

# Guide to Negotiated Rule Making

## Table of Contents

What is Negotiated Rule Making?

When is Negotiated Rule Making Appropriate?

Steps in the Negotiated Rule Making Process

Organizing a Negotiated Rule Making - Topics to Address

- Introduction, Purpose, and Contact
- Participation
- Decision Making
- Organization and Conduct of Meetings
- Information Used in the Negotiation
- Other

Other Methods for Involving the Public in Rule Making

- Advisory Committees
- Selective Use of Meetings

Appendix A: Sample Ground Rules

- Introduction
- Purpose and Scope
- What the Agency Does with the Product of this Negotiation
- Participation
- Mediator
- Decision Making
- Timetable
- Organization and Conduct of Meetings
- Subcommittees
- Information
- Media

Appendix B: Chapter 34.05.310

- RCW 34.05.310 B-1

## What is Negotiated Rule Making?

Negotiated rule making is a process by which representatives of an agency and of the interests affected by a subject of rule making seek to reach consensus on the terms of a proposed rule and on the process by which it is negotiated.

Negotiated rule making has the following attributes:

- Participants usually represent stakeholder groups or interests, and not simply themselves.
- All necessary interests are represented or at least supportive of the discussions.
- Participants share responsibility for both process and outcome.
- An impartial facilitator or mediator, accountable to all participants, manages the process.
- The intent is to make decisions through consensus rather than by voting.
- The agency is a party at the negotiating table; it does not just facilitate a consensus among the other participants.
- The product is a proposed rule that all parties can support or at least accept.

### **When is Negotiated Rule Making Appropriate?**

The agency and potential participants should consider the following questions when they explore whether to use negotiated rule making:

1. Is there a need for the rule? Or is there a better way to achieve the goal than through a regulation?
2. Is the subject of rule making controversial? Is litigation likely over the resulting rule?
3. Are the affected interests well-defined and could spokespersons represent them in a negotiation? Because of the number of people affected by most rules, the persons at the negotiating table usually must be representatives of the affected interests. If these interests are not sufficiently organized to be represented at the negotiating table, the agency should develop the rule in some other manner.
4. Could a better rule result if the agency and the affected interests collaborated on its development? Persons who would be subject to the rule, or other parties, may have ideas which could reduce the burden of administration or compliance, while still meeting the goals of the statute and the objectives of the rule.
5. Are the issues negotiable? Is there no single right answer? Is the outcome genuinely in doubt, or is it reasonably clear what the terms of the rule will be? Could agreement require any party to compromise a fundamental value?
6. Do all parties view the process as beneficial to their respective causes? Does each believe that it has something to gain by negotiating and something to lose by not negotiating? Do any stakeholders believe that another process would be better for them? Is the subject of rule making a priority for all concerned? These questions all get to the crucial matter of motivation. The parties must want to negotiate. If the proposed rule making is not a priority, some key players may not attend the negotiations, sending instead someone to take notes, stay alert in case anything important happens, and maintain good relations with the agency. Negotiated rule making requires the active participation of negotiators who can speak for their organizations.
7. Does each party have enough time, money, and people to participate effectively? Negotiated rule making can be resource-intensive. All parties must have adequate resources and believe that negotiation deserves a significant commitment of time, people, and money.
8. Is the agency willing to allocate sufficient staff time and resources? Would an independent facilitator be useful? If so, how will the facilitator be paid? Since a negotiated rule making can dominate the schedule of key agency personnel, agencies considering the process must be realistic about the time commitment involved. It may also be necessary to contract for additional professional assistance, such as an experienced, independent facilitator and outside technical experts.
9. Can agency representatives earnestly sit at the negotiating table and give reasonable assurance that the agency can and will use a consensus if one is reached? Because an agency may not

delegate the authority it was given by the legislature to adopt rules, it is important that it set "sideboards" for a negotiated outcome. The agency head can signal that if the outcome falls within certain bounds and meets the goals of the authorizing legislation, the agency will present the consensus rule as the proposed rule for public hearing and comment. Such a commitment may be necessary to secure the participation of key players.

In this Guide the terms "facilitator" and "mediator" are used interchangeably for someone who assists a negotiation.

