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Texas Negotiated Rulemaking Deskbook

with the Advice, Assistance and Concurrence of the
Advisory Committee on Negotiated Rulemaking in Texas

Center for Public Policy Dispute Resolution

Purpose and Organization

This *Deskbook is* designed for:

regulatory entities
- state agencies
- city governments
- county governments
- special purpose districts

and **regulatory stakeholders**
- trade associations
- public interest groups
- private citizens
- lobbyists

interested in finding out whether negotiated rulemaking would offer them a useful way to arrive at–or to better survive–regulations that the Legislature has mandated.

Every regulatory entity must navigate a unique policy and political landscape during a rulemaking. To help the parties involved learn about this new process for managing this task, the *Deskbook*

- **defines and describes negotiated rulemaking**,
- **explains how to do it,** step-by-step,
- **identifies legal issues** unique to Texas,
- suggests **ways to coordinate among and within agencies,** and
- proposes **ways to evaluate the success of the process.**

Any Texas government entity should be able to conduct its own negotiated rulemaking from start to finish using this *Deskbook*. Other parties should be able to use it to structure their participation in a reg-neg.

The *Deskbook* grew out of meetings of the **Advisory Committee on Negotiated Rulemaking in Texas,** a list of whose members appears on the next page. Convened in early 1996, its members are outstanding legal representatives of nine Texas regulatory agencies, along with several private dispute resolution professionals with a wealth of practical experience. The Committee decided to produce this *Deskbook* to make information about this useful process more widely available.

The Advisory Committee is sponsored and staffed by the **Center for Public Policy Dispute Resolution** at the University of Texas School of Law. The Center was founded in 1993 to develop fair and economical alternatives to litigation and contested administrative proceedings in Texas public policy disputes.

Advisory Committee on Negotiated Rulemaking in Texas

State Agency Representatives

Karey Barton, Office of the Comptroller
David Bolduc, Texas Natural Resource Conservation Commission
David Brown, General Services Commission
Martin Cherry, Office of the Comptroller
Ingrid K. Hansen, General Land Office
Mary Keller, Department of Insurance
Paul Leche, Department of Human Services
Suzanne Marshall, Office of the Attorney General
Susan Steeg, Department of Health
Carole Vogel, Public Utilities Commission
Martin Wilson, Public Utilities Commission

Private Dispute Resolution Professionals

Margaret Gosselink, Attorney/Mediator
Tom Reavley, Attorney/Mediator
Mike Schtess, Attorney/Mediator
Howard Seitzman, Attorney/Mediator
Mel Waxler, Attorney/Mediator

Acknowledgments

We thank the members of the **Advisory Committee on Negotiated Rulemaking in Texas** for their thoughtful work in making this *Deskbook* practical and comprehensive.

The Center's entire staff contributed to the preparation of this guide. **Andrew Bowman,** a Program Manager at the Center, drafted it. He compiled the Advisory Committee's suggestions, researched background and emerging issues and worked most diligently to create this *Deskbook* for you, and we thank him. **Jan Summer,** the Center's Executive Director, read numerous drafts and provided extensive substantive and editorial input.

The *Deskbook* has had the benefit of several very capable editors. Former General Land Office General Counsel with first-hand reg-neg experience, **Martha McCabe,** who is now pursuing creative writing, loaned her substantial talents to the Center to perform an intensive final round of edits. **Margaret Roll** with the Texas Department of Human Services volunteered many hours to edit the *Deskbook* and offered many useful comments. Advisory Committee member **David Bolduc** at the Texas Natural Resource Conservation Commission provided an especially attentive eye and raised a number of important questions.

The Center also thanks these individuals and organizations, with whose consent we have borrowed liberally from their excellent publications: **Peter Galvin,** Administrative Law Counsel, Division of Legislation and Legal Counsel, Office of the Solicitor, U.S. Department of Labor (for *Negotiated Rulemaking Handbook of the United States Department* of *Labor,* December 1992); **David M. Pritzker,** formerly with the Administrative Conference of the United States (ACUS), currently with the General Services Administration, and **Debra S. Dalton,** also formerly with ACUS, now with U.S. Environmental Protection Agency (for *Negotiated Rulemaking Sourcebook,* 1995); and **Jim Arthur,** Dispute Resolution Project, Office of Financial Management (Olympia, Washington) (for *A Guide to Negotiated Rulemaking and Pilot Rulemaking,* February 1996).

Two other texts provided Texas statutory background. These were *Rau & Shermans Texas ADR and Arbitration Statutes* (**Alan Rau** and **Edward Sherman,** Shepard's/McGraw Hill, 1994), and the *1995 Administrative Law Handbook,* published by the **Office of the Attorney General.**

The Center also thanks four distinguished dispute resolution professionals for their invaluable assistance. **Charles Pou,** a private practitioner and reg-neg facilitator with Harter & Pou of Washington, D.C., who served for many years as Senior Attorney with ACUS, provided extensive input and help. Mr. Pou was involved closely in this project from outlining to editing, and his expert advice, eye for detail and vast substantive knowledge have greatly improved the *Deskbook's*

quality. **Phil Harter,** also of Harter & Pou, reviewed material on several occasions and provided useful comments. Mr. Harter developed much of the theory of negotiated rulemaking and has demonstrated its worth in practice on a number of occasions. Most of the central concepts described in this document were originally outlined in his authoritative articles. **David Pritzker,** again, helped shape agency delegation issues and provided other useful editorial input. **Ed Sherman,** long-time UT law professor who became Dean of the Tulane Law School as this book went to press, critiqued the section on Texas' rulemaking statutes. The Center recognizes this invaluable assistance as well as his valedictory contributions as a Center founder and board member.

Table of Contents

Introduction

From plumbers to petroleum shippers, most Texans doing business today find their actions subject to some kind of state agency regulation. Each of these rules must be developed somehow, and it is not surprising that many citizens and interest groups seek a role in determining how agencies come up with them. Agency staff responsible for rules often find themselves hearing from trade associations, lobbyists, public interest not-for-profit groups, and individuals with perceived stakes in-and strong opinions about-what goes into the *Texas Register* as the final rule.

Negotiated rulemaking, known in dispute resolution jargon as **reg-neg** (short for "regulatory negotiation"), can help agencies more effectively handle those competing interests. It can provide an arena in which private sector participants can teach agency staff about the economic fundamentals of the regulated community. It can give public interest representatives a forum in which their comments can be taken seriously and given weight equal to those of industry. When a professional facilitator, often referred to as a third party neutral, is used, the process can free agency staff from the complexity of being both moderator and advocate. Agency staff can instead reposition themselves as experts in the statutory mission entrusted to them by the Texas Legislature.

The results of reg-neg usage by the federal government, which began in the early 1980s, are impressive. Large-scale regulators like the Environmental Protection Agency, Nuclear Regulatory Commission, Federal Aviation Administration, and the Occupational Safety and Health Administration have used the process on many occasions. These agencies report a number of significant advantages over traditional rulemaking, all of which are detailed below. Building on these positive experiences, several states including Massachusetts, New York, California and many others have also begun using the procedure for a wide range of rules.

Negotiated rulemaking uses interest-based negotiation techniques widely taught in management training programs, such as the award-winning Texas Governor's Executive Development Program. Through these techniques, agency staff can help their competing "publics" to identify and articulate their own interests side by side with the other major competing concerns, moving past less productive "positional" confrontations to areas of potential agreement. The process may also help an agency forge consensus about new rules, defuse controversy and ward off legal challenges. It may also tend to increase compliance with rules, on the theory that a regulated industry that has helped develop a rule from the drafting stage onward will probably end up with regulations it finds workable and with which its members may more readily comply.

Executive Summary

Negotiated rulemaking is a **consensus-based process** in which an agency develops a proposed rule by using a **neutral facilitator** and a balanced **negotiating committee** composed of **representatives of all interests** that the rule will affect, including those interests represented by the rulemaking agency itself. This process gives everyone with a stake in the rulemaking, including the agency, a chance to try to reach agreement about the main features of a rule *before* the agency proposes it.

- **Consensus** means that all members of the negotiating committee concur in the result reached because their major interests have been taken into consideration and addressed in a satisfactory manner.
- Each negotiating committee member agrees to **negotiate in good faith.**
- The **agency** sponsoring the negotiated rulemaking **commits,** to the maximum extent possible consistent with its legal obligations, **to use a consensus agreement** from the committee as the basis for, if not the actual text of, a proposed rule.

Negotiated rulemaking generally follows these steps:

1. The **agency evaluates** suitability of reg-neg **and gives its go-ahead.**
2. It **convenes** all the **stakeholders and**
3. **organizes** the negotiating **committee,** which
4. **negotiates the proposed rule** in committee meetings, then
5. compiles and **submits a report** to the rulemaking agency.

- **If the committee reaches consensus,** the report will contain the proposed rule, which the agency may use to begin the normal rulemaking procedure required by the Texas *Administrative Procedure Act (APA).*
- **If the committee does not reach consensus** on some or all issues, the agency may use any areas of agreement and all information gained to draft the proposed rule as it would any other rule.

Executed in this way, negotiated rulemaking is a **free-standing supplement to the APA's rulemaking provisions.** The APA tells agencies what to do once it has *proposed* a rulemaking action. Negotiated rulemaking is a process for *developing that proposal.*

The **advantages of negotiated rulemaking** include:

- **more information sharing** and better communication;
- **enhanced public** awareness and **involvement;**
- provides **"reality check"** to agencies and other interests;
- **encourages** discovery of more **creative options** for rulemaking;
- may **increase compliance** with rules;
- **saves time, money and effort** in the long run;
- probably allows **earlier implementation** date;
- builds **cooperative relationships** among key parties;
- increases **certainty of outcome** for all, thus enabling better planning;
- produces **superior rules** on technically complex topics;
- may give rise to **fewer legislative "end runs"** against the rule; and
- can **reduce post-issuance contentiousness and litigation.**

Contrary to some misperceptions, the use of **negotiated rulemaking:**

- **does not cause the agency to delegate its ultimate obligation to determine** the content of the **proposed and final regulations;**
- **does not exempt the agency from any statutory or other requirements;**
- **does not eliminate the agency's obligation to produce any economic analysis, paperwork or other regulatory analysis** requirement imposed by law or agency policy;
- **does not require parties or non-parties to set aside their legal or political rights** as a condition of participating; and it
- **is always voluntary,** for the agency and all others.

Negotiated rulemaking is a relatively labor-intensive way to approach a rulemaking, but one also more likely to lead to a political consensus supporting specific regulatory language or approaches. While reg-neg is not appropriate for every regulation, it has been **shown to work well when:**

- the regulation will affect **multiple constituencies;**
- the **subject matter is complex and controversial;**
- the **issues are generally known** and there are **enough issues for all parties to negotiate;**
- all **parties are willing and able to commit the effort needed** to participate;
- the **agency lacks complete information** on the subject matter; and
- the **agency is willing to be guided by consensus.**

Negotiated rulemaking is only one of a group of so-called "consensus-based processes" that agencies may call upon to increase public participation in policymaking. **Related techniques** include **one-at-a-time consultations** (a variant of the "open door" policy), **information exchanges, workshops, roundtables**, and **policy dialogues**. Depending on the time available, the complexity of the subject matter, the premium on consensus, and other factors, agency staff may decide that one of these alternative processes is preferable for a given rulemaking (see Appendix B).

Chapter 1
Overview of Negotiated Rulemaking

What It Is

A widely accepted definition describes negotiated rulemaking as

> *a consensus-based process in which a proposed rule is initially developed by a committee composed of representatives of all those interests that will be affected by the rule, including those interests represented by the rulemaking agency.*

A negotiated rulemaking committee is assisted by a neutral facilitator who helps members reach consensus on all necessary issues involved in a proposed rule. Consensus is generally defined as meaning that all members of the negotiating committee concur in the result reached because their major interests have been taken into consideration and addressed in a satisfactory measure. *Consensus does not necessarily mean unanimity;* committee members can embrace different elements of the consensus package with different levels of enthusiasm and still have consensus on a proposed rule. The negotiating committee members agree to negotiate in good faith. The agency sponsoring the negotiated rulemaking undertakes to use a consensus agreement from the committee as the basis for, if not the actual text of, a proposed rule.

Negotiated rulemaking usually follows these steps:

1. The agency **evaluates suitability** of reg-neg and **gives go-ahead.**
2. It **convenes** all the **stakeholders** and
3. **organizes** the **negotiating committee,** which
4. **negotiates the proposed rule** in committee meetings, then
5. compiles and **submits a report** to the rulemaking agency.

If the committee reaches consensus, the report will contain the proposed rule, which the agency may use to begin the normal rulemaking procedure required by the Texas Administrative Procedure Act (APA). If the committee does not reach consensus on some or all issues, the agency may use any areas of agreement and all information gained to draft the proposed rule as it would any other rule.

Executed in this way, negotiated rulemaking is a free-standing supplement to the APA's rulemaking provisions. The APA tells agencies what to do once it has *proposed* a rulemaking action. Negotiated rulemaking is a process for *developing* that proposal.

What It Isn't

Agency staff considering recommending negotiated rulemaking to their decisionmakers may anticipate questions and concerns about potential negative consequences for the agency, the public and the regulated community. Other potential participants in a reg-neg may have similar concerns. These individuals should be aware that experience in Texas and elsewhere shows that reg-neg:

- **does not cause the agency to delegate its ultimate obligation to determine the content of the proposed and final regulations.** As a full and equal member of the negotiating committee, the agency seeks in good faith to develop a rule that meets its interests as well as those of other parties. While this does mean the agency negotiates with other parties in a reg-neg, the agency never delegates its decisionmaking authority to the committee, or even to its own committee representative. The agency always retains authority to terminate the reg-neg and determine the final rule unilaterally. Just as in traditional rulemaking, only the statutory decisionmaker(s) of the agency can issue and enforce the rule.

- **does not exempt the agency from statutory or other requirements.** Because reg-neg provides only a front-end supplement to Texas' traditional rulemaking procedure, the agency is still required to comply with the APA and all relevant procedural, open government and other statutes.

- **does not eliminate the agency's obligation to produce any economic analysis, paperwork or other regulatory analysis requirement imposed by law or agency policy.** Although the committee's work and findings will probably help the agency prepare such analyses, the agency remains solely responsible for preparing them.

- **does not require parties or non-parties to set aside their legal or political rights as a condition of participating.** Parties to a reg-neg cannot be compelled to reach consensus. The willingness of the parties to impose limitations on their right to challenge the consensus proposed rule in court or through the political process is an important test of their commitment to participate in good faith, but the extent and duration of any such limitations are voluntary.

  Similarly, the rights of non-participants and the general public are not compromised by reg-neg. Rules developed through negotiation remain subject to due process, open government and administrative procedure protections.

- **is always voluntary, for the agency or any other party.** Negotiated rulemaking will not likely succeed if the process is forced upon a party unwilling to participate, or if it leaves out a key party. Some parties may lack resources or have other constraints making their participation difficult. Experience shows, however, that reg-neg succeeds only where all requisite parties have the commitment and can secure the resources needed to participate fully.

Federal and State Uses of Negotiated Rulemaking

Since the process was formally outlined in the early 1980s, negotiated rulemaking has been an increasingly popular option for regulatory entities at all levels of government. A number of federal agencies have used the process with favorable results, and state agencies have also begun putting it to work more frequently. The federal Negotiated Rulemaking Act passed in 1990, and three states, Florida, Montana and Nebraska, have also passed statutes. For more discussion of this topic see Appendix A.

Chapter 2
Why Use Negotiated Rulemaking in Texas?

Increased use of negotiated rulemaking by Texas agencies can produce significant benefits not obtainable through the traditional process. These benefits far outweigh potential drawbacks.

Benefits of Negotiated Rulemaking

Texas regulatory agencies operate in legal and political environments similar to those of other states and the federal government, where reg-neg has already proven very beneficial. One important difference, however, is that Texas agencies do not have a long history of facing legal challenges to their rules. While reducing post-issuance litigation is often touted as a major benefit of reg-neg, many other advantages still make it appealing. These include:

- **Greater information sharing and superior communication among crucial parties.** Reg-neg participants further their own cause by educating other parties about their concerns. Because parties have an incentive to make other committee members understand their perspective, they also have an incentive to share more information than they would in an adversarial setting.

