



E-PARCC

COLLABORATIVE GOVERNANCE INITIATIVE

Syracuse University

Maxwell School of Citizenship and Public Affairs

Program for the Advancement of Research on Conflict and Collaboration

Revising the Worker Protection Standards

Negotiated Rulemaking Exercise

Teaching Notes

This exercise is based on an actual negotiated rulemaking that happened in the 1980s. It requires no special legal or technical expertise and can be used at the graduate, undergraduate or high school level. The negotiation runs best with 10 people, which allows each party to the negotiation to be represented by a team of two players. If there are odd numbers, the EPA can be represented by a single student or some teams can be expanded to three players. With more than three players per team, the negotiation is likely to get unwieldy and multiple negotiations should be run simultaneously.

If possible, players should get copies of the General Instructions, the specific information for their group (and their group only) and any background readings a few days before the negotiation. Depending on the background of the students, it might be useful to give them some general information on negotiating/dispute resolution (i.e. Fisher and Ury, *Getting to Yes*, Chap. 1, pp. 3-14) and on farmworkers and pesticides (i.e. Perfecto, "Pesticide Exposure of Farm Workers and the International Connection," in *Race and the Incidence of Environmental Hazards* (1992), pp. 179-84). If material is not distributed in advance, instructors will have to build in at least 20-30 minutes for each team to review its information and plan its strategy. The background reading described in the general instructions (on interest-based negotiations and on farmworkers and pesticides) is helpful, but not absolutely necessary to the role-play.

This case was an honorable mention winner in our 2008 "Collaborative Public Management, Collaborative Governance, and Collaborative Problem Solving" teaching case and simulation competition. It was double-blind peer reviewed by a committee of academics and practitioners. It was written by Alma Lowry of Syracuse University and edited by Khristina Dodson. This case is intended for classroom discussion and is not intended to suggest either effective or ineffective handling of the situation depicted. It is brought to you by E-PARCC, part of the Maxwell School of Syracuse University's Collaborative Governance Initiative, a subset of the Program for the Advancement of Research on Conflict and Collaboration (PARCC). This material may be copied as many times as needed as long as the authors are given full credit for their work.

After the negotiation portion, plan at least 30 minutes for debriefing. In that session, consider the following questions for each set of negotiators and for each team within the negotiation:

1. Did you reach a complete agreement? A partial agreement? If so, what did you decide? *Write out the primary elements of each agreement on the board or on newsprint.*
2. How did you begin the discussions and why?
3. Did one group or person seem to take the lead in your negotiations? If so, who was it and how did that person establish leadership?
4. What was the tone in your negotiation — calm and rational or emotional? Cooperative or combative? How was that tone set? Did it seem to affect the result?
5. Was anyone tempted to walk? If so, why didn't you?
6. *(If the class ran two or more simultaneous negotiations and the final agreements are significantly different)* Did your group consider anything similar to the resolution in the other groups? If so, why didn't your final agreement include this component?
7. *(For each negotiating team)* What was your BATNA (best alternative to a negotiated agreement)? Were you able to reach an agreement that was better than your BATNA?
8. *(For each negotiating team)* What was your strategy going into the negotiations – both in terms of process (i.e. focusing on positions vs. interests; staking out an extreme position to create lots of room to trade down; focusing on science, economics or anecdotes of horrific results) and substance? Were you able to pursue that strategy? If not, what got in your way? If so, did you feel it was successful?
9. *(For each individual participant)* Did you feel heard during the negotiations? When you left the room, did you feel good about the result? Would you feel comfortable presenting this outcome to your membership or constituents as a success?

As a final step in the debriefing, instructors may want to tell the story of the actual negotiated rule-making. As noted in the General Instructions, the

Environmental Protection Agency first issued Worker Protection Standards in 1974. Nine years later, the agency had determined that the regulations needed to be strengthened and chose to proceed through a negotiated rule-making. (*Note: This rule-making focused only on the Worker Protection Standards; there was no discussion of either the Delaney Clause or the citizen suit amendment to FIFRA included in the role-play.*)

The EPA identified many potential stakeholders and asked 25 groups to participate in the negotiations. The parties involved represented farmworkers, health care providers, agricultural trade associations, commercial pesticide applicators, pesticide registrants, State health and agriculture agencies, the Environmental Protection Agency, and other federal agencies. Formal negotiations began in November 1985. By early 1986, after several meetings, farmworker representatives decided that they were not going to be able to protect their constituencies through this process and left the discussions. With the departure of a core stakeholder, the negotiations fell apart.

