

**ENVIRONMENTAL CONFLICT RESOLUTION:  
THE STATE OF THE FIELD AND  
ITS CONTRIBUTION TO  
ENVIRONMENTAL DECISION MAKING**

**PROGRESS IN THE PROFESSION  
EVOLVING INSTITUTIONAL CAPACITY  
ENHANCING ENVIRONMENTAL DECISION MAKING**

**MAY 14-16, 2002  
LOEWS VENTANA CANYON RESORT  
TUCSON, ARIZONA**

**CONFERENCE PROCEEDINGS**

**THE U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION  
OF THE MORRIS K. UDALL FOUNDATION**

**UDALL CENTER FOR STUDIES IN PUBLIC POLICY  
AT THE UNIVERSITY OF ARIZONA**

## INTRODUCTION

As the field of environmental conflict resolution (ECR) began its fourth decade, the 2002 ECR conference provided an opportunity for ECR practitioners, agency representatives, tribal members, nongovernmental organizations, and resource users to reflect on the progress that has been made in the profession, its contribution to the nature and quality of environmental decision making, and the significance of emerging institutional resources and requirements. As in previous years, the conference proved to be an open forum for the exchange of ideas and mutual learning among a broad cross section of interests.

This national conference was sponsored by the U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation and The University of Arizona's Udall Center for Studies in Public Policy, with support from the Council on Environmental Quality, Executive Office of the President; the U.S. Department of Agriculture, Forest Service; the U.S. Department of the Interior; the U.S. Environmental Protection Agency; and the Association for Conflict Resolution and the Environmental/Public Policy Section of the Association for Conflict Resolution.

The conference drew 435 attendees from across the U.S. and eight other nations. An international delegation of over 40 attendees representing Australia, Canada, Chile, Indonesia, Ireland, Japan, Scotland, and Thailand added significant depth and perspective to the discussions throughout the conference. Four plenary sessions, fifteen panel presentations, and twelve roundtable discussions took place over the course of the two-day conference. The ten preconference training sessions and the panel and roundtable sessions were organized along three tracks:

- **Progress in the Profession**—Reflections on practice and theory, professional standards and ethics, innovative techniques and processes, and emerging areas for concentration in ECR.
- **Evolving Institutional Capacity**—New programs, resources, and capacities emerging in government agencies, universities, and the private sector, including statutes, rules, and regulations of consequence to the field.
- **Enhancing Environmental Decision Making**—How environmental conflict resolution processes have improved such decision making and how they have and can enhance the contributions of science, technology, and decision support systems to sound environmental decisions.

The feedback from this conference has been overwhelmingly positive and enthusiastic, with excellent suggestions for enhancement of future conferences.

These proceedings were compiled from summaries written during each of the roundtable and panel sessions by a recorder and revised afterwards by the session moderator. Additional materials such as papers and PowerPoint presentations were submitted by presenters to augment the session summary. Please note that presenters, their bios, and contact information are all hyperlinked throughout the document to allow for easy access to information. Right before the contact information you will find an image gallery which contains photos from the three days of the conference. Please look for yourself and your new and old acquaintances!

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*The symbol next to each panel denotes the theme:*

- ① = Progress in the Profession
- ② = Evolving Institutional Capacity
- ③ = Enhancing Environmental Decision Making

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# **SESSION I: PANEL PRESENTATIONS**

**WEDNESDAY, MAY 15, 2002**

**10:30 A.M.—12:00 P.M.**

# GETTING BEYOND SO-SO: LESSONS LEARNED FROM MEDIATED NEGOTIATIONS OF ENVIRONMENTAL CONFLICTS

WEDNESDAY, MAY 15, 2002—10:30 A.M.—12:00 P.M.

## MODERATOR

Rosemary Romero, Institute for Intercultural Community Leadership, Santa Fe Community College

## PANELISTS

Polly Davis, Maralise Hood, and William Lincoln, Conflict Resolution Research and Resource Institute

## PANEL ABSTRACT

Do mediators themselves ever unwittingly contribute to the development of “so-so” settlement agreements that are unsatisfactory to everybody? This session will identify and address some of the contributing factors that produce minimally acceptable solutions that can be attributed to even the most experienced mediators. All examples will be drawn from three multiparty “resolved” cases in which the mediators participated. The three environmental cases to be critiqued include oil spill prevention, wheat stubble burning, and a destination resort development. Some of the factors to be discussed include the mediator’s acceptance or unwillingness to address:

- Impracticality of terms/conditions of contractual provisions regarding scope of work and expectations;
- Severe deficiencies in the structural design of the process;
- Wanting competency levels of advocate negotiators;
- Likely impacts of external variables;
- Incomplete reality testing; and
- Nonattentiveness to the pastoral needs of multiparty players.

## PANEL SUMMARY

## PANEL SUMMARY

### PURPOSE OF THE WORKSHOP

If our profession is committed to the continual development of best practices then all of us must discontinue to accept practitioners' shortcomings as external causal factors over which we have no control or even influence. Thus, in our efforts to contribute to the enrichment of the field's knowledge base and the perfection of the practice of mediation, we will be candid in our offerings as we hope you will be in the subsequent discussions.

### DESCRIPTION

Among the cases we've mediated in the last few years, there were three environmental conflict resolution settlement agreements from which *some* disputants emerged with low levels of satisfaction. The three scenarios are briefly described below:

- The practice of wheat stubble burning by eastern Washington farmers was before federal court with the assertion by the grassroots health and environmentally focused Save Our Summers (SOS) advocacy group that the State of Washington Department of Ecology's burn permitting process was in violation of the American Disabilities Act since it allegedly caused severe adverse effects for persons with chronic lung disease, such as asthma and cystic fibrosis. The U.S. government feared that if the case was ruled in favor of the plaintiffs, the ruling could "gut" the practicalities of the Clear Air Act, and if *not* ruled in favor of them, then related laws did not apply to protect the health of the most sensitive persons among the citizenry.
- The U.S. Secretary of Transportation created a federal commission to develop the *Puget Sound Long Term Oil Spill Risk Management Plan* co-chaired by the U.S. Coast Guard and the State of Washington Department of Ecology, and which was comprised of 20 stakeholders, some of whom were long-term myopically focused adversaries. Panel members included elected county, state, and federal legislators; tribal government leaders; environmentalists; representatives of the fishing industry, the freight shipping industry, oil refinery and shipping industries, and the towing and maritime pilots associations.
- Trendwest, Inc., a well known vacation time sharing corporation with world wide facilities, was committed to developing a significantly large destination resort (MorningStar) on approximately 7,500 forested acres of the rural, historic, and economically depressed town of Roslyn, film site of the popular "Northern Exposure" television series. The original Master Plan Resort enjoyed broad local business community support yet was continually challenged and delayed by RIDGE, an environmental activist group—at a daily cost of \$14,000 to Trendwest in interest charges, plus expensive and seemingly endless litigation costs.

## SUMMARY OF COMMENTARY

We, who have very high dispute settlement and agreement compliance rates, are either very courageous or very foolish to document our shortcomings in these three cases just described. In each case resolution was achieved. Nonetheless, there were varying levels of dissatisfaction by the parties, and we believe we contributed to those dissatisfactions in three general categorical ways, i.e., procedurally, substantively, and psychologically.

### PROCEDURAL DISSATISFACTION

- In the oil spill risk management case, we evidently were unable to help the parties realize and accept the mediators' role functions, thus the mediators were expected to exert more efforts than the parties who looked to the process' co-chairs (U.S. Coast Guard and State Ecology) to make determinations for the entire group.
- We did not always customize the mediation process to meet the parties' circumstances in terms of comfort level, confidence, organizational and personal realities, or the case's legal status, e.g., the oil spill risk management case had two formal quasi legal co-chairs (U.S. Coast Guard and State Ecology) who developed the agenda and related work plan in the interest of bureaucratic efficiency, thus depriving the group of process equity, process ownership, and process trust. In the wheat stubble burning case it was difficult for farmers to participate in two consecutive days of mediation 150 miles from their farms, and parent members of the opposing Save Our Summers (SOS) had inflexible schedules related to medical care, daycare, or educational classes.
- In all three cases we permitted the parties to develop unrealistic issue agendas to be addressed within unrealistic schedules that at times caused exhaustion of all participants. We failed early on to cause the parties to reassess and revise their unachievable work plan.
- We underestimated the needed time for parties to disseminate, discuss, comprehend, and resolve technical data—particularly in the oil spill risk management and wheat stubble burning cases.
- One person in the oil spill risk management case constantly complained about her time and the economic burdens of process participation, but we did nothing to assist her or even think about trying to mitigate her inconvenience—*in part because this person was exceedingly uncooperative and not easy to like*. In summary, we ourselves were unable to separate the person from the problem.
- We have never liked mediating in public—and there we were again in the oil spill risk management case, in the presence of constituent groups, observers, and the news media. Furthermore, the ground rules established to govern the public's presence were seemingly unenforceable since panel members would interact with the audience.
- We still don't know how to deal with the oxymoron of "consensus minus two," which was the federal commission's "guideline" for decision making by the Puget Sound Long Term Oil Spill Risk Management Planning Panel.
- In some instances, such as with the parents in the wheat stubble burning case, many of the disputants did not know how to negotiate—they only knew how to fight, how to

argue, how to manipulate, how to beg—thus making the mediation very difficult, and we didn't train them how to do otherwise.

- The oil spill risk management case involved over 20 parties and 25 issues—a seemingly perfect scenario for several working groups. Yet we couldn't make it happen — the disputants always wanted to know what “all the others are doing,” and thus insisted meeting in plenary session.
- In the rural destination resort case, the parties wondered if the process was ever going to end—and we also openly shared our own impatience, frustration, and dissatisfaction with meetings occurring on a string of summer weekends.

### **SUBSTANTIVE DISSATISFACTION**

- In the oil spill risk management case, the parties couldn't agree as to the purposes and conditions for why they were impaneled on the Puget Sound Long Term Oil Spill Risk Management Panel. We still don't know what else we could have done to make several parties remember why they were “commissioned,” e.g., to develop recommendations to manage (reduce) the risk of oil spills and *not* how to respond to oil spills.
- When we entered two of the conflict scenarios, we did not dissuade disputants' high expectations of results when we entered. In both the oil spill risk management and the wheat stubble burning cases, various parties were overly optimistic that they would get everything they wanted because of their own perspective of case merits and the morality of their proposals.
- In the wheat stubble burning case, the opposing Save Our Summers (SOS) parents literally did not know what they wanted as demonstrated by the competing proposals among their own team members—and we were ineffective in helping them become a unified team.
- In the oil spill risk management case many of the issue agreements achieved involved commitments to additional complex technical planning and/or regulatory review. Therefore there was no immediate gratification in terms of changing the status quo, and no satisfaction with an elusive certainty although some parties kept looking to us to provide something related to best maritime management practices and standards of care.
- Due to the parties' (and the mediators'!) eagerness to gain closure on specific issues there wasn't always confidence that their own interests were truly being met, whether health, economic, aesthetic, or whatever.
- In the rural destination resort case, the parties came to clear substantive agreements, but became concerned and confused when the attorneys translated their language into legal terminology—while we insisted on the appropriateness and need for us to extricate ourselves in part to control our expense bills which already exceeded what the parties had anticipated.
- We were somewhat dismissive of some parties who continued to wonder whether or not they could have done better in court.
- In the wheat stubble burning case the Save Our Summers (SOS) parents and attorneys were unconditionally dismissive of the farmers' economic, lifestyle, and personal interests—we were deficient in skills to cause any transformation of such attitudes and behaviors.

- In the wheat stubble burning case, all parties including the Attorney General’s office continually reassured us of their authority to negotiate, but after the agreement was signed, State Ecology claimed its negotiators were not authorized—at that point we stopped mediating and began arguing.

### **PSYCHOLOGICAL DISSATISFACTION**

- The whole idea that “the truth will set you free” can backfire, e.g., we and the oil industry reminded parties that although risk factors could be mitigated nonetheless some spills most likely will still occur.
- Folks didn’t feel they received the individual *pastoral attention* that they needed. Much of the interaction with each other over the years caused mistrust now ingrained in them. Parties came out of the process at nearly the same level of mistrust in which they entered.
- In the rural destination resort case, an agreement with the environmentalist party alienated a significant portion of the developer’s own constituency, e.g., a group of citizenry *not* at the table but to whom the developer said it would keep fully informed. We were not always diligent in monitoring the developer’s vertical negotiation responsibilities.
- We were unable to diffuse anger or to lift the spirits of parties when adversely effected by external variables, e.g., when the U.S. Supreme Court ruled that the U.S. Coast Guard—*not* the states—has the jurisdictional authority to regulate shipping along the nation’s coasts.

### **OTHER CONTRIBUTING FACTORS**

- Due to our own organization’s heavy workload, we should never have accepted the opportunity to mediate these cases. Our appreciation of the nature and the seriousness of these three conflict scenarios hindered our making an honest and realistic assessment of our available time and energies.
- In accepting our selection as mediators, we paid little attention to various contractual precisions, including confining time frames, burdensome reporting systems, significantly inadequate funding provisions, and geographical distances between parties as well as from ourselves.
- Our inability—due to the two factors identified above—to fulfill a mediator’s function that we have done so thoroughly well in countless other cases, e.g., *pastoral functions*—which are primarily comprised of frequent moments shared by the mediator and the individual disputant. Such instances are separate from the purposes of background-data gathering, conflict assessment, remedy explorations, or reality testing. Instead these individualized instances of “getting to know you better” are experiential demonstrations of acknowledgement, attentiveness, acceptance of personhood, and caring. While the genuine intrinsic nature of *pastoral functions* must be valued in and of themselves, one cannot discount likely utilitarian results of such expressions of attentiveness, i.e., increased “likeness” of the mediator as a person, increased trust of both the process and the mediator, a sense of *being accompanied* throughout the

process without role compromise, appreciation of their perspective, a clear acknowledgment of this extra effort beyond the formal process, and more empowerment for the mediator to do her or his job.

## **WHAT WE WILL DO DIFFERENTLY**

- Assess the availability of our organizational and individual professional capabilities and resources in the context of current and near future responsibilities and involvements as well as all contractual provisions.
- Insist that prior to multiparty mediation, all parties will fully participate for a minimum of two days of training in negotiations (collaborative planning and cooperative problem solving) as well as the role functions of a mediator and the responsibilities of the parties.
- Assist the parties (1) in designing the logistical aspects of the mediation process to be responsive to their particular realities in ways that are practical and equitable within the realm of “all things considered” and (2) in developing an achievable work plan—while remembering we are the people with experience and professional perspective.
- Adhere to our philosophy and normal practice of frequent and quick “process checks” as a means to determine levels of procedural satisfaction and whether or not there are needs for refinement.
- Manage the processes of data exchange in efficient ways without sacrifice to thoroughness or comprehension—with particular attention to determinations of relevancy and the prevention of redundancy.
- We, too, must (1) separate cause from blame, (2) separate “people from the problem,” and (3) separate ourselves from any overarching influences—it’s “not” about us.
- Diligently and impartially perform the mediators pastoral role functions as described above.
- Whenever necessary, reach out for additional resource assistance without hesitation or apology.
- Be ever mindful that while we have obligations to the parties, we also have responsibilities to the problem itself. As practitioners we are stewards of the process.

# TRADITIONAL APPROACHES TO DISPUTE RESOLUTION: PEACEMAKING AND OTHER MEANS OF RESOLVING ENVIRONMENTAL DISPUTES

WEDNESDAY, MAY 15, 2002—10:30 A.M.—12:00 P.M.

## MODERATOR

Diane LaResche

## PANELIST

Beadie Kanahele Dawson, Dawson Groups Inc.

