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# The Theory and Practice of Negotiated Rulemaking

Lawrence Susskind†

Gerard McMahon††

Scholars, government officials, and practitioners have expressed concern over the weaknesses of the federal rulemaking process and the time it often takes to promulgate rules. Given the many instances in which rules have been challenged in court, both the process of rulemaking and the regulations produced seem to have lost legitimacy in the eyes of many regulatees.

Since the late 1970's, advocates of negotiated approaches to rulemaking have argued that the legitimacy of proposed rules could be restored—and time-consuming court challenges avoided—if informal, face-to-face negotiations were used to supplement the traditional review and comment process. Critics, however, have responded quite negatively to what they perceived as the dangers of “deal-making behind closed doors.” Nevertheless, proponents of the innovation have persisted, and during the last few years several federal agencies have experimented with negotiated approaches to rulemaking.

The Environmental Protection Agency (EPA) has undertaken the most elaborate tests of the concept. EPA's experiences shed new light on the advantages of negotiated rulemaking and suggest that some of the concerns of the critics have been misplaced. This article examines the results of the EPA demonstrations in order to test the models of negotiated rulemaking advanced by advocates, to respond to the concerns of critics, and to inform and improve the provisional theory. With the refinements suggested in this article, EPA's approach to negotiated rulemaking appears to hold great promise for remedying the crisis of regulatory legitimacy.

## I. Negotiated Rulemaking as a Regulatory Reform

Almost all the parties involved in federal rulemaking—business associations, public interest groups, and many government officials—complain about the time and expense involved in developing and

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implementing regulations.<sup>1</sup> Businesses assert that delays are costly and increase the uncertainty surrounding investment decisions.<sup>2</sup> Advocacy groups complain that litigation delays implementation of important rules.<sup>3</sup> Each party tends to think that the agency favors the others.<sup>4</sup> Agency officials, on the other hand, feel that their autonomy has been unreasonably limited by procedural requirements mandated by Congress and the courts.<sup>5</sup> Courts, however, are inappropriate as final arbitrators of technically complex regulatory disputes. Many judges fear "government by the judiciary" and admit their inability to cope with complex technical issues.<sup>6</sup>

These groups would certainly be less troubled if they believed that the conventional rulemaking process generated rules responsive to their interests, but few are satisfied with the time it takes to enact rules, the cost involved, or the quality of the rules produced.<sup>7</sup> In a speech delivered shortly before he left EPA, former Administrator William Ruckelshaus estimated that more than 80% of EPA's rules are challenged in court and that approximately 30% of the Agency's rules are significantly changed as a result of litigation.<sup>8</sup>

How did this situation develop? The roots of the problem can be found in the evolution of the regulatory process and in the changing nature of the issues that the process has been forced to address during the past several decades. Agency rulemaking from the New Deal to the early 1960's was characterized by broad deference to agency expertise and discretion. By the late 1960's, however, the groups being regulated, the newly emergent environmental advocacy organizations, and the courts had become unwilling to let such discretion go unchallenged.

Federal regulations typically are developed under procedures defined by the Administrative Procedures Act of 1946.<sup>9</sup> Using in-house expertise and

1. Morgan, *Towards a Revised Strategy for Rulemaking*, 1978 U. ILL. L.F. 21, 21-22 (1978); Note, *Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981).

2. W. Ruckelshaus, *Environmental Negotiation: A New Way of Winning*, Address to the Conservation Foundation's Second National Conference on Environmental Dispute Resolution 3 (Oct. 1, 1984) (on file with the *Yale Journal on Regulation*).

3. *Id.* at 14.

4. Harter, *Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship*, 29 VILL. L. REV. 1393, 1404 (1984).

5. W. Ruckelshaus, *supra* note 2, at 2.

6. See, e.g., Bazelon, *Risk and Responsibility*, 205 SCIENCE 277, 278 (1979); Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 541-42 (1974).

7. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L. J. 1, 6 (1981) [hereinafter cited as *Cure for Malaise*]; S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 592 (2nd ed. 1985).

8. W. Ruckelshaus, *supra* note 2, at 2. Ruckelshaus also noted the tremendous amount of time consumed by litigation over agency rules. He estimated that, each year, handling litigation from rulemaking challenges requires approximately 50 person-years from EPA's Office of General Counsel, 75 person-years from the EPA program offices, 25 person-years from the Department of Justice, and 175 person-years on the part of the plaintiffs' counsel. *Id.*

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informal individual meetings with stakeholders (parties who are interested in or will be affected by the rule), an agency such as EPA first develops a Notice of Proposed Rulemaking, which is published in the *Federal Register*. Non-agency stakeholders, such as businesses or environmental organizations, are then able to respond by adding to a rulemaking record through a formal public comment process. Oral hearings are permissible but not required. The agency must base the final rulemaking on a consideration of the record, although in addressing ambiguities and uncertainties in the record it may make policy choices where necessary.<sup>10</sup>

Many of the regulations promulgated over the past two decades have involved the resolution of complex factual questions.<sup>11</sup> More importantly, they have required difficult policy decisions that, at times, have lacked an operable political consensus.<sup>12</sup> If all regulations had a clearly determinable factual basis, arguments about the exercise of agency discretion would be moot. Agencies, however, must also make policy choices in situations where either the desired facts are not available or the available “facts” are contested. In such situations, the agency exercises considerable discretion as it interprets inconsistent facts, balances various and often competing interests, and ultimately makes subjective policy choices with very real economic and political ramifications. In this context, an agency can expect opposition to almost every rule it develops.

Congress, the White House, and the courts have explored a variety of strategies to forestall concerns about the exercise of agency discretion and to increase agency accountability. However, the government’s efforts to limit discretion have increased the time and cost involved in rulemaking. Congress has enacted the Federal Advisory Committee Act (FACA),<sup>13</sup> the Sunshine Act,<sup>14</sup> the *ex parte* prohibitions of the Administrative Procedure Act,<sup>15</sup> and the Freedom of Information Act.<sup>16</sup> In issuing Executive Orders

9. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706 (1982)).

10. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1978) (a discussion of agency discretion in rulemaking).

11. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471, 473 (1983) [hereinafter cited as *Consensual Rules*]; Susskind & Ozawa, *Mediating Public Disputes: Obstacles and Possibilities*, 41 J. SOCIAL ISSUES 151 (1985).

12. Harter, *Consensual Rules*, *supra* note 11, at 474.

13. 5 U.S.C. §§ 1-15 (1982).

14. 5 U.S.C. § 552b (1982) (requires the agency to hold open meetings for most types of proceedings).

15. 5 U.S.C. §§ 554(d), 557(d) (1976) (prohibits *ex parte* contacts during formal rulemaking and adjudication).

16. 5 U.S.C. § 552 (1982 & Supp. II 1984) (requires agencies to make available to the public agency rules, opinions, orders, records, and proceedings).

12,291<sup>17</sup> and 12,498,<sup>18</sup> the White House has given the Office of Management and Budget (OMB) greatly expanded responsibility for reviewing the probable cost-effectiveness of proposed regulations. Since 1970, the courts have expanded judicial supervision of agencies by broadening the rules of standing,<sup>19</sup> issuing more specific criteria regarding the development and use of a factual record,<sup>20</sup> expanding notice and comment requirements,<sup>21</sup> and expressing a willingness to take a "hard look" at the reasonableness of proposed regulations.<sup>22</sup> These changes have produced "hybrid rulemaking,"<sup>23</sup> so-called because it is intermediate between the informal notice and comment rulemaking and formal procedures which include evidentiary hearings.<sup>24</sup>

While these developments have increased agency accountability, they have not fully responded to concerns about the legitimacy of regulatory actions. Limiting the role of non-agency participants to adversarial challenges to the rulemaking record has been an ineffective means of building support for the policy choices that agencies have had to make. The current rulemaking process is bound to generate dissatisfaction as long as regulatory agencies retain the exclusive responsibility for making the technical judgments and political compromises needed to develop a rule. By encouraging and empowering regulatees to challenge agency decisionmaking in an effort to enhance the political legitimacy of the rulemaking process, Congress and the courts have simply increased the complexity, cost, and time it takes to generate rules that can be implemented.

A number of scholars have suggested negotiated rulemaking as a response to these problems of delay, increased cost, and loss of political legitimacy.<sup>25</sup> In negotiated rulemaking, an agency and other parties with a

17. Exec. Order No. 12,291, 3 C.F.R. 127 (1982). See generally Whittington & Grubb, *Economic Analysis of Regulatory Decisions: The Implications of Executive Order 12291*, 9 SCI. TECH. & HUM. VALUES 1 (1984).

18. Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985).

19. See, e.g., *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (finding a tenuous claim of injury from regulatory action sufficient to establish standing). See generally 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24 (1983).

20. See *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974) (ordering EPA to explain scientific basis used to support promulgated standard and respond to the industry's technical objections to standards).

21. See 1 K. DAVIS, *supra* note 19, at §§ 6:19, 6:20, 6:25, 6:26.

22. See *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976) (in reviewing a rule phasing out lead additives in gasoline, the court took a hard look at the statement that lead in auto emissions endangers the public health or welfare).

23. See generally DeLong, *Informed Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 262-319 (1979).

24. 5 U.S.C. §§ 556, 557 (1982) (APA procedures for a formal rulemaking).

25. Stewart, *supra* note 10, at 1259, 1344-53; Harter, *Cure for Malaise*, *supra* note 7; Note, *supra* note 1. Congress has also examined negotiations as an alternative rulemaking process in response to concerns about the present regulatory system. *Regulatory Negotiation: Joint Hearings Before the Senate Select Comm. on Small Business and the Subcomm. on Oversight of Government*

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significant stake in a rule participate in facilitated face-to-face interactions designed to produce a consensus. Together the parties explore their shared interests as well as differences of opinion, collaborate in gathering and analyzing technical information, generate options, and bargain and trade across these options according to their differing priorities. If a consensus is reached,<sup>26</sup> it is published in the *Federal Register* as the agency's notice of proposed rulemaking, and then the conventional review and comment process takes over. Because most of the parties likely to comment have already agreed on the notice of proposed rulemaking, the review period should be uneventful. The prospects of subsequent litigation should be all but eliminated.

