

# RULES FOR SUCCESS IN ENVIRONMENTAL NEGOTIATION

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## ABSTRACT

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Scientists at the Midcontinent Ecological Science Center of the National Biological Service conducted a series of case studies of Federal Energy Regulatory Commission license consultations. The goal of these studies was to test hypotheses about factors that contribute to success in interagency negotiations. Based on their analysis of six case studies, the researchers constructed a list of ten "rules for success." Examples include: Analyze the incentives of each party to negotiate, paying special attention to parties who gain by not negotiating; Clarify the technical issues so that all agree and they coincide with resource management objectives; and Make sure the final agreement is feasible from both a physical and a policy perspective so that it can actually be implemented. These rules can be used to plan for negotiations and to diagnose ongoing negotiations.

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## INTRODUCTION

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The Federal Energy Regulatory Commission (FERC) issues operating licenses for both new and renewing non-federal hydroelectric facilities. The Federal Power Act of 1920 requires consultation with federal and state fish and wildlife agencies before the license is issued. The Electric Consumers Protection Act of 1986 (ECPA; 16 U.S.C. 791 et seq.) amended the Federal Power Act (1920) by calling for equal consideration of society's needs for energy, fish and wildlife (including habitat), recreational opportunities, and preservation of environmental quality. ECPA opened the FERC license consultations to a broad range of affected parties.

Scientists at the Social, Economic, and Institutional Analysis Section of the National Biological Service (SEIAS/NBS) conducted a series of six case studies of FERC license and relicense consultations to determine what factors contribute to success in natural resource negotiations. The case studies were selected using a "most similar systems" research design (Przeworski and Teune 1970), based on the logic that comparing cases that are as similar as possible will illuminate explanatory variables. Factors that were held similar were: FERC license; completed by 1990; and considered successful by U.S. Fish and Wildlife Service (FWS) field offices. These case studies

represented 25% of the FERC license renewal consultations conducted in this time period. To assure we were not just measuring regional peculiarities, half of the case studies were located in the Pacific Northwest and half in the Atlantic Northeast.

Three factors, drawn from the work by Kai Lee (1982), were used to measure "success": 1) each party believed an agreement was reached; 2) implementation and monitoring procedures were included; and 3) the parties were willing to engage in future negotiations. We systematically examined six independent variables, drawn from the negotiation literature, as factors necessary for successful natural resource negotiations. These included: a) Need to negotiate; b) Representation of stakeholders; c) balanced Power; d) clear Technical Boundaries; e) Commitment to Implement; and f) Urgency to reach agreement.

**NEED:** Fisher and Ury (1981) identified the "best alternative to a negotiated agreement" (or BATNA) as a measure by which parties can determine the desirability of engaging in a negotiation. Bingham (1986) helped clarify the role of need-to-negotiate when she wrote, "Parties will be unlikely to participate, let alone agree to a settlement, if they think they could achieve more of what they want in another way."

**REPRESENTATIVENESS:** As the first step in environmental dispute resolution, Susskind and Weinstein (1980) recommended identifying all the parties that have a stake in the outcome of the dispute and who want to participate. Cormick (1980:28) argued that the interest of every party that has a "stake in the outcome or the ability to influence implementation" must be represented, or the excluded parties may threaten the success of the negotiation. Susskind et al. (1987:130) asserted: "If the negotiations are going to yield an implementable agreement, all relevant parties must be included...Parties who are excluded may later try to undermine...the agreement".

**POWER:** Amy (1983) identified the context of power as the key element to successful negotiations. Wilds (1988) demonstrated that power distribution among parties is vitally important to water resources conflicts such as hydropower licensing. In our case studies, we adopted Amy's (1983) description of the role of power: that balancing power implies no participant can act or sanction unilaterally, and therefore must bargain in good faith.

**TECHNICAL BOUNDARIES:** Susskind and Weinstein (1980:341) asserted that, "no matter what a dispute centers on, the need to specify the boundaries...and time horizon is overriding." Parties to water disputes must be able to agree, despite inherent uncertainties, on what parameters are at issue and the appropriate science-based methods for gathering and analyzing information (Lamb & Taylor 1990).

**COMMITMENT TO IMPLEMENT:** Cormick (1980:28) stated that a "prerequisite to effective negotiations is that the parties are able to commit themselves and their constituencies to the implementation and support of any agreement reached." Carpenter and Kennedy (1988) recommended establishing procedures for implementation within the negotiated agreement itself.

