Environmental Policy Can Happen: Shuttle Diplomacy and the Reality of Reg Neg Lite

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Abstract

In an era of congressional gridlock, innovation and pathways for the future of environmental policymaking are needed. The U.S. Environmental Protection Agency (EPA) has long been an innovator in environmental decision-making, reconciling stakeholder differences. Yet, with the decline of negotiated rulemaking (“reg neg”), the purpose of our examination is to offer insights into how a contemporary U.S. Environmental Protection Agency (EPA) creates rules. This exploratory study examines original interview data from actors involved during the creation of EPA rules to suggest that a present-day EPA uses a new approach, shuttle diplomacy, to develop rules. The findings from our research suggest this new rule development method can help agencies that might operate in an adversarial environment to reconcile stakeholder differences while writing the language of a proposed rule before publishing a Notice of Proposed Rulemaking. We argue this new rule development model is important for understanding the next generation of environmental rulemaking, not only in the U.S., but internationally as well.

Key Words: Environmental Protection Agency, interest group, shuttle diplomacy, rulemaking, rule development, regulatory negotiation, reg neg, innovation

In an era of congressional gridlock, the study of administrative rulemaking could not be of more importance for the future of environmental policy. Rulemaking scholars have addressed many important questions about how federal rules are developed in the United States. In particular, scholars have extensively studied the role of interest group influence during the various stages of the process ranging from rule development, notice-and-comment, to rule finalization (Golden, 1998; Naughton, Schmid, Yackee & Zhan, 2009; West, 2009; Kerwin, Furlong & West, 2010; Kerwin & Furlong, 2011; Rinfret, 2011a; Rinfret, 2011b; Rinfret & Furlong, 2012; Cook & Rinfret, 2013).[[1]](#footnote-1) With this role of interest group influence, the presumption is that rulemaking can be adversarial, with groups vying to shape agency rulewriting (Harter, 1982; McGarity, 1992; Kerwin & Furlong, 2011).

In order to reduce the adversarial nature of the rulemaking process, agencies such as the Environmental Protection Agency (EPA) sought to implement innovative solutions such as negotiated rulemaking or “reg neg.” Within this process agencies would develop proposed rules through consensual face-to-face negotiations with major stakeholders (Fiorino, 1995; Harter, 1982).[[2]](#footnote-2) However, scholars have criticized this rule development method for being time and resource intensive, producing few results (Coglianese, 1997); as such the process has declined in use (Lubbers, 2008). Nevertheless, Fiorino (2009) suggests that new innovative rulemaking procedures are needed for the complex environmental issues of the 21st century. More specifically, Fiorino calls for a new regulatory structure that is more collaborative and is based upon environmental performance. Thus, the question remains if the EPA is no longer using reg neg, what methods are they employing to create rules?

In order to address this aforementioned question, we turn to the 2007 Council for Excellence in Government Report, which stated that the Office of Transportation and Air Quality (OTAQ) within the EPA had adopted a new approach to create rules – shuttle diplomacy. Under this approach, the EPA’s OTAQ office serves as the honest broker among stakeholders, remaining the authority for designing regulation, but creating an open dialogue where a strong and trusting relationship can develop between the various stakeholders and the agency. During the process of shuttle diplomacy OTAQ shares their thoughts on regulatory efforts with the affected parties and asks for interpretations and expertise from stakeholders to inform the development of a rule. The intent of this rule development approach is to provide an atmosphere where stakeholders begin to trust in the process, because they are helping to create it. However, few authors have analyzed this process, and explained what shuttle diplomacy is and how it is employed at the EPA.

Therefore, the purpose of this paper is to offer an exploratory study addressing how the EPA uses shuttle diplomacy and if this constitutes a new innovative model to develop environmental rules. More specifically, we provide original interview data from agency personnel and stakeholders to suggest that the EPA’s use of shuttle diplomacy to reconcile stakeholder differences during rule development does indeed represent a 21st century rulemaking structure.[[3]](#footnote-3) Simply put, this research suggests that using this rulemaking method, in comparison to the conventional method, provides for better policy, due to the input of stakeholders. Perhaps more importantly, this study suggests that the EPA has successfully used this shuttle diplomacy method to produce national policy within an environmental policy arena that is fraught with controversy at all levels of government. As a result, the fact that the EPA has had success using shuttle diplomacy within a highly contentious political environment suggests that an agency within the U.S. or internationally could employ a similar model to achieve environmental goals.

Federal Rulemaking Processes

 As noted, scholars suggest (Fiorino, 2006; Klyza & Sousa, 2008) that innovation is needed for the future of environmental policymaking in the United States. One fruitful pathway for environmental policymaking is the administrative realm. For decades, agencies have been interpreting vague congressional statutes to create law through rulemaking processes. Yet, Fiorino (2006) argues, “The times are changing, and regulation should change with them. Regulation as we know it is due, not just for a tune-up but for a more basic overhaul that will make it more relevant and effective in a new era of environmental problem solving” (1). As such, there are agencies like the EPA that have tried to implement new incentives and programs to base regulation on performance, in order to make rulemakings more efficient and productive (Fiorino, 2006).

However, Fiorino (2009) argues that more must be done by federal agencies to improve rulemaking structures to fold in five basic objectives that include: (1) using legally enforceable and stringent performance standards, (2) differentiating among firms based on past and likely future performance, (3) promoting continuous improvement in environmental performance, (4) measuring environmental performance, and (5) creating mechanisms and relationships that build trust between the regulator and the regulated. As a result, it is imperative that scholars analyze the rulemaking structures employed by federal agencies to determine if these agencies are embracing new structures or favoring the previous inefficient processes. We argue that focusing on the EPA is of particular importance because few scholars have analyzed how the rulemaking process has changed at the agency since the decline of reg neg in the 1990’s.

