ABSTRACT

The regulatory negotiation process is an alternative to the Environmental Protection Agency's (EPA's) traditional approach to rulemaking. The EPA typically uses an experienced, neutral facilitator to evaluate a regulation for a negotiation approach and to facilitate the process if the EPA makes a decision to proceed with the negotiation. The literature on negotiation predicts benefits from the negotiation process for all participating parties regardless of whether a consensus agreement is reached.

In 1992, the EPA made a decision to proceed with a regulatory negotiation for the architectural coatings industry to develop a regulation limiting volatile organic compound emissions from architectural coating products. Although the negotiation process lasted over two years, the negotiation ended without consensus being achieved. This paper discusses the factors which contributed to the selection of the architectural coatings regulation for negotiation and the process involved in selecting representatives of interest groups to participate in the negotiation. These interest groups included representatives of states, industry, consumers, and federal agencies. This paper identifies some overlapping interests among participant groups, and discusses value creating options which were developed during the negotiation. Although some benefits resulted from the negotiation process, this report concludes that the benefits were not worth the time, effort and money expended. Both the complexity of the industry and the negotiating tactics implemented by one of the industry groups participating in the process contributed to process delays and an inability to reach consensus. The importance of a careful evaluation of a candidate regulation for negotiation is highlighted as well as the need for a firm deadline under which to negotiate.
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I. INTRODUCTION

Rule development under federally mandated regulating statutes has become increasingly formalized over the years. Procedures and safeguards have been added to the process to protect against arbitrary and capricious actions by agencies, as well as to ensure an adequate factual basis for regulatory efforts. This increased complexity can result in regulation development approaches in which rules are formulated in isolation from affected parties. This isolation, in turn, can create adversarial relationships between affected parties and the agencies developing the rules. The end result can be a process in which parties focus on preparation for anticipated litigation rather than a cooperative effort to reach creative solutions to differences.

The Environmental Protection Agency (EPA) has roughly 200-250 rulemaking activities under development at any one time (EPA 1987). Approximately 75 percent of the EPA’s final regulations are challenged in court (Thomas 1987). These legal challenges result in costly time delays and resource expenditures.

This situation provided the impetus for Agencies like the EPA to rethink rule development and look for creative new approaches to reduce or eliminate the litigious atmosphere developed during rule development. In the 1980’s, in response to frustrations with the problems associated with the adversarial nature of the regulatory development process, negotiated rulemaking emerged as an alternative to the traditional approach to regulation development. Regulatory negotiation or "reg-neg" brings together affected interests in a formalized process to reach "consensus" on the requirements in a regulation during a series of meetings. The reg-neg approach is viewed as a means to reduce the number of lawsuits and increase stakeholder buy-in to the resulting requirements.

In 1983, the EPA initiated a pilot project to experiment with the use of regulatory negotiation (48 FR 7494). Based on successful results from this pilot project, reg-neg has become integrated into the EPA’s regulatory development process.
as a recognized alternative to the EPA's traditional method of developing regulations. According to the 1995 Administrative Conference of the United States Negotiated Rulemaking Sourcebook, "the EPA has been the most consistent and committed user of negotiated rulemakings, accounting for approximately one-third of federal agency reg-negs" (Pritzker and Dalton:9).

In arriving at cooperative solutions through a negotiation approach, many benefits are expected to accompany a successfully negotiated rule. These include enhancing compliance, accelerating implementation, reducing litigation, and promoting better relationships among stakeholders. There are many challenges related to negotiation of a regulation, however, including obtaining appropriate representation (i.e., who are the interest groups, and who can speak for them) adequate facilitation, and other issues.

This paper discusses the theory and practice of the negotiation process as a tool for regulation development, focusing on one example in which the EPA employed reg-neg to try to achieve a consensus-based regulation for an architectural coatings rule. This paper examines the legislative mandates, process, key parties and interests involved in the architectural coatings negotiation.

The requirement to regulate the architectural coating industry is based on new authorities provided to the EPA in the Clean Air Act Amendments of 1990 (CAAA). The CAAA expanded the EPA's authority to write national regulations aimed at small, dispersed area sources of volatile organic compounds (VOCs). These area sources include the category of architectural coatings. An architectural coating regulation targets VOCs emitted from a variety of coatings such as house paint, stains, traffic markings, and bridge coatings. VOCs are of concern because they react in the atmosphere with nitrogen oxides (NOx), sunlight, and other pollutants to form ground-level ozone.

From the outset, the architectural coating regulation appeared to be a good candidate for regulatory negotiation. There was a great deal of expertise available from state and local representatives who had developed their own regulations for the architectural coating industry within their areas of the country. Many in the industry
had a strong incentive to participate in the negotiation of uniform federal regulations to avoid a proliferation of differing state requirements. In addition, although environmental groups were relatively uninvolved in architectural coating regulations at the state and local level, the magnitude of VOC emissions involved on a nationwide basis was significant enough to warrant their time and attention.

Many reasons to negotiate were apparent, however, strained relationships existed between some key potential participants; California state and local regulators and some small and regional paint manufacturers headquartered in California. Some architectural coating manufacturers had been in conflict for years with California state and local regulators through legislative, political, and legal forums. These manufacturers argued that California architectural coating regulations had proven to be counterproductive in reducing VOC emissions and questioned the scientific justification for any such regulations. Could such participants negotiate in good faith toward a consensus position?

The EPA hired a facilitator in the fall of 1991 to interview parties, discuss issues of concern, and gauge the potential for successful negotiations. After a series of five exploratory meetings beginning in February 1992 and hundreds of interviews with representatives of affected interests, the facilitator recommended that the EPA proceed with negotiations.

The EPA initiated a regulatory negotiation for the architectural coating national VOC emission standard in October 1992. Although the negotiation lasted over two

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1 Potential state representatives also included New York, Michigan, and the director of the State and Territorial Air Pollution Program Administrators/Association of Local Air Pollution Control Officials (STAPPA/ALAPCO).

2 These paint manufacturers argued that architectural coating regulation resulted in an increase in VOC emissions to the environment due to excess thinning of the regulated coatings, poor performance, and the need to apply thicker coats. In a 1990 lawsuit in which these manufacturers claimed adverse environmental impacts of architectural coating regulation, and failure of local air pollution districts in California to prepare required environmental impact reports, the court ruled in favor of the plaintiffs (paint manufacturers) on procedural grounds, and rescinded some requirements of existing local air quality regulations for architectural coatings until an environmental impact analysis could be completed analyzing whether the adverse environmental impacts would indeed result.
years and included discussions of many potential frameworks for regulation, it was concluded without consensus being achieved in the fall of 1994.

In light of the inability of parties to achieve consensus, this paper explores the following questions:

* Was reg-neg an appropriate approach for this rule development?
* What negotiation strategies were attempted during the reg-neg?
* Why was the group not able to achieve consensus?
* Was value added to the regulation development effort despite the failure to reach consensus?
* What lessons can the EPA learn from the architectural coating reg-neg experience?

Even when consensus is not achieved through the reg-neg approach, it is often viewed as a beneficial process since it can help educate the EPA about the issues, build technical knowledge and data, enhance relationships among stakeholders, and enable the subsequent rule development to better reflect the interests of all stakeholders (Negotiated Rulemaking Act of 1990).

After negotiations ended, the EPA proceeded to develop an architectural coatings proposed regulation. The EPA proposed the National Volatile Organic Compounds Emission Standards for Architectural Coatings on June 25, 1996 (61 FR 32729). Although the main trade group representing the industry supports the proposed rule, it has not been well-received by states, environmental groups, and some in industry.

This paper concludes that although there were many overlapping interests among parties, some participants lacked trust in the process and chose to use the negotiation to further their own goals which did not include achieving consensus on a national VOC standard for architectural coatings. The facilitator likely overestimated these participants willingness to negotiate in good faith, and the atmosphere within the negotiation suffered as a result. In the end, a combination of factors relating to the complexity of the industry and process delays contributed to the failure of even part of the committee to reach consensus.
Although some benefits were achieved through the reg-neg process, these benefits did not help to produce a proposed rule that is accepted by the majority of stakeholders. The most value added by the architectural coating reg-neg experience to the EPA may have been to highlight the downfalls of a negotiation process that does not have an enforced deadline and involves a party devoting efforts to stalling the process.
II. METHODOLOGY

Based on a review of relevant literature on negotiations, this paper discusses the use of the negotiation process as a framework for rule development. This includes a discussion of the selection criteria, the process of negotiating, and the benefits expected to result. This paper then focuses on one industry for which the EPA chose to initiate a regulatory negotiation: the architectural coatings industry. In this negotiation, consensus was not achieved, and the reg-neg committee was disbanded after over two years of negotiations. This paper discusses the EPA’s evaluation of the source category and stakeholders for negotiation, and the process of conducting the architectural coating regulatory negotiation. Based on this unsuccessful attempt to reach consensus, suggestions for future negotiations are highlighted. This paper then evaluates whether the negotiation process, in the absence of consensus, yielded benefits commensurate with the time and resources expended by the parties.

For these purposes, key texts and articles on negotiation theory and practice were reviewed. From this literature, common themes about the negotiation process and benefits of negotiated rulemaking are highlighted. In addition, presumed benefits expected to result from the negotiation process regardless of whether consensus is achieved are noted. Negotiation theory is then compared to practice by examining the EPA’s reg-neg for architectural coatings. Subjective variables which were considered during the evaluation process are discussed.

To evaluate the specifics of the architectural coatings negotiation process, materials reviewed include documentation from the architectural coatings regulatory negotiation, minutes and summaries of the meetings of the architectural coatings reg-neg committee, texts of proposals offered during the architectural coatings reg-neg, and other public documents. From these documents, the paper details stakeholders interests, positions and negotiating strategies.
In addition, two groups who participated in the architectural coating negotiation prepared analyses of the regulatory negotiation process and theorized about the reasons the group failed to reach consensus. The Keystone Center, whose staff facilitated the reg-neg, prepared both a convening and concluding report on the negotiation. Also, representatives from the industry group representing some small and regional paint manufacturers prepared a report titled "A Retrospective Analysis of the Reasons for the Failure to Achieve a Unanimous Agreement." These analyses were reviewed to gain an inside perspective and opinions from parties to the process. These perspectives are compared and contrasted with the overall findings of this paper related to the negotiation process and reasons for the failure to achieve consensus.
III. RULE DEVELOPMENT AT EPA: THE EMERGENCE OF REGULATORY NEGOTIATION

In developing regulations, the EPA is typically responsible for clarifying and refining statutory mandates. In the process of striving to meet statutory mandates, the EPA must follow certain specific, defined steps. Applicable policies and procedures are found in general statutes which include the Administrative Procedures Act (5 U.S.C 551 et seq.), the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), the Regulatory Flexibility Act (5 U.S.C. 605(b) as amended, Pub. L. 104-121, 110 stat. 847), the EPA’s authorizing legislation (e.g., the Clean Air Act, The Toxic Substances Control Act), executive orders, judicial decisions, and the EPA’s own internal regulation management system.

In traditional regulation development, much of the rule development process relies on the EPA’s own expertise. The EPA typically gathers data and information about an industry through a survey instrument. The EPA investigates existing control measures, analyzes data, and then develops options for control. The EPA has internal meetings to select a control option to propose. During this pre-proposal time, meetings may be arranged with outside parties such as industry or states to hear concerns or get input. A proposal appears in the Federal Register, comments are requested during the public comment period following proposal, and the EPA considers all significant comments in developing the final rule requirements. Public involvement is in the form of written comments on the notice of proposed rulemaking and testimony at public hearings. In this process, formal opportunity for public participation occurs relatively late. The ability of parties to affect EPA choices is limited to their influence on the record (Harter 1982).

Since public comment may be limited to comments to the record, an adversarial relationship typically exists between the EPA and affected parties. Although many are critical of the existence of this adversarial relationship, one important benefit from it is a strong incentive for interested parties to develop and present a clear, concise factual basis for a position or argument. The adversarial
process can be a powerful tool to generate data, and to identify errors or weaknesses in arguments (Harter 1982).

There are significant drawbacks to an adversarial relationship between the EPA and parties affected by the regulation. These drawbacks include a failure to identify true interests and concerns, a lack of creative cooperative solutions, the formation of extreme positions, an incentive to withhold data that may not support the extreme position, inability to make informed trade-offs, and an inability of the Agency to anticipate reactions of affected parties to specific regulatory provisions (Harter 1982). This can create stalemates that may result in expense, delay, friction, and ultimately litigation. During litigation, compromise solutions are often reached which result in each party conceding some issues (Susskind and Cruikshank 1987). An approach which "splits the difference" does not result in maximum gain to every party or the most sensible environmental outcome for the public.

