

Negotiated Rulemaking

Conflict Prevention and Resolution Center
U.S. Environmental Protection Agency
Washington, DC

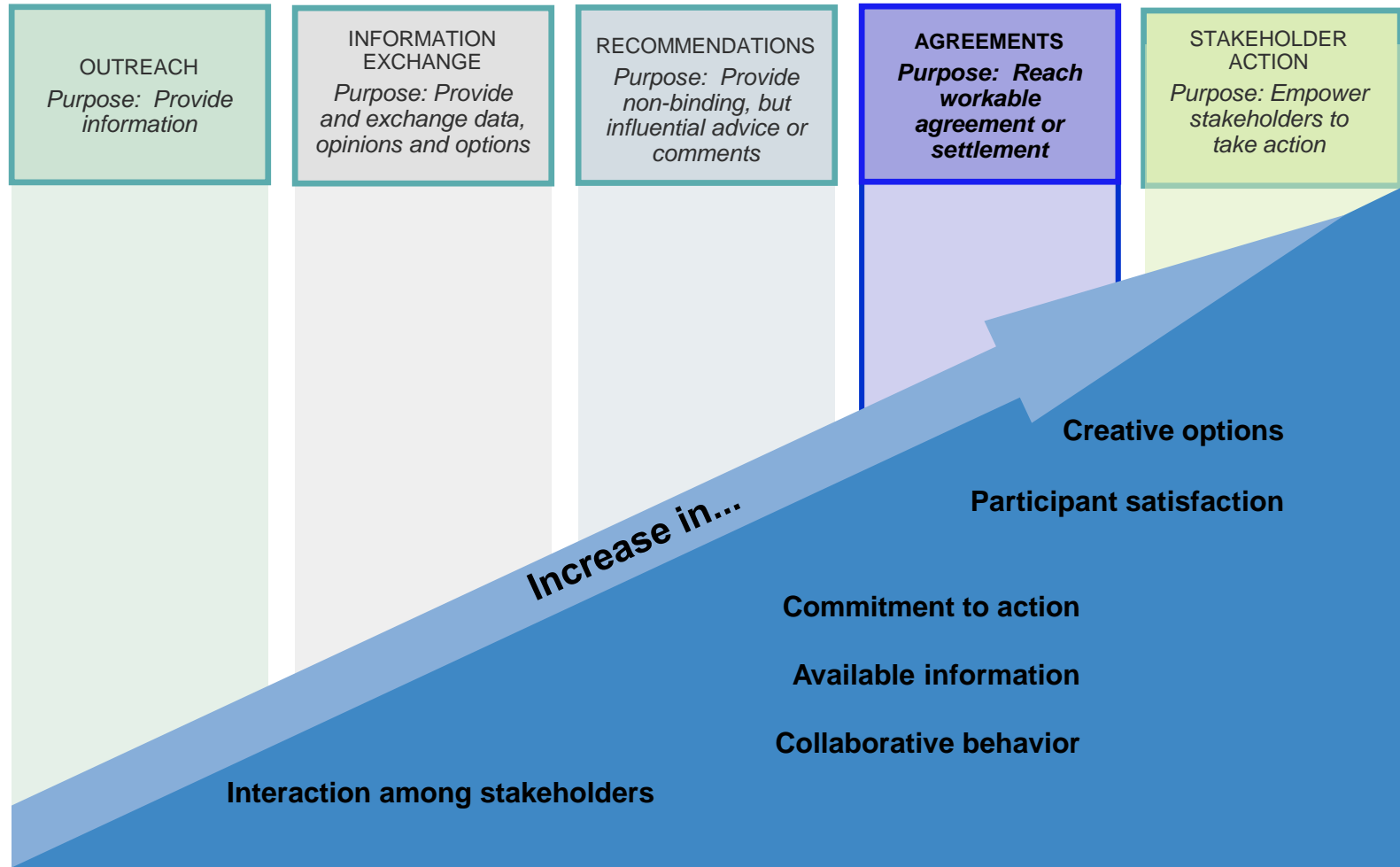


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Public Involvement Spectrum:

A Range of Possible Processes (EPA Public Participation Policy 2003)



