THE PRE-NEGOTIATION PHASE OF REGULATORY NEGOTIATION

THE CASE OF THE LOW-LEVEL RADIOACTIVE WASTE RULE

by

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Abstract

Regulatory Negotiation is a relatively new approach to improving the rulemaking process. The initial steps of the regulatory negotiation process, leading up to face-to-face negotiations, may be termed the Pre-Negotiation Phase. The actions taken during this phase have not been well articulated or studied. During Pre-Negotiation affected parties and major issues are identified; a preliminary version of the negotiation agenda is formed; obstacles to negotiation are identified and removed; representation of interests is established; the actual negotiations are structured; and conditions are assessed to see if negotiation is appropriate.

This analysis examines the Pre-Negotiation Phase of an Environmental Protection Agency rulemaking effort focused on a Low-Level Radioactive Waste Standards (LLW) rule. Some of the obstacles to regulatory negotiation that occured in the LLW rulemaking case include imbalances in power and resources; the lack of support for the process from within the agency; a lack of awareness of regulatory negotiation; and uncertainties surrounding this alternative process.

Despite the special circumstances of this first attempt by EPA at regulatory negotiation, conclusions can be developed regarding ways to improve future regulatory negotiations: an outside active facilitator/mediator can play an essential role throughout the Pre-Negotiation Phase; early active conflict assessment is crucial; strong Program Office support or top-level agency pressure are needed to proceed with a particular rule; the potential benefits of regulatory negotiation must outweigh the potential threats and there are many mechanisms available to EPA to help acheive this; a draft of protocols should be provided to potential parties early in the process and protocols should be set before parties are required to commit to negotiate; promotional and educational efforts may be used to decrease anxieties about a new process.

Thesis Supervisor: Dr. Lawrence Susskind, Professor of Urban Studies and Planning

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PREFACE

In January 1983, EPA initiated a Regulatory Negotiation Demonstration Project. The purpose of the project was to test the usefulness of face-to-face negotiations as a supplement to the current rulemaking process. I worked as part of a negotiating team documenting this process from its inception. We were hired by EPA to document two regulatory negotiation demonstrations and to analyze their usefulness to EPA. Our first product was a Status Report documenting the premise behind the Project and EPA's efforts to solicit and evaluate candidate rules for use in the two demonstrations.

The attached document is a second Status Report documenting EPA's efforts to initiate negotiations on their first rule: Low-Level Radioactive Waste Standards (LLW). The effort ran six months before EPA deemed the conditions surrounding LLW unsuitable for use in the demonstration. This report documents and analyzes this first effort at regulatory negotiation and makes suggestions for future efforts. Many of these suggestions were incorporated into EPA's second regulatory negotiation effort (focused on a rule for Nonconformance Penalties regarding Air Quality Standards). The parties to this second rule met initially to set protocols on April 6, 1984 and are scheduled to meet again on June 16, 1984.

Three agencies are currently experimenting with this alternative approach to rulemaking: the Environmental Protection Agency, the Federal Aviation Administration, and the Occupational Safety and Health Administration. The reason that regulatory negotiation is currently being explored is that the regulatory efforts of EPA and other federal agencies have received much criticism in recent years from industry,

public and environmental interest groups, and from within the agencies themselves. Industry claims that the uncertainty surrounding the outcome of regulations caused by extended court battles hinders investment. Public interest groups feel that opportunities to participate in the rulemaking process are too limited. The agencies realize that too much time and money is tied up in the promulgation of rules and subsequent litigation. All the groups feel that the scientific and policy questions surrounding the development of a regulation are not appropriately addressed in court.

One approach to improving the regulatory process, Regulatory Negotiation, offers a potential means of overcoming some of the weaknesses of traditional rulemaking. Regulatory negotiation uses face-to-face negotiation among all affected parties to develop consensus rules. These draft rules are then promulgated by the appropriate agency in the traditional fashion. This process responds in part, to complaints about the limits on public participation in the drafting of federal regulations. In regulatory negotiation, all interested parties play an active role from the outset (rather than merely raising objections at formal hearings or initiating lawsuits once rules have been promulgated).

Advocates of negotiated rulemaking suggest that direct participation by interested parties helps legitimize proposed rules and enhances their prospects for successful implementation. Negotiations may create an atmosphere conducive to cooperation. Parties may work together to find solutions. Regulatory negotiation encourages greater sharing of information than traditional rulemaking which fosters adversarial relations among affected parties.

The likelihood of court challenges by those who participate in

regulatory negotiation should be small if decisions are made by consensus. Also, there may be greater compliance with negotiated regulations if all the regulated groups are involved. Less time and fewer resources should be needed to produce each rule if court battles are avoided and information is shared (reducing duplication of effort).

EPA's efforts surrounding the LLW rule all took place before face-to-face negotiations actually began. We call this early part of a regulatory negotiation the Pre-Negotiation Phase. The subsequent phases are Negotiation and Implementation. Pre-Negotiation includes all the steps leading up to face-to-face negotiations including the identification and assessment of the interests involved and the structuring of the negotiation protocols.

Current theories and studies of regulatory negotiation do not formally articulate or give adequate attention to the steps which take place before face-to-face negotiations begin. In public disputes, this Pre-Negotiation Phase may often require a greater amount of the time and effort put into a regulatory negotiation. A facilitator or mediator can play an important part in making this phase run more smoothly and successfully.

Thus, the elements of Pre-Negotiation ought to receive greater attention and study. There are many questions which need to be answered such as: what roles should the facilitator/mediator play in Pre-Negotiation; what are the major obstacles to generating commitments to negotiate and how can they best be addressed; how can representation of diverse public groups and unorganized interests be ensured; and what are the conditions which make the use of regulatory negotiation inappropriate. This document considers many of these questions as they

apply to the LLW case.

I would like to thank Larry Susskind, my advisor, who worked closely with me throughout the entire thesis development and writing process. Larry gave me both advice and encouragement and I truly appreciate his special efforts. I also want to thank my husband Scott who lent a sympathetic ear for my frustrations and celebrated my accomplishments.

I. CHRONOLOGY OF EVENTS SURROUNDING A CANDIDATE RULE: THE CASE OF LOW-LEVEL RADIOACTIVE WASTE STANDARDS

The Emergence of the Proposed Rule

In January of 1983, EPA began searching for candidate rules for its first two Negotiated Rulemaking Demonstrations. EPA narrowed its preliminary list of candidate rules from twenty-two to two while continuing to solicit additional rules. The suggestion that the Low-Level Radioactive Waste Standards (LLW) rule be considered came from EPA's Office of Radiation Programs (ORP) in June, 1983. As first proposed, the rule would have involved consideration of an exposure limit or "de minimus" level, (below which exposure to radioactive wastes would not be regulated). The scope of the rule was subsequently expanded to cover all aspects of a Low-Level Radioactive Waste Standard (and not just the de minimus issue).

The de minimus rule was reviewed along with a second list of ten more candidates in June, 1983 by EPA Project Director, Chris Kirtz; former Project Director, Ken Young; and the facilitators from ERM-McGlennon Associates. The eight criteria they used to evaluate the suitability of candidate rules were: the apparent level of support from the relevant EPA Program Office; the appropriateness of the mandated time schedule for certain rules; the number of parties likely to be involved; the identifiability of the parties; the likelihood that key parties would agree to participate; the technical complexity of the rule; the manageability of the level of controversy surrounding the issues involved; the attractiveness to top EPA officials.

Only the de minimus rule, the proposed regulation of the chemical MBOCA, and NOx Averaging survived the review.

Initial Contact With Potential Stakeholders (July-September 1983)

Once the LLW rule passed the initial screening, ERM-McGlennon began contacting the parties likely to be involved. In late June and July, ERM-McGlennon identified fourteen of the most obvious potential stakeholders. They were in touch with many of these parties by phone. The parties and their general reactions were:

*Conference of State Radiation Control Directors
- -Several different regional offices were contacted. They were generally supportive and interested in the Negotiated Rulemaking Project. They had already established committees to examine issues relating to a de minimus level of exposure.

*Atomic Industrial Forum
- -They had worked on the de minimus concept before and were very interested in the Project.

*Sierra Club
- -The Buffalo, New York chapter was identified as the national coordinator for Sierra's low-level radioactive waste effort. Sierra was active on LLW issues and was referred by other environmental groups as playing a leadership role on this issue. Sierra initially expressed a willingness to negotiate.

  A very different perspective came from the Boston, Massachusetts chapter which felt it would be impossible for the Sierra Club to endorse a minimum standard given the limited scientific data available. They suggested that more research would be needed.

*League of Women Voters
- -They had done some work on LLW issues. They were interested in the negotiated rulemaking process and viewed it as a natural extension of the League's interest in public participation.

*Utility Nuclear Waste Management Group (UNWMG)
- -They were interested and willing to consider the negotiated rulemaking idea. They had done some studies of their own on the de minimus issue.

*Health Physics Society
- -They already had an ad hoc committee exploring the de minimus issue and were receptive to the concept of negotiated rulemaking.

Other potential parties, identified as possible stakeholders but thought

not to be as directly involved in the de minimus issue included: Society of Nuclear Medicine; Regional Compacts for LLW Land Disposal; U.S. Department of Transportation; National Governor's Association; National Conference of State Legislatures; and the Union of Concerned Scientists. (These parties were contacted in August and September).

The Nuclear Regulatory Commission (NRC) and the Department of Energy (DOE) were identified as crucial participants because of their jurisdiction over low-level radioactive waste disposal issues. EPA decided not to approach them, however, until the decision to select the LLW rule as the candidate for the first demonstration was more definite.