Parties' perceptions of the rule development process can also affect rule implementation. Parties who do not believe in the legitimacy of the rule development process are not likely to support the outcome. This may reduce the incentive for companies to comply voluntarily. Since such voluntary compliance is key to an effective regulatory program, the overall rule effectiveness suffers (Harter 1982).

The process of regulatory negotiation is at the opposite end of the public participation spectrum from traditional rule development. A reg-neg brings together affected interests to negotiate the proposed requirements of a rule. These affected interests include state and local representatives involved in implementation of the rule as well as environmental groups and industry representatives.

Figure 1 depicts both traditional rule development and regulatory negotiation. Consultation processes such as a reg-neg are designed to enhance rather than bypass the standard regulatory development process. As can be seen in Figure 1, the difference between the two is in the pre-proposal phase of regulation development. With regulatory negotiation, the opportunity of interested parties to interact with one another through a series of meetings enhances the EPA's ability to air issues and work with diverse interests to develop solutions.
Traditional Rule Development (1) vs. Regulatory Negotiation (2)

Affected interests informal input (i.e., industry reps, States etc.) - note: occurs sequentially with individual interest groups

(1)

formal public comment period

Proposal

Final Rule

States
Environmental Groups

SERIES OF MEETINGS

Consumers

EPA

Affected Industry
With a regulatory negotiation, fewer public comments are anticipated at proposal since affected interests would be expected to be supportive of requirements. In addition, internal EPA reviews and outside review by the Office of Management and Budget are expected to be expedited due to the up-front support of affected interests.

The regulatory negotiation framework offers several benefits over the traditional approach to rulemaking: it brings outside perspectives into the regulatory development process early and it allows stakeholders an opportunity to engage in policy dialogues with each other and with the Agency. In addition, the EPA can obtain a better understanding of the practical, legal, and policy issues involved to help produce a more workable and reasonable regulation (Siegler 1992). A negotiation may also provide parties with the opportunity to rank concerns and make trades to maximize their respective interests, less need for extensive data gathering since parties decide what level of information is needed, an ability of participants to focus on the details of a regulations rather than just the key points, and added legitimacy of the regulation (Harter 1982).

There are several potential drawbacks to use of negotiated rulemaking. It can be resource-intensive (travel, meeting and facilitator costs) to the EPA as well as public interests groups, and small business representatives; and involves high level management participation by the EPA as well as by other stakeholders. For these reasons, the EPA limits use of reg-neg to rules that are relatively major (Pritzker and Dalton 1995).

A. A Brief History of Reg-Neg Use at EPA

The EPA initiated the regulatory negotiation project in 1982 with a goal to reduce litigation and its associated costs and delays involving a large number of the EPA's regulations. From 1984 until May 1995, the EPA conducted 16 reg-negs, most resulting in consensus agreement on the basis for the proposed rule (Pritzker and Dalton 1995). Regulatory negotiations which formed the basis for regulations developed at the EPA include penalties for manufacturers of vehicles not meeting Clean Air Act standards, emergency exemptions from pesticide regulations,
performance standards for woodburning stoves, control of volatile organic compounds from equipment leaks, national emission standards for coke ovens, manifests for transporting hazardous wastes, and control of hazardous air pollutants from wood furniture manufacturing (Pritzker and Dalton 1995).

Although negotiations were conducted prior to 1990, the Negotiated Rulemaking Act of 1990 was enacted by Congress to provide the EPA with a framework for conducting negotiated rulemaking. This includes criteria to be considered by an Agency during the rule assessment period, and procedures to guide the negotiating committee.

B. The Benefits of Joint Problem Solving

One goal during negotiation is to create an atmosphere conducive to joint problem solving. Joint problem solving can occur when linkages among issues are established. Trade-offs benefitting each party may be realized through packaging of elements of the agreement. All parties may have opportunities to gain. Such joint problem solving may result in an outcome at least as acceptable to parties as what would have come about through a conventional approach (Susskind and Cruikshank 1987).

Opportunities for mutual gain can sometimes be developed which result in the ideal all-gain or win-win scenario (Fisher and Ury 1981). Value can be created when differences in the interests, as opposed to differences in the positions of affected parties are identified (Lax and Sebenius, 1986). The ability to convert a win-lose dispute into a win-win agreement relates to the ability to see potential solutions that satisfy interests of all parties. Creative, efficient trades are likely if all parties openly share information about their underlying priorities (Susskind and Cruikshank 1987). Positive outcomes can result from disputes if parties openly express differences, are willing to communicate, listen, and compromise to reach common ground (Ury, Brett and Goldberg 1991, Raiffa 1982). A regulatory development process which encourages open exchange of information to take advantage of the expertise of the various parties to craft a solution rather than criticize an approach is the key to improving the resulting regulatory proposal.
The problem with the goal of open exchange of information is that a fundamental tension exists between the need to cooperate and openly share information and the worry that this sharing can create vulnerability to others or a loss of advantage (Lax and Sebenius 1986). Parties have incentive to conceal true interests and even to mislead other parties about their interests. By pretending to be attached to an interest they are ready to give up, and feigning relative indifference to items they seek to gain, a party may be able to take advantage of the negotiation process and maximize their personal outcome. These types of tactics will likely lead to unnecessary deadlocks, and delays and the participants in the negotiation may fail to discover efficient trades to accomplish a win-win result (Raiffa 1982).

C. Other Consensus-building Approaches

Regulatory negotiation is not the only means available to the EPA to improve public participation. There is a continuum of consultation and consensus-building approaches which the EPA has available to use for regulation development which fall between traditional rule development and a formal regulatory negotiation. These include a one-time informational exchange meeting or a series of meetings focusing on consensus-oriented dialogue and negotiation. Each method has a varying degree of process requirements and stakeholder involvement (Pritzker and Dalton 1995). Early involvement of affected parties can be a key to success under any of the available options.

Selection of the appropriate method to develop a regulation depends on factors such as the number and type of affected entities, the number of issues involved, the priority and importance of the regulation, and the interests of all affected parties. It is important to select the form of public participation that is most relevant and suited to the issues and audience involved.

D. When Should the EPA Negotiate?

In choosing a regulation to negotiate, the EPA uses criteria to screen potential candidates for negotiation. As stated in the Negotiated Rulemaking Act of 1990 (Reg-Neg Act) and developed by EPA, a candidate rulemaking should encompass many if not all of the following criteria:
* A limited number of interrelated issues
* A deadline under which participants must work
* Common ground among prospective participants on some issues
* A relatively small number of identifiable affected parties willing to represent the interests of their constituencies
* Prospective participants willing to negotiate in good faith and who expect regulatory negotiation to provide the most effective forum for devising a rule
* A requirement for the rule and adequate time to conduct negotiations
* Adequate resources within the Agency and a willingness on the part of the Agency to commit to using consensus of the committee as a basis for the proposed rule

Of course there is no set formula for a successful negotiation. Even if all recommended criteria are met, factors such as perceptions, prejudices, personalities of stakeholder representatives, persuasiveness, negotiating styles, and the skill of the mediator all affect the outcome of any given negotiation (Administrative Conference of the United States Recommendation 85-5). A negotiation is dynamic and factors within it are likely to change during the negotiating process. For this reason, the process and criteria outlined by the Reg-Neg Act are merely guidelines.

E. The Three Phases of Negotiation

Regulatory negotiation is divided into three distinct phases; the convening phase, the negotiation phase and the conclusion phase. These three phases are outlined in this section.

**The Convening Phase**

During a "convening phase" the EPA hires an outside convener to conduct interviews to evaluate whether the candidate rule meets the selection criteria including the probability of successful negotiation. During this phase, the convener also recommends committee members, and identifies a preliminary set of issues to be negotiated (Pritzker and Dalton, 1995). Organizing and conducting a regulatory negotiation requires careful planning to identify key stakeholders. The outside
convener determines whether there are representatives who can speak for each interest (i.e., represent their constituency), and the willingness of these parties to negotiate. These representation issues are common to any public dispute (Susskind and Cruikshank 1987). Typically, a neutral outside convener is chosen who has qualifications such as "investigative talents, organizational skills, an ability to understand and communicate complex issues, and excellent listening skills" (Pritzker and Dalton 1995: pg 125).

The convening phase typically involves interviews with parties about the issues and the negotiation process and may also include exploratory meetings. The interview and/or meeting process helps to inform the potential participants about the negotiation process as well as the concept of "consensus" in the context of a negotiated rulemaking. Consensus is defined as "general agreement" which means that no party dissents significantly from the shared position (Harter 1982: page 93). Relatively weak stakeholders who may fear that they will be outvoted within the process are assured that consensus is required for decision-making thereby providing incentive for their participation in the process (Pritzker and Dalton 1995). At the end of the convening phase the convener makes a recommendation to the Agency on whether to proceed with the regulatory negotiation. If the recommendation is to proceed, the convener recommends representatives of affected interests.

In practice, the Negotiated Rulemaking Sourcebook suggests that 25 may be the maximum number of participants who can successfully negotiate without encumbering the process (Pritzker and Dalton 1995). The Reg-Neg Act specifies that 25 is the maximum unless an Agency head determines that more participants are needed.

Once a decision to negotiate is made by an Agency, a more formal commitment to participate is needed from the parties. The convener and the Agency must ensure that the representative has the authority to speak for his or her constituency, and plans to adequately communicate with this constituency. Based on requirements in the Reg-Neg Act, the Agency must announce in the Federal Register its intent to negotiate and request comments on the proposal including the list of
identified participants. This step can help establish that all affected interests are in fact identified. The negotiating committee is subject to requirements of the Federal Advisory Committee Act (FACA) which establishes certain procedures that must be followed when a Federal official seeks advice from a group which has a representative other than a federal or state employee. The procedures include obtaining a committee charter, having a balanced membership, and holding open meetings which are announced in advance in the Federal Register.

The Agency must also decide whether to select a facilitator/mediator. All of the reg-negs to date have used such a third party neutral mediator or facilitator (Pritzker and Dalton 1995). The Reg-Neg Act identifies duties for the facilitator including recordkeeping of proceedings, chairing meetings, and assisting parties to the negotiation. The facilitator serves the interests of all parties and strives to moderate negotiation sessions to keep discussions fruitful. Highly trained, skilled professionals often serve in this role and can be crucial to achieving a successful outcome (Administrative Conference of the United States Recommendation 86-8).

Pre-negotiation training has been conducted with participants in most of the regulatory negotiations conducted by federal agencies (Pritzker and Dalton 1995). This training is desirable when there are a large number of participants and interests and the participants are relatively inexperienced in negotiation. In addition to helping ensure everyone is working from a common basis with regard to negotiation knowledge and vocabulary, this training can acquaint participants with each other, and allows mediators to observe negotiation styles. This may help mediators establish a strategy for conducting the negotiations (Pritzker and Dalton 1995). Moreover, negotiation training can educate participants regarding joint problem solving techniques that can serve to create mutual gains (Fisher and Ury 1981).

In order for parties in a negotiation to recognize a good deal when they see it, and conversely to reject an unfair offer, it is important for participants to be aware of their Best Alternative To a Negotiated Agreement" or "BATNA" - the "standard against which any proposed agreement should be measured" (Fisher and Ury 1981: pg 101). Negotiation training can help emphasize the importance of detailed
consideration of the options available to every party participating in a negotiation if agreement is not reached (Fisher and Ury 1981). Training sessions are typically structured to last one or two days. According to the Negotiated Rulemaking Sourcebook, "the EPA has reported that these pre-negotiation sessions have made a real difference in the operation and success of negotiations" (Pritzker and Dalton 1995: pg 195).

The Negotiation Phase

The central component of the reg-neg process is the negotiation phase. This phase involves planning, dynamic interaction, and a reasonable amount of time for parties to identify issues, highlight priorities, gather any technical information needed, and eventually to create solutions. The amount of time needed to negotiate depends on the number of issues and parties involved, as well as the complexity of the issues.

Before beginning negotiations, the Agency establishes a deadline for negotiations. This deadline may be statutory, court-ordered or an internal deadline. For negotiations to reach consensus, it helps if all parties feel some pressure to reach a conclusion in a certain timeframe. If no deadline exists, parties may stall the process or fail to focus on reaching consensus (Susskind and McMahon 1985).

