

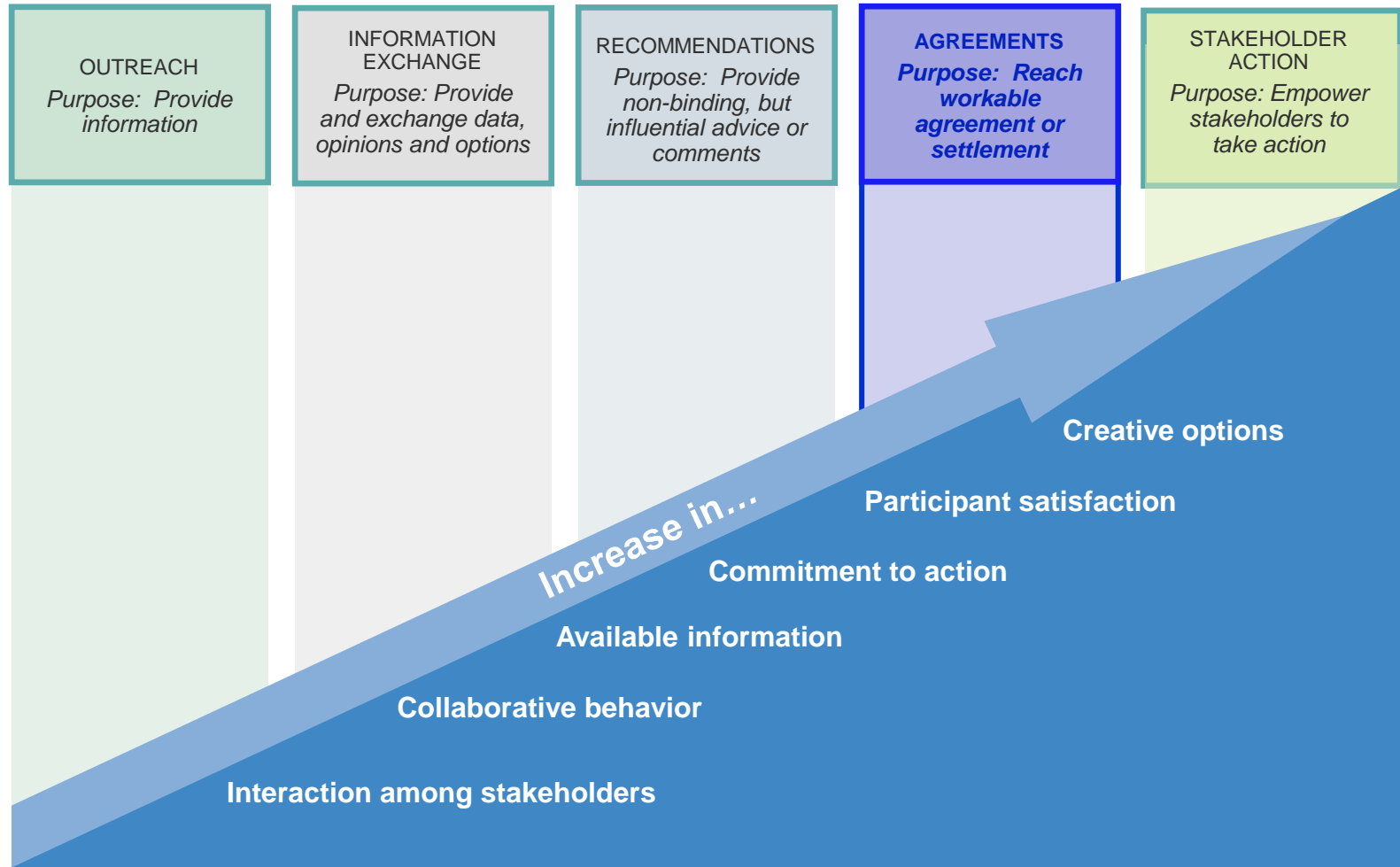
Negotiated Rulemaking

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



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

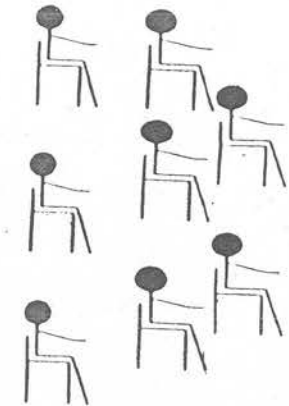
To reach a consensus - group members agree to work together until they find a solution that meets as many members' interests as possible and doesn't compromise strong convictions or principles

A consensus agreement is the strongest form of an agreement.

