT (Lawrence Susskind et al. eds., 1999) [hereinafter CONSENSUS BUILDING HANDBOOK]; and LAWRENCE SUSSKIND & PATRICK FIELD, DEALING WITH AN ANGRY PUBLIC: THE MUTUAL GAINS APPROACH TO RESOLVING DISPUTES (1996). For relevant case studies and guidance documents, see PROGRAM ON NEGOTIATIONS AT HARVARD LAW SCHOOL, <http://www.pon.harvard.edu> (last visited Mar. 23, 2016).

43. BACOW & WHEELER, *supra* note 42, at 121–22.

manage the negotiation process. Such mediators have facilitated complex negotiation of community benefits agreements for many years.⁴⁴

The negotiation process will thereafter address current concerns about proven as well as plausible risks and impacts, and can also structure an approach for addressing future concerns that may arise over time. In addition, it can be used to address community or group needs for company-held information about risks, operations, and management practices, and to also deal with financial needs of the community, especially those that arise from company activities. For any of these matters, the parties may need technical advice or assistance. To deal with this contingency, the agreement should provide for their joint selection.⁴⁵

The NSC that emerges from the process must establish company responsibilities for its implementation. It may prescribe the specific means, time frames, and outcomes for fulfilling some or all responsibilities, or set flexible performance-based requirements and goals instead. It should also provide a subset of procedures for resolving disputes, adjusting to changing circumstances that arise during implementation, and amending the agreement accordingly.

Finally, if the NSC is intended to be legally enforceable as a contract, it should establish obligations for the community parties to meet the consideration requisite of contract law. The obligations may involve ending or refraining from litigation and permit challenges against the company, engaging in negative publicity, or providing affirmative support for company applications for permits, for example.⁴⁶

Further discussion of the negotiation process, the agreement, and its implementation follows.

IV. THE PROCESS FOR DEVELOPING A NEW SOCIAL CONTRACT

The process for developing an NSC requires *motivation, trust, and negotiation*, which culminates in a written agreement on commitments.

A. Motivation

The process begins with a motivational phase during which the company becomes aware of its dependence on an SLO and its need to move beyond compliance with regulations and engage with the community to enlist local support for its current or future activities. This awareness is usually prompted when local or state permit renewals are needed to continue current operations,

44. CONSENSUS BUILDING HANDBOOK, *supra* note 42, chs. 5, 9.

45. *Id.*

46. KENNEY ET AL., *supra* note 19, at 13. In common law, each party to a contract must offer “consideration” to the other, with consideration being something of value, such as money, a product or service, a promised action, or a promise to refrain from a future action or activity. The examples given in the text above of community “consideration” have been accepted as sufficient in several types of community-company contracts. *See id.* app. H, at 127–28; *Valuable Consideration*, THEFREECTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/Valuable+consideration> (last visited Mar. 24, 2016).

or new permits are needed to expand local operations or site, build and operate a new facility. Motivation may also arise from the company's desire to end disruptive and costly disputes, avoid litigation, improve public image, join the CSR ranks, and gain competitive advantage.

Community or citizens' group motivation to engage in negotiation can be stimulated by many contextual factors. An inclusive negotiation may be seen as an opportunity to have competing factions in the community join forces and develop a common agenda rather than face off against each other in numerous hearings before zoning, planning, environmental, safety and other local boards. There may also be the desire to avoid new prescriptive, "one size fits all" regulations that could drive the company elsewhere, causing loss of jobs, tax revenues, and other benefits. Many residents may also mistrust local officials or be frustrated by the limitations of their local boards in acting on complex environmental issues and prefer do-it-yourself negotiation.

Finally, both company and community may be alarmed by "activists trying to eliminate 'offending' industries completely" or by a growing "not in my backyard" (NIMBY) movement, leading them to want a negotiation process involving selected stakeholders that would "shape industry practices to better respect and protect community values" instead of driving the company out of the community. This shared concern and the opportunity to develop a mutually beneficial outcome makes negotiation attractive to many, as shown in case studies of the GNA model.⁴⁷

B. Trust

The next phase in developing an NSC involves the coming together of the motivated company and community participants in jointly accepting a plan to begin a negotiation process. Taking this step requires mutual trust that each will make a sustained good faith effort to negotiate a reasonable agreement.