While the broader connection between rulemaking and environmental policy is needed, it is first important to begin with a general understanding of U.S. federal rulemaking processes or, more specifically, EPA procedures. The Administrative Procedure Act (APA) of 1946 loosely outlines the stages of United States administrative rulemaking requiring notice of a rulemaking and a public comment period. However, Kerwin and Furlong (2011) argue that the process unfolds over the course of 11 stages. For the purposes of our discussion, these stages can be condensed into three, which include rule development, notice and comment, and the final publication stage.

Rule development, or the first stage, includes agency efforts to compile technical, scientific, and economic information regarding why a rule is necessary as well as how a rule should be developed. At this stage agency personnel work, often collaboratively to produce a draft proposal with an accompanying Regulatory Impact Statement. More recently, agencies have begun to include more stakeholder input at this stage of the process, which has historically been included most rigorously at the notice and comment stage.[[4]](#footnote-4) Most importantly, the informal communication that takes place between agency personnel and stakeholders is not subject to legal restriction at this particular stage in the process and is one way for agencies to collect information while mitigating costs (Rinfret & Furlong, 2012).

These interactions lead to the second stage, notice-and-comment, where the agency publishes a Noticed of Proposed Rulemaking (NPRM) in the *Federal Register* (a daily publication of all federal rules). Here, an agency grants 30 to 60 days for the public to formally participate in the process through the submission of public comments on the rule. When the comment period ends, the agency moves to stage 3, the final publication stage, and examines the comments to determine the language of the final rule. Once the rule is published in the *Federal Register*, the agency sometimes must prepare for litigation in the form of petitions for reconsideration of a rule from stakeholder groups. This is the basic process that agencies, such as the EPA, use in making their policies (Rinfret & Furlong, 2012).

*Interest Group Involvement*

Though it is clear that stakeholders are involved during the notice and comment stage, scholars have tried to determine just which groups are influential during this phase in the process (Kerwin and Furlong, 2011). The approach by scholars is to examine the comments submitted during the publication of an NPRM to determine influence. For example, some suggest that business groups dominate the phase in which participants can submit comments to an agency in regard to a particular rule (see Fritschler, 1989; Golden, 1998; Kerwin, 2003; Kerwin & Furlong, 2011; Magat, Krupnick, & Harrington, 1986; West, 2004). In examining the EPA’s regulatory standards for water pollution, Magat et al. (1986) concluded that industry interest groups participated far more often than any other group in agency rulemaking. Fritschler (1989) built upon this study and analyzed the agency rule to place warning labels on cigarettes, concluding that business organizations indeed influenced the writing of this final rule.

In comparison, Golden’s (1998) research questioned the amount of interest group influence during notice-and-comment. In her examination of eleven regulations across three different agencies she concluded that business groups dominate the notice-and-comment processes for federal rulemaking. However, Yackee (2006) critiqued Golden’s work, challenging the field to understand the behaviors of interest groups during rulemaking. As a result, McKay and Yackee (2007) offered an analysis of forty rules across several agencies to conclude that interest groups do not compete with one another when submitting comments to an agency during notice-and-comment.

As noted, stakeholders have also become increasingly involved during the first stage of rulemaking – rule development, which deserves analysis (see West, 2009, Hoefer & Ferguson, 2007; Naughton et al., 2009; Rinfret, 2011a; Rinfret, 2011b; Rinfret & Furlong, 2012; Yackee, 2012; Cook & Rinfret, 2013). For example, Hoefer and Ferguson (2007) claimed that interest groups use their resources to give agency decision makers advice during the pre-proposal stage in exchange for gaining a better idea of what actions an agency is considering taking. Naughton et al. (2009) and West (2009) similarly asserted that an additional pathway for interest group influence is the rule development phase. Rinfret’s (2011a) examination of the U.S. Fish and Wildlife Service suggested interest groups that participate during the rule development phase shape the language of an NPRM in working “behind the scenes.” Thus, stakeholders are clearly involved in the rule development phase of the process.

*Creating EPA Rules*

However, the question remains, amidst this interest group involvement, how do agencies and in particular the EPA, create or develop proposed rules. When it comes to EPA rulemaking processes, Furlong (1995) and McGarity (1998) assert that the EPA follows a “team model” or “bureaucratic pluralism” when it comes to the promulgation of rules. As McGarity (1998) argues, “No individual within the EPA has genuine expertise in all of the required areas. The expertise upon which rulemaking edifice rests is thus an ‘institutional expertise’ that transcends the knowledge and experience of any individual person or office within the agency” (p. 61). As noted by Furlong (1995), this occurs because the EPA operates under many authorizing statutes. Basically, representatives from all subunits within the agency who have an interest in the outcome of a rule can participate in the process and bring forth the necessary scientific, engineering, management, enforcement, economic, legal, or political perspective (Rinfret & Furlong, 2012). However, this represents the more agency focused regulatory structure, and not the more innovative stakeholder focused structure promoted by Fiorino (2009).

In comparison, as noted in the introduction, the EPA has experimented with the rulemaking process - reg neg to include stakeholders in the rule development stage. This was an effort to offer working relationships with stakeholders, which appears to exemplify Fiorino’s fifth objective of a new regulatory approach. As Harter (1982) has explained agencies have used the reg neg model to diminish the often adversarial nature of federal rulemaking by creating a process in which groups can work together to develop the language of an NPRM.[[5]](#footnote-5) Moreover, this technique for developing rules was endorsed by the Administrative Conference of the United States (ACUS).[[6]](#footnote-6)

However, scholarship about reg neg as a positive rule development approach has been mixed. The largest areas of dispute surround the timeliness of the process, cost, and participation. Harter (1982) and Kerwin and Langbein (2000) suggest that those who participate in a reg neg can help to produce rulemakings that accommodate and resolve the concerns of interested parties, as they work together to develop the language of a rule. Susskind and McMahon (1985) affirm Harter’s (1982) work in their investigation of the EPA, suggesting that while the approach might take more time upfront to produce rules, it does produce rules all sides are comfortable with, reducing the likelihood of litigation.

