

**Negotiated Rulemaking:  
A Case Study of Administrative Reform**

by

Nancy Josephine Baldwin  
B.A., University of Wisconsin - Madison (1981)

**Submitted in partial fulfillment  
of the requirements for the degree of**

**Master of City Planning**

at the

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Department of Urban Studies and Planning

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Chairman, Departmental Committee

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## **Abstract**

This thesis is about reform development and organizational change. It is a case study of how an idea developed into a reform and gained the necessary support to test it. The setting is a large federal bureaucracy: the U.S. Environmental Protection Agency. The innovation is negotiated rulemaking, a way to develop rules which brings together affected parties and a mediator in an effort to reach consensus on what a rule should say. The paper examines the important internal and external agency factors that propelled the idea. It concludes that the reform reached the demonstration stage due to a hybrid of personal and professional characteristics of a few agency personnel, and the social, political and economic setting within which the agency existed in.

*Thesis supervisor:* Dr. Lawrence S. Bacow  
*Title:* Associate Professor of Law and Environmental Policy

## Acknowledgments

There are several people I would like to recognize and thank. First are the seven individuals who generously gave me their time and thoughts when I interviewed them: Ken Young, Dan Fiorino, Nell Minow, Phil Harter, Dave Pritzer, Gail Coad and John Palmisano. Second is Ken Young who deserves another acknowledgment and special thanks for including me in the project's activities as much as he did, and for making my summer internship at the EPA so enjoyable. Third are Professor Larry Susskind and Norman Dale, currently a MIT doctoral student, who assisted in the formulation of my thesis topic. Fourth is my thesis reader Dorothy Robyn, presently a MIT post-doctoral student. I am grateful for her detailed comments on my first and second drafts, which lead to a much higher quality thesis. Fifth is Murphy Brown who typeset several drafts and the final manuscript. Murphy and my brother Bob gave support and showed patience throughout the writing stages.

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# Preface

I wrote this case study with the advantage of an insider's view. I worked on negotiated rulemaking in the Environmental Protection Agency during the summer of 1982. Ken Young was my immediate supervisor. I saw firsthand how the idea unfolded and gained momentum, and indeed, contributed in a small way to the idea's development. I met and interacted with most of the important people involved with the project. I watched how the Regulatory Reform Staff operated and conducted business. I observed the organizational dynamics relating to the reform's development.

My connection with negotiated rulemaking continued as a research assistant for Professor Larry Susskind, Director of The Program on Negotiation at Harvard Law School. The Program is working with the EPA to document the negotiation demonstrations. I interviewed many of the key individuals connected with the project to document their attitudes towards and expectations of the demonstrations. We occasionally met with the EPA and Clark-McGlennon Associates, the consulting firm chosen to convene and facilitate the first negotiation, to update one another and discuss mechanics of the negotiations.

Throughout my involvement in negotiated rulemaking I sought to learn how and why the reform developed. In writing this thesis I interviewed seven individuals involved in negotiated rulemaking: Ken Young (ex-Project Director), Dan Fiorino (Chief, Regulatory Management Staff), Nell Minow (ex-EPA General Counsel), Philip Harter (private attorney), David Pritzer (the Administrative Conference of the U.S.), Gail Coad (Office of Management and Budget), and John Palmisano (Regulatory Reform Staff). They helped me develop the chronology of negotiated rulemaking, and understand what propelled and impeded it and reforms in general.

# Introduction

Formulating and testing new ways of doing things in government enables agencies to learn. Innovation can solve problems, increase efficiency and effectiveness, and enhance accountability. Reforms do not occur naturally though, especially not in large federal government bureaucracies where inertia is the norm. Something causes ideas to be researched, operationalized and tested. Precisely what causes reforms is not evident and most likely differs in every case. Knowing how one specific innovation developed into a reform and gained the support needed to test it provides insights into the general reform development process and may aid future reform efforts.

This thesis is a case study of the development of a particular innovation--negotiated rulemaking--in a federal agency, the U.S. Environmental Protection Agency (EPA). Negotiated rulemaking is a radically different way to develop rules than the current process. Negotiated rulemaking has never been used at the national level to develop general rules or policies. In traditional rulemaking an agency develops and publishes a "proposed" rule, solicits comments on it from affected interests, considers the comments, and promulgates the final rule. By contrast, negotiated rulemaking brings together affected parties--including industry, interest groups *and* the rulemaking agency itself--*before* a rule is proposed. With the help of a mediator they seek consensus on what a rule should say.

On February 22, 1983, a notice was published in the Federal Register announcing a planned demonstration of negotiated rulemaking in the EPA and soliciting candidate rules for the negotiations to center around. The case study that follows traces the idea from its early beginnings in the EPA to the announcement of the demonstration in the Federal Register. The case study attempts to answer the following questions: How did the reform come to be? Why was it pursued? What factors propelled its development? Were there barriers to overcome? What does this case study tell us about innovation development and organizational change?

The case study is at once, many things: It is an ethnography of administrative reform. It is a documentation of decision-making. It is a study of innovation development. It is a description of bureaucratic dynamics. It hopefully will be an aid to project directors who want to know how to get their ideas tested.

Part one of this thesis describes negotiated rulemaking and summarizes its perceived advantages over the traditional rulemaking process. Part two gives a synopsis of the idea's development. Part three sets the stage in which negotiated rulemaking developed. Part four is the main body of the thesis and tells the story of negotiated rulemaking in the EPA. Part five assesses negotiated rulemaking's broader significance for understanding reform development and organizational change.

## Part I

### Traditional Rulemaking versus Negotiated Rulemaking

Rulemaking is a power delegated to federal administrative agencies. It is defined as any agency process for formulating, amending or repealing a rule, where a rule refers to a regulation, policy or procedure for implementing or interpreting legislative mandates.

Federal rulemaking procedures are set forth by law in the Federal Administrative Procedure Act of 1946. An agency first publishes a general notice of proposed rulemaking (NPRM) in the Federal Register. The NPRM either explains the terms or substance of the proposed rule or describes the subjects and issues involved. The agency then offers "interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."<sup>1</sup> Next, the agency considers the comments, makes any revisions it deems appropriate, and then promulgates the rule.

"Notice-and-comment rulemaking", as the traditional process is called, frequently leads to litigation and subsequent appeals. Thus, the judicial branch plays an important role in shaping policy. Reflecting this, "traditional regulatory development" usually refers to the combined processes of notice-and-comment and adjudication.

Negotiated rulemaking is an alternative to the traditional regulatory development process. It allows an unprecedented level of citizen participation in agency decision-making. Affected and interested parties are convened to reach

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<sup>1</sup>5 U.S.C.A Section 553 (c), Federal Administrative Procedure Act. See Gellhorn and Byse, Administrative Law, Foundation Press (1974).



consensus on what a rule should say. For example, parties might decide what level of pollutant emissions are permitted, or how new toxic chemicals will be tested and registered. Negotiated rulemaking is characterized by consensus building and face-to-face negotiation among the interested parties, including the rulemaking agency. The parties set ground rules to guide the negotiation, e.g., when to meet, who the spokespersons will be, and what can be said to the press. They define the dispute and its constituent issues. They jointly explore the issues and underlying interests. They may collect additional data or information. The parties invent alternative options and solutions. Throughout the process, the parties bargain, trade and compromise. A mediator facilitates the discussions and caucuses with parties, but can not force any party to accept an agreement. If a negotiated agreement is reached, solving all or part of the problem, it is published in the Federal Register as the agency's NPRM. Next, the rule goes through the normal comment and revision process. Since all or most of the parties that comment on the NPRM are involved in the aforementioned negotiation process, this stage is somewhat perfunctory, and should go quickly and smoothly. The last stage is agency promulgation of the final rule. Hopefully subsequent litigation is precluded.

Negotiated rulemaking offers three main advantages over traditional rulemaking. First, the traditional rulemaking process usually resolves disputes between parties in court *after* rules are promulgated. Negotiated rulemaking aims to resolve conflicts out of court *before* rules are promulgated. Court proceedings--and the anticipation of them--encourage parties to compete fiercely against one another and take exaggerated positions to maximize their potential gains from judges. The win-lose nature of judicial decision-making reinforces adversarial relations and polarizes parties. Courts spend little time searching for solutions that lie between the extremes. Judges traditionally evaluate claims before them, rather than searching for innovative compromise solutions. As a result, court decisions are frequently extreme and unsatisfactory to at least one of the parties. The dissatisfied party(s) may slow down implementation of the rule or may appeal the decision to another court. Court rulings that are middle-ground solutions typically please neither party, largely because they do not represent a serious attempt to

accommodate the interests of all the litigants. Instead, middle-ground solutions are arrived at by merely "splitting the difference" between the parties.