Response to Proposed Rule Within EPA

Al Alm, Deputy Administrator of EPA, gave approval on August 10, to focus primarily on the LLW rule for the first Negotiated Rulemaking Project. McGlennon and Kirtz met with Richard Guimond, Director of Office of Radiation Program's (ORP) Criteria and Standards Division within EPA on August 16. ORP is the Program Office with jurisdiction over LLW. One outcome of the meeting was a recognition that NRC support is essential. Thus, EPA decided that NRC's willingness to participate had to be confirmed before a decision could be made to move any further on the LLW rule. Guimond and his ORP staff requested that an assessment also be made of another potential rule, Uranium Mining Standards, before going ahead with the deminimus rule.

Guimond and ERM-McGlennon met with NRC staff to discuss the LLW candidate rule and their interest in negotiation. NRC thought that regulatory negotiation was a good idea and offered preliminary support for the choice of the de minimus rule. In addition, Kirtz and ORP staff met with a representative of DOE's Office of Defense Waste and

By-Product Management. The official involved agreed in principal with the concept of regulatory negotiation and the rule choice, but would not commit the agency.

Another important meeting within EPA was held on September 16 between Kirtz, ERM-McGlennon, and top ORP officials, including Glen Sjoblom, Director of ORP (and the person who would be EPA's chief negotiator for the LLW rule). Sjoblom suggested that the only feasible approach would be to address the entire set of radiation protection standards for low-level radioactive waste disposal. He felt that the de minimus issue could not be addressed separately. As a result, the scope of the LLW rule was expanded.

Conflict Assessment:Follow-up Contacts With Potential Participants (October 19-2)1

On October 13, ERM-McGlennon sent out a letter to thirteen stakeholders likely to be central to LLW rulemaking.[1] The letter announced that the entire LLW standard would be focus of the negotiated rulemaking effort. The letter also asked the recipients to make a commitment by November 8, 1983, to negotiate. The letter included a list of the thirteen stakeholders and it requested suggestions for additional parties who should be included. A date was set for a first meeting at which procedural groundrules would be discussed. The letter contained a brief draft of the types of groundrules to be covered.

On October 19-21, ERM-McGlennon conducted conflict assessment interviews in Washington D.C. with eleven of the identified stakeholders. Two other stakeholders were interviewed by phone. The

[1] See appendix 1 for a sample letter.

full list included: Department of Energy (DOE); Atomic Industrial Forum; Nuclear Regulatory Commission (NRC); House Sub-Committee on Energy and Environment; League of Women Voters; Utility Nuclear Waste Management Group/ Edison Electric Institute; The American College of Radiology; The Environmental Policy Institute; National Conference of State Legislatures; Office of Radiation Programming-EPA; The National Governor's Association; Health Physics Society; and Sierra Club.

According to ERM-McGlennon, the purpose of the conflict assessment interviews was to "identify the primary concerns of the parties and the liklihood of their participation in the negotiations". Another purpose was to "identify other affected and interested parties". ERM-McGlennon also used the interviews to respond to questions about the negotiation process.

Each party was asked to describe its organization; its familiarity with low-level waste and formal negotiation procedures; the principal concerns of its organization; other parties that should be included in the process; and to discuss the likelihood of its participation in a negotiation concerning the whole LLW standard or just the de minimus issue.[2]

Hesitant Groups

As a result of these conflict assessment interviews, ERM-McGlennon identified several organizations with serious concerns and reservations. Those groups with the most substantial concerns were: Environmental organizations (the Environmental Policy Institute, the Sierra Club); the House Sub-Committee on Energy and the Environment; the National

[2] See Appendix 2 for the full conflict assessment format.

Governor's Association; and the Office of Radiation Programs in EPA. Industrial groups were the most supportive.

ERM-McGlennon summarized these reservations under six headings:

Representation

1. Concern that one or two environmental groups would not be able to represent the entire "environmental community".

2. Difficulty in checking back with constituencies, especially for environmental groups and the National Governor's Association.

3. Concern over achieving balanced representation of all the parties in the negotiations.

Timing

4. Fear of disrupting on-going state and compact efforts to site low-level disposal facilities before the 1986 deadline (i.e. some people might want to delay until the LLW rule could be finalized).

5. Concern that the issue is not ripe for resolution because of the lack of conclusive scientific research and insufficient public awareness to allow the constituents of environmental groups to participate knowledgeably.

Resources

6. Lack of sufficient staff resources to attend negotiations and participate effectively.

Jurisdiction

7. EPA's decision to develop this rule was questioned because some groups considered the NRC regulations to be adequate; EPA's jurisdiction in this area was challenged.

Litigation

8. Promulgating a LLW standard may re-open the NRC 10 CFR Part 61 regulations (governing low-level waste sites and shallow land burial) to further challenge and litigation; also the experimental nature of regulatory negotiation may lead to litigation over the resulting rule.

Scope of Rule

9. Of the stakeholders who were willing to participate, many would do so only if the de minimus issue rather than the whole LLW standard was the focus.

Meeting With Environmental Groups

The two groups ERM-McGlennon identified as presenting the largest stumbling blocks were EPA's ORP and the environmental groups. Without these groups, there could not possibly be balanced representation of all key interests. In late October, the ORP finally endorsed the LLW rule selection and the regulatory negotiation idea.

Thus, ERM-McGlennon focused its attention of the environmental groups. To further understand and address their concerns, EPA (both OPRM and ORP) held a meeting on October 28 with five key environmental organizations: Environmental Policy Institute, National Resource Defense Council, Union of Concerned Scientists, Environmental Defense Fund, and Sierra Club. The environmentalists questioned EPA's authority to promulgate LLW standards. They also questioned the suitability of the LLW rule for regulatory negotiation. They claimed that they did not have adequate resources to participate effectively. They were also concerned that an initial willingness to participate in negotiated rulemaking could be construed as an endorsement of the process before it had ever been tried.

Dave Berrick of the Environmental Policy Institute (identified as a key environmental party) put his concerns in writing:

1) LLW is not an appropriate rule choice; it does not fit EPA's criteria.

2) LLW could have dozens of affected interests making the size of parties unmanageable.

3) The technical data surrounding the affects of low-level radiation are highly controversial and intensely debated.

4) Authority to promulgate the LLW rule did not come from any specific legislative action, thus the parties and issues would not be well defined.

5) Representation is very difficult in large public groups because it is difficult to keep in contact with the constituency. A "communication/consensus mechanism" and the resources to maintain it are needed.

6) Environmentalist groups do not have adequate resources for participation. The $50,000 Resource Pool falls short of what is needed. Also too many public groups depend on "non-neutral" DOE for funding involving LLW issues.

7) Parties should know and agree to groundrules and participation rights before committing to negotiate or beginning "official" negotiations.

8) The rule is too technical, environmental groups cannot get up to date on the technical issues before the negotiations begin. Also, negotiation is not suitable for scientific debate.[3]

The meeting concluded with an agreement to hold still another meeting involving interested environmental groups and EPA to address these concerns. This meeting was supposed to include a discussion of procedural groundrules that the environmentalists could accept.

LLW Taken Out of Consideration

As a result of the October 28th meeting and subsequent phone

[3] See appendix for the Environmental Policy Institute letter.

conversations with many of the environmental groups, ERM-McGlennon concluded that the "active, supportive and balanced representation from the environmental community" would be unlikely if the LLW rule were chosen. ERM-McGlennon recommended that no further effort be made to promote the LLW rule and that resources instead be used for "developing a closer working relationship with the environmental community and identifying alternative rules".

On November 10, Al Alm amd Jack Campbell(OPRM) met with Bill Butler of the National Audobon Society, and Barbara Finnemore and David Doniger of NRDC to discuss the LLW rule. After discussing the environmentalists concerns, EPA stated that it intended to drop the LLW rule. The three environmentalists agreed to go back to the environmental community and solicit other possible rules that they would recommend as good candidates for negotiation. EPA gave the environmental groups two weeks to come up with the recommendations. In addition, EPA indicated that it would solicit additional rules from its Program Offices.

II. CRITICAL ISSUES IN THE PRE-NEGOTIATION PHASE OF THE REGULATORY NEGOTIATION PROJECT

Pre-Negotiation and Its Importance to Regulatory Negotiation

Public dispute resolution can be divided into three phases: Pre-Negotiation, Negotiation, and Implementation. In general, the Pre-Negotiation Phase involves assessing the problem and structuring the face-to-face negotiations. This first phase is very often the dominant and most difficult phase in public sector dispute resolution. One reason, is that public sector, all-party negotiation is a relatively new and infrequently used process. There are no well established procedures or norms. Also, the affected parties are often numerous, unorganized, and difficult to identify.

In the case of the Low-Level Radioactive Waste rule, a great deal of time was spent in the Pre-Negotiation Phase. Starting in June 1983 (when the rule was proposed and initially evaluated as a good potential rule), six months were spent in Pre-Negotiation. If the rule had not been dropped at this point, this phase would have continued for a minimum of two more months until the first official negotiation took place. Given that the actual Negotiation Phase has a time limit of six months set by EPA, the Pre-Negotiation Phase represents a significant portion of the entire Regulatory Negotiation process.

It is important to note that some of the time spent in Pre-Negotiation in this first Regulatory Negotiation Demonstration was a function of the newness of the process. Thus, this case may well exceed the norm. Nevertheless, it seems likely that a significant investment of time and energy will be needed in future regulatory negotiations in the Pre-Negotiation Phase.

The major objective of Pre-Negotiation is to identify and remove

obstacles to negotiation. An assessment should also be made during this phase of the prospects of removing the obstacles to face-to-face negotiation. Harold Saunders describes several stages which must take place before an international bilateral negotiation can take place. The same is true for regulatory negotiation.