Agencies other than EPA have experimented with a modified negotiated rulemaking process. The Occupational Safety and Health Administration (OSHA) tried a negotiated approach to drafting a standard for occupational exposure to benzene, and the Federal Aviation Administration (FAA) used a negotiated approach to develop a revised rule concerning flight and duty time for pilots.<sup>27</sup> However, neither of these agencies followed the model for negotiated rulemaking proposed by theorists, and thus these demonstrations are inadequate to test the concept. The OSHA effort involved only partial adherence to the suggested model—OSHA did not participate directly, but merely invited those affected by the rule to develop a version that they could agree upon. The OSHA effort did not succeed.<sup>28</sup> FAA was more successful—it adhered more closely to the

*Management of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. (1980) 271-77 [hereinafter cited as *Regulatory Negotiation Hearings*]. Following these hearings, proponents of negotiated rulemaking introduced The Regulatory Mediation Act of 1981, S. 1601, which sought to "establish an alternative rulemaking procedure which includes the establishment of regulatory negotiation committees."

26. In practice, consensus is achieved when all the participants remain silent in response to the mediator's inquiry, "Is there anyone who cannot live with this latest restatement?" That moment is usually preceded by an elaborate effort to ensure that every participant's primary concerns have been satisfied. Such a consensus may be elusive, with the group perhaps only able to agree on a range of acceptable alternatives. This at least narrows the scope of possibilities, and the agency can use this product to draft a rule that falls within the acceptable boundaries. See Harter, *Regulatory Negotiation: The Experience So Far*, RESOLVE, Winter 1984, at 9 [hereinafter cited as Harter, *Experience So Far*].

27. For a detailed discussion of these demonstrations, see H. Perritt, *Analysis of Four Negotiated Rulemaking Experiments 50-118* (Sept. 4, 1985) (draft report to the Administrative Conference of the United States).

28. There are competing views as to the reasons for OSHA's failures. One view is that OSHA's decisions not to conduct the negotiations under FACA or to participate directly in the negotiations, as EPA had done, minimized the chances of achieving a consensus. Another view of the OSHA negotiation is that the parties simply failed to invent a creative way of reconciling their substantive differences. It is hard to point to a specific reason why this might have been the case. Perhaps the benzene negotiation was framed too narrowly, or perhaps the parties did not consider a sufficient number of trades or options. It may have been that the pre-existing relationship among the parties was not conducive to a search for win-win outcomes. OSHA's difficulties have also been attributed to the departure of a key OSHA official during the negotiations, the infrequency of negotiating sessions,

model, but invited only a limited range of interests to participate.<sup>29</sup>

Only EPA has followed all the key prescriptions of the proponents of negotiated rulemaking—in one case to develop a proposed rule on non-compliance penalties for heavy engine manufacturers who fail to meet the requirements of the Clean Air Act, and in another case to redefine the bases for granting emergency exemptions from pesticide licensing regulations.<sup>30</sup> The results of EPA's two completed demonstrations provide the first evidence to test the theoretical suppositions underlying the concept of negotiated rulemaking.

## II. The Prevailing Theory

In order to evaluate EPA's negotiated rulemaking demonstrations systematically, a theoretical framework is required. There are two strands of theory that can presently be used to construct such a framework. The first addresses the hypothetical preconditions necessary for the success of a negotiated rulemaking, and the second sets forth criteria for evaluating rules produced through negotiation. The two strands are interrelated, and both draw on existing theories of negotiation and doctrines of administrative process.

### A. *The Hypothetical Preconditions for Success*

In his seminal study of negotiated rulemaking, Philip Harter proposed a set of hypotheses about the conditions under which regulatory negotiation would be likely to succeed. In developing these criteria for success, Harter drew upon analogous situations in the broad area of dispute resolution, in which negotiation is used to resolve complex policy problems.<sup>31</sup> The Administrative Conference of the United States endorsed his model and adopted a set of recommendations encouraging agencies to experiment with negotiated rulemaking.<sup>32</sup> Eight of the criteria proposed

uncertainty about OMB's probable reaction to a rule viewed as favoring labor, and unrealistic expectations on the part of some of the participants.

29. FAA's negotiated rulemaking effort began in the spring of 1983 and resulted in agreement on a proposed rule, issued by FAA in March, 1984. The negotiations moved slowly until FAA submitted a draft rule for the participants to review.

30. For complete accounts of the two EPA demonstrations, see L. Susskind & G. McMahon, *Documentation of EPA's Nonconformance Penalty Regulatory Negotiation Demonstration* (1985) (Report prepared for the Office of Regulation and Standards of the United States Environmental Protection Agency); L. Susskind & D. Kronenberg, *Documentation of EPA's Pesticide Exemption Regulatory Negotiation Demonstration* (July 1985) (Report prepared for the Office of Regulation and Standards of the United States Environmental Protection Agency).

31. Harter, *Cure for Malaise*, *supra* note 7, at 42-51.

32. 1 C.F.R. § 305.82-4 (1985).

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by Harter and noted by the Administrative Conference seem especially relevant and worth testing here.

First, people will come to the bargaining table only as long as they believe negotiations will produce an outcome for them that is as good as or better than the outcomes that would result from other available methods of pursuing their interests.<sup>33</sup> The concept that parties will pursue their own best interest in this way is a key assumption in negotiation theory, popularized by Fisher and Ury under the heading of BATNA (Best Alternative to a Negotiated Agreement).<sup>34</sup>

Second, the acceptability of negotiation as a dispute resolution process is determined by relative power,<sup>35</sup> another common strand in negotiation theory. Negotiations will only proceed if the parties are interdependent, that is, if they are constrained from acting unilaterally. Furthermore, if the imbalance of power is too great, the less powerful party is sure to seek an alternative context in which to press its claims, away from the negotiation table.<sup>36</sup>

Third, with regard to the issue of scale, fifteen parties is considered the "rough practical limit" on the number of participants that can work effectively in a negotiated rulemaking.<sup>37</sup>

Fourth, the issues must be readily apparent and the parties must be ready to address them.<sup>38</sup> Negotiation theorists, drawing in large part on the history of labor relations in the United States, have consistently identified "ripeness" as a criterion.<sup>39</sup> In the environmental mediation field, however, there is substantial disagreement about the relevance of the ripeness argument.<sup>40</sup>

Fifth, consensus building will be impeded if deeply held beliefs or values are in conflict.<sup>41</sup> If values are incontrovertible, there is no room for compromise or collaborative problem solving. This is linked to a sixth precondition that Raiffa and others have pointed out—namely, that there must be two or more issues "on the table" so that parties can maximize

33. Harter, *Cure for Malaise*, *supra* note 7, at 43.

34. R. FISHER & W. URY, *GETTING TO YES* 104 (1981).

35. Harter, *Cure for Malaise*, *supra* note 7, at 43; Cormick, *Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective*, *RESOLVE* 23 (Winter 1982).

36. Harter, *Cure for Malaise*, *supra* note 7, at 45; Fisher, *Negotiating Power*, 27 *BEHAVIORAL SCIENCE* 149-66 (1983).

37. Harter, *Cure for Malaise*, *supra* note 7, at 46.

38. Cormick, *supra* note 35, at 4, 6. *See also* Popper, *An Administrative Law Perspective on Consensual Decision Making*, 35 *AD. L. REV.* 255 (1983).

39. SIMPKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 42 (1971).

40. Susskind, *Environmental Mediation and the Accountability Problem*, 6 *VT. L. REV.* 17-18 (1981).

41. This refers to deeply held, almost theological values, as opposed to how two parties might value the impact of an emission standard differently.

their overall interests by trading or bundling issues.<sup>42</sup> This precondition for success can best be understood as a restatement of the basic distinction between "distributive" and "integrative" bargaining.<sup>43</sup> In distributive bargaining situations, one side can only win if another side loses—the classic "zero-sum" situation. In integrative bargaining situations, all sides can come out ahead by trading across issues or items that they value differently—the classic "win-win" situation.

Seventh, the pressure of a deadline is necessary for successful negotiation.<sup>44</sup> Without a deadline, parties may purposefully delay or fail to focus on reaching a settlement.

Finally, some method of implementing the final agreements must be available and acceptable to the parties.<sup>45</sup> Parties must believe that their agreement will be implemented and that their participation will be worthwhile. The importance of perceptions and commitments in negotiation cannot be emphasized strongly enough.

While Harter framed his discussion in terms of presumed preconditions for success, some of these same criteria can be recast in terms of a framework for evaluating the agreements reached through a negotiation process.

### B. *A Framework for Evaluating Negotiated Rules*

Negotiated rulemaking will only be utilized more broadly if it achieves better results than the traditional rulemaking process.<sup>46</sup> The framework for evaluating negotiated rulemaking is premised on the baseline criteria that fairer and wiser rules will be produced at a lower cost. Following from Harter's discussion of preconditions for success, this framework should include the following specific criteria.

Each party must feel that the negotiated rule serves its interests at least as well as the version of the rule most likely to be developed through the

42. H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION*, 164-165 (1982). However, as Harter points out, very few regulations involve single issues. Most proposals can be broken down into analyzing the scope of the remedy and the substantive and procedural elements of the regulation.

43. LEWICKI & LITTELER, *NEGOTIATION* 75-129 (1985).

44. Harter, *Cure for Malaise*, *supra* note 7, at 47. The legislature or courts could establish a perception of imminence by mandating agency action within a limited time period or the agency could set and publicize its own time frame for implementing regulatory programs.

45. *Id.* at 51. Professor Dunlop identified several of the same preconditions as being necessary for successful labor negotiations. Dunlop, *supra* note 25, at 1430-43. Political scientists have identified consensual decisionmaking as a way to reconcile majority and minority goals. *See, e.g.*, T. LOWI, *THE END OF LIBERALISM* 31-41 (1969); R. DAHL, *WHO GOVERNS?* 315-24 (1961).

46. Note, *supra* note 1, at 1874-76. *See also* Dunlop, *The Limits of Legal Compulsion*, reprinted in 1975 D.S.H. REP. (BNA) 884,886; Schuck, *Litigation, Bargaining, and Regulation*, *REGULATION* July-Aug. 1979, at 26.