In contrast, negotiated rulemaking encourages parties to work with one another to search for common ground and jointly solve their problems. Negotiated rulemaking may facilitate compromise and mutual accommodation among parties because the process is non-adversarial and seeks a solution that is acceptable to all parties. The face-to-face collaborative problem-solving that characterizes negotiation is more likely to develop positive working relationships among parties, and humanize disputes. Comaraderie may develop and may subsequently fuel the quest for a consensual agreement. The joint problem-solving process may enable parties to correct misperceptions of one another and begin to see the larger picture of conflicting priorities. A solution satisfying all parties may be found.

Second, substantive issues--at the heart of disputes--can be addressed easier in negotiated rulemaking than in the traditional rulemaking process because the former is a more flexible process. Because notice-and-comment rulemaking frequently fails to develop a satisfactory rule, courts resolve disputes. Yet adjudicatory processes and courtroom procedures are inflexible. Judicial review scrutinizes procedure not substance. Courts have strict rules concerning what evidence can be submitted. Useful information on substantive issues is often barred. Evidence and information that is admissible in court is often screened, simplified and distorted by parties because posturing is encouraged.

Negotiated rulemaking on the other hand, is more flexible. It can consider a wider range of interests and admit more information directly bearing on the real conflict. It can intercept numerous parties and issues. Direct dialogue discourages the presentation of extreme positions and irrelevant information. Face-to-face interaction and facilitating abilities of mediators tend to expose the true interests and priorities behind parties' positions. Negotiation's flexibility allows parties to concentrate on the important substantive issues. Time is not spent dwelling on spurious and procedural issues, or perfecting and defending extreme stances, but on designing a good solution that addresses the real problem.

A third advantage of negotiated rulemaking is that it permits quality citizen participation. In notice-and-comment rulemaking, administrative agencies determine unilaterally what the rule should be. Citizen involvement is more "presentation" than "participation". Groups present their position on a rule in a one-time submittal of comments. Parties are not able to respond to other comments, nor make rebuttals to challenges of their position. If there are public hearings, they usually fail to foster constructive participation because they encourage dramatic presentations and defensive discussions. If a rule is litigated, a judge or tribunal (versed in law, not science or policy) decides what the rule should be. The decision is out of the hands of the parties.

In negotiated rulemaking the locus of decision-making authority shifts to the parties themselves. The process seeks to provide direct and meaningful citizen participation. Negotiated rulemaking resembles a legislative-political process; affected parties collectively make complicated trade-offs, and balance conflicting interests in an effort to design rules. Constructive citizen participation may make rules better, more realistic; fairer and more acceptable. Implementation and enforcement of a rule may be swifter and smoother if the affected parties help design it than if it is decided by the agency or imposed by a court.

## Part II

### Synopsis of Idea's Development

The first talk of using negotiation in rulemaking<sup>2</sup> in the EPA dates back to 1978. The idea was amorphous at this stage. EPA was one of the most litigious federal agencies. Top-level administrators believed that there had to be a better way to settle disputes, one that was faster, cheaper and less adversarial. EPA had been involved in a number of conflicts where environmental mediation had been successfully employed. Because of the good track record of environmental mediation, EPA began looking closer at negotiation and mediation to help resolve several types of regulatory disputes, rulemaking being one of them. Negotiated rulemaking did not become a project of any stature until early 1982, when Kenneth C. Young, Jr. was named to lead the investigation of the idea. Six months later in a turning point, Young formally received the go ahead to test negotiated rulemaking in two demonstration projects. In the following four months, the project acquired definite shape, and the logistics of running the demonstrations were planned. Preparation for the first demonstration and final decision-making dragged on for four more months. In late February 1983, the first demonstration got underway with a formal notice in the Federal Register.

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<sup>2</sup>The EPA called the idea "regulatory negotiation" or "reg. neg.", as did Congress, the Reagan Administration, and the Administrative Conference of the U.S. Professionals in the dispute resolution community prefer "negotiated rulemaking" because it distinguishes negotiation in rulemaking from negotiation in other regulatory disputes, such as permitting, licensing and enforcement.

## Part III

### Context of Negotiated Rulemaking

#### Complaints and Growing Dissatisfaction

Throughout the 1970's many parts of society criticized the regulatory process. By 1978 a remarkably diverse group of citizens and political leaders, business executives and consumer advocates, economists and lawyers agreed on a fundamental point--something was wrong with much of the substance and procedure of regulation.<sup>3</sup> Government regulation of business was commonly described as "a disappointment at best, and more often than not, an utter failure and scandal."<sup>4</sup> The intellectual community wrote about the inability of the social, political, and legal institutions to resolve environmental disputes in a timely, efficient and decisive manner.<sup>5</sup> In their view, the notice-and-comment rulemaking process, originally intended to be a flexible, discretionary, legislative-type process, had been relentlessly judicialized, formalized and rationalized into something quite different.<sup>6</sup>

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<sup>3</sup>See, e.g., R. Stewart, "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking", *Harvard Law Review*, Volume 94, No. 8 (June 1981); Roger Cramton, "Causes and Cures of Administrative Delay", *American Bar Association Journal*, Volume 937, No. 58 (1972); and Morgan, "Towards a Revised Strategy for Rulemaking", *University of Illinois Law Review*, Volume 21, No. 78 (1978).

<sup>4</sup>Paul H. Weaver, "Regulation, Social Policy and Class Conflict", *The Public Interest*, No. 50 (Winter 1978).

<sup>5</sup>Lawrence Susskind and Alan Weinstein, "Towards a Theory of Environmental Resolution", *Environmental Affairs*, Volume 9:311, (1980).

<sup>6</sup>See, e.g., Peter Schuck, "Litigation, Bargaining and Regulation", *AEI Journal on Government and Society* (July/August 1979).

Business was outraged by the continual pattern of long project delays and protracted litigations. Delays decreased revenues and significantly increased material, construction, and legal costs. The uncertainty of unresolved conflicts hindered intelligent investment decisions. Business objected not so much to the goals of regulation, but the manner in which regulations were designed and implemented.<sup>7</sup> Critics argued that the very *process* by which regulations were devised failed to take proper account of the practical needs and incentives of business enterprise. They complained about the current implementation process, arguing it often required exhaustive filing and reporting, and nitpicking compliance. Business accused government of threatening them with "massive subpoenas, adverse publicity, cumbersome compliance, and surprise new policies that demanded sudden changes in business operating procedure and/or expensive retooling."<sup>8</sup>

Environmental groups' discontent took three forms.<sup>9</sup> They were resentful because they considered themselves inadequately represented in decision-making. They were frustrated because policy decisions seemed to be dissipated by political biases and technical incompetence. And they were thwarted by the inability of leadership to weld the numerous parts of government into a coherent unified and effective team. In their opinion, environmental legislation was far from satisfactory. There was not enough of it, it developed too slowly, and it was inadequately implemented and enforced.

Prominent judges voiced concern over the growing imbalance of power between administrative agencies and the judiciary, fearing "Government by the

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<sup>7</sup>Robert B. Reich, "Regulation by Confrontation or Negotiation", *Harvard Business Review* (May/June 1981).

<sup>8</sup>*ibid.*

<sup>9</sup>Herbert Kaufman, "Administrative Decentralization and Political Power", *Public Administration Review*, Volume XXIX, No. 1 (Jan/Feb 1969).

Judiciary."<sup>10</sup> Moreover, judges questioned the ability of the courts to cope with the complex scientific and technical issues characteristic of environmental disputes.<sup>11</sup>

## Reform Thinking

In response to the widespread regulatory criticism, regulatory reform thinking swept through the nation in the mid-1970's. A large empirical and theoretical literature amassed describing alternative forms of regulation.<sup>12</sup> It was hoped that changing regulatory mechanisms would decrease regulation's adverse impacts on society. Most reforms addressed problems of implementation and enforcement. Some examples include: emission fees, effluent charges, "bubbles" and emission trading, consolidated permits, and environmental auditing.

