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**FEDERAL HIGHWAY ADMINISTRATION**

**CONVENING REPORT**

**CONCERNING**

**THE FEASIBILITY OF A NEGOTIATED RULEMAKING**

**ON THE**

**HOURS OF SERVICE FOR COMMERCIAL DRIVERS**

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**I. BACKGROUND**

Congress created the Department of Transportation (DOT) in 1966, and transferred responsibility for regulating motor carrier safety from the Interstate Commerce Commission to DOT. The Department of Transportation is charged with ensuring the development, coordination, and preservation of the transportation system in the United States. The Federal Highway Administration (FHWA), one of DOT's modal administrations, has been delegated numerous duties involving regulation of motor carriers, including the promotion of safe, adequate, economical, and efficient motor carrier transportation.

FHWA has been considering possible modifications to its regulations which govern hours of service (HOS) for drivers of commercial motor vehicles (CMVs). The current HOS regulations had their origins in a set of motor carrier safety regulations issued in 1939 by the Interstate Commerce Commission (ICC). Those regulations sought to assure that motor carriers and their drivers operate safely by limiting the hours of service of drivers for interstate motor carriers. They prescribed that no driver should drive for more than 10 hours in any period of 24 consecutive hours unless the driver was off-duty for 8 consecutive hours immediately following the 10 hours of driving. Drivers were limited to 60 hours of on-duty time in any week, defined as 169 consecutive hours, or, for motor carriers that operated every day of the week, 70 hours in any period of 192 consecutive hours. Some exceptions were provided, such as for driver salesmen employed by private motor carriers of property and farmers of certain agricultural commodities. These regulations were developed in considerable part through ICC hearings, examination of states' rules, input from carriers and drivers, and negotiation among affected interests, and were not based upon scientific studies.

The current HOS regulations have changed little since their initial promulgation by the ICC, even as increased roadway traffic, a larger commercial vehicle sector, transportation deregulation, and many other economic, regulatory, and social factors have changed driving conditions. The trucking industry is no longer a single "industry" but rather it is many industries with diverse needs due to the numbers of types of vehicles driven, cargoes hauled, delivery systems, duties and compensation arrangements, and labor-management practices. It should also be noted that some parts of the industry have

changed substantially in recent decades, with “just-in-time” delivery and night driving becoming major factors. Many groups now believe that operations based on the current HOS regulations can lead to dangerous practices and even promote driver fatigue, especially when combined with an enforcement system that relies on paper log books that in many cases do not reflect actual driving or on-duty time. In addition, the HOS rules are seen by many in the trucking industry as inflexible, with an approach that merits modification in light of the dynamic, diverse nature of today’s commercial operations.

FHWA, and other agencies, has sponsored considerable research over the past 30 years on driver alertness, fatigue, and performance, as well as other aspects of transportation safety. However, in light of the widespread view that the HOS regulations should be revised to reflect current conditions, FHWA took steps to begin the process of updating and amending the rules. In 1996, FHWA issued an Advance Notice of Proposed Rulemaking in an effort to gather all pertinent data and seek public input that would lead to informed decisions. That notice gave rise to a large number of comments reflecting a wide array of views. Though numerous commenters agreed that change was necessary, they differed in their views as to the seriousness of the problem and the amount of changes that were warranted. Following the ANPR, the controversy continued to escalate. Even more recently, there has been extensive press coverage regarding the number of truck crashes, and there is now discussion among some in Congress to move the Office of Motor Carriers from FHWA to another division in DOT.

Given the ongoing controversy, and an impending Congressional deadline for revising the HOS regulations (March 1999), FHWA retained the services of Alana Knaster and Charles Pou, from the Mediation Consortium, to serve as conveners to provide an independent, neutral evaluation regarding the feasibility of FHWA’s conducting a negotiated rulemaking or another collaborative process for developing proposed rules. The team’s assignment was to interview the key stakeholder groups and report back their findings and recommendations to the Agency.

This report reflects the results of the team’s inquiry and analysis. It does not necessarily reflect FHWA’s views, except where it explicitly so states.

## **II. THE CONVENING PROCESS IN A NEGOTIATED RULEMAKING**

*Negotiated Rulemaking Generally.* Negotiated rulemaking is a process in which representatives of the interests that would be substantially affected by a rule, including the agency responsible for issuing the rule, negotiate in good faith to reach a consensus

on a proposed rule.’ The representatives who serve as members of a Negotiated Rulemaking Advisory Committee determine what vital information or data is necessary for them to make a reasoned decision, develop an approach for acquiring that requisite information (including establishing technical workgroups), consider that information, examine the scientific, legal and policy issues involved in the regulation, and seek a consensus recommendation to the agency. As part of the consensus, each private interest agrees to support the recommendation and resulting rule to the extent that it reflects the agreement, and the agency agrees to use the recommendation as the basis of its action.

Several things are implicit in this description that merit emphasis: First, a senior representative of the agency is a full participant in the give-and-take and deliberations of the negotiated rulemaking committee. Second, the committee makes its decision by consensus, which is defined by the Negotiated Rulemaking Act as the “unanimous concurrence among the interests represented on a negotiated rulemaking committee.”<sup>2</sup> Each participating interest thus has a veto over the decision. This process has proven successful in developing agreements in many highly polarized situations and has enabled parties to address the most effective or efficient way of solving a regulatory controversy. Next, the agency agrees to use the consensus as the basis of a proposed rule, which necessarily means that the agency will follow the traditional process of publishing the proposal as a Notice of Proposed Rulemaking and receiving comments on the proposal, before issuing a final rule. As a matter of administrative law, the agency will also be required to modify the proposed rule in response to significant, meritorious comments.<sup>3</sup> Finally, the consensus of the committee is a recommendation to the agency. The agency alone retains the authority to issue the rule and may modify the proposal in response to comments. Since representatives of the affected interests actually share in the making of the regulatory decision, the resulting consensus is far more than merely a recommendation – especially since the agency itself endorses it during the course of the deliberations.

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<sup>2</sup>The process is described in the Negotiated Rulemaking Act, 5 U.S.C. 5 561 et seq.

The definition continues that the committee may agree to define such term to mean a general but not unanimous concurrence; or agree upon another specified definition. 5 U.S.C. 8 562(2).

<sup>3</sup>

As a practical matter, this requirement means that the negotiated rulemaking committee needs to consider seriously what adverse comments might be submitted in response to the publication of its recommended rule lest its work be unraveled by unanticipated objections.

*Convening.* The first step in a possible negotiated rulemaking (known colloquially as a “reg-neg”) is to conduct a “convening” assessment. The convener who may be a neutral or someone assigned by the agency, identifies and interviews the interests that would be substantially affected by the proposed rule and individuals or organizations that might represent those interests.<sup>4</sup> The convener, based upon the interviews, identifies the issues of concern that would need to be addressed in the negotiated rulemaking, and determines whether “the establishment of a negotiated rulemaking committee is feasible and appropriate in the particular rulemaking.”<sup>5</sup>

The Negotiated Rulemaking Act<sup>6</sup> sets out some criteria for an agency to consider in deciding whether a particular rule could be developed using a negotiated rulemaking process. These factors include whether: (1) there is a need for the rule; (2) there are a limited number of identifiable interests significantly impacted by the rule; (3) a committee can be created with balanced representation who can represent the identified interests and can negotiate in good faith; (4) consensus on the issues appears likely; (5) the reg neg will not unduly delay the issuance of the rule; (6) the agency has resources and is willing to assist the Negotiated Rulemaking Committee; and (7) the agency, within the constraints of the law, will use the committee’s consensus as the basis of the rule for notice-and-comment.