Before beginning negotiations, parties should agree on the rules which will govern proceedings. Operating procedures are typically established which include the deadline for termination of the negotiating committee, logistics for meetings including the role of observers to the process, definition of consensus and other internal negotiating committee rules for organization and operation. These protocols or ground rules establish how the parties will work together. This gives all parties a common reference to the procedures within the negotiation process (Fisher and Ury 1981).

A process for resolving disputes should focus on interests of parties rather than positions, and procedures should be employed that encourage negotiations rather than power struggles or disputes about rights (Fisher and Ury 1981, Ury, Brett and Goldberg 1991). Various procedural steps may be used to structure a negotiation. These include identification of underlying assumptions of participants, and clustering
of related issues for agenda items or subcommittee focus. Subcommittees have been used to successfully gather data, assess issues and prepare proposals for consideration by the entire negotiation committee. Subcommittees should have balanced representation and should not have decision-making power (Pritzker and Dalton 1995).

The Concluding Phase

Under the Reg-Neg Act, a committee that reaches consensus on a proposed rule is required to issue to the Agency a report which includes the proposed rule (5 U.S.C. Section 566(f)). The Reg-Neg Act also provides that if a committee fails to reach consensus, they may issue a report detailing areas of agreement. Other materials including minutes or other records must be submitted to the Agency under the requirements of the Federal Advisory Committee Act. The Reg-Neg Act provides flexibility in determining how best to take advantage of accomplishments from the negotiations. For example, this might be in the form of regulatory text such as proposed definitions or other concepts on which agreement was reached.

If consensus is not reached, it is expected that the negotiation process would yield important information about the parties and their interests, helping to enlighten the agency's future decisions about the expected reaction to the proposal. "Agencies that have had negotiations end short of consensus have reported that the additional knowledge gained during the negotiations made the process worthwhile" (Pritzker and Dalton 1995: pg 230).

Negotiations may be undertaken for reasons such as to reduce litigation or antagonistic relationships, or a desire to increase public participation in a certain rulemaking process (Pritzker and Dalton 1995). Given that there are different reasons to initiate a negotiation, the Agency's definition of "success" for a regulatory negotiation can be variable depending on the circumstances. Although an ideal outcome would be consensus on the text of a proposed rule, the effort may be considered worthwhile if it merely narrows the areas of dispute, enhances the technical information available, or improves the relationships among negotiating parties.
In *Breaking the Impasse*, Susskind and Cruikshank have identified four qualities or indicators of a good negotiated settlement: fairness, efficiency, wisdom and stability.

One way to evaluate fairness of the agreement is to evaluate the fairness of the process used to reach the agreement. Some potential components of a fair process include openness to public scrutiny, accountability of participants to their constituencies, equal access of parties to technical information, and opportunity for all participants to express views. It is clear that these components affect the participants' perception of the process which may matter the most as an indicator of the fairness of an agreement. In addition, to be perceived as fair, it is important that process concerns raised by the participants are addressed (Susskind and Cruikshank 1987).

With regard to efficiency, the process must meet the time and cost constraints imposed. In addition, for the agreement to be efficient, opportunities for efficient trades within a negotiation must be realized. These trades can be realized if a problem-solving climate exists among negotiating parties, trust is developed, and true priorities are shared. In an absolute sense, efficiency is difficult to define. Efficiency should never be separated from fairness. The two are side by side components of a good negotiated settlement (Susskind and Cruikshank 1987).

Wisdom is best evaluated in hindsight since many negotiations involve predictions of some type. It may be months or years before the accuracy of these forecasts is known. The key to wisdom is the ability to apply knowledge and experience (related experience in some cases) to anticipate outcomes. The uncertainty involved in evaluating predictions or forecasts often results in the problem of advocacy science. In this process, arguing parties use paid experts to criticize each others claims. This results in confusion, exaggeration, and inability to concede points to the other side. Wise science is gained when parties are engaged in a cooperative inquiry to establish agreed-upon questions and responses using relevant facts and experience (Susskind and Cruikshank 1987).

Lastly, stability relates to the ability of the agreement reached to endure. Instability can result if consensus is based on standards that are not feasible or
timeframes that are not realistic for achieving short term or long term interests. Danger of this type of agreement can come from end of process pressures to reach agreement, people caught up in trying to achieve mutual goals, or parties weariness with participation in the process and a desire for it to end. A good relationship among negotiating parties improves the likelihood of achieving stability (Susskind and Cruikshank 1987).

Since negotiation is a process, dealing with issues that arise related to the process will strengthen the overall negotiation and basis for the outcome. Learning and planning takes place throughout the process. "A good process produces a good outcome; and a better process, a better outcome" (Susskind and Cruikshank 1987: pg 24).
IV. REG-NEG CASE STUDY: ARCHITECTURAL COATING

A. Background

Before discussing the specifics of the selection process and negotiation of the architectural coatings regulation, the first three sections are devoted to: 1) background on the problem of ozone nonattainment and new EPA regulatory authorities to combat ozone, 2) a general description of the source category of architectural coatings, and 3) methods of controlling VOC emissions.

1. The Ozone Problem/New Regulatory Authorities

Ozone is a photochemical oxidant that is formed in the atmosphere through a series of chemical reactions between precursor emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NOX) in the presence of sunlight. Ozone is the main component in smog. Health effects from exposure to ground level ozone include decreases in lung function accompanied by symptoms such as cough, chest pain, and shortness of breath, with the severity of symptoms increasing as ozone concentrations increase. Scientific studies have linked increased ozone concentrations with increased acute respiratory problems, hospitalizations, emergency department visits for respiratory causes, damage to crops and forests and numerous other adverse health and welfare effects (EPA 1996).

National air quality monitoring data from 1989 through 1991 indicated that there were approximately 170 geographic areas that failed to attain the EPA’s National Ambient Air Quality Standards (NAAQS) for ozone. Roughly half of the population lives in these areas (U.S. Congress, 1989).

To reduce ozone, the precursors of ozone must be reduced. In the past, the EPA’s efforts to control ozone have focused on control of VOC and NOx from mobile sources as well as large, stationary sources of emissions. As a result, most of these types of sources of VOC and NOx are fairly well controlled by existing federal and state regulations. However, with increases in vehicle miles travelled, and other growth factors, ozone nonattainment problems have persisted (EPA 1995).
The 1990 Clean Air Act Amendments (CAAAs) includes new responsibilities for both the EPA and the states in the continuing battle to bring ozone nonattainment areas into attainment. Title I of the CAAA divides ozone nonattainment areas into five classifications based on the severity of the ozone exceedances (Designation of Areas for Air Quality Planning Purposes, 40 CFR Part 81). This classification scheme is designed to tailor ozone attainment strategies to the degree of reduction needed in an appropriate timeframe for each type of area to reach attainment. For example, marginal nonattainment areas were expected to reach attainment by 1993, while the extreme areas are given until 2010 to attain the NAAQS for ozone.

An examination of emissions data completed in 1989 by the Congressional Office of Technology Assessment (OTA) indicated that individual small, dispersed sources of VOCs (area sources) contribute significantly to the continuing ozone nonattainment problem. In response to the recognized contribution of dispersed area sources of VOC to the ozone nonattainment problem, Section 183(e) of the CAAA addresses VOC emissions from consumer and commercial products (CCPs). Section 183(e) requires the EPA to study emissions from CCPs, develop a report to Congress detailing the findings of the study, and regulate a portion of the products investigated over a period of eight years after completing the report.

In March of 1995, the EPA submitted a report to Congress on consumer and commercial products and in that same month submitted the list of products to be regulated, separated into 4 groups (60 FR 15264). The architectural coatings source category was placed in the first group with regulation required by March 15, 1997.

2. The Architectural Coatings Industry

Architectural coatings are defined by the EPA as coatings "applied in the field to stationary structures and their appurtenances, to portable buildings, to pavements, or to curbs" (EPA 1996:2-1). Architectural coatings include stains, house paint, waterproofing sealers, traffic markings, and coatings for exterior steel. These coatings are used by both do-it-yourselfers and contractors (EPA 1996).

There are an estimated 500 manufacturers of architectural coatings. These companies vary in size from small, local manufacturers (under $1 million in annual
sales) to large, multi-national companies (over $100 million in annual sales) (EPA 1996). The paint industry is a mature industry with sales growth of two to four percent per year and is extremely competitive due to the very small profit margins. Market concerns are a significant issue within the industry since changes in market share tend to come at the expense of another manufacturer (Radian Corporation February 1993).

Almost all architectural coatings contain VOCs. The volume used and organic solvent content are the primary factors that affect the total amount of VOCs emitted by these products. The VOCs emitted from architectural coatings includes VOCs that are part of a coating’s original formulation, plus VOCs that are added during thinning, and VOCs released as reaction byproducts while the coating dries and hardens. Nationwide use of architectural coatings is estimated to contribute approximately 525,000 tons of VOCs per year (EPA 1996).

3. Methods of Control

Unlike other painting operations in which emissions can be captured and destroyed through use of add-on controls, architectural coatings are applied "in the field". VOC emissions from paint can be reduced by reducing the solvent contained in the coating. VOC emissions can be reduced if a conventional, solventborne (oil-based) coating is replaced with an available formulation that contains less solvent, such as a higher solids or waterborne (e.g., latex) coatings.³

A general trend in the industry is toward development of lower VOC technology through the use of higher-solids and waterborne coatings. From the 1950s to 1970s, market forces caused a major shift to waterborne coatings (SRI International 1990). More recently, an additional force driving this technological trend is the regulation of VOC content by states to reduce VOC emissions and meet the NAAQS for ozone (SRI International 1990). It is estimated that up to 75% of research and

³ A higher solids coating is a coating which has a higher ratio of resin to solvent (VOCs) than a conventional coating. This higher ratio of resin allows more coverage per gallon and less VOC emissions per gallon. Both of these factors contribute toward reductions in overall VOC emissions from the coating product.
development money within a company is spent to develop environmentally friendly products designed to comply with current or anticipated regulation (Mullin 1993).

B. The Negotiation Convening Phase

Based on the magnitude of VOC emissions (2% of the VOC from all manmade sources) and based on the involvement of a major, politically visible industry, the EPA decided to explore the possibility of using the reg-neg approach to develop the architectural coating regulation. In October 1991, the EPA hired The Keystone Center (Keystone), a non-profit environmental conflict management organization, to conduct a convening assessment. Prior to this point the EPA had been proceeding with traditional regulation development involving data gathering and individual meetings with vocal industry representatives.

Keystone conducted hundreds of interviews with interested parties during the fall of 1991 and early 1992. These interviews helped identify key interest groups and obtain initial feedback on the idea of negotiating the regulation. According to Keystone’s convening report, the following interest groups and representatives were identified during the interview and subsequent exploratory meeting process during the convening phase:

* Industry - Coating manufacturers, large architectural

  Benjamin Moore & Co.
  The Glidden Co.
  L&F Products
  The Sherwin Williams Company
  Sinclair Paint Company
  The Valspar Corporation

* Industry - Coating manufacturers, small architectural

  Triangle Coatings, Inc.
  Trinity Coatings Co.

* Industry - Coating manufacturers, industrial maintenance

  Ameron Protective Coatings
  Carboline Company
* Industry - Resin suppliers

Cargill, Inc.
CIBA-GEIGY Corporation
Miles, Inc.
Rohm and Haas Co.

* Industry - Research and trade associations

National Paint and Coatings Association
Steel Structures Painting Council
Environmental, Legislative and Regulatory Advocacy Program of the
Southern California Paint and Coatings Association (ELRAP)

* Federal Agencies

Federal Highway Administration
General Services Administration
U.S. Army Corps of Engineers
U.S.D.A. Forest Products Laboratory
U.S. Environmental Protection Agency

* Private Consumers

Painting and Decorating Contractors of America

* State and Local Air Control Agencies and Organizations

State and Territorial Air Pollution Program Administrators/Association
of Local Air Pollution Control Officials (STAPPA/ALAPCO)
California Air Resources Board
Bay Area Air Quality Management District
Michigan Department of Natural Resources
New York Department of Environmental Conservation

* Environmental Organizations

Natural Resources Defense Council
Coalition for Clean Air
American Lung Association

* Labor

International Brotherhood of Painters and Allied Trades
Some small, regional coating manufacturers headquartered in California had been actively opposing California district architectural coating regulations for many years prior to EPA initiating regulation development for architectural coatings. This group was led by the Environmental, Legislative and Regulatory Advocacy Program of the Southern California Paint and Coatings Association (ELRAP). Relationships between ELRAP manufacturers (which included Triangle Coatings) and the California state and local regulators (including all those California representatives listed above) were strained. Contributing to the strain in relationships between these parties was a 1990 lawsuit which was filed by ELRAP representatives against several air quality management districts in California. The plaintiffs claimed that the recent district rule amendments requiring lower VOC content levels in certain architectural coating product categories resulted in seven unintended adverse effects which, in the aggregate, actually increase pollution. The court ruled in the plaintiffs’ favor based on procedural arguments and the newly adopted California district limits were overturned.