In turn, Fiorino (1988) stressed that although the reg neg process was an effective method to produce rulemakings, the process inherently limits the parties involved at the table to discuss the rulemaking. More specifically, Coglianese’s (1997) empirical assessment of over 67 reg neg’s, claims that the reg neg process leads to additional conflict because the agency selects certain groups over others to become involved. In a similar vein, Steinzor and Strauss (1987) are particularly critical of the EPA’s reg neg process, stating that if public interests want to participate in the process it is expensive for groups to join in terms of time and labor costs. Despite the mixed reviews about reg neg as a rule development approach, Lubbers (2008) notes that from 2000-2007 only twenty-two federal rulemakings used this approach, and the EPA accounted for only 1 of those. Not surprisingly then, the EPA has publicly claimed that it no longer uses the reg neg process (Lubbers, 2008). Thus, this technique is in decline across the bureaucracy due in part to the demise of its original supporter the ACUS and tight agency budgets (Kerwin & Furlong, 2011; Lubbers, 2008). Nevertheless, reg neg still represents a method that would promote Fiorino’s (2009) new innovative rulemaking process, but with its decline what have agencies such as the EPA done to replace this method?

Some scholars (Kerwin and Furlong, 2011; Lubbers, 2008) claim that agencies continue to seek the input of stakeholders during the rule development stage, but they are now using less burdensome methods known as “reg neg lite.” Unfortunately, reg neg lite is not fully defined or understood by rulemaking scholars.[[7]](#footnote-7) However, recall in 2007, the Council for Excellence in Government stated that OTAQ, a division within the EPA is using a new method to create rules, shuttle diplomacy. In the following pages we argue that shuttle diplomacy is indeed a form of reg neg lite that not only OTAQ, but the rest of the EPA, is employing in order to increase collaboration and build trust with stakeholders to reduce conflict within one of the most controversial agencies in the U.S. bureaucracy.

Examining the EPA

In order to draw conclusions about how a contemporary EPA creates rules, this study utilizes an exploratory case study research approach. As Yin (2003) clearly states, “The case study method allows investigators to retain the holistic and meaningful characteristics of real-life events – such as individual life cycles, organizational and managerial processes, neighborhood change, international relations, and maturation of industries” (p. 2). We interviewed thirty-five individuals including agency personnel (rule-writers) and members of interest groups using semi-structured phone interviews from 2008-2011.

*Case Selection*

The EPA is a top rule-writing agency and was chosen for this investigation due in part to its adoption of the rule development method, shuttle diplomacy. Thus, two cases (Control of Emissions of Air Pollution from Locomotive Engines and Marine Compression Ignition Engines Less than 30 Liters Per Cylinder and Regulations for a Renewable Fuel Standard Program for 2007 and Beyond) were chosen. These cases were selected because they were both created by OTAQ,[[8]](#footnote-8) which was the first office within the agency to incorporate “shuttle diplomacy” into its rulemaking processes (Council for Excellence in Government, 2007). Shuttle diplomacy, according to the Council for Excellence in Government (2007), requires that agency personnel discuss issues with affected stakeholders in one-on-one meetings, and the goal of this approach is for the agency to strike a balance between competing stakeholder arguments during rule development.

 To ensure that these cases are also applicable for future research, we took into consideration the Office and Management and Budget’s (OMB) priority categorizations for each case. These categories comprise a five-point scale: a rating of 1 indicates an economically significant rule, defined as one with an annual impact of $100 million or more on the economy; 2 indicates a rule with some other significant impact, such as a substantial impact on the public interest; 3 indicates a rule with a substantial non-significant impact, such as one that will produce information an agency wishes to collect on an issue; 4 indicates a rule with a routine or frequent impact, such as one that will produce standard information; and 5 indicates a rule with an information/administration/other impact, such as the creation of a new administrative task for an agency. We narrowed our case selection to rules ranked 2 or 3, “other significant” or “substantive non-significant” impact, so the cases would closely match average significance on the OMB scale. This project, then, remains within the average and does not focus on outliers (Rinfret, 2011b).

*Interview Selection*

Twenty-five of the interviews (agency rule-writers and interest groups) were conducted from 2008-2009, which focused on two EPA case studies within EPA’s OTAQ.[[9]](#footnote-9) Interviewees for the locomotive and marine engine rule included six individuals from the agency and ten different individuals who represented groups for environmental and industry organizations ranging from public health advocacy groups, state and local governments, and engine manufacturers. For the RFS1 rule, two agency personnel were interviewed and nine individuals who represented environmental groups, state and local governments, the biofuels industry, farming organizations, and industry representatives. [[10]](#footnote-10)

The remaining ten interviews were with agency officials across media (air, water, and waste) to additionally examine the EPA’s rule development stage and to determine if shuttle diplomacy is a method used by the entire agency or just OTAQ. The Federal Register and Unified Agenda were used to identify individuals for initial interviews and later a snowball method was used to ascertain additional interview subjects for the cases. This interview approach was employed because in-depth interviews help to record more fully how subjects arrive at their opinions (Gerring, 2007).

 The following first examines the twenty-five case study interviews in order to unpack rule development methods used by the EPA’s OTAQ. Then, we report findings from ten interviewees conducted with agency personnel from across EPA media (air, water, and waste), offering important insight and evidence about how rules are crafted in a present-day EPA.

Findings and Analysis

The analysis of the interview responses in this section examines agency and interest group interactions for two rules developed by the EPA’s OTAQ. The following analysis ultimately illustrates that shuttle diplomacy or a version of reg neg lite has been adopted by the EPA to produce proposed rules. Moreover, we illustrate that this process represents a step towards Fiorino’s new 21st century regulatory regime. Thus, this section first begins with a brief overview of each case, followed by an examination of the interviews.