One stage is defining the problem. The parties involved must be identified and they must share a common definition of the range of issues to be negotiated. In the Negotiated Rulemaking Demonstration, EPA seeks to define the general outline of the items to be negotiated through its mandate to promulgate a regulation. However, the other participants must agree within each group and among all groups on what specific issues are to be addressed. The task of defining the scope of negotiations in a regulatory negotiation is much broader and more difficult than commenting on or litigating a proposed rule.

The second stage described by Saunders is producing the necessary commitments to negotiate. All the parties must judge that a negotiated solution would serve their interests better than a traditional rulemaking process. Also, the parties must feel that the balance of power (i.e. technical expertise, monetary resources, and negotiation skills) is such that a fair settlement is possible.

A third necessary stage within Pre-Negotiation is to agree on the structure of the negotiation and the procedures or protocols to be used. This involves generating agreement on issues such as:

*basis for decision making (consensus, majority, etc.)
*meeting place and frequency
*use of technical data and other information
*relationship with the press
*information sharing

In summary, the steps which should be completed during the

Pre-Negotiation Phase include:

* Identifying Affected Parties and Major Issues

This step is part of defining the problem. The parties and issues must be identified in order to give focus to the negotiation.

* Forming a Preliminary Version of the Agenda for Negotiation

This step is also a part of defining the problem. The issues to be negotiated must be defined and agreed upon to set the scope of the negotiations.

* Identifying and Removing Obstacles to Negotiation

This step is an essential part of producing commitments to negotiate. There are always obstacles to be addressed such as unequal resources and skills; lack of trust in the process and of other parties; and concern over the effects of negotiation on subsequent options to litigate.

* Ensuring Adequate Representation of Interests

This step is also important in producing commitments to negotiate. It is sometimes difficult to find people who can serve as representatives of group interests and are accepted as a spokesperson by the group. Representatives must maintain contact with constituents during negotiations. Teams may be needed if there are too many interests or parties at the table. Also a balance of interests acceptable to all parties must be established.

* Establishing Groundrules and Logistics

This step structures the actual negotiations in a way that all parties agree to. The groundrules are often set in a negotiation session involving all affected parties. Groundrules may be the topic of the first "official" negotiation.

* Assessing if Conditions are Suitable for Proceeding with Negotiation

This step is conducted continuously throughout Pre-Negotiation as more information is learned. The Pre-Negotiation process may be halted at any point if conditions are found to be inappropriate for continued negotiation.

Extent and Style of Facilitator Involvement During Pre-Negotiation

A facilitator plays a very crucial role during the Pre-Negotiation Phase of negotiated rulemaking. The conditions associated with public disputes usually necessitate a more active role for a facilitator/mediator than the role played by intermediaries in the

traditional collective bargaining situations. The more traditional role of a facilitator is typically limited to scheduling meetings, conveying confidential messages back and forth, etc. In public sector disutes, the facilitator/mediator may need to expand the traditional roles to involve action in all of the six steps. Within these steps, the facilitator may need to: identify unorganized but legitimate interests that should be included in the negotiations; balance the interests represented; address inequities in power and resources by helping the parties to improve their negotiation skills and improving access to resources; suggest draft protocols for the conduct of negotiations; take an active role in generating commitments to negotiate.

These types of actions are needed in regulatory negotiation for several reasons. The facilitator/mediator must be more active because it is hard to identify legitimate spokespeople for the large numbers of interested parties. Also a framework and norms for public sector negotiations are not codified or well-understood. There are great differences in levels of expertise and access to information among the parties. Parties lack experience with negotiation which can bog the negotiations down. Finally, there are no past bargaining relations which help to establish communications and build trust.[4]

The roles which ERM-McGlennon played in the LLW rule Pre-Negotiation Phase were extensive. In their May 1983 memo, they anticipated being involved in: identifying and meeting with parties to discuss their willingness to participate, conditions for participation, and preferred protocols; and drafting proposed protocols.

[4] Denise Maddigan and Lawrence Susskind, "Six Innovations in the Process of Public Dispute Resolution" Justice System Journal, (forthcoming).

In the LLW effort, ERM-McGlennon was involved to varying degrees in all six of the Pre-Negotiation steps. They were actively involved with EPA in identifying affected parties and ensuring balanced representation. They also played a significant role in meeting with parties to identify concerns about the proposed process. Also they conducted individual conflict assessments with key parties to determine if face-to-face negotiations would be effective.

Criteria for Evaluating Rule Suitability

Prior to the Pre-Negotiation Phase of the demonstration, EPA had to assess the suitability of LLW as a candidate rule. It asked the facilitator to help make this assessment.

Why LLW was Initially Selected

LLW was the top candidate rule for at least five months. The following factors made it an appealing rule to EPA and ERM-McGlennon:

1) Ground had been broken with dialogues on LLW and some coalitions had already formed.

-The Conservation Foundation had sponsored an eighteen month Dialogue Group on Low-Level Radioactive Waste Management in 1980-81. The group included waste generators, state regulators, citizens and environmental groups. The de-minimus issue for LLW was discussed.
-Massachusetts Department of Health had completed an eighteen month consensus building process on LLW disposal issues.

2) LLW standards were an important rule which could draw interest in Regulatory Negotiation and appeal to top-level EPA officials.

3) The parties were identifiable and from initial contacts it seemed likely that most would participate. The numbers seemed manageable.

4) Technically there is no way to assert a cut-off point for "safe" radiation exposure so it may be a negotiable rather than a technical issue. Other issues were clearly negotiable.

5) The EPA Program Office suported the rule. There was hesitation on the part of the Office of Radiation Programs until

October, but in general there was support. Few other rules had any Program Office support.

Objections to the Rule

The major objections to the LLW rule came from environmental groups. They challenged the suitability of the rule for negotiation. They especially questioned its suitability in light of EPA's announced selection criteria:

1) Issues too controversial for negotiation
- People are highly emotional about these issues. Data to resolve contradictory claims do not exist at this time.

2) Potentially too many parties
- LLW standards affect hundreds of potential parties from industry, hospitals, research labs, and universities.

3) Too technically complex for public groups to keep up
-environmental groups are not up to date on the technical issues and the negotiation process would move too quickly for them to stay abreast of the issues.

4) Timing is not right
-not enough scientific evidence yet to set appropriate standards
-issues and positions not well defined; lack of statutory background for defining issues.

Once it became evident to EPA and ERM-McGlennon that the environmentalists might not be willing to participate, EPA began to worry about the prospect of unbalanced participation.

Adequate Party Interest vs Controversial Nature of the Rule

EPA faced a dilemma in evaluating LLW as the rule for the first Regulatory Negotiation. On one hand, a rule was needed with appeal to top-level EPA officials so that the Project would recieve strong administrative support to be carried out. (The Project had lost momentum with the change in EPA heads from Burford to Ruckleshaus.) The rule selected needed to be significant enough to catch the attention of top-level EPA. Also, the rule needed enough interest from potential parties

to garner interest in this new process and set a good precedent.

However, on the other hand, if the rule selected is too controversial, top-level EPA will not support it because of potential adverse press coverage and pressures from objecting groups. Also, the demonstration would not be a good test if the rule was so controversial that it was not a "typical" rule.

The LLW rule captured the attention of the parties and some attention from top-level EPA officials. However, the highly controversial and emotionally charged character of the LLW issues ended up causing EPA drop the LLW rule. As Regulatory Negotiation is used more often, the degree of controversy suitable for negotiation should become more clear. The need to have a less controversial, more typical rule should become less important as the process becomes better known and accepted.

Selecting and Contacting Parties

Selection Process

ERM-McGlennon conducted most of the identification and interviewing of potential parties. The initial efforts to identify affected parties were drawn from the following sources: EPA's Regulatory Development Plan for the LLW rule; suggestions from EPA's Office of Policy and Resource Management; ERM-McGlennon's knowledge of groups involved with LLW issues; previous attempts at consensus building and dialogues on LLW. ERM-McGlennon identified sixteen potential participant groups including key industry, environmental and civic groups.[5] ERM-McGlennon

[5] See pages 2 and 3 of Chapter I for names of identified parties.

contacted each group by phone. They asked for reactions to the proposed rule and suggestions on additional potential parties.

In asssessing these groups as potential parties, ERM-McGlennon tried to determine: 1) if the parties were affected by the proposed rule; 2) if they had devoted past resources to these issues; and 3) if the process caught their attention. The appropriate federal agencies were not approached by EPA until after the initial assessments had been made of other parties and positive interest was discovered.

ERM-McGlennon's initial contacts led to the identification of still other potential parties who were also contacted by phone by ERM-McGlennon. By the time the ERM-McGlennon held individual conflict assessments in Washington D.C. (October 19-21), thirteen essential stakeholders had been identified. ERM-McGlennon hoped to minimize resistance to the process and the LLW rule by answering questions and addressing concerns before the deadline for commitments to participate.

Representation

There are many problems involved in establishing who the legitimate representatives of stakeholding interests are in public disputes. Even when the appropriate spokespeople have been identified, there are often no mechanisms in place to ensure that those present at the negotiating table are in touch with their constituents. When there are inadequate links between representatives and their constituents, groups not directly involved in the negotiations may be more likely to challenge the rule with litigation after it is promulgated by EPA.

EPA and ERM-McGlennon had difficulty in identifying the appropriate groups to talk to within the environmental community concerning LLW issues. The lack of a well-defined chain of command made it difficult

to establish acceptable representation.

ERM-McGlennon initially identified the New York Chapter of the Sierra Club and the Environmental Policy Institute as the key environmental groups involved in LLW issues. However, other environmental groups such as Natural Resource Defense Council and the Audobon Society came forth later in the Pre-Negotiation Phase and played active roles in identifying problems with LLW as a candidate rule. More interaction with the environmental community and other public interest groups may be necessary to identify adequate representatives of their collective interests.