## PANEL ABSTRACT

Traditional dispute resolution processes such as peacemaking, circle sentencing, and community reparative boards are well known approaches to addressing and providing remuneration for family and community based disputes and crimes. Examples of such approaches include the Navajo Nation's Peacemaker court, the Maori Circle Sentencing in New Zealand. Increasingly, traditional approaches are being adopted by courts and alternative dispute resolution practitioners to address issues in a more culturally consistent manner. How are such approaches effectively used to address environmental issues that arise within Native American communities or environmental issues between tribes? Equally important, in what ways can local or regional dispute resolution approaches be used to address environmental issues that cross multiple jurisdictions? This session will provide an overview of Native American peacemaking methods including practices of Native Hawaiians. Panelists will share examples of how traditional dispute resolution processes have effectively addressed environmental issues and the challenges presented in employing traditional methods in cross-cultural disputes as well as discuss the need and challenges of co-designing processes to ensure that they are procedurally just to all participants.

## PANEL SUMMARY

## INDIVIDUAL PRESENTATION

**American Conflict Resolution Adopting Native Hawaiian Paradigms**  
By Beadie Kanahele Dawson, Esq.

## PANEL SUMMARY

### DIANE LERESCHE

When working with tribes, where do we get our information? How do we help one another and what are our expectations and images of each other that may not be accurate? There are a number of caveats to be aware of with respect to traditional peacemaking approaches and working with tribes on various issues. It is important to emphasize that there is no one way, and the methodology used to resolve disputes might be context dependent.

Some traditional Native American dispute resolution processes are lost—lost with our elders. Certain members of a tribe apply some traditional ways only in certain settings and contexts. Tribal people and leaders want an active role in more customary and complimentary ways of proceeding in and designing a process. There are many complexities to working in Indian Country, including multiple jurisdictions, variations among tribal laws and within tribes with respect to politics. A lack of trust remains prevalent among many Native American and Alaskan Native communities. Trust must be gained among all parties to enter into co-management and cooperative agreements.

#### WHAT APPROACHES TO DISPUTE RESOLUTION CAN BE CONSIDERED PAN-INDIAN?

- Ask what procedures tribes would prefer—don't impose agendas.
- Peacemaking is often done purely within the tribes—but some aspects can be incorporated into all processes.
- Ask if tribal members would like to begin with an opening blessing or prayer for the land upon which the meeting is taking place.
- The pace of a process may be slower than that used with non-natives. This may be frustrating and requires patience. The problems have been around a long time, time is not limited, the issues are important; what is the hurry? Time is needed to build the relationships and building the relationships is often more crucial than the agreement. The agreements are not durable if the relationships are not sincere.
- Interrupting is very disrespectful in Indian country.
- Participation requires deep listening, understanding the deeper meaning, with an open and sincere heart in order to discover what others have to share.
- Don't argue, attack, or criticize.
- Give people an opportunity to speak, do not force them.
- The circle is closed—the discussion taking place may be confidential or not appropriate to record or share with others.
- Keep a healthy heart, mind, and body. The physical and spiritual aspects of the issue are of equal importance to many tribes.
- Consider who speaks first—it may be the elders, or they may speak last; elders may build one on another with a plan and a pattern.
- Let the speakers speak as long as they want—there are reasons for all of the stories,

the points are interconnected and may be new to each person.

- Use symbols, use logos of tribes and agencies.
- Words are chosen very carefully—and what one says goes a long way and has meaning to the heart.
- Language and cultural interpreters may be needed.
- Ask and determine who is authorized to share or to speak. The speaker may be limited in what can be shared.
- Community and family events are more important than meetings. A death in the family, a sick child is more important than a meeting. Patience and flexibility are essential skills.
- Traditional environmental knowledge, nonwestern science, and oral traditions must also be respected and incorporated into ways of thinking and approaches to process.
- Tribal decision making may occur through consultation—the chief or tribal president consults with the appropriate tribal members on matters.
- Dispute resolution is often viewed as problem solving.
- Ask for clarification—are the words you are hearing the words you are understanding?
- Most people want to know how much you care before showing how much you know.
- Speak from your heart because you can always change your mind.
- Appearances can be misleading—don't discount people because they are not dressed for success.
- Clarify expectations up front. Who will make decisions and how will they be made?

#### **WHY DON'T INDIANS SPEAK UP AT MEETINGS?**

- Traditional processes use silence and a different tone.
- Non-Indian meetings have information overload—how do you sort it all out?
- Some tribes may want the ideas and information of others first to determine how to respond.
- They may not have the authority to speak
- They need to be able to speak during a length of time in a manner that is comfortable. Do not cut speakers off and don't interrupt.
- They may be trying to understand the technical language and may be new to the topic.
- Invite Indians to speak—in a nondirective manner.
- Use open-ended questions to engage participants.
- Like all people, tribal participants may be shy or tired. Native American leaders wear many hats and are often stretched thin.

#### **EXAMPLES OF GOOD PROCESS**

There are many examples, but in Alaska where I am from, the Alaskan tribes have in recent years begun to develop effective relationships with the Department of Defense (DOD). The relationships are effective in part because DOD was willing to hold listening sessions before they held the actual meeting. This approach provided an opportunity for the tribes to express their interests and concerns about the matter at hand.

## BEADIE DAWSON

The judicial system has reached a point where it can incorporate dispute resolution tools that go beyond the courtroom. For example, Peter Adler and Kem Lowry brought people together with Departments of Interior, Commerce, and State to discuss the needs and priorities around the use and management of the northwestern Hawaiian Islands.

Traditional Hawaiian dispute resolution methods were developed by Polynesians when the Islands were first settled over a thousand years ago. Used by chiefs and families, community disputes and imminent and threatening wars were averted through this process. Practice was subverted by white settlers. *Ho*—to make right. *Ho'oponopono* is to make completely right—correcting and restoring relationships through prayer, discussion, confession, apology, forgiveness, relief. *Ho'oponopono* is practiced in Hawaiian communities, organizations, and by non-native Hawaiian entities, and the combination of both communities. The Hawaiian state courts have now begun to incorporate *ho'oponopono* methods in the court. This is a voluntary process that allows the dispute resolution process to become a private matter. Elements of *ho'oponopono* are used by parties to address family and environmental issues. Apology and forgiveness are foreign to western mediation but are essential to *ho'oponopono*.

In the purest sense *ho'oponopono* is:

- Not mediation, settlement, nor prayer, it is not a panacea to resolve all problems.
- Not a media event. Student practitioners are not allowed to witness actual processes.
- Not finger pointing.

*Ho'oponopono:*

- Is voluntary, and acceptance of the “mediator” by everyone is required.
- Requires a belief in a higher being.
- Requires a spiritual commitment and foundation by all parties.
- Requires commitment to process.
- Requires a commitment to result before the result is determined—similar to binding arbitration. The process must be accepted from the start. There is no appeal process. Attorneys are not permitted to participate in the process. All parties must speak for themselves.
- Requires total confidentiality, which is essential to the process.
- Requires self-scrutiny and self-reflection.
- Requires truth and openness and respect for the other and the leader.

### OVERVIEW OF HO'OPONOPONO

The elements of *ho'oponopono* often define it. Keep in mind that *ho'oponopono* is a sum of the parts.

- Mediator interviews everyone before the process begins, asks and elicits responses, ferrets out the truth. Individuals may only speak to the mediator unless given permission to speak to other parties.
- Mediator trains all of the parties in the process and the rules.
- Mediator states the problem.
- Self-scrutiny is required.
- Absolute truth—simple statement of the dead—told without embellishment. Partial truths are the terms of art of law, politics, journalism.
- Each problem is resolved and disposed before moving to the next
- May have time-out beginning and ending with prayer. The prayer helps define the process.
- *Mihi*—confession and forgiveness first to a god, then to self, and then to the person who has been wronged. Cannot turn your back on a person who has asked for forgiveness. “I am sorry.”
- Restitution is immediate with mutual forgiveness and apology.
- Release—dispensing with the problem.
- Closing prayer.
- Celebration with food at the conclusion of process with no discussion of the problem. Process does not permit payment to mediator—ever. However, the participants may make charitable donations to a third entity on behalf of the mediator.

## QUESTIONS AND RESPONSES

*Comment:* What causes conflict may be open to interpretation. Therefore how conflict is resolved is dependent on understanding the root causes. FMCS—meetings with over 12 tribes and federal agencies. The process was designed entirely over the phone and was effective.

*Comment (Diane):* Use common sense and research to design fair processes. Think about two things when you are designing a process. First, sacred justice—as defined by healing, relationship building, and balance. Second is procedural justice—if procedure is customary and fair then the parties are more likely to engage in processes, take ownership in it, and uphold agreements. It is important to learn about the cultures and ask what is customary and fair. Keep in mind that culture goes beyond race but includes organizations.

# **COLLABORATIVE APPROACHES TO ENVIRONMENTAL STREAMLINING ON TRANSPORTATION PROJECTS**

**WEDNESDAY, MAY 15, 2002—10:30 A.M.—12:00 P.M.**

## **MODERATOR**

Margaret Weil, Oregon Department of Transportation

## **PANELISTS**

Carie Fox, Fox Mediation

Lucy Garliauskas, Federal Highway Administration

Tracy Hill, PBS&J Corridor Study General Engineering Consultants

Louise Smart, CDR Associates

Stephen Zylstra, U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office

## **PANEL ABSTRACT**

The challenge to streamlining the environmental compliance process is the many aspects it has, depending on what and/or where you believe realignment can provide the most efficiency. The panel discussion will focus on three different and very important aspects in the presenters' pursuit of streamlining the environmental process:

- Projects or topic areas (programmatics)—“What are the projects or substantive areas that are creating problems?”
- System design—Examining the recurrent or acute conflicts on a system-wide basis; and
- Implementation of the streamlining tools.

## **PANEL SUMMARY**

## PANEL SUMMARY

### OBJECTIVES

- To introduce the concept of environmental streamlining on transportation projects
- To identify potential barriers to successful collaborative problem solving
- To share examples, from Oregon, Texas, and South Carolina, of what states are doing to achieve environmental streamlining and overcome these barriers

### WHAT IS “ENVIRONMENTAL STREAMLINING”?

Section 1309 of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) directs the U.S. Department of Transportation (DOT) to develop and implement a coordinated environmental review process for highway and transit construction projects. A national Memorandum of Understanding (MOU) has been signed by a number of federal agencies committing “to continuously improve and streamline the process used” while striving to be “protective of and more compatible with the natural and human environment” as transportation projects are developed.

In the simplest terms, environmental streamlining consists of completing environmental reviews and permitting in a timely way, while ensuring environmentally sound projects. The coordination of multiple and overlapping environmental reviews, analyses, and permitting actions is essential to meeting the environmental streamlining mandate for highway and transit projects under TEA-21. Although certain processes overlap, the procedural requirements for meeting these mandates are distinct and defined by each federal agency charged with statutory oversight of a specific environmental resource or concern. Also, most states and some local jurisdictions have their own environmental statutes and requirements that must be addressed. The complexity of the processes, multiple actions, and requirements do not easily lead to clear-cut solutions for establishing national time frames.

DOT recognizes that achieving our bottom line—the efficient and effective delivery of a sound and environmentally responsible transportation program—requires adopting a new mindset that embraces environmental stewardship and builds coalitions through partnerships of interest groups and Federal, state, and local officials.

**Streamlining successes at the national, regional, state, local, and project levels are inextricably linked and form an iterative process.** National leadership, direction, policy, guidance, and support provide a framework to facilitate regional, state, local, and project results. These results in turn drive innovations that demonstrate what does and does not work. Best practices are used to inform, shape, and influence national guidance and policies. Using this iterative, participatory approach, DOT and its Federal and state environmental and transportation partners have collectively and cooperatively achieved significant results, including cutting the median time it takes to process environmental reviews by one year. Much of this is facilitated through over 148 state initia-

tives that support interagency collaboration, early coordination, and programmatic approaches. These require time, skill, and resources and are built on trust and respectful partnerships. The Federal Highway Administration's (FHWA) streamlining Web site is the key medium for communicating these successes. <http://www.fhwa.dot.gov/environment/strmlng/index.htm>

Future efforts that will accelerate and continue the effective implementation of streamlining will focus on institutionalizing collaborative problem solving and effective project management among the project practitioners, providing them with skills to build relationships, and manage conflict as it arises during the environmental review process, and providing them with access to a well-qualified roster of facilitators skilled and experienced in transportation and environmental process problem solving.

The concept of environmental streamlining includes the elements:

- Early identification and resolution of issues
- Collaborative development of processes among field organizations
- The use of concurrent review of plans and projects
- Timely review and constructive comments on transportation proposals
- Early identification of information needs
- Creative solutions and innovative methods that reduce economic and environmental costs

A hallmark of environmental streamlining is early coordination, consultation, and collaborative decision making among the transportation and resource/regulatory agencies to improve implementation of the National Environmental Policy Act (NEPA) process.

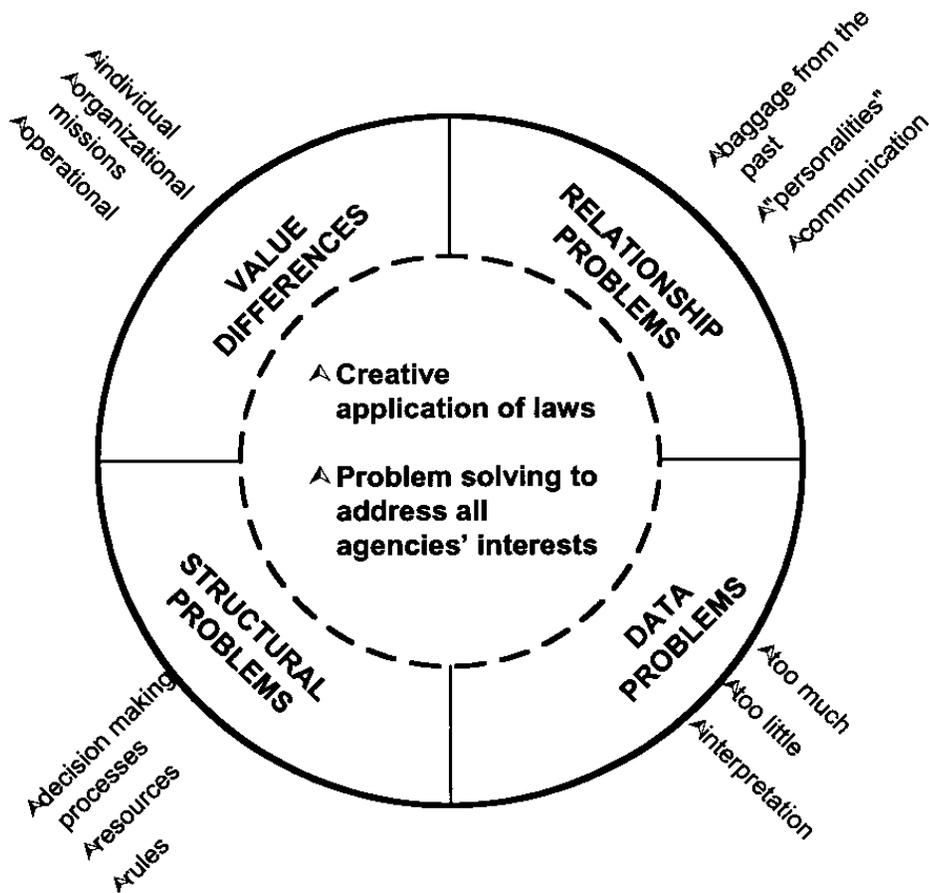
### **WHAT MAKES ENVIRONMENTAL STREAMLINING CHALLENGING?**

The accomplishment of environmental streamlining on projects entails creative application of laws and joint problem solving among transportation and resource/regulatory agencies to address all agencies' interests. There are a number of barriers, real and perceived, which must be overcome to achieve environmental streamlining. The outer ring of the circle diagram, below illustrates the need to break through relationship problems, value differences, data problems, and structural problems in order to undertake the task of environmental streamlining.