*Notice of Intent.* If, after the convening, the agency decides to go forward with a negotiated rulemaking, it publishes a Notice of Intent in the Federal Register, and other publications likely to be read by those interested in the subject matter, announcing its intention to conduct a reg-neg, describing the subjects and scope of the rule to be developed, and listing the people or interests that will be on the committee.<sup>7</sup> The notice also solicits comments on the decision to use negotiated rulemaking to develop the rule, and it invites anyone who believes he/she will be substantially affected by the rule but who is not adequately represented on the committee to apply for membership on it.\* The notice serves the purpose of ensuring that no important interests are overlooked, and that

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<sup>4</sup>

Since a reg neg is largely a democratic exercise, the affected interests generally choose their own representatives on the committee.

<sup>55</sup> U.S.C. 6 563(b)(1)(B).

<sup>65</sup> U.S.C. 6 563.

<sup>75</sup> U.S.C. 6 564(a).

<sup>‘5</sup> U.S.C. 9 564(b).

everyone understands that the decision on the rule will, at least initially, be made in the committee, so that if anyone is interested, they need to come forward. Following the Notice of Intent, a committee is established and the actual negotiations begin.

### **III. APPROACH UTILIZED BY THE CONVENING TEAM**

The convening team met initially with FHWA staff members to obtain background information pertaining to the HOS regulation and potential issues that would need to be addressed. FHWA provided the team with an initial list of persons to contact. The conveners then began interviewing people on the list. The interview questions were designed to obtain input on the following:

- views on which issues ought to be addressed in an HOS regulation
- other interests or individuals who would be important to include in deliberations
- which of the issues identified are likely to be amenable to resolution through consensual negotiations
- key stakeholder's interest in pursuing a negotiated rulemaking or other collaborative process
- whether all the key interests and viewpoints can be appropriately represented in a reg-neg process and if so, who could best represent those interests
- <sup>a</sup> process options and process design elements

The team's interviews also served to explain negotiated rulemaking to potentially interested persons. While some people were familiar with the negotiated rulemaking process, others found the explanation helpful in better understanding how numerous interests can be represented on an advisory committee and how a consensus package of recommendations is developed.

After the first round of interviews, the conveners contacted additional stakeholders recommended both by FHWA staff and the parties interviewed thus far. Parties interviewed included representatives of the following interest groups:

1. Commercial vehicle industry (major truck and bus trade associations, sectors within the industry, state associations, and owner operators)

2. Drivers
3. Unions
4. Shippers and Other Customer Groups
5. Victims and Victim Advocacy Groups
6. Highway Safety Advocacy Groups
7. Insurance Companies
8. Enforcement Community (national associations and state officials)
9. FHWA and DOT Staff
10. Fatigue and Sleep Research Community

The interviews were conducted in person and by telephone. (See Appendix for a list of persons contacted.) Since the conveners informed the parties that comments provided during the interviews would be kept confidential, this report does not link issues with individuals or organizations who have expressed a particular opinion. The report contains a synthesis of the comments and analysis of the information and data gathered during the convening process. The report is designed to assist FHWA in making its decision as to whether or not to empanel a negotiated rulemaking committee or undertake some other consensus process on HOS revision.

#### **IV. FINDINGS: SUBSTANTIVE AND PROCEDURAL ISSUES RAISED BY STAKEHOLDERS**

Each potential participant was asked to describe what issues would need to be addressed in a negotiated rulemaking on hours of service for drivers from the perspective of their organization or stakeholder group. They were also asked to discuss their views on the appropriateness of a negotiated rulemaking process for the HOS regulation, including advantages and potential problems in undertaking such a proceeding.

Several preliminary comments are in order. First, the current regulations have been in effect for over sixty years and many individuals fear the unknowns that change might bring, even though they strongly recognize and urge change. Organizational and personal sparring dominate much of the public interaction among the stakeholder groups. Intense scrutiny by Congress and the media regarding the need for overhauling the regulations,

and the recent FHWA Inspector General's report, merely add to the conundrum. Not surprisingly, as the "new kids on the block", the conveners were greeted with warnings about the intransigence of opposing interest groups. In response to the conveners' question, "Where do you think the other parties have flexibility?", with few exceptions, parties were not optimistic about their *opponents'* ability or willingness to compromise.

It was easy for the conveners to be initially misled by the negative comments of the parties into thinking that none of the key stakeholder groups were capable of compromising on the issues. But contrary to the stereotypical views that each group has of one another, the conveners learned that there are a number of commonly held assumptions that might lend themselves to productive deliberations on HOS issues. In addition, it appears that the parties have a good understanding and appreciation of the constraints that might limit one another's flexibility, and that they have already given a great deal of thought to how to strike a balance among competing interests. Everyone involved knows that the stakes are high and recognizes the obstacles that would have to be overcome both within organizations and among the competing interests. Even so, a number of groups are concerned about taking the first necessary steps toward exploring possible common ground because of a concern that the outcome could be less acceptable than the status quo.

This section will outline some of the commonly held views expressed by the parties contacted during the convening process. The report will then highlight divergent positions both on substantive and procedural issues. This discussion is intended to set the stage for the following section, which describes possible process options that FHWA might consider for addressing changes to the current HOS regulations.

### **Common Assumptions**

- There is a consensus among nearly all parties interviewed that steps need to be taken to improve safety in the trucking industry for the commercial drivers and the driving public.
- The predominant view among key stakeholders groups is that the current regulations need to be updated to reflect changes in the industry, and the realities of the modern national and international economy.
- Everyone acknowledges that even a moderate change in operations could have significant economic ramifications.

- The diversity within the trucking industry does not allow for a simple, “one size fits all” solution. Effective enforcement of any tailored approach would pose significant challenges.
- Truck drivers share the road with far more drivers than they did in 1937. Any changes in vehicle deployment could impact air pollution, especially in major metropolitan areas. And, they could increase congestion, leading to increased risk of accidents.
- There is a significant body of valuable scientific studies on the causes of fatigue and fatigue management that could be utilized to guide deliberations and help set policy.

Beyond these shared assumptions, there is a wide range of opinions on what could or should be addressed in a revised regulation and whether it would be best to proceed via an interactive stakeholder process or a traditional rulemaking proceeding.

The discussion below sets forth specific topics suggested during the course of the convening interviews. There is general agreement on the core issues that need to be covered in regulating hours of service. These include:

- ✓ on-duty time
- ✓ driving time
- ✓ off-duty time
- ✓ cumulative hours/days in a work cycle
- ✓ restart provisions
- ✓ notice of work assignments
- ✓ fatigue management during nighttime driving
- ✓ quality and quantity of resting environments (sleeper berths; rest stops)
- ✓ enforcement and monitoring methods
- ✓ funding for enforcement

However, there were significant differences, both within each of the interest groups and among the parties, as to whether negotiations should be more expansive in scope. A number of parties stated that HOS discussions should be confined to work schedules and enforcement. Other stakeholders stressed the need to broaden HOS to encompass concerns regarding driver lifestyles, health, and compensation, as well as conditions facing, and demands placed upon, drivers in the workplace. Arguments for and against broadening the scope of issues widely; they included: (1) a broad set of issues needs to be considered or else any solution would be piecemeal and ineffective; (2) many such issues are beyond the purview of FHWA and therefore inappropriate; and (3) discussions should

be focused on safety and core issues only, since taking on an entire set of interrelated, complex economic issues would be beyond the capability of a short-term negotiations process.

The discussion below attempts to describe the arguments provided by the parties as to the appropriateness of including or excluding a number of additional topics for consideration in a reg-neg on HOS issues.

### **Other potential HOS issues suggested by the parties**

*Shipper demands on drivers.* A number of parties suggested that unreasonable demands placed on drivers by many shippers to deliver goods on time result in unsafe driving practices and violations of the hours of service limits. In some instances, they said, these situations are a consequence of the “Just in time” delivery demands that increasingly characterize certain segments of the economy; others described long waiting times for drivers, while products are loaded or unloaded, that subtract from the hours available for driving. While there was agreement among several stakeholder groups that shipper demands have an important effect on truck safety, there were strong feelings on both ends of the spectrum as to whether these issues should be addressed in an HOS regulation by FHWA. One side argued that this was an appropriate extension of agency authority, or that these important issues at least merited discussion, while others believed that these issues should be addressed outside of the HOS rulemaking.