Recognition that mutual trust is an important condition for a successful negotiation process is emphasized in studies by Burke and other psychological researchers who hold that it creates a "psychological contract" (PC) that assures a respectful and cooperative engagement of the parties.⁴⁸

Another important insight is that mutual trust depends mainly on the "expectations that a company and community hold of each other," which in the case of negotiating an NSC, involves expectations about each other's reasonableness, ethics, willingness to cooperate and compromise, conform to a negotiation protocol, and perform on promises. Thus, when "both the community and the company count on each other to act and behave in particular ways," that is, to play by rules yet to be determined, the time to begin negotiating the rules is at hand.⁴⁹

47. KENNEY ET AL., *supra* note 19, at 13–14.

48. *E.g.*, EDMUND M. BURKE, CORPORATE COMMUNITY RELATIONS: THE PRINCIPLE OF THE NEIGHBOR OF CHOICE (1999).

49. As discussed in A. BUCKLEY, NEIGHBOR OF CHOICE: A PARTNERSHIP MODEL, REPORT FOR CSIRO MINERALS 3 (2010).

C. Negotiation

The main purpose of the negotiation process is to reach agreement on company commitments that provide mutually accepted means of responding to community concerns. As discussed earlier, there is a need to confirm the legitimacy of the representatives of the participating company and community, adopt a negotiation protocol, develop an agenda of issues and proposals, decide whether to retain a professional mediator, and make explicit that during the negotiation process, neither party will engage in activity that would undermine or interfere with the negotiation process. It is also the time to consider whether the outcome will be enforceable, either as a contract or as an officially adopted component of a local permit or ordinance.

Thereafter, strategies and skills shape the process.⁵⁰ For example, it is common knowledge that advantage in negotiation can be gained by either party when it knows what is most important to the other. Studies of the GNA experience show that communities and groups use the most urgent needs of the company, such as its need for a permit to continue operation, to leverage company acceptance of their proposals for risk reduction and information sharing. Similarly, a company is likely to target a group's need for jobs to leverage concessions in their proposals to change company operations.

In the GNA experience, communities and groups have sought company commitments to address many types of issues—for example,

- health risks posed by routine emissions of pollutants and fugitive emissions from leaky valves and pipes;
- impacts on water resources;
- spills;
- risks of fires and explosions;
- absence of pollution monitoring and pollution prevention programs;
- inadequate emergency response and evacuation plans;
- impacts of heavy equipment and construction;
- various “nuisances” (e.g., noise, lighting, odors, and traffic problems);
- inadequate management of contractors;
- unsightly parts of a facility that need to be screened or aesthetically improved;
- company unwillingness to share hazard and risk information and inform residents about company activities;
- absence of a company process for hearing and responding to complaints in real time;

50. Negotiation literature is extensive. For a particularly useful “mutual gains” approach, see generally LAWRENCE SUSSKIND ET AL., *NEGOTIATING ENVIRONMENTAL AGREEMENTS* (2000).

- lack of employment opportunities and job training for residents; and
- underresourced community health and social services.⁵¹

Obviously, proposed commitments that would be prescriptive, tightly scheduled, inflexible, and enforceable are certain to meet more company resistance, especially if the written agreement will be in the form of an enforceable contract or as a part of an enforceable local permit.⁵²

Another insight from the GNA experience is that latent parameters may stall or derail the negotiation process. In their detailed evaluation of GNAs negotiated by citizens' groups with refinery owners Chevron and Unocal, Macey and Susskind find that proposals for commitments that were "[m]ost readily excluded from negotiations" by the companies were those "questioning 'normal operating procedures' of both the refineries and their monitoring agencies and establishing new roles for local residents in plant inspection, pollution patrols and citizen monitoring"⁵³

Reviews of GNAs discuss the diverse citizens' groups involved and describe the broad range of commitments sought from companies including global majors such as Shell, Rhone-Poulenc, Chevron, and Rohm and Haas.⁵⁴ In addition to commitments regarding risks and impacts, groups often sought increased hiring and job training of residents, financial support for the groups, and monetary contributions for improving community infrastructure and social services. The extent to which such commitments were accepted by the companies and the extent to which they were subsequently fulfilled are also discussed, and in all cases show mixed results.

The studies of GNAs also reveal that companies sought several types of commitments with mixed results. These included proposals that the groups end negative publicity about the company, generate positive publicity, stop challenging an existing permit, support a pending permit application by the company, terminate or refrain from filing a lawsuit, accept a mediation process before filing a lawsuit, and support the company when it faces challenges by others who have not joined the negotiation process.