The EPA eventually completed the revisions on its own. In July 1988, the EPA issued draft regulations in July 1988. All interested parties, including the parties that had been part of the negotiated rule-making, had a chance to review and comment on the proposal. The EPA took these comments and reworked the regulations. Final regulations were issued in 1992. Although these regulations contained far more detail than discussed in the role-play, the main components were as follows:

- (1) Re-Entry Interval (REI): Farm owners were required to implement a 72-hour REI for organophosphates used in particularly dangerous (arid) conditions, a 48-hour REI for pesticides in Toxicity Category I, a 24-hour REI for pesticides in Toxicity Category II, and a 12-hour REI for all other pesticides. These generic REIs were to be replaced by pesticide-specific requirements as pesticides were re-registered.
- (2) Personal Protective Equipment (PPE): Workers were required to use the PPE indicated on each pesticide label. Farm owners were responsible for providing, cleaning and maintaining the necessary equipment and for ensuring that workers wore the required PPE and avoided heat stress.
- (3) Notification of Pesticide Application: Farm owners were required to notify any workers within $\frac{1}{4}$ mile of the pesticide application site. This notice could be an oral warning or a written notice posted at the site. Where early entry was especially hazardous, both oral and written notice was required.
- (4) Decontamination stations: Farm owners were required to provide an adequate supply of clean water for washing in any fields where pesticides had been applied within the last 30 days.

- (5) Emergency response: Farm owners were required to post information about the nearest hospital at each worksite. If a pesticide poisoning occurred, farm owners were required to provide transportation to the hospital and to give emergency workers information about pesticides used.
- (6) Training: Farm owners were required to provide basic safety training for all workers and to provide pesticide-specific training on pesticide handling and use of required PPE for pesticide applicators/handlers.
- (7) Pesticide Information: Pesticide handlers had to be told what pesticides they were using and to have access to basic information about the pesticide. Other workers had to be able to request this information for 30 days after a pesticide was used in fields where they worked.

The final regulations generated much confusion and many complaints about the difficulty of compliance. In 1994, Congress intervened to delay implementation of some of the most controversial portions of the regulations, including the requirements to provide pesticide safety training for handlers and applicators and decontamination stations, to notify workers about pesticide applications and provide information about pesticides applied upon request, and to provide detailed pesticide information to emergency personnel in the event of a potential poisoning. Since then, the EPA has modified the regulations several times to give farm owners and operators more flexibility in posting pesticide information and in allowing workers to re-enter fields treated with pesticides deemed to be of low toxicity.

Revising the Worker Protection Standards

Negotiated Rulemaking Exercise – General Instructions

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) requires that pesticides be registered with the EPA, that their labels include appropriate safety information, and that they be used consistently with their labeling. FIFRA is intended to protect the environment, consumers of agricultural products and agricultural workers or pesticide users. In 1974, the EPA enacted regulations specifically to protect farmworkers (known as “Worker Protection Standards” or WPS). The original WPS banned spraying pesticides directly on workers (or other people); required that workers stay out of treated fields until pesticide sprays had dried and/or dust had settled or, if earlier re-entry was necessary, wear personal protective equipment (PPE); created a longer “re-entry interval” (REI) for 12 specific pesticides; and required “appropriate and timely” warnings to workers about pesticides used in the fields they worked in. 40 C.F.R. § 170.1 (1974) (initially printed at 39 Fed. Reg. 16888 (May 10, 1974)). In 1983, the EPA determined that these regulations weren’t sufficiently protective and decided to amend them. For this role play, we are returning to 1983 and the debate around amending FIFRA’s WPS.

EPA’s Proposal:

The EPA has noted several reasons for the amendments. Under the dried spray/settled dust rule, workers are returning to the fields without protective clothing as little as two hours after pesticide application, which raises safety concerns and is believed to have led to pesticide poisonings in some instances. Safety warnings are often not provided or not provided in clear and understandable terms. Individual farmworkers often are required to provide their own protective clothing (a hat, long-sleeved shirt, long pants, socks and shoes) and sometimes don’t have the required items. In addition, due to concerns about pesticide residues on consumer products, farmers are replacing less toxic but longer lasting pesticides (organochlorines) with more acutely toxic but readily degradable products (organophosphates).

To address these concerns, the EPA has proposed making some or all of the following changes to FIFRA’s Worker Protection Standards:

- (1) Implementing a uniform REI of either 24 or 48 hours for fields treated with “Toxicity Category I” pesticides (the most highly toxic pesticides on the market) or, at minimum, for fields treated with any organophosphates

(essentially a subset of Toxicity Category I pesticides). All other pesticides must follow the “until dust has settled/spray has dried” standard. These generic or category-based REIs will be used unless a chemical-specific REI is determined for a particular pesticide.