4 Due to the significant air quality problems in California, the state is divided into numerous air quality management districts for purposes of tailoring air quality improvement strategies to the particular pollutants and sources of pollutants which are located within an area. For example, the area around San Francisco is called the Bay Area Air Quality Management District.

2 In 1989 the California Air Resources Board and some local air quality management districts in California drafted new VOC limits for 30 some categories of architectural coatings. Twenty-one paint manufacturers objected to adoption of five of these thirty VOC limits and brought judicial challenges against each district which adopted these five limits. The manufacturers contend that these requirements would result in more rather than less ozone and argued that the California Environmental Quality Act requires preparation of an environmental impact report on the adverse impacts of such limits.

6 The seven unintended adverse impacts of some VOC limits for architectural coating are alleged to be application of more product due to thicker films, excess thinning of compliant coatings, recoating due to poor performance, slower drying coatings resulting in coating failures, the need for more primer use below compliant coatings to insure proper adhesion, more costs necessary to achieve adequate performance, and coating failures due to stickiness of waterborne substitutes.

7 The court ruled that air quality management districts failed to consider and analyze the potentially significant adverse environmental impacts of recent rule amendments. The court upheld the plaintiffs argument that these regulations were subject to requirements of the California Environmental Quality Act and an environmental impact analysis must be completed prior to regulation.
The facilitator was aware of this history and focused some interview questions to obtain feedback from these parties about their outlook and predictions for the potential for a successful negotiation. The feedback obtained from these interviews and initial discussions was that these parties felt a negotiated agreement was at least possible (The Keystone Center 1995).8

In the initial interviews, parties indicated a need to understand the potential issues for discussion before they were comfortable committing to a regulatory negotiation (The Keystone Center 1992). As an assessment step during the convening phase, Keystone scheduled an "exploratory meeting" to discuss a number of issues prior to a decision to proceed with formal regulatory negotiation or another consensus building approach (The Keystone Center January 1992).

During 1992, Keystone arranged for five meetings prior to initiation of the negotiation. Table 1 lists the meeting dates and key activities at all of these meetings. The main purpose of these meetings was to discuss the potential scope of the regulation and issues, share information, determine data collection needs, and assess whether a regulatory negotiation would be appropriate for this industry. The convening phase lasted about nine

8 According to the Keystone Center's convening report, the interview included questions concerning historic involvement of the interviewee with development of state regulations and a question related to the primary concerns and most difficult issues the interviewee foresaw regarding development of the federal regulation. A detailed summary of these interviews was not produced due to the confidential nature of these conversations.
<table>
<thead>
<tr>
<th>MEETING DATE</th>
<th>KEY GOALS/ACTIVITIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>FEB/92</td>
<td>First cut at representation</td>
</tr>
<tr>
<td>1ST EXPLORATORY MEETING</td>
<td>Develop list of issues of concern</td>
</tr>
<tr>
<td>MARCH/92</td>
<td>Establish definition of architectural coatings and categories</td>
</tr>
<tr>
<td>SCOPE/DATA MEETING</td>
<td>Discussion of data needs/survey instrument</td>
</tr>
<tr>
<td>APRIL/92</td>
<td>Discussion of proposed scope and definitions including regulatory options (command and control vs. market-based)</td>
</tr>
<tr>
<td>2ND EXPLORATORY MEETING</td>
<td>Discussion about survey instrument</td>
</tr>
<tr>
<td></td>
<td>Profile of industry presented by industry</td>
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<tr>
<td></td>
<td>Reg-neg process description given by EPA</td>
</tr>
<tr>
<td></td>
<td>Discussion of protocol development by Keystone</td>
</tr>
<tr>
<td></td>
<td>Keystone informally polled group to determine interest in negotiation (result: qualified yes)</td>
</tr>
<tr>
<td>JULY/92</td>
<td>Additions to list of issues of concern</td>
</tr>
<tr>
<td>MEETING DURING PUBLIC COMMENT PERIOD (NOTICE OF INTENT TO NEGOTIATE)</td>
<td>Final review of survey instrument</td>
</tr>
<tr>
<td></td>
<td>Review of draft protocol</td>
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<tr>
<td></td>
<td>All agreed should proceed with negotiations</td>
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<tr>
<td></td>
<td>Set schedule: proposal in 8/93 and final in 1/94</td>
</tr>
<tr>
<td>SEPT/92</td>
<td>Expert presentations on science of reactivity and potential use of reactivity scheme for regulations</td>
</tr>
<tr>
<td>WORKSHOP TO DISCUSS TECHNICAL ISSUES</td>
<td>Discussion of VOC calculation methodology (presentations by EPA and industry)</td>
</tr>
<tr>
<td></td>
<td>Presentation by industry on performance and quality as it relates to coating composition</td>
</tr>
<tr>
<td></td>
<td>Presentation by small/regional industry representative on implications of lowering VOC too far</td>
</tr>
</tbody>
</table>
months. Appendix A lists the issues of concern to the affected parties which were developed during the initial meetings.

One major technical issue focused on during these exploratory meetings was the need for data. Before negotiations could begin, data were needed on the sales and VOC contents of architectural coatings. Although such a data base existed for California's products, the stakeholders decided to undertake a more comprehensive survey of the industry. During the exploratory meetings, time was devoted to developing the format for the survey instrument and determining the categories and definitions for each subgroup of architectural coating products included in the survey.

The results of the survey developed during the convening phase were available by the second official regulatory negotiation in January 1993. The National Paint and Coatings Association declared it to be "the most complete survey of the industry that has ever been performed" representing roughly 75% of total gallons, though only 25% of the estimated 500 manufacturers (Radian Corporation January 1993). There were two criticisms of the survey effort; small manufacturers were under-represented in the survey responses and no data was gathered on costs for reformulation (Radian Corporation January 1993).

In the convening report submitted to the EPA on July 23, 1992, The Keystone Center stated that "both the parties and the conveners recommend that the EPA proceed with a regulatory negotiation." (The Keystone Center 1992:2). Keystone determined that conditions existed for a successful negotiation and predicted a potential completion date of March 1993. Based on the interest of the potentially affected parties, and the recommendation of the facilitator, the EPA decided to proceed with the regulatory negotiation process. Appendix C lists Keystone's analysis of the screening criteria for regulatory negotiation as they related to the architectural coating regulation.

On July 16, 1992, the EPA issued a Federal Register notice to solicit comment on its intent to form an advisory committee under the authority of provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II 9(c) and the Negotiated Rulemaking Act (NRA), 5 U.S.C. sections 581-590, to negotiate a proposed
regulation for architectural coatings. Comments were received from representatives of ELRAP stating the proposed reg-neg committee was not balanced. These manufacturers argued about a lack of balance on two fronts. First, these manufacturers argued that the committee was loaded with representatives who favored lowering VOC content to levels which would eliminate some types of available coatings which allegedly have superior performance. In addition, the number of small and regional paint manufacturers on the reg-neg committee did not reflect their proportion in the industry. These small manufacturers argued that although large and small manufacturers share some common interests, their goals to achieve their interests may be directly in opposition. Typically, smaller companies focus on "niche" or specialty markets. A small company may enter a niche market because a larger company chooses not to compete in markets where it may not be profitable to devote resources to small volume products. Small companies often have smaller batch sizes and can pick up these specialty markets without competition from the larger manufacturers. These small and regional manufacturers argued that large manufacturers may attempt to squeeze out the competition through regulation requiring waterborne products produced predominantly by larger companies without recognition of the specialized niche markets. Although the EPA responded to these concerns by adding two more ELRAP-affiliated (and ELRAP petitioned-for) small manufacturers to the committee, the issue of balance was raised by these small manufacturer representatives throughout the negotiation and affected these participants' perceptions about the fairness of the process.

Three of the four small manufacturers chosen to represent the constituency of small manufacturers across the country were manufacturers who were actively opposed to continued regulation in California and who were participants in the previously discussed successful lawsuit against California regulators in 1990.

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9 Both the Regulatory Negotiation Act and the Federal Advisory Act require a balanced committee based on the following criteria: there is adequate representation from all affected parties so that a range of issues can be fairly and completely discussed, all affected interests with a range of views have the opportunity for representation at the table, and there is adequate representation in each caucus for each interest group to feel comfortable in deliberations (Keystone 1992).
Although the National Paint and Coatings Association (NPCA) participated in the negotiation and had membership that included both large and small manufacturers, the NPCA stated throughout negotiations that they had assumed a neutral stance on topics where interests of small and large manufacturers differed.

Appendix B contains a list of the 36 reg-neg committee members. Although this number exceeds the recommended limit in the Reg-Neg Act, the EPA and facilitator believed this number was necessary to adequately represent interests. At the July 1992 "information meeting" the issue of the unwieldly size of the group was brought up during discussions by some of the participants. Both the facilitator and the EPA representative assured the participants that consensus could be reached in a group of more than 30 people based on success of previous negotiations with similar numbers. (Radian Corporation July 1992).  

C. The Negotiation

Although negotiation training is often conducted prior to negotiation, in this case it was not even discussed and was not conducted. Meetings were held from October, 1992 to February, 1994. During the negotiation process it became evident that certain groups of committee members shared similar views and interests. These groups were called "caucuses." The formation of caucuses among parties with similar interests can help ensure that each interest rather than each individual supports a proposed action (Harter 1982). In other words, the formation of caucuses can help ensure that any individual ideologue’s views are tempered by peers with similar interests. On the other hand, if the individual ideologue is persuasive in his or her beliefs, this can steer the entire caucus into presenting more extreme positions.

Three major caucuses formed at the outset of negotiations. These were the State/Environmental Caucus; the Industry Caucus which included large and small manufacturers, resin and solvent suppliers, and the paint and coating trade

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10 The reformulated fuel negotiation was mentioned as an example of a successful negotiation that had roughly 200 people involved.
associations; and the Users Caucus which represented consumers, contractors and facilities which use architectural coatings.

Initially, the ELRAP representative and the small manufacturer representatives (two of which were also ELRAP members) were part of the Broad Industry Caucus. These manufacturers chose to separate out into their own caucus called the Allied Local and Regional Manufacturers or "ALARM" Caucus after the first few committee meetings in 1993. In a June 1993 letter to Keystone, the ALARM Caucus discussed the impetus for formation of their caucus. They reiterated that even before negotiations began, their members had been arguing about a lack of balanced representation on the committee. Specifically that "smaller local and regional manufacturers are, and have been grossly under-represented on the Reg/Neg Committee, while larger national manufacturers are, and have been, grossly over-represented." (ALARM Caucus June 1993). The newly formed ALARM Caucus pointed out that although large and small manufacturers have some common interests, they have "sharply divergent competitive interests." (ALARM Caucus June 1993). The ALARM Caucus identified several reasons why they could not have remained a part of the Broad Industry Caucus: 1) a cross-caucus workgroup had been formed in which they did not have representation, 2) the fact that various industry members had been floating complex, detailed proposals that had not been discussed or agreed to by the Industry Caucus, 3) the Industry Caucus had begun to run meetings on the basis of two-thirds majority votes rather than consensus, allowing their views to be easily outvoted, and 4) given the threat of state regulators to impose increasing state standards if consensus is not reached, the ALARM Caucus, who has less interest in national uniformity than the Broad Industry Caucus feared the Broad Industry Caucus would be tempted to sacrifice more in the interest of that uniformity (ALARM Caucus 1993).