*Basis for compensation and overtime compensation.* Several groups suggested that compensating drivers by the mile and not providing overtime pay affect safety by creating an incentive to exceed speed limits and drive beyond the hours set in the regulations in order to cover greater distances. Their arguments for including these issues were substantially similar to those raised regarding shipper demands. Again, those who opposed including these issues believe that “Fair Labor Standards Act matters” and labor-management/contract issues could complicate negotiations and should be “off the table”.

*Exemptions/Exceptions.* Parties raised the issue of exemptions to the HOS regulations in both a substantive and procedural context. There are currently federal and state exemptions for certain activities, e.g., agriculture and emergency repair operations. Other sectors in the trucking industry have suggested either that (1) there is no need to change the current rules for their operations because they have a good safety record or already have special licensing or OSHA requirements that differentiate them from other sectors or (2) driving is not their primary activity (e.g. building contractors, hazardous material transport) and there need to be provisions in the regulations to accommodate these distinctions.

While there is some degree of sympathy expressed by other stakeholder groups for considering exemptions and exceptions, there is sufficient controversy over how to characterize different industry sectors and determine appropriate safety regimes, as well as the ability of law enforcement to make such distinctions, to suggest a careful examination of these issues would be required.

*Available rest areas.* Many people concurred that having a sufficient number of rest stops is an important factor affecting the management of fatigue. However, some parties were concerned about including these issues in any HOS negotiations because it would require including interests, i.e. owners of truck stops, who would not have safety as their primary interest. This could add an unnecessary complexity to the talks.

*Applicability to international drivers/NAFTA constraints.* This is a major issue to several stakeholder groups. Although there are obvious safety implications, several individuals stressed a need to recognize restrictions on FHWA's legal authority to address this issue.

*Safety cost/benefit analysis.* All of the potential players acknowledge the need to determine the economic ramifications of any changes to the HOS regulations. However, several parties have indicated that they believe the analysis needs to do more than weigh the estimated direct costs per accident against the costs to a trucking company for making changes. They propose that FHWA look at external costs as well, such as the cost of traffic congestion that affects productivity of workers who cannot get to their jobs or the cost to clean up a spill.

#### **Process issues raised by the parties.**

As part of the interview process, parties were asked to provide their perspective on the appropriateness of utilizing a collaborative approach, and more specifically, a negotiated rulemaking process, for developing a revised HOS regulation. They were asked to discuss (1) the advantages from their perspective; (2) potential problems that they might foresee; (3) how one might make a negotiated rulemaking process on HOS more effective given the problems they identified; and (4) their willingness to participate in a "reg-neg".

Parties expressed strong opinions on the viability of a collaborative approach for addressing HOS. Positions ranged as follows:

- strong support for a "negotiated rulemaking" process as an effective tool for addressing the diversity of interests and the complex set of factors that would have to be considered

- preference for “reg-neg” or some type of collaborative process to give guidance to FHWA, because otherwise it is likely that any rule produced without some degree of consensus input will be challenged through political channels or will end in protracted litigation
- preference for a traditional rulemaking because of the level of contention surrounding HOS, and concern over the number of individuals and stakeholder groups that might be excluded from direct participation in a negotiated rulemaking
- strong opposition to negotiated rulemaking since reaching a consensus might require some parties to compromise on fundamental organizational interests.

#### **VIEWS AND ARGUMENTS FROM SUPPORTERS OF A NEGOTIATED RULEMAKING**

Parties who were either proponents of “reg-neg” or preferred a collaborative approach over traditional notice and comment had the following observations and suggestions on what would be the necessary ingredients for a negotiated rulemaking on HOS to be effective.

##### ***Concerns about Appropriate Representation***

Industry representation. Many people discussed the difficulty of ensuring that all of the segments within industry are adequately represented. Some of the smaller industry groups expressed concerns about the potential dominance of the larger trucking associations and urged the conveners to ensure that the diversity within the industry be reflected in the conveners’ recommendations on participants.

Drivers. Although organized labor is one of the most critical stakeholder groups in the HOS arena because of its accomplishments in advocating trucker health and safety, a number of parties also strongly advocated inclusion of the “unrepresented” driver. However, they indicated that it might be difficult to identify appropriate driver representatives to participate, since they might be reluctant to take strong advocacy positions for fear of later reprisals for disagreeing with an employer’s position. Others expressed concern about including drivers who might only speak for themselves and not a constituency. They urged the conveners to seek out drivers who might be able to provide an independent view but might be known to, and an acceptable spokesperson for, other drivers because of their involvement over the years. Several thought that, if drivers were included, the agency should compensate their time to assure that they would be regular, effective committee members.

Shippers. Shippers were viewed by some interviewees as a critical component of any reg-neg, since they are the customers served by the trucking industry and would be impacted by changes in HOS. These interviewees thought that shippers' scheduling practices, delays, demands on drivers, and related activities often have a significant impact on drivers' ability to comply with HOS limits. Others felt that shippers should not be included because their primary concern would be economics, rather than safety. Again, the conveners were urged to suggest the appropriate balance on a committee.

Crash Victims. Some people questioned whether crash victims would be able to participate effectively in a discussion of the complex set of HOS issues without letting their emotions intervene. Most parties, however, saw a need for victim representation to ensure that safety concerns do not succumb to economic considerations and to assure the general acceptability of any agreement.

Advocacy community. There were concerns expressed about whether the advocacy groups would be outnumbered by the economic interests at the table. There are also resource limitations with respect to fielding negotiation teams and preparing proposals. The importance of consensus ground rules was emphasized as a balancing factor.

Enforcement community. All interviewees thought inclusion of either the enforcers themselves or the Commercial Vehicle Safety Alliance would be valuable for addressing real compliance issues.

Insurance Industry. Insurance companies were considered important participants by many because of the balancing role that they might play in the discussion. They insure trucking operations and hence have the economic welfare of their clients in mind, but also are strong advocates for improving safety because of the need to remain competitive and reduce the cost of claims.

Numbers of Seats at the Table. Again, there were concerns about balancing industry's need to have adequate representation of each of its sectors (and groups that have special operational needs) against having to limit the number of seats available for trucking industry interests. This would require that representation be structured to offer assurances that minority opinions would be reflected at the table and not be outweighed by a large industry presence.

Background and Experience. Several parties suggested that there ought to be a mix of individuals on the negotiating committee that would include people with technical expertise and "on the road experience"; persons with political experience representing large, diverse constituencies; and individuals who might not be sophisticated on HOS or

regulatory matters in general, but who can speak from the perspective of the concerned citizen or the driving public.

### ***Role of the Agency***

Virtually all interviewees indicated that it would be crucial for the agency to play a strong leadership role in any reg-neg or collaborative process if negotiations were to succeed. They also thought it would be important for the agency to signal at the outset that it was entering the process with an open mind as to what might be appropriate solutions for improving safety. Many went on to express doubts that FHWA is now in a position to play this leadership role, in light of recent turbulence, personnel shifts, and political uncertainty.

Several approaches to enhancing the agency's ability to sponsor and participate effectively were suggested. A significant number of parties favored having a negotiator from the Office of the Secretary at the table along with the negotiator from FHWA. They noted that other modal administrations in DOT are grappling with similar HOS issues and the highway proceeding could benefit from the research that has been conducted by the other modes and from their experience in attempting to set safety standards. Although acknowledging that the OST personnel might not have the same substantive knowledge as the OMC representatives, these parties saw value in including members of the agency team who can look at the issue in a fresh manner by "thinking outside the box". Parties also suggested that having someone from OST or from the highest levels at FHWA would signal that reaching a consensus on HOS issues was a top administration priority.