- **Greater public awareness and involvement.** Traditional rulemaking does not involve public participation in the drafting stage; it requires only that the agency consider public comment after publication of a draft rule. Negotiated rulemaking enfranchises public interest groups and others as drafting parties, and it encourages public awareness consistent with Texas' open government statutes.

- **Provides a "reality check" to agencies and other interests.** The give-and-take of negotiations can give all participants a chance to have their data and assumptions questioned by parties with other viewpoints and information. These "reality checks" can help break the parties out of their initial positions.

- **Encourages discovery of more creative options.** Each committee member has an incentive to devise new solutions that offer something to all parties and that could form the basis of an agreed decision.

- **Increased compliance with more practical rules.** Because reg-negs usually lead to rules that enjoy support among and are better understood by regulated entities, fewer enforcement problems arise. Also, potential snags in a rule's enforcement mechanisms can be identified and remedied more easily when parties with practical experience can help craft innovative approaches and troubleshoot practical defects.

- **Time, money and effort savings.** Evidence shows that reg-negs require fewer agency resources overall than traditional rulemakings. For example, an EPA assessment of that agency's early use of reg-neg found that "[d]eveloping proposed rules through negotiation has made final rulemaking easier and less costly." See "An Assessment of EPA's Negotiated Rulemaking Activities," Office of Polity, Planning and Evaluation, in *Negotiated Rulemaking Sourcebook (1995)* (see bibliography for full cite).

- **Earlier implementation of the rule.** If the committee is able to reach consensus on the proposed rule, it can probably be implemented sooner than it could be under an adversarial procedure.

- **More cooperative relationships among crucial parties.** In negotiated rulemaking, each party invests in finding a solution that satisfies the other parties' interests and concerns. This process causes the parties to see each other more as people and less as institutions and to develop relationships that promote long-term cooperation.

- **Increased certainty of outcomes.** Because all affected parties are involved in formulating the proposed rule, each party gets early information about the shape of the rule. This certainty can be of great value to private interests with long-range goals, as well as to the agency preparing future budget requests.

- **Rules on complex subjects that are clearer, more accurate and specific.** A superior exchange of information on complex and technical subject matters can lead to better, more efficient rules.

- **Possibly fewer political challenges.** Because all interested parties will have had a chance to participate in drafting the proposed rule, and because constituencies have committed to supporting the rule, parties will be less likely to pursue end-runs through the political process.

- **Reduced post-issuance contentiousness and litigation.** An agency can generally expect dramatically fewer comments and less controversy at the public hearing and notice-and-comment stages. Interested parties will have already had a chance to influence the proposed rule. In addition, although litigation challenging an agency's rule is rare in Texas, reg-neg has probably been effective in reducing the number of such challenges.

Some Drawbacks

Although the benefits of negotiated rulemaking are numerous, an agency should also consider some drawbacks that may be associated with the process.

- **Premium on early coordination.** One of the first steps of the reg-neg process requires the agency to identify all proper interests and coordinate the participation of a number of groups. The importance of early organization and planning in the rulemaking process thus is far greater than in traditional rulemaking.

- **Greater short term resource outlays.** Staff costs and other expenses associated with the traditional APA rulemaking may be spread out over time; in a reg-neg, such expenditures are concentrated up front.

- **Compression of internal review schedules and greater importance of infra-agency coordination and communication.** Each agency section or department normally required to review a proposed rule will also need to review the rule in a negotiated rulemaking. However, such reviews will need to be completed promptly during a reg-neg so the agency's negotiator can use the information during subsequent committee meetings.

- **Some additional expenses.** In addition to assigning a senior official to attend committee meetings, an agency will have to provide at least a portion of the fixed costs required to execute a reg-neg, such as securing neutrals and providing technical and administrative support for the committee. If the agency chooses, the agency may also help defray the expenses of crucial public interest groups who are deemed necessary but who could not otherwise participate. Of course, it is anticipated that any additional costs would be more than made up for by savings resulting from use of the process.

Chapter 3
Which Regulations Are Good Candidates for Negotiated Rulemaking?

Not all rules are good candidates for negotiated rulemaking. In fact, given the modest reach of many rules, the process may not be the best alternative for many Texas regulations. For each potential rulemaking, agencies must determine whether the long-term benefits of using negotiated rulemaking outweigh the initial costs.

Criteria for Successful Reg-neg Candidates

The following guidelines for deciding when to use reg-neg draw on many years of experience by federal and state agencies. The list is not exhaustive, and every single criterion need not be met for a reg-neg to be successful and cost-effective.

1. **There is a need for a rule the shape of which is genuinely in doubt.** The agency should have determined that it requires a rule, that it has statutory authority to promulgate a rule and that no less demanding approach to addressing the problem exists. At the same time, the agency must not have decided yet upon all elements of the rule.

2. **The issues raised by the rule are generally known and sufficiently diverse to make the rule negotiable for all parties.** The agency should be able to articulate the purpose of the rule in a public notice clearly enough for other parties to understand how their interests might be affected. There should also be enough issues at stake for the parties to have room to bar-

Profile of Subject Matter Appropriate for Reg-Neg

Experienced negotiated rulemaking practitioners Phil Harter and Charles Pou have created the following list to describe the kind of subject matters for which reg-neg has been successfully used:

1. Regulation of **the subject matter will affect multiple constituencies.**
2. The subject matter has become **controversial** primarily **because of reasons relating to policy differences, not to core values.**
3. The **subject matter is complex** with significant but not determinative factual elements.
4. The **agency lacks complete practical information** on the subject matter, **and other potential parties** to the negotiated rulemaking **possess pertinent information.**
5. The **agency would have difficulty promulgating a lasting, technically accurate and widely-accepted rule without stakeholder consensus.**

gain. If the rule involves core issues about which parties will not compromise, it is unlikely that the committee will reach consensus.

3. **A limited number of identifiable interests ("stakeholders") will be affected by the rule.** Although number can vary, negotiating committees should generally have no more than 25 members. If more than 25 stakeholders need representation, the agency can consider whether some interests could combine representation into a coalition with a single representative.

4. **Spokespersons must exist who can provide full representation of each interest and can negotiate on its behalf in good faith.** All stakeholders, including the agency, must be able to supply a representative who can provide full and adequate representation of their interests. Representatives should be in a position to speak for their constituencies in negotiating a consensus agreement. They should have the confidence, communication skills and financial resources to engage in proper representation throughout the negotiations. Fragmented or nebulous stakeholder organizations can present difficult challenges in a negotiated rulemaking. If a necessary party cannot participate effectively for any reason, reg-neg is not appropriate.

   The agency will define its duties as a reg-neg participant within the limits of its statutory mission and legal constraints. Other stakeholders on the negotiating committee will define the parameters of their good faith commitment voluntarily in the process of developing the committee's "groundrules."

5. **Each stakeholder has something to gain by participating in the reg-neg process.** Each stakeholder should prefer a change over the status quo; the consequences of sitting on the sidelines should be negative and significant. Stakeholders should also be in a position to gain more by negotiating than they would lose by not negotiating. If even one stakeholder can impose its will through another channel (i.e., through the political process or the courts), other parties may have little or no incentive to participate.

6. **The committee is reasonably likely to reach consensus on the proposed rule within a fixed period of time.** Deciding whether the process can be accomplished within a limited time can be useful for deciding whether reg-neg is appropriate at all.

7. **The agency agrees, to the maximum extent possible consistent with its legal obligations, that it will use the committee's consensus report as the basis for the rule it will eventually propose under the APA.** While the agency may not delegate any of its rulemaking authority to the committee, the agency must convince the other parties at the outset that their good faith participation will be a productive and worthwhile use of their time. At the least, this means that for a reg-neg to be feasible the agency should be able to signal that if the outcome falls within the goals the agency has declared, its staff will recommend, and its decisionmakers will seriously consider, publishing the consensus rule as the agency's proposed rule. *(Agency staff should have no problem making this recommendation, for without his or her concurrence, no consensus would exist.)*

Is Reg-neg the Right Consensus-based Process for You?

Agencies considering using negotiated rulemaking should be aware that reg-neg is just one of a number of effective alternatives to traditional notice-and-comment rulemaking. There are several additional models for developing public policy in a way that enhances public input and builds consensus. Depending on the specific circumstances of each rulemaking, staff may want to explore other options along the spectrum of consensus-based processes. For more discussion of these alternatives, see Appendix B.

Additional Guidance for Deciding When Mediated Approaches Are Appropriate

The Society of Professionals in Dispute Resolution (SPIDR) is in the process of drafting guidelines for government entities considering using mediation in policymaking. The Critical Issues Committee of SPIDR's Environmental/Public Disputes Sector expects to complete by December 1996 a publication entitled, "Best Practices for Using Mediated Approaches to Develop Policy Agreements: Guidelines for Government Agencies." The Committee agreed to allow a draft version "Best Practices" to be included in this document (see Appendix E). Copies of the final document will be available through the Center for Public Policy Dispute Resolution at (512) 471-3507.

Highly experienced public sector mediators and facilitators from around the country contributed to SPIDR's effort. Written in the form of practical recommendations, the document draws on lessons learned in public policy negotiations to emphasize a number of broad points, including: the necessity of establishing and maintaining a clear understanding of the sponsoring agency's intent; the emergence of several specific agency responsibilities once a consensus-building process has been initiated; the importance of securing a neutral who is independent and accountable to each party; and others. Any regulatory entity considering initiating a reg-neg, as well as other potential parties to a negotiating committee and public sector facilitators generally, are well advised to acquaint themselves with these "Best Practices."

Chapter 4

A Step-by-Step Guide to Using Negotiated Rulemaking

This Chapter–Your Reg-neg Checklist

Any entity can use this chapter:

- to conduct a particular reg-neg or to develop a reg-neg policy, or
- to structure its participation as a private party in a reg-neg.

Steps as Minimum Requirements

What follows represents the minimum requirements for conducting a negotiated rulemaking. Agencies will certainly want to build on different components to fit their specific needs. However, to avoid undercutting gains from an approach that has been tested and proven successful, we suggest not excluding or overly minimizing any of the five steps described.

Five Steps to Successful Negotiated Rulemaking

Step 1: Initial agency evaluation and go-ahead.

Summary of Step 1:

- **Initial screening:** tentatively identify **issues** and **parties**.
- **Compare to** selection **criteria** (See Ch. 3 above, pp. 17-19).
- **Obtain management approval.**

- **Initial Screening.** Regulatory affairs, technical and legal staff (the "staff team") analyze the potential regulation or area to be regulated for general suitability for negotiated rulemaking. Agency staff tentatively identify issues and interested parties.

- **Compare to selection criteria.** The staff team reviews the selection criteria in Chapter 3 and decides whether negotiated rulemaking offers advantages. The initial evaluation may end here if, for example, the agency has not yet established the scope of a new rule, or there is only one acceptable form the rule could take. Reg-neg would be premature in the first case, unnecessary in the second.

- **Obtain management approval.** Once staff has made a tentative determination that reg-neg merits consideration for the regulation at hand, it should explore whether agency leadership supports its use. Because a negotiated rulernaking involves discharging the legal obligations of the agency, agency executive(s) must make this decision. Moreover, leadership may have information about the political history of the subject matter of which staff is unaware, or may have other independent sources of information bearing on whether reg-neg is appropriate.

Step 2: Assessment and Convening.

Summary of Step 2:

- **Set** the **scope** of the convening.
- **Select a convenor.**
- **Identify** the **potential parties.**
- **Confer** with **potential parties,** discussing:
  - **Reg-neg** process
  - Possible **issues**, and
  - **Willingness to participate.**
- **Convenor reports** to agency.
- **Agency tentatively selects parties.**
- **Agency** decides **whether to proceed** and secures **parties' commitments.**
- **Agency** publishes **notice of intent** to negotiate a proposed rule.
- **Agency considers responses** to notice and **finally determines committee membership.**
- **Agency sets deadline** for committee's report.

What is convening?

The term "convening" is a negotiated rulemaking term of art. It refers to the steps taken to evaluate the feasibility of negotiating a rule, design the membership and structure of a negotiating committee and identify a preliminary set of issues to be negotiated. A "convenor" is a person or team of persons who impartially assists an agency in executing these steps.

In a typical reg-neg, the convenor summarizes his or her analysis in a report to the agency. The report includes tentative lists of issues to be covered and parties who should participate, and a recommendation as to whether reg-neg should be used in this case. Using the report, the agency decides whether to proceed. If it goes ahead, the agency next publishes a notice of intent to negotiate, including a list of proposed parties and issues for the committee, and receives and considers responses to the notice. The convening ends when the agency finally sets the participants, issues and a timetable. A typical convening lasts from two weeks to two months.

- **Set the scope of the convening.** A threshold issue each agency must deal with in a reg-neg is setting the scope of the "convening" *(see box)*. Because the convening lays the groundwork for the overall success of any negotiated rulemaking, this stage is extremely important. Mistakes in convening, like failure to include a vital party, can doom a reg-neg to failure.

In setting the scope of the convening, agency staff should understand that some reg-negs will require an extremely rigorous convening and some will require substantially less. The scope required will depend on the nature of the rulemaking: how complex and contentious the issues are, how many interests are affected, how far apart the parties are initially. Determining early on

which type of convening is appropriate will influence later choices, such as whether to hire a private convenor or use agency personnel.

- **Select a convenor.** Ideally the convenor:
  - understands negotiated rulemaking.
  - has good organizational skills.
  - can quickly understand and communicate complex issues, and
  - has had some conflict management training.

A convenor's legal background and technical expertise may help a reg-neg involving complex rules, but are not essential. Another agency decision point is whether to hire a private professional convenor or to use Its own or other government employees *(see box)*.

- **Identify the potential parties.** The convenor begins with informal networking to identify all essential participants and others concerned with the subject of the rule. These might include:
  - organizations like trade associations.
  - established advocacy and public interest groups.
  - other government entities, and
  - private individuals.

Interviewing agency decision-makers and staff, and members of relevant agency advisory committees, will help the convenor create an initial list of potential parties.

Finding a Convenor: Public or Private?

An agency must decide whether to use a government employee or contract with a private dispute resolution professional as convenor. The latter is certainly not essential to success. Particularly in situations where the regulated community is limited in size, the parties are readily identifiable, and the rulemaking is not likely to involve highly adversarial behavior, an agency may be equally or even better able to conduct the convening.

While public sector convenors will almost certainly be less costly and easier to arrange administratively, their use may diminish the appearance of neutrality so important to the success of reg-neg. Private parties may have a hard time seeing any government employee, however fair-minded, as truly neutral. If the agency chooses a government employee as convenor, it is preferable for the individual to be either from a different part of the agency or from a different agency altogether.

While professional convenors can be expensive, a convenor with no stake in the proposed rulemaking may have en easier time establishing rapport with prospective parties and getting information from them. An outsider also may not share agency assumptions or blind spots about parties and issues. However, using a professional requires that the agency trust a person who may not be fully versed in the agency's rulemaking process or the subject matter. For additional discussion of these issues, see below, pp. 44 – 47.

- **Confer with potential parties.** Through interviews with each potential participant, the convenor should explore such possible obstacles to negotiations as whether:
  - issues to be negotiated relate to core values on which a party will be unlikely to compromise,
  - a key party does not want to participate,
  - factual disputes exist that are likely to "bog down" the reg-neg, or
  - excessively numerous parties or complex issues exist.

Interviews will help the convenor discover additional interests affected by the rule, and parties that might represent those interests. To speed the interviews, the convenor may work from a summary of the rule's subject matter and a list of assessment questions.

These discussions begin the two-way information flow essential to a successful reg-neg. The convenor learns about the parties' interests while the parties learn about negotiated rulemaking. Moreover, discussing with the convenor different ways to structure parties' interests and how they can be advanced by participation can begin the process of parties' moving away from fixed positions and toward interest-based negotiating.