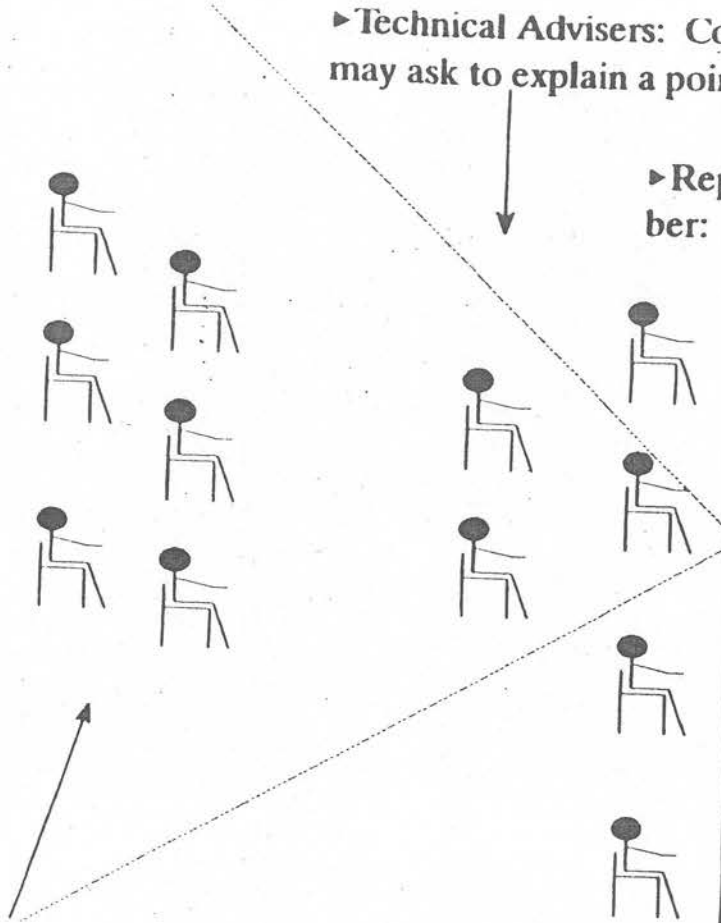


CPRC

Conflict Prevention and Resolution Center



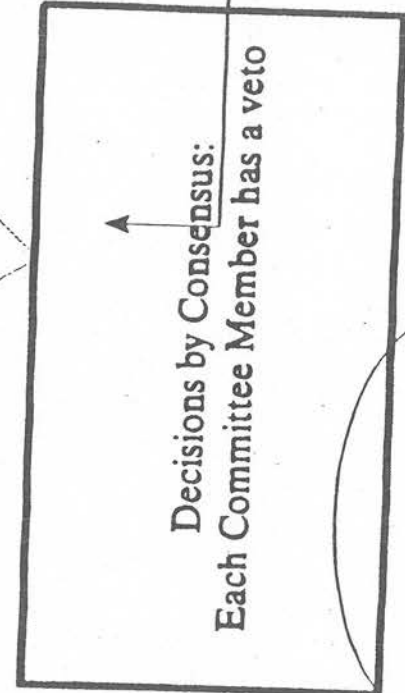
► Constituents who are not present: Keep in touch