### ***Role of Science***

Again, almost all of the persons we interviewed emphasized the desirability of basing any HOS rule "on the science". However, opinions diverged greatly as to which scientific research, data and scientists were credible. Some interviewees wanted to give experts in sleep physiology a seat at the table; others opposed this, asking whether scientists could really represent anyone other than themselves. Suggestions that emerged included developing a process in the initial phase of the negotiated rulemaking that would enable the negotiators to share seminal papers, developing a common base of knowledge, and allowing for structured input from mutually agreeable scientists that might lead to agreements on what science might underpin any new rules. Several parties stressed to the conveners that if the negotiators could not come to some consensus on the key scientific findings, it might not make sense to proceed further with negotiations.

***Protecting Proprietary Data***

A few persons raised a concern that data helpful to the negotiations may be proprietary and hence sensitive. Consequently, they felt that some information may need to somehow be “masked” or redacted. If such precautions are taken, they believed that a negotiated rulemaking could better address some issues and suggested this be a topic for the negotiating committee’s organizational meeting.

***Ground Rule Provisions***

**Consensus.** A number of parties stressed the need for any negotiations to operate by consensus, i.e., unanimity of all of the participating interests. Without a consensus rule, they believed the proceedings could be dominated by the groups with greater resources and available personnel. They also thought that it would be important for the agency to be part of any consensus that emerged.

**Negative publicity.** A significant concern expressed by a number of stakeholder groups was the importance of limiting the amount of negative publicity during the course of the negotiated rulemaking, to enable the parties to focus their energies on trying to solve problems together. They strongly advocated a ground rule that “parties may only characterize their own position and not that of opponents with the media or outside of the proceedings”, seeing such a limit as vital to keeping deliberations constructive.

**Timing.** Parties that had participated in other negotiated rulemakings strongly urged that there be a firm deadline set for the advisory committee; otherwise they feared there may be little incentive for some members to come to closure. While setting realistic limits can be an effective tool, there were different opinions as to what a realistic time limit would be. Some stakeholders felt strongly that the process should conclude by the end of 1999, especially in light of the already missed deadline set by Congress for issuing a revised rule. Other reg-neg proponents felt that it would take 1 to 1 1/2 years to do an adequate job and produce a completed consensus document, as opposed to just “deal points”.

**Issues off the table.** As the discussion under issues raised suggests, there is disagreement among the parties as to the scope of issues that could be addressed. Many believed that limits on nighttime driving and compensation to drivers, for example, should not be discussed; others disagreed. The conveners indicated to the parties that the scope of issues to be discussed would have to be one of the first agenda items in a reg-neg, even given that whether or not to include a particular issue could affect the willingness of some parties to participate. The conveners discouraged debating this matter at this stage.

**VIEWS AND ARGUMENTS BY PERSONS OPPOSING A NEGOTIATED RULEMAKING PROCEEDING**

Parties that did not think reg-neg was appropriate for HOS raised a number of key points in their discussions with the conveners that they believed should be weighed in a recommendation to the agency and in the agency's decision-making as to whether or not to go forward with a reg-neg.

***Number of parties is unwieldy.***

Tens of thousands of comments were submitted on the last HOS rulemaking notice issued by OMC. Several stakeholders believed that this indicates that it would be difficult if not impossible to develop a balanced, manageable representation scheme. Many individual drivers, as well as sectors and chapters within major national groups and companies that rely on commercial vehicles for carrying their goods, may all wish to represent themselves because the ramifications of change are so significant. Indeed, although several key interest groups indicated to the conveners that their associations have already begun the process of developing organizational positions and setting up procedures for obtaining member input, the conveners received calls from several members of these interest groups who indicated that they would prefer to have their own seat at the table.

***Prior efforts to reach a consensus on seemingly less controversial issues have failed.***

A number of the individuals interviewed participated in a recent FHWA reg-neg on commercial drivers licenses that did not end in a consensus. For some of the participants, this failure to reach a consensus on what was originally viewed as an issue appropriate for compromise, suggests that a consensus on HOS, with its far reaching consequences, is impossible. They are especially dubious given that some parties have widely divergent positions on potential approaches for addressing safety, and that negative public statements have driven the interests further apart.

***A negotiated rulemaking would delay the issuance of a rule.***

Opponents of a negotiated rulemaking on HOS expressed concern about the delay that might result from a reg-neg, even under a scenario in which everyone comes to the table in good faith and with a willingness and ability to compromise. They worried that the economic issues are so complex and the differences within industry as to what would be acceptable changes to operations so great that a good deal of time would be consumed, possibly with no agreement or product at the end. They said that, if there were a partial consensus, or none, the agency might then have to begin rulemaking anew. In their

view, even though such partial consensus might give the agency a greater understanding of what might be acceptable, it still would take considerable added time to draft a rule.

***Limitations on future opposition to the rule.***

One of the concerns expressed by a key interest group is that it would have to commit to support any consensus reached. Although recognizing that it could withhold approval of a final recommendation to the agency if the result were not acceptable to its members, it emphasized the difficulty of being the only naysayer in such a process, especially after everyone has devoted considerable time and resources to the deliberations. Once they were part of the consensus, their hands would be tied in criticizing the regulation and they believe their ability to prevail in subsequent litigation would be compromised.

***Degree of flexibility within interest groups.***

One of the questions asked by the conveners pertained to the degree of flexibility that an interest group might have entering the negotiations. Several of the key stakeholder groups indicated that compromising in the direction of what has been publicly stated by their opponents would be impossible, given the views and needs of their members. This, more than any other concern identified regarding the feasibility of negotiated rulemaking, suggests that a traditional rulemaking would be preferable in their view since they could then focus their energies on preparing meaningful comments and hope that their input would result in an acceptable regulation. If not, they could still exercise other options for attempting to influence a final regulation.

**V. PROCESS OPTIONS**

The task of an independent, neutral convener involves integrating the information provided by potential stakeholders with the neutral's professional assessment of the viability of a collaborative process. In some cases, parties might argue that the issues are too contentious or too complex to result in a consensus. However, the experience of numerous mediators who have successfully facilitated negotiated rulemaking proceedings suggests that complex issues lend themselves to the creation of creative packages of proposals. Indeed, a high level of controversy often causes the parties to take the proceeding more seriously because the outcome may be critical to each of the interest groups.

On the flip side, each of the parties might indicate their strong preference for a collaborative process and signal their willingness to compromise on key issues. Nevertheless, as the convener pieces together the input provided regarding where flexibility may lie, the information may indicate that the parties are too far apart on

critical path issues and there is little room for compromise unless one or more parties changes their expectations about what would be a realistic outcome of the deliberations.

One of the most critical factors to be considered in evaluating the feasibility of a negotiated rulemaking or other collaborative process is the ability and willingness of all of the key stakeholder interests to send representatives. Parties may have resource constraints that force them to decline as participants. There may be internal conflicts within a group that would make it difficult for that party to present a unified position. Or an interest group might feel that any compromise moving in the direction of other interests would fundamentally violate the principles held by members or constituents.

While a convener might work with a stakeholder group to determine if it is possible to overcome its resistance to participation, a “no” answer is not subject to professional reinterpretation. If the naysayers represent a small segment in a given interest community, or if they are a peripheral players, then the convener might still recommend that the agency proceed with a negotiations process. However, if there are six or seven key interest sectors that regularly engage in the political process regarding the matter under consideration, and one or more of those interests is not supportive of the process, then the convener is likely to recommend against reg-neg or other collaborative process.

### **Feasibility of a Negotiated Rulemaking Process**

***Based upon an analysis of the background information on the history of the HOS controversy and the input provided by the key stakeholders, the HOS convening team does not believe that a negotiated rulemaking process would have the likelihood of producing a consensus set of recommendations to FHWA.*** The key factors leading to this conclusion are as follows:

*Manageability.* Given the impact of changes in the HOS rule on many parts of the economy, a reg-neg on this issue would present a unique management challenge. While the conveners believe that it would be possible to compose an advisory committee with balanced representation and adequate involvement of each of the key interest groups, it might take several months or more for the neutrals who would facilitate the proceeding to work with several of the major associations to ensure that each of the sectors and factions are comfortable with their team and the internal decision-making process. This assessment is based upon calls from individual members and groups who have indicated their concerns about whether someone else can truly represent their position.