*OTAQ, Engines, and Fuel[[11]](#footnote-11)*

The EPA’s Renewable Fuels Standard (RFS1) rulemaking is reportedly the first-of its-kind because under the Energy Policy Act of 2005, Congress instructed the EPA to create a renewable fuels standard program (EPA, 2008c).[[12]](#footnote-12) As such, agency personnel for the RFS1 rulemaking were tasked with creating a rule to regulate the usage of renewable fuels. The idea was that the agency would be able to work with a variety of stakeholders to not only regulate renewable fuels, but also help to lessen the United States’ dependency on foreign sources of fuel. As one industry interviewee noted, “This was not an easy rule to develop, it is new, but the agency is trying to reach out to individuals.”

The second case, or the Locomotive and Marine Engine Rule originated within the EPA OTAQ office because the agency’s air-quality data had shown since the 1990s that these locomotive and marine engines have produced pollutants, such as particulate matter and nitrogen oxide, which have impacted over one hundred million people (EPA, 2008b).[[13]](#footnote-13) Therefore, the purpose for this EPA regulation was to curb emissions for newly manufactured locomotive or marine engines that are less than thirty liters per cylinder. In effect, this rulemaking updated the standards set in 1998 (regulating exhaust standards for post-1972 engines) to curb nitrogen oxide, particulate matter, and carbon dioxide emissions. According to one interviewee, “We saw this rule coming for a long time; first they regulated smaller engines, and this regulation was to be expected. The data has been growing since the 1990s. It is a public health hazard.”

*Perspectives about Rule Development*

 As such, to move beyond the basic descriptions of each case, interviewees across the cases provided a significant amount of information regarding the EPA’s (OTAQ) rule development process. Recall, rule development is the first stage in the U.S. federal rulemaking process in which an agency works with stakeholders to discuss and create the language often used in the NPRM published in the Federal Register.

Although EPA officials suggested that the agency tried to compile as much scientific information as possible on their own, agency interviewees noted that their informal communications with stakeholders were vital to the creation of both rules. Or, as one agency official noted, “We have a lack of resources and many environmental and manufacturers groups have the funding to conduct research that we cannot. We can use this information from both sides to think about how to create a rule.” Moreover, another EPA staff member noted that for the Locomotive and Marine Engine Rule: “We work really hard to establish a working relationship with all stakeholders prior to the NPRM. We call them, they call us, we send emails, or will conduct site visits with an industry. In terms of engine emissions standards, we have been working on this for a while, with cars and then trucks. . . . Groups saw the Locomotive and Marine Engine Rule coming.” Likewise, an agency rule-writer from the RFS1 rule stated, “For this particular rule, we had to start from scratch and needed to work with a variety of stakeholders in order to craft an NPRM.”

 However, there were clear differences in how groups perceived the problem suggesting that the finished product from the agency could result in significant controversy depending upon what the final language included. Beginning with the Locomotive and Marine Engines Rule, respondents from the environmental and public health communities stated that they used public health death rates to inform EPA agency personnel that nitrogen dioxide emissions from these large engines were a public health problem. In particular, three public health interviewees stated, “We provided the EPA with data (health and scientific) to explain that pollution from locomotive and marine engines needed to be addressed.”

In comparison, industry groups that represented locomotive and marine engine manufacturers used economic indicators to express to the EPA that emission reductions could be made in the future. According to one representative from the railroad industry, “We knew that regulations were coming and did not want them to be catastrophic to the manufacturing economy.” Or, as one marine engine manufacturer stated, “We wanted the EPA to understand the costs and benefits. Being regulated is not fun, and could hurt our companies.” As such, these economic indicators were used to show the costs of improvements over time and how those costs can impact businesses. Therefore, it is clear that within the Locomotive and Marine Engine Rule case, the agency was receiving competing data in which public advocacy groups argued for strong regulations based on the health effects associated with these pollutants, while industry groups were trying to persuade the agency to take the economics of the issue into account before publishing a rule that could be detrimental to their industry.

The RFS1 case also illustrates that the agency was dealing with competing interests. Similarly to the perspective of the engine manufacturers above, industry officials (biofuels/ethanol/farming) also wanted to offer the benefits of economic modeling for the RFS1 rulemaking. The idea was that economic modeling would be beneficial for the agency and industry to “dig deeper into how increased biofuel and ethanol production would impact the U.S. agricultural system.” Comparatively, environmental groups and scientists suggested the EPA implement a rule that provides cleaner fuel, but without the expense of the environment. The priority for these groups was to develop a rule that would help to fight global warming. One interviewee explained, “Scientific and environmental organizations have economic models, and that industry can create cleaner fuels to decrease harmful global warming-causing emissions.”

However, their major concern was that this new technology would not be used and increased biofuel and ethanol production would ultimately increase greenhouse gas emissions. According to one interviewee, “We work from the ground up and know that biofuels have the potential to be very good and very bad. If done wrong, biofuel production can increase global warming.” As such, in this particular case, we have industry and scientific organizations using economic modeling to explain different facets of the issue, and the EPA used this data to develop the language of the proposed RFS1 rule.

 As a result, the aforementioned findings illustrate that the EPA received input from a variety of groups with different perspectives on how to address a policy issue during the rule development phase within these two cases. Moreover, it is apparent the stakeholder groups involved used economic modeling, public health information, or scientific data to frame the debate under their terms. Not surprisingly, these competing groups used this information to promote widely different policy outcomes.

For example, in the Locomotive and Marine Engine Rule the engine manufacturing companies argued that in order to keep pace with the technology necessary to implement the proposed rule, they needed more time to ensure locomotive and marine engines became cleaner (Interviews with authors, 2008). In comparison, environmental groups, such as the NRDC were promoting a strong efficiency standard for these new engines (Herbert, 2004). For the RFS1 Rule disagreement about the content and timing of the rule was also prevalent, but the protagonists reversed. In this case, several industry organizations interviewed stressed that the U.S. needed to quickly, “Move forward for a renewable fuels standard not only to lessen our reliance on foreign sources of fuel, but to also recognize the costs associated with the rulemaking.” While the environmental groups interviewed in this case were the ones pumping the breaks, arguing that “Sure, this rule should be environmentally friendly, but we have to make sure that this is indeed the case.”

