

Wholesale Pork Reporting Negotiated Rulemaking Meeting

**February 8, 2011
St. Louis, Missouri**

Overview - Negotiated Rulemaking



Negotiated Rulemaking

Governing Statutes

- **Negotiated Rulemaking Act 1996 (NRA)**
- **Administrative Procedure Act (APA)**
- **Federal Advisory Committee Act (FACA)**
- **Mandatory Price Reporting Act of 2010**

Negotiated Rulemaking Act

Purpose

The purpose of this subchapter is to establish a framework for the conduct of negotiated rulemaking, consistent with section [553](#) of this title, to encourage agencies to use the process when it enhances the informal rulemaking process. Nothing in this subchapter should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovative rulemaking procedures otherwise authorized by law

Section 566

- **Duties of Committee-... “attempt to reach a consensus concerning a proposed rule”**
- **Representative of Agency- same rights as other members and “ authorized to fully represent the agency in...negotiations”**
- **Selecting Facilitator- agency may nominate subject to consensus of committee**
- **Duties of Facilitator**
- **Committee Procedures- committee may adopt operational procedures**
- **Committee Report**

Section 563

- (a)(7) “ the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.”

Section 562

- For the purposes of this (law), the term

- (2) “consensus” means unanimous concurrence among the interests represented on a negotiated rulemaking committee ... unless such committee-
 - (A) agrees to such term to mean a general but not unanimous concurrence ; or
 - (B) agrees upon another specified definition

“Facilitator”

- Section 562(4) defines a “facilitator” as “ a person who impartially aids in the discussions and negotiations among the members of a negotiated rulemaking committee to develop a proposed rule”

- Section 566(d) provides that facilitator’s duties are
 - (1) chair the meetings in impartial manner
 - (2) impartially assist members in discussions and negotiations
 - (3) manage the keeping of minutes and records

- See Proposed Ground Rules Section VII.C.

➤ **STRUCTURE**

- Director appointed by the President
- Headquartered in Washington, D.C.
- 70+ Field Stations
- Approximately 164 mediators nationwide

➤ **MISSION**

- Primarily involved with Collective Bargaining; however, considered the premier agency in the United States for conflict resolution

➤ **FUNCTIONS**

➤ ***No Regulatory or Enforcement Authority***

➤ Collective Bargaining Mediation and Labor-Management Conflict Resolution, Training, and Facilitation

➤ International training, consultation, and facilitation

➤ Alternative Dispute Resolution and Dispute Systems Design

➤ Facilitation of Regulatory Negotiations/Public Rule-making

➤ OUR BACKGROUND

Negotiated Rulemaking Context

- **Augments, does not replace, the Agency's rulemaking process**
- **Rule must still go through normal Agency and administration review processes**
- **Rule must still comply with other applicable statutes and executive order**
- **Rule still is subject to public comment per the APA**
- **If agreement is not reached, agency proceeds with its own rule.**

Negotiated Rulemaking Process

Before

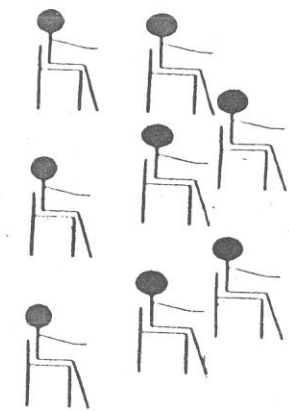
- Agency interest in Reg Neg
- Select facilitator
- Conduct convening assessment
- Plan & organize the process
- Identify & invite participants