Other reforms proposed to alter the rulemaking process. A popular theme to remedy the ills of the regulatory malaise was more participative or "democratic" administration.<sup>13</sup> For example, utilizing non-governmental standards (those developed by the private sector "standard-writing industry") in developing

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<sup>10</sup>See, e.g., Levanthal, "Environmental Decision-making and the Role of the Courts", *University of Pennsylvania Law Review*, Volume 509 (1974); and, D. Horowitz, "The Courts and Social Policy" (1977).

<sup>11</sup>See, e.g., D.L. Bazelon, "Risk and Responsibility", *Science*, Volume 205, No. 20, (July 1979).

<sup>12</sup>See, e.g., R. Stewart and J. Krier, "Environmental Law and Policy", (1978); Lawrence White, "Effluent Charges as a Faster Means of Achieving Pollution Abatement", *Public Policy*, Volume 25 (1976); Susan Rose-Ackerman, "Market Models for Water Pollution Control", *Public Policy*, Volume 25, No. 3, (1977); Allen Kneese and Blair Bower, "Standards Charges and Equity", in *Managing Water Quality: Economics, Technology, Institutions* (1968), Resources for the Future.; S. Breyer, "Analyzing Regulatory Failure", *Harvard Law Review*, Volume 92:549 (1979); Collin Diver, "A Theory of Regulatory Enforcement", *Public Policy*, Volume 28, No. 3 (1980).

<sup>13</sup>Marvin Meade, "Participative Administration--Emerging Reality or Wishful Thinking?", in Dwight Waldo's, "Public Administration in a Time of Turbulence" (1971).

mandatory federal standards affecting safety and health;<sup>14</sup> delegating standard-development for product safety to selected groups outside the Consumer Product Safety Commission (the "offeror" process);<sup>15</sup> and employing bargaining, negotiation, and mediation techniques in many agency's policy development and standard setting processes.<sup>16</sup>

### Growing Field of Environmental Dispute Resolution

Throughout the late 1970's the field of environmental dispute resolution, of which negotiated rulemaking is a part of, burgeoned. The field was pioneered by Gerald Cormick and Jane McCarthy, then of the Community Crisis Prevention Center at Washington University in St. Louis. Numerous consensual techniques for resolving environmental disputes out of court were developed, such as,

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<sup>14</sup>Hamilton, "The Role of Non-Governmental Standards in the Development of Mandatory Federal Standards affecting Safety or Health", *Texas Law Review*, Volume 1329, No. 56 (1978); R. Dixon, "Standard Development in the Private Sector: Thoughts on Interest Representation and Procedural Fairness".

<sup>15</sup>Teresa Schwartz, "Safety Commission: A Flawed Product of the Consumer Decade", A report to the Administrative Conference of the U.S. (August 1982).

<sup>16</sup>See, e.g., Richard Stewart, "The Reformation of American Administrative Law", *Harvard Law Review*, Volume 1667, No. 88 (1975); R. Stewart, "Regulation, Innovation and Administrative Law: A Conceptual Framework", *California Law Review*, Volume 69, No. 5 (September 1981); R. Stewart, "Rethinking Regulation: Negotiation as an Alternative to Traditional Rulemaking", *Harvard Law Review*, Volume 94, No. 8 (June 1981); Philip Harter, "Negotiating Regulations: A Cure for the Malaise?", *Georgetown Law Review*, (October 1982); L. Bacow, "Bargaining for Job Safety and Health", MIT Press (1980); P. Schuck, "Litigation, Bargaining and Regulation", *AEI Journal on Government and Society* (July/August 1979); S. Boyer, "Alternatives to Administrative Trail-type Hearings for Resolving Complex Scientific, Economic and Social Issues", *Michigan Law Review*, Volume III, No. 71 (1972).



facilitation,<sup>17</sup> policy dialogue groups,<sup>18</sup> consensus building,<sup>19</sup> concilitation,<sup>20</sup> negotiation,<sup>21</sup> and mediation.<sup>22</sup> Over 35 organizations were formed specializing in

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<sup>17</sup>*Facilitation*: a voluntary process to clarify and resolve differences among groups before a conflict reaches impasse. Facilitation is most effective when used by groups with similar objectives and/or having a functional interdependence where one can not act without the other. It involves informal collaborative problem solving exercises with a varying number of persons who may not officially speak for specific groups. The problems and issues themselves are often ill-defined at the outset. The group works toward consensus on the issues, but agreements may or may not be formally recognized or documented at the end. Defined in "New Tools for Resolving Environmental Disputes", by Peter Clark and Wendy Emrich. Prepared for Council of Environmental Quality and the Resource and Land Investigations Program of the Geological Survey in the U.S. Department of the Interior (1980).

<sup>18</sup>*Policy Dialogue Groups*: a small group process in which traditional adversaries on public policy issues meet to reason together, seeking areas of agreement and clarifications of their differences. Defined by Samuel Gusman of The Conservation Foundation, in "Policy Dialogue", a paper submitted for publication in Environmental Comment (10/30/81).

<sup>19</sup>*Consensus Building*: a method for making group decisions without voting. Agreement is reached through a process of gathering information and viewpoints, discussing, persuading, synthesizing proposals and developing new alternatives. Consensus is reached when everyone agrees to a solution. Defined in "Natural Resource Conflict Management Workbook", prepared for a series of workshops initiated by the U.S. Geological Survey (1980).

<sup>20</sup>*Concilitation*: a practice used to improve the attitudes different parties hold toward each other, for the purpose of encouraging reasonable discussion and, where necessary, rational bargaining. It employs a range of psychological techniques aimed at correcting perceptions, reducing hostility and unreasonable fear, and clarifying differences. Defined in: *ibid*.

<sup>21</sup>*Negotiation*: a table process by which two or more conflicting parties attempt through bargaining to reach an agreement on substantive issues about which they disagree. Negotiation generally involves direct discussions between the conflicting groups and, if successful, results in a settlement in which all parties' needs are met. Defined in: *ibid*.

<sup>22</sup>*Mediation*: a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be workable solution. Defined by Gerald Cormick, Institute of Environmental Mediation.

environmental dispute resolution.<sup>23</sup>

Environmental dispute resolution techniques were tested in numerous

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<sup>23</sup>List developed from Lawrence Susskind's "Environmental Mediation and the Accountability Problem", *Vermont Law Review*, Volume 6, No. 1 (Spring 1981), and "Agenda for Environmental Negotiation", *The Environmental Impact Assessment Review*, Volume 3, No. 1, pg. 92-94 (1982): Environmental Negotiation Program (MIT, Cambridge, MA); Harvard Negotiation Center (Harvard Law School, Cambridge, MA); Institute for Environmental Mediation (Madison, WI); The Conservation Foundation (Washington, D.C.); The Office of Environmental Mediation (Seattle, WA); Clark-McGlennon Associates (Boston, MA); The Rocky Mountain Center on Environment (ROMCOE), (Denver, CO); New England Environmental Mediation Center (Boston, MA); Center for Environmental Conflict Resolution (Minneapolis, MI); Environmental Mediation International (Washington, D.C.); The Environmental Mediation Service (Norfolk, VA); Keystone Center for Continuing Education (Keystone, CO); FORUM on the Community and the Environment (Palo Alto, CA); The Center for Environmental Conflict Resolution (Washington, D.C.); Federal Mediation and Conciliation Service; Western Network (Santa Fe, NM); Shorett and Associates (Seattle, WA); Interaction Associates, Inc. (San Francisco, CA); Center for Conflict Resolution (Honolulu, HI); Adaptive Environmental Assessment (Ft. Collins, CO); Illinois Environmental Consensus Forum (Urbana, IL); Center for Collaborative Problem Solving (San Francisco, CA); Scientists' Institute for Public Information (NY, NY); Public Mediation Service (Falls Church, VA); Institute for Mediation and Conflict Resolution (NY, NY); Environmental Law Center (South Royalton, VT); Center for Negotiation and Public Policy (Boston, MA); The Upper Midwest Council (Minnesota); New York University's Graduate School of Business Administration (NY, NY); University of Colorado; Institute for Environmental Negotiation (Charlottesville, VA); American Arbitration Association (NY, NY).

environmental conflicts and many were written up as case studies.<sup>24,25</sup> Evaluators and participants, often including EPA regional offices, commended negotiation and mediation techniques in many of the disputes. Other parts of the federal government, e.g., Department of Energy, Department of Agriculture, and the Department of the Interior, used negotiation and mediation and were encouraged

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<sup>24</sup>L. Susskind identifies many case studies in "Environmental Mediation and the Accountability Problem", *Vermont Law Review*, Volume 6, No. 1, pg. 3-4 (Spring 1981).