A party may express the desire to join the negotiating committee but lack the staff, time and/or money for effective participation. Public interest groups, in particular, may lack resources to travel, making it difficult or impossible to attend all the reg-neg meetings. Ways to address this issue are discussed below at p. 46.

- **Convenor reports to agency.** Interviews completed, the convenor should report (orally or in writing) to agency management, making the following recommendations:
  - whether proceeding with negotiations is worthwhile;
  - which parties or organizations (but generally not which individuals) should join the negotiating committee;
  - which issues the parties wish to negotiate, as well as which ones the parties will not or cannot negotiate;
  - which additional parties ought to be kept informed of the committee's progress;
  - any obstacles and their potential solutions;
  - a proposed design for the negotiation process.

  The agency may want the convenor to report to the potential parties as well. Informing the parties of the results of the convening can help establish a positive atmosphere that can be useful if the agency decides to pursue the reg-neg.

- **Agency tentatively selects parties.** Using the convenor's report, the agency tentatively identifies the negotiating parties. As stated, having more than 25 people on a committee makes success harder to achieve.

- **Agency decides whether to proceed and secures parties' commitments.** Once the convenor recommends reg-neg, agency decisionmakers must decide whether to proceed. Briefing staff will want to review again the list of criteria above, pp. 16-18, in light of the new information contained in the convenor's report. The choice requires careful consideration of the appropriateness-substantive, procedural and practical-of negotiating.

  If the agency decides to proceed with reg-neg, the convenor then contacts each party tentatively identified to get a more formal commitment. If the agency is willing to negotiate only some of the issues identified in the convening process, the convenor may first have to confirm whether the other parties would still be interested in participating if some issues are not "on the table."

- **Publish notice of intent to negotiate a proposed rule.** Without having all significantly affected interests represented at the negotiations, success is unlikely. The agency and the convenor, therefore, should make every reasonable effort to ensure that all relevant interest groups and others who may be affected by the rule are aware of the proceeding. Public notices in the *Texas Register* and at other convenient locations stating
  - the tentative parties,
  - the tentative issues, and
  - the agency's plan for the negotiations,

  and requesting comments can help prevent overlooking a significant party. An example of such notice is included in Appendix D.

  Subject to each agency's determination of its obligations under the Open Meetings Act, publication in the *Texas Register* of the intent to conduct a negotiated rulemaking may also be required. Even if not required to, the agency may choose to give notice to enhance public participation. For more discussion of Open Meetings requirements see below at pp. 32-33.

- **Agency considers responses to notice and finally determines committee membership.** The agency evaluates all comments received as a result of the *Texas Register* notice, then decides who sits on the committee. The committee should reflect a balance between industry, environmental, consumer, governmental and other groups as appropriate to the issue at hand. If a party with a significant interest has been overlooked, that party should contact the agency to explain why it should be included on the negotiating committee.

  Specific spokespersons for each party should also be identified at this point. *It is recommended that each party be allowed to appoint its own spokesperson for the committee,* because it will know best who is most qualified-and trusted-to represent it. Trust often becomes a critical issue late in the reg-neg, when representatives may have to "sell" a tough compromise to their groups. If a group lacks confidence in its representative, it becomes more difficult for it to close the final compromises needed to reach consensus.

- **Agency sets a deadline for the committee report.** Committees usually work better toward a deadline. By considering the number of parties involved, the breadth of issues to be covered and the initial divergence of the parties' positions, the agency can establish a realistic target completion date. Sometimes the publication date of a final rule is set by statute.

Step 3: Organizing the negotiating committee.

Summary of Step 3:

- **Select facilitator.**
- **Agency arranges** organizational **meeting.**
- **Committee adopts protocols** (ground rules) and a meeting **schedule.**
- **Committee adopts definition of consensus.**
- **Agency publishes notices** of meetings.

What Does the Facilitator Do?

The exact duties of the facilitator should be set forth in the protocols, which become the committee's rules for its own activities. The facilitator's duties generally fall into two related categories: facilitation and mediation. By performing these duties, the facilitator leaves the agency free to participate fully as a negotiating party. As facilitator, the individual must impartially chair the committee's meetings, set the pace and tone of negotiations, ensure that each party has a full opportunity to be beard and help the committee to finish its tasks in a timely manner.

Mediation responsibilities involve helping parties identify their concerns and consider ways in which these can be addressed through negotiation. To reach this goal, the facilitator can reality test, suggest ideas to stimulate debate or circumvent impasses, and encourage the parties to move toward each other. S/he can also encourage the use of caucuses or subgroups to negotiate issues which threaten to bog the group down or in which some members have more interest or knowledge than others. As mediator, the facilitator may also meet with representatives and their constituencies to help them define their interests and enable their negotiator to represent those interests more effectivelv.

- **Select facilitator.** Although each agency may construct its own system, most reg-neg facilitators are proposed by the agency, subject to the committee's approval. If the committee rejects the agency's choice, the agency should suggest another. If this individual is also rejected, the committee should negotiate an appropriate selection. Should the facilitator later lose the confidence of the committee during negotiations, the committee should negotiate an appropriate substitution.

  The facilitator should:
  - be familiar with the negotiated rulemaking process.
  - be able to easily and rapidly understand and communicate complex issues;
  - be skilled in conflict management and mediation, preferably with a year's experience in dispute resolution; and
  - have subject matter expertise in highly complex or technical rulemakings. (For more discussion of this issue, see below p.46).

Subject to a recommendation against using agency personnel as facilitators *(see box),* in many cases it is wise to have the convenor continue as facilitator. This builds on relationships the convenor has already established and the subject matter familiarity s/he has gained during the convening phase. The continuity gained by having the convenor serve as facilitator can also save time and money for the agency by eliminating another "learning curve."

Finding a Facilitator: Public or Private?

While it may be appropriate to use agency staff to conduct the convening, it is *almost never* advisable to use the agency's representative to the committee as facilitator of the reg-neg committee. Indeed, the federal Negotiated Rulemaking Act and state statutes specifically prohibits this arrangement. It opens the facilitator's neutrality to question, which can undermine the entire reg-neg. It also greatly reduces the agency's tactical flexibility in negotiating with regulated parties who may be very aggressive. What at first seems to offer the agency an opportunity to control both reg-neg dynamics and outcome (and save money) will usually force the agency to "water down" advocacy of its own interests in order to preserve a semblance of neutrality. Using an employee from a separate agency division will probably do little to avoid these problems. Experience strongly recommends against using a sponsoring agency employee facilitator.

Agencies do well to contract with an outside facilitator. Independent and effective facilitators can be secured from another governmental entity (another state agency, or a local or federal employee) or – more likely – contracted from the private sector.

- **Arrange organizational meeting.** Once it selects the facilitator, the agency calls the organizational meeting of the reg-neg committee. The agency will typically propose an agenda including:
  - introducing participants and identifying the interests they represent,
  - a briefing on the concept and practice of regulatory negotiation,
  - a short discussion of the issues involved in the rule under negotiation, and
  - creation and adoption of committee protocols

- **Adopt protocols (ground rules) and a meeting schedule.** Most reg-neg committees adopt protocols, or internal rules for organization and operation of the committee, during the first meeting. Typical protocols include:
  1. Purpose and scope of negotiations.
  2. Commitment of agency to using committee's consensus report.
  3. Commitment of parties not to oppose consensus report.
  4. Definition of consensus.
  5. Provisions in case of failing to reach consensus on all or some issues.
  6. Minutes, agendas and notice provisions.
  7. Open meetings policy.
  8. Workgroup and caucus provisions.
  9. Meeting schedule and attendance policy.
  10. Provisions for committee's dealings with press.
  11. Identity and interests of stakeholders.

12. Participation and voting rules for all representatives.
13. Staffing responsibilities of agency.
14. Provisions regarding role and duties of facilitator.
15. Commitment of all parties to negotiate in good faith.
16. Commitment of all parties not to withhold relevant information.
17. Rights of withdrawal.

Although working out acceptable protocols can take up to a day, having these ground rules in place is a key initial step. To save time, the agency or facilitator might send proposed draft protocols to committee members before the meeting. Appendix D contains sample protocols.

- **Adopt definition of consensus.** The definition of the term "consensus" will be key to successful negotiations. Its definition should be discussed at the committee's first meeting so that there will be a common understanding of the committee's goal *(see box)*.

- **Publish notices of meetings.** An agency should structure the negotiating sessions of the reg-neg committee as open meetings, even if it believes that the Open Meetings Act does not apply to them (see pp. 32-33 below for more discussion). Because reg-neg is an open process designed to enhance effective public involvement in rulemaking deliberations, there is little to lose and much agency should post notice of scheduled meetings in the *Texas Register* and in more accessible locations.

Defining Consensus

In prior negotiated rulemakings in Texas, the following guidelines for consensus have been used successfully:

"Consensus is reached when all Representatives agree that their major interests have been taken into consideration and addressed in a satisfactory manner. Furthermore, they must also agree that, given the combination of gains and trade-offs and given the current circumstances and alternative options, the resulting agreement is the best one the Representatives are likely to make." (See *Organizational Protocols and Guidelines,* Advisory Committee on Timberland Appraisal Manual, attached in Appendix D.)

Step 4: Negotiating a proposed rule.

Summary of Step 4

- **Committee identifies issues** to be negotiated.
- **Committee reviews** available **information and acquires needed information.**
- **Committee drafts and reviews** language and rule **proposals.**
- **Committee establishes** any necessary **working groups** or subcommittees.
- **Committee negotiates** text or outline of **proposed rule.**

- **Committee identifies issues to be negotiated.** One of the committee's first tasks is to decide on the substantive issues to be negotiated, although more issues may be added later as they arise. Once this list is established, it may be productive for the committee to attempt to frame these issues in agreed language and for each participant to identify any underlying assumptions they bring to the negotiation.

- **Committee reviews available information and acquires needed information.** During this step, the committee "educates itself' about the issues so that committee members can have a common framework for beginning negotiations. The committee reviews substantive information deemed necessary to its deliberations. This is often efficiently done by specialized subcommittees or working groups reporting to the committee of the whole.

- **Committee drafts and reviews language and rule proposals.** Once the committee has begun to make progress identifying and examining the issues involved in the rulemaking, it will start drafting potential language for all or part of the proposed rule. Agency star, having rule-drafting expertise, may be best prepared to actually write the drafts, although it may be wise for the committee to agree on specific language for key portions of the rule.

- **Committee establishes any necessary working groups or subcommittees.** The committee may decide that creating smaller groups to work on certain issues would be productive *(see box)*. Such subgroups may work alongside the main committee, reporting their progress and conclusions during full meetings.

- **Committee negotiates text or outline of proposed rule.** After working through several drafts the committee should reduce areas of agreement to a single text or outline.

Use of Subcommittees and Working Groups

Subcommittees and working groups may be formed to assemble data, examine issues in greater depth and/or prepare proposals for consideration by the full committee. These subgroups should maintain a balance of membership like that of the larger group and should not be vested with final decisionmaking power.

As a practical matter, it is usually most convenient to schedule subgroup meetings on the day before or after meetings of the full committee, particularly if some members have traveled to attend the sessions. The agency should consider whether it is appropriate to provide subgroups with technical or other staff assistance.

Step 5: Compiling report and transmitting to the agency.

Summary of Step 5

- **Committee completes negotiations** and reports to agency.
- **Agency receives report** and takes action.
- **Draft rule is issued under APA** rulemaking procedures.
- **Committee may be notified of public comments.**
- **Agency issues final rule.**

- **Committee completes negotiations and reports to agency.** The negotiating committee has finished its work when it reaches consensus on the issues under negotiation, or when it decides that consensus cannot be reached on all or parts of the rule. In either event, the committee should compile the information it has gathered and the areas of consensus it has identified into a report to the agency. Regardless of whether full consensus was reached, this report is likely to provide the agency with valuable information upon which to base the rule.

  If the committee reached consensus on the rule, the committee may at this point agree orally or in writing that each participant will not oppose the rule thereafter (see pp. 40-41 below for more discussion).

- **Agency receives report and takes action.** If consensus was reached on a draft text or recommendation for a rule, the agency should conform to the commitment it made to other parties on using the consensus report, whatever it was. Fulfilling this commitment will often mean that agency staff will recommend to top agency decisionmakers that the committee's agreed rule be published in the *Texas Register* as the agency's proposed rule. The agency is always legally responsible for the rulemaking, however (for more discussion of these issues, see below pp. 40-41). If statutory mandates require altering the rule at this point, the agency must of course do so but might consider notifying negotiating committee members and obtaining their response beforehand.

  After the agency has decided upon its proposed rule, the agency "re-enters" traditional rulemaking under the APA. If the negotiated rulemaking was unsuccessful, the agency also "re-enters" traditional rulemaking by drafting a proposed rule itself, albeit with the benefit of the committee's deliberations.

- **Draft rule is issued under APA rulemaking procedures.** The agency's proposed rule is published as the APA requires; the public comments on it.

- **Committee may be notified of public comments.** After receiving comments on the rule, the reg-neg committee may meet to consider substantive and non-substantive revisions the agency desires. Because what seem like "minor" changes to some can be critical to others, it is recommended that the reg-neg committee members be notified of any changes made. However, provisions for such meetings should be outlined by agency policy, committee protocols or other agreement of the negotiating parties.

- **Agency issues final rule.** After complying with APA requirements, the agency publishes the final rule in the Texas *Register*.

Chapter 5

Using Reg-neg in Texas: Legal and Practical Issues

Any Texas agency engaging in rulemaking must comply with the requirements of the Texas Administrative Procedure Act, Texas Open Records Act, Texas Open Meetings Act and all other pertinent statutory requirements. While proper use of the negotiated rulemaking process is consistent with these statutory requirements, no Texas court or Attorney General opinion has addressed the applicability of these acts to the process. In considering how it should conduct its own negotiated rulemaking, each agency should therefore make its own legal determination of how reg-neg is properly adapted to its statutory context.

To help agencies with this task, experts in rulemaking and the open government acts have helped develop the following non-exclusive checklists. This chapter reviews each of the following:

- **Texas Administrative Procedure Act** (APA);
- **Texas Open Records Act** (TORA);
- **Texas Open Meetings Act** (TOMA);
- **Texas Alternative Dispute Resolution Act** (TADRA); and
- **delegation of powers** issues.

Reg-neg and the Texas Administrative Procedure Act (APA)

The APA outlines the rulemaking procedure for state agencies. An agency commences an APA rulemaking by publishing in the *Texas Register* a "notice of proposed rule," containing the text of the proposed rule and other information. The agency then receives and responds to comments on the proposed rule, makes any necessary revisions and issues an order adopting a final rule.

An agency should consider the following in managing its compliance with the APA during a negotiated rulemaking:

- **No need to alter agency's proper rulemaking procedure.** Because negotiated rulemaking involves a process for developing a proposed, not a final, rule, it is purely supplementary to APA requirements. Therefore an agency need not change existing rulemaking procedures to use reg-neg, as long as current practice complies with the APA.

Furthermore, the APA specifically authorizes advisory input in the rulemaking process. Texas Government Code Section 2001.031 (b) states that "A state agency may appoint committees of experts or interested persons or representatives of the public to advise the agency about contemplated rulemaking," so long as the power of any such committee remains advisory in nature.

Reg-neg and the Texas Open Records Act (TORA)

The Open Records Act states that information collected or made by or for a governmental body is presumed to be available to the public unless it falls within one of the Act's specific exceptions. The term "governmental body" includes all public entities in the executive and legislative branches of government at the state and local level. "Information" includes, among other things, documents, photographs, videotapes, computer tapes and tape recordings.

Summary of Applicability of Open Government Acts

TORA is **probably applicable** to reg-neg records, but compliance with TORA requirements does not present a problem with the reg-neg process.

TOMA is **probably not applicable** by the terms of the act, although negotiating committee meetings should in most cases be open anyway.

TADRA probably does not provide negotiated rulemakings any **special confidentiality exceptions** to the TORA or TOMA.