During

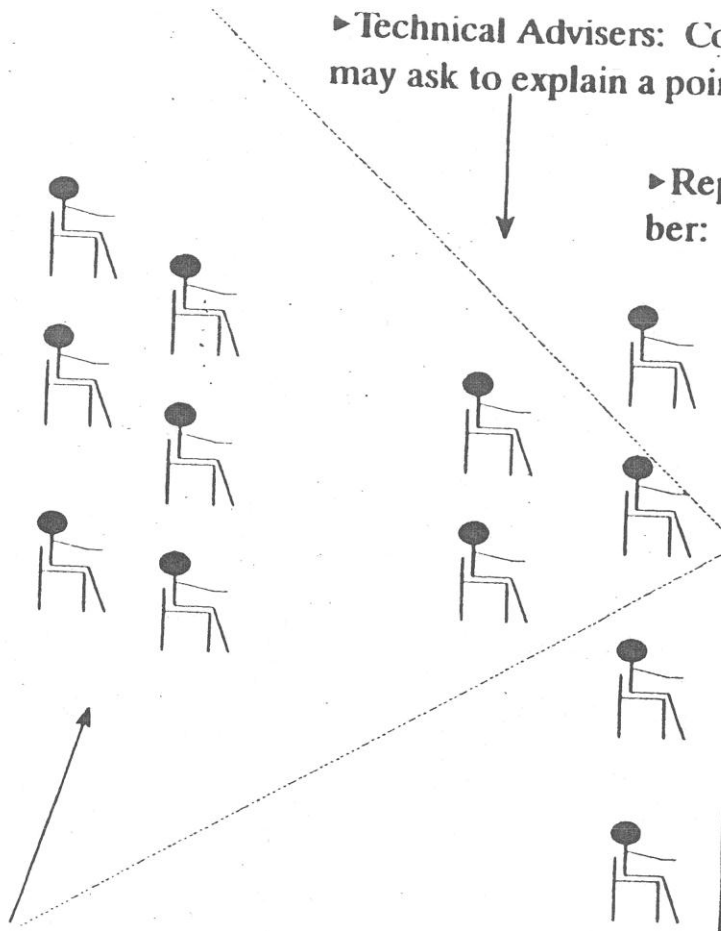
- Assemble, analyze, agree on data
- Consult constituents
- Construct and analyze options
- Constituent ratification
- Finalize agreement

After

- Final Agency Review
- OMB Review
- Administrator signs
- NPRM Published
- Public comment



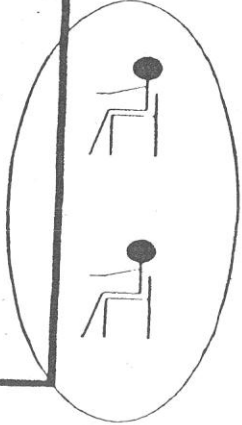
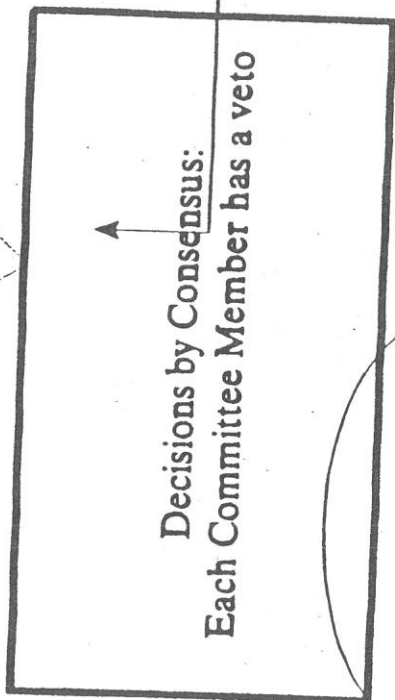
▶ **Constituents who are not present: Keep in touch**