**URGENCY:** The negotiation literature lists a sense of urgency as necessary for successful negotiation. Cormick (1980) underscored this by pointing out that if some parties can achieve their objectives by delaying or waiting out an opponent, then successful negotiation is highly unlikely.

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### SOME FACTORS OF SUCCESS

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Our case studies lent support to the importance of these six factors in promoting successful negotiations. We assessed two of the six negotiations as fully successful and four as minimally successful. The six factors were more strongly present in the most successful cases. Based on these findings, we are able to draw several "rules for

success" in negotiation. Some rules directly relate to the six factors tested and others to factors observed during the case-study process.

**INCENTIVE:** Analyze the "need to negotiate" of each party in the negotiation. Most interviewees identified their perceived "need" as the requirement to put forward proposals or to respond to others' actions, as identified and temporally controlled by the FERC process. The requirement to appear at a meeting is a different phenomenon from a perceived need to achieve resolution of issues through negotiation. What clearly emerged from our case-study research was the importance of analyzing every party's incentives to negotiate. When parties had shared incentives to negotiate, the probability of success was high. Where shared incentives were lacking, successful resolution became extremely difficult. The most obvious form of disincentive exists when one party can gain by stalling or blocking the process. For example, if a facility were operating under some interim guidelines that strongly favored one side of a contentious issue, then one party's best interest could be served by stalling the negotiations. It is important to assess all parties' incentives to assure that good faith negotiations are likely, or even possible.

Parties to a natural resources negotiation will usually have varying degrees of felt need to negotiate. We found that a single party could have a strong effect on the group's incentive to negotiate. In one fully successful case, one skilled party particularly wanted the negotiation to work and acted as catalyst to the process. The resulting atmosphere of creative problem solving pulled hesitant parties into active participation.

**TECHNICAL CLARITY:** Assure that all parties agree on the technical questions at issue and the geographic extent of the system to be assessed. Where there was consistent disagreement along these dimensions, the negotiations were marginally successful, at best. In one of the least successful cases, for example, one party held throughout the consultation that the geographic extent at issue was a comprehensive plan for the entire river, while some other parties insisted on keeping the focus on the particular dam up for relicensing. Consequently, not only were several issues left unresolved, but some issues that people thought had been resolved later came unraveled.

A second aspect of technical clarity that became clear from these case studies was the necessity of correlating issues and boundaries to management objectives. Further, when studies were commissioned, it was essential that their interpretation and contribution to problem clarification be agreed upon from the outset. In one project, parties agreed on general types of studies early in the process, but these seemed to be "study it and see" agreements that lacked consensus on interpretation criteria. Thus, when technical information was brought into the decision arena, parties were still arguing over the boundaries and technical merits of the studies. Ten years later, parties to the consultation were still re-interpreting technical issues for a variety of reasons.

An important aspect of technical clarity is scope of the problem. We discovered that keeping the problem at hand clear and as uncomplicated as reasonably possible helped in moving toward successful negotiation. Complication of issues can be used as a stalling tactic: adding another impediment each time parties approach problem resolution. On the other hand, the real scope of the issues cannot be ignored. Sometimes, expansion of the scope can lead to productive negotiation. For example, the timing of fish-passage installation considered for one of our most successful cases was a potential point of serious contention between fishery and hydropower interests. When that project was incorporated into a broader comprehensive plan for the whole river, fish passage was resolved in that larger, system-wide agreement.

**REPRESENTATIVENESS:** Include all the legitimate parties of interest that you can in a negotiation. One peculiarity of the case studies, resulting from the "most similar systems" study design, was that all of the FERC consultations studied spanned the passage of ECPA. In every case, we found that the definition of "legitimate parties of interest" changed significantly from pre- to post-ECPA consultations. Nonetheless, our case studies demonstrated the importance of including all of the parties likely to be directly affected by the project.

Simply stated, those who were left out found alternate ways to change, delay, or stop the process, with varying degrees of success.