Although application of the TORA to negotiated rulemaking involves new issues, the act probably requires disclosure of most reg-neg documents requested from the agency. This is primarily because agencies are government bodies within the meaning of the TORA, the documents used during the reg-neg process will likely be considered government information subject to the act, and the documents do not appear to fall within any obvious exceptions.

The following checklist represents items commonly used in a reg-neg for which an agency should consider the impact of the TORA:

- **Information exchanged among the parties.** Because information sharing is one of a reg-neg's primary goals, there will be frequent exchanges of documents between parties during negotiations.
- **Information given to the facilitator.** During the course of a reg-neg, the facilitator will receive many documents from the parties.
- **Facilitator's notes.** Facilitators commonly take notes during negotiations to keep track of technical points, issues raised and parties' interests.
- **Drafts of the final agreement.** A negotiating committee or subcommittee may work through a number of draft documents before reaching language on which there is consensus.

Possible TORA Exceptions

Depending on specific circumstances, some TORA exceptions may apply to reg-neg documents, including: Texas Government Code Section 552.101 exceptions for "Confidential Information" (particularly "Other Laws" and "Taxation"); Section 552.107 exceptions for attorney-client privilege; Section 552.110 exceptions for "Trade Secrets, Commercial Information and Financial Information;" and Section 552.111 exceptions for "Agency Memoranda" (particularly intra-agency and inter-agency drafts, position papers and "Advice, Opinion or Recommendation" documents).

Reg-neg and the Texas Open Meetings Act (TOMA)

The Open Meetings Act provides that most meetings of governmental bodies must be open to the public, unless they qualify for one of several exceptions. The act generally outlines requirements for notice, procedures relating to closed meetings and provisions for enforcement and remedies. The statute's definitions of "governmental body," "meeting," "deliberation" and "quorum" work together to establish which public bodies are subject to the act.

Texas Government Code Section 551.001 defines "governmental body" to include every "committee .. within the executive or legislative branch of state government that is directed by one or more elected or appointed members." It defines "meeting" as "any deliberation between a quorum of members of a government body or between a quorum of a governmental body and another person at which any public business or public policy over which the governmental body has supervision or control is discussed or considered, or at which any formal action is taken." "Deliberation" is defined as meaning "a verbal exchange during a meeting ....concerning an issue within the jurisdiction of the governmental body or any public business." "Quorum" means a "majority of the governmental body…"

Why TOMA Probably Does Not Apply to Reg-neg Meetings

There are at least two cogent arguments why the TOMA does not apply to most reg-neg meetings. First, because agency representatives to reg-negs will virtually always be staff and not "elected or appointed members," reg-neg committees do not seem to meet the definition of a "governmental body." See Attorney General Opinion H-772 (1976), citing legislative history to show that "the word 'member'… was not intended to include staff" and thus, that the TOMA does not apply to staff meetings.

Second, negotiating sessions do not appear to meet the definition of "meetings," which require "deliberation…(of) public business or public policy over which the governmental body has supervision or control." As purely advisory bodies having only the power to make a recommendation to agency decisionmakers, reg-neg committees do not have "supervision or control" over the rulemaking process. See Attorney General Letter Opinion 93-64 (1993), holding that the TOMA does not apply where "the committee is purely advisory and as such does not have supervision or control over the public business it conducts because it must submit its recommendations (to state entity decisionmakers) for final approval."

In contrast to the TORA, the TOMA will probably not apply to most reg-neg proceedings. Briefly, this is because reg-neg committees involve staff and not elected or appointed agency decisionmakers, and because reg-neg meetings are advisory in nature only *(see box)*.

Regardless of the result of the agency's inquiry, however, conducting all reg-neg meetings as open meetings is good practice. Negotiated rulemakng is an inclusive process designed to maximize constructive public involvement in rulemaking deliberations. Indeed, in the two reg-negs completed thus far in Texas, all meetings have been open, notice has been posted and minutes taken, without any untoward effects. Conducting open meetings will protect, and in all likelihood enhance, the credibility of the rulemaking process in the eyes of the public. Towards this end, committee meetings should provide for public audiences. Notice should be posted in the *Texas Register* and where potentially interested members of the public will see it.

Accordingly, an agency should consider the following checklist in forming its guidelines for negotiated rulemaking meetings:

- **Post appropriate notice.** An agency should have in place an adequate procedure for posting public notice in several different convenient locations.
- **Conduct meetings.** A committee is well-advised to establish ground rules for participation of members of the public attending committee meetings.
- **Take and post minutes.** Minutes should be taken and posted for each negotiating committee meeting to allow interested non-parties to keep up to date.
- **Form of minutes.** In past reg-negs, minutes have included such things as action taken, "home work assignments" for parties and topical issues covered by negotiations. Experience has shown that the best minutes record the essence of the discussion in a way that makes it safe for participants to explore ideas without being pinned down to past positions. Parties should not be inhibited from letting their positions evolve, so unduly specific minutes ascribing comments to individuals should be avoided.
- **Decisionmaker(s) briefings.** When the agency representative briefs the decisionmaker(s) about the progress of the negotiating committee, the TOMA may apply.

Reg-neg and the Texas Alternative Dispute Resolution Act (TADRA)

The TADRA, which provides statutory authority for a non-exclusive list of ADR procedures, does not mention negotiated rulemaking. Given reg-neg's status as large-scale mediated negotiation and its long history and firm grounding in the ADR field, it is possible that the act will be read to cover reg-neg implicitly. However, because the TADRA deals primarily with court-ordered ADR and ADR used in contemplation of litigation, it is difficult to predict how a court would rule on the question. The TADRA contains special confidentiality provisions which specifically prohibit protected communications from being used as evidence in a subsequent "judicial or administrative proceeding(s)," and which deny disclosure of records made during an ADR procedure. Civ. Practice. and Rem. Code Section 154.073(a), (b). Application of these special provisions to reg-neg would present other questions about whether the TORA supersedes TADRA. Statutory clarification of this question may be forthcoming.

In light of these uncertainties, the most prudent course of action is probably to assume that the TADRA does not cover reg-neg and that, accordingly, the act's special measures protecting confidentiality will not apply to negotiated rulemaking.

Delegation of Agency Authority Issues

Texas agencies may not delegate authority granted them by the Legislature. See Attorney General Opinion DM-14 (1991), involving delegation of purchasing power by a school board, holding that "[i]n the absence of statutory authorization, a public body may not delegate, surrender, or barter away statutory duties that involve the exercise of judgment and discretion." A delegation issue could arise if an agency took actions constituting a delegation of its rulemaking authority to a reg-neg committee. Agencies should therefore consider the following to prevent improper delegation:

- **An agency may not agree, prior to publishing the proposed rule and receiving public comment, to issue the committee's proposed rule as its final rule.** Contingent on the negotiating committee reaching full consensus, it is axiomatic that agency staff can and in many cases will commit to recommending to top agency decisionmakers that the committees consensus rule be published in the *Texas Register* as the agency's proposed rule. However, for staff to commit to issuing the committee's rule as the agency's final rule before notice-and-comment rulemaking would constitute an improper delegation of agency authority.

Chapter 6

Organizing and Managing the Agency's Participation

Each agency undertaking a reg-neg faces unique circumstances that will shape its participation. This chapter offers guidance to sponsoring-agency staff on several special issues:

- understanding and organizing the agency's roles during a reg-neg;
- choosing the agency's representative to the committee;
- managing intra-agency coordination;
- managing inter-agency coordination; and
- structuring the agency's and the stakeholders' commitments.

The Multiple Roles of the Agency

The agency sponsoring the negotiated rulemaking has four roles: administration, staffing, coordinating the convening, and interested party in the negotiation.

- **Administration.** The agency ensures that a convenor and facilitator are selected and provides logistical support for the negotiations. This can include arranging meeting times and places, distributing necessary documents to all parties, serving as a central clearinghouse for documents, and the like. In past reg-negs, it has been useful for an agency to designate one employee as a single point-person for such purposes.

- **Staffing.** The agency provides information and analysis at the committee's request. The agency usually has access to professional staff or consultants well-versed in the subject matter, although outside experts should also be available at the committee's consensus request. They can generate data for discussions and perform various useful analyses. These tasks are completed both during negotiations and between negotiating sessions.

- **Coordinating the convening.** Depending on the particular circumstances, this role may be large or small (see above pp. 21-22, for more discussion). At a minimum, the agency will be a primary source consulted by the convenor regarding what interests the proposed rule may affect. The agency will also hire the convenor and consider the convenor's report in making its decision to proceed with the reg-neg. In some cases, the agency may play a larger role by choosing to perform the convening itself.

- **Interested party.** As the sole entity at the negotiating table with legal authority to issue the rule, the agency will automatically be a major player in the negotiations, and this makes its role unique. If the agency takes a hard line during meetings, causing parties to believe they must wrestle it away from an initial position, the free flow of ideas may be limited. By remaining quiet, however, the agency can also inhibit discussions because others will not know how a major player will come out on an issue. Avoiding either extreme, it may be helpful if the agency takes the lead in the negotiations by providing a first cut at the factual underpinnings of the subject matter and reshaping the issues into the outline of a rule, while strongly seeking out and listening carefully to the input of other parties.

Who Should Negotiate for the Agency in the Committee?

The agency representative should be a relatively senior staff member whose position is commensurate with and who is respected by the other representatives at the bargaining table. He or she should be invested with authority to speak for the agency on relevant issues and be able to reach agency decisionmakers as needed. The representative should have access to support like data, experts and technical staff. He or she should also be familiar with the subject matter or, even better, work in the division of the agency responsible for the proposed rule. Experience or training in mediation and negotiation would also be useful.

In many cases, an agency may be well-advised to use a staff member from its existing rulemaking section as its representative. These individuals are familiar with the rulemaking process and can capitalize on established channels of communication with decisionmakers. Using a rulemaking staff member will also provide continuity in the agency's relationships with interest groups who axe used to dealing with particular individuals on rules.

Intra-agency Coordination Issues

Intra-agency communication, coordination of multiple-commissioner and periodically meeting board leadership structures, and management of established advisory committees are new issues many Texas agencies will need to face when undertaking a reg-neg.

Managing Communication Within the Agency. Reg-neg requires that the agency representative maintain close contact with, and be in a position to speak effectively for, agency decisionmakers ("leadership") throughout the negotiation. This includes such practical steps as:

- **Obtaining leadership's decision to use reg-neg.** Agency staff must first get executive approval to use reg-neg. This may involve educating agency leadership about the negotiated rulemaking process. In many cases, obtaining such approval can take place during the agency's standard procedure for briefing decisionmakers before proposing a rule.

- **Communicating with leadership during the process.** Negotiated rulemakings will require more communication with agency leadership as work progresses than a traditional rulemaking. The agency representative should regularly brief agency decisionmakers or executive staff about

the committee's work. This allows leadership to monitor the reg-neg and let the representative know if leadership feels uncomfortable about the direction the committee is taking.

- **Coordinating inter-divisional participation within** the agency. Because reg-neg may compress review schedules for a proposed rule, it is important that different divisions effectively coordinate their rule review in a timely manner. Divisions also need to respond rapidly to the negotiating committee's information requests.

- **Coordinating final approval with agency leadership.** When the committee nears consensus on a proposed rule, the agency representative should coordinate as closely with agency decision-makers as practicable to ensure that commitments the representative makes at this stage accurately reflect executive policy.

Coordinating with Multiple-commissioner Leadership. Texas agencies led by multiple commissioners, such as the Railroad Commission, the Public Utilities Commission, and Texas Natural Resources Conservation Commission, face a more complicated task in participating at committee meetings than those headed by a single executive. This governance structure can make it hard to get rapid approval from agency decisionmakers and to coordinate their input during negotiations. Instead of communicating with one executive and his or her staff, the representative must communicate with several offices not infrequently reflecting different leadership styles and philosophies. An agency facing this situation should first try to use its existing system for coordinating with decisionmakers during a rulemaking. An agency's current system may well provide a workable model for negotiated rulemaking. For reg-neg, the primary goal of such a system should be to centralize negotiating communications, perhaps by designating as early as possible a representative with whom each commissioner is comfortable, yet who is also neutral relative to each. Such an individual might be found in the office of the general counsel or executive director. The agency should also identify specific ways for the individual to communicate with each executive. This can be done through regular bi-weekly or monthly briefings with individual commissioners or their high-level staff, or with the full panel. The agency representative should also be able to reach executives or their staff as negotiations progress.

Coordinating with Board Leadership that Meets Periodically. Some Texas agencies, such as the Department of Health, are governed by boards that meet only periodically. A board can easily make the decisions to undertake a reg-neg and to accept or deny the consensus report at its regular meetings, but it may be difficult for board members to be kept timely informed of progress and to respond quickly to developments. These agencies should consider a system which maximizes the agency representative's meaningful interaction with board members, but also acknowledges to other reg-neg participants any limitations he or she may have. The representative should have a chance to discuss the rulemaking in detail with board members before, during and between board meetings so that he or she can clearly advocate the will of the board. The negotiating committee's schedule should also be synchronized with board meetings.

Coordinating with Advisory Committees. As stated above, use of advisory committees is specifically authorized by the APA, so long as their work remains only advisory. (See Texas Government Code Section 2001.031(b)). Many Texas agencies currently use these committees, a number of which are established by federal or state law, to develop drafts of proposed rules or to provide guidance on regulations. Although exact numbers are elusive, at least several hundred currently exist. Advisory committees present two issues for negotiated rulemaking. First, advisory committee members, already familiar with rule-related issues and parties, provide ready-made sources of information for the convenor. Also, to the extent advisory committee members represent parties who have already been "convened" in some manner by the agency, it is possible that they also may be appropriate representatives for a reg-neg committee. However, while advisory committee members may provide a useful starting point for the convenor's interviews, they should by no means be the only focus. Second, advisory committees associated with a defined subject area, taking a special interest in rules affecting that area, may resist creation of a separate reg-neg committee to deal with a new rule in the same area. Committee members may be understandably reluctant to see their role in developing any rule affecting their interests diluted. In such cases, the agency may choose to reconsider whether in practice reg-neg would provide a more efficient alternative. On the other hand, when proprietary interests are less well defined because the proposed rulemaking affects the subject matter of more than one advisory committee, an agency may prefer to use negotiated rulemaking.

Inter-agency Coordination Issues

Coordinating Multiple Agencies in a Single Reg-neg. When the reg-neg's subject matter impinges on multiple agencies' jurisdictions, more than one agency may need to participate. Unless preliminary steps are taken to reach agreement on a workable coordination mechanism, agencies might find themselves at cross purposes and lacking a clear understanding of their own authority over the rule. This confusion can impede effective negotiations. To avoid these problems, agencies should consider the following in multi-agency reg-negs:

- **Establish an inter-agency coordinating mechanism at the outset.** Agencies working together on a reg-neg should outline, either in the committee's protocols or through a separate agree ment (such as a Memorandum of Agreement (MOA)), the relationships and obligations of each agency and describing workable means of communication between them. This mechanism should outline as specifically as possible who will perform work assignments and make any financial outlays required in the reg-neg. It should also provide for a dispute resolution mechanism capable of quickly resolving any conflict arising between the agencies.

- **Coordinate notice-and-comment responsibilities of agencies.** An additional issue inter-agency reg-negs raise is that of which agency bears primary responsibility for publication and issuance of the proposed rule. While each promulgating agency must comply with the APA, participating agencies may want to establish at the outset whether each one will need to publish the rule and receive comments separately, or whether one agency may do so and the others incorporate the rule by reference.

Structuring the Commitments of the Agency and the Stakeholders

A central ingredient of the reg-neg committee protocols, and an issue at the heart of the negotiated rulemaking process itself, is the commitment the parties make to each other about the end product of negotiations. Such commitment is in addition to the good faith pledge each party normally makes regarding their participation in negotiations

As to the agency's commitment, each may decide upon different wording, consistent with its particular statutory obligations. Generally speaking, however, the agency should define its commitment clearly enough that other parties feel confident that their participation is a worthwhile investment of their resources. Phrasing this level of commitment can be challenging, and agencies are advised to consider prior clauses used in Texas and elsewhere *(see box)*.