*See figure on next page.*

**Relationship problems** that can get in the way include:

- Baggage from the past, where an agency still feels hurt, aggravation, mistrust, or frustration from what happened on a past project and is doubtful of another agency's willingness to cooperate, be reasonable, honor commitments, or think outside their own agency's point of view. Constructively airing impressions from the past, setting aside preconceptions driven by the past, forging new agreements on how to approach the future, and spending time getting to know others informally can help overcome such problems.



- Different personalities, where, for example, one staff person is a “big picture” person, highly verbal, likes processing issues in a group, and is willing to take risks, and another person needs a lot of detail to make sense of an issue, likes to process issues alone where they can think quietly, and wants to be certain that a direction is sound before making a decision. Too often such personality differences are inaccurately interpreted as intent to thwart people’s efforts, rather than just the personality differences that they are. Mutual understanding and acceptance of differences and a willingness to accommodate another person’s style can ease relationships and aid problem solving.
- Communication patterns that impede direct dealing and that escalate a problem, such as communication of needs and concerns through written comments and “comments on comments” or adherence to a cumbersome hierarchical chain of command. To the extent that communication can be direct and one-on-one, there is less opportunity for misunderstanding and more opportunity for addressing issues as they arise.

**Value differences** exist because different agencies have different missions and mandates, which then are reflected in how individual staff approaches a transportation project. Where agencies can embrace a joint value, such as stewardship of the public interest, defined as doing what is good for the environment *and* good for business and

local communities, and respect each other's role in that overall value, the individual agency values may be seen as less mutually exclusive. Individual staff member's personal values which are expressed in zeal that goes beyond an agency's mandate may need to be tempered in order for others to respond positively to the other agency's mandate. Some transportation and resource/regulatory agencies have sought to develop mutual operational values through partnering, in which they develop a jointly held set of values related to functioning as a team. In addition, joint training has helped agencies understand each other's missions and mandates.

**Data problems** can stem from having so much data that one cannot see the forest for the trees, having too little data so the agencies are reluctant to make a decision that will not be sufficiently informed, or disagreements over the interpretation of data or the methodology of collecting or analyzing data. Yet, it is essential to have good data as the basis for good decisions. Agencies are beginning to develop up-front agreements on what data will be needed, at what level of detail, and how they will evaluate that data.

**Structural problems** include differing decision-making processes, insufficient resources (staff, time, dollars), and rules that create contradictory "thou shalt nots" (thou shalt not take a wetland, thou shalt not take an historic property, thou shalt not have an unsafe roadway design).

- Each agency has its own process of decision making, prescribed under the regulation for which they are responsible. Careful thought and cross-agency negotiation may be needed to help these different processes mesh together into one cohesive whole.
- One agency may delegate decision-making authority to staff who participates "at the table" with the other agencies; other agencies may allow their staff to participate in discussions and share ideas but require their staff to bring issues back to higher-level decision makers in the agency. Collaborative decision-making processes need to accommodate these differences.
- Intensive coordination to achieve environmental streamlining may save time in the long run; however, achieving such coordination is a labor-intensive effort. Additional staff are often needed in order to participate in meetings and to be timely and responsive to multiple projects that are moving ahead at an accelerated pace.
- The challenge of applying all the rules to make sustainable transportation and environmental decisions is daunting. Agencies need to build a mutual understanding of each other's processes, responsibilities, and methods for applying these rules and accept the fact that the rules are challenging, rather than blame another agency for implementing its responsibility to the rules.

Most of all, it is essential that agencies understand the complexities of the structural problems at play, look for ways to problem solve around or through those problems where possible, and refrain from interpreting structural problems as personal flaws of other agency staff.

## WHAT ARE STATES DOING TO OVERCOME THESE BARRIERS?

### OREGON

The Oregon Department of Transportation (ODOT) and ten other state and federal agencies have developed Oregon's *Collaborative Environmental and Transportation Agreement on Streamlining (CETAS)* program to ensure that highway projects are built efficiently and with respect for environmental, cultural, and land-use values. CETAS requires an informal buy-off by the CETAS agencies on the purpose and need, criteria, and range of alternatives before a project can become eligible for the State Transportation Improvement Plan, includes a CETAS Technical Committee to work through a backlog of projects and address new streamlining products, and establishes a dispute resolution system. The following are examples of how CETAS is used to overcome the barriers.

#### Relationship

*Conflict elevation protocol.* This “barrier breaker” is included in the CETAS charter and recognizes that conflict will happen during the environmental process and therefore must be dealt with efficiently. The protocol identified four levels of conflict resolution, field staff to field staff, supervisor-to-supervisor, manager-to-manager, and director-to-director. This procedure recognizes that decisions, like staff, have different levels. It further recognizes when differences of opinion do occur, permission must be granted to elevate the decision and or disagreement to an appropriate level for resolution. Any one of the signatory agencies can introduce the conflict elevation protocol during the CETAS process.

**Relationship-building** elements of the CETAS Technical Committee include: (a) insisting on taking the time to reach mutual understanding, (b) modeling candor, (c) ensuring that the streamlining makes a positive difference in each participant's work life, and (d) very clear and pragmatic operating procedures.

Through joint development of the CETAS process, ODOT and the U.S. Fish and Wildlife Service (USFWS) have changed the **relationship** between their agencies from an historically difficult relationship to one of trust and cooperation. USFWS staff have expressed appreciation for the CETAS process because the process allows all involved to better manage their workload because of the early coordination which helps to foster better relationships, minimize strain on resources (a **structural problem**), and makes work life more efficient.

#### Value Differences

*Shared training.* The implementation plan for CETAS calls for joint training for the eleven agencies. The planned trainings will focus on employing the CETAS agreement throughout the signatory agencies. In addition, they will include cross-agency information and educational opportunities for better understanding of the various missions and/or goals of the CETAS partners. Last November, ODOT sponsored a joint training with the U.S. EPA, USFWS, the National Marine Fisheries Service on enforcement regulations and

protocols. One hundred staff members attended the daylong training from the CETAS agencies.

### **Data problems**

*Transportation Project Review Process.* CETAS requires earlier involvement in the development of transportation projects from the cultural and natural resource agencies, meaning less technical data will be available. CETAS agencies meeting monthly to review transportation projects and reach concurrence on purpose and need, location, and alternatives are gaining knowledge of the level of technical data necessary to make good and lasting decisions. As nuances of level of technical data are revealed, they are examined and incorporated it into CETAS Standard Operating Procedures.

### **Structure**

*Standard Operating Procedure (SOP).* CETAS developed the SOP to describe in detail each CETAS agency's responsibility during the transportation project review process and at when it occurs. The SOP is intended to build a mutual understanding of each agency's processes, responsibilities, and methods for applying its governing statutes.

### **TEXAS**

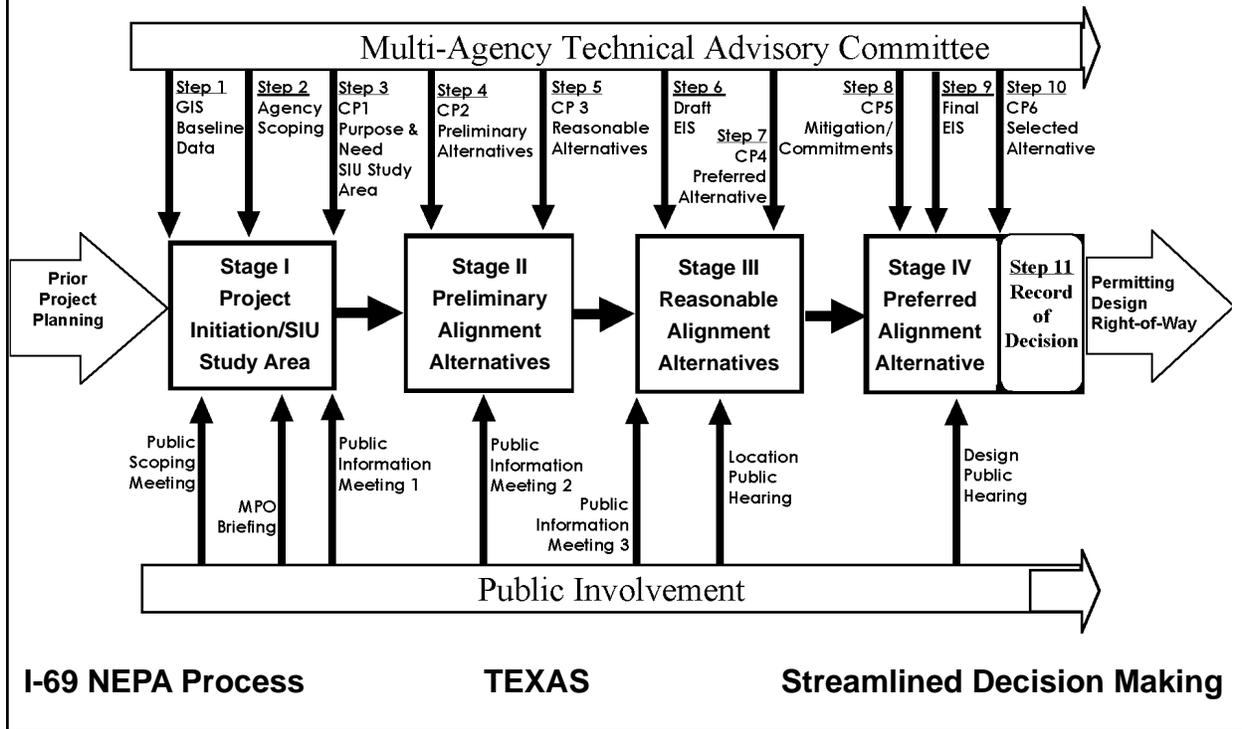
The national IH-69 corridor was designated by Congress to address the transportation needs associated with growing trade opportunities with Canada and Mexico. Over 1000 miles of the IH-69 project will pass through Texas. As the Texas Department of Transportation (TxDOT) moves forward with project development for IHB-69, they are embarking on a "streamlining pilot project," which includes a partnering process with federal and state agencies. To minimize **structural problems**, the I-69 NEPA process has been defined to create coordinated and streamlined decision making on this project.

On the next page is a flowchart that depicts six points at which the participating federal and state agencies will concur (CP1 through 6) in an 11-step process that goes through four stages.

This process is aimed at gaining agency involvement in the early decisions on project issues so that these particular issues will not need to be revisited during later stages of the project.

In addition to coordination of decision making through this process, a training schedule for joint training for all the relevant agencies has been created, including such topics as: NEPA and Decision Making, Endangered Species Act, Application of GIS, Section 106, Section 4F, Land-Use Planning, and Community Impact Assessment. This training provides an opportunity for agency staff to build new and better **relationships**, understand different agency **values**, missions and mandates, and application of rules, and build a common expectation for **data** that is needed to inform decision making. Essential to this process is the development of agreement on the level of detail of **data** needed at each stage of the process. Each stage generally represents a narrowing of

# Process Overview



alternatives (or area to be studied) and an increase in the level of detail required to inform decisions at that point.

## SOUTH CAROLINA

The South Carolina Department of Transportation (SCDOT) is undertaking an ambitious 27/7 program (twenty-seven years of projects to be completed in seven years). Proactive coordination with other federal and state agencies is a key to accomplishing this goal. To address the **structural problem** of limited resources in some of the resource and regulatory agencies, SCDOT has funded liaison positions in those agencies to ensure that staff will be available to participate in the coordinated inter-agency process and has set criteria to evaluate these positions. **Values differences** are bridged when those liaisons maintain a focus on the needs of their resource agencies, the transportation agencies, and the public need. Field trips where both resource and transportation agencies examine the situation on the ground help build an understanding of the need for a project. **Relationship problems** are minimized by creating an environment in which agency staff are willing to meet and talk about issues rather than sit in their offices and conduct letter-writing campaigns. Cross-agency education through an Engineering 101 class has enabled the resource agencies to understand the complexity of the transportation decision-making process and has built a stronger **relationship**

among the agencies. An Interagency Task Force has been established, which is an accessible management-level group that meets regularly to resolve environmental issues as they arise. This is a **structural** solution to prevent delays due to the festering of unresolved issues.

As transportation, resource, and regulatory agencies jointly undertake specific activities to address the barriers to collaborative problem solving, environmental streamlining can become a reality rather than a good intention.

# **COLLABORATION AND SUCCESSFUL RESOLUTIONS AT THE U.S. DEPARTMENT OF THE INTERIOR: THE PILOT EARLY CASE ASSESSMENT PROGRAM AT THE ATLANTA REGIONAL SOLICITOR'S OFFICE**

**WEDNESDAY, MAY 15, 2002—10:30 A.M.—12:00 P.M.**

## **MODERATOR**

Jennifer Boyens Victor, Paquin Victor LLP

## **PANELISTS**

Maria Elena Gonzalez and Michael P. Stevens, U.S. Department of the Interior

Jeffrey Paquin, Paquin Victor LLP

## **PANEL ABSTRACT**

As the site for the U.S. Department of the Interior's (DOI) Early Case Assessment Pilot Program, the Atlanta Regional Solicitor's Office has had the opportunity to assume a leadership role within the DOI in the area of concise and early assessment of disputes that lead to their effective and expedient resolution. The primary objective of the pilot program is to enable the Atlanta Regional Solicitor's Office to provide their client agencies, and the U.S. Department of Justice when necessary, with key factual, legal, and "next step" information, including a comprehensive resolution strategy, to allow them to make informed decisions regarding pending disputes. The session will include an in-depth overview of the premises underlying the program, the benefits of the program, the mechanics of the program, and a question-and-answer session.

## **PANEL SUMMARY**

## PANEL SUMMARY

### MAIN DISCUSSION POINTS

The moderator introduced herself and the panelists. The early case assessment program is a pilot program. The panel will discuss background, goals, objectives and mechanics of this program. The session will be closed, with information on challenges and opportunities associated with the effective roll-out of the pilot program.

#### JEFFREY PAQUIN

- Concise and early assessments of disputes that lead to their effective and expedient resolution help lawyers make informed decisions about pending disputes including a comprehensive resolution strategy.
- Concept of early case assessment goes back 20 years but in last 5 years corporate sector has been employing it. It is a predetermined, systematic, and uniform process to evaluate claims and ensure appropriate, efficient, and cost effective dispute resolution.
- Speaker summarized recent business and legal trends, such as more class action lawsuits, increased/claims litigation, protracted conflicts and costlier settlements, globalization, process improvements tied to measurement, and court decisions affirming support for ADR.
- Results from corporate efforts are promising. Companies often measure success in terms of cost savings and report the savings in the millions of dollars annually.

#### MARIA ELENA GONZALEZ

- The purpose of this pilot program is to create a culture where ADR and consensus-building processes are encouraged and routinely employed. This will increase the efficiency and effectiveness of operations. The pilot program effort in part will serve to clarify the role of the solicitor's office in the department with regard to ADR. The goal of the pilot is to give the attorneys tools so they can make more informed decisions regarding disputes. It encourages attorneys to work with clients earlier in the process to address disputes effectively and figure out what processes will work.
- Highly decentralized office—challenge to communicate and coordinate efficiently.
- The speaker reviewed some of the benefits of the program, such as costs savings, reduction in amount of management time in dealing with disputes. A benefit of locating, capturing, and sharing information as an organization is being able to recognize and identify patterns in disputes over claims and begin to deal with them in a more systematic manner.

#### MICHAEL P. STEVENS

The speaker provided a brief summary of the DOI Early Case Assessment Pilot Program Process map. To ensure it is an *early* assessment, the process takes 60 to 90

days, depending on the matter type. A matter comes into the solicitor's office, is assigned to an attorney, and a program administrator will step in to work with the attorney to create an assessment team to develop information in a number of categories in a predetermined, short period of time. A report is prepared on what is learned through this process and presented by the attorney to the client agency including recommendations about how to handle the matter. An extra step in the process is the lessons learned section to help build a database and information on patterns of disputes and to eventually prevent this type of dispute in the future. The purpose of this section is to help guide the program going forward.