Negotiated Rulemaking: Description

- A balanced group of stakeholder representatives that
- + Is chartered as a Federal Advisory (FACA) committee
- + Joins with Federal representative
- + Prior to the publication of an Notice of Proposed Rulemaking (NPRM)
- + To negotiate the text or outline of a proposed rule

- = Which, if agreement is reached, is used as the basis of the NPRM

Negotiated Rulemaking Context

- Augments, doesn't replace, EPA's rulemaking process. The NPRM and final rule still:
 - Goes through Agency and administration review processes
 - Must comply with other applicable statutes and executive orders
 - Subject to public comment per the Administrative Procedures Act (APA)
- If agreement is not reached, EPA proceeds with its own plans and requirements regarding whether a rule will be proposed.



Why then a Reg Neg?

- Statutory requirement
- Parties contribute their knowledge & constraints to seek mutually acceptable requirements
- Joint decision making = greater commitment
- If agreement reached, quicker implementation
- Can be less costly than litigation & delays due to dissatisfied stakeholders

Negotiated Rulemaking

Governing Statutes and Policies

- Negotiated Rulemaking Act 1996
- Administrative Dispute Resolution Act 1996
- EPA Alternative Dispute Resolution Policy 2000
- EPA Public Participation Policy 2003
- Federal Advisory Committee Act



Negotiated Rulemaking Process

Before - Convening

- Agency interest in Reg Neg
- Select facilitator
- Conduct convening assessment
- Plan & organize the process
- Obtain FACA charter
- Identify & invite participants

During - Negotiations

- Assemble, analyze, agree on data
- Consult constituents
- Construct and analyze options
- Constituent ratification
- Finalize agreement

After – NPRM

- Final Agency Review
- OMB Review
- Administrator signs
- NPRM Published
- Public comment
- Final Rule based on public comments

Negotiated Rulemaking Process

During the Negotiation Process

- Assemble, analyze, agree on data
- Consult constituents
- Construct and analyze options
- Work productively toward agreement
- Constituent ratification
- Finalize agreement

CONSENSUS on the Agreement

agreement made easier

The final agreement is a package of items on which all members of a group can agree

All of the individual items in the package may not be everybody's first choice:

Everyone has been able to express their views and be heard

Everyone can live with the package

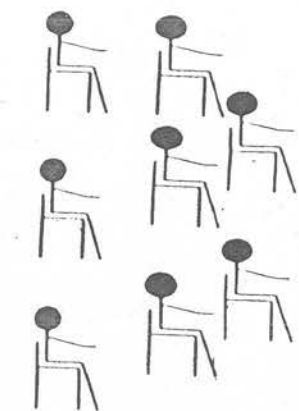
To reach a consensus - group members agree to work together until they find a solution that meets as many members' interests as possible and doesn't compromise strong convictions or principles

A consensus agreement is the strongest form of an agreement.