The stakeholders too must fashion their commitment in a manner sufficient to persuade the agency that negotiated rulemaking is worthwhile. This will frequently mean that the other parties to any consensus stemming from the reg-neg disavow their best alternatives to negotiated agreements (BATNAs, in the jargon of dispute resolution) relative to the rulemaking. In practice, this could mean agreeing to forego judicial challenges or political "end-runs" against the consensus rule *(see box)*.

Memorandum of Agreement in 1994 Oil Spill Reg-neg

During the 1994 negotiated rulemaking on oil spill damage assessment, a brief MOA was used very effectively by the General Land Office, Texas Parks & Wildlife Department and Texas Natural Resource Conservation Commission. A copy of this document is included in Appendix D.

Prescribed by statute, this MOA designated the lead agency, established a coordinating body of representatives from each committee and provided a resolution process in case of differences among the agencies. It also set a good faith requirement for agency interaction and provided a definition of consensus. Although the agreement was not invoked during the negotiations, participants report that drafting the MOA was a useful first step in outlining the relationships and responsibilities of each agency.

The Agency's Commitment to Participating in a Reg-Neg

In one Texas reg-neg, the agency expressed its commitment this way:

"(Agency) retains the sole responsibility to issue the final rule and (agency) intends to issue the final rule based on an Agreed Rule from the negotiating rulemaking committee, subject to public comment and additional information which (agency) is required to consider. The negotiated rulemaking committee may reconvene as it sees fit to consider any proposed changes to the Agreed Rule in order that there be a final Agreed Rule resulting from the negotiations of the negotiated rulemaking committee."

From *Organizational Protocols and Guidelines, Initial Meeting, Task Force on Waiver Rule Negotiating Group, Texas Council on Workforce and Economic Competitiveness.*

The Stakeholders' Commitment to Participating in a Reg-neg

The following language has been used in Texas to reflect the stakeholders' commitment:

> "The members of the negotiated rulemaking committee agree not to take action to inhibit the adoption by (agency decisionmakers) of a final rule to the extent that it contains the same substance and effect as the Agreed Rule. If a party fails to keep this agreement, all other parties agree to submit comments to (agency) and any other relevant state or judicial officials and governmental bodies stating that:
>
> i: all parties concurred in the Agreed Rule submitted to the Council, and
>
> ii: all parties support approval of a final rule with the same substance and effect as the Agreed Rule submitted by the negotiated rulemaking committee."

From *Organizational Protocols and Guidelines, Initial Meeting, Task Force on Waiver Rule Negotiating Group, Texas Council on Workforce and Economic Competitiveness.*

Chapter 7

Tracking and Evaluating Negotiated Rulemaking

The Importance of Performance Tracking and Evaluation

Evaluating negotiated rulemaking processes and other consensus-building methods can help an agency tell whether they are accomplishing the agency's goals, whether they are worth continuing and how they might achieve better results in the future. Evaluation also aids in strategic planning and helps an agency make comparisons about which of its systems are more efficient, equitable and practical for different types of rules. Tracking the effectiveness of its consensus-based processes will help an agency to better identify situations appropriate for their use. It can also become more familiar with specialized problems or snags associated with the agency's rulemaking, and can quantify at least some benefits, including time and money saved by using the process.

Designing an Evaluation System

There are two evaluation types:

- **"Process evaluations"** determine whether an ADR program or process works the way it was designed to function; for example, whether appropriate criteria are being used to select rules for using the process.
- **"Outcome evaluations"** are aimed at determining whether the goals of a program or process are being met, e.g. whether reg-neg is quicker, cheaper, less contentious, or otherwise "better" than traditional approaches.

An agency often uses both evaluation types at once.

Discussed below are the **five basic steps** in designing either a "process" or "outcome" evaluation system for negotiated rulemaking:

1. **determine the objectives** of the reg-neg;
2. **define indicators of success** correlating with the objectives **and identify ways to measure the indicators;**
3. **devise** a strategy and **practical method for collecting the kinds of information** that will permit measurement;
4. **collect, analyze and interpret data;**
5. **present the data** for decisionmakers and other interested persons.

Implementing an Evaluation System

Evaluations vary in degrees of sophistication, complexity and rigorousness, depending on what resources are available, who the intended audiences are and how the results are to be used. Advance planning will ensure that the necessary data are available when desired.

In addition, agencies should be aware that since issues associated with reg-negs can be complex, any rigorous analysis will probably require consultation with statisticians or survey research experts to ensure that appropriate collection instruments, samples and analysis methods are used.

Step 1: Determine the objectives of the reg-neg system

An agency implementing an evaluation system should define its primary goals at the outset in using consensus initiatives like reg-neg. Examples of objectives might be to reduce agency resources spent on rulemaking, to reduce the need for enforcement actions, and to improve agency relations with regulated industry and public interest groups. An agency should also consider how and by whom results will be used, who will conduct the evaluation and what resources are available for the effort.

Step 2: Define indicators of success and identify ways to measure them

The agency should then select performance indicators corresponding to the program objectives that will serve as the basis for data collection and analysis. Indicators for a reg-neg system might include qualitative "customer satisfaction" measured by survey, costs or length of time for rule development tracked by a central office, and incidence of compliance compiled from enforcement records.

Step 3: Devise a plan and practical method for collecting information

Design a workable plan for gathering information in a way that enhances the quality and credibility of the results. An agency should identify likely information sources and practical steps to collect data with minimal inconvenience and burden, probably via some combination of survey instruments, interviews, focus groups, on-site observation, time series studies and reviews of files, historical information, data bases or other documents. Items appropriate for tracking are identified in the model tracking form *(see box)*. Special care should be taken in selecting a sample of individuals to interview or survey to ensure that data collected are reliable and valid.

Model Form and Reporting

To assist agencies in implementing an evaluation system, a model "Negotiated Rulemaking Tracking Form" is available from the Center For Public Policy Dispute Resolution. Agencies conducting a reg-neg may use this form or adapt it to their own needs.

Upon completion of the negotiated rule making, or upon termination of the process before completion, the form should be completed by the agency employee responsible for the rulemaking. To facilitate performance tracking of reg-negs throughout Texas, a copy of any tracking form an agency uses should be supplied to the Center for Public Policy Dispute Resolution, UT Law School, 727 East 26th Street, Austin, Texas 78705.

Step 4: Analyze and interpret the data

Once collected, data will need to be analyzed. This can be done by comparing groups, identifying patterns and trends or distinguishing relationships among variables. Data should be compiled and analyzed periodically, perhaps every quarter, and thorough cumulative reviews should be conducted regularly. Ideally such analysis will reveal useful information regarding which types of regulations have benefited most from the process and which have proven problematic. This information can in turn be integrated into the agency's strategic planning process and legislative appropriation request.

Step 5: Present the data for decisionmakers and other interested persons

Finally, advance attention should be paid to communicating evaluation results and recom-mendations – whether by briefing or written report-in a clear and objective manner that supports meaningful decisionmaking.

Chapter 8

Resources, Support and Logistics

This chapter provides practical guidance to parties to a negotiated rulemaking: how to obtain technical support, find a good neutral, finance a reg-neg, and get training on negotiating skills and the negotiated rulemaking process.

Getting Technical Support for Your Reg-neg

Agency staff and other potential parties to a negotiated rulemaking will likely have a number of questions and concerns when contemplating initiating or participating in a reg-neg. While this *Deskbook is* designed to address many of these, other assistance may be required. For governmental entities, the Center for Public Policy Dispute Resolution at The University of Texas School of Law is available to provide technical support. The Center can help an agency, local government or other rulemaking authority to make such decisions as:

- Is negotiated rulemaking proper for the rulemaking at issue?
- Is negotiated rulemaking likely to lead to a consensus on a proposed rule in this case?
- What other consensus-building processes might be considered for the rulemaking?
- How long is the process likely to take, and what resource outlays will it require of the agency?

Private practitioners with experience in negotiated rulemaking provide another resource for technical assistance.

Finding the Best Neutral for Your Reg-neg

Because so much depends on the facilitator's skill at moving the process along productively, selection of neutrals is a very important part of negotiated rulemaking. Reg-neg uses neutrals at two points: convening and facilitating. The roles and responsibilities of each position are outlined above (see *pp. 21-23* and pp. *25-26).* This section provides assistance to agencies in identifying, securing and working with neutrals.

Attributes of a neutral. In the context of ADR, a "neutral" is an individual, usually serving at the will of the parties, who presides at a consensus-building process to help the parties resolve their dispute. An agency looking for a neutral to run either aspect of a reg-neg should seek someone with

- **competence at facilitation** and
- **objectivity of perspective.**

In some cases a third quality, **subject matter familiarity,** should also be weighed.

Regarding competence at facilitation, often neutrals selected by an agency or reg-neg committee will be highly skilled professionals with considerable training in the techniques of dispute resolution, such as experienced lawyers or social scientists. Indicators of skill in facilitation might be:

- basic and advanced **mediation training,**
- **negotiation training and experience** and
- first-hand **experience in multi-party dispute resolution.**

Objectivity of perspective should mean, at the least, that the facilitator's involvement brings with it no conflicts of interest. In addition, however, a neutral should neither have actual or *perceived* biases among the participating interests, nor preconceived notions about the end result of the process.

Finally, for highly technical or complex rulemakings, an agency may be well served by a neutral already familiar with the subject matter.

Sources for neutrals. The Center for Public Policy Dispute Resolution at The University of Texas School of La can often facilitate the location of neutrals from its Fellows group and others in government and the private sector. Persons interested in locating neutrals may request that the Center provide a list of candidates. The Center has been pleased to provide this service on many occasions in the past, promoting as it does its primary mission of increasing the benefits from ADR in the public sector. For additional information, please contact Jan Summer, Executive Director, at (512) 471-3507.

There are three potential sources for neutrals: the **agency, other governmental entities** and the **private sector.** The decision to seek a neutral from one or another source may be influenced by the expertise and experience desired, administrative difficulty of contracting with the individual and availability of resources.

Without doubt the most administratively straightforward and affordable source for an **agency** is its own staff, but this choice could have adverse repercussions on the process and will certainly involve many hidden costs. The agency representative should of course not serve as the reg-neg committee's facilitator; other problems and concerns regarding the use of agency staff as neutrals are discussed above at pp. 22 and 26.

Neutrals may be conveniently secured from **other governmental entities** as well. State agency neutrals could be arranged through informal loan or interagency agreement, and local or federal government employees could be obtained through intergovernmental agreements. The -perception of neutrality is probably stronger with a government employee not associated with the sponsoring agency.

The State Office of Administrative Hearings (SOAH) may also provide a desirable source for

state employee neutrals. Administrative law judges trained in mediation and multiparty public **policy** dispute resolution techniques are available at government rates through SOAH. Contracting can also be simpler for SOAH neutrals, as many agenciesI already have interagency contracts in place with it. Contact Nancy N. Lynch, Director, ADR Section, SOAH at (512) 475-4993 for more information.

A third source is the **private sector.** Private practitioners tend to be more costly on a per hour basis than government employees and may present more difficulties in contracting. An informal survey conducted by the Center for Public Policy Dispute Resolution found that typical rates for experienced ADR practitioners range between $100 and $175 per hour.

When contracting with private professionals, an agency will have to examine how to structure the compensation agreement to comply with its contracting guidelines; the form of the agreement may depend on whether the total payment exceeds a contracting limitation, and whether the individual is considered to be a professional under state guidelines. Notwithstanding contracting complications, using a private practitioner has several advantages: their schedules can be more accommodating, their experience with negotiated rulemaking or mediation of large-scale disputes can be more extensive, and they may be perceived as being more objective.

Alternatively, an agency may contract with a neutral through the Center for Public Policy Dispute Resolution.

The Neutral's Objectivity and Subject Matter Expertise: A Potential Dilemma

Obtaining a neutral familiar with complex subject matter who is also completely unbiased in his or her perspective can sometimes be difficult. One observer has described these qualities as being potentially in conflict:

> "Choosing a (facilitator) can be difficult. Objectivity and neutrality are important so that all parties will recognize a serious effort is being made to reach a fair solution, but it is also important that the (facilitator) have sufficient expertise to be able to understand what is going on – not only to understand the discussions but also to appreciate. why parties may be taking certain positions. Some knowledge can be obtained before the proceedings, but it will be difficult to find a person who will have sufficient expertise without any `bias: In some matters, obtaining an individual who will be perceived as objective and who will have sufficient expertise may require hiring someone from outside the government. This may result in substantial costs."

From: Neil Eisner, "Regulatory Negotiation: A Real World Experience," *Federal Bar News 6-Journal, vol.* 31, no. 9 (November 1984), reprinted in *Negotiated Rulemaking Sourcebook 1995* at pp. 833-838 (see bibliography for full cite).

In one successful negotiated rulemaking conducted in Texas, the facilitator did not have prior expertise in the subject matter, even though the rulemaking involved relatively complex territory (taxation of timberlands by local governments). At the federal level, although some agencies have insisted upon technical expertise as a matter of course, the biggest user of reg-neg, EPA, has seldom considered it a criterion at all in its selection of facilitators *(see* "Background Report for Recommendation 86-8: Acquiring the Services of Neutrals for Alternative Means of Dispute Resolution and Negotiated Rulemaking," George D. Ruttinger, Report to ACUS, November 19, 1986, reprinted in *Negotiated Rulemaking Sourcebook 1995* at pp. 872 873).

The Center can secure a neutral approved by the sponsoring agency, provide consulting services throughout the reg-neg and underwrite administrative services. Both successful Texas reg-negs have used this hybrid approach, with the Center playing a "bridge" role.

Paying for a Negotiated Rulemaking

The various benefits of negotiated rulemaking over the traditional process should result in lower total expenses associated both with developing the rule and enforcing it later. Still, the process involves a number of expenditures not required in traditional rulemaking. During a typical reg-neg, the following items will need to be funded:

- convenor's fee;
- facilitator's fee;
- administrative services;
- meeting costs (room rental, lunches, etc.); and
- additional research or consultancy requested by the reg-neg committee.

In addition, some training of agency staff in negotiated rulemaking may be desirable.

Cost-sharing among the parties to a reg-neg. Because negotiated rulemaking is a consensus-based process in which all parties participate as equals, it may be appropriate for each party to contribute towards total costs equally or on some other equitable basis. The agency may choose to solicit contributions from all stakeholders, both to help defray costs as well as to enhance the perception of impartiality of the neutrals and the dynamic of equality among the participants-assuming all parties are in positions to contribute equally to the costs.

Defraying expenses of participants with limited resources. While most industrial and business parties can attend negotiating sessions on their own budgets, some stakeholders-such as public interest groups, unions, local governments and many individuals may lack sufficient organizational resources to fund their participation. This situation might become a serious disadvantage where the meeting schedule requires frequent travel. If such parties are necessary to form a balanced negotiating committee, it may be essential to provide them with funding support.

In practice, this may be one of the most difficult issues an agency faces when negotiating a rule. Agencies should consider whether it is possible to hold meetings in the city where the needy party is located. Computer, telephone or video conferences might reduce travel, although these choices do not offer the opportunity for face-to-face interaction that successful negotiations often require. The agency might also search its own budget for funds that can be used for the group, or approach philanthropic organizations on their behalf. An agency seeking to provide a reg-neg party with funding assistance should review the advisory committee reimbursement provisions found at Art. 6252-33 V.T.C.S. These provisions probably do not apply to ad hoc committees such as those used in reg-negs, but each agency is encouraged to make its own determination.

As a last resort, it may be appropriate for the agency, facilitator or convenor to approach other members of the reg-neg committee to test their willingness to assist a needier party. Doing so, however, could pose serious problems for the committee's dynamics. Wealthier parties could feel "blackmailed" into contributing, or feel that they have bought the cooperation of the strapped parties. Likewise, having accepted funds from another group to which they may be philosophically

opposed, the receiving parties could feel compromised and constrained in their participation. Such effect might be lessened by structuring the gift as an escrow account.

Training Resources

Two types of training may be useful for agency personnel and individuals of private organizations who are potential parties to a negotiated rulemaking.