Snoqualmie River Dispute, see G. Cormick, "Mediating Environmental Controversies: Perspectives and First Experiences", 2 *Earth Law Journal* (1976).

White Flint Shopping Mall, see Malcolm Rivkin, "An Issue Report: Negotiated Development, a Breakthrough in Environmental Controversies" (1977).

The National Coal Policy Project, see Detailed Reports of the Task Forces: Two Volumes and a Summary, F. Murray ed. (April 1978). Published by the National Coal Policy Project, CSIS, Georgetown University.

Bachman Warbler Dispute, see "Resolving the Bachman's Warbler Controversy", *Conservation News*, Volume 1, No. 13, at 10-12 (August 1977).

General Electric PCB Case, see A. Weinstein, "Application of Environmental Mediation to Energy Facility Siting Dispute: Prospects and Problems", unpublished Master's Thesis submitted to the Department of Urban Studies and Planning, MIT (May 1979).

Grayrocks Dam, see Julie Wondolleck, "Bargaining for the Environment: Compensation and Negotiation in the Energy Facility Siting Process", unpublished Master's thesis submitted to the Department of Urban Studies and Planning, MIT (September 1979).

<sup>25</sup>"Colstrip Power Plant", Timothy Sullivan; "Negotiated Rulemaking (301(h) Case)", Diane Hoffman and Mary Lucci; "Foothills Water Project", Heidi Burgess; "Brayton Point Coal Conversion", Doug Smith; "Brown Paper Company", David Gilmore; "Jackson Water Treatment Plant", Steven Hill; "Holston River", Alexander Taegerman. All in "Resolving Environmental Regulatory Disputes" by Lawrence Susskind, Lawrence Bacow, and Michael Wheeler, Schenckman Publishing Company (1983).

Interstate 90, Portage Islands and Port Townsend Ferry Terminal; See Allan Talbot, "Environmental Mediation, Three Case Studies", published by the Institute for Environmental Mediation.

Homestead Mining; See Larry Lempart, "Lawyers sans Armor Resolve Environmental Case", *Legal Times*, Volume IV, No. 50 (May 24, 1982).

Policy Dialogue Groups, for a) training of toxicologist, b) initial testing of new industrial chemicals, c) follow-up for new chemicals after they are manufactured, d) identification of low risk situations for new chemicals, e) road construction in national forests, f) definition of hazardous wastes, g) information for communities hazardous waste disposal sites. See S. Gusman, The Conservation Foundation, "Policy Dialogue", a paper submitted for publication in *Environmental Comment* (10/30/81).

with the results.<sup>26</sup> Negotiation and mediation was successfully employed to develop policy in a few federal agencies: development of regulation for cable television and exchange network facilities for interstate access (the Federal Commerce Commission); setting of producer prices of natural gas (the Federal Power Commission); setting of standards for telecommunication's electrical systems in hazardous locations, and protective equipment for supermarket employees in meat departments (the Office of Safety and Health Administration); and development of automileage regulation (Department of Transportation).<sup>27</sup>

A large amount of literature on environmental dispute resolution techniques

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<sup>26</sup>Nancy Stockholm, in "New Approaches to Managing Environmental Conflict: How can the Federal Government Use Them?", Report for the Council on Environmental Quality (June 1980), compiles a compedium of federal experiences with environmental mediation as of 1980.

<sup>27</sup>P. Harter, "Report to the Administrative Conference of the U.S. on Regulatory Negotiations" (Fall 1981).

and their applications had amassed.<sup>28</sup> Some of it found its way onto desks of business executives, environmentalists, politicians, attorneys, community leaders, and bureaucrats. Several national and regional workshops and conferences on environmental dispute resolution were held. The Administrative Conference of the United States' (ACUS) adoption of a resolution on regulatory negotiations was evidence of the widespread support of the idea in government.<sup>29</sup> By the time negotiated rulemaking found its way into the EPA bureaucracy, it was supported by a substantial body of literature.

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<sup>28</sup>Sec, e.g., David O'Connor, "Environmental Mediation: the State-of-the Art", *Environmental Impact Assessment Review*, published by the Lab of Architecture and Planning, MIT (October 1978). American Management Systems Consultants, "The Potential of Mediation for Resolving Environmental Disputes Related to Energy Facilities" (1979). American Management Systems Consultants, "The Potential of Alternative Conflict-Management Techniques for Resolving Environmental Disputes related to Energy Facilities", Report for the Department of Energy (1980). L. Susskind and A. Weinstein, "Towards a Theory of Environmental Dispute Resolution", *Environmental Affairs*, Volume 9 (1980-81). Nancy Stockholm, "New Approaches to Managing Environmental Conflict: How Can the Federal Government Use Them?", prepared for the Council on Environmental Quality (CEQ) (June 1980). Clark-McGlennon Associates, "New Tools for Resolving Environmental Disputes", published in cooperation with American Arbitration Association (AAA), CEQ, and the U.S. Geological Survey (USGS) (1980). Susan Carnduff and Joel Russell, "Alternative Environmental Mediation Structures within the Federal Government", Final Report to the CEQ (1980). Clark-McGlennon Associates, "Selected Readings on Conflict Management", published in cooperation with AAA, CEQ, USGS (1980). Clark-McGlennon Associates, "Environmental Conflict Management-Working Papers", published in cooperation with AAA, CEQ, USGS (1981). Howard Bellman, Gail Bingham, Ronnie Brooks, Susan Carpenter, Peter Clark and Robert Craig, "Environmental Conflict Resolution: Practitioner's Perspective of an Emerging Field", *Resolve Newsletter* (Winter 1981). Gail Bingham, "Does Negotiation hold a promise for Regulatory Reform?", *Resolve* (Fall 1981). L. Susskind and A. Weinstein, "How to Resolve Environmental Dispute Out of Court", *Technology Review* (January 1982).

<sup>29</sup>The ACUS is a governmental body comprised of 90 members, half government employees, mainly from federal agencies. The non-government members are from industry, consumer and other special interest groups, and hold two year terms. The chairman of the ACUS is appointed by the President. The Conference is divided into nine committees (presently consolidated to six), each assigned a variety of projects. Recommendation 82-4, "Procedures for Negotiating Proposed Regulation" (June 18, 1982). Based on a study by P. Harter.

## Part IV

### How Negotiated Rulemaking Developed

#### Early Beginnings

The identified regulatory malaise, reform spirit and growing environmental dispute resolution field was the backdrop for negotiated rulemaking's story in the EPA. The idea of using negotiated rulemaking in the EPA first emerged during the Carter Administration. Douglas M. Costle was the EPA Administrator. Regulatory reform was one of his top priorities,<sup>30</sup> influenced in part by the environment surrounding him. Costle was committed to be a regulatory reform leader. He propagated a reform spirit in the Agency and attracted many high-caliber entrepreneurs.

Two areas in which Costle encouraged reform thinking were regulatory development and public participation. By 1978 two procedural reforms in regulatory development had been tested and deemed successes.<sup>31</sup> One involved cancellation of pesticide registration, the other, issuing of water pollution discharge permits. Both actions traditionally were formal, court-like hearings, which proved ill-suited for agency decision-making. The new procedure for pesticide decision-making used technical panels for gathering information and making decisions. The new procedure for water discharge permit used informal, legislative-style hearings. Both reforms were managed by the Office of General Counsel (OGC).

These two reforms served as stepping stones for the emergence of negotiated

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<sup>30</sup>"Regulatory Reform Initiatives, Quarterly Progress Report", published by the EPA (August 1978), p.i.

<sup>31</sup>*ibid.*

rulemaking in the EPA. They demonstrated to the Agency that informal, joint problem-solving processes could work in regulatory decision-making, and had numerous advantages over the normal processes. The reforms also illustrated that a high-level of citizen participation in decision-making was manageable and, more importantly, the affected parties' expertise in scientific and technical issues was extremely useful.

The reform crusade continued. With so many keen policy analysts looking for reforms, it is not too surprising that some landed on negotiation and mediation techniques. Environmental dispute resolution had developed into a field of some stature and, as has been previously mentioned, negotiation and mediation had been successfully employed in numerous environmental conflicts. Further, negotiated rulemaking was being touted as the cure for the regulatory malaise. Researching the idea would be a statement of EPA's concern in the litigiousness and regulatory miasma, and their desire to improve it. Not pursuing the idea might have portrayed EPA as insensitive, unresponsive, or ignorant of the growing environmental dispute resolution field.