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conventional process.<sup>47</sup> The only way of testing this latter criterion is to compare the attitudes of the participants at the end of the process with their initial statements of expectations.

A negotiation should yield realistic commitments from all of those involved. A rule that satisfies everyone in principal but cannot be implemented is of little use. Not only is the support of the participants important, but so too is the support of any interested party. The measure of success on this score is whether the proposed rule, drafted through the informal process, can weather the close scrutiny of those who did not participate in the negotiation process—and perhaps a “hard look” by the courts.

The interests of the parties should be so well-reconciled that no possible joint gains are left unrealized. Changes which would help a party without harming another party should not be missed.<sup>48</sup> If a more elegant method of reconciling the conflicting interests of the parties is possible, it will probably emerge once the draft agreement is publicized. Thus, it may take some time to evaluate fully negotiated rules relative to this criterion.

The agency should be able to demonstrate that it has upheld its statutory mandate, and the public-at-large should feel satisfied that both the process and the outcome were fair.<sup>49</sup> The perceptions of the parties who participated in the negotiations and the reactions of those they ostensibly represented ought to be a good preliminary indicator of success in this regard. Again, it may take some time to fully evaluate these perceptions.

Relationships among the participants in a negotiation should improve, not deteriorate, as a result of their interactions. The parties should be in a better position to deal with their differences in the future. Changed dynamics can be evaluated by questioning the participants and watching to see what happens in their subsequent dealings with each other.

The negotiated rule should take account of the best scientific and technical information available at the time of the negotiation. If, during the review and comment period, qualified experts testify that important scientific evidence has been ignored or misinterpreted, the result should clearly be judged an inferior or unwise rule. Although the wisdom of the

47. Parties must at least do as well as their BATNA—Best Alternative to a Negotiated Agreement. Fisher and Ury argue that the BATNA provides a standard or floor against which any proposal should be measured. R. FISHER & W. URY, *supra* note 34, at 104.

48. H. RAIFFA, *supra* note 42, at 164-65.

49. *Cf.* Note, *supra* note 1, at 1871, 1874-76 (alternative models of direct agency involvement in negotiated rulemaking and agency oversight without participation); Harter, *Cure for Malaise*, *supra* note 7, at 59-66 (advantages and disadvantages of agency participation). Some commentators have warned against agency participation. Since an agency has the final legal authority, parties might want to preserve their positions with the agency and therefore would negotiate less freely. Moreover, in its lead capacity, the agency might dominate the negotiations. However, these issues of inflexibility and posturing are endemic to all negotiations and not limited to instances where the agency is present.

negotiated rule will become clear once the rule has been implemented, it might be disastrous to delay evaluation until that point.

Since negotiated rulemaking is a voluntary effort undertaken by a regulatory agency to improve its rulemaking procedures and not a response to legislative or judicial procedural directives, the benefits forecast by proponents of negotiated rulemaking will have to be demonstrated if agencies are to sustain an interest in the process and if affected parties are to continue to participate. In the next section, we will examine the two EPA negotiated rulemaking demonstrations in some detail.

### III. EPA's Regulatory Negotiation Demonstrations

The notion of using a negotiated approach to rulemaking at EPA first emerged during the Carter Administration, when procedural reforms akin to negotiated rulemaking were tested.<sup>50</sup> A top EPA official strongly supported the idea at major Senate hearings held in 1980.<sup>51</sup> While the change of Administration slowed the momentum,<sup>52</sup> appointment of Joseph Cannon as Acting Associate Administrator of EPA's Office of Planning and Resource Management in 1981 brought renewed interest. Cannon and several other EPA officials had strong personal commitments to various regulatory reforms and worked diligently within EPA to develop backing for the idea of negotiated rulemaking.<sup>53</sup> In the fall of 1982, Cannon announced that the Agency would move ahead aggressively to demonstrate the concept. In a January 1983 address to the Conservation Foundation's National Conference on Environmental Dispute Resolution

50. N. Baldwin, *Negotiated Rulemaking: A Case Study of Administrative Reform 25-26* (1983) (unpublished Master's Thesis, Department of Urban Studies and Planning, MIT). During the Carter Administration, two successful experiments with procedural reforms illustrated that informal joint problem-solving could aid the progress of regulatory decision-making. The first of these reforms involved the creation of a technical panel which was responsible for making certain complex decisions regarding pesticides. The second was the adoption of an informal hearing procedure for the water pollution discharge permitting system, used to improve the efficiency of the existing, more cumbersome process. In both instances an informal participatory process was employed rather than the formal hearing method which tends to be more court-like and adversarial. See also Comment, *An Alternative to the Traditional Rulemaking Process: A Case Study of Negotiation in the Development of Regulations*, 29 VILL. L. REV. 1505, 1525-35 (1984) (describing the consultation procedure used by the Department of Labor's Office of Federal Contract Compliance Programs to gain public input prior to rulemaking).

51. *Regulatory Negotiation Hearings*, *supra* note 25, at 83-84, 94-95 (1980) (statement of Roy N. Gamse, Deputy Assistant Administrator, Planning and Evaluation, EPA).

52. N. Baldwin, *supra* note 50, at 25-26. Implementation of Regulatory Negotiation at EPA was slowed initially by the controversies associated with Administrator Ann Gorsuch.

53. *Id.* at 25-28. Cannon had been a lawyer involved in litigation prior to his appointment and was deeply committed to the idea that many disputes were best resolved out of court. This personal commitment, coupled with the fact that many parties, including industry and the Reagan Administration's OMB and President's Task Force on Regulatory Relief, were supportive of the concept, prompted Cannon to make negotiated rulemaking his pet project.

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Cannon announced that EPA was ready to develop several rules using negotiation.<sup>54</sup>

In February 1983, EPA published a notice in the *Federal Register* indicating that it intended to pursue the idea of negotiated rulemaking and used solicitation letters to invite interested parties to suggest candidate rules.<sup>55</sup> This followed more than a year of preliminary staff work at the Agency.<sup>56</sup> EPA engaged ERM-McGlennon to assist in contacting potentially interested parties<sup>57</sup> and obtained the services of the Program on Negotiation at Harvard Law School to document and analyze the upcoming demonstrations.

Dozens of candidate rules, many suggested by senior Agency staff, were considered carefully. In mid-1983, the agency came very close to selecting a rule governing disposal of low-level radioactive waste. By November, however, the Agency ended this effort because of resistance from the environmental community.<sup>58</sup> In exchange for dropping the low level radioactive waste rule, EPA asked leaders of key national environmental advocacy groups to suggest other rules for a first demonstration.

### A. *The Non-Conformance Penalty Rulemaking*

Section 206(g) of the Clean Air Act requires EPA to issue certificates of conformity to any class or category of heavy-duty vehicles or engines which exceeds an emission level, within an allowable upper limit, if the manufacturer pays a nonconformance penalty (NCP).<sup>59</sup> This penalty is intended not only to cost the manufacturer of a nonconforming vehicle or engine as much as compliance with the standard but also to create a financial disincentive for continued noncompliance.<sup>60</sup> Although the Clean

54. Harter, *The Experience So Far*, *supra* note 26, at 3.

55. Regulatory Negotiation Project, 48 Fed. Reg. 7494 (1983).

56. EPA made some crucial decisions regarding the proper negotiation procedures. The first of these was to employ a central staff from the Office of Planning and Program Evaluation to carry out the process. These individuals played a key role in educating others in the Agency about the regulatory negotiation process and worked to ensure that the top leadership at EPA understood the risks involved and would expend a great deal of time and effort to ensure success.

57. John McGlennon, former EPA Administrator for Region One, directs ERM-McGlennon, a Boston-based firm specializing in natural resource issues and dispute resolution.

58. L. Susskind & D. Fish, Status Report II: The Pre-Negotiation Phase of Negotiated Rulemaking: The Case of the Low-Level Radioactive Waste Rule 7 (June 1984) (unpublished manuscript). The environmentalists felt that the low level radiation waste rule involved perceptions and values that differed so greatly among the key stakeholders that successful negotiations were unlikely.

59. Clean Air Act, 42 U.S.C. § 725(g) (1982).

60. *Id.* The 1977 Amendments identified specific considerations to be used in estimating noncompliance costs, including: the degree to which emission standards were exceeded; the imposition periodically of increased penalties in order to incorporate incentives for the development of engines which are more able to meet the prescribed level of emission reduction; and the removal of any competitive disadvantage to manufacturers who choose to produce engines in compliance with the standard. Clean Air Act § 206(g)(3), 42 U.S.C. § 7521 (1982).

Air Act Amendments were passed in 1977, EPA had not issued NCP regulations by late 1983.<sup>61</sup>

In December 1983, David Doniger of the Natural Resources Defense Council (NRDC) formally proposed nonconformance penalties to EPA as a candidate rule for negotiated rulemaking.<sup>62</sup> Between December 1983 and March 1984, ERM-McGlennon found widespread support for negotiating the NCP rule among potential stakeholders. Charles Freed, Director of EPA's Manufacturers Operations Division, the program office responsible for the rule, enthusiastically supported using a negotiated approach, as did the EPA Office of General Counsel and Office of Program Planning and Evaluation. Environmentalists were generally supportive, viewing NCPs as a means to accommodate temporary industry needs while holding industry to technology-forcing standards. Smaller manufacturers were somewhat wary of the costs of participating in a negotiated rulemaking and felt that any NCP rule had to preserve their competitiveness. Larger manufacturers generally supported the proposed process and felt that they had adequate staff to participate in the process.<sup>63</sup> In general, all stakeholders felt that the rule was important enough to merit their involvement and that it did not involve the type of "life and death" value questions that would have made negotiation—an unfamiliar process at any rate—appear less workable.

In an April 1984 *Federal Register* notice, EPA announced its intention to develop an NCP rule using a regulatory negotiation.<sup>64</sup> At an organizational meeting, also held in April, some twenty participants met to learn more about the proposed process and to discuss how the negotiations would proceed.<sup>65</sup> At that time, EPA announced the creation of a \$50,000

61. EPA proposed NCP regulations in 1979 but never finalized them. Two years later, in April 1981, the Administration announced numerous regulatory relief measures which would reduce the economic impact of governmental regulations on industry. This put the NCP regulations on the backburner for several more years. L. Susskind & G. McMahon, *supra* note 30, at 7-8.