A second issue in representation is maintaining a "workable" number of parties to the negotiation. The Federal Advisary Committee Act (FACA), under which the demonstration must operate, limits the number of participants in a regulatory negotiation to fifteen.[6] One step taken to reduce the number of potential parties was to involve national rather than state or regional groups. EPA and ERM-McGlennon planned to use national organizations such as the National Governor's Association and National Conference of State Legislatures rather than state and regional organizations. Also, they hoped to use national industry organizations like the Atomic Industrial Forum to represent waste generators and facility operators.

The formation of teams to represent groups of interests was another mechanism open to EPA and ERM-McGlennon. They chose not to use it. Effective team representation requires that clusters of interest groups

[6] The Federal Advisary Committee Act (FACA) sets certain limits on any advisary group to an agency. Under current laws, a regulatory negotiation group will be set up as an Advisary Committee. Thus it must operate under these FACA requirements.

choose a spokesperson who does the actual negotiating but all on the team guide the strategy and sign agreements. EPA chose not to form teams with the LLW parties mainly because it felt that the total number of participants could be kept to a minimum while still ensuring the negotiation's success.

A third issue is achieving a balance of the represented interests so that no group feels threatened by the negotiation process. Although regulatory negotiation uses consensus as the basis for making decisions, a set of interests which feels outnumbered at the table can be at a disadvantage in the negotiations. This group may succomb more easily to social pressures from the rest of the negotiating groups. The Pre-Negotiation Phase for the LLW rule did not get far enough along for the final balance of power among the participants to become clear. In general, EPA wanted a balance of representatives from waste generators, civic and environmental groups, and state and federal government. Some environmental groups expressed a concern that they would be outnumbered at the table and they wanted to know the balance before agreeing to negotiate.

In the end, the balance of interests was a factor in EPA's decision to drop the LLW rule. Once it became very likely that there would not be sufficient and supportive participation from the environmental community on the LLW rule, balanced negotiations seemed unfeasable.

Early Identification of Party Concerns

A major question surrounding the LLW rule is why it took five months to discover significant concerns of some groups which would make the LLW rule unsuitable for negotiation. When two key environmental

groups were initially contacted by ERM-McGlennon, they were giving first impressions on an unfamiliar process. It took time for environmental groups to communicate among themselves and to analyze the suitability of the rule for this new process. The objections to the rule took time to emerge.

A second reason is that EPA and ERM-McGlennon may not have gone far enough in seeking other environmental groups to participate. More exploration of the attitudes and concerns of the environmental community early in the process, might have brought out the problems sooner in the Pre-Negotiation Phase. The likelihood of addressing these concerns could then have been determined before other parties had devoted substantial time and resources to preparation for the negotiation process.

An important outcome of the LLW rule assessment and continued exploration of the feasability of other rules is that many more parties are now aware of the regulatory negotiation process. Also, regulatory negotiation has received attention from within the environmental community from NRDC which helped to legitimize the process by soliciting possible candidate rules once LLW was dropped. In addition, ERM-McGlennon now believes that party identification and assessment strategies must go beyond the parties initially claiming to be involved so that concerns of all affected groups are likely to be identified earlier in the Pre-Negotiation Phase.

Getting the Parties to the Table

The Balance of Power and Resources

Imbalances in power and resources are a major obstacle to securing commitments to participate in regulatory negotiation. Large imbalances

inhibit negotiation. More powerful groups may presume that bargaining or compromise is not necessary to achieve their goals. Power and resource imbalances can also create psychological barriers to negotiation. Parties which perceive themselves to be in a weaker relative position may feel intimidated in a negotiation setting.[7]

The primary power and resource imbalances found in the proposed LLW rule negotiation were time, access to technical data and information, and negotiation skills. There is a fairly large investment of time required to prepare for and participate in negotiations. For government and industry, there may be employees who can participate within the context of their job. There are greater constraints on the amount of time representatives of non-profit organizations and voluntary associations can devote to the process.

Lack of access to technical data and information is also imbalanced against the non-profit organizations. Industry is the party being regulated, so it usually has the most information pertaining to production processes and the probable nature of regulatory impacts. Government agencies have large budgets for aquiring and analyzing information although they still depend on industry for much of their data. Non-profit organizations are in a relatively weak position because they usually lack the clout to demand that information be shared or the expertise to evaluate the information. This relative imbalance is likely to produce a refusal to negotiate. The alternative route of litigating rules may be more appealing. The legal process forces

[7] Timothy Sullivan, "Resolving Development Disputes Through Negotiation, Graduate School of Public Policy, University of California at Berkeley, September 1983.

information into the open. Also, non-profit groups presently have an easier time raising contributions to support legal action.

There is also often a lack of negotiation skills in public disputes and an imbalance of the skills which exist. Conflicts are resolved more effectively when the negotiators have skills which allow them to articulate their interests and understand bargaining signals.[8] Negotiations can become bogged down when the parties are unfamiliar with negotiation techniques.

Removing Obstacles to Negotiation

A party's decision about whether or not to come to the negotiation table is based on an evaluation of the likely consequences of this action. The major concerns mentioned by potential LLW parties not directly addressing the LLW rule choice, focused on the factors of power and resources. For the parties with relatively less power and resources, the potential threats of regulatory negotiation may appear to outweigh the benefits. The potential threats and benefits to negotiating parties are as follows:

potential threats

1) lack of money and time to participate effectively and keep up with the fast pace of the negotiation process

2) lack of technical data and expertise

3) lack of skill in negotiation

4) fear of direct confrontation with more powerful groups

5) fear of too many parties "on the other side" (unbalanced representation).

[8] Timothy Sullivan.

potential benefits

1)likely to have more influence on a rule in a consensual process

2) addresses all substantive issues rather than just those procedural issues permitted by the court

3) cuts the uncertainty and long delays presently caused by litigation

4) may reduce the effort and cost involved tn trying to influence the substantance of a rule.

Resource Pool

ERM-McGlennon and EPA tried to counter the "threats" associated with negotiation in order to get the LLW stakeholders to come to the table. One incentive they could point to was the Resource Pool. Fifty thousand dollars (half from EPA and half from foundations) was promised for use by all the stakeholders. The stipulations were that the entire negotiating group must agree on how the money would be used (i.e. for technical analysis, joint studies, legal advice, etc.). The availability of the Resource Pool, it was suggested, could help to decrease any imbalances in access to information.

A problem with the consensus method of distributing the money is that the less powerful groups have no reason to believe that the more powerful groups would allocate them enough money to participate effectively. One way of addressing this concern might have been for EPA to guarantee that groups with few resources would receive enough money to cover their transportation and out-of-pocket expenses. The whole negotiation group could still allocate the remainder of the money as it chooses.

Negotiation Workshops

Regulatory Negotiation is a relatively new concept. Only two other

agencies (Occupational Safety and Health Administration, Federal Aviation Administration) are currently testing its usefulness. As mentioned previously, many potential stakeholders had little or no negotiation experience. For some who were unfamiliar with the process, it was intimidating. A good way to dispell such fears and to help the parties participate more effectively would be for EPA to offer workshops on negotiating skills.

ERM-McGlennon had hoped to hold such a workshop in December of 1983 to help prepare interested parties for negotiation. The availability of such workshops is an important incentive to get parties to commit to participate.

Technical Briefings

In addition to being unfamiliar with negotiation techniques, many of the parties were not up to date on LLW issues. Negotiations run more rapidly and smoothly if the parties start with the same base of background knowledge concerning a rule. ERM-McGlennon or even EPA could have offered to review recent studies or to provide a panel of experts to answer questions. EPA and ERM-McGlennon considered holding technical briefings, but none were held before the rule was dropped in November.

For future regulatory negotiation efforts it might be desirable for the initiating agency to form a Technical Advisary Committee before face-to-face negotiations begin. This committee could be comprised of technical experts approved by all participants. Such a committee could be responsible for briefing all groups to bring them up to date on available scientific evidence pertaining to the rule. The committee could also serve in an advisary capacity throughout the negotiations.

Balancing Interests

Relatively weaker parties often fear direct confrontation with more powerful groups. Such concerns are intensified if less powerful parties feel outnumbered as well. These concerns can be at least partially addressed by guaranteeing that balanced representation is a prerequisite for proceeding with negotiations.

In the case of the LLW rule, ERM-McGlennon suggested that EPA address the environmentalists concerns that they would be outnumbered by reserving a certain number of seats at the bargaining table for the environmental community. The value of this suggestion was not fully tested in the case of the LLW rule since the Pre-Negotiation Phase was cut short.

Establishing Protocols Prior to Negotiation

The issue of establishing the protocols for negotiation is circular in that some parties refuse to come to the table until the procedural groundrules are set, but the ground rules cannot be set until all parties agree to them. Thus, the only practical way to establish protocols is to have all the parties at the table to work them out together.

The environmental groups commenting on the proposed LLW rule wanted protocols to be established before they endorsed the regulatory negotiation process by coming to the table. ERM-McGlennon could not negotiate the ground rules with one group without consulting all other parties as well.

Prior to dropping the LLW rule, EPA tentatively scheduled a meeting in January 1984 of all the parties to discuss negotiation protocols. Thus, they were asking for commitments to participate before the

protocols were discussed. Perhaps for future negotiations, EPA might want to have all the parties commit to draft protocols before asking for commitments to participate in the process. Prior to this meeting EPA could ask for a commitment to participate in the protocol meeting with agreement to continue if the meeting is successful. This approach may help address the environmentalists' concern that they did not want to endorse the process by coming to the table before they knew how the process would be conducted.