Negotiation outcomes for each GNA were shaped by many factors, but detailed analysis is not provided by the studies for most cases. Obviously, the factors included the leverage each party could bring to bear, latent parameters, and opportunities to make advantageous trade-offs, as previously discussed. One can assume that many other factors were also influential, such as the costs

51. See studies cited *supra* note 39.

52. Of the eleven GNAs studied in KENNEY ET AL., *supra* note 19, all are written agreements, and nine of these are legally binding and enforceable. *Id.* at 109. The study finds that "having a written and binding agreement offers additional opportunities to ensure compliance should the signatory company become uncooperative" but notes that the case studies indicate that "signed and apparently legally-binding agreements do not ensure successful implementation." *Id.* at 15.

53. MACEY & SUSSKIND, *Seeking Good Neighbor Agreements*, *supra* note 19, at 88.

54. KENNEY ET AL., *supra* note 19. Each GNA involved one or more citizens' groups and a company. The companies were Bowie Resources, Stillwater Mining (coal and palladium mining); Chevron, Shell, Sun Oil, Unocal (refineries); Rhone-Poulenc, Rohm and Haas, Seneca-Babcock, (chemicals production); Syntex (pharma); and Idaho Dairies (large scale dairy industry). *Id.* at 5-8.

of the commitments being sought, their technical feasibility, the urgency of the company's need for a permit or avoid further litigation, the significance of the risks and impacts, public relations, and the threat of regulatory intervention.

Among the lessons learned from the GNA cases is the need to think ahead about their implementation during negotiation. Thus, it is advisable to agree on a procedure for dealing with changed circumstances, such as sale of the company to a new owner, a company's inability to perform on a commitment because of an unforeseen event, or new laws or regulations that would preempt or otherwise conflict with the commitments being negotiated.

Similarly, it is advisable to agree upon an entity, a mediator, or procedure to address other implementation issues such as disputes about company progress or fulfillment of vaguely defined commitments, interpretation of key words in the written agreement, whether the company has sufficiently provided promised information to the community, the means of handling proprietary information, determining when the NSC would be fulfilled, whether commitments can be renegotiated, and whether the written agreement to be reached could be made an integral part of a permit or other legal requirement of the community. Approaches to be negotiated for addressing such issues include appointing a mediator, creating a balanced committee of participants with authority to resolve them, or establishing a third party mechanism.

V. THE WRITTEN AGREEMENT AND ITS IMPLEMENTATION

The written agreement is the end product of the negotiation process and the roadmap for implementation. Because each negotiation is shaped by the interplay of many contextual factors, agreements differ in their details but have a generic structure. This structure involves the designation of the parties and their representatives; the commitments made by the company with regard to community risks, impacts, and needs; the commitments made by the community or citizens' group; and the procedures for dealing with changed circumstances and implementation issues. And if the agreement is intended to be an enforceable contract, that should be made explicit and will require inclusion of standard provisions pursuant to state contract law and the interests of the parties, such as those dealing with severability, applicable law, indemnification, and breach of contract.⁵⁵

The GNA experience and common sense indicate that company commitments should be described in sufficient detail to minimize future misunderstandings. For each commitment it is therefore advisable to specify the risk, impact, or need it addresses; the specific promise being made and a designated outcome; whether performance is discretionary, mandatory, or contingent upon an audit or other factors; and whether progress shall be made in accord-

55. See, e.g., *Severability*, CONTRACTSTANDARDS, <http://www.contractstandards.com/clauses/severability> (last visited Mar. 23, 2016); *Unified Contract Structure*, CONTRACTSTANDARDS, <http://www.contractstandards.com/contract-structure> [<https://web.archive.org/web/20140112122035/http://www.contractstandards.com/contract-structure>] (last visited May 6, 2016) (among many sources on contract law).

ance with a timeline or a good faith effort. Other types of commitments also need to be clearly defined such as commitments to pay for audits, provide information and technical assistance to the community or group, and provide financial support for specific community needs.

These suggestions are based on review of the GNA studies that are informative about the types of company commitments agreed upon and the extent of their implementation. For example, the GNA between Rhone-Poulenc and an environmental nongovernmental organization (NGO) regarding the company's chemical plant in Manchester, Texas was negotiated in the aftermath of an SO₂ release, which caused 27 residents to be hospitalized. The written agreement includes the company's commitments to pay for an independent environmental and safety audit by an expert selected by a committee whose members are chosen by the community; to put company documents on its hazard and risk assessments, accidents and near misses, corrective actions taken, and waste management practices in the town library for public review; to subsequently "negotiate in good faith on the audit recommendations"; to allow citizens to accompany the auditor and inspect the facility; to monitor SO₂ offsite; and to accept that the GNA agreement will be legally binding. Over 90% of the commitments in this GNA were met by the company.⁵⁶