62. Letter from David Doniger to William Ruckelshaus (Dec. 7, 1983), *reprinted in* L. Susskind & G. McMahon, *supra* note 30, at app. B. At the same time Doniger formally notified EPA Administrator Ruckelshaus of NRDC's intent to sue EPA for failure to publish several rules, including the NCP rule. Doniger was strengthening his BATNA. *See supra* note 34.

63. L. Susskind & G. McMahon, *supra* note 30, at 34-39.

64. Notice of Intent to Form Advisory Committee, 49 Fed. Reg. 17,577 (1984).

65. The original conflict assessment conducted by ERM-McGlennon produced a list of participants that included eleven engine manufacturers, five industry associations, two environmental organizations (NRDC and the National Clean Air Coalition), and three environmental agencies or associations. Subsequently, two other groups asked to participate. Both were accepted, while the Clean Air Coalition decided to let NRDC represent the environmental concerns. The final list of manufacturing participants included the Automobile Importers of America, the American Trucking Association, the Engine Manufacturers Association, the Manufacturers Emission Control Association, General Motors, Chrysler, International Harvester, ONAN Corporation, Caterpillar Tractor Company, Volvo Truck Company, Isuzu Motors America, Ford, Mack Truck Corporation, IVECO Trucks of America, Cummins Engine, Freightline/Mercedes-Benz, and Motor Vehicle Manufacturers Association. The non-manufacturers included the California Air Resource Board, the State and Territorial

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resource pool—a fund that any or all of the participants would be able to draw upon to cover the costs of technical studies or other costs related to their participation.<sup>66</sup>

Negotiations began June 14, 1984, and ended October 12, 1984. In order to develop some structure for the process, the negotiation facilitator opened the June session by asking participants to produce a statement of issues reflecting their interests. A final list of ten issues was synthesized to help organize the work of the negotiating committee. Three work groups were formed around the following issues: Application of NCPs, Penalty Structure and Rate Setting, and NCP Administration and Enforcement.<sup>67</sup>

Five one-day negotiating sessions dealing with substantive aspects of the NCP rule and numerous work group sessions dealing with specific technical and administrative issues were held during a four month period. The NCP negotiating committee used over \$10,000 to fund an independent study of a proposed engine testing plan. Other collaborative technical work was done by committee members who designed a micro-computer-based spreadsheet model to test the impacts of parameter changes in the penalty formula.<sup>68</sup>

The negotiations were conducted under a Federal Advisory Committee Act (FACA) charter.<sup>69</sup> Notice of the NCP negotiating committee sessions was given in the *Federal Register*, and meetings were open to the public. The committee eventually reached consensus<sup>70</sup> on all of the issues it originally identified at the first meeting.

In reaching this consensus, EPA's choice of a facilitator was crucial. The ERM-McGlennon team, which had extensive mediation experience,

Air Pollution Program Administration, the Colorado Department of Health, the Natural Resources Defense Council, and EPA/OMB.

66. Because of the many unanswered questions surrounding the issue of intervenor funding, EPA thought it wise to raise private foundation funds to supplement the Agency's contribution to the resource pool, a task requiring substantial effort. An independent body, the American Arbitration Association, was given sole responsibility for the management of these funds.

67. Each working group was responsible for its own subset of issues. L. Suskind & G. McMahon, *supra* note 30, at 73.

68. *Id.* at 156-157.

69. The use of a FACA charter (Federal Advisory Committee Act, 5 U.S.C.app. § 1-14 (1982 & Supp. II 1985)) situates the negotiating committee within the labyrinths of existing federal administrative procedures. Among the FACA requirements are: 1) the negotiating committee is constituted as an advisory group to EPA, chartered by the General Services Administration of the Office of Management and Budget; 2) meetings must be open to the public and controlled by the agency; 3) formation of the group and meeting schedules must be announced in the *Federal Register*; and, 4) detailed minutes must be kept of all meetings. Additionally, FACA requires close scrutiny of advisory committees by Congress and the executive branch. There is some uncertainty about whether FACA applies to negotiated rulemaking-type groups. The Administrative Conference of the United States has concluded that such uncertainty about the applicability of FACA has tended to discourage useful contacts between the agency and nongovernmental sectors.

70. Consensus is defined *supra* note 26. See also H. RAIFFA, *supra* note 42, at 218-25, for a description of the use of joint fact finding in the mediation of conflicts.

took the lead in generating agreement on a detailed agenda and work schedule, organizing work group meetings at which components of the final version of the regulation were drafted, and convening the full group to review these work group drafts. It also assumed responsibility for the preparation of detailed minutes of all committee meetings and of the complete draft of the final rule. Finally, the facilitation team initiated caucuses during and outside of meetings, maintained frequent contact with all participants, and intervened quite actively during several of the sessions.<sup>71</sup>

After the last negotiation session on October 12, 1984, in which all the issues were resolved, a four-member subcommittee—consisting of EPA, state, environmental, and industry representatives—was given the responsibility of translating the tentative agreement into a consensus document. A first draft was circulated in mid-October, and comments were solicited. The subcommittee then used several conference calls to prepare the final draft that was signed by the entire committee in December 1984.

With the consensus statement signed by all participants, EPA published its notice of proposed rulemaking on March 6, 1985.<sup>72</sup> Only thirteen comments were received during the comment period, all in support of the committee's proposal. The final rule was promulgated without opposition on August 30, 1985.<sup>73</sup>

### B. *The Pesticide Exemption Rule*

Regulations promulgated pursuant to the 1972 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) specify that registration applications for new pesticides must include information demonstrating the potential risks they pose to human health.<sup>74</sup> Unfortunately, at present, there is no completely reliable empirical test of a substance's relative toxicity or safety. Data used to demonstrate such properties are drawn chiefly from lifetime-exposure animal bioassays. Completion of such tests for a new compound may take two years. This means that it might take four years to move a new pesticide from development to commercial use. Neither the agricultural users nor the producers of such products find this time frame acceptable.<sup>75</sup> Section 18 of FIFRA gives the Administrator of EPA discretionary authority to exempt a state or federal agency from any provisions of the Act if it is determined that an emergency condition exists

71. L. Susskind & G. McMahon, *supra* note 30, at 126, 171-175.

72. Notice of Proposed Rulemaking, 50 Fed. Reg. 9204 (1985).

73. Final Rule, 50 Fed. Reg. 35,374 (1985).

74. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136a (1982).

75. L. Susskind & D. Kronenberg, *supra* note 30, at 2.

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which requires an exemption.<sup>76</sup> Given the uncertainty of much of the required scientific information, such discretion has the potential for misuse.

In March of 1983, EPA's Office of Pesticide Programs published an internal audit of Section 18.<sup>77</sup> The audit concluded that there had been a dramatic increase in the number of exemptions requested. The House Subcommittee on Department Operations, Research, and Foreign Agriculture expressed concern that states or industries might be using Section 18 to circumvent more stringent data and risk control requirements which apply to registration.<sup>78</sup>

Prompted by this audit and resulting Congressional concern, EPA began to review the Section 18 regulations in January 1984. The Agency held three public hearings to solicit recommendations. In August 1984, EPA published a *Federal Register* notice declaring its intent to form an advisory committee to develop new Section 18 regulations.<sup>79</sup>

The Section 18 rule was proposed as a candidate for negotiated rulemaking by the National Audubon Society.<sup>80</sup> In agreeing to a negotiated format, the Office of Pesticide Programs stipulated that the negotiations span no more than four months and indicated that if no consensus were reached by that time, the Agency would dissolve the committee and promulgate regulations drafted internally.<sup>81</sup> An advanced notice of proposed rulemaking was published in the *Federal Register* on April 8, 1985.<sup>82</sup>

As in the NCP demonstration, a central staff from the Office of Planning and Policy Evaluation was employed to carry out the negotiated rulemaking and ERM-McGlennon was selected as convener, with responsibilities for completing pre-negotiation activities. In contrast with the NCP experience, however, the EPA Policy Office made a decision to appoint a facilitator other than the convener. The new facilitator would be

76. Exemption of Federal and State Agencies for the Use of Pesticides Under Emergency Conditions, 40 C.F.R. § 166 (1985).

77. Registration Division, Office of Pesticide Programs, EPA, Audit of Emergency Exemption and Special Local Needs Programs as Authorized Under Section 18 and 24(c) of FIFRA (1983).

78. *The Pesticide Regulatory Program Study: Hearing Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 97th Cong., 2d Sess. 12 (1983)

79. L. Susskind & D. Kronenberg, *supra* note 30, at 7.

80. *Id.* at 4-5. Interviews conducted with all participants before the demonstrations revealed that environmentalists wanted to develop an exemption procedure limited to true emergencies. In general, there was a feeling that exemptions were being granted too frequently.

81. *Id.* Preliminary interviews with all participants did not indicate that this time frame was a major problem, unlike the NCP negotiated rulemaking, where the timetable was thought to be a problem by most participants at the start of the negotiations.

82. Exemption of Federal and State Agencies for Use of Pesticides Under Emergency Conditions, 50 Fed. Reg. 13,944 (1985) (to be codified at 40 C.F.R. pt.166).

responsible for the remaining responsibilities, which are concentrated heavily in the negotiation and post-negotiation stages, including conducting and mediating meetings and insuring that consensus is achieved. Moreover, EPA decided to experiment with the use of an "inside" facilitator—someone who worked for EPA but was not associated with the EPA office directly involved in negotiating the rule. EPA was determined to explore the advantages and disadvantages of using an "honest broker" from within the Agency to facilitate a negotiated rulemaking despite doubts raised by groups such as the Conservation Foundation about how the neutrality of such a facilitator would be viewed.<sup>83</sup> LaJuana Wilcher, a special assistant to the Office of General Counsel, was selected as the mediator.