### Steps in the Negotiated Rule Making Process

1. Initial Screening: The agency first screens the subject of possible rule making using the above questions to see whether it might be a candidate for negotiated rule making.
2. Assess feasibility with potential participants: The agency and potential participants consider whether negotiated rule making would be feasible.
3. Designing the framework: The agency and the parties design a framework for the negotiation which they put in writing. This written set of ground rules or protocols should explicitly define the negotiated rule making process to the satisfaction of all participants.
4. Deciding who participates: One success factor for collaborative processes such as negotiated rule making is that each interest - and not the sponsoring agency - selects its own representatives to participate in the negotiation. Throughout the process it may also be important to stay in touch with other interested parties not represented or participating directly in the talks, such as key legislators or other elected officials and their staffs.
5. Solicitation of public comments: The agency files form CR 101 with the Code Reviser and publishes the statement of intent which describes the negotiated rule making process in RCW 34.05.310. To ensure that no one has been left out, the notice could list negotiators and the interests that each represents and explain how other persons may participate.
6. Commitment to participate: The agency and other parties approve the protocols or ground rules and pledge to negotiate in good faith. The agency puts the determination to negotiate the rule in the rule making file, in compliance with RCW 34.05.310 (3)(a). This completes the organizational or convening phase (steps 1 through 6). The convening phase can be critical. Each party's support for negotiation must be accurately gauged and the process must be defined so as to build trust. An independent facilitator can be especially valuable during convening, meeting confidentially with parties to ascertain interest and then helping them negotiate ground rules.
7. Negotiation of substantive issues: The agency and the other participants then negotiate the substantive issues, working within the scope, purpose, and structure specified in their ground rules. The negotiation could result in three types of outcomes:
  - Agreement: The agency and other parties could agree on the entire text to be proposed for public comment (after ratification by constituents of the negotiators, if necessary). In some negotiated rule makings, the parties mutually craft every phrase; in others they agree on general provisions and principles and leave it to the agency to do the actual writing. In either case, agreement would mean that all parties support, or at least accept, the rule proposed for public review and comment.
  - Agreement on some issues: In the event the parties can resolve some but not all issues, the agency would proceed according to the ground rules. Those ground rules might specify, for example, that parties would define any areas of disagreement in order to facilitate decision by the head of the agency. The agency head would then make those "tough calls" and include them in the proposed rule along with consensus provisions.
  - No agreement: The parties could conclude that no significant agreement was possible and

disband the negotiation. The agency would prepare a proposed rule by some other method and present it for public comment.

8. Informal public meetings: To ensure that the consensus-based proposed rule is acceptable to the broader public, the agency and parties may decide to jointly sponsor public meetings (before the official public hearings) to explain the terms of the proposed rule and identify any significant criticisms.
9. Public hearing and comment: For any level of agreement reached, the agency would still comply with all public notification and comment provisions of RCW 34.05.320-340. If the agency felt that the text of mutually approved portions of the proposed rule should be changed because of concerns expressed in the formal public comment period, the agency could meet again with the negotiating parties to review proposed changes. The intent here would be to modify the proposed rule in response to public concerns and to retain consensus, if possible.
10. Adoption of the rule: The agency head adopts the final rule. The agency and participants could hold a signing ceremony or other event to commemorate adoption and demonstrate commitments to implement the rule.

### **Organizing a Negotiated Rule Making - Topics to Address**

Agencies and other participants should consider the following topics when organizing their negotiation and writing their protocols or ground rules. Some topics may not be relevant to a particular negotiated rule making. Participants may think of other relevant issues not listed here. Negotiated rule making may appear complicated and process-laden, but it is the participants who decide how much structure is needed to create a setting for productive negotiations. In the approach suggested in this Guide, participants commit to negotiate in good faith only after they have agreed on process and clearly understand the scope of their commitment and how they will proceed. Introduction, Purpose, and Context

1. The subject of rule making, including need for the rule and the decision to use negotiated rule making.
2. The purpose and scope of the negotiation, and that the intended product is a consensus-based proposed rule.
3. The relationship, if any, between the negotiation and other proceedings that could affect the negotiation, for example, a legislative session.

### **Participation**

1. The interests that might be affected by the rule, the names of persons who will represent each interest during the negotiations, whether there will be alternates, and the obligations of negotiators to attend meetings and to keep their constituents informed of progress in the negotiation.
2. The roles of participants: For example, will some participate as technical advisors and not be party to a negotiated outcome, if one is reached?
3. The role of agency staff, i.e. who will represent the agency in the negotiation and whether other staff will provide technical support or facilitate the meetings.
4. A provision for including new parties that may come forth during the course of the negotiation.
5. The role of the facilitator, and how and by whom he or she will be paid.
6. Whether good faith participation should constrain any activities of participants in other forums or proceedings, such as litigation or a legislative session.
7. Whether there are interests or persons not participating directly in the negotiation, for example elected officials, commissioners, or board members, who should be kept informed of progress, and

who will do that and how.

