

publishing a proposed rule; therefore, ensuring that the rule is more sensitive to the needs and limitations of both the parties and the Agency. A rule drafted by negotiation with informed and affected parties is expected to be more pragmatic and more easily implemented, therefore providing the public with the benefits of the rule while minimizing the negative impact of a regulation conceived or drafted without the input of outside knowledgeable parties. Since a negotiating committee includes representatives from the major stakeholder groups affected by or interested in the rule, the number of public comments on the proposed rule may be reduced and those comments that are received may be more moderate. EPA anticipates that there will be a need for few substantive changes to a proposed rule developed under a regulatory negotiation process prior to the publication of a final regulation.

B. The Concept of Negotiated Rulemaking

Usually, EPA develops a proposed rulemaking using Agency staff and consultant resources. The concerns of affected parties are made known through various informal contacts, the circulation of a draft proposal to known affected parties for their informal comment, through advance notices of proposed rulemaking published in the **Federal Register**, or formal consultation with an advisory committee. After the notice of proposed rulemaking is published for comment, affected parties may submit arguments and data defining and supporting their positions with regard to the issues raised in the proposed rule. All communications from affected parties are directed to the Agency. In general, there is not much communication among parties representing different interests. Many times, effective regulations have resulted from such a process. However, as Congress noted in the Negotiated Rulemaking Act, such regulatory development procedures may "discourage the affected parties from meeting and communicating with each other, and may cause parties with different interests to assume conflicting and antagonistic positions * * *" (Sec. 2(2)). Congress also stated that "adversarial rulemaking deprives the affected parties and the public of the benefits of face-to-face negotiations and cooperation in developing and reaching agreement on a rule. It also deprives them of the benefits of shared information, knowledge, expertise, and technical abilities possessed by the affected parties." (Sec. 2(3)).

Using negotiated rulemaking to develop the proposed rule is fundamentally different. Negotiated rulemaking is a process in which a proposed rule is developed by a committee composed of representatives of all those interests that will be significantly affected by the rule. Decisions are made by consensus, which generally require concurrence among the interests represented. The process is started by the Agency's careful identification of all interests potentially affected by the rulemaking under consideration. To help in this identification process, the Agency publishes a notice in the **Federal Register**, such as this one, which identifies a preliminary list of interests and requests public comment on that list. Following receipt of the comments, the Agency establishes an advisory committee representing these various interests to negotiate a consensus on the terms of a proposed rule. Representation on the committee may be direct, that is, each member represents a specific interest, or may be indirect, through coalitions of parties formed for this purpose. The Agency is a member of the committee representing the Federal government's own set of interests. The negotiated rulemaking advisory committee is facilitated by a trained mediator, who facilitates the negotiation process. The role of this mediator, or facilitator, is to apply proven consensus building techniques to the advisory committee setting.

Once a regulatory negotiation advisory committee reaches consensus on the provisions of a proposed rule, the Agency, consistent with its legal obligations, uses such consensus as the basis of its proposed rule, to be published in the **Federal Register**. This provides the required public notice and allows for a public comment period. Other participants and other interested parties retain their rights to comment, participate in an informal hearing (if requested) and judicial review. EPA anticipates, however, that the pre-proposal consensus agreed upon by this Committee will effectively address all major issues prior to publication of a proposed rulemaking.

C. Proposed Rule Setting Standards for All Appropriate Inquiry

The negotiated Rulemaking Act allows EPA to establish a negotiated rulemaking committee if it is determined that the use of the negotiated rulemaking procedure is in the public interest. We understand that voluntary standards developed by standards developing organizations, such as the ASTM 1527–2000 standard,

are available and are currently being used to conduct all appropriate inquiry in conjunction with private real estate property transactions. In addition, site assessment protocols have been established under the federal Superfund program and Resource Conservation and Recovery Act (RCRA) corrective action programs. Similarly, many State response programs include site assessment requirements. We intend to develop federal regulations that build upon the depth of experience accrued in both the public and private sectors in implementing these standards and programs. We believe that building upon currently available private sector standards for undertaking all appropriate inquiry as well as building on the experience of state and federal government site assessment programs is the most efficient and economical way to develop federal regulatory standards that will both meet the criteria set in the Brownfields Law and ensure minimal disruption to the private market and state and federal site assessment programs.

EPA has determined that the regulatory negotiation process will ensure that we obtain a diverse array of input from both private sector stakeholders and state program officials who are familiar with and experienced in implementing processes to conduct all appropriate inquiry. During the fall of 2002, we initiated the convening stage of the negotiated rulemaking process to identify appropriate stakeholder groups and solicit advice and input from experienced public and private sector users of similar standards. We retained an expert facilitator to contact parties potentially affected by the all appropriate inquiry rule to determine whether or not stakeholders are interested in participating in a negotiated rulemaking process and determine the potential for stakeholder issues to be successfully addressed through a regulatory negotiation. Following an evaluation of stakeholder interest and input during the convening process, our facilitator determined that there is sufficient enthusiasm among stakeholders for a negotiated rulemaking process and almost all stakeholders that we identified and interviewed expressed a belief that potential issues and differences between interested parties could be successfully addressed and negotiated through the regulatory negotiation process. A description of the issues raised by identified stakeholders and a list of interested stakeholders, as well as the findings of our facilitator are contained in the final report entitled *Convening Assessment Report on the*