III. OBSTACLES TO THE IMPLEMENTATION OF REGULATORY NEGOTIATION

Problems in Implementing Regulatory Negotiation

There is risk and uncertainty associated with any new way of doing things. Because the process is relatively new and untested in the rulemaking context, the outcomes are uncertain. The lack of familiarity with the negotiation process and skills may make it seem like a very risky undertaking for potential participants. Also, large bureaucracies prefer to maintain the status quo rather than take risks.[9]

A consensual negotiation process may also threaten agency rulemaking officials. They may fear the loss of their authority and jurisdiction in the area of promulgating rules. In the consensual process, they become just one of many decision makers, each with veto power.

Of course, a similar "threat" to jurisdiction already exists in the form of legal challenges to agency rulemaking decisions. Agency officals lose control over the final outcome of a rule when it is taken to court. Bringing affected interests in at the beginning of the process may reduce these challenges to the final rule and allow the agency final say in the outcome of the rule.[10] Nevertheless, a perceived threat to rulemaking jurisdiction may cause agency rulemaking officials to shy away from participating in regulatory negotiation.

[9] Lawrence Susskind and Alan Weinstein, "Towards a Theory of Environmental Dispute Resolution", Environmental Affairs, vol.9, 1980-1981.

[10] Philip Harter, "The Political Legitimacy and Judicial Review of Consensual Rules", The American University Law Review vol.32, #2, Winter 1983.

Finally, parties must feel that the regular rulemaking process is not constrained in instances where regulatory negotiation does not produce consensus on a rule. It is still not clear, for example, how participation or a refusal to participate in regulatory negotiation affects a party's ability to subsequently litigate a proposed rule. Limits on the use of information obtained during a regulatory negotiation in subsequent litigation are not yet established.

Given these obstacles, there are several things EPA can do to improve the likelihood of successful implementation of a regulatory negotiation effort: increase agency support and promotional efforts; increase public understanding of the process; decrease the degree of uncertainty surrounding certain aspects of the process and the roles of key parties.

Agency Support

Regulatory negotiation cannot survive at EPA without strong advocates within the agency. Inertia and opposition to change in any bureaucracy are difficult to overcome. The regulatory negotiation process has to be sold within the agency as well as to outside parties. During the Pre-Negotiation Phase of the LLW Standards, ground was broken by the Project Director and the Facilitator in gaining support from the different sectors within EPA. However, the delay in obtaining the backing of the Administrator and Program Office heads contributed to the problems in bringing the LLW rule to negotiation.

Top-Level Officials

The Regulatory Negotiation Project must have the endorsement and active support of top-level officials for successful implementation. Top-level promotion is also important to overcome inertia and solicit

cooperation from the Program Offices within EPA who will actually do the negotiating.

During the Pre-Negotiation Phase of the LLW rule, the top EPA officials endorsed the Project but did not actively promote and support it. Al Alm, EPA Deputy Administrator, indicated support for the Project on August 2, 1983 and expressed a preference for LLW Standards as the first rule. However, little effort was made by Alm or Ruckleshaus to legitimize the project, by talking or writing to groups to show support and address their anxieties, until very late in the process. They did not put pressure on hesitant Program Offices.

Alm did meet with environmental groups once very strong objections to the rule and the process had been raised with EPA's Policy Office. However, this meeting came so late in the process that the focus was on the particular rule and not the negotiation process per se. The need was for top-level EPA support for the process not for a particular rule.

One reason why it may have been difficult for Ruckleshaus and Alm to be more visible in their endorsement of regulatory negotiation was the myriad of issues facing EPA at the time.[11] They might not have wanted to use up scarce bargaining chips to pressure environmental or other groups for support of this project.

[11] Top EPA officials were facing the aftermath of accusations and investigations of EPA officials for illegal "under-the-table" negotiations with private industry. The level of public trust in EPA had greatly decreased. Public endorsement of the Project by a trusted official such as Ruckleshaus, could have helped to legitimize the project and distinguish this Regulatory Negotiation Project from the covert private negotiations with industry. However, many other projects needed top-level endorsement at the same time.

Also, while EPA officials have the authority to demand support from all Program Offices, they must wield that power sparingly. Other items on the EPA agenda may have taken priority over winning Program Office support for the regulatory negotiation project.

Program Offices

Each regulation promulgated by EPA falls under the jurisdiction of a Program Office. Under the terms of the Regulatory Negotiation Demonstration, the Director of the relevant Program Office will serve as EPA's chief negotiator. Therefore, a negotiation cannot take place without the approval and active participation of the respective Program Office. In the early phases of evaluating the candidate rules, there was little Program Office support for the Regulatory Negotiation Project. The degree of Program Office support became an essential criteria in evaluating the suitability of a proposed rule. Only two Program Offices submitted candidate rules although suggestions were requested several times. Some of this reluctance may be explained by the previously mentioned concerns about risk and uncertainty associated with a new and unfamiliar process. Also, the threat of losing some control over rulemaking may have caused some Program Offices to try to avoid having a rule under their jurisdiction selected for negotiation.

The Office of Radiation Programs (ORP), which had jurisdiction over the LLW standards, suggested several potential candidate rules and was receptive to the concept of negotiation. However, the office gave mixed signals in its support for the LLW rule once it had passed the initial screening. This hesitation seems to have been associated with their uncertainty over the degree of control that ORP could maintain over the rulemaking process.

ERM-McGlennon's October conflict assessment pointed out that ORP had "serious reservations" about becoming involved in regulatory negotiation. Glen Sjoblom, Director of ORP, was hesitant to comit his office unless he felt that he could "remain in control". He felt that EPA's Policy Office (OPRM) had taken the lead with the LLW rule and it was not maintaining adequately close contact with ORP.

It remains to be seen whether the perceived threat to Program Office jurisdiction is too great to encourage acceptance of negotiated rulemaking.

Project Director

A third actor within EPA with the power to substantially affect the Project's success is the Project Director and other key members of the Regulation Management Staff. Project Director, Chris Kirtz, worked hard to promote the process within EPA and coordinate the mechanics of the negotiation. Kirtz feels that he could have been more effective if he had delved much farther into identifying affected parties and their substantive concerns early in the process.

In my view, Kirtz also waited too long to formulate a strategy for obtaining the necessary top-level EPA support of the process.

Shaping an Understanding of the Process

Another critical factor affecting successful implementation of Regulatory Negotiation is making the process and its benefits known to potential parties. Parties may not participate in this process over traditional options if they do not fully understand its potential. According to John McGlennon, a major impediment to dealing with the hesitations of the environmental groups toward the proposed LLW rule was

their unfamiliarity with the negotiation process.

Detailed Draft of the Process

If the negotiation process is too unfamiliar or open-ended some groups will be scared away from participating. During the Pre-Negotiation Phase of the LLW rule, ERM-McGlennon sent a brief draft of potential groundrules to the likely parties.[12] ERM-McGlennon suggested that the groundrules, which set the procedures for the negotiations, would be agreed upon at the first full negotiating session. The draft protocols were too vague to give a sense of what to expect from the process.

A more specific set of groundrules might have given parties who are unfamiliar with the process a feel for what to expect. This description should be offered as a draft from which parties can develop specific procedures to fit individual needs and circumstances. Such a detailed description gives structure and thus greater predictability to the unfamiliar negotiation process. However, if detailed protocols are circulated as a rough draft, some parties may feel trapped into a process over which they had no control.

Gaining Public Acceptance

Public acceptance of regulatory negotiation should increase if the process proves to be beneficial. However, before that time, the merits of regulatory negotiation must be made known to develop an interest in this process over the traditional process.

One step taken by ERM-McGlennon to build public support for regulatory negotiation was to hold briefing meetings in May 1983

[12] See appendix 1 attachment B Draft Proposed Procedural Groundrules.

in Washington D.C. Separate meetings were held with industry representatives, environmental groups, and experienced environmental mediators. ERM-McGlennon described plans for the Regulatory Negotiation Demonstration Project and fielded questions and concerns. The meeting served to heighten awareness of the process. Another step towards gaining public acceptance was the development of a Regulatory Negotiation "kit" by Project Director Kirtz. This information package described the EPA project in some detail.[13] Unfortunately, the kit was not put together until November 1983, so it had no affect on the LLW rule decision.

Media coverage is an important mechanism for making the process better known and understood. Since its official inception in January of 1983, the Project has received relatively little press coverage even in technical and professional journals.

Decreasing Uncertainty

Some of the negative reactions observed in conflict assessments of the LLW Standards were due to the many unknowns and uncertainties surrounding regulatory negotiation. Parties are concerned with setting favorable precedents for their roles in future negotiations. There are three major issues and roles which are not yet established in the EPA Regulatory Negotiation context: access to and use of information; effects of negotiation on litigation; and power relationships. To the extent that uncertainty around these factors is reduced, parties are more likely to be willing to participate in negotiations.

[13] See appendix for executive summary of Regulatory Negotiation kit.

Access To and Use Of Information

Information is an important source of negotiating strength. How information is obtained, shared, and used are important factors which affect the outcome of negotiations and the relative influence of the parties.[14] The current EPA rulemaking process fosters adversarial relationships among parties. Also there is little individual control over how submitted information will be used. Thus, information is withheld for fear that it would be misused or would compromise a group's position.[15]

In negotiations, parties may work together to find solutions and are likely to have more influence on how data will be used to shape the regulation. Thus, parties are more likely to share information. Joint fact-finding processes in negotiations give a common base of information which has credibility because all parties agree to the methods of collection and evaluation. The Technical Advisary Committee mentioned in Chapter II could be the medium for some of these data collecting processes. Information sharing and joint fact-finding help to reduce the large inequities in access to information among negotiating parties in public disputes.

However, there are still some uncertainties surrounding the use of information in negotiations which may inhibit information sharing if they are not addressed. One uncertainty involves the allowable uses of information. At present there is uncertainty concerning whether positions and data disclosed in negotiation could be held against

[14] P.H.Gulliver, Disputes and Negotiations, New York, N.Y.: 1979, chapter 6.