ERM-McGlennon again conducted preliminary interviews with potentially interested parties and eventually produced a list of sixteen likely participants, in addition to EPA.<sup>84</sup> The sixteen included four environmental groups, four state organizations, four agricultural user groups, two manufacturers, and the USDA.<sup>85</sup> The basis for selection lay primarily in the participants' familiarity and past involvement with FIFRA and Section 18, their ability to represent important interests, and their willingness to participate.<sup>86</sup> Six additional parties were added after they submitted requests to participate at the preliminary organizational meeting.<sup>87</sup> The final group of twenty-two members was proposed by EPA to be a formal advisory committee under FACA.

An introductory meeting of the committee was held on August 16, 1984. With the help of ERM-McGlennon and the EPA facilitator, the group agreed upon an agenda, organized subcommittees to work on the various issues, adopted protocols (including guidelines for the use of a

83. L. Susskind & D. Kronenberg, *supra* note 30, at 6-7. It may be difficult for participants to believe that the interests of an EPA Program Office do not somehow influence the behavior of a "neutral" facilitator from another EPA office.

84. *Id.* at 6, 8. Potential stakeholders were identified for ERM-McGlennon by EPA's Office of Pesticide Programs (OPP), by the participants themselves during interviews, and from transcripts of testimony at the January 1984 hearings. Several rounds of interviews narrowed the number of participants to 16, although no upper limit on participants had been set by EPA. *Id.* at app. 6-7.

85. *Id.* app. 7 at 2. Environmental organizations included National Audubon Society, National Coalition Against the Misuse of Pesticides, National Wildlife Federation, and Defenders of Wildlife. State organizations included National Association of State Departments of Agriculture, Association of State and Territorial Health Officials, State FIFRA Issues Research Group, and Association of American Pesticide Control Officials. Pesticide user groups were the Pesticide Users Advisory Committee, American Farm Bureau Federation, California Citrus Council, Florida Citrus Mutual, and National Food Processors Association. Manufacturers were represented by the National Agricultural Chemical Association. Federal Agencies included USDA and EPA's Office of Pesticide Programs.

86. *Id.* app. 7 at 1-2.

87. The six groups were American Seed Trade Association, Interregional Research Project No. 4, National Association of Wheat Growers, National Cattlemen's Association, National Corn Growers Association, and the National Cotton Councils. *See id.* list of participants at iv-v.

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\$50,000 resource pool), and specified the technical information they needed to start.<sup>88</sup> EPA's Office of Pesticide Programs, the Agency representative in the negotiations, provided a draft of the preamble and regulation at the outset, in contrast to the relatively clean slate with which the NCP committee began. This draft provided the committee with considerable guidance in structuring its discussions.<sup>89</sup>

Negotiations began September 28, 1984, and ended January 16, 1985. There were six formal sessions, three of which lasted two days each. Smaller work groups were organized around the three key issue areas—Definition of Emergency, Health and Safety, and Implementation—and met as needed. The earlier meetings were devoted primarily to fact-finding, while the latter ones became more issue oriented, with alliances often developing. Late in the negotiations, participants seemed to become more willing to take strong stands or negotiate assertively.<sup>90</sup> Much of the substance of the agreement was finalized during the last two-day meeting.<sup>91</sup>

As it turned out, the resource pool was not needed to finance technical assistance, as it was in the NCP demonstration. Due to the nature of the criteria for exemption, negotiations did not revolve around conflicts over the legitimacy of scientific evidence but were concerned with more general decisions often involving definitions. When differences in the interpretation of technical matters did arise, however, participants in the second demonstration were able to resolve them satisfactorily without outside research.<sup>92</sup>

Although the EPA facilitator was not as active as the ERM-McGlennon staff had been in the NCP negotiation, participants in the Section 18 negotiations were able to reach agreement at the sixth and final meeting. The consensus agreement was signed on January 16, 1985, and published as a proposed rulemaking on April 8, 1985.<sup>93</sup> Nineteen comments were received during the public comment period; three of these were from participants and supported the proposal.<sup>94</sup> The others raised

88. *Id.* at 7-11.

89. *See id.* at 58. In other circumstances, a similar maneuver could easily have been used to coerce them into following EPA's lead.

90. *Id.* at 71.

91. *Id.* at ii.

92. *Id.* at 137.

93. Proposed Rule, 50 Fed. Reg. 13,944 (1985).

94. In an interesting provision, participants agreed that the consensus statement was not binding and did not preclude entities or persons who may be members of the signing organization (i.e. the umbrella organization) from submitting comments individually, but did prohibit the signing organizations themselves from commenting. Three organizations apparently took this circuitous route to show their added support. L. Susskind & D. Kronenberg, *supra* note 30, at 107-09.

relatively minor points.<sup>95</sup> EPA sent copies of the comments to the participants, but the groups decided to support EPA's final draft without reconvening. The final rule is expected to be published in the *Federal Register* in January 1986.<sup>96</sup>

### C. *Outlines of the Process in Practice*

Based on EPA's experiences, we suggest that negotiated rulemaking can best be understood as a three-stage process. During the first stage—pre-negotiation—the agency decides whether to negotiate a specific rule and gives appropriate notice of its intentions in the *Federal Register*. A convenor is then designated by the agency to identify the likely stakeholders and to convince them to send senior representatives to the negotiating table. The convenor must work with all the relevant parties to organize an introductory session, cope with subsequent requests for permission to participate, develop deadlines and draft a set of ground rules to guide the proceedings, and assist the participants in obtaining the technical and financial resources they need to proceed, including training in negotiation if the parties desire it. Essentially, the convenor seeks to uncover and remove obstacles to negotiating the rule. If he or she fails to convince most of the key parties to come to the table or if the necessary resources cannot be obtained, the convenor can call the process to a halt. While the convenor is laying the groundwork for the process, the agency central staff should coordinate the internal decision to use negotiated rulemaking, gather the necessary financial resources, tend to the mandatory notice requirements, and prepare a request for a FACA charter.

During the second stage—negotiation—the parties need to structure a work program, agenda, and timetable; undertake a process of joint fact finding, using consultants if necessary; organize subcommittees or working groups to develop preliminary drafts of proposals; confront major differences in their interests; produce careful summaries of the agreements reached at their meetings; and prepare a written draft of the proposed rule for all the participants, including the agency, to circulate for review. The success of these efforts depends in large measure on the assistance provided by a non-partisan facilitator acceptable to all the parties. The facilitator might be the original convenor.

95. The comments focused on very specific language and clarification of particular aspects of the rule and did not involve the more general criticisms which are common in the traditional rulemaking notice and comment period. Telephone interview with Chris Kirtz, EPA Regulatory Negotiation Project Director (Nov. 15, 1985).

96. *Id.*

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During the final stage—post-negotiation—the facilitator should assist the parties in winning support for the draft agreement from their constituents or members and arrange for a formal signing that will commit the participants to support the final draft during the review and comment period. Following review and comment, the agency may decide to reconvene the participants, but not necessarily as a formal committee, to review the comments received and to discuss the agency’s decisions regarding the language of the final rule.

### IV. Comparing Theory to Practice

Based on the evaluative framework described earlier and first-hand observations of EPA’s experience, both of EPA’s demonstrations must be judged successful.<sup>97</sup> Detailed interviews with the participants indicated that almost every one of them felt that his or her group’s interests were well served by the negotiated agreements. While they were surprised at the amount of time and effort it took to negotiate a consensus rule, they agreed that the time invested up-front reduced the overall amount of time involved in litigation and subsequent administrative wrangling.

Many of the participants felt that the negotiated outcome was far better than what they might have expected had they gone to court.<sup>98</sup> Versions of the two agreements that would have helped some parties more without hurting the others did not emerge during or after the review and comment process, and both rules were formally adopted without court challenge. Thus, the first step toward implementation was completed successfully.

The relevant technical staffs at EPA felt that the Agency’s statutory mandate had been upheld in both instances and that the wisest possible rules had emerged. Furthermore, the relationships among the parties, many of whom came into the negotiations with a long history of harsh adversarial relations, improved markedly. The participants were left in a better position to deal with each other in the future.<sup>99</sup> The parties not

97. See *supra* note 30. In the first demonstration, the manufacturers were almost unanimous in their conclusion that the negotiation produced a better rule than the conventional process would have produced. Non-manufacturers also felt that the rule was probably better. Improvement was attributed to the opportunity stakeholders with varying interests had to probe each other’s positions directly rather than working through EPA. L. Susskind & G. McMahon, *supra* note 30, at 133-34. In the second demonstration, negotiators for the growers and other agricultural interests were nearly unanimous in their view that negotiation produced a rule more representative of their interests with less conflict. Environmental representatives also offered a positive assessment of regulatory negotiations relative to the standard notice and comment procedure. One said that the environmental community “wouldn’t have permitted EPA to take Section 18 through standard rulemaking.” Agency representatives as a group were not inclined to forecast a vastly different outcome had negotiations not been used. L. Susskind & D. Kronenberg, *supra* note 30, at 117-18.

98. L. Susskind & G. McMahon, *supra* note 30, at 133.

99. L. Susskind & G. McMahon, *supra* note 30, at 180; L. Susskind & D. Kronenberg, *supra*

only agreed to sign the negotiated rule, they agreed to support it during the review and comment process. All in all, in the eyes of the participants and others closely observing the process, negotiated rulemaking appeared to produce more legitimate outcomes at a lower cost than usual.<sup>100</sup>

The results of EPA's two demonstrations offer the first full-fledged opportunity to reexamine the hypothetical claims of both the proponents and the critics of negotiated rulemaking and to suggest refinements in the provisional theory.

#### A. *Rule Selection*

EPA's experience proves the importance of the theorists' prescriptions for rule selection. First, parties are unlikely to make the necessary concessions to reach consensus if the only way to reach agreement is to compromise fundamental values or beliefs.<sup>101</sup> Second, success in a negotiation depends on having a large enough range of issues or options to allow trade-offs or creative packaging.<sup>102</sup>

EPA's first candidate rule was rejected by key environmental groups because they felt that it was impossible to negotiate and engage in compromise over a *de minimis* rule regarding low-level radioactive waste disposal. As far as they were concerned, the *de minimis* level had to be zero. Since compromise was impossible, negotiations would be fruitless.