General reg-neg training. This is training in the procedure itself, giving participants an overview of how it works and where they fit in. It usually takes one to two days and can help prepare parties for future rulemakings and sharpen their knowledge of, and their comfort level with, the process.

Specific reg-neg training. This is a shorter, more general type of training designed to prepare the participants in a particular reg-neg. This pre-negotiation/orientation training program is typically held on the day before negotiations actually begin and might last from four to six hours. The training provides a brief overview of the process and may involve a role-playing exercise related to the subject matter at issue. The sessions provide a chance for the parties to get together in an informal, educational setting, and also help "level the playing field" with regard to negotiation skills prior to the commencement of the rulemaking.

Although not required, use of a brief preparatory training program may be well-advised. The EPA reports that such sessions have made a real difference in the operation and success of many negotiations. EPA staff indicate they have consistently seen participants during the course of actual negotiations use the language presented and the distinctions drawn in the training sessions. Such training was also used with good result through the Center for Public Policy Dispute Resolution before the timberland appraisal and oil spill liability reg-negs.

The first type of training is provided periodically by the Center for Public Policy Dispute Resolution in Austin, and the second can be arranged at an agency's convenience. Interested parties should contact the Center at (512) 471-3507 for more information.

Appendix A

Federal and State Uses of Negotiated Rulemaking

Since the process was formally outlined in the early 1980s, negotiated rulemaking has been an increasingly popular option for regulatory entities at all levels of government.

Federal use. The federal government has been the most consistent user of negotiated rulemaking. Passage of the Negotiated Rulemaking Act of 1990, 5 U.S.C. Sections 581-590, establishing a statutory framework for agency use of the process, provided an important congressional endorsement. Federal agencies were also encouraged by the 1993 National Performance Review recommendation on reg-neg, President Clinton's Executive Order on Regulatory Planning and Review, and the directive to federal agencies to explore and use consensus-based mechanisms and to identify "at least one rulemaking which the agency will develop through the use of negotiated rulemaking." On some occasions, Congress has also required agencies to use reg-neg for specific rulemakings. Since the first negotiated rulemaking in 1983, fourteen different federal departments and agencies, and many distinct divisions within these organizations, have used the process. As of late 1995, these organizations included those indicated in the chart below.

No cumulative evaluation of federal agencies' use of negotiated rulemaking has yet been conducted. However, the Environmental Protection Agency, the most prolific reg-neg user in the federal government, has conducted some analyses. A 1987 review concluded: "In the `right' situations, negotiated rulemaking can produce proposed rules that meet statutory requirements but are more pragmatic than proposals EPA would be likely to develop on its own and may produce better environmental results; in addition, negotiated rules are more likely ... to be accepted by the affected industries and other interested parties involved in developing them. Negotiation also may reduce the time it takes to proceed from proposed to final rulemaking." From "An Assessment of EPA's Negotiated Rulemaking Activities," Program Evaluation Division, Office of Management Systems and Evaluation, Office of Policy, Planning and Evaluation (December 1987), in *Negotiated Rulemaking Sourcebook* (1995), p. 23 (see bibliography for full cite).

State uses of reg-neg. States have a long history with participatory decisionmaking processes for rulemaking, and it is not surprising that use of negotiated rulemaking at the state level has been increasing over the past decade.

States that have used reg-neg and similar formal consensus-building processes include Arizona, California, Colorado, Idaho, Indiana, Maine, Massachusetts, Montana, New Mexico, New York, Ohio, Oklahoma, Texas, Virginia, and Washington. These projects have dealt with a wide variety of issues, including transportation planning, air and groundwater standards, pesticide emissions, oil and gas controls, access issues for the disabled, pollutant discharges in the Great Lakes, utilities regulation issues, fertilizer containment and timber, fish and wildlife resource management.

As of mid-1996, at least three states (Florida, Montana and Nebraska) have passed negotiated rulemaking statutes, one (New York) has promoted it by executive order and several others have referenced the procedure in statutes to encourage its use (Idaho, Indiana, Maine, Oklahoma and Washington).

Federal Uses of Reg-neg Through 1995.

Reg-Neg Uses	Agency/*Subdivision*
3	Department of Agriculture *Animal and Plant Health Inspection Service*
7	Department of Education
1	Department of Energy *Federal Energy Regulatory Commission*
2	Department of Health and Human Services *Health Care Financing Administration* *Indian Health Service (with Bureau of Indian Affairs)*
1	Department of Housing and Urban Development
7	Department of the Interior *Bureau of Indian Affairs* *Minerals Management Service* *Bureau of Land Management* *Office of Self-Governance* *Office of Surface Mining Reclamation and Enforcement*
3	Department of Labor *Occupational Safety and Health Administration*
7	Department of Transportation *Federal Aviation Administration* *Office of the Secretary* *National Highway Traffic Safety Administration and Federal Highway Administration*
17	Environmental Protection Agency
1	Farm Credit Administration
4	Federal Communications Commission
1	Federal Trade Commission
1	Interstate Commerce Commission
2	Nuclear Regulatory Commission

Source: *Negotiated Rulemaking Sourcebook* (1995), Administrative Conference of the United States, pp. 375-398 (see bibliography for full cite).

Appendix B

Is Reg-neg the Right Consensus-based Process for You?

Negotiated rulemaking is just one of several models for developing public policy in a way that enhances public input and builds consensus. When faced with a rulemaking and a desire to pursue some sort of consensus-building, staff may want to explore a range of options along the spectrum of consensus-based processes.

Techniques related to negotiated rulemaking include one-at-a-time stakeholder consultations (a variant of the "open-door" policy), information exchanges, workshops, roundtables, and consensus-oriented policy dialogues. These techniques vary according to:

- the **degree of interaction** between the agency and affected parties;
- whether the process is a one-time event or part of a series;
- whether the goal is to
  - exchange or acquire information,
  - identify areas of agreement/disagreement,
  - enhance mutual understanding, or
  - develop general or specific policy consensus.

Relative to other techniques, negotiated rulemaking is a labor-intensive way to approach a rulemaking, but also one more likely to lead to a political consensus supporting specific regulatory language or approaches. In sorting out which consensus-based process is appropriate for the subject matter at hand, **a key issue** is thus **how much the agency needs or desires to develop consensus about the rule** before proposing it in the *Texas Register*.

The "convening" process described above will help the agency to identify the most appropriate technique to use. In addition, an agency can consider a few general principles about each process.

Information exchanges and **one-at-a-time meetings,** in which parties share information and perspectives but do not negotiate together towards consensus, may be preferable when

- issues are **ill-defined, too broad or too complex** to address in a dialogue,
- **representatives** of affected interests **cannot be easily identified,**

- **representatives are not sufficiently educated about the issues** to reach closure in a decision-oriented process, and/or
- the **agency has no legal duty or deadline** to propose rules.

Workshops or **roundtables** are appropriate when
- the agency seeks to **share and receive information** and
- the **agency prefers limited, usually unfacilitated discussions** with affected interests.

These processes are not calculated to reach firm or specific consensus, but may be superior to a public hearing, which is more an opportunity for the flow of testimony from the public to the agency.

Policy dialogues or **negotiations,** which use neutrals to facilitate information exchange and the generation of options but are less structured than reg-neg, may be suitable where
- the **issues are not sharply focused** but
- the **parties are willing to try negotiations** and
- the **agency wants an outcome accepted by all** affected interests.

Negotiated rulemaking may work best if
- the rulemaking **fits the criteria outlined above,**
- the agency places a **high premium on lasting consensus** and
- **parties are willing to commit the effort and resources needed** to participate.

Practically speaking, negotiated rulemaking may be superior to other techniques when an agency is seeking to use consensus to manage a potentially controversial decision, maximize "buy-in" by the regulated community, and ensure technical soundness affecting complex subject matter.

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Appendix D

Sample documents

A. Sample Negotiated Rulemaking Committee Groundrules
Organizational Protocols and Guidelines, Advisory Committee on Timberland Appraisal Manual

B. Sample Multi-agency Memorandum of Agreement for Negotiated Rulemaking
Memorandum of Agreement Among the Texas General Land Office and Texas Parks and Wildlife Department and Texas Natural Resource Conservation Commission, 19 Tex. Reg. 6053 (August 2, 1994)

C. Sample Notice of Negotiated Rulemaking
Notice of Negotiated Rulemaking, General Land Office, 19 Tex. Reg. 2318 (April 1, 1994)

D. Sample Notice of Negotiated Rulemaking Committee Meeting
Notice of Negotiated Rulemaking Committee Meeting, General Land Office, 19 Tex. Reg. 2226 (March 29, 1994)

E. Sample Preface to Proposed Rule Developed Through Negotiated Rulemaking
Proposed Rule, Title 31, Natural Resources and Conservation, Part 1, General Land Office, Chapter 20, Natural Resources Damage Assessment, 19 Tex. Reg. 6525 (August 19, 1994)

ORGANIZATIONAL PROTOCOLS AND GUIDELINES
INTIAL MEETING JUNE 9, 1995
ADVISORY COMMITTEE ON TIMBERLAND APPRAISAL MANUAL

I. ADVISORY COMMITTEE GOAL AND AGREEMENT

a. ***GOAL*** The goal of the Advisory Committee is to reach consensus on recommendations to the Comptroller of Public Accounts regarding the contents of the appraisal manual for Texas timberland.

b. ***AGREEMENT***

1) ***INVITATION TO MEETING***. The Comptroller of Public Accounts will invite Advisory Committee members and will provide meeting facilitators, staff support for the Committee, meeting facilities, and a Comptroller Representative who will participate in the meetings on behalf of the Comptroller.

2) ***AGREED PROPOSAL TO AGENCY***. An agreement reached by the Advisory Committee will take the foam of a written *Proposal to the Comptroller* that will be signed by all parties to the negotiations and presented to the Comptroller of Public Accounts ("Comptroller"). Comptroller staff will draft the *Proposal* at the Advisory Committee's direction.

3) ***PUBLIC COMMENT AND FINAL RULE***. The Comptroller desires to adopt by rule anew timberland appraisal manual. If the Advisory Committee reaches consensus on the contents of the new manual, the Comptroller will incorporate in the new timberland appraisal manual the contents of the Advisory Committee's *Proposal to the Comptroller* or language having the same effect and substance as the *Proposal,* subject to any additional information the Comptroller is required by statute to consider, and subject to the approval of the *Statutory Approval Committee,* composed of the Governor, Comptroller of Public Accounts, Commissioner of the General Land Office, Agriculture Commissioner, and the Attorney General.

4) **DISTRIBUTION OF DRAFT FINAL RULE**. The Comptroller will send to the Representatives who serve on the Advisory Committee a copy of its final proposed rule before the Comptroller adopts the rule. The rule, as adopted, will be submitted for approval to the *Statutory Approval Committee.* The rule will not take effect until after the *Statutory Approval Committee* has approved it.

5) ***NO ADVERSE ACTION AND SUPPORT***. The Representatives who serve on the Advisory Committee agree not to take action to inhibit rule approval by the *Statutory Approval Committee* to the extent that the rule contains the same substance and effect as the *Proposal to the Comptroller* from the Advisory Committee. If a party fails to keep this agreement, all other parties agree to submit comments to the Comptroller, any other relevant state officials, government bodies, and courts, stating that:

i. all parties concurred in the *Proposal to the Comptroller* submitted to the Comptroller, and
ii. all parties support approval of final recommendations with the same substance and effect as the *Proposal to the Comptroller* submitted by the Advisory Committee.

II. DECISION-MAKING AND INTERNAL ORGANIZATION

a. *USE OF CONSENSUS*..... Negotiations will be conducted using a consensus decision-making process. Though there are a number of definitions of "consensus," a suggested workable approach is that, unless the parties agree to some other definition at the outset, each Representative must concur in the result.

Consensus is reached when all Representatives agree that their major interests have been taken into consideration and addressed in a satisfactory manner. Furthermore they must also agree that given the combination of gains and trade-offs and given the current circumstances and alternative options, the resulting agreement is the best one the Representatives are likely to make.

b. *FAILURE TO REACH CONSENSUS.* If the Advisory Committee is unable to reach consensus on a *Proposal to the Comptroller,* the Comptroller will issue his own rule, or will withdraw the proposed rule and continue to promulgate the current manual, at his sole discretion. The Comptroller may consider deliberations and areas of consensus developed during the negotiation of the Advisory Committee in creating its rule.

c. *STAFFING, MEETING SUMMARIES, AGENDAS, NOTICES.* The proceedings of the Advisory Committee will not be electronically recorded, but draft summaries of Advisory Committee meetings will be prepared by the facilitator with the assistance of the Comptroller staff for the convenience of the members of the Advisory Committee. Such summaries shall not be approved by the Advisory Committee, or be construed or taken to represent the official position of the Advisory Committee or any member on what transpired at an Advisory Committee meeting. A proposed agenda for each meeting will be prepared by the Comptroller staff and will be finally approved by consensus of the Advisory Committee. If a deadlock or impasse is declared by any party, the facilitator will be available to help the deadlocked parties to resolve the impasse. Any party may declare a caucus at any time. The facilitator will be available to help in caucuses and workgroup activities as described below.

d. *OPEN MEETINGS.* Meetings of the Advisory Committee will be open to the public. Although the Advisory Committee is not subject to the Open Meetings Act, the Comptroller will publish notice of each meeting in the Texas *Register.* However, participation in the meeting will be limited to the Representatives described below.

e. *WORKGROUPS AND CAUCUSES.* Workgroups may be formed to address specific issues and to make recommendations to the Advisory Committee as a whole. If formed, workgroups are open to any Advisory Committee Representative. Workgroups are not authorized to make decisions for the Advisory Committee. All Advisory Committee members will be notified of all workgroup meetings. The facilitator may at any time during the meeting call for a break in the proceedings and invite specific Representatives to meet in a confidential caucus setting to attempt resolution of a specific dispute. Caucuses held during regular meeting times will be limited to 15 minutes.

f. *ATTENDANCE AT MEETINGS.* Representatives of each stakeholder interest group must be present at each full meeting of the Advisory Committee and must keep each other informed as to the status of the negotiations. Effectiveness, consistency, and continuity of the negotiation process require this commitment from the participants to this attendance requirement. Scheduled Advisory Committee meetings will proceed even if Representatives are absent. Absent Representatives are responsible for informing themselves in regard to meeting contents other than information conveyed through regular meeting summaries.

g. *MEETING SCHEDULE.* The schedule of Advisory Committee meetings shall be as set out in the Schedule of Meetings in Attachment A to this Organizational Protocols and Guidelines, and such other meetings as the Advisory Committee shall agree are necessary to accomplish its goals.

III. ADVISORY COMMITTEE PARTICIPANTS ("STAKEHOLDERS") or ("REPRESENTATIVES")

To date, the following Stakeholder interests have been identified and Representatives from each of these interest groups have been invited to participate in negotiations:

a. ***STAKEHOLDER INTERESTS***.

- Counties
- School Districts
- Timber companies
- Timberland owners
- Appraisal Districts

b. ***STAKEHOLDER REPRESENTATIVES***. Each interest group shall have two Representatives in the negotiations and at least one Representative must be present at each of the meetings of the Advisory Committee. Each Representative will have an equal and separate role and right to consent to the *Proposal* and must be present to vote. Representatives must be willing to represent both themselves as well as their interest group, and to communicate with members of their interest group during the course of the negotiations. Stakeholder Representatives are identified on the Representative List on Attachment B to this *Organizational Protocols and Guidelines.* At least one representative of each stakeholder interest group must be present at each meeting. Each representative may delegate the right to express his views to another representative.

c. ***COMPTROLLER STAFF ROLE***. The Comptroller staff shall present, as a Representative, the interests of the Comptroller of Public Accounts in the negotiations, discussions, and decision making of the Advisory Committee. Comptroller staff may provide Advisory Committee with technical expertise and assistance as well as participation in discussion.

d ***OUTSIDE EXPERTS***. It is believed that the members of the Advisory Committee and the Comptroller Staff will have sufficient internal technical expertise to allow the Advisory Committee to perform its functions. If the Advisory Committee agrees that an outside expert is necessary to its function, it may recommend one to the Comptroller by consensus of all Representatives. Unless agreed otherwise, the final approval to hire and the expenses of such expert shall be the responsibility of the Comptroller, who shall have final approval of the terms and conditions of the consultant agreement.