- (2) Requiring chemical companies to develop pesticide-specific REIs as part of FIFRA’s registration/re-registration process instead of creating a generic rule. (Note: New pesticides must be registered before being used in the field and must apply for re-registration every 5 years; however, the EPA is often behind in this process and pesticides waiting for re-registration can be used under the original registration terms.)
- (3) Expanding the definition of “protective clothing” required for early re-entry into treated fields to include chemical-resistant gloves and cloth or paper face masks that cover a worker’s nose and mouth. (Note: This is not a proposal for respirators.)
- (4) Requiring that, in addition to the oral warnings required under the current regulations, written warnings of pesticide applications be posted near each treated field and making crew leaders (middlemen who recruit and travel from farm to farm with migrant workers) directly liable for failure to provide appropriate warnings.
- (5) Setting specific quantitative limits for exposure to specific pesticides within a particular time frame and establishing routine monitoring requirements for total exposures. The limits would be set as part of FIFRA’s registration/re-registration process and would be based on data provided by manufacturers.
- (6) Mandating that decontamination stations (i.e. washing stations with an adequate supply of clean water) be made available at or near all fields treated with pesticides within the past 30 days.

The agency has called this negotiated rule-making to get consensus on the provisions to be included in the final rule and has circulated the proposals listed above as a starting point for discussions. The EPA has invited four groups to participate in the negotiations: Beyond Pesticides, an environmental and public health advocacy group; Farmworker Justice Fund, a farmworker advocacy organization; CropLife Association, a business association which represents pesticide manufacturers; and the American Farm Bureau Association, an organization which represents agricultural interests.

The negotiated rulemaking is not limited to the EPA’s specific proposals. The agency is willing to consider any ideas that further the goal of better protecting farm workers from unsafe exposure to pesticides. However, these initial proposals represent EPA’s best efforts to draft its own regulations. If the negotiations are unsuccessful, the EPA will return to the standard rulemaking process, which entails developing draft rules internally and only allowing public comment once a final

draft is complete. In that case, the proposed rules will closely resemble the options outlined above and the final rules are unlikely to deviate significantly from the initial proposal. The negotiated rulemaking offers the best opportunity for finding other ways of managing this problem and for creative collaboration among the stakeholders.

Two other issues may be on the table, although they would not be directly incorporated in the Worker Protection Standards. Farm worker advocates have been pushing the EPA to support adding a “citizen suit” provision to FIFRA that would let workers sue farmers or pesticide manufacturers who violate the law; under the version favored by farm worker advocates, workers could sue both to force compliance with the law and to get monetary damages for any harms caused by violations of the law or its regulations. (**NOTE:** The EPA cannot create a citizen suit provision. Only Congress can change the law. EPA support for the change would be politically valuable.)

Pesticide manufacturers and the agricultural industry want EPA support for the repeal of a provision in the Federal Food, Drug and Cosmetic Act, known as the Delaney Clause. This provision prohibits the sale of processed foods containing any carcinogenic food additives, including additives in the form of pesticide residues. As the ability to detect pesticide residues improves, smaller and smaller levels trigger Delaney Clause concerns, limiting the type and amount of pesticides that producers are willing to use on their crops. Industry has proposed replacing the Delaney Clause with a *de minimis* risk standard. (**NOTE:** Again, Congress must repeal the Clause; EPA can only lend its potentially politically-valuable support to the idea.)

Exercise Instructions:

To prepare, review any assigned background readings, this introduction and the role-specific information provided. Meet with your partner before class to develop a negotiating strategy, which should consider the following:

- (1) What are your group’s interests? How do those interests affect your preferred outcome on each of the possible regulatory revisions?
- (2) What are the likely interests of the other groups at the table? Who are your natural allies? What issues or concerns might block collaboration with the other groups? Can you imagine a way around those obstacles? A way to frame the issues that could unite everyone at the table?
- (3) What additional or alternative proposals might better serve your needs or be more likely to generate consensus? How could you structure a solution that would satisfy the interests of all the groups at the table?