[15] D.V.Feliciano, "Negotiating Regulations: Let's Negotiate, Not Litigate", Journal Water Pollution Control Federation, January 1983.

parties in subsequent rulemaking efforts if negotiation is unsuccessful in producing concensus. Some example protections which could be suggested as protocols to limit how information may be used are:

*establish that any particular position is tied to other aspects of the standard, thus a party is not held to positions on isolated issues;

*submit data in aggregate form;

*circulate initial positions without tying them to particular parties- (mediator could make the suggestions);

*do not quote or refer to data, discussions, or positions in any subsequent rulemaking process unless explicitly agreed on by all parties to the negotiation.16

Another uncertainty involves the use of confidential business information. At present, industries are required to reveal certain information to EPA concerning the processes and materials they use. However, industries may have some information which they do not want to share with other competing industries also involved in a regulatory negotiation. This issue must be addressed according to individual circumstances around a particular regulation. It may be a factor which makes certain regulations unsuitable for negotiation.

Effects of Negotiation on Litigation

Some groups may not be willing to participate in regulatory negotiation unless they can be assured that traditional channels to resolving regulatory disputes will remain open. On the other hand, negotiation must reduce the likelihood of litigation or the negotiation process becomes futile.

Every party must have an option not to participate in a proposed

16 Phil Harter, Discussion Outline:Potential for Negotiating OSHA's Benzene Standard, August 1983.

regulatory negotiation. However, it is very expensive to litigate and a party would likely have to justify to a court why s/he did not participate. The outcome of litigation is an unpredictable win or lose situation. A party could have more influence and at least get some interests met in a negotiation. Parties are likely to take the negotiation option (if the obstacles to negotiation discussed in this paper are removed).[17]

Nevertheless, some litigation will still take place after unsuccessful negotiations and even some "succesful" negotiations. Parties fearing litigation will be more likely to withhold information and refuse to cooperate if they fear having their positions later used against them. The limits on the use of information in subsequent litigation mentioned in the previous section are important to foster a cooperative setting for sharing information. No precedent has been set for litigation on a negotiated regulation.

Establishing Power Relationships

The way information is used, resources allocated, and skills balanced will have a great effect on the power relationships that develop in a regulatory negotiation process. Parties feeling at a great disadvantage will not participate. In the case of the proposed LLW rule, the objecting groups had concerns over both the rule itself and potential imbalances of power.

Some groups may not be willing to negotiate unless they have adequate access to resources, information, and negotiation training. Without these critical ingredients, they may prefer litigation, even

[17] D.V.Feliciano.

with its costs and risks. The availability of such things as the Resource Pool and Information and Negotiation Workshops may help to establish perceptions of more equal power relationships among the parties.

The strong stances taken by environmental groups and by ORP were in part an effort to establish favorable roles for their groups in negotiations. Glen Sjoblom's request for five additional ORP staff for the regulatory negotiation on LLW standards strengthens his Program Office and sets a favorable precedent for future negotiations. The environmental groups' long list of concerns and demands were in part an attempt to establish the most favorable precedent for their role in this new process.

In EPA regulatory negotiations, many of the same groups will meet many times for different regulations. Groups often become more cooperative when they have to work together over time. These conditions can encourage the sharing of information and resources which would help to equalize power among groups. However, if relatively stronger groups feel they are giving up too much power, they may prefer to resort back to litigation as the mode of settling disputes over regulations.

IV. CONCLUSIONS

Did EPA Make The Correct Decision?

Yes, EPA's decision to drop the LLW rule from negotiation was correct. The demonstration would have lacked legitimacy and received bad publicity without the participation of the key environmental interest groups. Also the hesitancy of the Program Office would have made it difficult for the negotiation to succeed. Either EPA's top leadership must be willing to press Program Offices to cooperate or regulatory negotiation should only take place when actively supported by the relevant Program Office.

Did the Facilitator/Mediator Make The Correct Decisions?

Yes, ERM-McGlennon performed well in just about all aspects of the process. They were appropriately active in the Pre-Negotiation stage, taking initiative and responsibility for the direction of the process.

ERM-McGlennon may not have done enough to identify the substantive concerns of all the parties early in the process. Moreover, they did not have an explicit strategy for defining whether environmental group representation was adequate. They might have convened an assembly of environmental groups to help determine a basis for acceptable representation and to shape a clearer agenda of substantive concerns.

Lessons to Draw From the LLW Rule Experience

1. **An outside active facilitator/mediator can play an essential role throughout the Pre-Negotiation Phase of a regulatory negotiation process.** A facilitator/mediator needs to be active in this phase because many of the affected interests for a rule are not easily identified, representation of interests is unclear, and there are great differences in levels of expertise and access to information among

parties. The facilitator/mediator can address the potential obstacles to achieving committments to negotiate. In order to avoid problems of credibility and trust, the facilitator/mediator should come from outside of EPA (which is an interested party to the negotiation).

2. **Early active conflict assessment is crucial.** The experience with the LLW rule suggests that concerns of many key parties are not readily apparent. Concerted efforts must be made by EPA and the facilitator to seek out potentially affected parties and identify their concerns. It is important to try to surface concerns early in the Pre-Negotiation Phase to avoid having substantial investments made in a particular rule only to have it fall through at the last minute.

3. **Strong Program Office support or top-level agency pressure and endorsement are needed to proceed.** Regulatory negotiation cannot take place without the approval and active participation of the relevant Program Office (which is the primary negotiator for EPA). Inertia and opposition to change may cause barriers to successful implementation of regulatory negotiation. Either the Program Office must fully support a particular rule or top-level officials must be willing to require Program Office support. Public top-level endorsement is also important to legitimize and emphasize the importance of a regulatory negotiation effort for outside groups.

4. **In order to bring the parties to the negotiating table, the potential benefits of regulatory negotiation must outweigh the potential losses** Steps taken to address obstacles to negotiation can improve the likelihood of participation. The Resource Pool is a crucial device for addressing the concerns of potential participants over imbalances of

power and resources (like the concerns mentioned by potential parties to LLW). Other mechanisms such as technical briefings, Technical Advisary Committees, and joint fact-finding efforts can serve to bring parties up to date on technical aspects of the rule, form a common pool of data from which parties can make decisions, and reduce the large inequities in access to information among the negotiating parties. Negotiation skill workshops may help parties who are unfamiliar with the negotiation process to participate more effectively.

5. **A draft of procedural protocols should be provided to potential participants to increase their understanding of the regulatory negotiation process and to give hesitant parties an idea of what to expect.** From this draft, parties can develop unique procedures to fit the particular circumstances and needs. A major impediment to getting some parties to participate in the LLW regulatory negotiation was their lack of familiarity with the negotiation process. Meetings of all potential parties should be held to set protocols prior to requiring official committments to negotiate. This can avoid the dilemma of parties being asked to commit to a process (and thus legitimizing it), before the procedures have been determined. Once regulatory negotiation has been tried, the protocols from past efforts could be presented to potential parties as sample procedures used in negotiation.

6. **Promotional and educational efforts to improve understanding of the Regulatory Negotiation Demonstration should decrease anxieties about a new process.** Press coverage, briefing meetings, and information packets can be used to increase public awareness and explain certain aspects of the process. An interest in regulatory negotiation should be developed

in its early stages of use to attract potential parties.

7. If these efforts at making the regulatory negotiation process attractive to potential parties do not garner sufficient commitments to negotiate, it may be necessary to make the alternative option of litigation less attractive. Parties may not participate in regulatory negotiation if they anticipate an expensive court battle afterwards. Disincentives to litigation could make regulatory negotiation a more competitive option. One method would be to require parties who refuse to participate in regulatory negotiation to justify their reasoning to a judge before being allowed to litigate a negotiated rule.

APPENDIX 1

SAMPLE PARTICIPANT LETTER

ERM-McGlennon Associates
148 State Street Boston, Massachusetts 02109 • (617) 742-1580

October 11, 1983

Lisa Finaldi
Co-Director
Sierra Club
Radioactive Waste Campaign
78 Elmwood Ave
Buffalo, NY 14210

Dear Ms. Finaldi:

The purpose of this letter is to follow-up on your telephone conversation with Peter Schneider regarding EPA's Negotiated Rulemaking Project. As you know, this project will explore the usefulness of all-party, face-to-face negotiations as a possible supplement to the current rulemaking system. The negotiations are intended to lead to a consensus which will be used as the basis of a proposed rule.

After carefully assessing over 30 candidate rules for negotiated rulemaking, EPA has selected a rule to establish radiation protection standards for low-level radioactive waste disposal. The scope of the rule includes a determination of whether or not there is a limit of exposure from the disposal of radioactive waste below which radiation-related regulation is not warranted. The scope of this proposed rule is outlined in Attachment A of this letter.

The Negotiated Rulemaking Project and the selection of the low-level waste rule have the full endorsement and support of EPA. Glen L. Sjoblom, Director of the Office of Radiation Program, (ORP) will be EPA's chief negotiator. Richard Guimond, Director of ORP's Criteria and Standard Division will serve as EPA's alternate.The Office of Policy and Resource Management will provide logistic, administrative and management support.

This negotiated rulemaking effort, however, can only proceed and be successful if all the key parties are willing to participate in good faith. In earlier discussions with my office, you expressed an interest in this project. Now that a rule has been selected we are requesting a more formal commitment from potential parties. I would appreciate it if you would discuss your participation with your Board of Directors or appropriate policy group. If you are willing to participate, you will need to designate a senior person who can represent your organization in the negotiations. We would like to obtain a formal committment from all parties by November 8th.