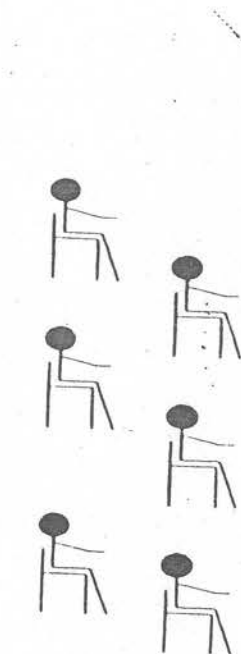


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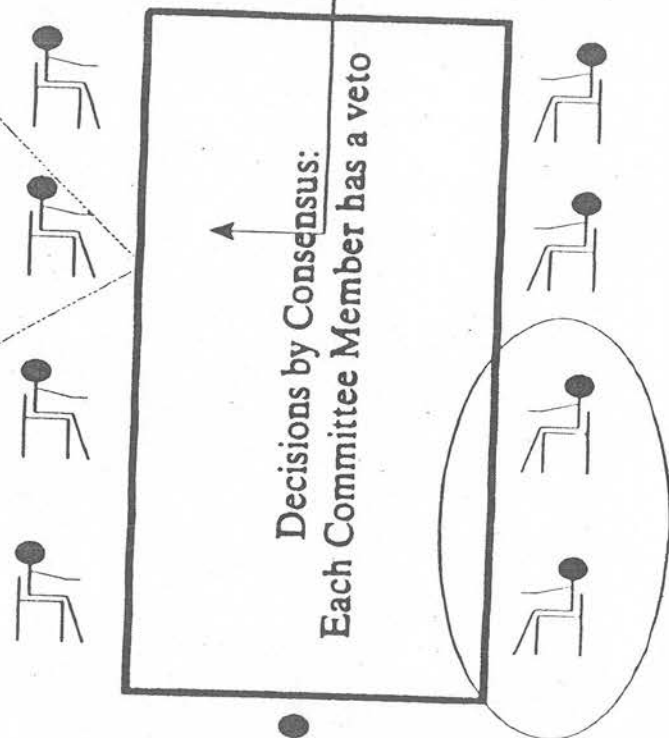
► Constituents who are not present: Keep in touch



► Constituents in audience: May speak only with agreement of the Committee

► Technical Advisers: Committee Member may ask to explain a point

► Representative/Committee Member: Has full right of the floor



► Mediator: Assists the parties in the process of reaching agreement

► Caucus of allied interest

The "Wedge" of Interests

Prepared by Philip J. Harter, 1990

AGENCY RESPONSIBILITIES



- Provide leadership (ideas, schedule, options)
- Articulate Agency's needs and constraints
- Provide definition, direction, & decisions in a timely manner
- Provide resources
- Provide data and information
- Keep promises
- Comply with FACA and other requirements

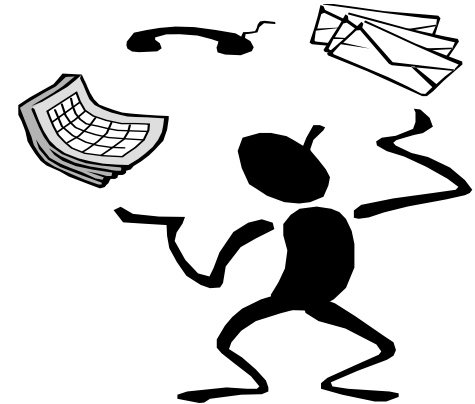
RESPONSIBILITIES OF PARTIES

- Provide consistent representation
- Provide information and data
- Articulate interests, issues, problems
- Check with constituency often
- Suggest solutions, be flexible
- Work together to reach mutually acceptable decisions
- Keep promises




Some Roles of a Facilitator

- **Act impartially, be accountable to all participants**
- Process design, agenda development
- Chair meetings – develop groundrules
- Assist in writing summaries, agreements
- Assist in identifying when to move on
- Assist in identifying and overcoming impasse
- Consult with each party about their concerns
- Maintain confidentiality of dispute resolution communications
- Assist in identifying need for resources
- Assist in obtaining closure



Negotiated Rulemaking Process

After Agreement

- 
- **Final Agency Review**
 - **OMB Review**
 - **Administrator signs**
 - **NPRM Published**
 - **Public comment**
 - **Final Rule based on public comments**

PROMISES, PROMISES

if agreement is reached:

The Government promises:

- to use the consensus of the group as the basis for the NPRM
- Advise members about any major changes due to public comment prior to final