Some GNA's involved a much broader range of company commitments and problems. For example, the GNA negotiated by Unocal and three citizens' groups regarding operation of the company's refinery in Rodeo, California followed two accidental releases, one lasting sixteen days, the other involving deadly hydrogen sulfide gas, which sickened children and teachers at a school. As challenges to the permits sought by the company for its expansion, lawsuits, and other adversarial activities by labor and residents commenced, Unocal reluctantly agreed to negotiate. Several other groups joined the difficult negotiations over eight months of weekly meetings, and the county government decided to make the GNA outcome a condition for granting permits to the firm.⁵⁷

The GNA includes Unocal commitments to pay for a medical clinic and the medical needs of the injured, fund several emergency service improvements and a study of public health impacts, pay for an independent safety audit of the plant overseen by a community committee and determine whether and how to implement its recommendations, develop an advanced air monitoring system and stop "fugitive emissions" of certain air pollutants, reduce traffic impacts and contribute several millions to fund local road improvements, support a local library and tree preservation program, plant vegetation and build a bike path on its property. In addition, the company made financial commitments to local vocational training, local transport (\$4.5 million), a broad range of community betterments (\$300,000 annually for 15 years); and agreed to avoid use of anhydrous ammonia in its new reformulated gasoline project. In

56. KENNEY ET AL., *supra* note 19, at 92; Lewis & Henkels, *supra* note 39.

57. KENNEY ET AL., *supra* note 19, at 82-83.

return, the citizens' groups agreed to drop their challenges to the company's land use permit and permit to operate.⁵⁸

Although the written agreement is intended to be a legally binding GNA and an integral part of its permits, implementation has been highly problematic with one observer estimating that approximately 60% of the commitments have been met after several years. The plant was sold and the new owner, ConocoPhillips, is said to have disregarded parts of the GNA. Communications and coordination of the citizens' groups broke down over time as their financial resources became depleted and activism waned. Nevertheless, no further toxic releases have been reported and the contributions made have been beneficial to the community.

Overall, the studies of GNAs show that many company commitments were implemented, especially commitments that focused on preventing the recurrence of a prior injurious event and improving emergency response services. Similarly, commitments to mitigate nuisances such as traffic problems and odors were kept, as were promises to pay for public infrastructure improvements, healthcare, and fence-line monitoring of air pollutants. Perhaps the most notable results are informational and involve company commitments to allow and pay for independent health and safety audits of facilities, consider audit recommendations for improvements, and accept public oversight of the audit process and public review of the documentation.⁵⁹

Thus, the GNA experience shows that company-community engagement in negotiation, while problematic in several respects, has potential to reduce residual risks and impacts, bring about company self-audits and improvements, provide for information sharing, and empower local stakeholders. The knowledge gained from this experience can therefore be used to justify and further develop the larger concept of the new social contract.

VI. RECOMMENDATIONS

The concept of an NSC can be advanced and put to optimal use by heeding lessons learned and best practices derived from the GNA experience, and knowledge derived from CBA negotiation and other private and governmental use of negotiation and dispute resolution.⁶⁰ Some of most relevant information from these sources is imbedded in the foregoing discussion and summarized

58. *Id.* at 85.

59. The studies by Macey & Susskind, Kenny and his coauthors, and Lewis & Henkels highlight several types of company commitments that were negotiated in the GNAs they reviewed. These include providing community access to internal company information and rights to inspect the facility, agreeing to have audits of company practices done by independent experts, improving their accident prevention measures, providing equipment and assistance to the community for responding to emergencies, carrying out pollution monitoring and pollution prevention initiatives, creating local employment opportunities, and funding various community benefits. See MACEY & SUSSKIND, *supra* note 8; KENNEY ET AL., *supra* note 19; Lewis & Henkels, *supra* note 39.

60. For example, negotiation to settle lawsuits out of court, to develop agency rules (negotiated rulemaking), and to reach consensus and settle disputes on various technical, economic and legal issues.

here, with some additional insights, to present a coherent set of principles and recommendations for NSC implementation.

The need for a written agreement and supporting documentation is necessary to structure the implementation process and hold parties accountable. Making such agreements enforceable as contracts or pursuant to their inclusion in local permits and ordinances would seem to improve their prospects for implementation, but it may discourage companies from making more robust commitments. In addition, the assumption that enforceability is better for implementation than reliance on trust may be illusory because lawsuits are costly, can overwhelm community resources, and under certain conditions, incurring public mistrust and media stigmatization may be more threatening to the company.