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

▶ **Technical Advisers: Committee Member may ask to explain a point**

▶ **Representative/Committee Member: Has full right of the floor**

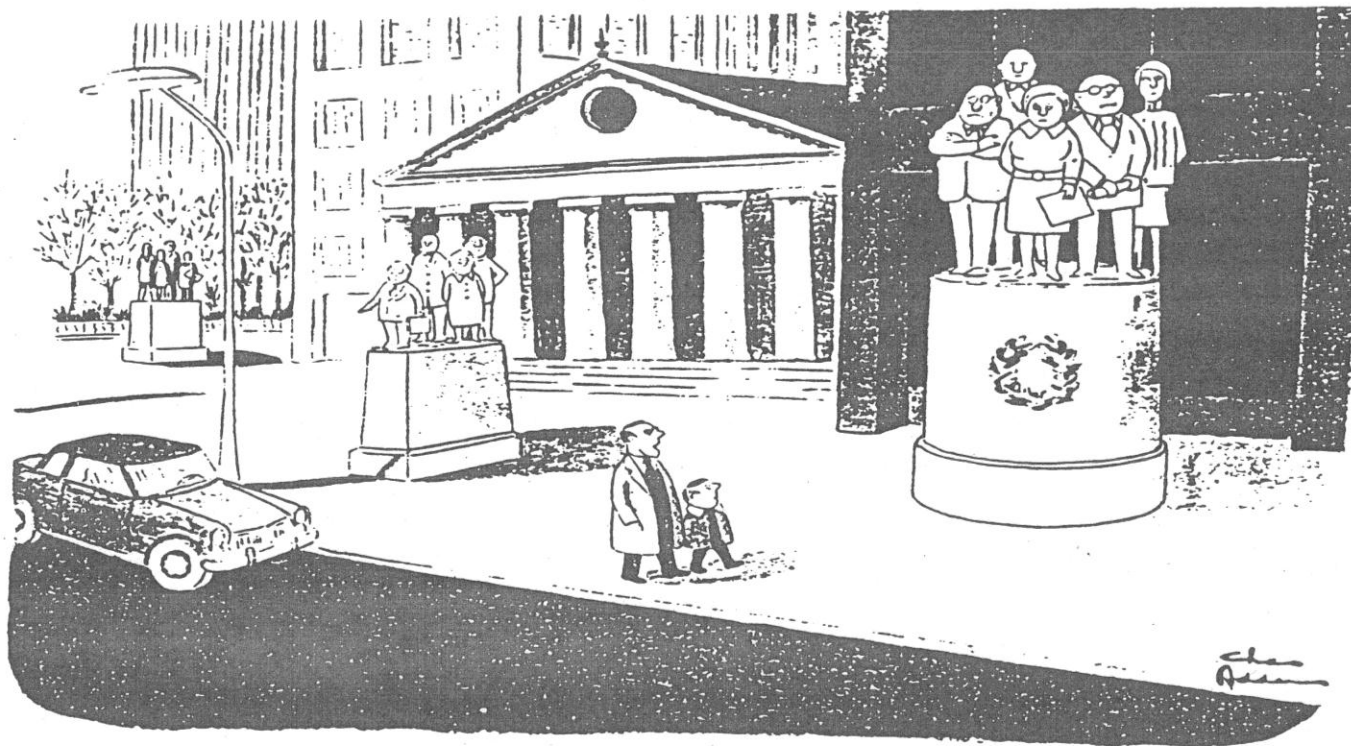


▶ **Mediator: Assists the parties in the process of reaching agreement**

▶ **Caucus of allied interest**

The "Wedge" of Interests

Prepared by Phillip J. Harter, 1990



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

Tips for Successful Reg-Neg

- 1. Work with the facilitator
- 2. Don't renege on agreements
- 3. Come willing to reach an agreement
- 4. Be open to persuasion or correction by facts or principles
- 5. Don't withhold critical information
- 6. Don't use the process for attaining other goals
- 7. Negotiate with an open mind
- 8. Have the authority to make decisions
- 9. Come to negotiations prepared -- do your homework
- 10. Each member holds a piece of the truth...

CONSENSUS DECISION- MAKING



“*con.sen.sus*”

- A PROCESS FOR GROUP DECISION- MAKING IN WHICH:
- **EVERYONE HAS BEEN HEARD**
 - **EVERYONE CAN LIVE WITH, AND SUPPORT, THE DECISION**



Consensus Decision-Making

- A group reaches consensus when all members agree on one alternative
- All points of view are heard
- An acceptable solution at the time

Guidelines for Consensus

- Listen **ACTIVELY**
- Encourage participation
- Openly share information and ideas
- Don't change to keep harmony

BLOCKERS

- Blockers are people who don't agree with a consensus decision
- Serve an important purpose
- Help avoid “group think”

Responsibilities of Blockers

- Stay involved with the group
- Clearly state “why” they disagree
- Try to offer a specific way to satisfy his/her interests