In contrast to this first attempt, EPA's two demonstration rules involved a range of sub-issues to which various groups attached different degrees of importance. This enabled them to make trades that led to "win-win" packages that everyone could support. Perhaps even more importantly, both demonstrations centered on the distribution of economic gains and losses and not on EPA's right to regulate. As long as the Agency achieved its basic objectives, it was willing to work with the other participants to allocate gains and losses fairly. Neither of EPA's first two demonstrations involved fundamental value conflicts. The question remains, though, as to what proportion of the rules issued each year revolves around distributive bargaining ("win-lose") issues and what proportion lends itself to integrative ("win-win") bargaining.

#### B. *Incentives to Negotiate*

The theorists suggest that interested parties will choose not to participate in a negotiation if they feel that their alternatives away from the

note 30, at 111-13, 131-32, 146.

100. L. Susskind & G. McMahon, *supra* note 30, at 133-34.

101. Harter, *Cure for Malaise*, *supra* note 7, at 49.

102. S. BREYER, *REGULATION AND ITS REFORM* 122 (1982).

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bargaining table will produce better results.<sup>103</sup> The EPA experience suggests that parties to a proposed rulemaking may not be sure of their BATNAs (Best Alternative to a Negotiated Agreement), and this uncertainty may help bring them to the bargaining table.

In both demonstrations, each group's BATNA was diminished by the willingness of all the other parties to participate in the demonstrations. Unless all the key groups refused to participate, any group that decided to hold out and challenge the rule in court at a later time would face difficulty mustering allies for such a challenge. Moreover, while the courts have not indicated whether they will set aside the "hard look" doctrine in instances where a well-managed negotiated rulemaking effort has been completed, the possibility of such a court response increases the uncertainty of a hold-out strategy and makes cooperation by all interested parties almost inevitable.<sup>104</sup>

Many of the groups involved in the conventional rulemaking process spend a great deal of their resources trying to influence agency decision-making. Many of the same groups complain that the review and comment process does not come until after the agency has already committed itself to a course of action. For these groups, the offer to negotiate a draft of the proposed rule was too attractive to pass up. If the interest groups failed to get what they wanted from EPA, they knew they could walk away and block consensus. For most of the participants, the prospect of negotiation thus looked as good as, if not better than, their alternatives, and participation did not preclude them from pursuing other options later.

In sum, many of the groups were unsure of what policy options the other groups might pursue, and this uncertainty affected their decisions. Working behind the scenes, the convenor may have encouraged participation and altered the parties' estimates of their BATNAs by manipulating this uncertainty and changing their perceived costs and benefits. The convenor urged participants to consider the advantages of interacting with the Agency before it had committed itself to a draft of the proposed rule and reassured them that the process was voluntary and that they could quit at any time.

### C. *Unequal Power*

Harter has suggested that negotiated rulemaking will fail if any party can achieve its goals without having to deal with others.<sup>105</sup> He has also implied that the more powerful negotiators will achieve their aims, while

103. R. FISHER & W. URY, *supra* note 34, at 104.

104. See *infra* text accompanying note 133.

105. Harter, *Cure for Malaise*, *supra* note 7, at 45.

the less powerful interests are likely to be disappointed. The EPA demonstrations did not support these hypotheses. In both instances environmental interest groups were outnumbered and came into the negotiations with what the other parties perceived as uncertain power.<sup>106</sup> They were, however, quite capable of holding their own in the negotiations. In fact, in the eyes of some of the participants, the environmental group representatives exerted substantial influence over the final agreements.<sup>107</sup>

Individual negotiating skills also altered traditional power relations, and the number of representatives was secondary to the negotiating abilities of each participant. Generally, participants in both demonstrations entered the negotiations without a great deal of negotiation experience, even though some were quite familiar with adversarial proceedings. The initial negotiation training provided by the facilitator may have helped equalize ability levels.

Certainly the availability of the resource pool gave many of the groups a sense of equal access to information and technical advice. The resource pool helped to even up some of the sharp disparities in the availability of financial resources and provided assurance to even the least well-to-do groups that their representatives would be able to cover the costs of participating in all meetings.

Further, even when unequal political power exists, the process of facilitated negotiation appears to impose some constraints on the exercise of that power. For example, EPA certainly reserved the right to walk away from the table at any time and write whatever rule it wanted, but the Agency did not want to appear responsible for the failure of the negotiation effort. The presence of a non-partisan facilitator who could report objectively on which groups had reason to feel co-opted or treated unfairly may have provided a check on the actions of the more powerful parties.

Furthermore, power in negotiations is quite fluid. Certain power relationships were altered during the negotiations as "less powerful" groups coalesced behind certain strong arguments and formed coalitions. Harter and others seem to have overlooked the impact of coalition formation on the outcome of a negotiated rulemaking. They also appear to have underestimated the impact of momentum as the drive toward consensus held some of the more recalcitrant groups in check. As Fisher has pointed out, a party's power in negotiations depends on a number of factors, including skill and knowledge, alternatives to a negotiated agreement, the ability to form coalitions, and financial and human resources.<sup>108</sup> Unequal power

106. L. Susskind & D. Kronenberg, *supra* note 30, at 34.

107. L. Susskind & G. McMahon, *supra* note 30, at 144.

108. Fisher, *supra* note 36, at 153.

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entering a negotiated rulemaking turned out to be much less of a problem than Harter and others imagined because the process empowers all the parties in various ways and constrains the most powerful.

### D. *Scale*

Harter was quite clear regarding his presumption about the maximum scale at which a negotiated rulemaking could proceed successfully.<sup>109</sup> He claimed that approximately fifteen participants would be the maximum, but his supposition is not borne out by the EPA experience.

Through indirect delegation of representation, skillful facilitation, and the use of subcommittees, EPA was able to include more than twenty-five participants in its demonstrations.<sup>110</sup> Most public decision-making processes are not facilitated, so very few people are familiar with anything other than the back-and-forth pattern of public discourse which gets harder to manage as the number of people involved grows. Facilitation by a skilled professional, on the other hand, can insure effective communication among much larger numbers of people.

EPA was also able to accommodate larger numbers of participants by breaking larger groups into smaller working groups to complete tasks that might otherwise have been too difficult to handle in a group of twenty-five. These tasks included generating draft documents for the full committee to consider. As negotiating groups get larger, additional working groups may be used to ensure full participation by all interested parties.

Harter implied that the fifteen participants would represent fifteen groups. In fact, through a process of pyramiding representation managed by a skillful convenor during the pre-negotiation phase, a great many more groups can become involved indirectly in negotiated rulemaking. During the conflict assessments undertaken by ERM-McGlennon, it became clear that some groups were prepared to sit out the negotiations as long as they could be assured that other particular groups with common interests would be participating.<sup>111</sup> Many of the individual participants had alternates who could sit in for them when other commitments prevented them from attending meetings, and participants were often accompanied by staff when they attended negotiation sessions. If observers are also counted, at times there were more than thirty-five individuals

109. Harter, *Cure for Malaise*, *supra* note 7, at 46.

110. In the second demonstration the ERM mediators felt that 25 was close to the practical limit on the number of parties that could be managed effectively by a mediation team of two or three people. L. Susskind & D. Kronenberg, *supra* note 30, at 135.

111. L. Susskind & G. McMahon, *supra* note 30, at 20-21.

present at scheduled sessions. A rough practical limit on the number of participants should certainly exceed twenty-five.

### E. *Ripeness*

Like many other negotiation theorists, Harter suggests that issues must be readily apparent and that parties must be ready to address them if a negotiation is to succeed.<sup>112</sup> The EPA experience, however, challenges the importance of this criterion.

EPA hired a convenor to undertake a conflict assessment aimed at identifying potential stakeholding parties. Many of those contacted were not aware that a negotiation on an issue of concern to them was about to take place.<sup>113</sup> Many of those who actually participated were only vaguely aware of some of the technical aspects of the rules under discussion. Additionally, at the outset of the negotiations, there was reluctance on the part of some of the administrators within EPA to participate in the demonstrations.

When the parties arrived at the initial organizational sessions for each of the negotiated rulemakings, they were confronted with the task of setting a detailed agenda of items to be discussed. While everyone knew that the product of the negotiation process was supposed to be a draft rule, they were vague in preliminary interviews with regard to the appropriate range of issues to discuss.<sup>114</sup>

Even the agencies directly involved in negotiations had conflicting ideas about their authority and appropriate roles. EPA and OMB differed at the outset regarding the appropriate scope of the two FACA charters<sup>115</sup> and the role that OMB would play in the negotiations. OMB felt it should not participate directly since it wanted to reserve the option of disapproving the negotiated rule if, in its judgment, the rule was cost-ineffective pursuant to Executive Order 12,291.<sup>116</sup>

From a theoretical standpoint, EPA's two demonstrations thus did not meet the criterion of ripeness. Yet, even with the confusion about who would participate and what the agenda would be, the demonstrations were successful. This merely confirms the inappropriateness of the ripeness criterion. Most public dispute resolution efforts are likely to involve a

112. Harter, *Cure for Malaise*, *supra* note 7, at 47; *see also* Popper, *supra* note 38, at 286; Cormick, *supra* note 35, at 46.

113. L. Susskind & G. McMahon, *supra* note 30; L. Susskind & D. Kronenberg, *supra* note 30.

114. L. Susskind & G. McMahon, *supra* note 30, at 72.

115. Telephone Interview with Chris Kirtz, EPA Regulatory Negotiation Project Director (September 1985); Telephone Interview with Nell Minnow, OMB (September 1985).

116. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), 3 C.F.R. pt. 127 (1981). Executive Order 12,291 gives OMB responsibility for evaluating the cost-effectiveness of proposed rules.

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changeable and expandable agenda and a shifting set of interest groups who are not quite clear why they are at the table.

### F. *Deadlines*

Harter and others have argued for the importance of deadlines as a tool for keeping the negotiations moving and for avoiding dilatory tactics.<sup>117</sup> In most labor-management negotiations, the greatest progress traditionally occurs close to the final deadline. In accordance with this view, EPA initially set tight deadlines. In the first demonstration, the Agency actually shortened the deadline early in the process, thereby angering participants.<sup>118</sup> Somewhat to their surprise, however, participants were able to reach agreement even with the shortened schedule. Adverse effects became apparent when participants felt they needed more time to check back with their constituents for reactions to the proposed agreement.