 As a result, it is clear that these groups had competing views on how these policies should unfold and that OTAQ solicited their input during the rule development phase. However, it is one thing for the agency simply to seek input and it is quite another if the agency actually uses that input. Therefore, a reasonable question at this juncture is did OTAQ allow for any “winners and losers” during this stage, where some groups were more impactful than others on the language of the proposed rule published in the Federal Register.

First, it is important to note that all interest group interviewees stressed the importance of being able to meet informally with the agency to express their concerns, offer their expertise, and ask questions during the rule development phase. These meetings did not occur with all groups sitting around the table like reg neg, but rather informally through phone conversations or meetings with the agency one-on-one. In any case, the stakeholder interviewees clearly valued these interactions with the agency.

But did the agency favor one side over the other? The EPA responded that they tried to “strike a balance between the differing perspectives during the development phase of this rule.” As such, one EPA interviewee noted, “No particular group won or lost. We were interested in hearing the major concerns of groups, examining the information received, and then developing the language for the rule.” According to another agency official, “It is vital for the EPA to find common ground on problem definition for this rulemaking to avoid future controversy.” It is not surprising the EPA would argue they did not favor one side over the other, but what was most interesting from the interview data is that approximately ninety-five percent of the stakeholders interviewed affirmed it was indeed the case that OTAQ tried to find this balance.

In fact, these stakeholders were particularly supportive of the process, and kept asking us at the end of each phone interview if we had heard of the new rule development method, shuttle diplomacy, that OTAQ is using. For example, an industry representative stated, “We do have our differences, but it should be noted that OTAQ is using shuttle diplomacy to bring all of our perspectives together on paper, in the draft rule.” Thus, it appears that OTAQ is clearly inviting the informal participation of stakeholders in the rule development stage, while also trying to find a common ground between the affected stakeholders before proposing a rule in the Federal Register.

As such, the shuttle diplomacy approach and more specifically the EPA’s goal to strike a balance among stakeholders regarding a given rulemaking during the rule development stage, clearly resembles the main goal of the reg neg process –consensus building. However, shuttle diplomacy and reg neg are clearly not the same thing as the process occurs informally, the stakeholders involved are not limited, and the agency does not have to gain unanimous consensus regarding a particular rule. As a result, we argue that shuttle diplomacy can best be described as a form of reg neg lite, because it attempts to achieve the same main goal of consensus building without being burdened by the significant formal requirements of the reg neg process.

Moreover, we argue that shuttle diplomacy, as it is used at the EPA is indeed a new regulatory approach born from reg neg that builds relationships between the agency and stakeholder groups. More specifically, these interactions between the agency and stakeholders can build trust, which is important in breaking down barriers to communication. Increased communication, according to Fiorino (2006), will result in more innovative policy by providing agencies accurate information about costs and performance. Therefore, shuttle diplomacy, as used at OTAQ, has led to more innovative policy, as argued by the agency and stakeholders interviewed here, by opening up these communication pathways between the agency and stakeholders.

 However, the question becomes is OTAQ and its shuttle diplomacy process an anomaly within the EPA? Simply put, is the EPA’s OTAQ the only division within the agency to adopt this rule development approach? To address this question, we conducted additional interviews with agency rule-writers across media.[[14]](#footnote-14)

 First, it is important to note, how agency personnel across EPA media view the rule development phase. As was the case in the above OTAQ rules, rule-writers suggested that the rule development stage is crucial for gathering information. In the words of one rule-writer, “The rule development stage is critical. It is similar to baking a cake. We have to gather the ingredients to bake the cake. This way we know what the rule is going to look like before you publish it in the Federal Register.” Another rule-writer from the waste division put it more bluntly, “From my perspective, the rule development stage is extremely important. It is where we really try to understand all of the aspects of the rule so when we propose something we don’t come out with something silly or stupid. You don’t want to propose something that is half baked.”

 Thus, this stage is clearly important, but are other divisions within the agency using the same rule development method – shuttle diplomacy? Over half of the respondents suggest that this is the case. For example, one interview noted, “I believe that Henry Kissinger was the first to use the term shuttle diplomacy, but this phrase has been incorporated into not only OTAQ, but across the agency.” Another interviewee claimed, “We are talking with a variety of groups to garner additional expertise to propose a rule – you know, consensus building.”

 The remaining respondents suggested that they do not necessarily call their approach to rule development shuttle diplomacy per se, but the theme of talking with a variety of groups to gather information is still the same. For example, one rule-writer stated, “We might call them brown bags, or listening sessions. Basically, we are conducting outreach to talk with groups about the creation of a rule.” Similarly, a respondent suggested, “Shuttle diplomacy is a good approach and I have heard of it, but sometimes we just call it outreach. We are reaching out, bringing different groups in to discuss a rule.”

 Collectively, across the interviews conducted with the two case studies and the rule-writers from across the EPA, all of the interviewees strongly suggested that discussions with stakeholders about best available science, the law, and economic factors are not only helpful, but a healthy approach to develop rules. According to one interviewee, “The EPA builds consensus early in the process. And, the rule development stage is the MOST important stage in the process. When a rule is proposed in the *Federal Register* it is 90-95% done.” Therefore, the EPA believes that bringing the practical knowledge and expertise of affected stakeholders into the process at this early stage is critical in producing a more appetizing cake for all the parties involved, prior to applying the frosting, or more specifically submitting it for the notice and comment stage.

Discussion and Implications

 Although this research is exploratory in nature, it does offer important implications for scholars and practitioners. First, one important finding from this study is providing how a present-day EPA creates rules. This understanding is imperative because environmental policy is being made in the administrative realm due to congressional gridlock (Klyza & Sousa, 2008). However, Fiorino (2009) argues that agency rulemaking processes must be improved in order to provide new and innovative methods to produce this policy. Therefore, we need to understand what processes agencies like the EPA are using to make these decisions, in order to determine how they might improve those processes to meet Fiorino’s objectives.