*Adequate time frame.* Several proponents of a reg-neg process have strongly indicated that they believe the process should be completed within this calendar year or soon

thereafter. Other stakeholder groups estimate that it would take at least a year to do an effective job. It is the opinion of the conveners that, given the high level of controversy, the shorter time frame would require short circuiting of some of the initial critical steps in the dialogue that build the foundation for collaborating on a solution. In addition, a negotiating committee would likely have inadequate opportunity to consider all necessary issues, ascertain the implications for each segment of industry, reach tentative decisions and communicate with constituencies -- all necessary elements leading to any final consensus. Unless there is greater flexibility in the time frame for the process, the conveners would have to recommend against proceeding.

*Agency Participation.* Given recent controversy about OMC leadership and the proposals under consideration by Congress to transfer the agency, both proponents and opponents of a reg-neg for HOS issues have expressed reservations about the ability of FHWA to participate effectively and lead the effort. They have suggested that OST be designated as co-lead or at least second chair to FHWA/OMC. The conveners have conferred with a number of the members of the agency team that would participate in a reg-neg and believe that there is an enthusiastic and dedicated staff that would be effective. The agency has expressed its willingness to support a negotiated rulemaking committee and has agreed to employ any resulting consensus as the basis for a notice of proposed rulemaking. However, one of the potential lead negotiators is about to retire. The conveners are unsure as to whether the replacement for this individual and any OST representative would be able to get up to speed in sufficient time to manage the process for the agency team.

*Participation By All Affected Interests.* Some key parties have stated that they do not want to participate in a reg-neg on HOS at this time. They point to a number of factors, which have been described in the previous section (on procedural issues raised during the convening) that support this position. The conveners have worked with these groups to discuss possible approaches for addressing these concerns, but have not been able to alleviate their concerns.

### **Other Potential Collaborative Processes**

While the conveners do not recommend commencing a full reg-neg, the conveners noted that numerous persons whom we interviewed expressed support for a facilitated, interactive process that would have several advantages: (1) enabling some mutual sharing of information on scientific research, (2) permitting dialogue on "real world" concerns that should be addressed in crafting realistic and implementable requirements and (3) providing input to the agency that could result in a better informed rule, even if not producing a full consensus.

Several different approaches were discussed with the parties for alternatives to a reg-neg process. Drawing upon these discussions and the experience of the conveners in other settings, the convening team believes that some less ambitious, smaller scale process might be very productive. These alternatives might be more acceptable to parties that were concerned about the length of time required for a full reg-neg, without any guarantee that there would be a consensus at the end. It also might overcome some of the concerns of groups that were reluctant to participate in a full consensus process. One alternative approach engages the stakeholders in a review of scientific data regarding alertness, fatigue and safety. The second alternative involves stakeholders in the preparation of “straw man” HOS proposals that would meet a series of specified criteria. A detailed description of each of these alternatives is provided below.

### **Collaborative Scientific Issues Dialogue**

In this approach, FHWA would establish an advisory committee to examine some of the key studies, data, and analysis on fatigue and safety management in the transportation industry. The main emphasis would be on work pertaining to the trucking industry, but research in other modes could be considered as well. The goal of this process would be to reach a common understanding of which scientific findings ought to be relied upon for the underpinnings of a highway safety regulation.

If substantial agreement on this question was reached, the committee might then move to a second phase connecting scientific theory to practice. This discussion could focus on fatigue prevention measures, possible regulatory schemes and other strategies for improving driver safety.

Total numbers of individuals in the dialogue group would be more limited than for a full reg-neg process, but there would still be adequate representation of each of the key interests identified in the convening report. A group of 20 might be able to work effectively. This would not, however, eliminate the involvement of other groups or individuals, since the proceedings would be designed with specific agendas for obtaining input from observers.

The first task of such an advisory committee would be to exchange seminal studies that each interest believed should be reviewed and discussed by colleagues. Included in this mix might be some of the recent research conducted by other modes in DOT or sister agencies. This would, at a minimum, establish a common base of information on the research literature. The next task would be to agree upon a mutually acceptable group of scientists to confer with the committee and a list of questions that the group wished to have addressed. The format for bringing the researchers together would be to engage them in a dialogue to identify where they have agreement on fatigue management issues,

where there are differences of opinion, and the implications of the areas of agreement and disagreement to setting policy on fatigue. Key questions to be addressed might include whether competing study results were mutually exclusive or whether there were strategies for managing fatigue that could result from marrying the recommendations that emerged from the respective studies.

Then either FHWA could use whatever consensus emerges on critical issues to draft rules reflecting this input, or if parties agreed that further collaboration appeared warranted, they might agree to engage in deliberations to craft a consensus NPRM. There would be no commitment in advance by any of the parties to move to the third phase. Participants would also have to revisit whether and to what degree they might be bound to support any resulting rule.

### **“Strawman” Approach**

This alternative would be similar in structure to the science dialogue process, except that the task of the group would be to develop regulatory proposals that would be the focus of the dialogue among the parties. Each interest group, rather than each individual member (e.g. industry, drivers, advocates, state enforcement officials), would come to the initial meeting with a “straw man” HOS proposal that would meet a series of specified criteria. The criteria would be developed in advance of the meeting with the assistance of the neutral facilitator (i.e., pre-negotiation “shuttle diplomacy”). The committee members would present their proposals and explain how they accomplish various safety and policy objectives or meet other criteria that have been set. The committee would then either select two or three of the preferable proposals or craft a hybrid of the proposals that emerge from the discussions. In this approach, too, either FHWA could take any general consensus that emerges on selected issues and draft rules reflecting that collective input, or the parties might agree to move to a second step to consider provisions in a draft HOS NPRM.

The “strawman” approach is another mechanism for determining whether the parties in the HOS arena could narrow their differences and engage in productive talks without risking extensive time delays or having to commit their entire organization or interest group to a consensus product. Unlike traditional notice and comment, in which parties provide their reactions or counter proposals to the agency, the straw man approach would enable the stakeholders to exchange ideas with one another. The conveners have successfully utilized this approach in other proceedings; however the process is only effective if the parties agree to develop “strawman” proposals that move beyond the rhetoric that they have employed in prior public interchanges.

One of the criteria for a proposal is that the authors include provisions that are crafted to address concerns that have been expressed by opposing factions. For example, parties might be instructed to draft a proposal that they believe will be acceptable to the other interests and then demonstrate how the proposal meets the needs of the other interest groups.

### **Variations on the Science Dialogue and “Strawman” Approaches**

Several persons who were attracted to either the science discussion or “strawman” process indicated that these approaches would be more attractive to their members if they were not designed as “stand alone” processes, but were the first phase of a negotiated rulemaking. FHWA would establish a rulemaking committee, with expansive membership to include all of the key interests with a stake in the regulation (per the provisions of the Negotiated Rulemaking Act.) The ground rules would establish a consensus process, and parties would commit to support any consensus reached. However, there would be an understanding that if the first phase of the process did not proceed satisfactorily then the agency, with the committee members, would re-evaluate whether or not to continue deliberations. This variation would enable the stakeholders to move forward without having to make changes to the committee’s charter or ground rules. It would also require a greater up-front commitment by parties to work towards a consensus, a factor which a number of parties felt to be an advantage over the “mini-consensus” processes.

### **Traditional Notice and Comment Rulemaking**

Several key stakeholder groups have indicated their preference for a traditional notice and comment rulemaking proceeding. They believe that this approach provides them with the best opportunity for giving their input to the agency. They also believe that this approach provides the greatest access to all groups and individuals that might have a stake in the outcome of a rulemaking, rather than limiting involvement to a designated group of representative negotiators. Most important, providing comments to a proposed rule would not limit one’s subsequent ability to litigate an unacceptable rule or seek legislative relief.