Table 2 lists each stakeholder group along with a speculation of each groups major interests based on a review of meeting summary materials from the negotiation. Some of the major interests and issues are discussed in more detail below.
<table>
<thead>
<tr>
<th>PLAYERS AT THE TABLE</th>
<th>KEY INTERESTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>EPA</td>
<td>Fulfill legislative responsibility</td>
</tr>
<tr>
<td></td>
<td>Obtain real, verifiable, enforceable emission reductions</td>
</tr>
<tr>
<td></td>
<td>Obtain politically acceptable, realistic, economically feasible rule (get buy-in)</td>
</tr>
<tr>
<td></td>
<td>Minimize rule development costs (streamline rule development)</td>
</tr>
<tr>
<td></td>
<td>Maintain relationships with parties</td>
</tr>
<tr>
<td>STATE AND LOCAL REGULATORS</td>
<td>Obtain real, enforceable emission reductions effective in 1996 and years beyond</td>
</tr>
<tr>
<td></td>
<td>Avoid the costs of developing state regulations</td>
</tr>
<tr>
<td></td>
<td>Maintain relationships with EPA, and environmental groups</td>
</tr>
<tr>
<td></td>
<td>Avoid undermining of existing state requirements</td>
</tr>
<tr>
<td>ENVIRONMENTALISTS</td>
<td>Maximize real, enforceable reductions</td>
</tr>
<tr>
<td></td>
<td>Get reductions as soon as possible</td>
</tr>
<tr>
<td></td>
<td>Advance the state-of-the art low VOC technology</td>
</tr>
<tr>
<td></td>
<td>Maintain relationships with EPA and states</td>
</tr>
<tr>
<td>LARGE INDUSTRY</td>
<td>Maintain paint quality (keep customers)</td>
</tr>
<tr>
<td></td>
<td>Reduce administrative cost burden of state by state regulations</td>
</tr>
<tr>
<td></td>
<td>Gain certainty in planning for requirements</td>
</tr>
<tr>
<td></td>
<td>Minimize reformulation costs and maximize flexibility to meet requirements</td>
</tr>
<tr>
<td></td>
<td>Reduce competition (reduce the number of paint companies)</td>
</tr>
</tbody>
</table>
| SMALL AND REGIONAL MANUFACTURERS | Minimize regulation (minimize cost)  
|                                  | Avoid repeat of economic experience with California regulation  
|                                  | Refute claim that VOC from paint is a problem (promote need for reactivity research and ozone attainment strategies focusing on NOx)  
|                                  | Promote issues (gain support) related to why industry should not be regulated  
|                                  | Protect against manipulation and exclusion of concerns by larger manufacturers  
| END USERS                        | Maintain paint quality  
|                                  | Minimize impact on application technology  
|                                  | Avoid price increases  
| FACILITATOR                      | Enhance reputation (facilitate a successful agreement)  
|                                  | Make money |
1. Overlapping Interests Among Caucuses

One of EPA’s screening criteria for selecting a regulation as a candidate for regulatory negotiation is common ground among prospective participants on some issues. There were several interrelated interests among the participants to the architectural coating reg-neg.

*Market Share Maintenance*

Although both industry manufacturer caucuses’ underlying objective was market share maintenance, each caucus’ method to go about achieving this objective differed. The ALARM Caucus members argued for no regulation, or at least preferred a regulation that would only apply in nonattainment areas of the country. The ALARM caucus felt that many technical issues needed to be addressed before it should be assumed that lowering the VOC content of coatings results in a benefit to the environment. The Broad Industry Caucus was interested in supporting a limited national regulation that would set uniform standards and would pre-empt further regulation at the state level.

If large industry could structure a regulation that would drive out competition from small manufacturers in the markets that both supply to (e.g., general markets such as house paint, and industrial maintenance coatings), their means of achieving market share maintenance could be directly at odds with the ALARM Caucus’ goal of market share maintenance. This conflict created a major division in the paint industry during negotiations. As mentioned previously, small and regional manufacturers were concerned that nationwide requirements based on the VOC content limits supported by large companies would likely give these companies a competitive advantage in markets that both large and small manufacturers sell into and would not accommodate or consider the niche markets served by the small and regional markets.

*The Desire to Reduce VOC Emissions*

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11 These technical issues included the seven unintended adverse consequences of architectural coating regulation detailed in footnote 6, issues regarding the differences in photochemical reactivity of compounds found in architectural coatings, and the effectiveness of VOC reductions from architectural coatings in reduce ground level ozone.
The desire to reduce VOC emissions by the maximum extent feasible was shared by the EPA, states and environmental groups. The environmental interest group representatives' interests were to obtain maximum achievable short- and long-term emission reductions as quickly as possible. The interests of the state and local regulators and the EPA were much more complex involving environmental protection, budget conservation, and administrative ease. Given their similar dominant interests, state and local regulators joined the environmental interest group representatives to form the State/Environmental Caucus.

The states' desired schedule for achieving VOC reductions was influenced by requirements spelled out in the CAAA. Based on requirements in the CAAA, states which have areas of ozone nonattainment are required to achieve VOC reductions in certain timeframes. The first such deadline was November 1996. By this date, states with nonattainment areas were required to achieve a 15% reduction in 1990 base year VOC emissions. In subsequent years, states must show a 3% per year rate of progress. This requirement was a driving concern for state representatives which was repeated many times during negotiations.

The Desire for National VOC Control

The Broad Industry Caucus, and State/Environmental Caucus shared an interest in nationwide, federal requirements as opposed to an increase in state by state individual VOC regulations for architectural coatings. Coating manufacturers who market across state lines desire a reasonable, predictable nationwide federal regulation to minimize the administrative (inventorying, labeling, and recordkeeping) and technical burden of complying with differing state standards. The Broad Industry Caucus was interested in establishing realistic VOC content goals and deadlines through a national rule.12

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12 At the January 1993 committee meeting the Broad Industry caucus stated their criteria for an acceptable proposal includes technically feasible limits, limits which enable good coating performance, and a structure which avoids unnecessary adverse impacts on the industry. These criteria are relatively subjective, however, and the opinion of whether these criteria are met would likely vary from manufacturer to manufacturer regardless of size.
States encouraged the EPA to develop a national regulation for architectural coatings since these products are highly transportable, and are products of interstate commerce. In addition, state resources could be conserved since individual efforts by states to address architectural coatings are reduced.

Environmental groups took a position similar to the states supporting a nationwide regulation as the best mechanism to ensure that highly transportable architectural coatings were not transported from uncontrolled areas to controlled areas of the country thereby undermining the effectiveness of regulations.
<table>
<thead>
<tr>
<th>MEETING DATE</th>
<th>KEY ACTIVITIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>OCTOBER 1992</td>
<td>Finalize committee membership</td>
</tr>
<tr>
<td></td>
<td>Discussion of ideas for addressing performance considerations</td>
</tr>
<tr>
<td></td>
<td>Preliminary survey results discussed</td>
</tr>
<tr>
<td></td>
<td>Industry Caucus agreed to develop first proposal</td>
</tr>
<tr>
<td>JANUARY 1993</td>
<td>First industry proposal presented (one phase, VOC reductions between 3-5%)</td>
</tr>
<tr>
<td></td>
<td>State/Enviro Caucus developed technical for industry about proposal</td>
</tr>
<tr>
<td></td>
<td>Survey results discussed</td>
</tr>
<tr>
<td>FEBRUARY 1993</td>
<td>Industry broadly responded to technical questions raised at January meeting</td>
</tr>
<tr>
<td></td>
<td>Industry described the competitive nature of the industry (sales growth is small)</td>
</tr>
<tr>
<td></td>
<td>Cost and performance issues of lowering VOC broadly discussed</td>
</tr>
<tr>
<td></td>
<td>State/Enviro Caucus agreed to develop next proposal</td>
</tr>
<tr>
<td>Date</td>
<td>Details</td>
</tr>
<tr>
<td>------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>APRIL 1993</td>
<td>State/Enviro proposal (95% reduction through VOC limits, fee system, and potential cap if targeted reductions not met)</td>
</tr>
<tr>
<td></td>
<td>Concept of two phases of requirements and averaging/credit program introduced by industry</td>
</tr>
<tr>
<td></td>
<td>Three workgroups formed: regulatory structure, categories/definitions, legal</td>
</tr>
<tr>
<td></td>
<td>Discussed potential future formation of data analysis and administrative provisions workgroups</td>
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<tr>
<td></td>
<td>Protocol finalized</td>
</tr>
<tr>
<td>May 1993</td>
<td>Report on progress of categories and definitions and regulatory structure workgroup (regulatory structure workgroup focused on Corporate Average VOC Emission (CAVE) approach)</td>
</tr>
<tr>
<td></td>
<td>Discussion led by industry regarding the categories and definitions in relation to the VOC content and resin information in the survey results (focusing on categories with largest VOC emission contribution first and discussing problems and constraints on coatings in lower VOC ranges)</td>
</tr>
</tbody>
</table>
| June 1993 | Presentation by state representative on VOC strategies to meet CAAA requirements (statement that if agreement is not reached in time (next 30-45 days), state organization will recommend that states seek a 35% emission reduction from architectural coatings)  

Reports from "Category and Definitions" and "Regulatory Structure Workgroup"  

Discussion about regulatory structure including CAVE approach (ALARM Caucus raised concerns about burden of recordkeeping on small manufacturers)  

Debate over whether reductions should be phased in over time  

Discussion about emission reduction calculations as they relate to survey results  

Industry Caucus discussed that in the next week they were considering developing a table of standards to achieve a 25 to 35 percent reduction in VOC  

Facilitator emphasized need for committee to start making decisions to move group toward consensus |
| JULY 1-2 1993 | Facilitator summarized categories and definitions workgroup activities related to developing recommendations for VOC limits and possibility of subdividing or combining categories  
Facilitator summarized Regulatory Structures workgroup activities related to CAVE concept and how it might be structured  
Facilitator defined tentative schedule as consensus on regulatory structure by the end of July  
Economic impacts workgroup formed |
| JULY 28-30 | EPA stated their goal to assess potential for consensus by end of meeting  
ALARM Caucus handed out proposal to committee (no discussion)  
Broad Industry Caucus gave presentation estimating cost of "average" reformulation  
ALARM Caucus responded with presentation of general reformulation costs for small company  
Presentation by trade association (NPAC) on survey results related to hazardous air pollutants (HAPs)  
Lots of time devoted to caucusing  
At conclusion of meeting, the EPA representative stated that there appeared to be enough support for a preliminary draft agreement framework presented and discussed during caucus meetings to warrant using it as the basis for a proposal which EPA would draft within two to three months |
EPA stated a need to narrow the gaps between caucuses because time and funds are running short.

Discussion of ALARM Caucus proposal which was a revised proposal from that distributed at the July 1993 meeting. ALARM also distributed a list of 75 paint manufacturers who supported proposal. Their proposal was a nationwide two-phase regulation that achieves 8 percent in the first tier and 17 percent for the second tier. The second tier would only apply to ozone nonattainment areas.

EPA, User Caucus, and State/Environmental Caucuses all stated that low emission reductions achieved by ALARM proposal are unlikely to be supported by the full committee.

EPA proposal was presented which achieved a 25% reduction in 1996 and 35% in 2000 and 45% by 2004 and contained a fee on VOC emission above targeted reduction and optional “CAVE” provision.

EPA representative considered progress at the meeting adequate to proceed with development of a draft EPA rule. The Committee will be given the draft for review prior to EPA publishing a proposal in the Federal Register.

2. Caucus Proposals

Although originally committed to be developed by December 1992, the first proposal was presented by the Broad Industry Caucus in January 1993. At this time, the Broad Industry Caucus included all manufacturers (i.e., the ALARM Caucus had not yet been formed as a subgroup). The creditable VOC reduction expected to be
achieved by the proposal was calculated to be between 3 and 5% from 1990 baseline levels.

Although originally planned for March, the next proposal was prepared by the State/Enviro Caucus in April 1993. This proposal was estimated to achieve a 95% reduction in VOC emissions from 1990 baseline levels. In addition to very low VOC content levels, this proposal contained an economic incentive to induce reductions to zero VOC. A manufacturer would need to pay a fee on the total VOC content of a coating regardless of whether the coating complied with the table of VOC content standards. The fee rate was not specified, but was structured to escalate over time.

Given the extreme nature of both of these proposals, it is apparent that these initial proposals are examples of the negotiation strategy of "anchoring" or setting an initial position in one extreme to influence the other parties' expectations or BATNAs (Fisher and Ury, 1981). The State/Environmental Caucus may have felt compelled to offer an extremely stringent proposal following the Broad Industry Caucus' initial weak offer in order to counter any influence the industry proposal may have had on other participants' BATNAs.