In one project, an Atlantic-salmon interest group discovered the consultations, but was never formally invited. This party remained contentious throughout the negotiations, to the point of undermining their own self-interest. Another state agency's water quality conditions for the relicense were at first denied by FERC, under the technicality of not having responded within the proper time window. Judicious pressure brought by the Governor and by the state's senators and representatives in Washington, D.C. soon led to a reversal of the FERC's initial decision. Of course, the most direct avenue for those left out of the negotiation process is to officially intervene. The history of FERC's acceptance and rejection of intervention petitions is so varied as to make prediction very difficult. Often, finding and responding to their concerns during the negotiation process is far less costly than subsequent project delays and attorney's fees.

**POWER:** Know your own sources of power; assess your opponent's power; and determine when, in the negotiation process, your power will be most effective. Much of the negotiation literature (op cit) focuses on the need for a cross-checking balance of power. Each party should have the means to prevent unilateral action by any other party. The FERC consultation rules legally establish this balance. Power is lost only by ignoring requirements or deadlines. However, a great deal of negotiating parties' perceived power, in these consultations, was found in the current trend in FERC decisions. In some instances, negotiating parties were much more willing to accept stale mate because each interpreted the impact of ECPA to be a shifting in their direction; i.e., they believed that if the negotiation failed, FERC would decide in their favor. Conversely, in one case study, each party complained that FERC was moving in their opponent's direction.

Parties in our case studies derived power from physical control of the resources, statutory authority, expertise, and agenda control. We found that relative power in these FERC consultations tended to ebb and flow markedly. Those parties who recognized the timing of their own power ascendance were effective in accomplishing their most important objectives. For example, a fisheries expert had quite a bit of leverage when studies, study objectives, and interpretations were being defined.

We found that parties could significantly enhance their negotiating power by thoroughly learning the regulatory rules and process. In two outstanding instances, one case-study party knew the rules so thoroughly that others consistently deferred to their knowledge, thus adding to their authority. Of course, working in an environment of changing rules makes this both more difficult and more important.

**COMMITMENT:** Commitment to implement the final agreement is critical. Otherwise, what is the negotiation for? But, in our FERC case studies, the commitment to implement was not necessarily made to a negotiated agreement. As often as not, the commitment was to do what FERC ordered in the license conditions, regardless of whether that reflected agreement among the affected parties.

In general, the commitment to implement was high in our case studies. Monitoring was consistently listed as part of the implementation, although the degree of monitoring ranged from "access to operation records" to "biological monitoring." Indeed, this sense of commitment to seeing the agreement implemented might be one reason why the FWS Field Offices identified these consultations as "successful." Armour and Taylor (1991) found that of 616 IFIM applications, only six confirmed monitoring studies (1%) were implemented to verify that the IFIM recommended flows were working.

A critical aspect of commitment is tied directly to technical clarity: the negotiated agreement must be both physically and politically feasible. It does no good to agree to allocate more water than exists; nor to agree to act without the regulatory agency's (FERC) concurrence, nor to disenfranchise the water rights of an affected Indian Reservation or National Park.

**URGENCY:** Although urgency to agree is an important catalyst for many kinds of natural resource negotiations, this factor played a relatively minor role in our FERC license case studies. Urgency received the lowest overall rating of all the independent variables we tested (approximately 6.8 on 1-10 scale). FERC was to make the final decision and license conditions. Signals from FERC, vis-a-vis reaching agreement, varied dramatically during the course of our case studies. If the probability of FERC promulgating negotiated agreements were consistently high, this urgency factor would increase.

**RULES:** An additional key to success that emerges from our case study research is, know and play by the rules. As mentioned earlier, thorough knowledge of the rules of the game greatly enhances one's negotiating power. Second, negotiations tend to be much more successful if the participating parties lay out and agree to their own "rules of negotiating." This makes it much clearer what each party can expect in terms of when it will be their turn to set the agenda, whether that side caucus is legitimate, etc.

Probably the most important key to successful negotiation related to "rules" is that, once the rules are established, each party must play by them fairly. Nothing undermines a legitimate negotiation more quickly than cheating or lying. Even if a last-minute switch might win the present skirmish, it has the potential of undermining the much broader context of resource negotiations. Each natural resource negotiation (e.g., FERC license, 401 Water Quality requirement, wetlands permit, Forest plan) is conducted in the context of ongoing, multiple negotiations among many of the same players. What is done today, especially in terms of honesty and trust, will profoundly affect what happens tomorrow.

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#### APPENDIX - REFERENCES

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