IV. FACILITATOR

A neutral facilitator will be provided by the Center for Public Policy Dispute Resolution at The University of Texas School of Law ("CPPDR"). Facilitators will work with the parties and the staff of the Comptroller to ensure that the process runs smoothly. Each facilitator serves at the will of the Advisory Committee.

V. SAFEGUARDS FOR THE PARTIES AND STAFF

a. ***GOOD FAITH***. All parties and staff of the Comptroller agree to act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any purpose outside the negotiations. It is the intent of the Advisory Committee that other attendees at the Advisory Committee meetings also voluntarily comply with this provision in order to support the consensus decision-making process by encouraging the free and open exchange of ideas, views, and information prior to achieving consensus. Personal attacks and prejudicial statements are detrimental to the consensus process.

b. ***RIGHT TO WITHDRAW***. Any party may withdraw from the negotiations at any time without prejudice. The remaining Advisory Committee members shall then decide whether to continue the negotiations.

c. ***OTHERS' POSITIONS***. No party will make public announcements or hold discussions with the press characterizing the position of any other party even if that party withdraws from the negotiations.

d. INFORMATION

(1) All parties agree not to withhold relevant information.
(2) Parties will provide information called for by the prior paragraph as much in advance of the meeting at which such information is to be used as is reasonably convenient.
(3) Information and data provided to the Advisory Committee in writing is a matter of public record.

PROPOSED SCHEDULE OF MEETINGS
ATTACHMENT A

The following dates are suggested for subsequent meetings of the Advisory Committee. The length of the meetings, as well as the schedule itself, is open to discussion.

Friday, June 21, 2002

_____, _____ 2002

ATTACHMENT B

REPRESENTATIVES LIST

1. David Luther
Jasper County Appraisal District
Post Office Box 1300
Jasper, TX 75951-130
Phone: 409-384-2544
Fax: 409-384-7416

2. Alan Conner
Liberty County Central Appraisal District
Post Office Box 10016
Liberty, TX 77575-2916
Phone: 409-336-5722
Fax: 409-336-8390

3. James A. Hall
Texas Forest Landowners Council
Route 3, Box 285
Crockett, TX 75835-9561
Phone: 409634-3001
Fax: 409-634-2998

4. Daniel Barnes
P.O. Box 1851
Trinity, TX 75862-1851
Phone: 409-594-6021

5. Bob Samford
Manager, Ad Valorem Taxes
Temple-Inland Forest Products
P.O. Drawer N
Diboll, TX 75941-0814
Phone: 409-829-1477
Fax 409-829-1698

6. Ron Patterson
Foster, Lewis, Langley, Gardner and Banack
100 Congress Avenue
Suite 2100
Austin, TX 78701
Phone: 512-469-3595
Fax: 512-469-6335

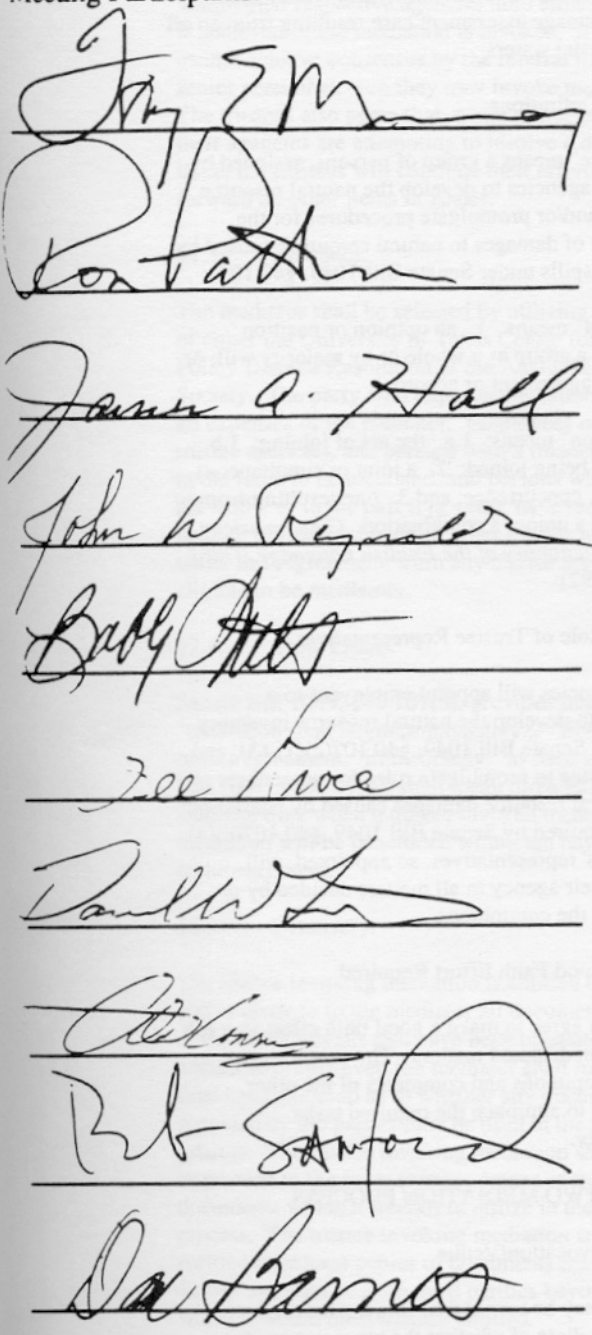
7. John Reynolds
Superintendent
Groveton ISD
P. O. Box 728
Groveton, TX 75845-0728
Phone: 409-642-1473
Fax: 409-642-1628

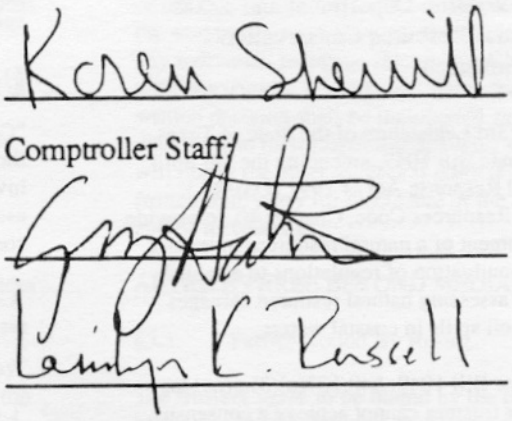
8. Tony E. Murray
Superintendent
Rusk ISD
203 East 7th
Rusk, TX 78785-1121
Phone: 903-683-5592
Fax: 903-683-2104

9. Bobby Smith
Polk County Commissioner
Precinct Two
Post Office Box 1388
Onalaska, TX 77351-1388
Phone: 409-646-5929
Fax: 409-646-6137

10. Lee Groce
Chairman
Liberty County Commissioner
Precinct Two
1923 Sam Houston
Liberty, Texas 77575-4800
Phone: 409-298-2790
Fax: 409-298-9737

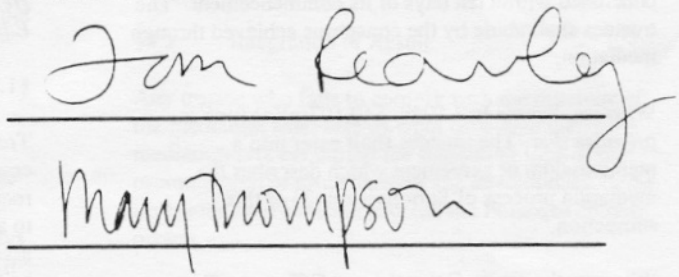
Meeting Participants:





Comptroller Staff:

Facilitators:



Sample Multi-agency Memorandum of Agreement for Negotiated Rulemaking

IN ADDITION 19 Tex Reg 6053 August 2, 1994
TEXAS GENERAL LAND OFFICE

Memorandum of Agreement Among the Texas General Land Office and Texas Parks and Wildlife Department and Texas Natural Resource Conservation Commission

Whereas, the 73rd Legislature of the State of Texas has passed Senate Bill 1049, amending the Oil Spill Prevention and Response Act of 1991 (OSPRA), Texas Natural Resources Code, Chapter 40, to provide for the development of a natural resources inventory and for the promulgation of regulations to establish procedures for assessing natural resource damages resulting from oil spills in coastal waters,

Whereas, Senate Bill 1049, §40.107(a)(3) provides that "Whenever trustees cannot achieve a consensus, the commissioner may invoke mediation to settle any disputed matter relating to this section. The mediation shall immediately be commenced and shall be concluded within ten days of its commencement. The trustees shall abide by the consensus achieved through mediation,"

Whereas, Senate Bill 1049, §40.107(a)(4) further provides that "The trustees shall enter into a memorandum of agreement which describes the mediation process of Sub-division (3) of this subsection,"

Whereas, the Texas General Land Office, the Texas Parks and Wildlife Department and the Texas Natural Resource Conservation Commission are all "trustees," as that term is defined in Senate Bill 1049, §40.003(25),

Now therefore, in compliance with Senate Bill 1049, and in furtherance of the development of a natural resource inventory and the promulgation of regulations for procedures for assessing natural resources damaged by oil spills in Texas' coastal waters, the trustees, as signatories to this Memorandum of Agreement, hereby agree as follows:

ARTICLE ONE GENERAL PRINCIPLES

§ 1.1. Basis of Agreement.

The Commissioner of the Texas General Land Office shall represent the consensus position of the trustees whenever a collective decision or agreement is required pursuant to Texas Natural Resources Code, Chapter 40, §40.107 of the Oil Spill Prevention and Response Act. By agreement among the trustees, any trustee may invoke mediation, subject to the procedure in §2.1 of this Agreement, on any matter related to the promulgation of procedures for assessing natural resource damages resulting from coastal oil spills, as that task is defined in Senate Bill 1049, §40.107(c)(4), and on any matter related to the development of a natural resource inventory, as that task is defined in Senate Bill 1049, §40.107(c)(1), and on any natural resource damage assessment case resulting from an oil spill in coastal waters.

§ 1.2.Definitions.

"Committee" means a group of persons, assigned by the trustee agencies to develop the natural resource inventory and/or promulgate procedures for the assessment of damages to natural resources caused by coastal oil spills under Senate Bill 1049, §40.107.

"Consensus" means: 1. an opinion or position reached by a group as a whole or by majority will; or 2. general agreement or accord.

"Conjunction" means: l.a. the act of joining; 1.6. the state of being joined; 2. a joint or simultaneous occurrence, concurrence; and 3. one resulting from or embodying a union; a combination. *(The American Heritage Dictionary of the English Language, Third Edition,* 1992)

§ 1.3. Role of Trustee Representatives.

Trustee agencies will appoint employees to a committee to develop the natural resource inventory required by Senate Bill 1049, §40.107(c)(1)-(3), and to a committee to promulgate rules for procedures to assess natural resource damages caused by coastal oil spills, as required by Senate Bill 1049, §40.107(c)(4). The trustees' representatives, so appointed, will represent their agency in all matters decided by or disputed by the committees.

§ 1.4. Good Faith Effort Required.

The trustees agree to make a good faith effort to reach consensus on disputed matters. The trustees agree to respect the opinions and comments of the other trustees and to approach the required tasks cooperatively.

ARTICLE TWO MEDIATION PROCESS

§2.1. Invocation/Venue.

Mediation may be invoked by any trustee on any matter, regardless of whether the other two trustees have concurred on that matter, at any time after the signing of this Agreement and before August 31, 1995. The party requesting the mediation shall make available to the other trustees and to the mediator, as described in §2.3 of this Agreement, at the time of the request for mediation, a written statement of the issue to be mediated. All mediation shall occur in the City of Austin, Texas.

§2.2. Pre-Mediation Negotiation.

The trustees agree that prior to invoking mediation they will attempt to resolve a disagreement or dispute by referring it to successively more senior personnel within their respective agencies until either agreement is achieved or the mediation is invoked. If the trustees cannot achieve consensus by the referral to more senior personnel, then they may invoke mediation. The trustees also agree that, while senior personnel in their agencies are attempting to resolve a disputed issue, the trustees will continue their efforts to move forward on other items or issues.

§2.3. Mediator.

The mediator shall be selected by utilizing the services of either the University of Texas Center for Public Policy Dispute Resolution or the Austin Mediation Society. The party who requests mediation shall pay all expenses of the mediator. Employees of any of the trustee agencies, and persons with a financial interest in the issue to be mediated, and persons who presently, or in the past five years, have received any income or financial benefit, other than as mediators under this Agreement, from any trustee agency are not eligible to be mediators.

§2.4. Time Limits.

Senate Bill 1049, §40.107(3), provides that "mediation shall begin immediately…" For purposes of this agreement, "immediately," as used in Senate Bill 1049, §40.107(3), shall mean three business days from the time when a trustee invoked mediation. All mediation will be concluded within ten days of its commencement.

§2.5. Discovery.

The trustee invoking mediation is entitled to utilize and to disclose to the mediator all documents and drafts of documents that have been presented to the committee. However, the mediator shall make the final determination as to whether any documents provided by the parties may be used in the mediation process. The trustee invoking mediation shall identify or provide to the other trustees copies of the documents which it intends to utilize in the mediation process. The trustee invoking mediation is not entitled to request copies of documents from other trustee agencies or from third parities beyond that to which it would otherwise be entitled.

§2.6. Result in Writing.

The agreement with the mediator shall include a provision requiring the mediator to write a statement of the results of the mediation. That statement shall bind all trustees on the disputed issue and in future negotiations related to that issue.

§2.7. Confidentiality of Mediation Process.

Except for the written statement prepared pursuant to §2.6 of this agreement, the trustees shall not subpoena, or make any other request for discovery, either formal or informal, of the mediator's work product. Further, the trustees agree to keep confidential the substance of any individual meetings that the mediator conducts with any trustee. The trustees agree that the mediator's written decision shall be maintained as a confidential document in their respective agencies and that they will notify the other trustees if there is any request from a third party for disclosure of the document and/or its contents.

ARTICLE THREE BEYOND MEDIATION

§3.1. Parties Bound By Result.

The trustees agree to be bound by the results of the mediation for the duration of the committee's work on the mediated issue. There shall be no right of appeal and no right to invoke mediation more than once on the same issue.

§3.2. Integration of Result.

Any trustee who fails to comply with the outcome of the mediation shall lose its right to invoke the mediation process during the remaining time of the promulgation of procedures or the development of the inventory, in whichever process the failure to comply occurs.

ARTICLE FOUR

§4.1. Entire Agreement.

This document constitutes the entire agreement among the trustees as required by OSPRA §40.107(a)(4).

§4.2. Amendments.

This Agreement may be amended only upon the written authorization of all trustees.

§4.3. Effective Date/Duration.

This document shall take effect upon the signature of the trustees.

Issued in Austin, Texas, on July 25, 1994.

RD-9445593

Deborah B. Schilling
Staff Services Officer 11
General Land Office

Filed: July 25, 1994

19 Tex Reg 2318 April 1, 1994

GENERAL LAND OFFICE

Notice of Negotiated Rulemaking

The Texas General Land Office is conducting negotiated rulemaking for the promulgation of procedures and protocols for assessing natural resource damages resulting from coastal oil spills. Participants in the rulemaking group are representatives from the Texas General Land Office, the Texas Natural Resource Conservation Commission, the Texas Parks and Wildlife Department, the Texas Mid-Continent Oil and Gas Association, the Texas Waterways Operators Association, the Galveston Bay Foundation and the Galveston Bay National Estuary Program. This rulemaking is authorized pursuant to the Oil Spill Prevention and Response Act (Texas Natural Resources Code Annotated, Chapter 40). §40.107.

The negotiated rulemaking process is expected to continue through June, 1994. The meetings are open to the public. Any person interested in receiving copies of draft regulations or the schedule of meetings should contact Diane Campbell, Texas General Land Office, 1700 North Congress Avenue, Room 735, Austin, Texas 78701-1495. (512) 305-9176.