As part of our conflict assessment, we have identified and contacted other parties who are likely to have an interest in these negotiations (see Attachment C). Every effort will be made to ensure that each interest is adequately represented on the negotiating group. We would welcome your recommendation on other parties that might be included. A Federal Register announcement that is expected in the next few weeks will help to identify parties we may have missed.

The negotiating body will operate as an advisory commitee under the Federal Advisory Committee Act (FACA). FACA requires that all formal negotiating sessions be noticed in the Federal Register. As such, the forthcoming Federal Register notice mentioned above will announce the selection of the low-level waste rule and set the date for the first meeting or negotiating session. At this time, we expect the first negotiating session to focus exclusively on procedural groundrules. It is tentatively scheduled for January 16, 1984 in Washington, D.C. The negotiations must be completed within six months.

I am pleased to report that progress has been made on the the so-called Resource Pool which will support the negotiations by funding activities such as training, computer simulation and technical support. EPA has pledged $25,000 for this first rule and an additional $25,000 is expected from private foundations. The parties involved in the negotiations will develop their own rules for requesting and approving funds. The American Arbitration Association has agreed to serve as the clearinghouse with respect to managing the pool.

The parties involved in the negotiations will also have to agree upon a variety of groundrules at the first meeting. These groundrules will include items such as how often to meet, where meetings will be held or how to handle confidential information. A draft of the procedural groundrules is included as Attachment B.

In conclusion, I am delighted that the Negotiated Rulemaking Project is moving ahead and find the low-level waste rule particularly exciting. I will be serving as the convenor/facilitator working with all the parties to keep the process running smoothly. The participation of the Sierra Club is important to the success of this innovative project and I encourage you to give it serious consideration. Finally, we will be calling you next week to answer any questions you might have and arrange a meeting if necessary.

Sincerely,

John A.S. McGlennon
Convenor/Facilitator

Encl.

ATTACHMENT A

SCOPE OF NEGOTIATION

RADIATION PROTECTION STANDARD
FOR LOW LEVEL WASTE DISPOSAL

The purpose of the negotiation is to develop environmental radiation protection standards for low-level radioactive waste disposal to protect the public health and general environment. This will include consideration of a limit of exposure below which radiation-related regulation is not warranted. This is sometimes known as a level "below regulatory concern" (BRC) or a "de-minimus" standard.

By definition, low-level radioactive wastes include all radioactive wastes except high-level radioactive wastes, uranium mill tailings, and wastes regulated under the Resource Conservation and Recovery Act of 1976. About 50% of commercial low-level wastes are generated by facilities related to the production of nuclear power; the rest come from medical and research institutions and industrial facilities. Approximately an equal volume of LLW is generated and disposed of by the Department of Energy at their facilities. Typical wastes may include filter sludges, dry compressible trash, protective clothing, animal carcasses, and contaminated chemicals. They occur in a wide variety of physical and chemical forms and may contain quantities of radioactive materials ranging from trace amounts to thousands of curies per cubic foot. In general, however, some low-level wastes contain very low concentrations of radioactive contamination and require little or no radiation shielding for human handling. They also require relatively short isolation from man's environment (tens to hundreds of years of isolation, in contrast to the thousands needed for high-level wastes).

Historically, these types of wastes have been disposed of in shallow land burial sites operated commercially or by the Department of Energy. Yet the disposal capacity for radioactive wastes has been decreasing as the volume of wastes has increased. In 1970, six commercial low-level shallow land disposals sites were operating; in 1983, four of those sites had closed because of problems, and the remaining two had curtailed disposals. Yet at the same time, the annual volume of wastes has increased from 25,000 cubic meters to 95,000 cubic meters.

Several key questions will be addressed as part of these negotiations including:

- What is the appropriate level of environmental and public health protection associated with the disposal of these wastes?

- What is the appropriate form and a numerical value for low-level waste standards?
- Are there some types or classes of radioactive waste that do not need regulatory control?
- What are the key factors in reasonably assuming that environmental protection standards will be satisfied?
- Is a 100 year institutional control period for LLW disposal facilties an appropriate time?
- What should be the basis for determining to which facilities the standard should be applied?
- What method should be employed to confirm that environmental standards are being met?

These questions are illustrative only. There may be additions or deletions depending on the interests of parties.

ATTACHMENT B

DRAFT

PROPOSED PROCEDURAL GROUNDRULES

FOR EPA NEGOTIATED RULEMAKING PROJECT

1. The negotiation will be conducted in the context of the Federal Advisary Committee Act (FACA) in accordance with a specific charter which allows for a maximum of 20 members on the committee. Under FACA, meetings will be announced in the Federal Register and open to the public unless closed under allowable FACA provisions.

2. ERM-McGlennon Associates will serve as the neutral convenor/facilitator helping to organize the negotiations and working with all parties to ensure that the process runs smoothly.

3. Participants must be prepared to negotiate in good faith. As such, a senior representative from each organization who can speak for that organization must be designated to serve on the negotiating group.

4. If a consensus is reached that fulfills the relevant statutory requirements, EPA is committed to using the consensus as the basis of a Notice of Proposed Rulemaking.

5. The negotiating group itself will establish detailed procedures with respect to meeting times and places, the use of the Resource Pool and other items which they deem appropriate including:

   -protecting confidential business information,
   -establishing deadlines for completion of negotiations,
   -"opting out" either during the negotiations or after their completion, and
   -speaking freely and openly during negotiations without being adversely affected in later proceedings.

ATTACHMENT C

INITIAL LIST OF POTENTIAL PARTIES

LOW-LEVEL WASTE DISPOSAL
RADIATION PROTECTION STANDARD

- Atomic Industrial Forum
- Environmental Policy Institute
- Conference of State Radiation Control Directors
- Health Physics Society
- League of Women Voters
- National Governors Association
- Sierra Club
- Utility Nuclear Waste Management Group
- U.S. Environmental Protection Agency
- U.S. Department of Energy
- U.S. Nuclear Regulatory Commission

APPENDIX 2

CONFLICT ASSESSMENT FORMAT

ATTACHMENT A

CONFLICT ASSESSMENT FORM

NAME:_____INTERVIEWER:_____

AFFILIATION:_____

DATE:_____

1. FAMILIARITY

   A. with process

   B. with LLW issues

   C. with status of proposed rule

2. MAJOR CONCERNS

   A. of organization

   B. you personally

   C. how can these concerns be addressed?

3. OTHER PARTIES

   A. who are they?

   B. what are there concerns?

C. what do you think EPA's position is on this rule?

D. do you have a problem with any of the parties? their participation?

E. are you in contact with any of the parties?

4. EXPECTATIONS

A. What is your desired outcome?

B. What do you think is the likely outcome?

C. Are there alternatives that might be acceptable?

D. What are the likely barriers to an agreement?

E. Can they [barriers] be accomodated? how?

F. Is there room for compromise?

5. PARTICIPATION

A. Is your group willing to participate? Are there remaining questions we can help address?

B. Who should represent your group?

C. What process do you need to follow for your representative to be empowered?

D. Will your representative be able to speak for your group?

E. Will your representative be willing to speak for any other group?

F. Do you have a process for checking back with your organization?

6. PROTOCOLS (refer to examples)

A. Are there any other protocols that you wish to recommend to the group?

B. Discuss the resource pool.

C. Discuss the negotiation process. Do you have any other recommendations?

D. Discuss the role of the documentation team - follow-up phone calls.

E. Any other questions

APPENDIX 3

ENVIRONMENTAL POLICY INSTITUTE CONCERNS

Environmental Policy Institute
317 Pennsylvania Ave. S.E. Washington, D.C. 20003
202/544-2600

November 2, 1983

Mr. Jack Campbell
Acting Assistant Administrator for
Policy and Resource Management
U.S. Environmental Protection Agency
401 M Street S.W.
Room 1013 West Tower
Washington, D.C. 20460

Dear Mr. Campbell;

Thank you for the opportunity to discuss the Agency's implementation of the "Regulatory Negotiation Project" and the proposed selection of low-level radioactive waste(LLW) regulations as the initial demonstration of the negotiation concept. I found our meeting on Friday, October 28th to be very helpful in gaining an understanding of the Agency's goals in this endeavor. I sincerely appreciate your willingness to meet with us and your generous commitment of time.

It is my intention here to summarize the principal reasons as to why the Agency's anticipated rulemaking on low-level radioactive waste is not an appropriate choice for regulatory negotiation. As we discussed, my concerns extend beyond the issue of whether or not the low-level radioactive waste rule is an appropriate candidate for regulatory negotiation and into the conduct of the negotiation program.

Despite previously proposed selection criteria(48 FR 7494; February 22, 1983), EPA proposes to select a rule that does not fit those criteria and, more importantly, the selection mechanism did not identify unique aspects of the low-level waste rule which make it inappropriate for selection.

I note in passing that the EPA criteria are less extensive and less rigorous than those outlined by proponents of the negotiation process(Harter, Philip J., "Negotiating Regulations: A Cure for Malaise", 71 Geo.L.J.1(1982)) (Administrative Conference of the U.S., "Recommendation No.82-4", 47 FR 30708-30710, July 15, 1982). For example, the Administrative Conference, recognizing the need to keep the absolute number of participants in the negotiation to a workable minimum, recommended keeping the number of "interests that will be significantly effected by the rule and therefore represented at the negotiations" restricted to the point that the number of participants representing those interests be no more than fifteen. EPA criteria, however, anticipate that the number of "parties interested in or affected by the outcome of the development process" number between 10 and 15. Participants are not synonymous with affected interests. Furthermore, the low-level waste rule could involve dozens of "effected interests".