- (4) What is the best outcome you can reasonably expect if there is no agreement? How will you protect your interests if the negotiated rulemaking is unsuccessful and how effective will that method be?
- (5) Every group has “private” information. What will you reveal and what will you keep to yourself? Why?
- (6) Who will you send to the negotiation? Will you and your partner be attorneys? scientists? executives with, or directors, of your group? firebrand activists? Think about what each role would add to the efforts to collaborate and choose strategically.
- (7) What negotiating style should you adopt? Will you take the lead in offering solutions or wait to see what others want? Do you want to focus on interests first or start hearing proposals? Should you ask for the moon and hope to get half or propose something you think others would actually accept?

We will spend the first 50-60 minutes of class in negotiations and the remaining time discussing results and debriefing. You can ask for breaks in the negotiation to confer with your partner or a private “sidebar” with another group. You can add information to your packet, if it is realistic and doesn’t contradict the general information provided. The EPA representative(s) will facilitate and record the negotiations. Remember, however, that the EPA may have interests of its own.

Losing the Delaney Clause wouldn't change pesticide use patterns much, but it would be a psychological defeat. The key for you is a citizen enforcement provision – too many workers are being poisoned on a regular basis with little or no legal recourse.

Your membership is relatively powerless in the traditional legislative and regulatory process. Many farm workers are non-citizens; most are poor; many can't read or write in English; most have never participated in a regulatory or legislative process. If the negotiated rulemaking fails and EPA goes back to its standard rulemaking procedures, you will not have access to EPA staffers while they are developing the rule and, in the past, you've had limited success in forcing changes to draft rules. If you can't make a difference in the negotiated rulemaking, you'll have to rely on the handful of lawyers, advocates, agency staffers and Congress members who have supported the group in the past to make your voice heard. Your best chance to affect the new WPS standards is during this negotiated rulemaking.

Additional Information for Beyond Pesticides representatives:

As indicated by your group's name, your primary goal is to reduce or eliminate pesticide use. Your primary concern is the effect of pesticides on the consumers of agricultural products and on the wildlife and natural areas near farms. If you can't eliminate pesticide use, you want to push for the development of more information about their effects on human health and the environment. Your group is sympathetic to farmworkers, since they're the frontline in pesticide exposure, but they aren't your primary constituents.

With that in mind, your concerns about re-entry intervals (REIs) are not related to whether farmworkers will be adequately protected. Longer uniform REIs would make pesticide use more complicated and costly and might convince farmers to use less. Pesticide-specific REIs, on the other hand, would generate valuable new information about the effects of pesticide exposures. Given your focus on the end use, you have been relieved to see the movement away from persistent pesticides, like DDT and other organochlorines. You would not want to create barriers to the use of their replacements – the organophosphates. For that reason, you are concerned about REIs that target organophosphates.

As already noted, you are sympathetic to farmworkers and would support additional precautions, such as written warnings, decontamination stations and protective clothing if it doesn't cost you anything. In fact, your membership is largely composed of liberal "greens" who can be expected to support farmworker rights and might be dismayed if you appear to support provisions that harm or exploit this group. However, you don't want to be seen supporting farm worker protections that allow continued use of high levels of pesticides.

You would prefer to keep the Delaney Clause, because it creates an incentive to reduce pesticide use. However, it is a pretty blunt instrument that only focuses on cancer risks. Your group is also concerned about other pesticide-related effects (such as endocrine disruption, neurological impacts on young children and babies and birth defects) that aren't covered by the Delaney Clause. A revised provision that replaced the absolute prohibition on carcinogenic residues with a *de minimis* risk requirement that covered a broader range of health impacts might better serve your membership.

Your organization has a national base and many of your supporters are well-off. You've developed successful campaigns against pesticides in the past around the risk that they pose to children and charismatic fauna (like frogs and songbirds). You feel confident that you can generate many supportive comment letters from environmentalists, families with children, and wealthy greens, even if you can't

match the money or scientific expertise that the pesticide industry and agricultural groups can produce. However, if negotiated rulemaking fails and the EPA goes back to the standard rulemaking procedure, your influence will be limited. Past experience has shown that grassroots campaigns are best at blocking bad regulatory provisions rather than advocating better ideas. Your best chance to affect the new WPS standards in a positive way is through this negotiated rulemaking.

Additional Information for American Farm Bureau Association Representatives:

Your primary concern is to avoid additional burdens on growers. You believe that pesticides and other “agricultural inputs” are necessary for adequate crop production and that the benefits of pesticide use in general dramatically outweigh the costs. Some recent studies have found that, without adequate herbicides, farmers would need an additional 70 million farm workers to control weeds, but would still lose 20% of their crops. While there are pesticide-related accidents, you believe that the health impacts of pesticide exposures are overstated and that many problems could be avoided if individual workers took responsibility for their own work.