Matters that are addressed are defined as broadly as possible, including contracts, ESA civil penalties, habitat conservation plans, natural resources damages, land-use issues, torts, and any other matters deemed appropriate by the Regional Solicitor's office.

The speaker discussed the program's process in more detail.

### **Expedited Factual Investigation**

The assessment team usually consists of the attorney from the solicitor's office, program administrator, main contact at the agency, and someone in a decision-making position from the client agency. A DOJ attorney is included on the team when necessary. There is a systemized way of front-loading the work to provide consistent and broadly useful advice to clients.

Basic information is collected, usually provided by the agency, including a focus on what might be unique to this case. The next step is the more detailed legal analysis. Sometimes the process may identify additional stakeholders.

### **Abbreviated Damage Analysis**

During this phase a risk assessment is conducted, claims prioritized, etc.

### **Review Department History**

Coordinate with agency to review prior relevant disputes, predict potential scenarios, and network with other regional solicitor offices regarding relevant disputes.

### **Review General History**

This is of limited use to the department but useful information can be discovered by looking at cases in other government agencies and institutions. This information can be used to predict the length of litigation process and the likelihood of success.

### **Conduct External and Internal Economic Analysis**

The government is not always adept at measuring and factoring in costs. One outcome of this process may be that agencies look at costs, in terms of resources, of handling issues with litigation as opposed to negotiated solution.

### **Identification and Analysis of Noneconomic Risks/Benefits**

These include: policy considerations, importance of establishing precedent, effect on internal and external relationships, and importance of maintaining confidentiality.

## CONSIDERATION OF OTHER RELEVANT MATTER SPECIFIC OF GENERAL INFORMATION

### **Recommendation for Resolution Strategy**

Information is gathered and analyzed, case assessment team meets (assuming they have been meeting throughout process) and develops report that includes recommendation for a resolution strategy, whether that be ADR, litigation strategy or some other process. If ADR is recommended, the program will organize the process.

One challenge of selling this to attorneys is that it is perceived as additional work. It is important to emphasize that work needs to be conducted regardless of whether alternate dispute resolution (ADR) is used; however, work is being front-loaded and the possibility of reducing the overall work load exists.

### **“Early Warning System” Insight**

By providing this part of the process as a goal, you keep a lookout for systemic improvements that the solicitor’s office and agencies can promote. We learned not to give away rights before talking to attorney first. Sometimes the Solicitor’s office needs to mediate with different departments internally to ensure a unified front is presented to an external party.

## **KEY ELEMENTS**

### **Early Case Assessment Report**

This report summarizes data, includes discussion of range of monetary settlements that would be a good result, identifies nonmonetary solutions and offers preliminary dispute resolution recommendations.

*Program Administrator.* The Program Administrator is a full-time employee whose entire job is to support the Pilot Program. The role is very important to help take on administrative tasks and ensure that overworked attorneys do not have to do administrative work in addition to legal work. They provide support and consistency of implementation. The administrator facilitates the process, ensures communication within team, ensures a report is provided, and tracks the overall progress of the program.

## **CHALLENGES AND OPPORTUNITIES**

- The biggest challenge has been implementing the program when the program administrator could not be replaced, because the attorneys were required to participate in administration of program.
- The shutdown of e-mail at the DOI has made the process very difficult.
- Getting buy-in from attorneys has not been a significant challenge to date; however, there is not really enough experience with the program to assess whether this is a problem or not.
- Solicitor’s office attorneys were trained at the outset. This training has been moderately successful. Many feel that they are already well-versed in ADR when in fact they have little or no experience with its processes.

- There was very little trouble convincing assessment teams of matters being handled. The challenge has been communicating progress on implementation. For instance, team members don't necessarily report back to managers (who approved of the program in concept) how the program is being implemented.
- The long transition within the agency after the change in administration (Clinton to Bush) has been another challenge as new staff arrived. New staff does not necessarily see this Pilot Program as one of the most pressing matters they should deal with.

## QUESTIONS AND RESPONSES

*Question:* What is the protocol for providing a referral of matters to the program?

*Answer:* Each agency has its own protocol for providing referral to the program. Each office operates somewhat independently. Typically, a referral is made by the regional director although there are cases where a park director will make the referral.

*Question:* Do agencies bring you rule challenges?

*Answer:* Yes. The purpose of the process is to assess cases for suitability for ADR. ADR is a possible outcome of the assessment.

*Question:* Do you talk to other parties involved with the matter?

*Answer:* Sometimes that is appropriate but it depends on the case.

*Question:* Do you have a triage system if a 60-to-90 day timeline would prevent handling a case?

*Answer:* The preliminary injunction case required legal analysis to be accelerated. Because the injunction was denied, we were able to work with 60-to-90 day timeframe. Also, that is the longest time it will take to process it. Cases can be assessed more quickly and because ADR is a flexible process, there is an opportunity to tailor the program to the matter as necessary.

*Question:* What if Habitat Conservation Plan process needs ADR Process? Are resources available?

*Answer:* DOJ has asked for mediation assistance because resources for external negotiator/mediator are not available.

*Question:* Is there resistance to the program? Will the strategy for addressing success of the program change minds?

*Answer:* From a pure pragmatic standpoint, the results will speak for itself. Teams are just now getting together to address the issues and decide who will deal with them and how—the cost of the mediation process is seen as an operational cost to the bureau and needs to be absorbed by the bureau. This will be tested in the future—funds should be available through bureaus if external assistance is needed. Resistance from clients is not encountered because the program is being driven by requests from the bureaus.

*Question:* How cooperative have agencies been in providing information with assessments?

*Answer:* In the ordinary course of events, this has not been a problem. If not asked for in the right way, the information can't be gotten, but that is not specific to the early assessment program but rather an ongoing problem.

*Question:* How many matters have come into the program so far?

*Answer:* Because of limitations on matters and lack of program administrator, only about two dozen have been selected for the pilot program.

*Question:* Will you be working with the Institute to get resources and support for mediating/negotiating issues?

*Answer:* Yes, the department already works with the Institute and will continue to do so.

*Question:* Are clients more comfortable with attorneys going through the department?

*Answer:* The department usually provides mediator services because they have the resources available for that purpose. Many people do use outside sources that are available to them if they have experience and a comfort level with an individual or organization that provides ADR services.

*Question:* Who developed the time frame for the pilot program?

*Answer:* The department suggested 6 months development/design time and 6 months implementation to help sell the program. We need a year to design it and run it and do an assessment at the end of process so that decisions can be made about whether or not to continue. The pilot has been extended for six months based on success to date.

*Question:* Do agencies do own assessment before sending matters to solicitor's office?

*Answer:* NPS is already doing this on personnel cases. They may take it to the next step and realize they could do the assessment themselves. The pilot is a small piece of the building infrastructure and support throughout the department. One discrete area to try and change is the way we're doing business. We're looking at an integrated conflict management system. The solicitor's piece is just a start.

*Question:* If two agencies are involved, would both be on the assessment team?

*Answer:* It depends on the relationship of the agencies as to whether both agencies are represented.

*Question:* What is linkage between interior solicitor's office and agency solicitor's office?

*Answer:* Bureaus/agencies do not have individual solicitor offices. They go directly to the department's solicitor's office.

*Question:* Has there been a dramatic shift because of the political transition?

*Answer:* At a department level, roles have not shifted and support has been tremendous and consistent.

# ENHANCING ENVIRONMENTAL DECISION MAKING: USING WEB-BASED TECHNOLOGY IN MULTIPARTY CASES

WEDNESDAY, MAY 15, 2002—10:30 A.M.—12:00 P.M.

## MODERATOR

Cindy Cook, Adamant Accord

## PANELISTS

Saradhi Balla, Technical Outreach Services for Communities Program, Michigan State University

Todd Barker, Meridian Institute

Dr. Jonathan Raab and Colin Rule, Raab Associates, Ltd.

Nancy Serrell, Dartmouth College

## PANEL ABSTRACT

The Web has a multitude of applications in multiparty cases. This panel will highlight a variety of cases—the Elizabeth Mine Superfund Case, Rhode Island Greenhouse Gas Project, and a variety of public involvement projects in Michigan—that have effectively used Internet-based technology. Panelists will discuss:

- Using the Web to disseminate information;
- Web sites as vehicles for internal, confidential discussions;
- Possibilities of chat groups and other on-line forums;
- The Web's potential for fostering broad-based community involvement;
- Conveying technical information effectively;
- Possibilities and limitations of on-line mediation;
- Unique issues associated with using Web-based technology; and
- How ADR practitioners and others can get assistance in developing and using Web-based tools.

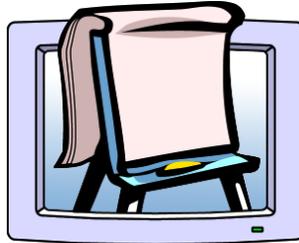
## INDIVIDUAL PRESENTATIONS

### **Using the Internet for Multiparty Dispute Resolution**

By Dr. Jonathan Raab and Colin Rule

### **Elizabeth Mine: Balancing Community Interests**

By Nancy Serrell



## Using the Internet for Multiparty Dispute Resolution

Dr. Jonathan Raab  
Colin Rule  
The Online Public Disputes Project  
Raab Associates, Ltd.

May 13, 2002

## About Raab Associates



Public Disputes.org

- **Founded 12 years ago** by Jonathan Raab
- **Energy and environmental** expertise
- **Primary client types:**
  - Federal Agencies: EPA, FERC, DOE
  - State environmental agencies, public utility commissions, and energy offices
  - Other public and private sector organizations
- **Projects using the Internet:**
  - Electric Utility Restructuring Roundtable
  - Rhode Island Greenhouse Gas Process
  - New England Demand Response Initiative
- Hired **Colin Rule**, Co-Chair of ACR's Online Section
- Launched the **Online Public Disputes Project**

## ADR Technology / Internet Tools



Public Disputes.org

### Meeting Support

- Projection / dynamic presentation systems
- Real-time feedback
- Brainstorming
- Voting and rating tools
- Electronic flip charts
- Audio / Video conferencing

### Online Data and Communications Management

- Full-text searching
- Document management systems
- Online scheduling
- Email broadcasts / e-mail newsletters

## ADR Technology / Internet Tools (2)



Public Disputes.org

### Online Interactivity

- Synchronous meetings (chat, instant messaging, whiteboards)
- Threaded discussion environments
- Polling
- Joint document editing systems
- Automated negotiation mechanisms

### Fully Online Dispute Resolution Processes

- Online Facilitation
- Online Mediation
- Online Arbitration
- Online Expert Evaluation

# Examples

## REPORT TO STAKEHOLDERS FROM BUILDINGS AND FACILITIES WORKING GROUP

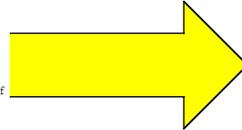
Date: April 8, 2002  
To: RI GHG Stakeholder Group  
From: Buildings and Facilities Working Group

Re: Recommendations on Buildings and Facilities Related GHG Reduction Options

The purpose of this memo is to report back to the Stakeholder Group on the work completed by the Buildings and Facilities Working Group with respect to prioritizing potential greenhouse gas reduction options related to buildings and facilities in Rhode Island.

The Group met three times – on November 29<sup>th</sup>, February 7<sup>th</sup>, and April 4<sup>th</sup>. During the first meeting, the Group reviewed a scoping paper by Tellus Institute on a range of potential options. At that meeting, the Group suggested additional options, proposed modifications to options suggested by Tellus, and reviewed and commented on a range of methodological and assumption issues. During the second meeting, the Group reviewed additions and changes suggested by Tellus as a result of further inquiries. The Group also prioritized the options into three bins (high, medium, and low), and reached a consensus on the placement of all the options except for one option pertaining to switching from oil to natural gas. After the second meeting, one of the Working Group

### R. I. Greenhouse Gas Process

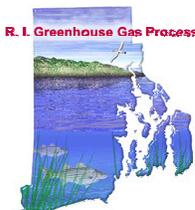


The RIGHG Process

**Table 1:  
Binning from Building & Facilities Working Group<sup>1</sup>**

Consensus Recommendation Options			
Number	Name	Saved Carbon	CSC
<b>High Priority</b>			
2.6	Energy efficiency in existing nonresidential facilities; implement additional new fossil-oriented program	100	-200
3.1	Upgrade and extend appliance efficiency standards	100	-56
3.2	Compact appliances life style option	80	
6.2	Energy efficiency targets adopted by industrial firms	40	
4.1	Combined heat & power (CHP) in industry	35	
1.6	Electric energy efficiency in existing nonresidential facilities: extend "Energy Initiative"	30	
6.3	Repeal and expand tax credits, for energy efficiency	15	
4.2	CHP in buildings and facilities (non-industrial)	15	
2.1	Efficient residential electric cooling initiative	10	
1.3	Retrofit program for electrically heated homes	9	
2.5	Retrofit program for fossil heated homes	8	
1.2	Efficient lighting and efficient appliances DSM programs	5	
1.5	"Design 200" DSM for efficient new nonresidential construction	5	
1.4	"Energy Star" DSM for efficient new residential construction	1	
1.7	Small commercial & industrial DSM program	5	
6.1	Public facilities efficiency initiative	5	
2.4c	Encourage use of lower carbon fossil fuels	750	
<b>Medium Priority</b>			
2.2	Efficient residential fossil fuel heating initiative	25	
5.1	Compact floorspace life style option	5	
<b>Low Priority</b>			
2.4b	Switching from electricity to fossil fuel heating	1	
1.1	Solar PV buydown program	1	
2.3	Active solar hot water heating program	1	
2.7	Nonresidential gas air conditioning	<1	

**R. I. Greenhouse Gas Process**



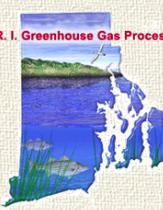
**Notes for Table 1: Binning from Building & Facilities Working Group**

- For Options 3.2a and 3.2b, Upgrade New Residential and Commercial Construction Building Codes**, all but four of the Group members concluded that both code options should be high priorities. The Business Roundtable concluded that it should be medium priority, while the Rhode Island Builders Association, the Association for Builders and Contractors, and the Oil Heat Institute concluded that it was premature to propose these options until further evaluating their relative costs and benefits. The nine members supporting the placement of the code options in the high priority bin were New England Gas, Sustainability Coalition, RI DEM, RI State Energy Office, RI DOA Building Code, Brown University, Management Electric, People's Power and Light, and Conservation Services Group. However, the Group unanimously agreed that there should be options to provide education on best energy saving building practices for both residential and non-residential construction practices.<sup>4</sup>
- For Option 2.4a Switching from Oil to Natural Gas**, the Group was strongly divided about the advisability of this option. However, the Group agreed that we should encourage use of lower carbon fossil fuels (where fossil fuels are in use) when such fuels are available and cost effective, and Rhode Island should continue to look for those opportunities. The Group agreed that this new option (2.4a) should be a high priority.
- For Option 3.1 Upgrading and Extending Appliance Efficiency Standards**, the Group decided to categorize the Option as "High Priority" but to emphasize that a focus on regional and federal standards would be a more effective strategy than RI-only implementation, which the Group believes is probably impractical.
- For Option 5.1 Compact Floorspace Life Style Option**, the group agrees to keep the floor space option in the Medium Priority bin despite a very low projected cost of saved carbon because many in the Group questioned the political viability of promoting smaller living units.