During the April 1993 meeting, three cross-caucus workgroups were formed to address issues related to regulatory structure; categories and definitions, and legal issues. At the May 1993 committee meeting, the regulatory structures workgroup discussed an averaging approach called the "corporate average volatile emissions" or "CAVE." From mid-1993 to the beginning of 1994, this concept was the focus of efforts to structure a regulation. The Broad Industry Caucus proposed this approach which would allow each manufacturer to achieve an average percent reduction over their entire product line rather than meeting individual category-specific VOC content levels. The CAVE concept is discussed in more detail in Section 4.

At the July 1993 meeting, the EPA representative developed a potential agreement structure from informal, individual discussion with caucuses. There was a significant delay between the time the parties reached a tentative agreement (July 1993) and the issuance of EPA's draft rule incorporating those agreements (February 1994). During this time lag, Keystone circulated for comment a "preliminary
framework" of the concepts discussed by the EPA representative with the other caucuses during the July 28-30 meeting. Keystone stated in their September 3, 1993 memorandum to participants that "using this framework EPA plans, in consultation with each caucus, to develop the major components of the first formal EPA proposal, before November 1, 1993 " (The Keystone Center September 3, 1993).

The EPA presented their proposal at the February 1994 meeting and suggested that much of the delay was due to the need to coordinate with representatives of various caucuses who had issues with the preliminary framework circulated by Keystone as well as time spent obtaining small manufacturer input from two meetings the EPA arranged with roughly 100 small manufacturers at forums in Atlanta and Dallas in late 1993 (Radian Corporation February 1994). The EPA's proposal would achieve a 25% reduction in 1996, an additional 10% in the year 2000 (with a company average VOC emission or "CAVE" component) and an additional 10% by 2003 (or 45% total from 1990). The proposal included two extra years for small manufacturers to come into compliance with the 1996 table of standards and an extra year for small manufacturers to comply with the year 2000 standards. The proposal also included a fee system for VOC emissions beyond targeted reductions, and performance evaluation checkpoints to determine the impact of 1996 standards on coating performance characteristics and also to evaluate emerging technologies to determine whether new technology is likely to be available by the year 2000 and 2003 (Radian Corporation February 1994). At the February 1994 meeting, the committee discussed the complexity and potential for confusion in meeting CAVE requirements as well as the potential inequity since manufacturers with broader product lines would be able to take better advantage of benefits of averaging. Members of both the Broad Industry Caucus, the ALARM Caucus, and the User Caucus expressed concern about the achievability of requirements. The ALARM Caucus stated that the EPA's proposal did not meet most of their criteria of an acceptable rule: environmental benefits (this rule would result in poorer performing products that would require more frequent repainting), adequate consideration of the impacts on small business (too complex, burdensome, and stringent), technical feasibility (requires elimination of
necessary products), recognition of the regional and seasonal components of ozone, relief mechanisms (needs a variance provision), and a reasonable timeframe to comply (Radian Corporation February 1994).

At the February 1994 meeting, the ALARM Caucus was given a formal opportunity to present their proposal which was a slightly modified version of the proposal they distributed to the committee at the July 1993 meeting. The ALARM Caucus proposal included a consumer education component which would inform consumers through labeling or some other materials distributed by manufacturers about the role of VOC in ozone formation. The ALARM Caucus proposal would achieve an eight percent reduction in the first tier (1998) and a 17 percent in the second tier (2001). The second tier would only impact nonattainment areas. The ALARM Caucus used their formal presentation time to reiterate their concerns about regulations for their industry. They discussed their position that a nationwide rule is not necessary given the fact that ozone problems are isolated and infrequent (hot summer afternoons in nonattainment areas) and that they were still waiting for EPA’s Section 183(e) study results on reactivity. The ALARM Caucus emphasized the significance of biogenic emissions in the VOC inventory and suggested that the EPA needs to reevaluate ozone control strategies and focus more on NOx than VOC. The ALARM Caucus stated that their proposal reflects the belief that reductions in VOC from architectural coatings is counterproductive beyond certain levels. The ALARM Caucus also stated that their proposal reflects their concern about the potential adverse economic impact of regulating architectural coatings. The EPA, User Caucus, and the State/Environmental Caucus all stated that the low emission reductions achieved by the ALARM Caucus proposal are unlikely to be supported by the full committee. In addition, a representative of the State/Environmental Caucus noted that they had met with the ALARM Caucus at the July 1993 committee meeting to express their concerns about the ALARM proposal and that rather than narrowing the gap between the magnitude of VOC reductions the State/Enviro Caucus supports and the VOC reduction the ALARM Caucus supports, this revised proposal appears to have broadened the gap. The representative from the State/Environmental Caucus
questioned whether the ALARM Caucus was interested in consensus (Radian Corporation February 1994).

At the close of the February meeting, the EPA requested a few more weeks to revise their rule to reflect the ideas presented at the meeting and committed to provide committee members with the opportunity to review the next version before EPA would propose in the Federal Register.

The EPA’s next proposal was mailed to committee members in June 1994. It was a framework (as opposed to regulatory text) which was based on discussions with representatives of each caucus. The framework included a 20% reduction in 1996, a 30% reduction in 2000 and a 40% reduction in 2004. Fees allowing manufacturers to exceed the VOC content standards in 2000 and 2004 were included. Suggested revisions from caucus leaders and committee members resulted in Keystone developing a rule framework and memorandum of understanding (MOU) for distribution to the committee in July 1994. The most significant change in Keystone’s framework was a 25% reduction in 1996 and the ability to exceed the VOC content for certain categories in 1996 upon payment of a fee. Keystone was seeking support for a MOU rather than regulatory language given the EPA’s need for timely development of a draft rule. Although the Charter establishing the architectural coating reg-neg had been extended in the past, the EPA indicated that no more extensions would be requested and therefore the Charter expiration date of July 31, 1994 would be the date on which the committee would be terminated (i.e., there was no more time to negotiate regulatory text). Even if consensus was not reached, Keystone pointed out that those committee members who did sign the MOU could enter into a binding agreement to support the final product of negotiations. The EPA and Keystone received comment letters from Committee members that the MOU could not be supported with complaints from industry representatives about various categories and VOC limits. Some industry comment letters went so far as to characterize the framework as anti-competitive and arbitrary. In their response to EPA and Keystone, the ALARM Caucus rejected the proposal outright and instead recommended that their last proposal be circulated to the Committee again.

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Some of the problems in achieving agreement may have related to the broad, diverse nature of the industry. This broadness and complexity likely made it difficult for Keystone or any of the caucuses to have discussions with "representative" members of the industry. Every company has particular product lines which represent key markets for them. Even if two manufacturers specialize in the same type of category, they may have completely different positions on acceptable VOC content limits for that category. The various proposals presented during negotiations contained 50 some product categories which in turn are broad representations of product lines. For example, the category of "industrial maintenance" coatings includes coatings applied to a variety of substrates such as steel, brick, and concrete. Tentative agreements among select industry members may not be a good indicator of the potential for agreement among the broader constituency with which these industry members were communicating.

In a last effort to achieve consensus, the Broad Industry Caucus prepared a proposal that included a phased approach of VOC content limits that would achieve a 20% reduction in 1996 and a 30% reduction in 2000. In the year 2000, manufacturers would have the option of paying a fee to exceed VOC content standards. The Broad Industry Caucus had a 2/3 majority vote in support of the proposal, and some members of the User Caucus supported the proposal (Broad Industry Caucus 1994). However, the ALARM Caucus rejected the proposal, as did the State/Environmental Caucus. Despite over two and a half years of effort, the committee could not reach consensus on a regulatory framework. Therefore, on September 23, 1994, the Keystone Center sent a notification to each of the committee members announcing the EPA's decision to terminate the regulatory negotiation. The letter stated that "this is a situation where it does not appear that the interests of the various Committee members coincide to the extent adequate to reach consensus" (The Keystone Center September 1994).

3. Existence of a Deadline?

The initial deadline established by EPA and Keystone for the negotiation was May 1993. The firmness of this deadline was questioned at the January 1993
committee meeting. The January meeting summary states that "the EPA representative indicated that the Agency had deadlines to meet, but that it was too early to say whether this date would remain firm" (Radian Corporation January 1993). Although other deadlines were established beyond May 1993, these deadlines were extended each time based on a determination by the committee that reasonable further progress was being made.

No real statutory deadline was looming in the future because the architectural coating regulations due date was dependent on the submission date of a report to Congress under Section 183(e). The architectural coating regulation was required to be finalized two years after submission of this report to Congress. Although this Section 183(e) report was due in November 1993, the report had still not been completed even by the end of negotiations in 1994. This moving target did not promote concern among participants of any impending statutory deadlines.

4. Proposal Elements

During the negotiations, most of the caucuses submitted proposed regulations for review by the rest of the committee. In addition, several regulatory frameworks based on elements from the caucus proposals and discussions were prepared by the EPA and the facilitator. Below is a discussion of some of the elements included in proposals offered by the various caucuses. These approaches demonstrate value creating options which resulted from the creative, problem-solving atmosphere developed during negotiations.

A Phased-in Approach

After the initial industry caucus one-phase proposal in January 1993, it became clear that a multi-phase approach to regulation might be desirable. More than one phase of regulation would help accommodate the interest of states and environmental groups to maximize reductions, and also the interests of the industry to provide predictability and adequate lead time to reformulate. In this way, state and

13 The report to Congress under Section 183(e) of the Clean Air Act was submitted in March 1995.
environmental groups could obtain needed near term reductions to meet CAAA VOC reduction goals while still providing flexibility to industry to phase in more stringent requirements in a reasonable timeframe. This was a value-creating strategy whereby time is traded for reductions.

*Economic Incentives*

Economic incentives are generally considered to provide a more cost-effective means of achieving an environmental goal. This is because such approaches provide sources with the flexibility to achieve emission reductions at the least possible cost. Other benefits of economic incentive approaches include increasing innovation, enhancing flexibility and accelerating achievement of environmental goals (Tietenberg 1984).

Section 183(e) of the CAAA lists "...economic incentives (including marketable permits and auctions of emission rights)...") among the systems of regulation authorized to be used to achieve reductions from consumer and commercial products. This type of approach had appealing components to all interest groups involved in negotiations. Beginning with the April 1993 State/Enviro proposal, market-based approaches began to appear in proposals and be seriously considered during discussions.

The EPA believed the opportunity to use flexible options could result in lower impacts and equivalent or better emission reductions. Discussion of flexible options during the reg-neg were thought to have the potential to bring together the industry and State/Enviro caucus interests to maximize emission reductions yet minimize cost. This approach was value creating since flexibility in where (i.e., from which products it was cheaper) emission reductions are achieved could be traded for greater overall VOC reductions.

Given the diverse nature of the industry, flexibility to reduce VOC emissions in coatings where the reductions are low cost, in favor of keeping a product on the market which requires a high VOC to maintain performance was appealing to manufacturers as well as users of architectural coatings.
In addition, a flexible market-based approach could mitigate impacts on smaller manufacturers who may produce products in lower volumes where it may not be cost effective for either the manufacturer or resin supplier to invest in reformulation.

The reg-neg committee considered emissions averaging, emission allowances (caps), and exceedance fee approaches. An averaging approach called the "corporate average volatile emissions" or "CAVE" was the focus of efforts during mid 1993 to the beginning of 1994. The Broad Industry Caucus proposed the CAVE approach which would allow each manufacturer to achieve an average percent reduction over their entire product line rather than meeting individual category-specific VOC content levels. This flexibility would allow companies to achieve the same overall emission reduction at less cost, since they would not have to achieve reductions from hard to reformulate products if they simultaneously achieve extra reductions from easy to reformulate products. Manufacturers could therefore maintain higher VOC content products in one market if these emissions were offset by lower VOC emissions in another architectural coating market. Unfortunately, the CAVE approach involved relatively complex calculations and the details of the concept could not be worked out to everyone's satisfaction. It was clear that manufacturers with broader product lines had an advantage over manufacturers that specialized in one coating area since broader product lines can benefit more readily from an averaging approach. In addition, establishing a baseline under which credit could be generated was a controversial issue. It did not appear to be equitable to require further reductions from manufacturers who had already concentrated efforts on reducing VOC contents of their coatings in the past. Alternatively, just as problematic was the potential to reward excess VOC credit to manufacturers who did not choose to be proactive in switching to available emission reduction technologies in the past. Ultimately, it was also the complexity of the record keeping, reporting, and averaging calculations that contributed to the inability to come to consensus on the details of the approach.