Yet, since the decline in use of the formal process of reg neg, there has been a lack of literature discussing how the EPA has retooled its process to incorporate stakeholder involvement early in the process (Lubbers, 2008). Therefore, this research provides some insight into how the agency is conducting its current process. More succinctly, through incorporating the most effective components of the reg neg process into a package of “reg neg lite” or what we define in this article as shuttle diplomacy, the agency has made strides to build working relationships with stakeholders to produce more effective and innovative rules (Kerwin & Furlong, 2011; Lubbers, 2008)

More specifically, Coglianese, (1997, 2001, 2003) argues that reg neg actually causes greater conflict and distrust between interest groups and the agency than traditional rulemaking, because many groups are inevitably not included in the negotiating group. Therefore, though on paper the reg neg process attempts to achieve Fiorino’s fifth objective for a new regulatory approach by bringing in stakeholder groups early in the process, in practice it fails to reduce controversy and build trust between the agency and the regulated community.

Therefore, the effectiveness of the shuttle diplomacy process is derived directly from this criticism. In this case, the agency does not limit its discussion of a rulemaking with a small subset of interest groups that may alienate some groups; rather the agency can discuss the rule with many groups informally and collect a much larger pool of data regarding a policy area.[[15]](#footnote-15) Moreover, this allows the agency to determine in what areas they may have consensus regarding the language of the rule and those areas that remain contentious, which can narrow the focus of the discussions in the latter stages of the process.

This helps to explain the next implication of this study, that the EPA is not just an environmental agency hell bent on destroying American jobs as some regulatory critics suggest. To the contrary, the interview data suggests, the EPA in this case, considers diverse perspectives and makes an effort to balance competing environmental and economic interests. Moreover, the agency uses these informal discussions to gauge the interests of stakeholders regarding various policy options, discussing the feasibility of particular methods to regulate a given air pollutant or sector of the economy. The agency then can discuss the concerns of one group of stakeholders with another in order to discern why discrepancies may arise between competing data and research which allows the agency to determine where and what type of compromise may be most appropriate in a given policy area.

Though this may seem commonsensical from the agency’s perspective, in that they would like to appear like honest brokers, to reduce litigation, the fact that stakeholder groups believed the EPA was actually doing this is particularly revealing. More specifically, as stakeholder groups begin to appreciate the efforts of the EPA to hear their concerns and attempt to rectify them, they can begin to trust that the agency is not favoring one side or the other. This is the first step towards building a trusting relationship where stakeholders can begin to believe that the agency “will not act against [their] interests, at least not without warning and for good reason” (Fiorino, 2009, 76). It is exactly this trust, or the belief that the agency is trying its best to rectify competing interests, that allows for the innovative regulation that Fiorino and other regulatory scholars have been calling for the past twenty years.

 Lastly, the findings from our study provide one more important insight - that the rule development stage is crucial to defining the latter stages of the process or as the interviewee noted above – this stage is the ingredients in order to bake the rulemaking cake. It is the informal communication between the agency and stakeholders that really does shape the language of a rule (Rinfret, 2011a). Therefore, once the rulemaking reaches the notice and comment period, although the agency can make changes, much of the policy underpinning the rule has already been finalized.

As a result, Fiorino’s trust building and collaboration must occur at this stage of the process, as opposed to stages 2 and 3, because this is where most of the language is decided. Though the later stages are important, and particularly stakeholder and agency interactions, the EPA and the rest of the bureaucracy must incorporate this input early in the process in order to truly build this trust. In fact, we argue that Fiorino’s other four objectives based upon performance that would solidify the new regulatory regime are not possible, unless agencies work on developing these working relationships with industry to develop the trust that allows for innovative practices to occur. For example, most of the performance based programs outlined by Fiorino (2006; 2009) have fallen into disuse, or have been criticized as too lenient on industry (Press & Mazmanian, 2013). This is potentially because environmental groups may have felt they were not included in the discussions to create the programs, leading them to believe that the agency was not listening or protecting their interests.

Therefore, we conclude that the inclusion of shuttle diplomacy, is one method that could be adopted outside of the EPA to begin to foster working relationships between stakeholders and the bureaucracy in order to finally realize the new regulatory regime that has been discussed since 1992, but has yet to fully materialize (Press & Mazmanian, 2013).

Conclusion

Overall, this research has attempted to provide a contemporary perspective about a new approach, shuttle diplomacy, a version of reg neg lite, which the EPA is using to create environmental rules. We argue that this approach is important for the future of environmental policy because the “government will steer more than row” (Fiorino, 2006, 20). In addition, with declining or stagnating administrative budgets (Kerwin & Furlong, 2011) agencies will continually rely more on outside sources of information to produce rules. Therefore, we argue that shuttle diplomacy provides one example of what reg neg lite really entails in the modern bureaucracy.

Moreover, we conclude that shuttle diplomacy may be more explanatory of what the EPA is actually doing to replace reg neg as opposed to the vague definition of reg neg lite provided by previous scholars. Recall, Kerwin and Furlong (2011) suggest agencies are just selecting parts of the reg neg process and folding them into traditional practices. Ultimately, understanding what reg neg lite really is and how it is used is especially important for scholars and practitioners because “what is needed now is a more dynamic, adaptive approach that creates capacities for learning, sharing of responsibility, and continuous improvement” (Fiorino, 2006, 224).

Thus, it is clear that the EPA is using shuttle diplomacy to produce more innovative rulemakings. However, this may not be the only method in which agencies are attempting to fold in components of reg neg to develop more dynamic rulemaking processes for the 21st century. This research provides a starting point for future scholars to compare and explain efforts outside of the EPA to develop new rulemaking structures and in doing so provide a more concrete definition of reg neg lite. For instance, future researchers could use the same methodological and theoretical components discussed here in order to investigate rule development within other agencies in the U.S. or internationally.