➔

**The RIGHG Process**

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**R. I. Greenhouse Gas Process**

- RIGHG Home
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- Documents
- Modeling
- Membership
- Stakeholder Committee
- Working Groups
  - Buildings & Facilities
  - Transportation Land Use
  - Energy Supply Solid Waste
  - Education/Outreach
- Raub Home

**Rhode Island Greenhouse Gas Process**

The Rhode Island Greenhouse Gas Process (RIGHG) represents a unique attempt on the state level to reduce the greenhouse gases that cause global warming. RIGHG's goal is to formulate a Greenhouse Gas Action Plan for the state of Rhode Island. RIGHG is comprised of many different members. The process is guided by a stakeholder committee and utilizes topical working groups. The initiative will make use of detailed modeling to enhance the applicability of the findings and numerous framing papers and other documents. Click [here](#) for the full schedule for each of the groups.

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## Membership

The RIGHG process is comprised of many different individuals and organizations representing government, industry, environmental and consumer groups. These members include stakeholder representatives who are working on the stakeholder committee, on one or more of the topical working groups, or both.

**View Stakeholders & Working Groups Members**

[SG](#) - Stakeholder Group    [BF](#) - Buildings & Facilities  
[TL](#) - Transportation/Land Use    [ES](#) - Energy Supply/Solid Waste  
[EO](#) - Education/Outreach    [ALL](#) - View Members of All Groups

(Click on a Name to see Contact Info or Click [HERE](#) to View ALL Contact Info)

Organization	Representative	SG	BF	TL	ES	EO
AAA Public Affairs	Bob Murray	<input checked="" type="checkbox"/>				
Alliance Environmental Group	Michael Geisser					<input checked="" type="checkbox"/>
Aquidneck Island Planning Commission	Kelly Woodward					<input checked="" type="checkbox"/>
Associated Builders and Contractors	Robert Boiselle		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Audubon Society of RI	Eugenia Marks			<input checked="" type="checkbox"/>		<input checked="" type="checkbox"/>

**Rhode Island Greenhouse Gas Process**

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## Schedule

Upcoming event(s) are highlighted in yellow.  
Click on the Event name to see details.

Sort by event type or date by clicking on the  buttons.

Event	Location	Date
<a href="#">Stakeholder Committee Meeting 1</a>	RI DEM	10/4/2001
<a href="#">Stakeholder Committee Meeting 2</a>	RI DEM, Rm 300	11/2/2001
<a href="#">Buildings &amp; Facilities Meeting 1</a>	RI DEM, Rm. 280C	11/29/2001
<a href="#">Transportation/Land Use Meeting 1</a>	RI DEM, Rm 300	12/19/2001
<a href="#">Energy Supply/Solid Waste Meeting 1</a>	RI DEM, Rm 300	1/10/2002
<a href="#">Buildings &amp; Facilities Meeting 2</a>	RI DEM, Rm 300	2/7/2002
<a href="#">Transportation/Land Use Meeting 2</a>	RI DEM, Rm 300	2/14/2002
<a href="#">Energy Supply/Solid Waste Meeting 2</a>	RI DEM, Rm 300	3/14/2002
<a href="#">Stakeholder Committee Meeting 3</a>	RI DEM, Rm 300	3/21/2002
<a href="#">Buildings &amp; Facilities Meeting 3</a>	RI DEM, Rm 300	4/4/2002
<a href="#">Transportation/Land Use Meeting 3</a>	RI DEM, Rm 300	4/25/2002
<a href="#">Energy Supply/Solid Waste Meeting 3</a>	RI DEM, Rm 300	5/9/2002
<a href="#">Stakeholder Committee Meeting 4</a>	RI DEM, Rm 300	6/13/2002
<a href="#">Stakeholder Committee Meeting 5</a>	RI DEM, Rm 300	7/11/2002

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**Rhode Island Greenhouse Gas Process**

**Documents**

The process has produced a number of helpful documents including framing papers, meeting summaries, meeting agendas, modeling results, etc. Use the pull down menus to search by date, document type, or group.

You can search by Date, Document Type or Group:

10/4/2001 Search by Date

Agenda Search by Document Type

Buildings and Facilities Search by Group

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**Documents**

The process has produced a number of helpful documents including framing papers, meeting summaries, meeting agendas, modeling results, etc. Use the pull down menus to search by date, document type, or group.

Search by group: **Buildings and Facilities**

**Buildings & Facilities Meeting 1 (11/29/2001)**

- Agenda - BF1 (Agenda) (24k)
- Buildings and Facilities Scoping Paper (Scoping Paper) (208k)
- Energy Office Programs (Other) (45k)
- Buildings and Facilities Scoping Paper--Technical Annex (Scoping Paper) (195k)
- Narragansett Electric Commercial Programs (Other) (2,070k)
- Narragansett Electric Residential Programs (Other) (202k)
- Buildings and Facilities Meeting Summary (Meeting Summary) (37k)

**Buildings & Facilities Meeting 2 (2/7/2002)**

- Agenda - BF2 (Agenda) (23k)
- Prioritization Memo - BF2 (Memoranda) (58k)
- Buildings and Facilities Revised Scoping Paper (1/31/02) (Scoping Paper) (267k)
- Meeting Summary (Meeting Summary) (250k)

**Buildings & Facilities Meeting 3 (4/4/2002)**

- Buildings & Facilities Revised Technical Appendix (Background

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**Conferences**  
All Messages | 7 New | 10 Alerts

- RIGHG Status Report (13, 7 New) **xxxx**
  - Revised Memo (Roger Wiener) 04/05/02
  - Commentary/Response (Jonathan Raab) 04/05/02
  - Warren Comment/Response (Jonathan Raab) 04/05/02
  - New England Gas Company (Jonathan Raab) 04/05/02
  - Draft memo to the Legislature (Jonathan Raab) 04/05/02
  - Draft memo to the Legislature 9 (Colin Rule) 04/05/02
  - Draft memo to the Legislature (Harold Ward) 04/05/02
  - Draft memo to the Legislature (Jonathan Raab) 04/05/02
  - Draft memo to the Legislature (Jonathan Raab) 04/05/02
  - Latest Version of the Status Report 9 (Colin Rule) 04/05/02
  - Welcome (Colin Rule) 03/27/02

**WebBoard**

**Topic:** Draft memo to the Legislature (2 of 6), Read 32 times, 1 File Attachment  
**Conf:** RIGHG Status Report  
**From:** Colin Rule [colinr@medstate.com](mailto:colinr@medstate.com)  
**Date:** Friday, April 05, 2002 01:28 PM

Here is the latest version of the draft memo to the Legislature. Please post your comments and suggestions in Webboard.

If you'd like to make more substantive changes and suggestions, please feel free to download the file, turn on "track changes" (in the Tools section of Microsoft Word), make your edits, save the new version on your hard drive, and then upload it back to the RIGHG Webboard for everyone to see.

To attach it to a message, click "post" (or "reply") and then check the "attach file" box at the top of your new message. Webboard will then walk you through the process of selecting the file off of your hard drive and uploading it onto the Webboard.

We will take all of the edited memos and synthesize them into one unified document for approval from the RIGHG Stakeholder group.

As always, just give me a ring (Colin Rule, 617-261-7111) if you should have any questions.

Colin

[MEMO FOR RI LEGISLATURE FINAL 4-3-02 DOC \(112KB\)](#)  
[Memo for RI Legislature](#)

**Topic:** Draft memo to the Legislature (2 of 6), Read 32 times  
**Conf:** RIGHG Status Report  
**From:** Harold Ward [harold\\_ward@brown.edu](mailto:harold_ward@brown.edu)  
**Date:** Monday, April 08, 2002 07:31 AM

My comments on the Draft memo are the ones I made in the last Stakeholders meeting. I think it is misleading to list strategies that have very low probabilities for implementation and over which RI has very little influence - e.g. federal CAFE standards - as showing large and cost effective reductions. To all but the most experienced, that

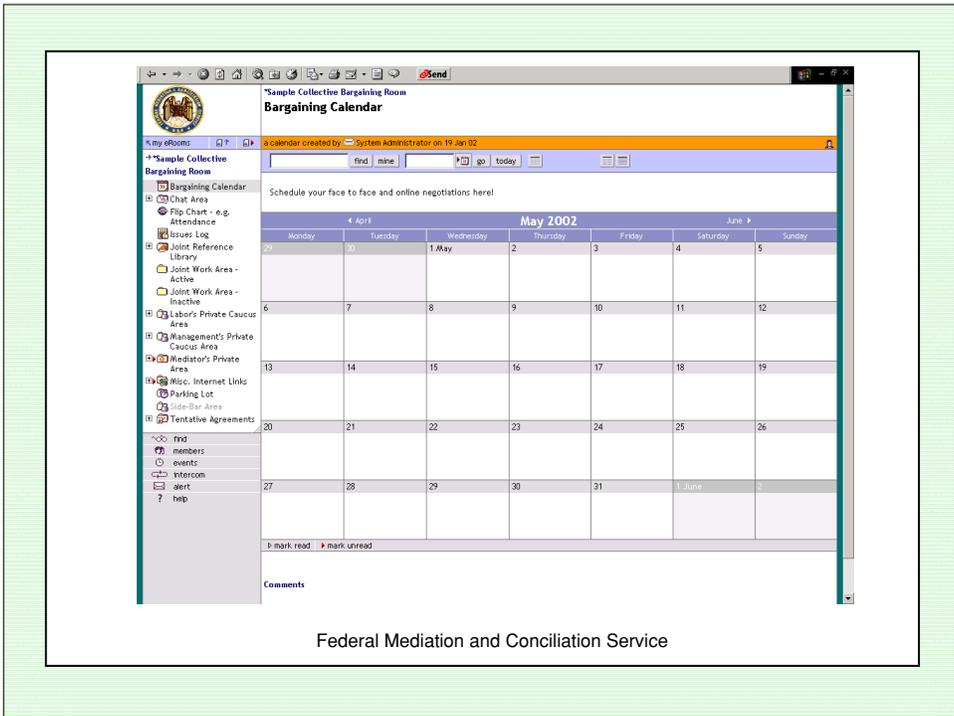
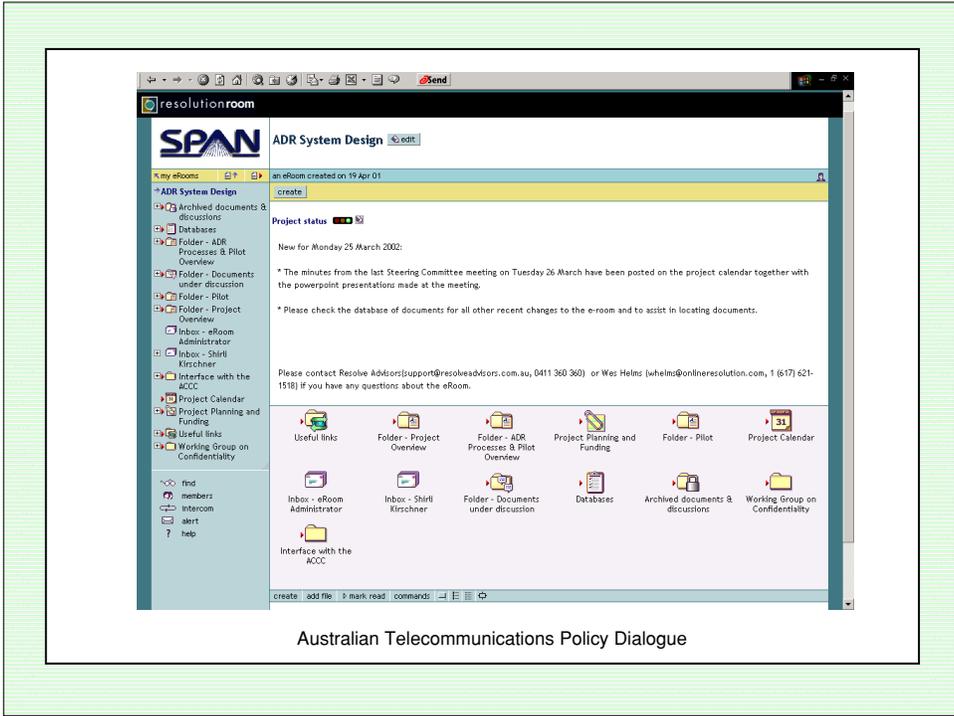
Rhode Island Greenhouse Gas Process

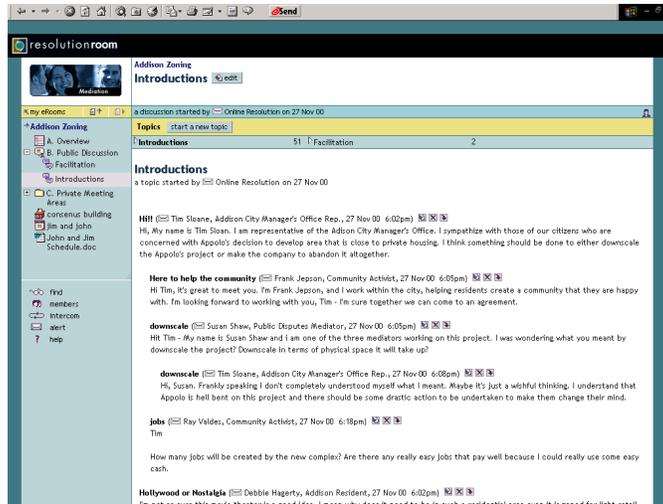
## Primarily Online Disputes

  
**Public Disputes.org**

- **The Expanding Field of ODR**
  - E-commerce (eBay)
  - Transboundary (ICANN)
  - Insurance (Cybersettle)
  - UN, ICC, FTC, BBB, WIPO, etc.
- **Multiparty, public disputes**
  - RuleNet
  - Australian Telecommunications Dialogue
  - EPA Public Participation, Summer 2001

"By combining broad participation with the intensive interaction typically found only in small-group participation processes, on-line dialogues offer a whole new approach to public involvement." - *Resources for the Future*





Addison Zoning Simulation

## Advantages



Public Disputes.org

- **Lightens administrative load on neutrals**
  - Easy information dissemination
  - Document and information repository
- **Allows for both targeted and asynchronous communication**
- **Supports in-meeting tasks**
- **Enables participants to make progress between meetings**
- **Can engage people across wide geographic areas where face-to-face meetings are impractical**
- **Dynamic reframing**
- **Concurrent caucusing**

## Disadvantages



Public Disputes.org

- **Some are threatened by technology**
- **Things can go wrong**
- **Facilitators can lose control**
  - Parties are more able to communicate among themselves
  - Mediators can overreact and misuse online power
- **Discussions can end up focusing on the technology and not the issues that need to be addressed**
- **Technology may advantage some parties over others**
  - Those with fast Internet connections
  - Those who are comfortable with technology
  - Those who type fast (especially in synchronous communications)

## Conclusion



Public Disputes.org

- **Public Dispute Resolution sponsors, providers, and participants will come to use technology more extensively**
- The tools will become more sophisticated
  - More user friendly
  - Better integrated and tested for stability
  - Improved support materials (help files, user manuals)
- Users will become more comfortable with technology
  - Parties will come to expect that online interaction options will be available to them
  - Funders will ask for online components in proposals
- **Technology decisions need to be well considered and thought out thoroughly in advance of implementation**

## Services of the Online Public Disputes Project



Public Disputes.org

### Facilitation and Mediation

- Traditional face-to-face processes
- Face-to-face plus:
  - Deliberative polling/Online voting
  - Online working groups
  - Web-based public participation
- Fully online processes, where face-to-face meetings are inconvenient or impossible

### Consulting

- Improve ongoing processes
- Design new processes
- Evaluation
  - ODR experiments
  - Traditional evaluation using online techniques

### Training

- ODR training for public dispute facilitators and mediators
- Online training systems

## Users



Public Disputes.org

*Who Should Make Use of the Services Provided by the Online Public Disputes Project?*

### Federal/state/local governments and agencies, for:

- rule making
- policy dialogues
- dispute handling systems
- expert panels

### ADR Service Providers, for:

- partnering on ODR-enabled processes
- technology planning and design
- facilitation/mediation
- pre-meeting preparation
- post-meeting follow-up.