In 1978 EPA's General Counsel, headed by Jody Bernstein, began to examine how negotiation might be used to resolve regulatory disputes in permitting, enforcement, registration, and especially rulemaking. Nell Minow, then special assistant to Bernstein, conducted the examination. The exploration of the idea began, Minow recalls, when Bernstein "handed [her] a brochure about environmental mediation by Gerald Cormick's Institute for Environmental Mediation based in Seattle, and said look into this." Minow read the brochure, contacted Cormick, and had numerous discussions with him. OGC then contracted with Cormick's organization to further develop environmental mediation concepts. EPA contributed \$10,000 to the effort and several other agencies matched EPA's contribution.

In mid-1980, a representative from EPA appeared before a Senate Hearing on

regulatory negotiation and strongly support the idea.<sup>32</sup> Testimony was also heard from representatives of both the private sector and public sector who had specific experiences in regulatory negotiation, including the National Coal Policy Group and The Conservation Foundation. The witnesses supported regulatory negotiation as a valuable aid to achieving more flexible and workable regulatory policies. An outgrowth of these Senate hearings, was a proposed Senate bill that encouraged the utilization of regulatory negotiation, and authorized grants for administrative expenses of regulatory negotiation commissions.<sup>33</sup> However, the bill went nowhere.

### **Change of Administration**

The change of administrations in 1980 slowed the development of negotiated rulemaking. All but EPA's most basic functions halted. It took over a year to put together a team of political appointees and bring them up to speed. Negotiated rulemaking, still at the conceptual stage, was low on the list of priorities. It was not an urgently needed reform, but a "chique procedural reform dreamed up by moderate intellectuals concerned with good government", expressed an outside observer. The ideological bent of the new Administration also retarded the idea. Reagan's anti-environmental stance caused a massive exodus out of EPA. The Agency was grossly understaffed and those remaining had to concentrate on the basic functionings of the Agency. Further, as one agency employee recalled, "Reagan's people came in with a seige mentality. They mistrusted most of the Agency. . . they didn't want to hear anything from anyone". Most of the ideas pursued by the previous Administration, including negotiated rulemaking, were automatically suspect, and resisted. The new Administration's intention was "to sell

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<sup>32</sup>Testimony from Roy Gamse, Deputy Associate Administrator of the Office of Planning and Management (the Policy Office), Joint Hearings on Regulatory Negotiation before the Senate Committee on Small Business and the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, U.S. Senate, 96th Congress, 2nd session (July 29-30,1980).

<sup>33</sup>Congressional Record, September 18, 1980 (S-13020-9).



out to industry", continued the EPA employee. Thus without understanding the idea nor knowing much about environmental regulatory disputes, Reagan's appointees saw negotiated rulemaking as impeding their efforts to "sell out", since both environmental groups and industry would be allowed to participate. "The new Administration preferred to negotiate with industry alone, and was confident it could do so."

## **Cannon**

Negotiated rulemaking was not pursued in the new Administration until Joseph A. Cannon, head of the policy office,<sup>34</sup> entered the Agency. By fall of 1981 his office began investigating the idea. Cannon's interest in negotiated rulemaking arose from many reasons. First, Cannon was in a precarious situation: he entered the Agency as an acting head of the policy office. Cannon needed to create an impressive portfolio to have any chance of becoming the permanent head. Cannon was convinced negotiated rulemaking would succeed because of the good track record environmental dispute resolution techniques had. Further, environmental mediation was a popular idea and was gaining widespread support from industry, environmental groups, and all levels of government. Investigating such a popular idea might be the advertisement he needed. Second, Cannon saw political gains in backing negotiated rulemaking. As the previous Administration had realized, pursuing negotiated rulemaking portrayed the agency as responsive, innovative, and committed to improving performance and efficiency. Additionally, the Reagan Administration, Office of Management and Budget (OMB), and the President's Task Force on Regulatory Relief liked the idea and were supportive of it. With all the interest and support of negotiated rulemaking Cannon must have seen an opportunity for significant personal gain. If he was responsible for the first demonstration of negotiated rulemaking and it succeeded and grew into a sweeping

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<sup>34</sup>His official title was Acting Associate Administrator, Office of Planning and Resource Management (OPRM).

reform throughout the federal government, Cannon would become well-known in many circles. A fourth motivating factor in Cannon's pursuit of negotiated rulemaking was his genuine interest in procedural reforms and his knowledge of administrative law. He had practiced law for several years and was very familiar with the aggravation and costs associated with litigation. He believed many disputes were better settled out of court. Negotiated rulemaking became his "pet project".

## **Young**

A fifth factor motivating Cannon to pursue regulatory negotiation was Ken Young, an interested, knowledgeable and capable EPA employee. Young worked in the Regulatory Reform Staff (RRS) and established an early relationship with Cannon by writing his speeches. In early 1982, Young became seriously interested in negotiated rulemaking within the Agency.

Many of Young's motivations to pursue regulatory negotiation were similar to Cannon's. First, Young was interested in the idea and familiar with adjudicatory processes. Like Cannon, Young had practiced law for several years and saw firsthand the many weaknesses and constraints of courtroom procedures. Young too, was convinced there was a better way to settle differences. His feelings and ideas were nurtured while at the Mid-Career Public Administration Program at Harvard's Kennedy School of Government. Second, Young saw that he could personally benefit by investigating regulatory negotiation. Like Cannon, he was looking for a good project to link up with to expand his portfolio. Young strongly believed negotiated rulemaking was a good idea and likely to succeed. Being project director of a successful, popular administrative reform could make headlines and law review articles, would lead to career advancement, and would certainly invite contacts with a host of professionals.

Two individuals were spending some of their time examining the idea's potential, one in Cannon's office, another in the Regulatory Management Staff. However, both individuals had other commitments and were very receptive to

Young's interest in working on negotiated rulemaking. Young soon became project director and the loosely defined "project" was transferred to his office. Young had several other responsibilities at that time so at first, could not devote much time to negotiated rulemaking. Yet he kept the idea simmering.

After Young concentrated on negotiated rulemaking, the idea took shape and moved. The steps he took in managing the project proved to be a recipe for success. His astute intuition of organizations allowed him to anticipate conflicts and design strategies to avoid them.

By mid-1982 Young was devoting half his time to negotiated rulemaking. Young stressed the need for "small and early successes" to build a good track record for negotiated rulemaking. His strategy for policy change was to conduct a series of negotiation "experiments". The experiments would be small-scale demonstrations, which limited the risks of real or perceived failure; the small-scale of the demonstrations meant less resources were at risk and the demonstrations could be portrayed simply as "experiments" if they failed terribly. The project did not scrap the traditional rulemaking structure, only supplemented it, so the status quo was always there to fall back on. The "experiment" strategy would enable both EPA and its constituencies to gradually become familiar and skilled with the new process. In addition, the experimental negotiations would center around rules that were highly likely to be successfully negotiated. Young developed criteria for carefully selecting such "negotiable" rules, and later circulated them to groups who would nominate candidate rules for the demonstrations.

Young developed a cogent memorandum delineating the benefits of negotiated rulemaking. The memorandum was written to advertise, but also to help tighten Young's thinking.

Young took steps to de-radicalize the idea, thereby increasing its likelihood of acceptance. Young wrote up past successful experiences the EPA and other federal agencies had had with processes similar to negotiated rulemaking. By emphasizing the similarities of these experiences with the negotiated rulemaking, Young further

decreased the perceived risks of the demonstrations. Young knew negotiated rulemaking was much more likely to survive if it was backed by the people involved in the normal regulatory development process. He anticipated the difficulty of getting their support because negotiated rulemaking could be construed as "threatening their turf". To assuage their fears and portray negotiated rulemaking as supportive of established procedures, Young met with the top official concerned with regulation development (the Chief of the Regulatory Management Staff). After these conversations Young developed a framework for integrating negotiated rulemaking into the normal regulation development and review processes. Young described negotiated rulemaking in a non-threatening fashion. For example, "[It] *slightly* alters the tasks and relationships of the groups in the current process, but in ways that are *easy* to understand and *familiar*." (emphasis added).