Stakeholders who favor either reg-neg or some form of collaborative approach have expressed concerns about a “notice and comment” proceeding, because they believe that the agency might be unduly influenced by groups that can devote greater resources to preparing comments or can mobilize more commenters to dominate the proceeding. Traditional rulemaking would also mean that FHWA would not be able to benefit from the type of regular exchange of information and ideas that could result in an acceptable

regulation. The consequence could be that all of the key groups will litigate the proposed rule and there will be further delays in making changes to the HOS regulation.

Parties that would like to see a more expanded scope of issues in a revised HOS regulation, argue that it would be more difficult for FHWA to draft a rule that encompasses broader issues than the core HOS topics under a traditional notice and comment rulemaking. FHWA might be better able to consider the broader scope of issues (e.g., shipper responsibility, compensation) if they are considered in response to the suggestions of an advisory committee in a collaborative process.

## VI. RECOMMENDATIONS

**The conveners recommend that FHWA establish an advisory committee to engage in a collaborative scientific issues dialogue process.**

The conveners believe that this approach has a number of advantages in light of the reluctance of several key stakeholder groups to participate in a full consensus process. The predominant view among the stakeholders is that it would be extremely valuable to participate in a structured dialogue on the HOS issues to give guidance to FHWA on what might be acceptable solutions. We concur with this assessment. As we indicated in our findings, there is considerable interest in trying to move forward to solve some of the critical safety issues that characterize the U.S. trucking industry. The complexity of the industry and in the science of fatigue management strongly suggests that the problem-solving occur in an interactive dialogue.

The collaborative scientific issues dialogue would allow parties to try to obtain agreement on the directions suggested by scientific research on sleep and fatigue management -- i.e., the scientific underpinnings of an HOS rule -- rather than have them set forth positions and then haggle over tradeoffs. In addition, it offers more potential for the participants to "think outside the box" and thus possibly find creative solutions that might occur in a traditional notice and comment proceeding.

A process that begins by addressing research issues is consistent with the input of the stakeholders provided during the convening process, i.e., that scientific studies on the causes of fatigue and fatigue management ought to guide the setting of policy. Second, establishing a common base of knowledge and working off of common scientific or technical assumptions is a typical and appropriate first step in a negotiated process. It therefore makes sense, if FHWA is to utilize an alternative collaborative approach, that the process focuses on attempting to establish common ground on the findings of the scientific community regarding the causation and management of fatigue.

The conveners recognize that there currently are significant disagreements among the stakeholders regarding which studies and which findings ought to drive the formulation of revised regulations. In a number of interviews, parties referred to what they considered to be the “definitive” sleep study, which then coincidentally seemed to support their position on what might be an acceptable proposal for changing the HOS regs. They subsequently, however, talked about the complexity of the science and indicated that there might be some value in reviewing the body of literature, bringing together experts from a number of the transportation modes, and trying to determine what aspects in the research should be relied upon and which should be rejected.

The interest expressed by a number of stakeholder groups in a facilitated, negotiated scientific dialogue and the experience of the conveners utilizing this approach in other dispute arenas, suggests that this approach should be given serious consideration by FHWA.

**The conveners recognize that a scientific dialogue is likely to be contentious because the outcome has important ramifications. Therefore, it may not end in a consensus, but it holds the greatest promise for engaging the opposing groups of stakeholders in a meaningful dialogue that might narrow differences on a number of key issues.**

The process of joint education, identifying mutually acceptable scientists, and designing the format for a workshop or series of workshops in which the researchers would systematically consider on the research findings are important first steps in overcoming some of the current barriers among the stakeholder groups and setting a positive tone for any future discussions.’

It may also prove true that no single theory of the cause of fatigue or no single solution for managing fatigue should be solely relied upon. This would then suggest that a regulatory proposal should incorporate some aspect of each type of strategy and then establish a framework for evaluating which piece of the strategy appears to have the most positive impact. The debate would then move off of the “battle of the experts” to evaluating which package of strategies will best address safety concerns and meet other potential tests for feasibility: e.g. cost effective, consistent with operational conditions, and enforceable.

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See Knaster, A, “Scientific Negotiations: ADR’s Answer to the Battle of Expert Witnesses”, *The Recorder*, Fall, 1994 (attached to this report).

**Additional recommendations regarding process design.**Participants

Many parties indicated the importance to them of being included on an HOS reg-neg negotiating committee and expressed a willingness to participate. If the conveners had recommended a reg-neg, then the conveners would likely have suggested greater breadth of representation for each of the key interest sectors that needs to be accommodated for the HOS issue.

For the scientific dialogue process, however, the conveners are suggesting that the advisory committee include representatives of each of the interests that might be affected by an HOS rule, but that the numbers of representatives for each interest be more limited. While it is critical that the representatives on the advisory committee be diligent in communicating and consulting with the other participants in their interest group, this focused discussion on sleep research is more akin to a task group. It requires participation primarily by individuals who have some familiarity with the research issues and the scientists who are likely to be selected to work with the group, although there still needs to be a balance of experience and expertise.

It will be critical for the larger group of representatives to be involved at various intervals in the process. The “on the road” experience of drivers, for instance, will be important in evaluating the validity of some of the research designs and fatigue management strategies that have been tested.

The conveners therefore propose the following preliminary list of members for the core advisory committee:

***Agency***

- A high-level FHWA representative at the Committee table supported by appropriate technical staff a member with an enforcement background
- A representative from elsewhere in DOT, either OST or another mode familiar with HOS issues and safety research

***Industry***

- ATA (2)
- NPTC (2)

- OOIDA (1)
- Independent Truckers and Drivers Association (1)
- U.S. West or Edison Electric Institute (or similar representative of utilities with repair/emergency duties) (1)
- American Bus Association (1)

***Drivers***

- Drivers reflecting different perspectives (e.g., small and large long haul operations, LTL, local) (2)
- International Brotherhood of Teamsters (2)

***Safety advocates***

- CRASH (1)
- AHAS ( 1 )
- Public Citizen (1)

***Victims***

- PATT (1)

***Shippers***

- NIT League (1)
- Food Distributors International (1)

***Enforcement community***

- Commercial Vehicle Safety Alliance (1)
- State transportation agencies (1)

***Insurers***

- National Association of Independent Insurers (1)
- Insurance Institute for Highway Safety (1)

**Suggested Ground Rules**

The conveners recommend that the advisory committee operate by consensus for all its decisions, except for housekeeping issues. Interests on the committee would commit to representing the positions and interests of their own organization and the broader constituency that they represent.

All studies and research material suggested by any member should be on the table at the beginning of the process. Thereafter, the members will decide what criteria to use to identify and select the studies and researchers that they will use to guide them.

The committee should be facilitated and chaired by neutral dispute resolution professionals, not by a member or by the agency. The advisory committee may subsequently decide to select one of the researchers as chair of the science panel group that is convened.

**Facilitators and their accentability**

Given the critical importance of having facilitators who are able and acceptable to all, we recommend that, before proceeding with any consensus process (whatever the scope or goals), the agency should contact all key potential participants to ascertain who they believe would, or would not, be appropriate to facilitate the process. If these interests object to any particular facilitator(s), the agency should act to acquire the services of persons who are viewed by all as neutral, unbiased, and able to lead a process involving discussions of highly contentious issues.

**Recommendations regarding other options**

The conveners would not recommend that FHWA proceed to conduct a traditional notice and comment rulemaking unless the dialogue process proves unworkable. The convening interviews have demonstrated the importance of the Agency engaging in some level of interactive dialogue with its constituent groups, even if the process is limited in time and scope and does not require a consensus product.

The conveners are not recommending the “strawman” approach, because they believe that it would be difficult for the parties to prepare proposals, at least in a first round of proposal

exchange, that would be more than a reaffirmation of their current public positions. The

were unable to proceed to a single text that merged some of the mutually acceptable ideas in each of the proposals. Instead, each party insisted that their full proposal be the text that would prevail.