The unique circumstances surrounding the LLW include the fact that there is no statutory framework for the rule. EPA's authority for the LLW rule stems entirely from the 1970 Reorganization Plan creating the Agency. As such, the Agency's radiation authority has been interpreted to allow it to set only general environmental standards. EPA, under this interpretation, does not have authority to set technology control requirements, nor to permit facilities, nor to enforce the standards. In short, the field of negotiation settles on a series of very narrow technical debates concerning dose pathways and health risks. The potential to develop policy tradeoffs, the theoretical heart of a negotiation process, appears to be virtually non-existent while the ground for technical and scientific debate appears almost endless.

Not only has radiation exposure and risk assessment been the subject of three decades of intense debate and showing no signs of lessening given new analyses of the Japanese atomic bomb data, but the regulations would conceivably cover dozens of types of facilities and hundreds of waste products. The Agency's August 31st ANPRM announcing the low-level waste rule, and made without reference to its consideration as a candidate for negotiation, identified four general institutional categories alone to which the rule would apply; nuclear power-related facilities, medical and research institutions, industrial facilities, and Government operations. Within these categories, the rule would cover many different industrial processes and types of facilities to say nothing of the many related waste products. The proposed undertaking fails to take into account the need to field negotiating teams, and the development of data bases, to address such issues of this nature in a "negotiation" format including the the enormous resource commitment it would entail from effected parties.

As noted above, EPA's authority to promulgate the LLW rule does not originate from any legislative action or directive, but rests on the 1970 Reorganization Plan. As such, there is no consensus or impetus for developing the proposed rule and in fact the attention of environmental groups, the public, and state officials has been directed in an entirely different arena; the political debate over the establishment of regional low-level waste compacts for the low-level waste management pursuant to the Low Level Waste Policy Act of 1980.

The absence of prior legislative debate, which would inevitably preceed Agency rulemakings in other environmental protection areas, results in a lack of easily identifiable issues and controversies. Even more significantly, key interests, such as environmental organizations, do not have a policy making/communication network in this area upon which to base and conduct their negotiation. The establishment of such a mechanism is customarily associated with legislative campaigns and post-legislative implementation, but is lacking for LLW.

The difficulty of establishing and maintaining internal consensus/communication mechanisms within large interest groups engaged in negotiation has been all but ignored by the EPA. This is a specific problem in the proposed low-level waste rule for the reasons identified here, but would confront any negotiation. In general, non-industry or non-agency parties will be faced with a difficult task of assembling a means of representation within their constituencies. This applies no less to parties like the National Conference of State Legislatures, which is not equipped or structured to represent its members in a day-to-day negotiation than to the environmental community. I do not believe that representatives of the environmental community could genuinely represent those interests in a negotiated rulemaking on low-level radioactive waste, or any other generic rulemaking, in the absence of a communication/consensus mechanism and the resources necessary to maintain it.

The problem of representation in regulatory negotiations is compounded, in my view, by the absence of identifiable procedures or criteria to select parties to the negotiation and to assure that parties have equal resources. Not only will other Federal agencies(DOE and NRC) with almost limitless resources be involved in the low-level waste negotiations, but other parties including industrial trade organizations possess resources well beyond those which can be developed by public interest or state representatives. In fact, some of the state organizations(NGA, NCSL, Conference of State Radiation Program Directors), and at least one public interest organization(LWV), depend upon funding from DOE for LLW activities. It goes without saying that we do not view DOE nor NRC as neutral parties in this proceeding. DOE currently spends about $8 million in direct line item authority annually promoting low-level waste technologies and the establishment of new disposal sites. Of this amount, approximately $2.5 million is distributed to state governments, agencies and state associations. EPA's proposal to provide $50,000 for technical support and research for all parties falls far short of what would be required to achieve parity among the interests involved.

I repeat here, for the record, my concern that under the Agency's proposed procedures the groundrules for individual negotiations would not be determined until the negotiation is in session. It is my firm belief that parties should know, and agree to, the procedures for the negotiation and their rights of participation prior to commencement.

In sum, I am not advocating that EPA abandon its efforts to regulate low-level radioactive waste as others propose. I am also not endorsing the current system of regulation development especially at the ANPR level. I do have serious reservations, however, about the use of regulatory negotiation, as proposed by the Agency, in the low-level waste rulemaking. Those reservations have been reinforced by the apparent lack of rigorous procedures for selecting candidate rules and conducting the negotiations. Similarly, I am concerned about a central

point of disagreement raised in our meeting; your view that the regulatory negotiation process was an appropriate means to resolve scientific controversies.

Regulatory negotiation, as described by its advocates, is not a mechanism for resolving disputes of fact nor conducting scientific debate for the benefit of the Agency. Rather it is intended to serve as means of resolving regulatory conflicts among effected parties through negotiated trade-offs of regulatory policies mutually effecting those parties. While I am reluctant to oversimplify our disagreement, I believe there is a fundamental difference between "debate" over scientific or technical evidence or theory and "negotiation" among effected parties over how an environmental pollutant should be regulated.

As I stated several times in our meeting, I firmly believe that the Agency should review the characteristics of the many different types or regulatory issues, including scientific issues, before it and examine a range of preliminary "consensus" or "resolution" mechanisms which may be appropriate to them. I think the Agency's interest in examining complex scientific issues preliminary to rulemaking merely underscores the need for an appropriate means to do so. It does not argue for "regulatory negotiation", as the one concept under examination, to be selected as a suitable approach. Other mechanisms, such as formal or informal public hearings, could be used to achieve the desired end.

Sincerely,

David Berick
Environmental Policy Institute

cc: B. Early(SC)
B. Finamore(NRDC)
R. Percival(EDF)
M. Faden (UCS)
D. Doniger(NRDC)
W. Butler(AS)

APPENDIX 4

EXECUTIVE SUMMARY OF REGUALTORY NEGOTIATION KIT

REGULATORY NEGOTIATION PROJECT
INFORMATION KIT

"Executive Summary"

Overview

The Environmental Protection Agency (EPA) has begun a project to study the usefulness of all-party, face-to-face negotiations as a supplement to the current adversarial system of regulatory development. The project will apply the negotiation process to two rulemakings.

EPA's Current System

EPA's current process of developing regulations is directly linked to the "informal notice and comment" requirements specified in the Administrative Procedure Act. As such, it is largely an adversarial process: The agency develops facts and policy, and solicits information from interested and affected parties. The agency then analyzes all the information and issues a rule. When this system fails to accommodate competing interests, the result is litigation or some other form of conflict.

What is Negotiation?

Negotiation, on the other hand, is an accommodation process which gives the parties far greater control of the decisionmaking. Parties with different intersts can resolve issues by meeting, discussing, and agreeing upon facts, questions, and solutions. An advantage to negotiation in the regulatory area is that the parties determined not only the substance of the rule but also the procedures for deciding what the substance of the rule will be. Encouraging the parties to share information and to work together allows for creative approaches to resolving issues and reaching consensus.

Genesis of EPA's Project

Regulatory negotiation is not a new concept. Building codes, electrical and plumbing standards, and product safety measures are all developed through a process of negotiation among affected parties. In addition, regulatory negotiation takes place in settling lawsuits that challenge regulations promulgated by an agency. Furthermore, in the environmental area, negotiation and mediation processes have been used frequently to manage regulatory conflicts involving government agencies.

In 1982, the Administrative Conference of the United States (ACUS) recommended (82-4) that agencies consider assembling parties in interest to a given rulemaking and negotiate the text of the proposed rule. To date, three agencies--FAA, OSHA, and EPA--have initiated negotiations related to developing rules.

A Description of EPA's Project

EPA's regulatory negotiation project will involve two rulemakings. The goal of the negotiation will be to reach consensus on which to base the Notice of Proposed Rulemaking (NPRM). The Administrator will use any consensus--so long as it is within his statutory authority--as the basis of the proposed rulemaking.

The project will investigate:

- o the value of developing regulations by negotiation
- o the types of regulations which are most appropriate for this process
- o the procedures and circumstances which best foster negotiations

The negotiations will occur at the pre-proposal stage All the normal Administrative Procedure Act requirements will continue to apply.

If the pilot negotiated rulemaking process is successful, and well received by the agency and the public, EPA will consider adding it to its repertoire of methods for developing regulations.

The Regulation Management Staff (RMS) designed the project and will administer it for EPA. A staff member from the lead program office at EPA will negotiate as the party-in-interest for EPA. Parties representing legitimate and definable interest groups will negotiate on behalf of their constituencies.

A neutral third party will chair the negotiations, keep the process moving smoothly, and assist in resolving disputes. For the first negotiation, EPA will use an outside contractor in this role of convenor-facilitator; for the second negotiation, staff from EPA's Office of Standards and Regulations will perform this function.

The Harvard Negotiation Project will document the entire project. After the negotiations, EPA will issue a final report describing the experience, what it has learned, and any intended follow-up.

Steps in the Project

The major steps in EPA's demonstration project are:

- o Establishing criteria and selecting appropriate items for negotiation.
- o Preparing a Federal Advisory Committee Act (FACA) charter

- Designing and establishing a resource pool to support the group in reaching consensus
- Commencing and completing negotiations
- Documenting the project

and

- Issuing a final report

Status of the Project

On February 22, 1983, EPA published a notice in the Federal Register, requesting parties to submit suggestions for rules to be negotiated. EPA also solicited suggestion internally from Program Offices and had its contractors send requests for suggestions to 66 environmental groups, trade associations, and other organizations. In all, over 50 candidate regulations were nominated.

EPA is now in the process of screening the candidate regulations. Once the agency has selected the first candidate for negotiated rulemaking, it will publish a notice in the Federal Register announcing its intent to establish a FACA Advisory Committee, and listing the candidate item, potential issues, parties, etc. The notice will propose the procedures and guidelines to be used, and will invite public comment.

After evaluating the responses to the notice, EPA will issue (if appropriate) a final notice, announcing the establishment of the Committee, and setting a date for the first meeting.