CONSENSUS TIPS

- **THE 70 % RULE**
- **ASK YOURSELF:**
 - **CAN I LIVE WITH THE DECISION AT LEAST 70% OF THE TIME?**



CONSENSUS TIPS



→ ACCELERATED CONSENSUS TECHNIQUE

- WHEN THE GROUP IS IN GRIDLOCK
- WHEN YOU NEED TO NARROW SEVERAL OPTIONS TO ONE

Consensus Reached

- Consensus reached when all members of a group are willing to accept a decision.
- Even though a decision may not necessarily be an individual's first choice, they consider it an acceptable approach
- 70-100% Test

Consensus Exercise

A large, empty rectangular box with a thin black border, occupying the majority of the slide's content area. It is intended for a consensus exercise, likely a group activity where participants discuss and agree on a common point.

INTEREST BASED BARGAINING/PROBLEM SOLVING

IBB ALSO TERMED

- WIN / WIN
- INTEGRATIVE BARGAINING
- COLLABORATIVE BARGAINING
- BEST PRACTICES
- MUTUAL GAINS
- PRINCIPLED BARGAINING
- BEST PRACTICES PROBLEM SOLVING

IBB DEFINED

- **A PROBLEM SOLVING PROCESS CONDUCTED IN A PRINCIPLED WAY THAT CREATES EFFECTIVE SOLUTIONS WHILE IMPROVING THE RELATIONSHIP.**
- **AN ALTERNATIVE STYLE OF NEGOTIATING AND/OR PROBLEM- SOLVING.**

APPROACHES TRADITIONAL vs. IBB

→ TRADITIONAL

- STARTS WITH POSITIONS
- MAKE GRADUAL ADJUSTMENTS
- DEFER TO POWER OR TRADE

→ IBB

- STARTS WITH INTERESTS
- JOINTLY DEVELOP OPTIONS
- MEASURE OPTIONS WITH STANDARDS; DECIDE BY CONSENSUS

STRATEGIES

TRADITIONAL vs. IBB

→ TRADITIONAL

- ATTACK INDIVIDUALS & DISCREDIT THEIR POSITIONS
- CONCEAL NEEDS & INFO
- ARGUE YOUR POSITION
- INSIST ON YOUR POSITION
- USE POWER TO LEVERAGE

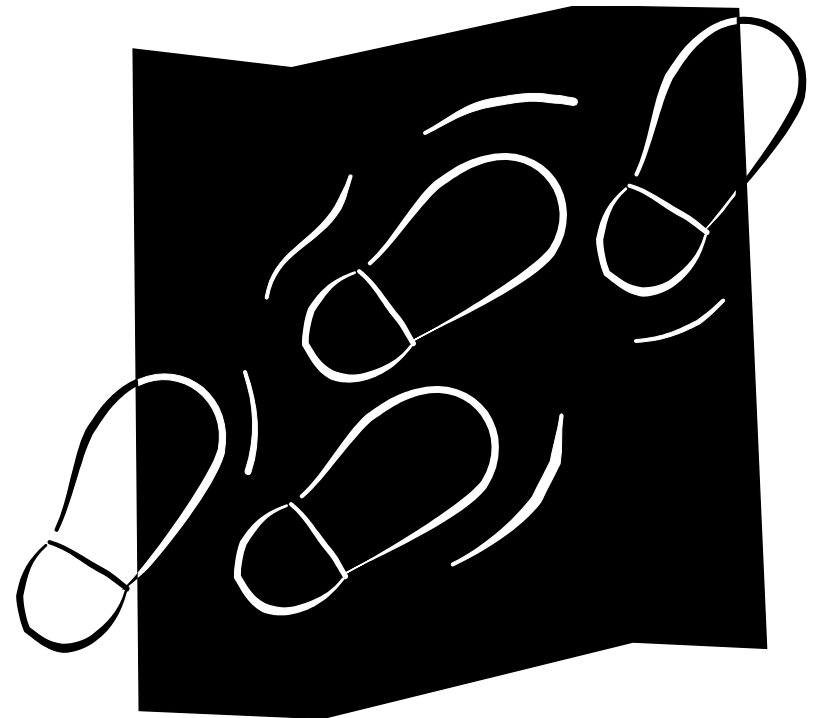
→ IBB

- ATTACK ISSUE/PROBLEM NOT INDIVIDUALS
- REVEAL TRUE INTERESTS & INFO
- EXPLORE ALL INTERESTS
- BE OPEN TO OPTIONS/SOLUTIONS
- DEFINE SOLUTION WITH STANDARDS