This approach could also seriously disadvantage interest groups that do not have the resources to develop proposals, although they would be involved in the review and subsequent dialogue.

As indicated at the beginning of this section, the conveners do not recommend a negotiated

strawman approach might be

workable because parties could decide whether or not to proceed after the first phase, the conveners believe that this variation on a reg-neg process would still not address all of the concerns that led several key parties to conclude that a reg-neg process would be unacceptable to their interest group.

## **VII. NEXT STEPS**

If the agency decides to move forward with the scientific dialogue process, an immediate next step would be to publish in the Federal Register a notice of intent to form an advisory committee. The Negotiated Rulemaking Act provides that the agency must then allow 30 days for comments on the proposal and for applications for committee membership. This step is likely to be an important one in this case, given the number of entities that may have views on HOS matters and the proposal by the conveners to limit participation.

In preparation for the organizational meeting, the agency needs to proceed with the selection of neutral facilitators, in consultation with the proposed members. The facilitators should begin as soon as possible to work with the agency and members to prepare a set of draft groundrules and to identify which studies and data would be appropriate to circulate prior to the first meeting.

At the committee's organizational meeting, committee membership would be finalized; organizational ground rules would be approved to define how the committee would operate and be structured; and the participants would engage in a "scoping session" to develop the specific approach that will be utilized for their proceedings.

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By ALANA S. KNASTER

**S**cientific negotiations," the joint use of neutral panels of technical experts on behalf of all parties in a dispute, is an innovative approach for resolving complex technical issues in settlement of environmental litigation. Scientific expertise focuses on determining the best means of solving a problem rather than discrediting the position of opponents.

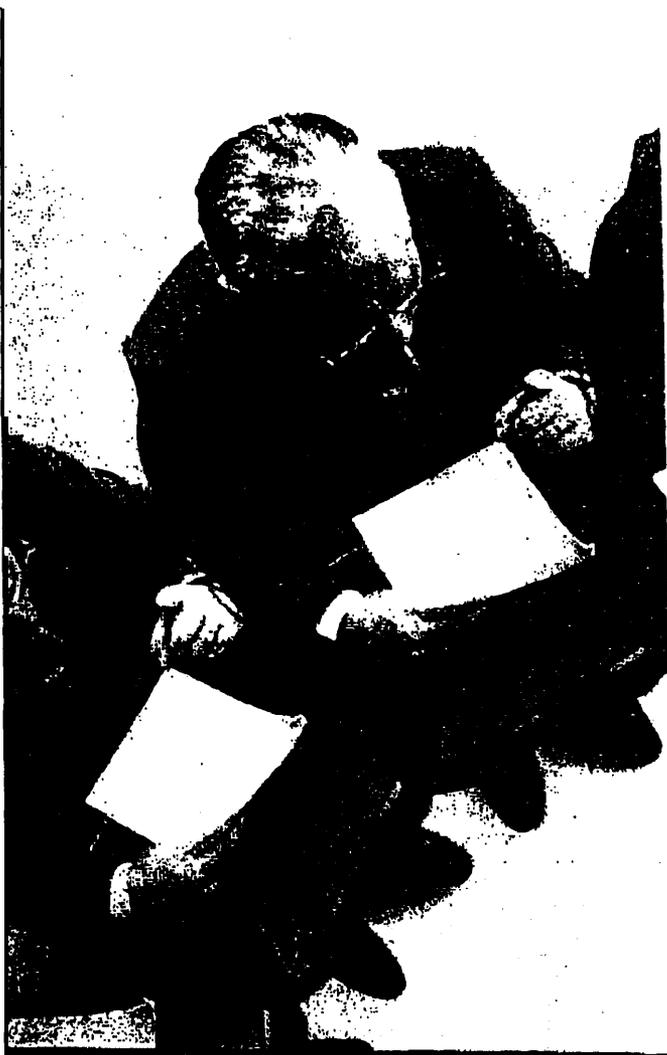
These mutually acceptable panels of experts do not replace the expert witness in environmental case management, but may be effectively used as a collaborative aspect or phase of an overall settlement strategy. The experts are given carefully defined problems to solve with the objective of reaching a consensus or unanimity among themselves on their findings or recommendations. Each step of the process is carefully negotiated and agreed upon to ensure that the outcome of the panel deliberations will be acceptable to all of the parties.

The collaborative approach of scientific negotiations is in sharp contrast to the many years of hostile and conflicting expert testimony before governmental agencies and the courts that often characterizes environmental disputes. In conventional approaches to litigation, whenever one party perceives it is losing the information battle, they shift gears and bring on a new team of scientists to challenge the data and conclusions of opposing experts. While the battle rages on, the cost of addressing any problems that need to be solved or providing requisite mitigation increases. While one side might ultimately prevail in having its assessment of potential impacts accepted, interim, incremental measures that might benefit sensitive neighbors or critical natural resources are overlooked.

#### FROM CASE STUDY TO TREND

The first scientific negotiations were convened as part of the resolution of a dispute over potential effects of off-shore oil drilling. Neither the commercial fishermen, who claimed

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# Scientific ADR's answer to the

that the acoustic airguns utilized in geophysical surveying were lethal to fish, nor the oil industry, which claimed that low-frequency sound waves could not be harming fish, could produce actual research data or concrete evidence to support their positions. Instead of continuing what was obviously becoming a futile war of the experts, the parties decided to retain an environmental mediator.

The mediator recommended that the parties establish a process for joint selection of experts to design and oversee appropriate studies. Had any one industry conducted the research study on its own, the results would have been questioned no matter how pristine the science. (See *Cornick and Knaster, "Oil and Fishing Industries Negotiate: Mediation and*

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## Negotiations' a little of expert witnesses

Scientific Issues," *Environment*, December 1986). The process that emerged served as the prototype for comparable scientific negotiations in other disputes and technical areas:

- An unprecedented agreement reached by the Seattle-Tacoma International Airport Noise Mediation Committee is expected to reduce aircraft noise at least 50 percent by the year 2001. Committee members, who included representatives of the airport, FAA, airlines, pilots association and municipalities bordering the airport, accepted the recommendations on a package of noise reduction measures prepared by a jointly selected technical team. These included nighttime limitations on noisier aircraft, an allocation for each airline of noise that will decrease over time, and a state-of-the-art flight-track monitor-

ing system to ensure compliance.

- A panel of geologists and hydrologists, brought together by appellants and intervenors in a challenge of a national forest management plan, developed a set of long-range recommendations for watershed evaluation and protection. In response to the cumulative assessment requirements of NEPA, the panel's consensus proposals addressed thresholds of concern for activities in the watershed, mitigation measures, and the timing of placing restrictions on recreational access, private development, grazing and timber harvesting in and adjacent to the forest. The panel's recommendations were incorporated into a final settlement document approved by a 19-member negotiating group that included the Forest Service, Sierra Club, California Timber Association, California Cattlemen's Association and the Four-Wheel-Drive Vehicle Association.

- In a recent land use dispute in California, the parties deadlocked over development impacts. Rather than continue the debate by their respective sets of experts, the parties agreed to a joint property-appraisal process that would provide some guarantees to homeowners against a decline in property value from the proposed project. Based upon the home value appraisal of a mutually acceptable registered appraiser, the developer agreed to pay any homeowner the differential between the fair market value of their home and the re-appraised (by the same appraisal firm and using the same methodology) fair market value of similar homes in the vicinity at the time of sale.

Although each interest contacted the mediator in an attempt to slightly modify certain parameters in the appraisal with suggestions that per-

haps another round of appraisals would improve the outcome, the mediator convinced each side that when viewed as a package of appraisals, rather than for their individual merits, the appraiser's work product was balanced. A final agreement was thereby signed by all the parties.