Integrating negotiated rulemaking into the established regulatory development process was also important to get the support of potentially involved parties outside EPA. To persuade the parties to commit sufficient resources and to take the negotiations seriously, Young had to convince them the negotiations would be the *real* rulemaking of a *real* rule. The demonstrations would not be experimental theatrical productions. Perceived integration was so crucial that in August, Young and the project were transferred to the Regulatory Management Staff, the office responsible for regulatory development. The Regulatory Management Staff was a more functional and legitimate place for negotiated rulemaking.

### Legal Issues

A potential problem confronting Young was the legal issues raised by the experiments. For example, did the Federal Advisory Committee Act (FACA) pose any constraints on the negotiation? Would the negotiation process amount to an illegal delegation of statutory power? EPA's legal office believed FACA would almost certainly apply to the negotiations. FACA imposed a number of onerous procedural constraints limiting the negotiation's flexibility. For example, meetings must be

open to the public and detailed minutes must be kept. To meet FACA requirements EPA first had to obtain a "FACA charter" from the Office of Management and Budget (OMB), which registers the negotiation as an Advisory Group. This proved to be a long and time-consuming process.

### **Gusman's Interest**

Samuel Gusman, of The Conservation Foundation, was also an important force behind negotiated rulemaking's development. Gusman was well-known in the dispute resolution field and had extensive experience with negotiation and mediation techniques in environmental conflicts. He had extensive experience with "policy dialogue groups", a process similar to negotiated rulemaking which convenes interested parties to seek areas of agreement and clarifications of their differences.

Early in 1982 Gusman heard of EPA's negotiated rulemaking project, quickly contacted Young and established a good rapport with him. As Young recalls, "[Gusman] was a powerful influence in the project's formulation." Gusman sent many articles and literature to Young about environmental conflict resolution generally and negotiated rulemaking specifically. Gusman continually called Young to keep updated on the project and to discuss any idea and questions Young had. Gusman was a sounding board for many of Young's ideas. Gusman even spoke with Cannon, the head of the policy office, about negotiated rulemaking and its potential advantages.

Gusman was the major force behind changing the mechanics of the demonstrations. Initially the RRS, in the policy office of the EPA, was planning to function as the mediator ("convenor/facilitator") in the negotiations. The RRS would attempt to function as an honest broker concerned primarily with the success of the negotiation rather than the final shape of the rule. The EPA program office whose area the rule fell under would act as party-in-interest for the Agency. The intent was to establish in the policy office the capacity to act as a process controller

and facilitator for future negotiations based on its lack of specific program responsibility, its unique role as the manager of regulation development, and its established success in regulatory reform. Gusman sharply criticized EPA's dual role in the demonstrations and publicly denounced it. Gusman argued that "inside" mediators would never be able to gain parties' trust because of their ostensible lack of neutrality. Gusman's words had weight, and EPA decided the first demonstration would be conducted by an "outside" mediator, a professional outside of the EPA.

### **Nature of the Regulatory Reform Staff**

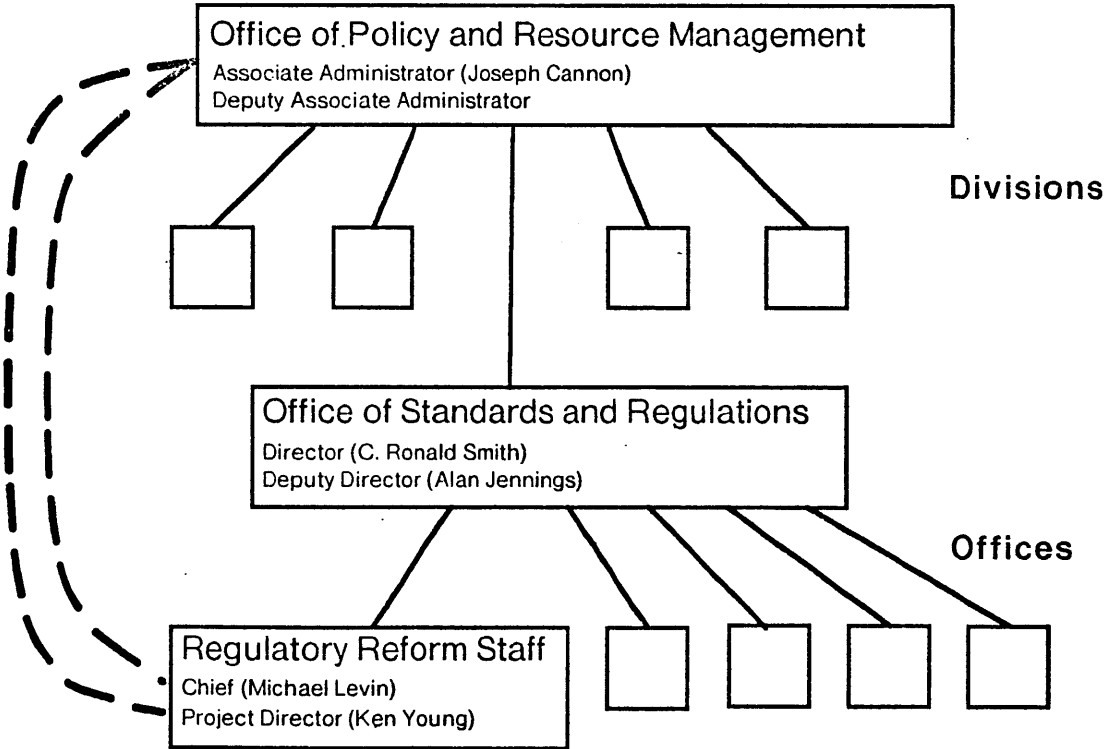
The office which housed the negotiated rulemaking project, the Regulatory Reform Staff (RRS), was critical in the idea's development. The RRS's role was, as the name suggested, to undertake regulatory reforms. It was the only office in EPA exclusively devoted to reform. The RRS was the institutional structure for reform development. The RRS thought up major policy reforms and tried to push them through the Agency. The staff researched ideas, formulated them into concrete projects, and tested them. An intricate part of the staff's work was selling their ideas both inside and outside the EPA. Thus when negotiated rulemaking landed in the RRS, it fell into experienced hands. Once a staff member got behind an idea it had a good chance of getting attention, receiving funding, and being tested. Negotiated rulemaking was incorporated into the RRS's "advertising brochure", was included in regular briefing meetings with agency and non-agency personnel, and became a dot point in the agency speeches on regulatory reform initiatives.

### **Organizational Structure**

The RRS's organizational location was also important in the successful development of negotiated rulemaking. The difference between the formal and informal lines of command was a critical factor. (Diagrammed below.) Formally, Young, project director of negotiated rulemaking, was to report to his boss, who was to report to the Deputy Director and then Director of the division, who was to report to the Deputy Associate Administrator of the overall policy office, who was to

report finally to the Associate Administrator of the policy office, Cannon. The informal communication lines were much different. In reality either Young or his boss, Levin, reported directly to Cannon. The power of personal contact with Cannon should not be underestimated. The reform received top-managerial attention. This leapfrogging of the chain of command occurred for a number of reasons. Most of the RRS' projects required on-going, top-level policy decisions. Reform was a top priority for Cannon and the Administration. Some of the staff's projects were politically sensitive. Some projects were of great interest to Cannon. Levin, the chief of the RRS, had "exceptional bureaucratic capability". He knew reforms needed top-management support to have any chance of success. He was a persuasive person and found convincing reasons to get what he wanted. Further, Levin and his staff were attractive to Cannon because they were "a bunch of high-caliber entrepreneurs with good reputations".

Formal versus Informal Communication Lines



## **Program versus Policy Office**

The relationship between the program offices and the policy office, was a second aspect of agency structure that helped the idea develop into a demonstration. The four program offices were concerned with substantive issues in their respective areas: air, water, solid waste, and toxic substances. They were staffed mainly by scientists and career employees. The policy office was concerned with policy and regulation development, management, and evaluation. It was staffed by a large percentage of young policy analysts and social scientists, and had a large turnover rate. Reforms usually came from the policy office, and directly affected the program offices; reforms change the distribution of gains and losses, and often threaten the turf of the program office staff. The program offices and the policy office were somewhat antagonistic. The program offices sometimes resented policy analysts "meddling in their affairs". At the same time, the policy analysts saw the program office staff as "the part of the bureaucracy that stagnates."