8. That any party, including the agency, may withdraw from the negotiation at any time and what the remaining parties will do if that occurs: [The assumption should be that if a party is at the table, it has a significant interest in the rule making. Therefore, if it elects to withdraw, the process stops unless the withdrawing party does not oppose the continuing effort of the remaining parties to reach agreement among themselves. If the negotiated rule making process stops, the agency would develop the rule in some other way.]

## **Decision Making**

1. That decisions will be made by consensus and that participants understand that consensus means support for or at least acceptance of the proposed rule - unless they define it differently.
2. That all positions and agreements on specific issues or sets of issues are tentative and may be modified until there is a consensus agreement on an acceptable package that addresses all issues.
3. What will happen if the parties are not able to reach consensus; for example, what they will do and how the agency will proceed with rule development if they are able to agree only on some elements of the rule, or they disband the effort.
4. That constituents will have to ratify language agreed to by their representatives at the negotiating table and that all parties, including agency representatives, may check back with those in each organization who have final decision making authority.
5. Some mechanism for registering support for the product of the negotiation, such as letters endorsing the proposed rule or a signature page for negotiators to sign on behalf of the organizations they represent.

## **Organization and Conduct of Meetings**

1. How meeting agendas will be set and by whom.
2. Ground rules about behavior at meetings, if needed.
3. How records of the negotiating sessions will be kept, by whom, and for what purpose.
4. That meetings will be open and observers welcome to attend.

## **Information Used in the Negotiation**

1. What information participants will need to participate effectively. For example, is there a need to establish some common level of technical understanding at the outset or to provide ongoing technical assistance?
2. How new information, if needed, will be obtained so that it is credible to all participants and useful to the negotiation.
3. How confidential information that may be disclosed in the negotiation will be protected, bearing in mind the requirements of chapter 42.17 RCW regarding confidential documents in government possession.

## **Other**

1. Procedures for establishment and operation of subcommittees.
2. Who will deal with the media, if needed, and how.
3. The timetable for the negotiation.

## **Other Methods for Involving the Public in Rule Making**

### **Advisory Committees**

Advisory Committees give advice and input to an agency. Agencies can establish committees to gather advice from individual committee members, from organizations or interest groups represented by committee members, or from the committee as a whole and the people they represent if the goal is to reach consensus. Agencies and potential committee members may find it useful to address several questions at the outset:

1. What is the purpose of the advisory committee? The intent is to ensure that everyone's expectations are the same.
2. How long will it exist?
3. How has membership been determined and may others join the committee later?
4. Will members of the advisory committee be speaking for themselves or on behalf of an organization or interest group?
5. What will be the product of the committee's work? To whom will advice be given and in what form? How will it be recorded? How will members confirm that their advice has been accurately recorded?
6. Will the committee try to reach consensus on its advice? Are there any affected interests that are not expected to participate and would thus not be part of the consensus?
7. If the goal is consensus, will committee members also share decision making about process? If the product of the committee is intended to reflect the views of groups represented on the committee, how will those constituents be included in the decision making process? Should provisions be made for constituents to ratify any consensus reached at the committee meetings?
8. What will the agency do with a consensus if one is reached?
9. What does it mean when committee members agree on the advice to give? For example, does it mean that members will support the result during subsequent proceedings, such as the formal public comment period or a legislative session? What about constituents of members if the committee was set up as a representative process?

### **Selective Use of Meetings**

Instead of a series of meetings with the same people, as occurs with negotiated rule making and advisory committees, in some circumstances a more efficient option might be for the agency to prepare and distribute drafts, white papers and the like, inviting public feedback to identify and narrow the issues. Staff can then meet separately or jointly with interested persons or focus groups as needed without establishing an on-going committee. This approach might also provide a second opportunity to negotiate the rule - if negotiated rule making previously had been found to be unfeasible. Stakeholders who lacked the resources to participate in a process from the outset, or who were skeptical about the chances for consensus, may change their minds after seeing progress made through discussion drafts, focus group discussions, and perhaps "shuttle diplomacy" by agency staff.