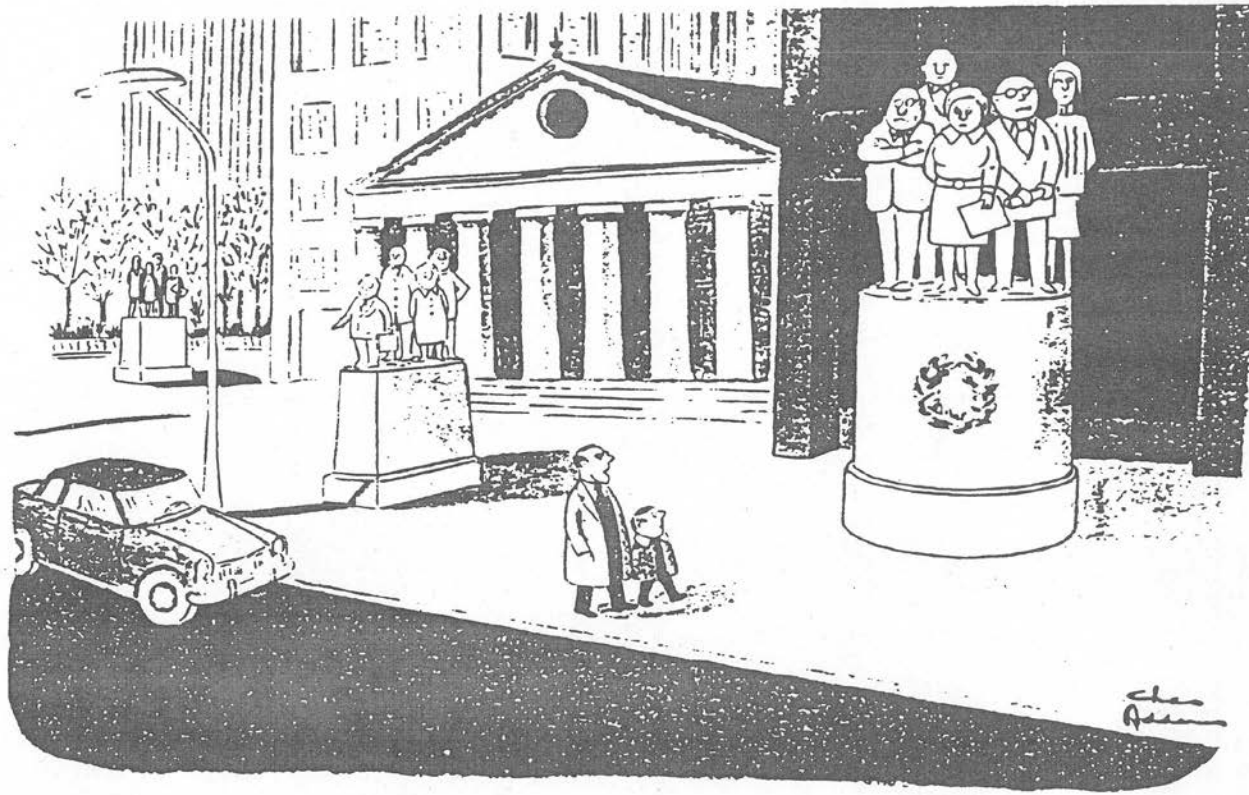
The outside members promise:

- to implement the rule,
- not to file negative comments,
- not to litigate the final rule (if no major changes were made)



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There are no great men, my boy,
only great committees.

EPA's Reg Negs (1986 – 2015)

- Total Coliform in Drinking Water
- All Appropriate Inquiries
- Disinfectant Byproducts I and II (several related rules)
- Residential Woodstove Emissions
- Coke Oven Emissions
- Small Non-road Engine Emissions
- Fugitive Emissions from Equipment Leaks
- Oxygenated and Reformulated Fuels (two rules)
- Asbestos in Schools
- Hazardous Waste Manifest Revisions
- RCRA Minor Permit Modifications
- Emergency Pesticide Exemptions
- Non-conformance Penalties for Heavy Duty Trucks
- Architectural and Industrial Coatings VOC
- Wood Furniture VOC Emissions
- Underground Injection Wells
- Recycling of Lead Batteries
- Farmworker Protection

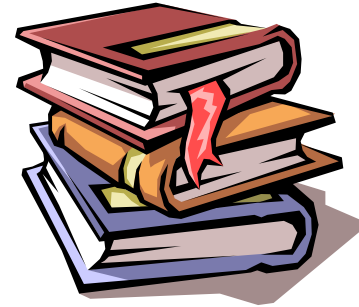


Helpful Websites



- www.epa.gov/adr (EPA Conflict Prevention & Resolution Center) (links to NRA, ADRA)

Useful References



- Negotiated Rulemaking Sourcebook, 1995, Administrative Conference of the U.S. (contact: dalton.deborah@epa.gov)
- “Experienced Practitioner Offers Guidance to Participants in Negotiated Rulemaking” BNA’s Alternative Dispute Resolution Report, vol. 2, pp.62-64, 80-86. 1988 (also in Sourcebook, above.)