The purpose of negotiation is to secure commitments that are acceptable to both company and community. But the commitments must also be acceptable to others if they are to be fulfilled. Thus, they should not conflict with laws and regulatory programs, nor should they interfere with intercommunity arrangements for cooperation on regional problems such as waste disposal, watershed protection, or traffic burdens. Nor should they cause transference of a company's risks and impacts to other communities or to other neighborhoods within the same community.

As members of a community, it is appropriate for companies to fund programs for the social and economic wellbeing of community residents, such as health and recreational facilities, job training, and social services. But the GNA and CBA experiences reveal that community interest in company funding of various betterments inevitably grows during the negotiation process, giving the company increasing opportunity to offer funds for community needs or desired projects in exchange for the lessening of community demands for reduction of various risks and impacts. Thus, the negotiating parties bear responsibility for ensuring that the NSC continues to serve its main purpose of risk and impact reduction, making it advisable for them to agree that company funding be limited to community needs that arise from company activities or have been officially recognized in community development plans.

With these and other issues in mind, the following basic principles and recommendations should be applied to ensure ethical and effective use of the NSC model.

- The negotiated agreement between a company and its host community or groups or other stakeholders within the community should be consistent with, and be designed to serve as a supplement to, federal and state regulation, local ordinances and other social controls governing company activities in the community.
- The current and foreseeable impacts to be addressed may include local nuisances, adverse health effects, environmental justice issues, and damage to the community infrastructure and natural resources when these are not sufficiently dealt with by regulations, community ordinances and permit requirements.

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- The safety, health, and environmental risks to be addressed should be proven, or determined to be plausible, on the basis of local knowledge, public health studies, exposure and monitoring data, audits of company activities, or other factual information.
- The means for addressing the impacts and risks must not cause their transference to others within or outside the community, nor interfere with regional arrangements that allocate responsibilities, burdens, and benefits among several communities (including the host community), nor accept continuation of disproportionate burdens borne by any sector of the community.
- Company commitment of funds to a community or group for social or economic betterment should not be used to gain concessions from the community or other local parties to the negotiation regarding their concerns about factually established risks to health, safety and essential natural resources.
- If a citizens' group or local stakeholders are to be parties to the negotiation of an NSC, their legitimacy should be established by a showing that their interests have been recognized as being consistent with the broader interests of the community. If multiple groups are to be involved, they must develop and adhere to a shared agenda.
- The negotiation process, the agreement reached, and its implementation must be noticed, documented, made transparent and effectively communicated to all community residents, and to other communities whose interests may be affected.

To ensure that negotiated agreements, whether enforceable or trust-based, meet these conditions and serve the public interest, it is advisable to have state oversight and guidance. A state official or board should be established to review proposed negotiated agreements and intervene when an agreement would be contrary to laws, regulations, policies or the rights of individuals. The state office could also maintain a publicly accessible archive of completed NSCs, offer guidance to communities, and develop a statewide plan indicating where NSCs would be useful supplements to state and local regulation.⁶¹

61. This approach has been taken for conservation easements that are privately negotiated by landowners and land trust entities to prevent future development. For example, in Massachusetts, state level review and approval of conservation easements, and town approval, are necessary, and a state archive of all such easements is maintained for public use. Requisites for state approval include findings of public benefit and public interest. MASS. GEN. LAWS ANN. ch. 184, §§ 31–33 (West 2016). The state also offers advice to prospective easement grantors and provides a listing of the types of lands that it is particularly interested in having protected by such easements. *See* DIV. OF CONSERVATION SERVS., COMMONWEALTH OF MASS., THE MASSACHUSETTS CONSERVATION RESTRICTION HANDBOOK 1–12 (1991), <http://atfiles.org/files/pdf/MAaconsrestrict08.pdf>.



The NSC model is available to address many of the concerns of communities about the risks and impacts created by the companies they host. It can be used to reduce residual risks, nuisances, and other local impacts that federal and state regulators and local officials have not sufficiently addressed. Thus, it can supplement regulation and fill regulatory gaps without incurring the costs of further regulatory proceedings. And if it proves to be inadequate in certain community contexts, its use does not foreclose further attempts by concerned residents to invoke regulatory and common law options.

The extent to which an NSC is fulfilled is one measure of its value but not the only measure. By fostering the direct engagement of companies and communities, the NSC approach has intrinsic worth because it enhances participatory democracy at the local level and serves the cause of social justice by empowering those whose concerns and quality of life issues have not been sufficiently respected and addressed by government and industry. And its propagation would put industry on notice that its accountability to the public and responsibility as a member of a community extend beyond regulatory compliance and conformance to corporate governance law, and thereby promote improved company policies and practices.