You want to ensure flexibility for farmers, because some field work can't wait two or three days after spraying. For instance, some Northeastern blueberry farms have had recurring problems with blueberry maggots. These pests appear just before harvest and can devastate the crop. During the last growing season, growers were applying an organophosphate Category I pesticide every 7-10 days to keep the maggots in check. However, workers had to be in the fields daily during this crucial period. Because the pesticide didn't have a chemical-specific REI, workers could reenter hours after pesticide application. No serious health problems were reported and you are convinced that the blueberry crop would have failed that year if a more rigid REI was in place.

Along with flexibility, you're concerned about costs for growers. Protective clothing is fine, if growers don't have to provide it. Additional infrastructure, like decontamination stations and posted warning signs, or additional monitoring of farm workers' exposure to pesticides could be very costly. You've seen other problems with monitoring requirements. When it was required in Washington State, farm worker groups and environmentalists latched onto “elevated” pesticide levels in workers to force reductions in pesticide use even though there was no evidence that the “elevated levels” were actually harmful. More than anything, you're worried about the costs of a citizen suit provision and the many meritless lawsuits that farmworkers and environmentalists might file, if they had a direct way into court.

Repealing the Delaney Clause would not be tremendously important from a substantive ground, but it would be a huge symbolic victory. Your membership has been grumbling – and now loudly complaining – about this provision for years now and repeal could really energize them and give you the support you need for other initiatives.

Your membership is composed of both small farmers and industrial-size growers. You have a fair amount of money and great support in Congress. If you're not able to get what you need in these regulatory negotiations, you're perfectly willing to go over the EPA's head. However, you'd prefer that this debate not go public, since consumers are becoming more anxious about pesticide use. Your organization would have to choose its battles carefully to avoid creating a rallying point for environmental and public health advocates. In addition, even with strong membership and Congressional support, you would only be able to force change in a handful of provisions within any draft rule. Your best chance to affect the new WPS standards in a broad sense is during this negotiated rulemaking.

Additional Information for CropLife Association Representatives:

Your primary concern is to avoid additional regulatory burdens on pesticide manufacturers and disincentives for pesticide purchase and use. However, you have to balance those concerns against possible liability for pesticide-related harms.

Your organization believes that pesticide manufacturers are already under a substantial research burden from the pesticide registration process. Producing the data required by the EPA for FIFRA registration is costly. In addition, the more data that has to be reviewed for a particular product, the longer it takes for the EPA to issue the registration and for your membership to get the product to market. Routine data collection on farm workers could exacerbate this problem. The EPA would be under pressure to review all of the data being generated through this monitoring process, which you're concerned, could be of dubious quality. Your members would also have to invest in additional testing to respond to the data if farmworkers showed elevated pesticide levels in their bodies. In addition, where standardized monitoring has been implemented, states have responded to the mere presence of "elevated" pesticides in blood levels with restrictive regulatory proposals – whether or not the data showed that those levels were harmful.

In addition to concerns about manufacturers' bottom-line, however, you want to reduce the limits to and cost of pesticide use to increase your market. Flexible or short REIs, for example, would likely increase (or, at least, not decrease) sales. Although many of the Category I pesticides that have already been registered have longer REIs, the data you've seen supports an REI of 12 hours or less for at least 60% of the remainder. Similarly, limited grower responsibility for worker protection or decontamination gear could help your membership maintain and expand their market. On the other hand, clear and uniform Worker Protection Standards that place the burden on growers might limit manufacturer liability if a poisoned farmworker finds a way into court.

You also want to avoid fueling public concerns that pesticides are inherently bad or dangerous. Consumer demand for organic food can also affect your bottom line. Posted warnings could be problematic if they're too negative and become public. Requiring high-tech "moon suits" for field workers could convey the same message of extreme danger from pesticides. The Delaney Clause raises similar consumer concerns and restricts pesticide use – unnecessarily, in your opinion – for some growers. Getting rid of the Clause would be a coup for your group.

CropLife Association is a powerful lobbying organization with long ties to many of the major players in Congress. Your group also has significant financial

resources and access to a lot of technical data. Typically, CLA does not litigate, preferring “public education” and media campaigns. If the negotiated rule-making falls through, EPA will return to the regular rulemaking process – a process in which you feel comfortable in and have typically been able to protect your constituent’s interests. However, your group has most often accomplished this goal by blocking regulations entirely. The best way to ensure that your clients benefit from changes to the WPS is through this negotiated rulemaking.