Reforms can be hindered or halted by program office resistance. Negotiated rulemaking was unique in that program office's were barely consulted in development and decision-making, and they were not in any position to block the demonstration. The idea was purely the policy office's idea. It needed no program office support to be tested. Whether the absence of program office consultation hurts the quality of the negotiations and implementation of negotiated rulemaking is another question, and remains to be seen.

## **Personnel Changes**

Numerous personnel changes disrupted the idea's continuity and chopped its momentum. Each time employees changed there was delay while the replacement learned his or her new duties. Routine activities had to be mastered before any time could be spent on interesting reforms or pet projects. Turnover made implementing a consistent plan of action difficult. Each new individual connected with negotiated rulemaking had less stake in the project, and less to gain in pursuing it.



The top position in the policy office turned over twice. Cannon was the acting head for a year, at which time he singled out negotiated rulemaking and became an important supporter. When he was promoted to permanent head of the office, regulatory negotiation dropped on his list of priorities. Responsibilities that had been temporarily spread around to other offices to help Cannon out as acting head, were now transferred back to Cannon and filled his time.

The director of the RRS's division had been an acting since the new Administration had entered and throughout negotiated rulemaking's critical formulative stages. The acting director had little clout with the RRS. The RRS leapfrogged the formal chain of command and reported directly to Cannon. Although, as mentioned in the previous section, the direct link to Cannon helped the idea's development, it simultaneously hurt the idea in another sense. It narrowed the number of top officials who were concerned with the idea to one--Cannon, who was the busiest. Even when Cannon was acting he was a busy man. He did not have much time to discuss the many issues that arose from the project, and certainly not the mundane ones. Turn around time for Cannon's decisions was long. Contacting him and setting up appointments took at least a week. The reform needed constant top-management's direction and authority to move forward quickly, but it failed to receive it. Workplans continually become outdated. Face-to-face negotiations that had been planned for July, 1982 were rescheduled for October, then for Spring of 1983, and most recently planned for mid-summer, 1983.

When the permanent director of the division was appointed, the RRS was forced to use the formal channels of communication. The direct link to Cannon was shut off, yet at first the director's door was barely open. Like other new appointees, the director needed time to learn his new responsibility and concentrated mostly on his basic duties. Negotiated rulemaking received little of his attention, especially since the RRS did not share its projects with the director, wanting to retain its direct link to Cannon. Fortunately, the project had enough momentum at this stage to keep it rolling.

The lead investigator of negotiated rulemaking changed several times through the idea's crystalization. First, the idea was researched by a lawyer in the General Counsel's office. Then someone in Cannon's office pursued the idea. Next it was investigated by the Regulatory Management Staff (in the same division as RRS). The fourth lead investigator was Ken Young in the RRS. Young was by far the most important manager of the idea. Then Young and the project was transferred to the Regulatory Management Staff. After the project had a life of its own, Young took another job outside the agency and Chris Kirtz became the project director.

### **Superfund Controversy**

Another factor slowing the project was the turmoil in the EPA that erupted in February and March, 1983 over alleged political finagling of Superfund money. The controversy eventually lead to the resignation of many top officials in the agency, including Ann M. Gorsuch, The Administrator. Six congressional panels, the FBI, the Justice Department and the White House investigated the agency. The turmoil had a freezing effect on project decision-making throughout the agency. Top-management's time was devoted to carefully assessing the controversies and defending the agency in the dispute. Turn around time for decisions lengthened significantly. The Superfund controversy also impeded the project in an indirect way. EPA's trustworthiness suffered a blow. Potential participants of the demonstration, especially environmental groups, became more leary of EPA's sincerity in the demonstration. Additionally, negotiated rulemaking got a bad name because it sounded (to untrained ears) like the reported "luncheon negotiations" EPA had had with industry groups.

### **Epilogue**

Negotiated rulemaking succeeded in reaching the testing stage due to a hybrid of internal and external agency factors. Several barriers delayed the project but did not stop it.

Supporters of negotiated rulemaking hope the carefully controlled demonstrations will create convincing success stories and that, overtime, negotiated rulemaking will supplement the regulatory development process. Whether the negotiations will succeed, and whether the demonstration strategy for policy change will succeed in implementing negotiated rulemaking, remains to be seen.

Negotiated rulemaking has gained "good currency"<sup>35</sup> in parts of EPA and in many organizations, yet it may only take one recalcitrant participant to make the demonstrations fail, and to hurt the idea's credibility. Individuals connected with the project are concerned that parties may not participate in good faith, if at all, especially EPA program offices and environmental groups. Program offices are threatened by negotiated rulemaking. They had to be told by top-level management to cooperate throughout the process, and to search for possible rules to use in the demonstration. Only the Air Office submitted candidate rules. No environmental group nominated rules for the demonstration in response to the Federal Register notice and personal phone calling. This may be due, in part, to the Superfund controversy. Many environmental groups have voiced their reservations about the viability of negotiation in rulemaking, its touted benefits, and about EPA's sincerity in the negotiations. Advocates of negotiated rulemaking hope program offices and environmental groups will overcome their fears and conclude the benefits of negotiated rulemaking outweigh the costs of changing to a new process.

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<sup>35</sup>Donald A. Schon, *Beyond the Stable State* (1971). "Good currency" of an idea means it has gained acceptance, support, or a good name.

## Part V

### Lessons for Other Reform Efforts

This case study illustrates that bureaucracies do not operate in vacuums but constantly interact with their environments. Incentives to support reforms and accept organizational changes are produced through a mixing of complex internal processes with the social, political, economic, and intellectual setting the agency exists in. Project directors can create numerous incentives to change. However, many factors which influence incentives are outside their control. The major "uncontrollables" in most reform efforts are the prevailing political, economic, and intellectual climates. How these climates influenced negotiated rulemaking is described below.

#### **Political currents**

The political climate during negotiated rulemaking's critical stages of development was conducive to its development and testing. The Reagan Administration's ideologies determined EPA's attitude towards the idea because the EPA Administrator, appointed by the President, lacked independence and a will of her own. The Reagan Administration strongly advocated using negotiation to settle differences. It supported negotiation not only in the EPA but in other agencies as well. Vice President George Bush, the Presidential Task Force on Regulatory Relief, and the Office of Management and Budget all publicly supported negotiated rulemaking, and privately encouraged its use in the EPA. Adopting negotiated rulemaking was seen as a way to improve EPA's deteriorating public image, which was becoming a bigger political liability by the week. Pursuing the idea would portray EPA as responsive, innovative, open to other interests besides business', and committed to improving performance and efficiency. It was also

another reform to add to the Administration's list of accomplishments. Negotiated rulemaking was believed to save business significant resources by decreasing adjudicatory delay and costs, and therefore would help EPA maintain business' support.

### **Economic situation**

Economic problems in the early 1980's created public sentiment that was conducive to negotiated rulemaking's development. The economy was in a recession. Much of the public muted their anti-business regulation rhetoric for fear that additional regulation might cost jobs. Businesses had to be regulated but not at the expense of long, costly and adversarial adjudicatory processes. Resources were scarce and had to be saved for only urgent reasons. Business were very concerned with the downturn of the economy. They wanted to save wherever possible, and certainly wanted to avoid expensive litigations. Many in the private and public sector thought negotiation seemed like a good solution given budgetary restrictions.

### **Intellectual climate**

A substantial literature existed demystifying negotiations and deducing its potential benefits. The literature had begun piecing together a theory of environmental dispute resolution. For example, there were articles explaining what disputes are likely to be negotiable, offering methods to select and bind legitimate stakeholders, describing fundamental steps in negotiations, and delineating criteria to measure the success of negotiations. Theory made negotiated rulemaking understandable and more persuasive. The literature convinced Cannon, Young, the Administration and EPA's constituents that negotiated rulemaking was a good idea to try. Giving the idea even more legitimacy, several influential intellectuals of regulation and public administration supported the premises on which negotiated rulemaking is based: increased public participation, less agency discretion and government-business partnerships.

Most of the concepts and processes involved in negotiated rulemaking had been tested in site-specific environmental conflicts. The number and variety of the conflicts enabled hypotheses to be tested. Practice was constantly improved. Techniques that worked well repeatedly were identified. The numerous local and regional conflicts using negotiation and mediation helped familiarize and build interest in the process.

More important than what a project director *cannot* control, is the environment he or she *can* control. Identifying and discussing "controllables" is more useful for project directors who want to learn how to push reforms through organizations. The case study suggests several actions one can take to improve the chances of successful reform: institutionalize an office promoting reform, gain top-level interest and support, and reduce the threat of change.