While the deadlines played a helpful role at the outset, the willingness of all parties to negotiate in “good faith” and with a great deal of energy proved to be as significant as the tight negotiating schedule.

### G. *The Concerns of the Critics*

The EPA demonstrations address many of the concerns mentioned regarding negotiated rulemaking. Some of the critics have charged that interests that ought to be represented would be absent for one reason or another. Stewart has expressed concern that ad hoc processes of selecting participants might not produce sufficient or credible representation.<sup>119</sup> Other observers have expressed doubts about the ability of ad hoc representatives to speak for their constituents or to bind their members.<sup>120</sup> EPA’s success, however, suggests that the openness of the *Federal Register* notice procedures plus the thoroughness of the convenor’s nation-wide solicitation can produce credible representation. If key groups had been missed, their views would undoubtedly have emerged during the review and comment process. They did not. Also, EPA had considerable success identifying effective organizational spokespeople to participate in the demonstrations. Since there was much at stake for the organizations involved, they did not have to be persuaded to send top-level people.

A number of critics have also expressed concern about the “delegation problem”—the abrogation of agency responsibility implied by the willingness of an agency to agree ahead of time to be bound by a negotiated

117. Harter, *Cure for Malaise*, *supra* note 7, at 47.

118. L. Susskind & G. McMahon, *supra* note 30, at 74-82.

119. Interview with Richard Stewart, Professor of Law, Harvard Law School (September 1985).

120. Rodwin, 3 ENVTL. IMPACT ASSESSMENT REV. 376 (1982).

consensus.<sup>121</sup> Because negotiated rulemaking can be viewed as the sharing of promulgation powers with private citizens who are not accountable to the electorate, delegation issues warrant careful attention. However, it is important not to exaggerate the magnitude of the problem. A review of the two EPA demonstrations shows that the Agency did not in any way abdicate its administrative responsibilities.

EPA promised the participants that the Agency would "live with" a consensus rule, publishing it as a notice of proposed rulemaking. The Agency was not agreeing to defer to the group and support an unknown quantity, however, since the Agency itself, as a direct participant in the negotiations, had the equivalent of a veto over any consensus. Nor were the top-level agency officials delegating authority to low-level officials sitting at the negotiating table. Every participant knew that the EPA representatives had to do as much checking back with superiors as did the others at the table. Moreover, EPA sought FACA charters for both its committees, and it attempted to comply with the letter of the law since it ran all of the full negotiating sessions on an open basis. Thus, the participants were members of official Agency advisory committees, and EPA was not delegating its authority to a group of private citizens.

121. H. Perritt, *supra* note 27, at 160-63. Perritt concluded in his report to ACUS that if an agency delegates its authority to a group of private citizens, further delegation problems are presented. One such problem is whether such delegation is within the agency's authority delegated from the Congress. Another problem is that the private delegates are even less accountable politically than the agency officials.

Compliance with the delegation doctrine has concerned proponents of negotiated rulemaking. While it is appropriate to think about delegation issues associated with negotiated rulemaking, it is important not to exaggerate the magnitude of the problem. The early proponents of regulatory negotiation offered a number of reasons why violation of the delegation doctrine does not result from negotiated rulemaking.

First, under all the current conceptions of negotiated rulemaking, and clearly reflected in the ACUS guidelines, negotiators play only an advisory role in the agency; the agency retains the final decisionmaking authority. Such an advisory role has been approved by the courts in a variety of circumstances. Second, the nature of negotiated rulemaking, if it is pursued under ACUS guidelines, ensures adequacy of representation of affected groups. Thus it provides its own form of political accountability, which probably is greater than when the agency makes rules unilaterally. Thus negotiated rulemaking avoids the problem of unaccountable decisionmaking that the delegation doctrine is intended to avoid.

It bears emphasizing that the delegation doctrine overlaps other requirements imposed on agency decisionmaking under the APA and substantive statutes. In a real sense, delegation problems are avoided when rules are subject to judicial review under APA standards. In other words, the delegation doctrine is embodied in APA requirements and need not be addressed separately.

There are thus two entirely independent ways for negotiated rulemaking to satisfy the delegation doctrine. First, if the rule ultimately resulting from negotiated rulemaking passes judicial scrutiny under the arbitrary-and-capricious, within-statutory-authority, and in-accord-with-statutory-procedures standards, it perforce has passed muster under the delegation doctrine. Second, if the affected interests have been represented fairly in the negotiation process, political accountability exists, and there is no need to be wary of delegation because the harm it seeks to avoid has been avoided ab initio.

*Id.*

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Nevertheless, Harter has raised the concern that negotiated rulemaking may contravene the policy against *ex parte* communication contained in the Administrative Procedure Act.<sup>122</sup> Perritt successfully counters Harter's concerns in his report to the Administrative Conference of the United States and concludes, based in part on his own analysis of the results of the EPA demonstrations, that *ex parte* contact will be found permissible by a court.<sup>123</sup> In addition, Perritt argues a balanced selection of interest representatives, consultation focused solely on policy rather than factual matters after the record is closed, and the placing of summaries of the negotiations in the record are likely to satisfy the court. According to Perritt, caucuses and work group meetings can be closed without violating the terms of FACA. Since EPA gave notice of all of its full negotiation sessions, it complied with its FACA charter and the Sunshine Rules. However, EPA may not have met all the relevant notice requirements for some of its subcommittee meetings.

In some respects, negotiated rulemaking efforts cannot fail. At the very least, conflicts can be clarified, data shared, and differences aired in a constructive way. Even if full consensus is not achieved, the negotiation process may still have narrowed the issues in dispute. While the issue did not explicitly arise in either EPA demonstration, the question of what would happen if consensus was not reached was very much on the minds of the participants. Most of the participants indicated that they thought the Agency would not ignore even partial agreements when fashioning the final rule, in order to head off some of the legal challenges that might otherwise occur.

### V. Reflections on the Success of Negotiated Rulemaking

In retrospect, EPA appears to have made a number of important decisions that helped to ensure the success of its first two demonstrations. Most of these decisions focused on the processes involved in conducting

122. Harter, *Cure for Malaise*, *supra* note 7, at 12, 22.

123. A rule ultimately adopted by the agency must be supported by factual information contained in the official record. Persons with an interest in the content of the rule must be afforded an opportunity to know the factual basis for the rule and to challenge facts submitted by opponents in an adversarial context. If the negotiation takes place among appropriately balanced interest representatives, the opportunity for adversarial exploration of policy and factual issues is preserved in the negotiation itself. Consultation between the agency and the negotiation participants after the "record" is closed should be permissible so long as such consultation focuses on policy rather than new factual matters. Placing summaries of discussions in the "record" so that non-parties to the discussions can know of their substance and have an opportunity to respond, while not necessary in every case, enhances the likelihood that the *ex parte* contact will be found permissible by a court. H. Perritt, *supra* note 27, at 171-73. *See also*, Note, *supra* note 1, at 1871-89.

such a demonstration, an area little addressed by either proponents or critics of negotiated rulemaking. Yet these decisions appear crucial to the success and legitimacy of EPA's demonstrations. First, EPA designated one portion of the Agency to manage the negotiations process while relying on a separate section of the Agency to represent EPA's interests in the negotiations. Second, EPA worked hard to establish a resource pool that the participants themselves were allowed to manage. Third, the Agency focused on the drafting of a written agreement. Fourth, EPA gave the facilitator substantial latitude and independence.

EPA made a crucial decision to designate the Office of Planning and Program Evaluation (OPPE) to coordinate its negotiated rulemaking demonstrations. It is not likely that these functions would have been handled as credibly by a section of the Agency which had to function at the same time as an interested party in the negotiations. The individuals in this office played a key role in educating others in the Agency about the negotiated approach to rulemaking. OPPE staff selected a convenor and solicited proposed rules from all sections of the Agency, and it worked to ensure that the top leadership at EPA understood the risk involved and would throw its weight behind the effort.<sup>124</sup> The same central staff contracted with an outside evaluation team to ensure that there would be an independent analysis of the results.

The resource pool also proved an important factor for success. OPPE staff worked extremely hard to assemble the funds for a resource pool. Because of the many unanswered questions surrounding the issue of intervenor funding, EPA thought it wise to raise private foundation funds to supplement the Agency's contribution to the resource pool.<sup>125</sup> Once the

124. The active backing of top EPA officials was identified as one of the most important conditions for success in the first EPA demonstration. Significant barriers to implementing the demonstration emerged whenever "12th floor" support flagged. There needs to be top level pressure on the EPA Program Offices to suggest candidate rules and to clearly define the process they will use to incorporate the product of negotiated rulemaking efforts into a NPRM; on hesitant stakeholders to encourage their participation; on the EPA Office of General Counsel to move quickly and authoritatively to resolve resource pool-related uncertainties such as the intervenor funding question; on OMB to define clearly and publicly its role in the funding process; and on the EPA "team" to ensure OMB's good faith participation in the negotiations and to ensure a speedy regulatory review of the consensus statement and NPRM.

125. In July 1984, Philip Harter prepared a memorandum for the NCP negotiating committee regarding intervenor funding and conflict of interest statutes entitled *Advisory Committee Members and the Federal Conflict of Interest Statutes* reprinted in L. Susskind & G. McMahon, *supra* note 30, at app. C.

Drawing on the Susskind & McMahon report, Wilson writes:

Doniger (staff attorney at NRDC and the environmental representative at the NCP regulatory negotiations) reported at the July meeting that he had not yet drafted the position paper on compensation, as he was still awaiting the results of legal research being conducted independently by Philip Harter. At this point NRDC was not alone among negotiation participants who felt that, with limited funding, they were not on an equal footing with other groups having larger in-house technical and research resources; but NRDC was the only one actively

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funds were in hand, EPA agreed to turn them over to an independent body to hold. By working with the participants to develop guidelines for the use of these funds, EPA not only assuaged some of the parties' concerns about having too few resources to participate effectively, but it also underscored the Agency's commitment to the negotiation process.