Issued in Austin, Texas, on March 24, 1994

TRD-8438082

Deborah B. Schilling
Staff Service Officer II
General Land Office

Filed: March 24, 1994

19 Tex Reg 2226 March 29, 1994

GENERAL LAND OFFICE

Friday, April 8, 1994, 8:30 a.m.

Galveston Bay National Estuary Program
Bay Plaza One, Merrill Lynch Building
711 Bay Area Boulevard, Suite 210
Webster, Texas

According to the complete agenda, the Oil Spill Division (Negotiated Rulemaking Group) will call to order; review of latest draft of Natural Resource Damage Assessment rules; review of statutory requirements of the Oil Spill Prevention and Response Act; relationship between state and federal natural resource trustees; cost recovery; restoration plans; and adjournment.

Contact: Ingrid K. Hansen, 1700 North Congress Avenue,
Room 740
Austin, Texas 78701
(512) 463-5091

Filed: March 23, 1994, 9:51 a.m.

TRD-9437989

PROPOSED RULES 19 Tex Reg 6525 August 19, 1994

TITLE 31. NATURAL RESOURCES AND CONSERVATION
Part I. General Land Office

Chapter 20. Natural Resources Damage Assessment

The General Land Office proposes new §§20.1-20.44, concerning Natural Resources Damages Assessment. The new rules are proposed pursuant to the Oil Spill Prevention and Response Act (OSPRA), Texas Natural Resources Code, Chapter 40, which directs the Commissioner of the Texas General Land Office (commissioner) and the state natural resource trustees to adopt administrative procedures and protocols for the assessment of natural resource damages resulting from an unauthorized discharge of oil to coastal waters. **OSPRA** directs the commissioner to adopt the rules as part of the State Coastal Discharge Contingency Plan (OSPRA, §40.053). The rules will be incorporated into and become part of the State Coastal Discharge Contingency Plan when that plan is fully adopted. The State Coastal Discharge Contingency Plan is intended to be consistent with the Area Contingency Plans developed under the Oil Pollution Act of 1990 (OPA), 33 United States Code Annotated, §2701 et seq, and with the National Contingency Plan, Code of Federal Regulations, Title 40, Part 300.

Senate Bill 104S (73rd Legislature, 1993) amending OSPRA, became law in June, 1993; it instructed the commissioner to develop the procedures and protocols through negotiated rulemaking with the Texas natural resource trustees and other interested parties. Pursuant to Senate Bill 1049, the commissioner established a Negotiated Rulemaking Group (NRG), which included the Texas natural resource trustees: the Texas General Land Office (GLO); Texas Natural Resource Conservation Commission (TNRCC); and Texas Parks and Wildlife Department (TPWD). Other interested parties invited to participate in the negotiated rulemaking were the Texas Waterways Operators Association, the Texas Mid-Continent Oil and Gas Association, the Galveston Bay Foundation, and the Galveston Bay National Estuary Program. Those persons liable for natural resource damages resulting from coastal oil spills are the owners or operators of a facility or a vessel from which a spill emanates. The Mid-Continent Oil and Gas Association represented vessel owners; the Galveston Bay Foundation and the Galveston Bay National Estuary Program represented the public. One impetus behind the enactment of OSPRA was a major oil spill which occurred in 1990 in Galveston Bay. Thus, the two Galveston-based organizations had experience in assessing, for their own purposes, the effects of oil spills in their region of Texas.

The NRG met from November 1993, through June, 1994. Notice of the NRG meetings were published in the Texas *Register*. Through these meetings, the NRG achieved consensus on the scope and content of the rules. Each of the NRG members had an equal voice in the proceedings of the NRG; however, the trustees, because of their legal responsibilities, retained final authority over the scope and content of the rules. The NRG engaged the services of an independent facilitator who assisted in all but the first meeting of the NRG. He was available to all participants for private consultation. The facilitator did not represent any one participant and did not participate in the substantive decisions of the NRG. The GLO thanks Tom Reavley, Esquire, of Austin, Texas, for his invaluable services as the facilitator for the NRG. The GL O also gratefully acknowledges the expertise and assistance of the University of Texas Law School Center for Public Policy Dispute Resolution and its Executive Director, E. Janice Summer. The Center for Public Policy Dispute Resolution provided training in negotiated rulemaking for all participants in the NRG. The Center also provided the NRG with most of the language and the framework for the mediation section of the rules. The GLO proposes the rules today as the Product of the Negotiated Rulemaking Group.

OSPRA, §40.107(c)(4), requires TNRCC and TPWD to adopt the rules. TNRCC and TPWD will adopt the rules after they have been adopted by the GLO. TNRCC and TPWD request that commenters structure their comments to address the effects of the rules at all trustee agencies. The NRG will participate in developing responses to the comments received by all trustees and will participate in any modification of the proposed rules in response to comments received.

The rules outline the procedures that trustees may use in assessing damages to natural resources caused by oil spills in coastal waters. The rules do not apply to oil spills that do not impact coastal waters or to any hazardous substance spills. The rules apply only to the actions of state trustees and are, to the extent Permitted by OSPRA, intended to achieve consistency with existing and proposed federal rules for natural resource damage assessment. There are several ways the rules differ significantly from the existing and proposed federal rules. First, pursuant to OSPRA, §40.107(c)(5)(C), the rules require the trustees to invite the responsible person to participate in the damage assessment process (as detailed in §20.23, relating to Responsible Person Participation). Second, pursuant to OSPRA, §40.107(c)(6)(C), the trustees are required to conduct a field investigation (as detailed in §20.30, relating to Field Investigation). Third, pursuant to OSPRA, §40.107(c)(7)(F), mediation of a disputed natural resource damage assessment claim is a prerequisite to invoking the jurisdiction of any court, as detailed in §20.43 (relating to Mediation). Fourth,

the rules provide that the trustees may invite the public to participate in determining whether an assessment is necessary (as detailed in §20.44, relating to Public Participation). The NRG believes that these procedures, designed to meet statutory requirements, will effectuate the legislative intent of "reasonably valuing the natural resources of the State of Texas in the event of an oil spill and that the state recover monetary damages or have actions commenced by the spiller as early as possible to expedite the restoration, and/or replacement of injured natural resources" (OSPRA, §40.002(b)).

The rules provide definitions for terms commonly used in the natural resource damage assessment process and terms used in Senate Bill 1049, and require the trustees to coordinate their activities with the state on-scene coordinator and the federal trustees. Senate Bill 1049 specifically required the trustees to enter into a Memorandum of Agreement (MOA) wherein they would agree to resolve any disputes among them by mediation. The trustees did execute the required MOA and it was published in the Texas *Register* on August 2, 1994 (19 Tex Reg 6053). The rules also provide for public participation, review, and comment throughout the damage assessment process. Trustees are required by §20.31 (relating to Notice of Intent to Perform An Assessment) to issue a Notice of Intent to Perform an Assessment when a decision has been made to perform an assessment under these rules. The decision to perform an assessment is based upon an injury to natural resources, including any impairment of the services provided by the natural resource. Services include the human and ecological benefits and uses of the natural resource. The protocols and procedures for determining injury are listed at §20.32 (relating to Assessment Procedures and Protocols for Determining Quantifying and Valuing Natural Resource Injury and Loss of Services). This section is the heart of the proposed rules, describing the scientific an economic methods which trustees may use in determining injury and damages.

The rules provide for three types of assessments: expedited, as defined in §20.33 (relating to Expedited Damage Assessment); comprehensive, as defined in §20.34 (relating to Comprehensive Damage Assessment); and negotiated, as defined in §20.35 (relating to Negotiated Assessment). In addition to recovering damages for the injury to natural resources, the trustees are also entitled to recover the costs of performing the assessment. The allowable recoverable costs are provided in §20.41 (relating to Recovery of Damages). The trustees must maintain an assessment record for each damage assessment. All closed assessment records will be permanently maintained in the Archives and Records Division of the Texas GLO and will be available to the public, as provided in §20.40 (relating to Assessment Record). The statutorily required mediation process is described in §20.43 (relating to Mediation). This section requires the trustees and the responsible person to mediate a disputed natural resource damage assessment prior to initiating a lawsuit.

The trustees have the option to proceed with a damage assessment under these rules or under rules pursuant to OPA. State natural resource trustees are designated by the Governor under both OPA and the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA), 42 United States Code Annotated, §9601 et seq. OPA allows state trustees to assert a claim for natural resource damages from oil spills in federal court and OSPRA allows state trustees to present such a claim in state court. Thus, state trustees may opt to use the rules or the rules promulgated pursuant to OPA. The federal trustees may make a claim separate from, and in addition to, any claim made by the state trustees. The federal trustees can use federal rules, state rules and any other procedure allowed by federal law. Through the NRG, the state trustees agreed to invite participation by the responsible person, as provided for in the rules, in the damage assessment process whenever the trustees choose to use federal rules instead of the state rules. The state trustees have also agreed that a preliminary field investigation will be conducted by them in each case, regardless of which rules are used. This provision ensures compliance with the OSPRA mandate that trustees consider the unique circumstances of each spill. Finally, the state trustees may invite public participation in determining whether an assessment shall be conducted and in the development of equivalent resource plans.

The rules are proposed pursuant to OSPRA, §40.017(c)(4), which requires the commissioner to adopt administrative procedures and protocols for the assessment of natural resource damages from an unauthorized discharge of oil.

Timothy G. McKinna deputy commissioner, Division of Oil Spill Prevention and Response, has determined that for the first five years they are in effect, the rules will not cause any additional costs to state and local governments. The Texas natural resource trustees have been conducting natural resource damage assessments for several years and these rules codify many of the procedures and protocols used in the past. There are no requirements in the rules which will increase the state's costs of perforating natural resource damage assessments in cases of oil spills in coastal waters. Local governments are not required to perform any additional functions as the result of the rules. The new requirement of mediation is not expected to cause an increase in the overall costs of assessments because the use of mediation is expected to enhance speedy resolution of disputed claims and therefore reduce the overall costs by eliminating the need for litigation. Further, all costs incurred by the trustees in complying with the rules are reimbursable

to the state by the person responsible for the unauthorized discharge of oil. The rule contains the statutory time lines for conducting natural resource damage assessments and may result in an overall reduction in the trustee's assessment costs. Natural resource damages are not considered revenues but are compensation for injuries to natural resources. The monies recovered by trustees may be used only to reimburse the trustees for the cost of performing the assessment and for restoring, rehabilitating, replacing and/or acquiring the equivalent of injured natural resources. In summary, Mr. McKinna concludes that the rules will not result in additional costs to state or local governments, nor will it impact revenues to state and local governments.

Mr. McKinna also has determined that for the first five years the rules are in effect certain benefits will accrue to the public. First, the public, at the discretion of the trustees, may participate in determining whether an assessment should be conducted. Second, the public is granted the opportunity to review and comment on proposed assessments and restoration plans. Third, the public will benefit from the delineation of the procedures and protocols that will be used to assess injury to and restore the resources they own. Finally, the public will benefit from the required use of mediation, which is expected to result in lower litigation costs and speedier restoration of injured resources.

There will not be any economic cost to persons or small businesses as a result of the rules because the rules do not require private persons to perform any activity. The rules are only applicable to state officials when they are fulfilling their statutory duty to restore, rehabilitate, replace or acquire the equivalent of natural resources injured as the result of a coastal oil-spill.

Comments on the proposed rules may be addressed to
Ingrid K. Hansen
Texas General Land Office
Legal Services Division, Room 630
1700 North Congress Avenue
Austin, Texas 78701-1495
(512) 463-5007; fax (512) 463-6311.
Comments must be received by 5:00 p.m. CDT on September 19, 1994.

The rules are proposed under Texas Natural Resources Code, §40.107, which provides the GLO with the authority to promulgate the procedures and protocols for assessing damages to natural resources injured by an unauthorized discharge of oil.

[Proposed rule omitted].

Appendix E

Best Practices for Using Mediated Approaches to Develop

Policy Agreements: Guidelines for Government Agencies (Draft)

Report and Recommendations of the
SPIDR Environment/Public Disputes Sector Critical Issues Committee
(Draft for Circulation and Review)

BEST PRACTICES FOR USING MEDIATED APPROACHES TO DEVELOP POLICY AGREEMENTS:

GUIDELINES FOR GOVERNMENT AGENCIES.

Recommendation 1: An Agency Should First Consider Whether the Issues are Appropriate for Negotiation:

Before a government agency or official decides to sponsor or participate in an agreement seeking-process, it should consider its objectives and the suitability of the issues for negotiation. All potential participants need to understand the sponsor's intent – whether it is to try to reach a consensus-based agreement, or to seek advice, or to build a coalition or public support. In particular, before the sponsoring agency convenes a collaborative process, it is essential for the agency to determine internally its willingness to share control over the process and the resolution of the issue. This is essential to avoid participant concerns about coercion or manipulation.

Recommendation 2: Agency Leaders Should Support the Process:

Agreement-seeking processes should only be undertaken when there is endorsement and tangible support from the highest levels of leadership in the sponsoring agency and other agencies with jurisdiction and in some cases, from the administration or the legislature. The support, and often the presence, of leadership is necessary to assure participants of the commitment of those authorized decision makers who will be responsible for implementation. It helps sustain the process through difficult periods and enhances the probability of reaching agreements.

Recommendation 3: Stakeholders Must Be Supportive of the Process:

In order for an agreement-seeking process to be credible and legitimate, representatives of all necessary parties - those involved with or affected by the potential outcomes of the process- must agree to participate, or at least not to object to proceeding with the process. All necessary parties must be adequately represented by persons whom they self-select. If some interests are not sufficiently organized or lack of resources and these problems cannot be overcome, the issue should be addressed through traditional administrative or adjudicatory forums.

Recommendation 4: A Sponsoring Agency Should Ensure the Resources to Enable Full Participation and Completion of the Process:

Sponsoring agencies need to ensure that there are sufficient resources available to support the process from its initiation through the development of an agreement. As part of the pre-negotiation assessment, sponsors need to determine what allowances they will need to make to meet evolving resources needs as they emerge and provide for funds to accomplish the goals of the negotiation.

Recommendation 5: An Assessment Should Precede a Collaborative Agreement-seeking Process:

Government agencies or officials should first undertake a deliberate assessment and preparation phase (Phase 1) to ascertain whether the necessary conditions and present for negotiation to take place. There are three phases to a successful agreement-seeking process: Phase 1, the preparation or pre-negotiation phase, involves assessing whether the necessary factors to ensure legitimacy are present, and planning and preparing for the process. Phase 2 involves engaging in negotiations to try to reach agreement. Phase 3 involves implementing the agreement.

Recommendation 6: Ground Rules Must Be Mutually Agreed Upon by All Participants, and Not Established Solely by the Sponsoring Agency:

All participants must be involved in developing and agreeing to any protocols or ground rules for the process. Once ground rules have been mutually agreed upon, the facilitator or mediator must see that they are carried out, or point out when they are not being followed and seek to remedy the problems. Any modification to ground rules must be agreed to by all participants.

Recommendation 7: The Sponsoring Agency Should Ensure the Facilitator's or Mediators Independence and Accountability to all Participants:

It is preferable for all parties to share in selection of the facilitator or mediator. When that is not possible, an agency has a responsibility to ensure that any facilitator or mediator proposed to the participants is competent and impartial. This is particularly important where the complexity of issues and the pattern of communications among the participants suggests that special competence will be required.

The facilitator or mediator should not be asked by the sponsoring agency, or any other participant, to serve as their agent, or to act in any manner inconsistent with being accountable to all participants.

Recommendation 8: From the Outset, Both the Agency and the Participants Should Plan for Eventual Implementation of the Agreement:

Implementation needs to be considered as integral to the process from the beginning. The agreement should set out clear steps and stages for implementation: clarifying contingencies, tasks, resources, and oversight responsibilities.

Recommendation 9: Policies Governing These Processes Should Not be Overly Prescriptive:

Policymakers should resist overly prescriptive legislation or administrative rules governing such processes. In contrast to traditional processes, the effectiveness of consensus-based processes depends upon the fact that they are voluntary, informal and flexible in nature.