### **Appendices**

#### **Sample Ground Rules**

## **Chapter 34.05.310**

### **APPENDIX A**

Sample Ground Rules for Negotiated Rule Making A. Introduction [Include a paragraph or two providing background, context, etc., concluding with the need for rule making and the agency's decision to negotiate with affected interests.] B. Purpose and Scope The purpose of this rule making is to adopt a rule that - [Describe what the rule is intended to accomplish.] The intended product of the negotiation will be a regulation that has the support of the affected interests, is consistent with state law, and lays a foundation for all interested parties to work cooperatively in the future. C. What the Agency Does with the Product of this Negotiation The agency will present the consensus-based rule, if one is reached, as the proposed rule for official public hearing and comment. If public comments raise significant concerns about the proposed rule, the agency will meet with the negotiating parties to attempt to modify the proposed rule so that it accommodates public concerns. If consensus cannot be maintained, see (F.3) below.

#### D. Participation

1. Interests: The following affected interests are participating in the negotiation. [insert list of names and organization(s)/interest(s) each is representing]
2. Role of agency staff: The agency will be represented by staff empowered to speak for the agency and participate actively in the negotiation. The agency also may assign staff to serve as technical advisors. [Note: Role of staff may vary depending on the structure of the agency, i.e. whether the agency head is an appointed or elected director, or a board or commission.]
3. Provision for inclusion of new parties: If during the negotiation a new party asks to be included in the negotiation, the agency and other negotiators will consider the request and the agency may invite the party to join the negotiation, either as a negotiator or as part of another caucus.
4. Observers: Meetings will be open and observers will be welcome to attend.
5. Other interested parties: As appropriate, the agency and facilitator will have responsibility for keeping other interested persons, such as state legislators and staff, informed of progress in the negotiations.
6. Withdrawal: Any party may withdraw from the negotiation at any time. Such party, however, is obliged to explain its reasons to the other parties. If a party withdraws, the negotiated rule making effort will stop, unless the withdrawing party does not object to the continuing effort of remaining parties to reach agreement among themselves.

#### E. Mediator [or Facilitator] [Give name, describe how selected, how paid, role, etc.] F. Decision Making

1. Consensus: Since the purpose of the negotiation is to produce a rule that all interests can support, decisions in the negotiation will be made by consensus. Consensus means that all participating interests support or at least do not object to the outcome being adopted as the rule.
2. Agreements tentative until package complete: All positions and agreements on specific issues or sets of issues are tentative and may be modified until there is a consensus agreement on an acceptable package that addresses all issues. Throughout the negotiation, all negotiators, including the agency's, may check back with those who have decision making authority in their organization.
3. Inability to reach consensus: If parties are not able to reach consensus on all issues, they will attempt to delineate the nature of their disagreement, in effect framing the unresolved issues for the agency head to decide in accordance with the statutory authority to adopt the rule. There will not be any voting. If the parties are unable to reach consensus on enough significant issues, the parties will discontinue the negotiation and the agency will propose a rule for public comment.
4. Ratification: Agreements reached by the negotiators are tentative until they have been ratified by the negotiators' constituents. Time will be allowed for negotiators to meet with constituents and obtain ratification of any tentative agreement reached in the negotiation.
5. Registering support for the outcome: To demonstrate support for the consensus-based proposed

rule, representatives of the participating interests will sign a signature page to accompany the proposed rule and provide letters of endorsement during the official public comment period.

G. Timetable [Fill in interim dates and deadline for the negotiation.] H. Organization and Conduct of Meetings

1. Agendas: At the end of each joint meeting, the negotiators will set a tentative agenda for the next meeting. Changes to the agenda between meetings will be made through the facilitator.
2. Record keeping: The chief purpose of record keeping will be to focus on progress made toward the goal of a rule that all can support. Any meeting summaries will be directed toward this purpose. Neither the agency nor the mediator will keep minutes that record the give-and-take of discussion. Individual negotiators may take their own notes, consistent with any provisions adopted to protect confidential information.

I. Subcommittees If subcommittees are deemed necessary, they will be formed with the consent of all negotiators and will report back to the full group. J. Information

1. Technical information: [Does any information need to be assembled before the negotiation begins? How will information be prepared during the negotiations?]
2. Confidential information: Under the Washington Public Records Act (RCW 42.17) documents in the possession of agency representatives become part of the public record. If it is necessary to protect confidential information, participants will agree on a means for doing so.

K. Media Participants will represent only their own views when speaking with the media.

## **APPENDIX B**

### Chapter 34.05.310