Another example of research could assess whether agencies that include reg neg lite procedures are more successful in developing performance based regulatory programs. This is particularly important, as this research seems to suggest that agencies may have put the cart before the horse by developing performance based programs without developing the needed trust and collaboration first. Therefore, scholars and practitioners may wish to restructure Fiorino’s (2009) objectives to place developing collaboration and working relationships first as a prerequisite to create new regulations that are a strong departure from the status quo. In doing so, stakeholders and practitioners may begin to trust that administrative agencies are indeed attempting to develop rules that produce a win-win for everyone rather than picking winners and losers as these agencies are so often decried for doing.

In short, this research suggests that shuttle diplomacy is a useful rulemaking method for administrative agencies to break the adversarial nature of environmental policymaking. There is nothing to suggest that this rulemaking method cannot be used across agencies in the U.S. or internationally. Nevertheless, it may indeed be through shuttle diplomacy that not just the U.S., but a global community develops the next generation of environmental policymaking.

References

Administrative Conference of the United States (ACUS) (1982). Recommendation 82-4,

Procedures for Negotiating Proposed Regulations. In *Federal Register*, 47, 30708.

Administrative Conference of the United States (ACUS). (1995). Building consensus in agency

rulemaking: Implementing the Negotiated Rulemaking Act. Retrieved from http://archive.org/details/gov.acus.1995.consensus. Accessed 30 April, 2012.

Coglianese, C. (1997). Assessing consensus: The promise and performance of negotiated

rulemaking. *Duke Law Journal*, *46*, 1255-1348.

Coglianese, C. (2001). Assessing the Advocacy of Negotiated Rulemaking: A Response to Philip Harter. *New York University Environmental Law Journal, 9,* 386-447.

Coglianese C. (2003) Is Satisfaction Success? Evaluating Public Participation in Regulatory Policymaking. In O’Leary, R., & Bingham, L., eds, *The Promise and Performance of Environmental Conflict Resolution* (69-86). Washington D.C.: Resources for the Future Press.

Cook, J.J. and Rinfret, S.R. (2013). The EPA Regulates GHG Emissions: Is Anyone Paying Attention? *Review of Policy Research* 30(3): (263-80).

Council for Excellence in Government. (2007). *Working with stakeholders: The*

*nonroad diesel rule*. A report prepared for the USEPA Office of Air and Radiation, Office of Transportation and Air Quality, Washington, D.C.

Environmental Protection Agency. (2008a). *Summary and analysis of Comments:*

*Control of emissions of air pollution from locomotive engines and marine compression ignition engines less than 30 liters per cylinder*. Chapter One. Report by EPA’s Office of Transportation and Air Quality.

Environmental Protection Agency. (2008b). *Nonroad, engines, equipment, and*

*vehicles*. Retrieved from http://www.epa.gov/OMS/locomotv.htm.

Environmental Protection Agency. (2008c). *EPA finalizes regulations for a renewable*

*fuel standard program for 2007 and beyond*. Retrieved from http://www.epa.gov/otaq/renewablefuels/420f07019.htm

Field, A.B. and Robb, K.E.B. (1990). EPA Rulemakings: Views from Inside and Outside. In *Natural Resources and Environment* 5(1) (p. 9-13).

Fiorino, D. (1988). Regulatory negotiation as a policy process. *Public Administration Review*,

*48*(4), 764-772.

Fiorino, D. (1995). Regulatory negotiation as a form of public Participation. In Manpower, J.,

Renn, O., (Eds), *Fairness and competence in citizen participation: Evaluating models for environmental discourse* (223-237). Location: Publisher.

Fiorino, D. (2006). *The new environmental regulation*. Cambridge, MA: MIT Press.

Fiorino D. (2009). Regulating For the Future: A New Approach for Environmental Governance. In Mazmanian D.A. & Kraft M.E. (eds.) *Toward Sustainable Communities: Transition and Transformations in Environmental Policy.* Cambridge, MA: MIT Press

Fritschler, A. L. (1989). *Smoking and politics*. Upper Saddle River, NJ: Prentice Hall.

Furlong, S.R. (1995). Reinventing regulatory development at the Environmental Protection

 Agency. *Policy Studies Journal*, *23* (3), 466-482.

Gerring, J. (2007). *Case study research: Principles and practice*. Cambridge University Press.

Golden, M. (1998). Interest groups in the rule-making process: Who participates? Whose voices

get heard? *Journal of Public Administration Research and Theory*, *8*(2): 245-270.

Harter, P. (1982). Negotiating regulations: A cure for malaise. *Georgetown Law Journal*, *71*,1-116.

Hebert, H. J. (2004). *EPA directs pollution cuts for locomotives, ships, and ferries*.

Retrieved from http://seattletimes.nwsource.com/html/localnews/2004282753\_apshiptrainpollution1stldwritethru.html

Hoefer, R., & K. Ferguson. (2007). Controlling the levers of power: How advocacy

 organizations affect the regulation writing process. *Journal of Sociology and Social*

 *Welfare*, *34*(2), 83-108.

Kerwin, C. M. (2003). *Rulemaking: How government agencies write law and make policy*.

 Washington, D.C.: Island Press.

Kerwin, C. M., & S. R. Furlong. (2011). *Rulemaking: How government agencies write law*

*and make policy*. (4th Ed.)Washington, D.C.: CQ Press

Kerwin, C., S. R. Furlong, & W. West. (2010). Interest groups, rulemaking, and American

bureaucracy. In *The Oxford handbook of American bureaucracy*, R. Durant, ed. Oxford, UK: Oxford University Press.

Kerwin C., & Langbein L. (2000). Regulatory negotiation: Claims, counter claims, and

empirical evidence. *Journal of Public Administration Research and Theory*, *10*, 599-632.

Lubbers, J. (2008). Achieving policymaking consensus: The (unfortunate) waning of negotiated

rulemaking. *South Texas Law Review*, *49*,987-1017.

Magat, W., A. Krupnick, & W. Harrington. (1986). *Rules in the making: A statistical analysis of*

 *regulatory agency behavior*. Washington, D.C.: Resources for the Future Press.