The use of scientific negotiations has been applied to numerous other environmental and public policy controversies: risk assessments for proposed industrial facilities; wetlands regeneration and mitigation; habitat impacts from livestock grazing and other agricultural practices; and alternative technologies for cleanup of contaminated property. In each case, the panel recommendations have been accepted by the parties, because the neutrality of the process has been main-

tained from beginning to end.

#### STEPS TOWARD A PROCESS

It was important to identify high-caliber scientists for each of these expert panels and the process employed in their selection and in the definition of the scope of work was probably critical to the success in each case. Moreover, the mediators retained by the parties to assist in their negotiations played an integral role in advising and guiding the process:

The convening of neutral panels of technical experts entails a number of discrete steps that are necessary to guarantee the neutrality and hence acceptability of the outcome to all of the negotiating interests. The process is managed as a facilitation within a mediation. The mediator guides the parties toward a consensus on each matter and for each step. It is necessary to require separate interest caucus deliberations. Successful mediation and other techniques for breaking an impasse.

**Step 1. Identification of the scope of work for the expert panel.** This includes specific questions to be addressed and the selection of the off-shore oil expert panel was not intended to conduct the study, but whether, based upon the panel's knowledge of acoustics, population dynamics, and marine biology, there was a likelihood that any impacts could occur. If the answer was yes, then the panel was to provide their recommendations on a study design.

**Step 2. Identification of the criteria of expertise or technical qualifications of expert panel members.** In some cases, parties agree to criteria pertaining to years of experience, number of studies published, and institutional affiliation. In other situations, the parties may be seeking scientists with very specific areas of expertise — invertebrate behavior as opposed to marine biology; or the relationship between the type of facility or project planned.

If the issue is the safety of a waste incinerator, the parties seek experts who have design or similar industrial facilities, as opposed to individuals with more generic industrial safety credentials. What is important is that the parties reach a consensus on the criteria.

One of the parties contacted an expert to challenge some of the findings in a draft report that included a risk assessment of a proposed industrial facility. When news of this unauthorized contact leaked to other interest-group representatives, a controversy erupted over whether the final draft report would be acceptable. The issue was ultimately resolved by having one additional, mutually acceptable expert review the final set of recommendations.

**Step 5. Review of candidates by the parties and selection of an expert list.** In contrast to the selection of experts for adversarial proceedings, parties often make their final selection based upon the expert's reputations as problem-solvers rather than warriors.

**Step 6. Identification of the contract for the expert's services, including the task to be performed and the questions to be addressed.** In the Airport Noise Abatement Act, the consulting firm was retained to prepare a "noise budget" as well as to provide consultation to neighborhood groups at public meetings designed to keep the communities informed. A subcommittee of the mediation committee served as contract managers for this \$50,000 analysis.

**Step 7. Significance of the process by all interested parties and the panel's role; consensus on the mediation process on wetlands issue.** Several interest-group representatives indicated their approval of the panel members but did not take the extra step of formally agreeing to abide by the outcome of the panel deliberations. When the panel consensus did not conform with the current position of one of the parties, the recommendation was rejected.

**Step 8. How the parties will be represented by the mediator.** The mediator performed several roles during a panel deliberation that were instrumental in helping

### The collaborative approach of scientific negotiations is in sharp contrast to the conflicting expert testimony that often characterizes environmental disputes.

**Step 3. Identification of potential expert panel members, either by the parties or the mediator, who have both the appropriate qualifications and whom the parties can set aside or limit their participation in the process.** This was especially difficult for the selection of cumulative watershed experts because the most qualified scientists were already retained as consultants for the various groups at the negotiation table. However, the panelists realized that in the panel setting, these scientists would not represent any given position, but rather would collaborate to produce the most competent work product.

**Step 4. Meeting of the expert panel.**

ing the experts reach a consensus: 1) facilitating the proceedings by helping the panelists work through the agenda; 2) helping panel members generate counterproposals in the event of an impasse; 3) conferring with individual panel members to ensure that no panelist is forced to compromise on an important principle because she did not want to be the hold-out on a particular decision; 4) verifying when closure has been reached on each issue as well as on the package of recommendations.

**Step 9. Parties and the mediator sign the CO-OPERATION AGREEMENT.**

As the use of the scientific negotiation process has

evolved over time. adaptations and variations on the basic steps outlined above have enabled parties to utilize this approach for issues that are less technically complex or that require a more expeditious resolution, such as retaining a single fin or consultant rather than a panel.

However, several key process elements — joint problem definition and identification of potential experts, as well as prior agreement to abide by the consultant's recommendations — have characterized the processes that have been considered a success by participants. In some instances, panics who once have utilized a science panel in their mediated ne-

Expert participants in scientific negotiations are more challenged by developing solutions to problems than by trying to make points in adversarial proceedings.

negotiations have included provisions in their settlement agreements to have the same panel reconvene or use a similar process if new information emerges or there is a dispute during the implementation phase that needs to be addressed.

Although differences in priorities and values may remain and technological and economic changes may create new issues, a relationship has been established that enables former disputants to continue to try to resolve their problems by looking for mutually acceptable and scientifically appropriate solutions.

#### THE ROLE OF THE MEDIATOR

The mediator plays a critical role throughout the expert-panel process in guaranteeing that the process is protected from undue influence by any single interest or panel member. Contacts with potential panel members, contracts for payment, meeting arrangements, as well as facilitation of the panel deliberations are most appropriately conducted by the mediator.

In performing the background checks on potential expert-panel members, the mediator is entrusted by the negotiators to ask questions about current or prior work and disclose the answer in the event of a potential conflict of interest. The mediator may also help determine whether a prospective panel member appreciates the sensitivity of such an assignment.

For example, in convening an ocean-acoustics panel, the negotiating group wanted panelists who had real-life experience in the public arena, not just careers as researchers. The mediator designed a questionnaire that was approved by the parties that ascertained panel member reactions to the proposed science negotiations and other consensus-like processes.

The mediator must guide the negotiators carefully through each step in the design and implementation of the process by confirming with each client group that there is buy-in to what has been proposed. The mediator can play an invaluable service by relating prior experiences in similar

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scientific negotiations and providing alternative options for the parties to consider-

Each set of negotiators will design a process that best suits the issues under discussion and meets the needs of their interest. The success of the process will be determined by the extent to which the parties feel ownership of what has been inspired. By far, the most crucial role of the mediator is in helping clients evaluate whether the issues in dispute are appropriately addressed through a collaborative panel process.

The mediator might point out that once then are answers to some of the technical questions presented, these issues cannot be used as effectively to argue for stronger provisions in the settlement agreement. Uncertainty has its strategic benefit. On the other hand, the most persuasive arguments for a panel process can be made for issues where the scientific literature is emerging or vague, for issues where parties want to know how to do something rather than whether to proceed; or for situations where there is a general agreement upon a set of parameters. For example, where a cost cap for a remedy has been decided, what the parties are seeking is the technology that is most cost-effective.

In response to concerns from the parties that the panel might propose solutions that, although creative, are not yet state-of-the-art, the mediator may guide the panel members in the design of a pilot study with discrete points for reconvening the panel to evaluate the pilot-study outcome.

## BENEFIT6 OF THE PROCESS

The uniqueness of the process used in scientific negotiations enables parties to attract extremely qualified teams of experts who welcome the change from battling before commissions and juries. Panelists have commented on their preference for developing information that would be used for making decisions rather than disputing them. Panel members have been able to assist in generating creative solutions to difficult problems on behalf of all conflicting interests. Other expert participants in scientific negotiations have likewise stated that they have been more challenged by developing solutions to problems that have dragged on for years and that are too often resolved through political or judicial compromise, than by trying to make points as an expert witness in adversarial proceedings.

Clients are well-served by the process and feel a sense of ownership of the results, because they have been directly involved in their development. They are able to use the best possible information and take advantage of the best available expertise in the field in resolving their dispute. Moreover, although differences in priorities and values may remain, a relationship has been established that enables a former disputant to continue efforts to resolve problems by looking for mutually acceptable and scientifically appropriate solutions. ■



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