In the first demonstration, the NCP negotiating committee used over \$10,000 from the resource pool to fund an independent study of a proposed engine testing plan. Other collaborative technical work was done by committee members who designed a microcomputer-based spread sheet model to test the impacts of penalty formula parameter changes on penalty fees.<sup>126</sup> In the eyes of the participants, this joint modelling effort was absolutely crucial to the success of the negotiation.<sup>127</sup> It avoided the typical pattern of adversarial science—each side calling on its technical experts to discredit the work of the others.

Working from a single negotiating text proved important in focusing the negotiations. In the first demonstration, EPA asked the participants to produce a statement of policies that would guide the Agency in formulating the specific language of the rule. In the second demonstration, the

pushing for per diem compensation as the answer to redressing the balance. The implications of this situation for the future success of the NCP negotiations were disturbing. About half of the manufacturing representatives still opposed compensating NRDC from the resource pool. But NRDC was the only environmental group represented on the negotiating team, and Doniger still had not signed on formally as a participant. 'Indeed, he gave every indication that he would not sign on until his interests regarding compensation were met' (especially the long term concern about funding that is replicable, doesn't cut into NRDC's normal fundraising pool, and doesn't conflict with NRDC's by-laws regarding receipt of funds from groups with possible conflicts of interest).

Harter's paper on compensation issues under federal administrative law was available by the time of the next resource pool subcommittee meeting on July 26, but its length and level of detail was such that it raised many more questions than it answered. In the meantime a separate issue had arisen as to whether even the participants' direct expenses (i.e., travel, room and board) could be reimbursed out of the federal portion of the resource pool without being considered 'intervenor funding' (which would then subject individual members to restrictions on their future freedom to represent their own organizations in the NCP rulemaking for fear of 'conflict of interest'). At this point the subcommittee decided to try a different tack and draft a letter to EPA Deputy Administrator Alm requesting that the agency itself act quickly to resolve the compensation and related conflict of interest issues. It also subsequently decided to 'borrow' funds from the private side of the resource pool to cover members' out-of-pocket expenses until the needed EPA guidance on appropriate use of federal funds was forthcoming.

In fact EPA never did resolve these important procedural questions or provide the NCP negotiating team any final guidance as to how they should be handled. After the July 26 subcommittee meeting no further mention is made of compensation or intervenor funding in the Harvard documentation of the NCP regulatory negotiation. In the end everyone, including NRDC, simply allowed these issues to go away. Still unanswered, however, is David Doniger's contention that the long term feasibility of participation by non-profit organizations in regulatory negotiations will be severely limited without some form of per diem compensation.

Wilson, Report on Regulatory Negotiation § III, at 5-6 (draft of September 24, 1985) (prepared for National Science Foundation).

126. L. Susskind & G. McMahon, *supra* note 30, at 155-56.

127. L. Susskind & G. McMahon, *supra* note 30, at 156-58.

Agency asked the participants to draft the actual language and the preamble of the proposed rule. EPA was also careful not to promise more than it could deliver. The final drafts had to go through the normal review and comment process, so EPA could not promise that the negotiated drafts would be the rules that were actually promulgated. As it turned out, the relatively few comments received did not require EPA to alter the language of the draft rules at all. Had the comments been more extensive, EPA was prepared to meet again, informally, with the members of the committees to discuss the changes that it was intending to make.<sup>128</sup> Because such a meeting was promised, the participants felt that their efforts to negotiate a written draft of the proposed rule would not be ignored.

To avoid any potential misunderstanding about the consensus document, EPA and the facilitators attempted to make certain that everyone knew what they were doing when they signed the final drafts of the proposed rules. They were committing themselves in the first demonstration and their organizations in the second demonstration. In both cases they were agreeing to support the draft during the review and comment period and, if it were not changed, after that as well. By making the written document the focus of the negotiations, EPA was able to focus all the energies of the participants on a shared task.

Finally, use of a skilled facilitator proved essential to the success of the project. EPA made a decision to rely on a non-partisan convenor to explain the negotiated approach to rulemaking to potentially interested stakeholders. As the sponsoring entity, EPA knew its motives were likely to be suspect. The active mapping of stakeholders and the solicitation of their involvement was crucial to ensuring adequate representation of all interests.

The skilled facilitators involved in the two demonstrations managed the actual negotiation processes. The Agency knew it was not in a good position to referee conflicts among the participants, even when such disputes threatened to bring the whole process to a halt. EPA used facilitation teams to ensure that those managing the process had both the facilitation skills and the substantive knowledge to help the process along. In the first demonstration, ERM-McGlennon relied on a pair of senior staff members. In the second demonstration, the Assistant to EPA's General Counsel worked in tandem with the ERM-McGlennon staff. This ensured that the lessons of the first demonstration were not lost.

128. Had the comments been more extensive or more critical, it probably would have meant that a key participant had not been at the bargaining table.

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The facilitators took the lead in generating agreement on a detailed agenda and work schedule, organizing a subcommittee meeting at which components of the final version of the rule were drafted, and convening the full group to review subcommittee drafts. The facilitators took responsibility for the preparation of detailed minutes of all meetings and the complete draft of the final rule. The degree of facilitator involvement, however, varied in the two demonstrations. The ERM-McGlennon staff, having a great deal of mediation experience, tended to be more active than the EPA facilitator. They maintained frequent contact with all participants, intervened quite actively during several of the meetings, and tended to initiate a variety of activities, including caucuses during and outside of meetings.<sup>129</sup>

The facilitators task was not over once the draft agreements had been prepared. ERM-McGlennon played a central role during the first demonstration in ensuring that the parties checked back with their constituents and that needed changes were agreed upon by the entire committee. Indeed, the facilitation team may be central to the entire post-negotiation phase of the negotiated rulemaking process. The participants may designate the facilitator, as a non-partisan outsider aware of their intentions, to be the person to monitor the draft rule as it proceeds through the final steps of promulgation. The facilitators played such a role in both EPA demonstrations.

In interviews after the demonstrations were completed, the participants in both negotiated rulemaking efforts indicated that they had become advocates of further demonstrations.<sup>130</sup> Indeed, several urged EPA to proceed with further demonstrations (which, at this writing, the agency has done).<sup>131</sup> The participants felt that the openness of meetings; the availability of minutes and written subcommittee reports, as well as drafts of the final agreement; and the presence of all the relevant stakeholders at the table ensured the legitimacy of the negotiated agreement. While it is too soon to make a final judgment and there are too few data available to calculate formally the cost-effectiveness of negotiated rulemaking, the two demonstrations suggest that in a cooperative setting the pooling of views, experience, and knowledge can produce a rule that is considered by those

129. L. Susskind & G. McMahon, *supra* note 30, at 126, 171-75; L. Susskind & D. Kronenberg, *supra* note 30, at 147.

130. L. Susskind & G. McMahon, *supra* note 30, at 129-148.

131. EPA has recently begun a third demonstration, involving the development of a rule on migrant farmer working conditions. Notice of Intent to Form an Advisory Committee, 50 Fed. Reg. 38,030 (1985).

directly involved to be more legitimate than what the Agency might otherwise have drafted on its own.<sup>132</sup>

In light of this clearly superior outcome of negotiated rules, the courts should be urged to evaluate the regulatory negotiation process in a more favorable light. Within the conventional rulemaking process, courts have undertaken an oversight role designed to induce agencies to conduct better research, pay attention to the concerns of those with a stake in the rule and exhibit analytical rigor in promulgating a final rule.<sup>133</sup> The so-called "hard look" doctrine, adopted by the courts during the last decade, is intended to make sure that agencies provide a reasonable analytical justification for rules.

The products of negotiated rulemaking do not warrant the usual "hard look". The rationale behind the hard look doctrine will be satisfied during the negotiations themselves if the following key conditions are adhered to: 1) adequate notice; 2) availability of financial resources to disadvantaged groups to help them participate on an equal footing; 3) the keeping of a reasonable record of formal meetings; 4) ample opportunity for all parties to review the final draft; 5) an opportunity for all parties to discuss the results of the review and comment process; 6) a chance for all interested parties to shape the scope of the negotiation agenda, agree on the selection of a facilitator, and receive access to the information they request; 7) a clear explanation by the agency of its obligation to the negotiating committee; and 8) an opportunity for all parties to sign off on a final version of the agreement. If these elements are incorporated in the negotiations process, the participants themselves will ensure that the Agency addresses their concerns, conducts adequate research, and carefully analyzes all proposals in choosing the best one. Thus, the judicial hard look doctrine would be redundant.

In short, a different standard of judicial review would help to ensure the efficiency and perceived legitimacy of the rulemaking process. Courts should insist on substantial reasons for granting judicial review of a rule that meets the eight conditions listed above. If information was falsified or the agency failed to promulgate the rule as negotiated, judicial review would certainly be justified. However, if a party were offered a chance to participate in a full-fledged negotiated rulemaking effort, but chose to remain aloof, the courts ought to respond skeptically to a request for

132. See *supra* text accompanying notes 46-49 for discussion of the characteristics of a legitimate rule.

133. Harter, *Consensual Rules*, *supra* note 11, at 471-85. Judicial review, in effect leads to a second round regulation, which is often produced through a settlement agreement. For a description and critique of the role of settlement agreements in the informal rulemaking process, see Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO. L.J. 1241, 1241-82 (1985).

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judicial review. If the courts adopted this posture, the incentive to participate in negotiated rulemakings would be enhanced. This would, in turn, increase the odds of a workable consensus being reached and reduce the likelihood of legal challenges to subsequent rules. Of course, challenges to rules based on claims that fundamental rights have been abridged would still be heard as always.

Judge Patricia Wald of the U.S. Court of Appeals for the D.C. Circuit has suggested that the judicial role in reviewing negotiated regulations should not, and will not, be passive.<sup>134</sup> This is certainly a reasonable position, but once an active review has determined that the eight conditions suggested above have been met, the courts should realize that continued second-guessing of the results of negotiated rulemakings will undermine the prospects for using this particular regulatory reform to enhance the efficiency of the rulemaking process and to restore a measure of legitimacy to the outcomes of the process.

134. Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1, 17-25 (1984).