McGarity, T. O. (1998). The internal structure of EPA rulemaking. *Law and*

*Contemporary Problems*, *54* (4), 57-111.

McGarity, T. O. (1992). Some thoughts on “deossifying” the rulemaking process. Duke *Law Journal*, *41*, 1385-1462.

McKay, A., & S.W. Yackee. (2007). Interest group competition on federal agency rules.

 *American Politics Research*, *35*, 336-357.

Naughton, K., C. Schmid, S. W. Yackee, & X. Zhan. (2009). Understanding commenter influence during rule development. *Journal of Policy Analysis and Management*, *28*(2), 258-277.

Press, D. and Mazmanian, D.A. (2013). Toward Sustainable Production Finding Workable Strategies for Government and Industry. In *Environmental Policy New Directions for the 21st Century*, Kraft, M. and Vig, N. Los Angeles: CQ Press.

Rinfret, S. R. (2011a). Behind the shadows: Interest groups and the U.S. fish and wildlife

service. *Human Dimensions of Wildlife: An International Journal*, *16* (1), 1-14.

Rinfret, S. R. (2011b). Frames of influence: U.S. environmental rulemaking cases. *Review of*

*Policy Research*,3, 231-245.

Rinfret, S.R. & S. Furlong. (2012). Defining environmental rulemaking chapter.

In *Oxford Handbook of U.S. Environmental Policy*, Michael E. Kraft and Sheldon Kamieniecki. Forthcoming.

Steinzor, R. & Strauss, S. (1987). Building a consensus: Agencies stressing ‘reg neg’ approach.

*Legal Times*, 16.

Susskind, L. & McMahon G. (1985). The theory and practice of negotiated rulemaking. *Yale*

*Journal on Regulation*, *3*, 133-165.

West, W. (2004). Formal procedures, informal procedures, accountability, and

responsiveness in bureaucratic policymaking: An institutional policy analysis. *Public Administration Review*, 46 (2), 66-80.

West, W. (2009). Inside the black box: The development of proposed rules and the limits of

 procedural controls. *Administration and Society*, 41(5), 576-599.

Yackee, S. W. (2006). Sweet-talking the fourth branch: The influence of

interest group comments on federal agency rulemaking. *Journal of Public Administration Research and Theory*,16, 103-124.

Yackee, S.W. (2012). The politics of ex parte lobbying: Pre-proposal agenda building and

blocking during agency rulemaking. *Journal of Public Administration Research and Theory*, *22*, 373-393.

Yin, R. K. (2003). *Case study research: Design and methods*. Thousand Oaks, CA: Sage Publications

Interviews with the authors, 1-25 June-September 2008-2011.

1. Kerwin and Furlong’s (2011) definition of “interest group/stakeholder,” is a category that includes companies, business and trade associations, unions, levels of government and public interest groups. As a result, to remain consistent within the political science and rulemaking literature, we use a combination of both definitions for this paper. In addition, interest group and stakeholder are used interchangeably. [↑](#footnote-ref-1)
2. Congress formally recognized the process in 1990 under the Negotiated Rulemaking Act (5 U.S.C§561-70). [↑](#footnote-ref-2)
3. The purpose of this paper is not to compare and contrast negotiated rulemaking with new EPA rule development approaches. Instead, our focus is to examine what the EPA does today to create environmental rules. [↑](#footnote-ref-3)
4. One could argue that stakeholders were influencing agencies during the pre-proposal stage throughout their history, as Field and Robb (1990) do suggest that proactive interest groups could influence the EPA during the pre-proposal stage. However, they argued that the EPA was unlikely to seek this input, thus stakeholder groups were most influential on the agency through the submission of public comments. In addition, McGarity (1992) argues that agencies did not do enough prior to his writing to include stakeholders early in the rulemaking process, leading to regulatory ossification. [↑](#footnote-ref-4)
5. Based upon Harter’s (1982) recommendations, the Administrative Conference of the United States (ACUS) (1982; 1995) published a set of suggestions for federal agencies to maintain a successful reg neg approach to developing rules prior to an NPRM. Ultimately, Congress established the statutory authority for federal agencies to use this process with the passage of the Negotiated Rulemaking Act of 1990. [↑](#footnote-ref-5)
6. ACUS is a federal agency comprised of private and public experts promoting consensus processes. [↑](#footnote-ref-6)
7. Lubbers (2008) suggests this process could be similar to the informal negotiated rulemaking procedures that were experimented with during the early 1990s, but does not provide more than this vague definition. In comparison, Kerwin and Furlong (2011) suggest that reg neg lite incorporates the best components of reg neg, but does not define what those are. [↑](#footnote-ref-7)
8. OTAQ is required to protect the public’s health by regulating air pollution for motor vehicles, engines, and the fuels used to operate them. [↑](#footnote-ref-8)
9. All interviews were transcribed into plain text files to inductively analyze the interview responses to detect any patterns of behavior across interviews. However, in the case study analysis portion of the paper interview names are kept confidential to protect the anonymity of the interviewee and to abide by university IRB policies. [↑](#footnote-ref-9)
10. Usually due to the lack of staff resources, on average, 2-6 persons are involved writing the rule for any given agency. [↑](#footnote-ref-10)
11. Please note that a different iteration of these case studies has been used in a prior publication [↑](#footnote-ref-11)
12. A renewable fuel is defined by the EPA as a motor vehicle fuel that is produced from plant or animal products or wastes, as opposed to fossil fuel sources [↑](#footnote-ref-12)
13. To provide some context, the EPA states that the term locomotive engine applies to all line-haul, passenger, and switch locomotives, while marine engines are those engines that operate in tugs, barges, and ferries (EPA, 2008a). [↑](#footnote-ref-13)
14. Please keep in mind that the names and respective divisions are kept anonymous to protect the confidentiality of the interviewees and to abide by university IRB policies. [↑](#footnote-ref-14)
15. The formal reg neg process limits the number of stakeholders allowed at the table to 25 or less (ACUS, 1995). [↑](#footnote-ref-15)