Another economic incentive considered during negotiations was the concept of an "exceedance fee." Exceedance fees would allow a company to exceed the
applicable VOC standard through payment of a fee. This fee was to be calculated based on the amount that VOC content levels exceeded applicable levels and the volume of coating sold. Any fee revenues could then be used to induce additional reductions through programs such as low-VOC paint research subsidies, or awards to low-VOC paint manufacturers. The fee option could be expected to provide transition time for those manufacturers that desired additional time to obtain lower VOC technologies. It could also provide a less costly compliance approach for manufacturers selling very low volume products. This was a value creating approach in which flexibility to maintain profitable products would be traded for a revenue which could be used to obtain further VOC reductions. This concept was not well-received by ALARM or the National Paint and Coatings Association who during the reg-neg argued that it was an "illegal tax" on paint.

5. Strategies to Influence BATNAs

During negotiations, strategies were employed by Committee members to influence BATNAs of participants. For example, at the June 1993 meeting a representative of a state organization (STAPPA/ALAPCO) urged the group to reach consensus in the next 30-45 days. If consensus was not reached, the representative stated he would have to urge his members to seek a 35% reduction from architectural coatings by 1996. In addition, representatives of the State/Environmental Caucus reiterated throughout negotiations that states had implemented all the easy controls to reduce VOC and were now regulating down to the mom-and-pop businesses and that if the rule did not achieve a 25 percent reduction in 1996, the difference must come from other small businesses. If the state does not meet Clean Air Act reduction requirements, they lose their federal highway funds. This strategy was used to emphasize the importance of near-term reductions to the states and to remind industry that absent an agreement, states were likely to develop state by state architectural coating regulations with no certainty in requirements.

The EPA representative repeated during the last few meetings the idea that if consensus was not reached "everyone would likely lose something they have achieved through negotiations" (Radian Corporation Feb 1994).
The ALARM Caucus throughout negotiations distributed materials (articles, reports) which addressed issues related to ozone control strategies in attempts to convince people that VOC control strategies were relatively ineffective in reducing ozone and therefore the cost of nationwide, stringent standards should be weighed against the uncertainty of environmental gains. This approach may have been a strategic ploy to minimize the importance of environmental benefit of VOC regulation and exaggerate the economic impact of these regulations on small manufacturers.

6. The ALARM Caucus Agenda

The ALARM Caucus made clear throughout negotiations that they felt that VOC regulation targeting the architectural coating industry should be minimal if at all. One of the main interest of ALARM Caucus representatives in participating in the negotiation appeared to be to advance their issues related to the need for further technical research before further regulations are adopted.

The physical separation of the ALARM Caucus led to its members becoming more and more isolated and extreme in their views prior to end of negotiations. In an August 3, 1993 letter to The Keystone Center, the ALARM Caucus complained of procedural problems which resulted in "unequal treatment" of the ALARM Caucus. Specifically, the ALARM Caucus complained the facilitator had not allowed the caucus time on the agenda to present their regulatory proposal at the July 1993 meeting and accused the facilitators of "abandoning the role of impartial facilitator" in originating and presenting to caucuses a new proposed compromise regulatory concept which the ALARM Caucus objected to the facilitator sharing with other caucuses until their proposal had been given "full and fair consideration." (ALARM Caucus August 3, 1993). This letter led to a further exchange in correspondence with the Keystone Center suggesting that ALARM’s position makes it "extremely difficult for us to continue to advise EPA and the other parties regarding whether your participation in the regulatory negotiation continue to be in good faith," and response by ALARM that Keystone’s response is "further evidence of an absence of impartiality" and questioned whether the regulatory negotiation was still operating under the context of consensus decision-making (The Keystone Center August 11, 1993; The Alarm
Caucus August 26, 1993). This exchange is evidence of the lack of trust the ALARM Caucus members had in the negotiation process which translated into an inability to buy into the process and share with the committee their true priorities. For this reason, some of the energy of the facilitators and participants was focused on debating ALARM's various allegations, rather than working collaboratively to craft solutions. In addition, the ALARM Caucus focused major effort outside the process. They garnered outside support for their position from other small and regional manufacturers and organized a letter writing campaign to EPA's Air Docket during negotiations.

7. Retrospective Analyses by Participants

Both the facilitator and the ALARM Caucus prepared analyses of the reasons for the failure of the group to reach consensus. Factors identified by the facilitator as contributing to the failure to reach consensus included:

- A variety of concerns and positions within the broad spectrum of industry
- Certain parties to the negotiation did not view agreement (i.e., a national rule) as in their best interests
- State and environmental groups had preconceived notions about the minimum acceptable requirements (based on existing state requirements)
- A large number of participants with diverse interests
- A large scope
- A lack of time pressure to reach agreement
- Process delays

Factors identified by members of the ALARM Caucus as contributing to the lack of consensus include:

- The issues were not ripe for discussion because the EPA had not yet completed mandated studies (i.e., these studies are preconditions to regulation).
The negotiation committee did not contain a balanced representation of members both for and against stringent VOC requirements (i.e., too many advocates of radical reformulation).

- Unequal treatment of the ALARM Caucus proposals (absence of impartiality by the facilitator)

The facilitator offered several recommendations for future negotiation efforts by the EPA:

* Negotiate with a small contained industry
* Use a strict guideline in assessing parties willingness to negotiate
* Work within a firm deadline

8. Was the Negotiation an Efficient Use of Resources?

The EPA invested roughly $700,000 in the regulatory negotiation facilitator support, contractor technical support, and travel support for meeting participants (Keystone 1995). In addition, EPA as well as committee members invested a large time commitment in the negotiation. Although the regulatory negotiation committee was unable to reach consensus on major elements of a proposed regulation for architectural coatings, the EPA received some input and support for several general concepts. The negotiation proved to be effective in providing some information and identifying issues relevant to the development of an architectural coatings rule. Specifically, information on the volume, VOC content, and hazardous air pollutant content of coatings produced in 1990 was collected in an industry survey, and even though the survey had an under-representative sample of small manufacturers, it is the most comprehensive information on the industry gathered to date. In addition, architectural coatings regulatory structure concepts were presented in discussions and in caucus proposals.

With formal negotiations over, the EPA was left to develop a regulatory framework that would build on the information learned during negotiations. Given that EPA and participants devoted over two and a half years to the negotiation effort, it is arguable that this use of time and resources could only be judged efficient if the EPA were to proceed with rule development expeditiously and without litigation as a
result of benefits obtained through the negotiation process. To proceed with regulation development, several key decisions needed to be made by the EPA about which categories and definitions to include as well as the VOC content levels to assign to categories.

9. Post-Negotiation Negotiations

Although the negotiation had ended, the industry representatives remained active in communication with the EPA regarding their position. In April, 1995, representatives of the NPCA met with the EPA to discuss a "model rule" which they presented as a proposal which most manufacturers in the industry would support. This model rule was significantly less stringent than requirements supported by many members of the industry caucus at the end of negotiations, offering roughly 20% reduction in VOC emissions in one phase of requirements.

At the same time, the former members of the ALARM Caucus continued in their efforts to oppose a national VOC regulation of architectural coatings. With letters to Congress, and letters to the EPA opposing development of the rule, this group continued to argue against the science, the structure, and the stringency of the draft rule controls. An October 1994 paint industry journal article describes ELRAP members continued campaign to "marshall small and regional coating manufacturers in a battle against drastic VOC-reduction" (Dwyer 1994). The article reported that a representative of ELRAP (the CEO of one of the companies that participated in the negotiation) attended a paint industry meeting in St. Louis where he "told approximately 25 representatives of small coating producers from across the country that they should use experience gained during the recently concluded regulatory-negotiation process to make their voices heard in Washington and in various state capitals" (Dwyer 1994). The EPA's subsequent regulatory indecision led to industry impatience and alternative positions. The growing "no-reg movement" which included large and small manufacturers was basing its position on scientific findings believed to indicate that emissions of VOC from architectural coatings do not contribute to ozone nonattainment. The desire of this group was for a regulation moratorium at both the national and state level.
From April 1995 to September 1995, the EPA received 43 letters from a variety of Congressmen regarding the not-yet-proposed architectural coatings rule. These letters were a result of separate campaigns by the National Paint and Coatings Association (the trade association who participated in the reg-neg as part of the Broad Industry Caucus), and members of the former ALARM Caucus to put political pressure on the EPA to propose requirements in line with the Republican dominated Congresses' agenda to balance environmental with economic concerns. The NPCA members were pushing for EPA to adopt their April 1995 proposed model rule, while the former ALARM Caucus members were campaigning for no new architectural coating requirements at either the state or federal level.

10. Was Value Added to EPA's Proposed Regulation?

The EPA proposed the architectural coating regulation on June 25, 1996 (61 FR 32729). Although a phased-in approach was offered by each of the caucus groups during negotiations, the EPA's June 25, 1996 notice of proposed rulemaking contained a one-phase regulation expected to achieve a 20% reduction in VOC emissions from 1990 baseline estimates. This is less than the reduction recommended by the majority of the members of the large-industry caucus and far less than that supported by the state and environmental groups during negotiations. Criticisms of the proposal have been expressed by industry representatives as well as state and environmental representatives.

Bill Becker, Executive Director of STAPPA/ALAPCO, and a former reg-neg participant has stated that the EPA's proposal "flies in the face" of agreements reached by parties during negotiations (Environment Reporter March 15, 1996:2124). Mr. Becker further stated that "we're extremely disappointed with the soon-to-be-proposed rule"(Environment Reporter March 15, 1996:2124). Mr. Becker stated that one of the main concerns of state and local agencies is the removal of the second phase of requirements. Mr. Becker also stated that unless the rule is

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14 Mr. Becker is probably referring to tentative framework agreements between caucuses during the July 1993 meeting which included three phases of requirements with reductions approaching 35-45% in the out-years.
tightened, the states may be forced to develop more stringent requirements on their own (Environment Reporter March 15, 1996).15

The former members of the ALARM Caucus, and an additional 100 or so paint manufacturers formed a "Task Force for True Ozone Policy" in the spring of 1996 which opposes the national rule and requests the EPA complete mandatory duties under Section 183(e) of the Clean Air Act to study emissions of consumer and commercial products and determine their potential to contribute to ozone nonattainment, the Small Business Regulatory Enforcement Fairness Act (SBREFA), and the Unfunded Mandates Reform Act (UMRA) before proceeding further with the rule. Some members of this newly formed "task force" joined in filing a lawsuit against the EPA on September 10, 1996. Issues identified in the lawsuit include failure to perform mandatory statutory duties related to the 183(e) study required by the Clean Air Act, UMRA, and duties under the Regulatory Flexibility Act, as strengthened by SBREFA.

The National Paint and Coatings Association, on the other hand, supports the proposed national rule on behalf of their 500 members (NPCA 1996). This is not surprising since the EPA's proposal closely resembles the model rule submitted by NPCA to the EPA for consideration in April 1995. The NPCA's press release of June 24, 1996 stated that "NPCA, which represents some 500 companies, the majority of which are small to medium in size, believes the proposed national rule is a practical and achievable standard that will result in significant VOC reductions nationwide"(NPCA 1996).

The EPA expects to promulgate the architectural coating regulation in September 1997, and also expects that members of the former ALARM Caucus will file a lawsuit against the final rule. This expectation is based on the fact that many issues raised by the former members of ALARM in their September 1996 lawsuit against the architectural coating proposal were countered by EPA with arguments

15 Differing State standards are an administrative nightmare for any manufacturer (large or small) that sells in multiple States.
about the premature nature of the claim and that the proper time to raise such an issue is at the promulgation stage of rule development.
V. CONCLUSIONS AND RECOMMENDATIONS

Many factors contributed to the selection of architectural coatings regulation for negotiation. It was an effort involving large Agency resource output combined with high level EPA management involvement, a politically visible industry, and a large source of emissions.

Although the regulatory negotiation ended without consensus, there were a few benefits that were obtained from the process. These included the development of the most comprehensive database on the VOC content and sales information on architectural coatings available to date, and general information on the average cost for a reformulation. This information, in addition to categories and definitions developed during negotiations was used by EPA to develop the proposed regulation for architectural coatings. The EPA also gained insight into the interests of states, environmental groups and industry through the process. The EPA obtained feedback on the concept of an "exceedance fee" within a regulation to allow manufacturers more flexibility in meeting requirements and was able to understand the complexities involved in attempting any type of averaging scheme within a complex coating industry. However, the proposed regulation resulting from this knowledge, data and insight was not well received by states and by some industry representatives. After almost three years and a resource output of $700,000, a lawsuit was still filed against the June 25 proposal and the EPA expects a lawsuit on the final rule as well. This reg-neg effort certainly did not streamline the rule development process in any recognizable way and therefore was not worth the time and resources expended.