IBB

STEPS IN PROCESS

- 1 = ISSUE
- 2 = INTERESTS
- 3 = OPTIONS
- 4 = SOLUTION



STEP 1

SELECT AN ISSUE



- **JOINTLY SELECT AN ISSUE**
- **CLEARLY DEFINE THE ISSUE**
 - **ANSWER ALL QUESTIONS**
 - **SHARE INFORMATION**

STEP 1: DEFINE THE ISSUE/PROBLEM

→ WHY ?

- To ensure common understanding
- To put the issue/problem in a format for interest based problem solving

STEP 1: DEFINE THE ISSUE/PROBLEM

→ HOW ?

- **Develop a question with:**
 - ✓ Subject--what the problem is about
 - ✓ Issue—identifies the issue
- **Develop a proper question that:**
 - ✓ Begins with “How might we...”
 - ✓ Cannot be answered “yes or no”
 - ✓ Contains no solutions
 - ✓ Contains no accusations or worse

STEP 2

DISCUSS INTERESTS

- **DISCUSS & CLARIFY YOUR LIST OF INTERESTS BEHIND THE ISSUE**
- **CONVERT ANY POSITION STATEMENTS TO INTERESTS**
- **CONTINUE TO GATHER INFORMATION AS NEEDED**

STEP 2: DISCUSS AND DETERMINE INTERESTS

→ How?

- Ask why this is a problem
- Identify and chart individual interests
- Identify and discuss common interests
- Reach consensus on common interests

STEP 2: DISCUSS AND DETERMINE INTERESTS

How?

Ask why this is a problem

Identify and chart individual interests

Identify and discuss common interests

Reach consensus on common interests

STEP 2: DISCUSS AND DETERMINE INTERESTS

→ Why ?

- To illustrate interests with needs and concerns
- To distinguish between positions and interests

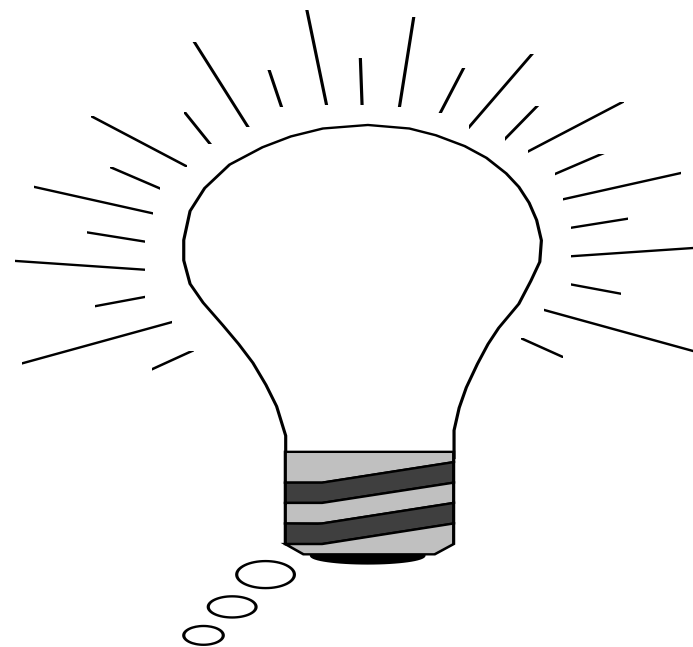
STEP 2: POSITIONS VS. INTERESTS

- A Position is one party's solution to a issue/problem. A position statement often answers the "how to resolve the issue question."
- An Interest is one party's concern or need underlying the issue/problem. An interest statement often answers the "why the issue is important."