► 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



Decisions by Consensus:
Each Committee Member has a veto



► Caucus of allied interest

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

The "Wedge" of Interests

Prepared by Phillip 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



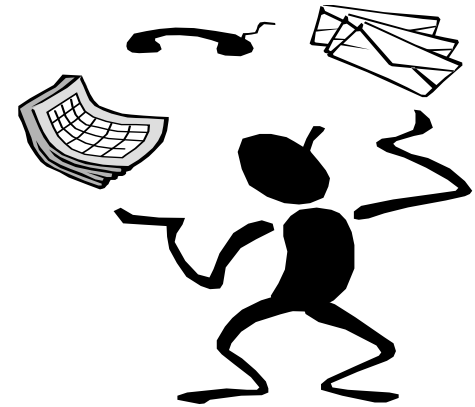
RESPONSIBILITIES OF PARTIES

- 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

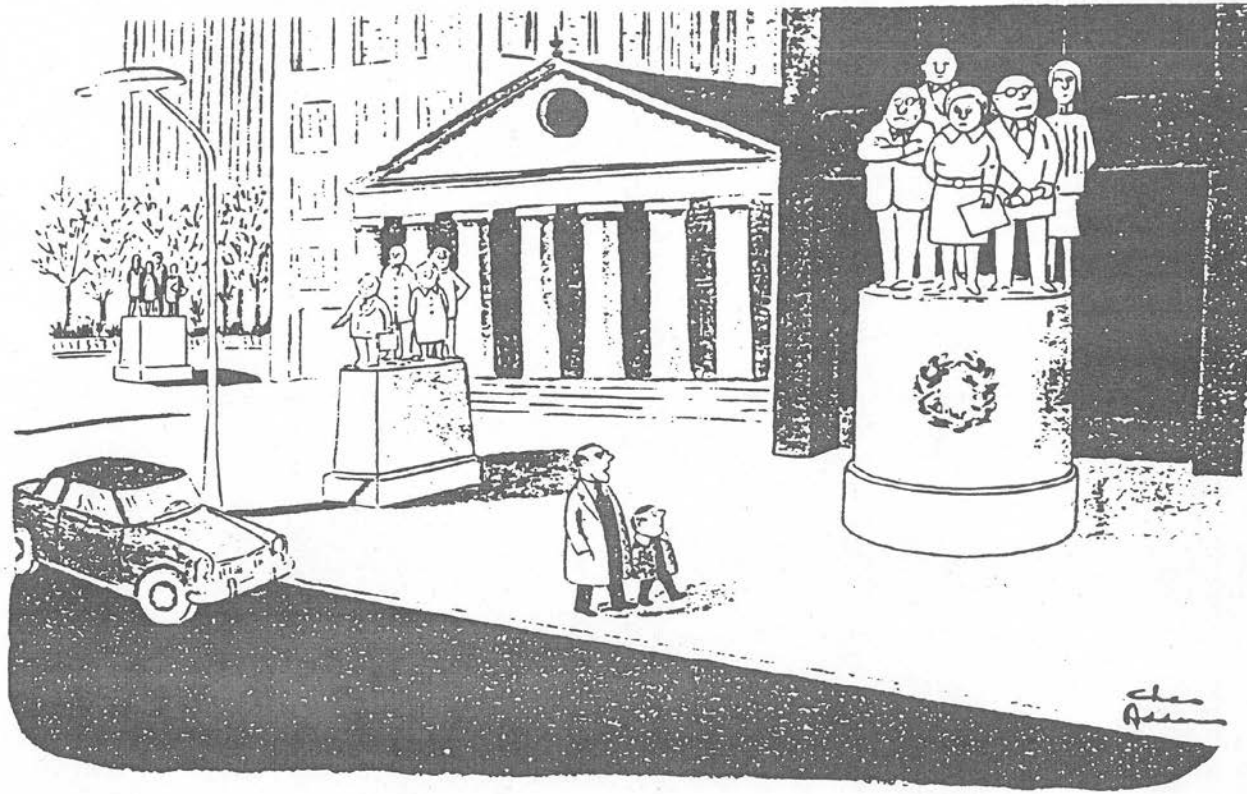
The outside members promise:

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



CPRC

Conflict Prevention and Resolution Center



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

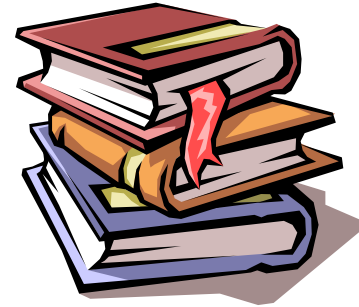


Helpful Websites



- 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.)