Although it is predicted that regulatory negotiation can enhance relationships among parties, the ALARM Caucus members became more isolated and extreme as a result of the process. In addition, frustration with the process, dissatisfaction, and a need to blame another party for the inability to gain consensus strained relationships among all parties to the negotiation. Future dealings among the parties would not be expected to be enhanced as a result of this negotiation.

The reg-neg process provides a framework within which an Agency can craft a process to work with affected interests to reach consensus. The lack of specific
structure in one respect is a benefit, but could also be a source of problems if not properly managed. If properly managed, this flexibility allows a process to be structured in which the energy of participants is channeled towards creation of innovative, acceptable regulatory requirements. If improperly managed, this flexibility can allow parties to sabotage the process where energies can be targeted towards defensive maneuvering and result in a single interest dominating negotiations.

As stated by the facilitators in their final report, the industry is broad and complex and this complexity contributed to the inability to reach consensus. The broad nature of the industry translates to infinite possibilities for combinations of VOC contents for each product category. This made it difficult for the Broad Industry Caucus to negotiate a position even within their own caucus. The opposing positions within the same caucus led to delays in developing proposals, delays in responding to proposals, and difficulty in facilitators and other caucus representatives in dealing with select "representative" members of industry to work out potential frameworks for agreement.

In retrospect, involving ELRAP members in the process was a mistake. These manufacturers were coming to the negotiation having just won a lawsuit against California district regulators. Consequently, it is likely ELRAP was feeling as though their complaints about regulation had been validated through the court system. There was little incentive for ELRAP to seek agreement since their perceived BATNA was probably strong. The motivation for this group to participate appeared to be to promote their issues and become educated about EPA's position in preparation for a future lawsuit. ALARM (and ELRAP) benefitted from the process in that they gained elevated status in the paint community as a reg-neg representative, and mobilized many small companies outside of California to join them in their efforts.

The ALARM Caucus did not have trust in the process. With these perceptions, it is clear that there was no way for this group to perceive any agreement resulting from the process as good or fair. The ALARM Caucus loaded the docket with correspondence throughout the negotiation process to prepare for subsequent planned litigation. This was a symptom of the fact that they never really bought into
the process. The reg-neg probably resulted in a further solidification of ALARM members views.

In their final report, Keystone recommends using a stricter guideline to assess parties willingness to negotiate. This recommendation may be difficult to implement. In this case, Keystone was aware of the lawsuits that ELRAP members had participated in and their interviews included questions concerning ELRAP’s views on architectural coating regulation. An alternative recommendation would be to carefully explore motivations of parties to participate in a negotiation, focusing on determining the parties perceived BATNA. Caution should be used in proceeding with a negotiation in which parties initial agreement to participate is couched with reservations about the product of negotiations, the science, or the legitimacy of the environmental control strategy.

In addition, Keystone’s recommendation to use a stricter guideline to assess parties’ willingness to negotiate implies that the facilitator may have been too optimistic about their ability to facilitate an agreement and convince parties such as ELRAP to buy into the process. Many of the EPA’s criteria for selecting a regulation for negotiation that Keystone evaluated are subjective. To ensure the facilitator is not influenced by their expectation to conduct the negotiations (perpetuation of their paycheck) or by feelings of ownership of a process they have begun and a desire to see it through, the EPA should consider using separate groups for convening and facilitating the negotiation. An obvious drawback to this recommendation is that the convener becomes educated in the issues and begins forging relationships with parties. The EPA would have to spend time and resources for a new facilitator to obtain this position and it would result in some process delays as the new facilitator got up to speed on the issues.

Another option might be to have one facilitator conduct the interview portion of the convening phase, and have another conduct exploratory meetings if the decision is made to proceed. This option recognizes that once exploratory meetings begin, the facilitator gains knowledge and establishes relationships with participants that would not be easy or quick to reconstruct if the facilitator were replaced.
Process delays contributed to the inability to reach consensus even among the groups outside of ALARM. During these delays, internal caucus discussions may have served to solidify positions of the caucus and make it difficult to accept a loss from that position. Parties became frustrated with these delays and had less energy to devote to evaluating frameworks and constructively working towards consensus.

The facilitator should have conducted pre-negotiation training. Through pre-negotiation training, the facilitator can observe negotiating styles. Knowledge of negotiating techniques may have avoided the need for first two anchoring proposals offered during the architectural coating reg-neg.

The deadline for terminating negotiations should not have been presented as soft and changeable. The most progress in reaching consensus often occurs in last moments of negotiation. The fact that EPA’s statutory deadline for promulgation of the architectural coating standard was a moving target (two years after submittal of a Report to Congress) contributed to the delays and ability of participants to stall the process. If a deadline is soft, the EPA should continuously evaluate perceived BATNAs of participants to determine the likelihood of consensus in the immediate future.

In the case of architectural coatings, the number and divergence of interests overwhelmed the process resulting in delays. Rather than contributing creative ways to develop requirements, some parties seemed to focus on exhaustive ways to sabotage a process they seem to have never really bought into. The combination of these many factors resulted in an inability to reach consensus.
VI. REFERENCES


The Keystone Center. Letter of invitation to potential participants of the January exploratory meeting. January 1992


Regulatory Negotiation Project, 48 Federal Register 7494 (Feb. 22, 1983).


U.S. EPA. Staff Paper on Health Effects of Ozone. 1996


U.S. EPA. An Assessment of EPA’s Negotiated Rulemaking Activities. December 1987

DISCLAIMER

This paper does not necessarily reflect the views of the U.S. EPA, and no official endorsement should be inferred.
Appendix A: Issues of Concern

AIM Regulatory Negotiation Issue List
August 11, 1992

This list of issues for discussion has been compiled from the Scope document developed during the two exploratory meetings, the Convening Report, the Federal Register Notice announcing the Information Meeting and the discussion which took place at the July 28 and 29 Information meeting. The issues are not presented in order of importance or priority.

If you have any suggested revisions or additional issues, please contact The Keystone Center.

1. Appropriate form of national regulatory action; national rule, control techniques guideline (CTG) or combination.
2. Form of the rule: whether is will be command and control, market based or a combination.
3. Whether retailers, applicators, and other end users should be regulated under national regulatory actions.
4. How to achieve quantifiable and enforceable emissions reductions.
5. Economic impacts of national regulatory action; the costs and benefits.
6. Extent to which the national regulatory action promotes national uniformity.
7. Consideration of hazardous air pollutant emissions, including safety considerations associated with changing coatings formulations.
9. Role of coatings systems under national regulatory actions.
10. Methods used to calculate VOC levels.
11. Use of phased approaches to implementing national regulatory actions.
12. Determination of how to achieve the greatest possible emission reduction as soon as possible.
13. Appropriate categories of coatings to serve as the basis for national regulatory actions.
15. Technology advancement and the technological feasibility inherent in the national regulatory actions.

16. Administrative requirements associated with implementation (e.g. labeling and recordkeeping).

17. Coordination with the consumer and commercial product study.
Appendix B: List of Reg Neg Committee Members

ARCHITECTURAL COATINGS REGULATORY NEGOTIATION
Committee Members

CONSUMER REPRESENTATIVES

Bernie Appleman
Executive Director
Steel Structures Painting Council

Charles Field
Staff V.P.
National Association of Home Builder’s

G. Lawrence Gettier
Traffic Control Project Engineer
North Carolina Dept. Of Transportation

John Peart
Research Chemist
Federal Highway Administration

Tim Race
Chemist
U.S. Army Corps of Engineers

Vincent R. Sandusky
Executive Vice-President
Painting and Decorating Contractors of America

John Stone
Chemist
G.S.A. Paint & Chemicals Commodity Center

R. Sam Williams
Forest Products Laboratory

ENVIRONMENTAL REPRESENTATIVES

David Hawkins
Senior Attorney
Natural Resources Defense Council
ENVIRONMENTAL REPRESENTATIVES (cont.)

Joel Schwartz
Staff Scientist
Coalition for Clean Air

Ronald White
Deputy Director, National Programs
American Lung Association

INDUSTRY REPRESENTATIVES

Earle K. Borman, Jr.
Sr. Vice President
L&F Products

Jack J. Bracco
Manager/Market Development
Miles, Inc.

J. Andrew Doyle
Executive Director
National Paint and Coatings Association

Marcel Gaschke
Group Marketing Manager
CIBA-GEIGY Corporation

Jay Haines
Attorney at Law
Haines & Riley

Madelyn Harding
Administrator/Product Compliance and Registrations
The Sherwin-Williams Company

Ned B. Kisner
President
Triangle Coatings

Robert J. Klepser
Laboratory Manager
Carboline Company
INDUSTRY REPRESENTATIVES (cont.)

James F. Lawrence
Senior Vice President
Cargill Inc.

Carl Minchew
Assistant to the Technical Director
Benjamin Moore & Co.

Kenneth J. Murray
Environmental Affairs Manager
Exxon Chemical

Pete Nicholson
Market manager/Industrial Finishes
Rohm and Haas Co.

John Prinz
Vice President Research, Development & Quality
Sinclair Paint Company

Jim Sainsbury
Manager/Product Regulation
The Glidden Company

Christine Stanley
Product Development Manager
Ameron Protective Coatings

William Stewart
Director/Regulatory Affairs
The Valspar Corporation

Robert Wendoll
Chairman
Environmental, Legislative and Regulatory Advocacy Program

Richard Williamson
Executive Vice President
Trinity Coatings Co.
LABOR REPRESENTATIVE

Mike Andrews
Representative of the Health & Safety Department
International Brotherhood of Painters & Allied Trades

STATE REPRESENTATIVES

S. William Becker
Executive Director
State and Territorial Air Pollution Program Administrators/ Association of Local Air Pollution Control Officials (STAPPA/ALAPCO)

Dan Belik
Enforcement Program Supervisor
Bay Area Air Quality Management District (BAAQMD)

Robert Irvine
Senior Environmental Engineer
State of Michigan - Department of Natural Resources

Peggy Taricco
Manager of Solvent Control Section
California Air Resources Board

Bob Warland
Regional Air Pollution Control Engineer
New York State DEC Regional Headquarters

ENVIRONMENTAL PROTECTION AGENCY

Bruce Jordan
Director/Emission Standards Division
U.S. EPA

FEDERAL GOVERNMENT OBSERVER

Chris Kirtz
Director
Consensus and Dispute Resolution Program
III. ASSESSMENT ACTIVITY FINDINGS

The assessment activities resulted in parties advising EPA to enter into negotiations with all significantly affected parties in order to develop a rule. Based on the results of the convening assessment to date, the convenors also recommend that EPA proceed with negotiated rulemaking.

A. Conditions for a Successful Reg Neg

The following summarizes the convenors determination that the conditions for successful negotiation, as stated in the Regulatory Negotiation Act and developed by EPA, are present and thus an AIM Coatings Reg Neg could succeed:

- **Issues and Data.** A proposed rule would require the resolution of a limited number of interrelated issues, as listed below. Through the development of an emissions inventory and additional information from follow-up surveys, there is the potential for the Committee to have a sufficiently well-developed factual base for meaningful discussion and resolution of the issues.

- **Deadline.** The Agency has stated it will submit a final AIM Coatings rule upon the submission of the report to Congress which is scheduled for by November 1991.

- **Common Issues.** There are areas of overlap in the positions and interests of the parties. Most parties have additional issues of concern that they would like to see addressed by the reg neg committee, but they also appear to be able to live with the scope and nature of the discussions as currently formulated.

- **Committed Representatives.** The significantly affected parties have been identified and can be formed into a reasonable number of interest groups and participants. Participants have said they are willing to represent the interests of their constituencies.

- **Adequate Incentive.** All parties have indicated that reg neg might provide the most effective forum for devising a rule. Parties are at least somewhat optimistic that a consensus rule can be negotiated.

- **Rule Required.** Control of VOC emissions from groups of consumer and commercial products is required under the Clean Air Act Amendments of 1990, Section 133 (a).

- **No Unreasonable Delay.** There is adequate time to conduct negotiations and they should not delay the notice of proposed rulemaking or issuance of the final rule.

- **Adequate Resources.** The Agency has adequate resources and is willing to commit such resources, should they proceed.

- **Consensus as Basis for Rule.** The Agency has stated that should negotiations proceed and to the maximum extent possible consistent with its legal obligations, EPA will use the consensus of the committee as the basis for the proposed rule.