#### **Institutionalize an office promoting reform.**

The RRS was a critical factor propelling negotiated rulemaking. Young and his boss, Levin, were rewarded for changing the status quo rather than preserving it. They were accountable for the reforms they backed. Since it was their primary job to push reforms through the bureaucracy they were good at it. The office's job was to keep abreast of reform literature and search for innovations. The staff was trained in public policy and organizational analysis, and used these skills to push ideas and marshal support for them inside and outside the agency. They were experienced in operationalizing ideas into concrete projects, and then managing them. And lastly, people listened when the staff talked because they had built a reputation of backing good reforms and managing them well.

An institutionalized office of reform may be a general solution to bureaucratic inertia. To achieve this end, Levin believes the office must have a clear charter to act as centralized manager for reform, complete with sign-off authority on all offices' reform proposals. Centralizing reform enables innovations to be winnowed, prioritized, tracked and evaluated. Centralization of reform efforts is particularly

important for coordinating and implementing system-wide and multi-office reforms. Levin further stresses that the office should be both accountable and *responsible* for delivering reforms, giving it authority, credibility and leverage. Formal authority is needed to insure offices cooperate in identifying, developing and implementing reforms. Without formal authority, the office has no stick.

However, centralizing reform is not without risks. First, it may be difficult to empower the office, the end result being fewer reforms than without the office. If the office is located anywhere else but the center of decision-making in the top echelons of the agency, program staff and outside contacts will not pay much attention to it. Who the agency reports to determines how people respond. If the office is on the periphery of decision-making it may lack sufficient authority and power to leverage what it needs. Program offices would feel the reform office was trespassing on their turfs, and grow very antagonistic towards the office. Not being at the center of decision-making also prevents the office from responding quickly to people inside and outside the Agency, critical for maintaining credibility and reform momentum, because decisions would have to go through extra levels of bureaucracy.

Second, centralizing reform may dampen innovation in other parts of the agency. Program and other office staff might feel the reform office would receive credit for any innovation they propose, creating a disincentive to innovate. Fewer heads thinking about reform, means fewer reforms. And importantly, if program offices stop thinking about reform, implementing reform will be more difficult because they will value current ways of doing things more.

Third, some reforms may require more technical and scientific knowledge than the reform office has. For fear of losing some power, and bringing in a stranger, the office may not seek the necessary expertise and continue its efforts regardless, or may not pursue such technical reforms. Related to the reform office's potential lack of sufficient technical and scientific knowledge, its relations with program offices and other policy offices (e.g., economic analysis office) may be

further strained. The offices are likely to argue their skills are important, yet difficult to learn, and conclude the reform office is meddling in their affairs.

### **Get support from top management.**

The support of Cannon, the head of the policy office was critical throughout negotiated rulemaking's development. Cannon was the key decision-maker, and could start or stop the project on command. The legitimacy of the reform also depended on Cannon's support. People would not commit resources, nor pay much attention to Young and Levin if the project was not approved by top-management. Acquiring Cannon's initial support was relatively easy since he proposed researching the idea. The chances the project would be shelved were decreased by including negotiated rulemaking in many of his public speeches. The RRS ran a number of workshops on regulatory reform around the country and frequently got Cannon to speak at them. More importantly, Young was in a powerful position to ingratiate the project since he was Cannon's speech writer. By having Cannon describe the potential benefits of the innovation and endorse it, the costs to Cannon of stopping the project were greatly increased. He would have had to admit his previous support was a mistake.

Cannon needed to be assured the mechanics of the demonstration were good. The RRS's direct link to Cannon enabled it to involve Cannon in designing the mechanics thereby making his approval more likely. Cannon probably would not have spent as much time meeting with Levin and Young brainstorming alternative ways to manage the project had it not been for the "pet project" status negotiated rulemaking had. In a late stage of the project the mechanics of the demonstration were under fire by an influential critic outside the agency. His influence reached Cannon's office, and effectively changed Cannon's perception of a good and a bad demonstration. To maintain Cannon's support Young altered the demonstrations to accommodate the criticism.

Cannon's interest in the project had to be sustained to maintain sufficient



momentum for the project. If response time from Cannon was slow, people might have doubted EPA's interest, confidence and sincerity in negotiated rulemaking. Young tried to sustain Cannon's interest by sending frequent memoranda updating the status of the project and describing the widespread support of the idea. Unfortunately, factors out of Young's control caused Cannon's turn-around time to lengthen. Cannon acquired new responsibilities, and had to devote time to the Superfund controversy and its related issues.

It almost goes without saying that approval from key decision-makers is necessary for every reform to succeed. The important question is *how* to secure it. The short answer is that one must sell the reform to the key decision-makers. Although no two salespersons have the exact same technique, there are fundamentals in selling an idea. People sitting in the decision-making position must be briefed early on in the development of the reform. Presentation of the reform should spotlight how the decision-makers can personally gain from it. Decision-makers must be involved in designing the reform. For example, in choosing between alternatives in major project decisions. Decision-makers should be continually updated on the progress of the reform. And finally, their public endorsement of the idea is important. A warning to reformer pushers is don't promise more than can be delivered. Fraudulent salespersons go nowhere. They can damage a good idea, and discredit a good office. There are always risks in trying new ways of doing things, and one should be frank about them.

### **Reduce threat of change.**

Agency staff connected with the traditional regulatory process--the Regulatory Management Staff, program office's staff, and attorneys in the legal office--had incentives to resist negotiated rulemaking because they stood to lose from it. It would be painful to alter habitual and accustomed ways. There would be a personal cost of learning new ways of doing things, and no guarantee one would be as good at it as the old ways. Managing and participating in negotiated rulemaking requires different skills than traditional rulemaking. Individuals with these skills, (e.g.,

strategic savvy, verbal faculty, and interpersonal skills) would prosper. Negotiated rulemaking might reduce staff members' power, prestige and security. Negotiated rulemaking would decrease program offices' authority to make rules by giving affected parties a much greater role. Negotiated rulemaking would require the Regulatory Management Staff to admit the traditional way it develops rules was sometimes inadequate. If negotiated rulemaking worked it would mean less litigation and therefore less need for attorneys in the agency. Attorneys survive off of conflict and negotiated rulemaking seeks to decrease it. Staff attitudes needed to be change to give the demonstration a fighting chance. Not only could they influence Cannon's decision to permit the demonstrations, but they would play an important role in the negotiations--developing EPA's bargaining positions and options as part as the agency's task force.

Young reduced the threat of negotiated rulemaking in a number of ways. One method was simply by choice of semantics. Inside the Agency, negotiated rulemaking was referred to as an "experiment"; two "experiments" (as opposed to "demonstrations") would be run to test the idea. Experiments *test* ideas. Demonstrations *present* ideas. Doubts about whether an idea works or not are much more apparent in the word experiment than in the word demonstration. It is more natural to say an experiment failed than a demonstration failed, so change is less likely as a result of an experiment. The word demonstration is more threatening because change is more likely. One drawback with calling the project an experiment may be that participants outside the agency will hesitate to commit sufficient resources to the process, especially top-management's time. Parties may view the process as a mock negotiation. They may also resist participating because they do not want to be "like mice in a lab experiment".

Second, Young presented negotiated rulemaking as only a potential incremental change to the traditional rulemaking process. The experimental design of the project helped communicate this. The experiments were self-contained and would not scrap the established process. If results were favorable from the experiment, negotiated rulemaking was planned to expand slowly to carefully

selected areas. Personnel and their functions would be only slightly altered. Young emphasized cautious incrementalism.

Third, as mentioned previously, Young conferred with the individuals responsible for regulatory development and created a framework for integrating negotiated rulemaking into the normal regulation development process by retaining its steps, its members, its groups' names and titles, and functions. The only difference was that the agency process would be developing negotiating *positions* not the verbatim *text* of the proposed rule.

And fourth, threat was greatly decreased by transferring the project to the office traditionally responsible for rule development. Their responsibilities were therefore not decreasing but seemingly increasing to include managing this new process. Their fears were assuaged because they thought they had much more control of the reform. They would also now be the ones getting credit if it succeeds. One risk with handing the reform over to the people involved with the normal process is sabotage. If once they are familiar with the reform, they calculate they will lose from it (e.g., lose power, lose prestige, lose jobs), they are able to make the experiment fail, thereby preventing or at least hampering it from expanding into a widespread reform.