Center for Environmental  
Health Sciences at Dartmouth

## Elizabeth Mine: Balancing Community Interests

Nancy Serrell  
Associate Director for Outreach

Center for Environmental Health Sciences at Dartmouth

## The legacy of a copper mine

Elizabeth Mine  
Strafford, Vermont



Center for Environmental Health Sciences at Dartmouth

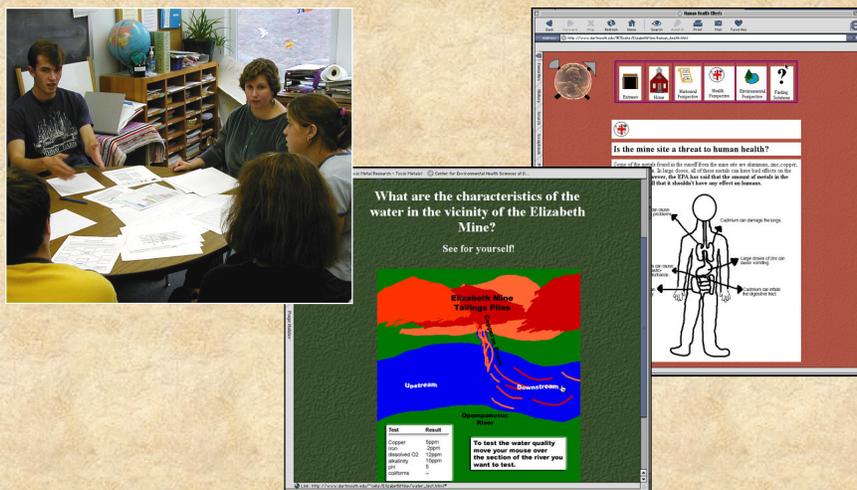
## Newton School Elizabeth Mine projects



Center for Environmental Health Sciences at Dartmouth

## Newton School Elizabeth Mine web site

<http://www.dartmouth.edu/~cehs/ElizabethMine/indexEM.html>



Center for Environmental Health Sciences at Dartmouth

## But first, some questions...

- Whose site is this?
- What will get posted?
- How will decisions be made?
- Will documents be vulnerable to changes?
- Will the Web site invite trespassing?



Center for Environmental Health Sciences at Dartmouth

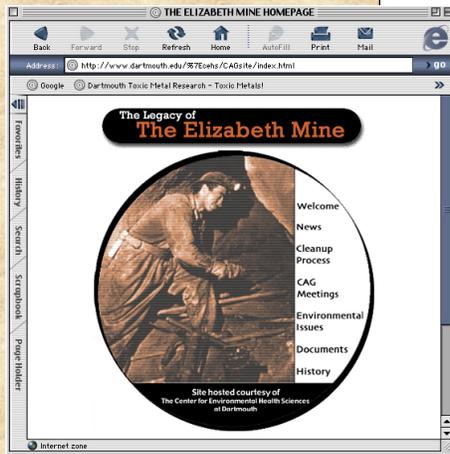
## Citizens Advisory Group site: planning stage



Center for Environmental Health Sciences at Dartmouth

## Community Advisory Group site launched

<http://www.dartmouth.edu/%7Ecehs/CAGsite/index.html>



### Welcome to the Elizabeth Mine website!

The Elizabeth Mine is an historic mine site located in the towns of Stratford and Thetford, Vermont. The mine operated intermittently from 1809 to 1958, and is a nationally significant [historic site](#).

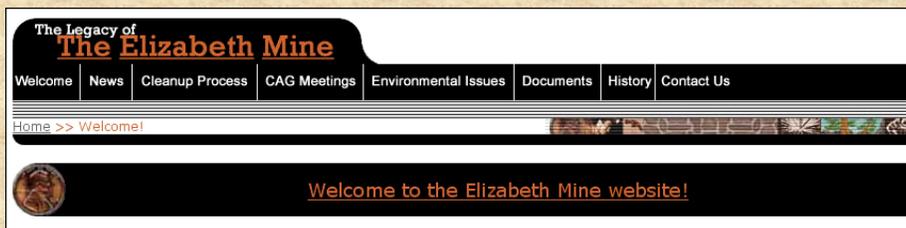


Rain and surface water that flows through the mine waste piles dissolves metals and other contaminants that are polluting the West Branch of the Ompompanoosuc River. Since the spring of 2000, a [Community Advisory Group \(CAG\)](#) has been working with the United States Environmental Protection Agency (EPA) and the Vermont Agency of Natural Resources (VNR) to develop a way to clean up the site while respecting the historic landscape and minimizing [disaster-related impacts](#) on the local community. In September, 2000 the Community Advisory Group voted.



Center for Environmental Health Sciences at Dartmouth

## Elizabeth Mine CAG site



- Official documents
- Meeting calendar
- Resource on process
- Meeting summary archive
- Background reference
- Control over access

Center for Environmental Health Sciences at Dartmouth

## What a community Web site can do...

- Provides the “long view”
- Puts science into cultural context
- Creates record of "where we agree"
- Tells story in community’s terms

The land upon which the Elizabeth Mine is located is PRIVATE PROPERTY.

**Citizens for a Sensible Solution** is an unincorporated association of Strafford and Theford residents committed to making sure the cleanup and restoration of the Elizabeth Mine site are proportional to the size of the problem and that the concerns of all affected members of the community are taken into account.

**The Elizabeth Mine Non-Residential Property Owners** are property owners who do not live on or near the site.

**The Elizabeth Mine Residential Property Owners** live at or near the mine site, and are concerned about the effects of Superfund on residents’ homes and daily life. Health and safety issues, noise, traffic, dust, drinking water supplies and the general disruptions will affect us, our property values and our neighborhood for an indefinite period of time. Decisions about the final outcome of the clean up will permanently affect us.



Tyson Mill buildings (ca. 1900)

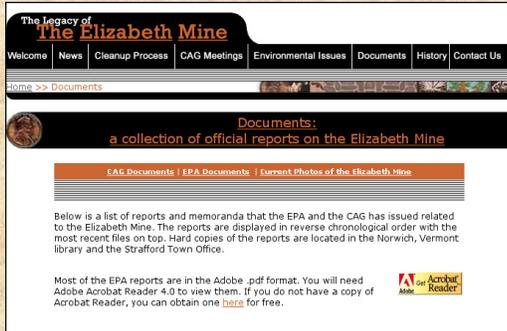
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## Why the CAG site worked

- Recognized need
- Trust established
- Web access
- Clear roles
- Simple process

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## To produce a community site...



- Need for a Web site
- Server space
- Webmaster
- Site editor
- Technical assistance

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## Six habits of highly effective Web sites

A good Web site answers the questions:

- Where am I?
- Who are you?
- What is this site?
- Why did you build it?
- Where can I find...?
- How can I reach you?

This site presents information about the history of the Elizabeth Mine and the cleanup process, and is intended to provide the public with information about the Elizabeth Mine Community Advisory Group's activities and meeting schedules as well as access to reports related to the cleanup. The site is being developed collaboratively with the [Center for Environmental Health Sciences at Dartmouth College](#). The web design work is being tackled by [Peter Ostendorp](#), a member of the Class of 2003 at Dartmouth College. All content has been provided by the EMCAG.

The land upon which the Elizabeth Mine is located is PRIVATE PROPERTY.

Page last updated: 11/1/2001  
webmaster

[The Center for Environmental Health Sciences at Dartmouth](#), © 2001  
Site designed by [Peter Ostendorp '03](#)

Contact Us

Questions regarding the Community Advisory Group

Questions about the Elizabeth Mine and the Community Advisory Group should be directed to [Cindi Cool](#), the CAG's facilitator.

E-mail: [ccool@adamantacord.com](mailto:ccool@adamantacord.com)  
Tel: (802)223-1330



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## National Institute of Environmental Health Sciences Superfund Basic Research Program

<http://benson.niehs.nih.gov/sbrp/Index2000.cfm>



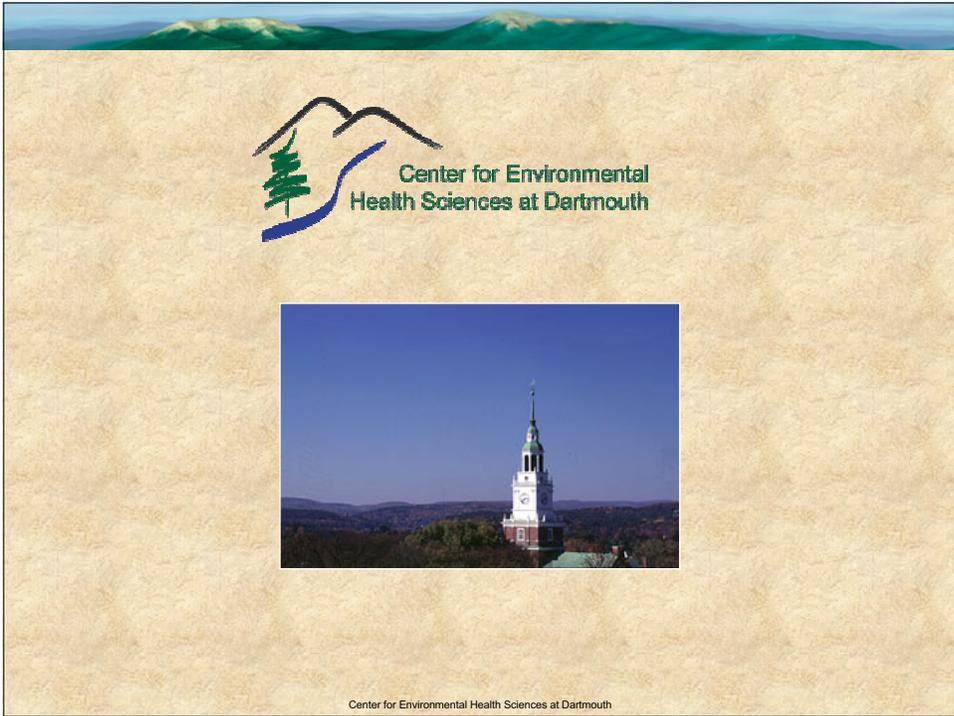
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## NIEHS Community Outreach and Education Programs (COEPs)

<http://www.niehs.nih.gov/centers/home.htm>



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# **SESSION II: PANEL PRESENTATIONS**

**WEDNESDAY, MAY 15, 2002**

**1:30–3:00 P.M.**

# REPORT FROM THE FRONT LINES: SHIFTING TO AN INTEREST-BASED COLLABORATIVE NEGOTIATION AT THE VERONA WELL FIELD SUPERFUND SITE

WEDNESDAY, MAY 15, 2002—1:30–3:00 P.M.

## MODERATOR

R. Craig Hupp, Bodman, Longley & Dahling LLP

## PANELISTS

Richard Boice, U.S. Environmental Protection Agency, Region V

Claudia Kerbawy, Environmental Response Division, Michigan Department of Environmental Quality

Bridget Morello, Progressive Engineering & Construction, Inc.

## PANEL ABSTRACT

The Verona Well Field was placed on the Superfund National Priority List in 1983. The well field itself is the sole source of water for Battle Creek, Michigan, the breakfast cereal capital of the world. Key technical issues remained unresolved for years and there were ongoing disputes as to which agency (U.S. EPA or the MDEQ) was in charge and what the standard of performance was for the remedy. By 1998, relations had deteriorated and each of the four parties was actively considering initiating litigation to get what they wanted.

On the very eve of litigation, the parties met and made a resolution to shift from adversarial stances to collaborative negotiations without the assistance of a third-party neutral. The panelists will provide a frank disclosure of their respective reasons for shifting from adversarial stances to collaborative negotiations, what their underlying interests were, and a candid evaluation of the strengths and weaknesses of the process and its effectiveness in obtaining a “win-win” solution.

## PANEL SUMMARY

## PANEL SUMMARY

### MAIN DISCUSSION POINTS

Introduction (Craig)—Verona Well Field (VWF) Superfund site: A situation that was heading for litigation and was resolved using collaborative negotiation *without* using a third-party mediator.

- Parties involved: State of Michigan, City of Battle Creek, U.S. EPA, Michigan Attorney General, and PRP (potentially responsible parties) group.
- Purpose: How did the atmosphere change from litigation to collaborative negotiation?
- Definition of collaborative negotiation

### THE CONTEXT (CRAIG, CLAUDIA, BRIDGET, AND RICHARD)

- Characteristics of the Superfund site: Battle Creek water supply source areas were found to be contaminated in 1983.
- PRPs (20 different companies) were being held accountable for this contamination and cleanup.
- In 1998, four parties (state, city, PRP group, and EPA) were in discussions with lawyers regarding the proposed remedy by EPA to clean up source areas.
- Parties were not communicating effectively.
- Battle Creek wanted to supply safe water to residents in present and future; EPA remedy did not protect long-term water supply.
- Relationships between all parties were very strained. All parties were seriously considering litigation.
- A decision was made to set up a meeting with all four parties. This meeting occurred in September 1998. This was the beginning of the collaborative process.
- Although there was no mediator, Craig Hupp brought some principles of collaborative negotiation to the meetings.

### GROUND RULES ESTABLISHED BEFORE COLLABORATION COULD BEGIN (CRAIG)

- No “I told you so,” no rehashing historical decisions.
- Show courtesy.
- Appreciate the costs of others’ commitments.
- No one leaves the table until everybody’s issues are satisfactorily addressed.
- Deal is not done until everyone signs off and all issues are resolved.
- Each party must contribute to solving issues.

A series of meetings took place before trust was established. All parties had to step back and listen to the other parties to come to an agreement as to what the issues were.

## **WHY DID THE PARTIES SWITCH TO A COLLABORATIVE APPROACH?**

### **PRP Group Reasons (Craig)**

- Wanted to work directly with the city instead of the state and EPA coming between them.
- Existing style had not worked.
- Wanted to close issues that had been subject to dispute for years.
- Litigation would be very expensive and time-consuming and outcome was uncertain.
- Wanted to improve long-term working relationships with other parties

### **State's Reasons**

- Frustrated with the status quo.
- Wanted to avoid delays of litigation.

### **City's Reasons**

- Hoped transaction costs would be lower than those of litigation.
- Wanted assurance that future water supply would be protected.

### **EPA's Reasons**

- Wanted to address concerns of city, state, and Congressmen.
- VWF Group was showing exceptional cooperation

### **ADVANTAGES OF COLLABORATIVE NEGOTIATION (CRAIG)**

- Found solutions not likely to be identified in litigation.
- Got concessions not available in litigation.
- Improved relationships resulting in flexibility, cooperation, streamlining, and trust.

### **DISADVANTAGES OF COLLABORATIVE NEGOTIATION**

- No faster than litigation.
- Required significant input from decision makers.

### **QUESTIONS AND RESPONSES**

*Question:* Was there a conscious decision not to use a third party?

*Answer (Craig):* No. I was prepared to take a proactive role taking the place of a mediator. There was also a matter of good timing. The parties lead representatives had decision-making authority and were at least one step removed from the technical level. The lead decision makers were a little more removed from the front lines and were more

amenable to collaboration. All parties were interested in doing something else other than continual conflict. This kind of thing does not happen very often.

*Question:* Were people actually not greedy in the meetings (as stated in the ground rules)?

*Answer (Bridget):* All parties could not be greedy. Each party had to figure out what they could compromise on.

*Answer (Craig):* A greedy approach could only have been supported by an adversarial approach, not a collaborative approach. Each party had to state what they *needed* while respecting the other parties' concerns. By definition, greedy people cannot address others' concerns.

*Question:* Who enforced the ground rules?

*Answer (all presenters):* Everybody!

*Question:* Why didn't you (the state) order the PRP group to do things that had to be done?

