On Negotiated Rulemaking

The Administrative Procedures Act delineates the two methods, formal and informal rulemaking, for promulgating agency policy. Formal rulemaking requires the agency to attend hearings where they present evidence and findings, cross examine witnesses, and make known the final policy that will be promulgated. While formal rulemaking is long and arduous, actions taken by agency's are protected by courts, unless it is "found to be… unsupported by substantial evidence [in the hearing] [5 U.S.C §706(2)(E)]." But unless specified in the agency's statute, agencies defer to informal rulemaking, or notice and comment rulemaking. Informal Rulemaking is otherwise known as notice and comment rulemaking for its requirement to give "interested persons an opportunity to participate in the rulemaking through submission of written data, views, and arguments" [44 CFR §1.4(c)]. Moreover, informal rulemaking lends the opportunity to agencies to consider factors that may not have been brought up in a hearing. The courts are tasked to protect these actions so long as the actions are not "arbitrary" or "capricious." Informal rulemaking has since its implementation been complimented with the negotiated rulemaking procedure. Negotiated rulemaking calls upon a committee of interested persons to negotiate components of a proposed rule, before the agency puts it out for notice and comment. Before the Negotiated Rulemaking Act was passed in 1990, agencies experimented with negotiated rulemaking by calling on advisory committees to discuss policy. Now, the process, formalized under the NRA states that the negotiated rulemaking procedure is to be used "if the head of the agency determines that [its] use…is in the public interest" [5 U.S.C. §563(a)]. However, when negotiated rulemaking produces regulations, which go against statutory mandates, the public interest fails to be protected. Time and time again, do we see implementations of negotiated rulemaking by the EPA failing to produce regulations that follow its statutory mandates under the Clean Air Act with respect to public health, exhaustive regulations, and technology advancement.

The main avenue by which the EPA protects the public interest is by providing "ample margin of safety" in its proposed regulation. One of the ways that it has the ability to do this is by creating New Source Performance Standards that demonstrate the "best system of emission reduction…[that] has been adequately demonstrated" [42 U.S.C §7411(a)(1)]. However, when the EPA was tasked to regulate woodstoves as part of a court ruling, the regulation passed by negotiated rulemaking failed to meet NSPS. The policy that came out included two categories each with their own standard. The more efficient catalytic combusted stoves had a more stringent regulation than those with out the catalytic combusters. While §112(d)(1) allows the EPA to "promulgate regulations establishing emission standards for each category or subcategory of major sources and area sources of hazardous air pollutants" and this regulation is within the ability of the EPA to approve, it fails to protect the public health by enforcing the need for the "best system of emission reduction."

In the previous case, the EPA's negotiating committee rightfully used its ability under §112 to divide the woodstove industry into categories that it could regulate separately, however, when faced with regulating the wood furnishing industry, it failed to use §112 to promulgate more extensive and restrictive emissions standards for the furniture industry. As it stood, this was another case of the EPA being sued to include

new hazardous chemicals, used in wood furniture coatings, under their review. The EPA decided that the best way to undertake this task would be by using negotiated rulemaking. The committee set one standard for the whole industry that only regulated "major" facilities which were around 750 of the 11,000. This committee could have utilized §112 to promulgate a policy which called for an exhaustive and comprehensive industry-wide emission standard for the 11,000 facilities through categorizing and subcategorizing the industry. However, a less than detailed regulation was promulgated in December of 1995, almost a year after the judicial decree called for the rule to be promulgated. Whether or not the delay was caused by the negotiated rulemaking, the law passed failed to include measures that would drive emission rates down across the industry.

In 1990, congress amended the CAA to include coke oven plants in §112(b) and called on the EPA to promulgate regulations by the end of 1992. The EPA decided to use negotiated rulemaking in an effort to meet the deadline set by congress.The coke oven industry, diverse in its methods and requirements for operation, directly pushed for regulation which would take into account a 30 day average rather than a daily maximum as desired by congress. Although in this case going against the statutory mandate created an opportunity to create statistically more stringent requirements of the coke oven plants, the promulgated rule was more lax than the one intended by congress and allowed daily emissions to reach toxic levels; acceptable if the plant maintains low levels the rest of the month.

As part of the long term emission standards required for coke oven plants, the negotiated rulemaking committee was asked to set standards based on the "lowest achievable emission rate" and as per §7411(a)(1), this would necessitate requiring the "best system of emission reduction…[that] has been adequately demonstrated" [42 U.S.C. § 7412(i)(8)(B)(i)]. In the coke oven industry, the best available technology was implemented in nonrecovery plants. Although the NSPS calls on industry to utilize the best available technology when bringing new plants online and renovating old plants, the negotiating committee decided to base standards off of by-product recovery plants a more inefficient type of plant. The standard was eventually set to 3.8% leaking rates of most doors and 4.3% leaking rate for tall and foundry doors based on by-product recovery plant capabilities, but a study showed that most plants were well below this threshold and that several plants which had been below the threshold began to increase emissions as a result of the lax regulation [Huntley Interview]. This case is a prime example of interested parties overriding the public interest and replacing it with more cost effective and biased solutions.

While negotiated rulemaking may prove useful in bringing conversations among groups that would only otherwise see each other in court, it has concerning effects on the EPA's ability to follow its statutory mandates. Members of congress, empowered by the support of their constituents, create laws that serve the majority of the public's interest. However, when agencies, which are extensions of congress do not follow their mandates to promote public health, industry wide improvements, and advancement of technology, society is worse off as a whole. When these failures can be linked to a root cause, it is imperative that congress and the EPA reevaluate their need and use of negotiated rulemaking for it fails to find a situation where the outcome is more likely to be "in the public interest."