STEP 3

GENERATE OPTIONS/SOLUTIONS

- **BRAINSTORM**
 - AS MANY OPTIONS AS POSSIBLE TO SATISFY YOUR INTERESTS
- **RECORD EVERY IDEA**
- **CLARIFY OPTIONS**
 - ELIMINATE DUPES
 - COMBINE



STEP 3 : DEVELOP OPTIONS/SOLUTIONS

→ Why develop options/solutions

→ How to develop options/solutions

STEP 3 : DEVELOP OPTIONS/SOLUTIONS

→ Why develop options/solutions

- To engage all participants
- To explore a full range of creative ideas
- To develop a solution to the issue/problem which satisfies common interests

STEP 3 : DEVELOP OPTIONS/SOLUTIONS

- **Principal Methods:**
- **Best Practices**
 - **Expert Panel**
 - **Brainstorming option/solution**

STEP 3 : DEVELOP OPTIONS/SOLUTIONS

→ How to develop options/solutions

- Review the options generation methods
- Select the method by considering:
 - ✓ Issue complexity
 - ✓ Time availability
 - ✓ Knowledge of group members

STEP 4: SELECT A SOLUTION

→ Why?

- To resolve the issue/problem
- To satisfy the underlying interests

STEP 4: SELECT A SOLUTION

→ How?

- By using the consensus decision-making process
- By applying agreed upon “standards” to evaluate the options/solutions

THREE STAGE ANALYSIS

Stage I. *FEASIBILITY ANALYSIS*

Stage II. *BENEFIT ANALYSIS*

Stage III. *APPROVAL ANALYSIS*

Stage I. *FEASIBILITY ANALYSIS*

CRITICAL QUESTION:

Does the option or proposal solve the problem in a doable manner?

CONSIDERATIONS:

Is the option....

Legal?

Workable?

Understandable?

Simple?

Flexible?

Manageable?

Affordable?

Cost Effective?

FEASEABILITY CONSIDERATIONS

Legal?

Is this a solution that is legal, ethical? Do we have the authority to enact the solution?

Workable?

Can it work? Does it solve or improve the problem?

Understandable?

Does it makes sense? Will the people that have to use the solution understand it?

Simple?

Is it complicated or as simple as possible?

FEASEABILITY CONSIDERATIONS

Flexible?

If things go haywire, can we change the solution to make it workable? Can we measure and evaluate to determine if a change is needed?

Manageable?

Does it provide a manageable solution? Can we control the outcome or predict the effects?

Affordable?

Do we have the financial resources needed? If the budget is exceeded, can it be made to accommodate the addition?

Cost Effective?

Can the solution provide economic benefit? Does the solution create offsets to cost?

Stage II. *BENEFIT ANALYSIS*

CRITICAL QUESTION:

Does the option or proposal address important interests in a positive manner?

CONSIDERATIONS:

Is the option...

Equitable?

Mutually Beneficial?

BENEFIT CONSIDERATIONS

Equitable?

Is it fair? Does it discriminate? Will it be perceived as fair by the constituents? Does it treat individuals or groups in a disparate manner? If this solution is enacted will it require catch up with someone else?

Mutually Beneficial?

Does it provide mutual benefit? Can the solution be viewed as a “win” or improvement by both parties? Does it solve or improve the problem.

Stage III. *APPROVAL ANALYSIS*

CRITICAL QUESTIONS:

Will we and our constituents approve the solution?

Would the inclusion of the provision in the overall agreement cause the deal to fail?

If it would fail, could an alteration make the proposal acceptable?

Three Stage Cheat Sheet

- 1 *Can we do it?*
- 2 *Does it solve the issue?*
- 3 *Will our constituents approve it?*

TECHNIQUES USED IN IBB PROCESS

- BRAINSTORMING
- CONSENSUS DECISION MAKING
- ACTIVE LISTENING
- CONVERTING POSITIONS TO INTERESTS
- PROCESS CHECKING
 - FACILITATOR
- RECORDING
- FOUR STEP PROCESS

IBB Exercise