*Answer (Claudia):* We all really wanted to have decent working relationships with the other parties. We did not want litigation—ending up in court does not necessarily resolve the issues. There was a potential to work things out.

*Question:* Do you think about sustaining the good working relationship between parties for good communication in the future?

*Answer (Bridget):* We are developing a VWF management plan and all parties have a part in its development. This will outlive us and it reflects the groups' agreements about the maintenance and protection of Battle Creek's water supply. Future decision makers may look to this document to confirm what each party had agreed to. The consent decrees reflecting the parties' agreements incorporate an ongoing technical consultation process.

*Question:* What was the nature of the dispute between the two regulating agencies?

*Answer (Richard):* EPA ordered the PRPs to follow the ROD and UAO for contamination cleanup and the state was to enforce this. The EPA and state disagreed on the level of well field protection required by the ROD. The state did not agree with some of EPA's technical decisions.

*Question:* Why was it hard to create meaningful deadlines?

*Answer (Bridget):* The VWF Group has had to keep all parties on time with deadlines. We were able to prioritize to keep the process moving.

*Answer (Craig):* Deadlines help decisions.

*Question:* Would have an outside mediator have sped things up?

*Answer (Claudia):* There may have been a role for an outside mediator but we did pretty well without one. I would not want to go through this in other situations without a mediator.

*Question:* You say that this would not have worked in other situations. What made your parties unusual?

*Answer (Bridget):* The VWF Group was unusual—they were highly organized. The companies were all able to step up to the plate. MDEQ also deserves significant credit. It took risks and actions to further matters that were not typical of MDEQ.

*Answer (Craig):* Money was an important factor. In that the PRP had made long-term funding commitments, so there was not an issue of raising funds.

*Question:* Did anyone have training in collaborative negotiation?

*Answer (Bridget):* I did not have any training and a lot of people did not, but we were all open to the process. Craig and Claudia had some experience.

*Answer (Claudia):* I did not have any specific training but I was open to the process.

## Report from the Front Lines: Shifting to an Interest-Based Collaborative Negotiation at the Verona Well Field

R. Craig Hupp, Moderator

Richard Boice

Claudia Kerbawy

Bridget Morello

U.S. Institute for Environmental Conflict Resolution  
*Environmental Conflict Resolution: The State of the Field  
and its Contribution to Environmental Decision-Making*  
May 15, 2002



## Panel Members

R. Craig Hupp (Moderator)  
Bodman, Longley & Dahling LLP  
Common Counsel, Verona Well  
Field PRP Group

Claudia Kerbawy  
Superfund Section Chief  
Environmental Response  
Division  
Michigan Department of  
Environmental Quality

Richard Boice  
Remedial Project Manager  
Verona Well Field Site  
USEPA, Region V

Bridget Morello, P.E.  
Progressive Engineering &  
Construction, Inc.  
Project Manager for the Verona  
Well Field PRP Group



## Objectives of the Presentation

To examine what is required of the parties to shift from an adversarial relationship to a collaborative relationship by sharing the experiences and thinking of four governmental and private parties in negotiating revisions to a Superfund site remedy and a final resolution of all claims at the site.



## The Parties

- **City of Battle Creek**
  - Operates municipal water supply threatened by contamination
- **MDEQ**
  - State review and oversight
  - Responsible for clean up at the TSRR Source Area
  - Natural Resources Trustee
- **Michigan Attorney General**
  - MDEQ's lawyer/co-trustee
  - Ensure law is complied with under UAO, Part 201
- **Verona Well Field PRP Group**
  - 20+ PRPs to implement the 1991 ROD
- **EPA**
  - Site is federal lead
  - Enforce ROD and UAOs



## Collaborative Negotiation

- **Concept**
  - Interest-based bargaining
- **Collaborative vs. adversarial**
- **Requires different roles of regulators, lawyers, and consultants**
- **Just as hard as litigation – but emphasis and approach differ**



## Basic Objectives of Collaborative Negotiation

- **Focus on solving problem at hand (not potential problem or worst case)**
- **Avoid many future problems through a strong working relationship**
- **Respect others' interests and point of view**
- **"Arguments" rarely change minds**



## Site History

1983	Special Notice
1984	Interim Blocking Well Remedy
1989	RI Completed
1991	ROD
1993	Implementation of Soil Remedy
1994	Request for ROD Revision
1996	Blocking Well Implementation
1996-1998	Issues that Would Not Die
May 1998	The Turning Point



## Issues that Would Not Die

- Monitoring and Demonstration of System Effectiveness
- Compounds of Concern
- Demonstration of System Effectiveness
- Amount of Protection for Well Field
- Complex and Lengthy Review/Approval Process
- EPA and MDEQ with Overlapping Authority and Unclear Roles
- Perceived Inconsistent Application of Requirements
- Strained Working Relationship among All Parties



## Party Positions in May 1998

- State:** Preparing to sue
- City:** Considering suit
- Group:** Considering legal options to protect "rights"
- EPA:** Attempting to assure proper O&M and monitoring of remedy, and compatible City well field operation. Looking into possibility of enforcement action.



## Initial Results of Collaborative Process

- Start of Process (September 1998)
- Trust and Process Building
- Commitment to Revision
- Reconsideration of Remedy
- Resolution of Cost Claims and Resolution of NRD (April 2000)
- Interim Commitment (September 2000)



## Current Status of Collaborative Process

- **Consent Decrees with EPA and MDEQ (in progress)**
- **Fleshing Out the Details**
  - Well Field Management Plan
  - Routine Monitoring Plan
  - ESD
- **Just One More Issue**
  - Demonstration of GW System Protectiveness



## Ground Rules

1. Don't rehash history and don't say "I told you so."
2. Show courtesy.
3. Appreciate costs of others' commitments: "Your dollars are as hard to come by as our dollars."
4. No one leaves the table until everyone's issues are satisfactorily addressed.
5. The deal is not done until everyone signs off and all issues are resolved.
6. Each party must contribute to solving issues.



## Understandings

- **Take positions in good faith**
- **Minimum of posturing and BS**
  - Don't start with inflated positions to bargain down from.
  - Put your bottom line, or something close to it, on the table.
- **Identify and try to understand each party's real concerns**
- **Help solve others' issues**
- **Recognize practical constraints at the site**
- **Don't be greedy; don't seek maximum advantage**



## Process

- Build trust
- Face to face
- Take risks
- Show cards (mostly)
- Identify & respect others' interests
- Make initial commitment to show good faith and performance
- Take on part of burden of making the process work
- Once an issue is resolved, do not revisit
- EPA dropped oversight contractor, procured USGS assistance, and relied more on MDEQ technical staff



## Why We Made the Decision to Take a Collaborative Approach



## VWF Group's Reasons

- Permit Direct Dealings with the City
- Existing Style **Had Not** Worked
- Unable to Close Issues
- Litigation Very Expensive and Energy and Time Consuming
- Unlikely to **Get** Judicial Relief on Several Key Issues
- Need to Improve Working Relationship for Long Term



## State's Reasons

- Frustration with the Status Quo
- Desire to Expedite Resolution without Delays of Litigation
- Desire to Minimize Intergovernmental Conflict
- Need to Include, and Apparent Willingness of Key Stakeholders to Participate
- Apparent Potential for Success
  - Clear that communication had been poor
  - Apparent motivation to work in good faith



## City's Reasons

- Working toward a Known Agreement vs. the Uncertainty of Litigation
- Hope that Transaction Costs **Would Be** Less than for Litigation
- Preference to Work Together if Possible



## EPA's Reasons

- Address Concerns of City, MDEQ, and Congressmen
- Effective Operation of Remedy Required Cooperation of City
- Enforcement **Was Not Promising**
- VWF Group **Was Showing Exceptional Cooperation**



## VWF Group's Interests

- Streamline Process
- Get Cap on Obligation to Protect Well Field
- Get Cleanup Numbers Revised
- Get Closure on Open Technical Issues
- Get Acknowledgement of Voluntary Cooperation
- Develop Unified Well Field Management Plan
- Resolve All City, State, and Federal Claims
- Consistent treatment **between State and VWF Group Source Areas**
- Developing Solutions Based on One Unified Aquifer
- Get City Involved as Active Partner



## State's Interests

- Ensure an Effective, Protective Remedy
- Adequately Monitor Remedy Performance
- Ensure State and City Concerns Addressed by VWF Group and EPA during Remedy Implementation
- Coordinate State's Source Area Remedy with Remaining Remedy
- Recover Natural Resource Damages
- Obtain Reimbursement of Past and Future Cost



## City's Interests

- Regain 30 MGD Well Field Production
- Provide Water with Quality Acceptable to Customers – Residents and Major Food Companies
- Minimize City's Costs for Problem It Did Not Cause



## EPA's Interests

- Identify and Correct Any Remedy Deficiencies
- Gain Cooperation of City and MDEQ - Avoid Bad PR
- Improve Reporting of Problems by VWF Group
- Use "Reform" to Facilitate Final Settlement on All Remaining Issues, Provide Greater Fairness, Reduce Litigation and Transaction Costs



## VWF Group's Concerns with Collaborative Process

- Can We Trust Them?
- May Result in VWF Group Taking on More than "Fair Share."
- Will Process Yield Final Resolution of Technical Issues?
- Will Process Encourage Other Parties' Demands?



## State's Concerns with Collaborative Process

- Significant Up-front Commitment of Resources – high loss if unsuccessful
- Stepping Down from the Traditional Regulatory/ Enforcement Posture
- If Cards Are on the Table, Would Bottom Line be Compromised?



## City's Concerns with Collaborative Process

- PRPs Will Not Act in Good Faith
- Process Would Take an Unreasonable Amount of Time
- Process Would Not Result in Enforceable Agreements



## EPA's Concerns with Collaborative Process

- Significant Resource Commitment with Uncertain Outcome
- Would Parties **Be** Reasonable and Work in Good Faith?



## What Risks Did the VWF Group Take? What Were the Obstacles Involved?

- Lost leverage of forcing others to sue
- ROD could get reopened
- Process would reopen some settled issues
- Opened NRD issue without knowing federal and state positions
- Deciding if others would take comparable risks and make comparable concessions



## What Risks Did State Take? What Were the Obstacles Involved?

- Committed \$ up front for additional monitoring without cost recovery
- Resource commitment with no guarantee of reimbursement
- Open to evaluation of trade-offs to obtain an effective remedy
- New territory within MDEQ management
- Traditional process and previous working relationships



## What Risks Did the City Take? What Were the Obstacles Involved?

- Loss of time if PRPs were stalling
- Historical distrust of PRPs by some decision makers



## What Risks Did the EPA Take? What Were the Obstacles Involved?

- Additional data would show remedy was not effective
- EPA would not appear sufficiently independent from private interests
- EPA's technical position would not be adequately represented due to displacement of its oversight contractor



## What Were the Keys to Success?

- Ground rules
- Decision maker's direct involvement
- Key stakeholder direct involvement
- Face to face meetings
- Building trust
- Patience and persistence
- Compromise
- Willingness to address others' concerns
- Initial concessions without guarantee of reciprocation
- Detailed documentation of discussions and agreements



## Where Did Negotiators Take the Heat From Their Principals?

- **Bucked the Traditional Negotiation Process**
- **Process Took Too Long**
- **Up-front Agreement to Forego Some Cost Recovery**
- **Concessions beyond Legal Obligations**
- **Technical Staff Had to Consider Nontraditional Solutions**
- **Doubts about Others' Motives or Ability to Live Up to Agreements**



## Matters Resolved

- **VWF Group Commitment to Implement an Enhanced Remedy for Long-Term Protection of the City Water Supply**
- **Clear Performance Criteria for Remedy**
- **MDEQ Commitment of Resources without Claim for Recovery**
- **Good/Fair Past Cost Settlement with MDEQ**
- **EPA Orphan Share Credit**
- **Good NRD Settlement**
- **Settled City's Potential Claims for \$0**
- **Coordinated Well Field Operation**
- **Capped Obligation to Protect Well Field**
- **Ground Rules for Review Process**



## Remaining Challenges

- Expedite Turnaround, and Achieve Review and Decision Making Efficiency
- How to Evaluate If Remedy Is Effectively Capturing Contamination
- Maintaining Closure of Technical Issues
- Continue to Build Trust by Reporting of Problems



## What Did the VWF Group Get that They Could Not Have Gotten Otherwise?

- **\$1.6 Million Orphan Share**
- **Unified Well Field Management Plan**
- **Cap on Obligation to Protect Well Field**
- **Reasonable Cost Settlement**
- **Improved Technical Review**
- **Trust and Respect from MDEQ, City, and EPA**
- **USGS Expertise and Independent Review**



## What Did State Get that It Could Not Have Gotten Otherwise?

- Unified Well Field Management Plan
- Positive and Constructive Working Relationship with All Parties
- Opportunity to Take Lead on Technical Issues and Have Its Technical Concerns Seriously Considered
- Enhanced, Protective Remedy with Clear Performance Criteria \*
- Better Site Data, Improved Model, and Better Understanding of Site \*
- NRD and Cost Recovery \*

\* *May have obtained these through protracted litigation with uncertain outcome*



## What Did the City Get that It Could Not Have Gotten Otherwise?

- Tremendous Amount of Technical Expertise and Assistance from Agencies
- Financial Savings from Contributions by the PRPs
- Unified Well Field Management Plan



## What Did the EPA Get that It Could Not Have Gotten Otherwise?

- Resolution of MDEQ and City Complaints – Avoided Bad PR
- Waiver of 106(b) Claims and All Other Challenges to ROD Remedy and UAOs
- Possible Reimbursement of Future Oversight Costs
- “Bean” for Achieving a Settlement Using Orphan Share Credit “Reform”



## What Did the VWF Group Do that They Would Not Have Done Otherwise?

- Substantial Increase in Routine Monitoring
- Undertook “Extra” Investigations of Site Conditions
- Worked through Concepts Proposed by Others
- Gave Up 1991 ROD as Constraint on Level of Protection of Well Field
- Agreed to Implement Source Area Remedial Enhancements



## What Did State Give Up that It Would Not Have Given Up Otherwise?

- Part of NRD and Cost Recovery Claims
- Some Monitoring
- 1991 ROD Requirements for Cleanup Criteria
- Some Boilerplate Conditions



## What Did EPA Give Up that It Would Not Have Given Up Otherwise?

- **Orphan Share Credit for Past Costs**
  - More than usual costs for USGS support and investigations
  - Costs for MDEQ oversight and technical support
- Substantial staff time



## Advantages of Collaborative Negotiation

- Found solutions not likely to be identified in litigation
- Got concessions not available in litigation
- Improved relationship resulting in flexible review, cooperation on permit issues, some streamlining of review process
- All parties working on generally consistent ground rules
- Favorable settlement with EPA
- Increased perception of fairness by all parties
- Lower blood pressure for all parties



## Disadvantages of Collaborative Negotiation

- No faster and no less work than litigation
- Requires significant input from decision makers
- Parties had to undertake a number of activities to further the collaboration process
- Hard to create meaningful deadlines
- Hard to change negotiating style
- Government agencies could be suspected of being soft in environmental enforcement, pandering to private interests, or unfairly preferring one party over another



## Lessons Learned

- Process Will Proceed Only as Fast as Resources/Time Are Devoted
- Sometimes **It** Costs More to Argue than Compromise
- Collaborative Bargaining Did Work
- Easier to Find Solutions when Parties **Are More** Open about Concerns
- Collaboration **Takes** Skills and Approaches **Not** Actively Used in **Most** Regulatory Negotiations
  - Old Dogs Do Need to Learn New Tricks
- Much Better if No One **Has** to Be Wrong in Order to Find a Compromise
- Must Protect and Continue to Build Trust



## Summary & Conclusions

- Process Can Work; All Parties Feel **It Is** a Better Approach
- Process Can Only Work **If** All Parties:
  - Adopt a Collaborative Approach
  - Work in Good Faith
  - Trust Others
  - Acknowledge Others' Interests and Help Address **Them**
  - Show Respect for Others' Work, Abilities, Concerns, and Constraints
- Relationship Improvement Should Yield Dividends for Many Years
- Process **Is** Painstaking and Lengthy, and **Not** Cheap but Likely Cheaper than Litigation
- Anger Replaced by Different and Lower Stress
- Found Solutions Not Available by Other Means



## Further Reading

- Getting To Yes – Ury & Fisher
- Bargaining For Advantage – Shell
- Managing Scientific and Technical Information in Environmental Cases – Resolve, USIECR and Western Justice Center Foundation



# ENSURING SUFFICIENT PUBLIC INFORMATION IN TIMES OF HEIGHTENED SECURITY CONCERNS

WEDNESDAY, MAY 15, 2002—1:30–3:00 P.M.

