

## DEVELOPING RULES THROUGH COLLABORATION

The President's Memorandum of January 21, 74 Fed. Reg. 4685 (January 26, 2009), emphasized that government should be both participatory and collaborative. Collaboration, when properly executed, expands the information and insight that is available to agencies and the focused deliberation can result in policies that would be difficult to achieve otherwise. Experience demonstrates these benefits vividly. They result from the interaction of those with a practical, first hand, state-of-the art knowledge of the relevant issues under procedures that encourage creative outcomes. Moreover, participation and collaboration enhance the democratic process.

Public participation can take two forms: As most often used, it is a means by which members of the public submit information and views to the agency which will take them into account when making its decision. The second is when members of the public actually share in developing the policies. Collaboration is a form of participation in which the agency works together *with* members of the public, and it can be used in either type of participation. It requires the clash of diverse views through procedures that are transparent as to process and information and that channel conflict through sustained dialogue to the end of achieving a shared goal. The essence of collaboration is the bi-lateral nature of the discussions with the agency engaging in a give and take, instead of simply informing itself to make the decision alone.

Collaboration can take many forms and be employed throughout the regulatory process — it might be a “scoping session” to develop the issues that need to be taken into account in a new rule; it might be a “policy dialogue” or “roundtable” in which the science or other important components are discussed; it might be recommendations to the agency concerning a proposed rule. While these are certainly helpful in informing the agency, they stop short of securing the ultimate benefit of collaboration: an actual agreement on the major provisions of a new rule.<sup>1</sup> Sharing in the decision is actual participation and is the essence of collaborative governance. When properly conducted,<sup>2</sup> consensus has proven itself time and again as an extraordinarily powerful tool for resolving complex, politically controversial issues.<sup>3</sup> It achieves results that are simply not available in other forms of collaboration. Moreover, collaboration builds an important form of legitimacy into the rule.<sup>4</sup>

This results from the fact that consensus develops a synergy that results when a

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1. Philip J. Harter, *Negotiating Government Policy: Better Decisions Through Democratic Synergy* in Regulation Économique et Démocratie, Martine Lombard ed. (Daloz, Paris 2006).
  2. Congress defined these procedures in the Negotiated Rulemaking Act, 5 U.S.C. § 561.
  3. Philip J. Harter, *Assessing the Assessors: The Actual Experience of Negotiated Rulemaking*, 9 N.Y.U. Env. L.J. 32 (2000).
  4. See, e.g., Jody Freeman and Laura Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. Env'tl. L.J. 60 (2000).

group of individuals with experience, insight, and interest in a common issue come together to solve the problem in a mutually acceptable manner. The parties stimulate each other's thinking; foster creative ideas; refine and extend promising leads while weeding out less promising suggestions; determine what information is necessary for a responsible decision, without wasting time and expense on unnecessary defensive work and actually obtain that data; and determine what approach will yield "the biggest bang for the buck." Moreover, it is the means of overcoming the Coasean dilemma as to how to reach the point in regulation where the marginal costs equal the marginal benefits precisely because it sets up the bargaining posited by Coase but which is virtually impossible to achieve in customary regulatory proceedings.<sup>5</sup>

Executive Order 12866 recognizes these benefits. It provides: "Each agency shall ... provide the public with meaningful participation in the regulatory process. . . . Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." § 6(a)(1). This was clearly a positive step. Unfortunately, however, other actions diminished its effectiveness and made it difficult for agencies to achieve successful consensual outcomes.

As explained in my earlier note, OIRA actively discouraged the use of negotiated rulemaking and made it difficult for agencies to implement the directive. That opposition was in large part driven by a self interest on the part of OIRA staff to preserve a maximum amount of discretion on its part. The belief was, I have been authoritatively told, that OIRA felt that it was more difficult to force the agency to change a rule that was developed by a consensual process. That is, of course, antithetical to transparency, public participation, and collaboration. Moreover, OIRA made no effort to ensure that agencies engaged in an effective public participation or collaborative process in developing a proposal. As a result, agencies became sloppy in the use of collaboration and took shortcuts that both diminished the breadth of participation and its effectiveness in crafting creative solutions to complex regulatory issues.

The task for OIRA is to encourage agencies to use collaboration to develop policies and to pay heed to the basic requirements for the successful implementation of a collaborative approach. OIRA needs to do so both in terms of a revised executive order and by means of its practical implementation. That is, agencies are far more likely to use a collaborative, participatory approach if they have an incentive to do so; agencies will clearly shy away from collaboration if its use makes achieving their goal substantially more difficult. Moreover, OIRA needs to build a mechanism that both encourages agencies to collaborate and that enables OIRA itself to perform its important duty of ensuring that "centralized review is both legitimate and appropriate as a means of promoting regulatory goals." President's Memorandum of January 30, 74 Fed. Reg. 5977 (February 3, 2009). These twin goals are not inconsistent and are indeed not only achievable but reinforce each other.

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5. See, Ronald Coase, *The Problem of Social Cost*, *The Journal of Law and Economics* (October, 1960).

I would urge something like the following:

## Use of Collaboration

Each agency is directed to consider the use of collaboration where appropriate to develop new rules and policies. In doing so, the agency needs to determine what form of collaboration will best fulfill its needs. When making this decision, the agency should consult with representatives of the major interests that will be affected by the decision and clearly define the goals to be achieved through the collaboration.

If the agency decides that its goal is to develop a rule or policy collaboratively, which is encouraged, then it should:

1. engage in an outreach to identify representatives of the interests that would be substantially affected by the decision. A successful collaboration must reflect a sufficient diversity of views that the agency can be reasonably assured that the major issues will be addressed in the deliberations.
2. publish in the Federal Register, on its website, and in places where affected individuals are likely to read it, a notice that the agency is —
  - a. planning to use a collaborative process to develop the policy, and
  - b. inviting anyone to participate if they believe they will be substantially affected by the policy in a way that is significantly different from any one already participating.
3. actively participate in the deliberations.
4. consult with OIRA with respect to the issues to be addressed, the deliberations thus far, and the range of potential outcomes before reaching a final agreement on a rule that is subject to this Executive Order so that OIRA's views may be taken into account in developing any agreement.
5. explicitly concur in any final agreement.
6. consistent with its legal obligations, use the result of the collaboration as the basis for its proposed rule or policy.
7. when submitting a rule or other policy to OIRA pursuant to this Order, describe any collaborative process the agency used in its development, including whether or not the rule or policy reflects a consensus of the participants in the collaboration. If it does not, the agency shall provide a brief description as to why.

It would be my fervent hope that *if* a proposed rule reflects the consensus of those substantially affected *and* the agency followed the process above, *then* OIRA would be able to make an expedited review of the document. That would provide the agency with

an incentive to use the participatory process. Moreover, it would be legitimate since the views would have been thoroughly vetted and would reflect any concerns OIRA had as a result of the consultation before the agreement was reached.

I would be delighted to discuss this further with you or to provide additional information should you wish.

Respectfully submitted,

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