## MODERATOR

Douglas Sarno, The Perspectives Group, Inc.

## PANELISTS

David E. Adelman, James E. Rogers College of Law, The University of Arizona  
Chip Cameron, U.S. Nuclear Regulatory Commission

## PANEL ABSTRACT

As security concerns heightened in the wake of the September 11 attack, many agencies removed potentially sensitive materials from Web sites, public-reading rooms, and other public sources. The result is that information that the public historically had regular access to is no longer available. While some of this will and should remain restricted, inaccessible information limits the public's ability to understand and provide input into important government actions. Environmental impact statements and other documents are being released without key pieces of information that are important to public participation. Even though eight months have passed, there is little guidance and no coordination among agencies for how these information-related activities should be addressed. A number of questions are being raised about the types of information that should be restricted, how these decisions should be made, and by whom. The panel will explore the handling of these issues across the represented agencies, along with audience members. It will also explore how these issues could be better coordinated and implemented in the future.

# **NEGOTIATING TRIBAL ENVIRONMENTAL AGREEMENTS: INSTITUTIONAL CAPACITY IN NATIVE AMERICAN GOVERNMENTS**

**WEDNESDAY, MAY 15, 2002—1:30–3:00 P.M.**

## **MODERATOR**

Anna Masayesva, U.S. Institute for Environmental Conflict Resolution

## **PANELISTS**

Jon Cooley, White Mountain Apache Tribe

Beth Janello, Sandia Pueblo

Gillian Mittelstaedt, Tulalip Tribe

Lucy Moore, Lucy Moore Associates

## **PANEL ABSTRACT**

The panel will discuss how ADR/ECR can be applied to tribal environmental issues and what types of conflicts can/cannot be addressed through ADR/ECR. It will explore the question of whether there are any perceived implications by tribes that ADR/ECR settlements and negotiations compromise sovereignty, including the hesitation on the part of tribes to be viewed as stakeholders rather than sovereign governments. The panel will discuss the institutional capacity of tribes to participate in ADR/ECR, as demonstrated by cooperative agreements, negotiated settlements, and the establishment of Tribal Environmental Policy Acts (TEPA).

## **PANEL SUMMARY**

### **INDIVIDUAL PRESENTATIONS**

#### **Pueblo of Sandia**

By Beth Janello

#### **Strengthening Tribal Sovereignty and Improving Environmental Decision Making: What Role for NEPA and TEPA?**

By Gillian Mittelstaedt

**Experience from the Environmental Dispute Resolution Field: Adjusting the Process for Maximum Inclusion of Interests**

By Lucy Moore

**Some Thoughts on Working with Tribes**

By Lucy Moore

## **PANEL SUMMARY**

The concept for this panel was borne out of questions regarding the status of tribal environmental management. This session will explore the issues surrounding tribal participation in intergovernmental decision-making and consensus-building processes. We wanted to explore the capacity of tribal governments to manage natural resources and maintain positive relationships with other governments.

### **TRACK 1**

The first track will explore tribal participation in environmental conflict resolution (ECR)/ alternative dispute resolution (ADR). Tribes hold a unique sovereign status. Because of this status, tribes are separate governments and need to be treated accordingly in ADR/ ECR processes.

### **LUCY MOORE**

- To prepare for the panel, I considered Anna's request for reasons to be optimistic about this field.
- I am a mediator and facilitator, working in the Southwest and nationally. My formative years were spent in Chinle, Arizona, on a Navajo reservation.
- Look for ways to include tribes.
- Held belief that all who are affected by a decision should be included in how that decision is made. Who has power, who doesn't, who needs to be included and at the table.
- I run into problems where non-native agencies do not want to include tribes.
- See an issue, raise it with the federal agencies, local government, and community, see that the tribal government needs to be included, and the response is strange looks that reflect fear.
- People are unsure how to deal with it in their professional roles, fear that the tribal voice might overwhelm them, blast them out of their seats, make them feel uncomfortable.
- Don't see that the tribal voice may make them enlightened, make them laugh—only see fear.
- Questions to EPA—let's ask the tribe—and thought they would ask about religion and sovereignty. Questions were all about food—do I have to eat there? No knowledge of how to begin, how to start the process. To whom do I write the letter, who will answer, they don't answer, some overall reluctance to start the process.
- From the tribes: Lots of history about broken promises, not clear about process, fear to participate, can't be part of a consensus process that ends with a vote, want the right to veto but if process is consensus with voting used to break difference, that is a problem. Risky in terms of loss of resources, loss of respect and elected position within the tribe, what is in it for us, lots of negatives.
- My dilemma is to make it as tight as possible and be clear about purpose, decision making, and inclusion—that all needs to be clear.

- Need to be inclusive; all voices need to be in the room.
- Stories are all about how groups have adjusted the process to make it inclusive. Make the process clear and then adjust it to make it comfortable for all to be in the room.

El Paso sued New Mexico to get their hands on water from New Mexico for use in Texas. Judge said New Mexico can protect your water but you need to prove that you have water within your borders. State began water planning process and divided state into six regions. The regions were brought together to do an assessment of water needs and projections to determine water budget to meet judges' order. Mines, cities, industries, all have ideas about needs; local government and environmental groups, etc., started a planning process. State planning process began to plan for the water future for water resources in the future. We need your representation on this committee, they said to the six pueblos.

Pueblos said, no, they would not sign the MOU, to define the role of the committee and how the process would work. They would not sign as this is the planning process started by state of New Mexico, we don't have a trusting relationship with New Mexico. We are not willing to endorse a process that may have impact over us. Follow-up invitations went out, inviting them to participate to come to meetings, even if they don't sign the MOU. Pueblos did send water resources staff to the meetings. Pueblo observers did come and did sit at the table and soon distinction between members of the committee and the observers (Pueblos) disappeared.

As a facilitator I did not distinguish between who represented anyone, whether they are part of the state process, did not sign, etc. Meaningful input was given, based on traditional knowledge of the land, and their voice was heard and they were contributing.

Then after one year, we came out with a newsletter—updates, pop studies, public meetings, and in one, the newsletter editor did a review of the planning process and identified who signed the MOU and noted we are happy to have x, y, z participating in the meetings from these pueblos.

That raised problems. The pueblo was offended that they were noted in the newsletter as observers. "It looks like we are part of the process." We responded with a detailed overview of sovereignty, the need to respect observer status, and overall, we learned about the significance of names being on the page.

The state provided a grant to the pueblos to participate in the planning, and it allows them to carry out their own water planning process.

## **LESSONS LEARNED**

Early communication, joint planning, how can we invent this together to make for meaningful process, flexible process—take chances, make mistakes, and move on.

## **BETH JANELLO—PUEBLO OF SANDIA**

### **Barriers to the collaborative process**

- 23,000 acres of reservation, near Albuquerque, New Mexico.
- Pressure from surrounding land uses all around us
- Fire map showing reservation boundaries.
- Environmental program started in 1994 began on a half-time basis to see if we have enough issues. Now there are 17 employees.
- Scope of presentation—how do people within the tribal council deal with collaborative issues, other directors, the issues?
- Is a collaborative process with outside agencies, government, and other tribes easy?
- Not easy, sounds good but collaboration does not equal harmony, created because there is a problem—different agendas and different cultural values.
- Lack of knowledge about tribal sovereignty—all over the government agencies—about what that means.
- Basic principles about sovereignty.
- Trust responsibility of government to protect lands.
- Lack of knowledge about tribal history, lack of awareness about the tribes' use of the area for centuries. We weren't here yesterday.
- Lack of understanding about tribal cultural values. They want to protect the environment because it is the right thing to do, not because of the laws or threats of being sued, it is about homeland protection.
- Tribal governments are different, with annual appointments, great continuity on the council as some representatives sit for life.
- All tribes are not the same. All have different issues.
- Short-term versus long-term solutions. Some have short-term goals, long-term program of say 10 years—that is not a long time.
- Not same sense of urgency as we have been dealing with these issues for three generations.
- Not equal at the table, sometimes sit as observers, not participants, sometimes there are representatives from 10 different agencies with only one tribal representative. We don't feel like equals.
- Confidentiality: We like to manage our resources and financial information confidentially. Different work groups have agendas that they like to push.
- When are you going to change our water quality standards—this is not the purpose of this meetings.
- Don't realize the ceremonial reasons for some of our decisions.
- Lacking respect.
- Tribes' fault because they won't participate, the blaming of the tribes means that we don't want to participate.
- Lack of resources—we can't afford the money to participate.
- Economic survival is a barrier in collaborative settings.
- Land issues, jurisdictional issues cause us problems; 10,000-acre land claim ongoing for many years, this has been in litigation and settlement reached.
- Senate hearing a few weeks ago negotiated agreement between three federal agencies with all kinds of parties in a collaborative process—still some up hills to overcome.

- Think long term
- Be holistic, don't piece meal project, and think about the whole project, not just your project.
- Respect the differences, don't make us change to be like you.

## **QUESTIONS AND RESPONSES**

*Question:* Is there a problem with confidentiality with federal data?

*Answer:* We share the information we collect with the use of federal money; have some agreements about keeping some things confidential.

*Question:* Do other tribes have the same relationship with federal government?

*Answer:* Yes, all 550 federally recognized tribal governments are recognized. All are sovereign nations.

## **TRACK 2**

Second track will focus on examples of intergovernmental collaborations and tribe specific laws that allow full participation and influence on decisions and actions of federal and state governments on tribal land.

### **JON COOLEY—DIRECTOR OF WILDLIFE, APACHE TRIBE**

- Tribe in general was presented—what the reservation is, what makes the tribe tick economically, example of what they went through, how these results have let us moved forward on our projects.
- Reservation includes recreation areas, communities, 13,000 tribal members scattered throughout.
- Gaming operation provides a lot of jobs—recreation and tourism, ski resort, camping, fishing, and hunting.
- Timber sales now in decline due to market and environmental issues.
- 1.6 million acres, contiguous—mixed forests and elevations with diverse landscapes. Challenging landscape to manage with these diversities.
- Some issues with the tribe and the Endangered Species Act (ESA) and the Fish and Wildlife Service (FWS).
- Frustrated with working with local fish and wildlife agencies, felt like we were dealing with rigid bureaucracy—went instead to other agent and negotiated an agreement on how they would work together.
- Affront to their tribal sovereignty, and desire to be self-determining.
- FWS folks have legal mandate to enforce the ESA.
- Both wanted to negotiate framework on a government-to-government basis.
- History with federal FWS folks not limited to ESA—had a good relationship with that agency on other issues. A basic preset of this agreement is that the tribe and service have a shared desire to protect their resources and ecosystems.
- Both had been trying to recover the species of fish that is only found in one area. Fish

now may be first one to be removed from ESA list.

- Relationship recognized tribe's rights, sovereignty, technical expertise of FWS.
- Trust and communication compromised as tribe felt ambushed in ESA.
- FOYA and confidentiality was a huge issue for the tribe.

### **Statement of Relationship**

- Resource issues can be addressed by FWS service.
- Communication Protocol to determine how data and confidentiality will be respected.
- Several agencies within the tribe were involved to look at tribal natural resource management
- Tribal biologists and experts were used to collect data and to develop our own management plans on the reserve.
- Doing own plans for endangered species (owls, fish, willow)
- Trying to move to ecological team effort with FWS.
- On-the-ground effectiveness with on-the-ground results to focus on habitat and single species management.
- Process: Pooling resources to get the most bang for our buck, centralized database system. All data is needed for cooperative effort.
- Watershed planning: Helping to restore watershed health, riparian wetlands.
- Forestry: fuel treatment, fire management, recovery.
- Outside the reservation connecting with other agencies on restoration projects.
- Creative and pushy behavior has paid off for tribes—they are putting their effort into where the Statement of Relationship is and the Permanent Land Restoration Fund, where revenues are dedicated to restoration using cultural traditions of the tribe.
- Cultural advisory board—includes Elders—to determine priorities.
- Statement of Relationship was to get dialogue back, to get a protocol that would give the tribal council some comfort—it has opened doors for the parties to talk.

### **GILLIAN MITTELSTAEDT**

#### **Strengthening Tribal Sovereignty—TEPA**

- Tribes and the NEPA process, four-year process on developing the handbook on NEPA and TEPA.
- NEPA: What is it and what does it do?
- NEPA triggered by federal actions, any federal trigger. TEPA does not supplant NEPA
- NEPA is prominent feature in federal statutory landscape, has broad scope and mandate, and brings tribes to the table.
- Consultation requirements encourage more robust decision making.

#### **NEPA Realities**

- Tribal involvement driven by collaboration, tribal laws, and NEPA regulations.
- Some CFS note tribes to be lead agencies but often they are shown as neither parties nor lead.

- Consultation of NEPA—some historical and archaeological, religious freedom act, education.
- Some Indian law, case laws, etc. But need to understand the Federal Trust Doctrine as all federal agencies have fiduciary responsibility and this drives treaty involvement.
- Executive orders also drive treaty involvement.
- Case law: Judgment call was impermissible, regarding implementing the trust responsibility.
- Geography: As you move further and further away from the reservation, this will affect if and how they will get involved. NEPA can be subjective as to whether the tribe will get involved and participate in the process.
- Collaboration
  - Tribes serving as a lead agency
  - Tribes a co leads
  - Tribes as cooperating agency
  - Tribes as Affective Party
- Decision making declines as you go down and costs and responsibilities increase as you go up.

### **Tribal Environmental Policy Act**

- How can TEPA strengthen tribal sovereignty? Organic tribal law, no federally derived source, can be used as a planning tool to look at cumulative impacts.
- Can express tribal regulatory authority, can also invoke environmental process
- Tribal departments are now large and have focused resources.
- Triggering environmental review—if tribe has TEPA and a NEPA is being conducted consecutively, the federal agencies will have to comply with the terms of TEPA to identify cumulative and cultural impacts.
- TEPA can promote collaboration by establishing system to promote resolutions of land-use disputes.
- Fair and consistent means of enforcement, tribal land-use actions, and environmental permits.
- Positives of NEPA
  - It is an established process.
  - It may mirror state and local process.
  - The public is familiar with opportunities.
- Negatives
  - Certain parties expect process to fail.
  - Applicants know and use the short cuts.
  - Administratively cumbersome with limited resources, may be regulatory overkill as preferred course of action is informal.

### **QUESTIONS AND RESPONSES**

*Question:* What are examples of best scenarios and what are factors?

*Answer:* Start early, recognize that they may have different input, don't expect fast and quick decisions.

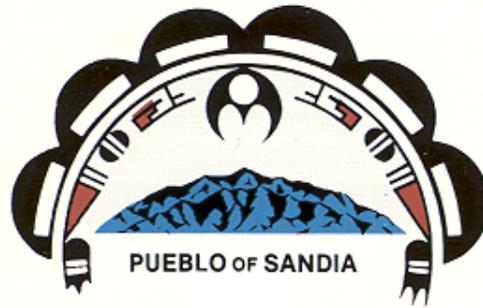
*Question:* What are obstacles Jon ran into in the tribe to establish the process like this?

*Answer:* ESA involvement—is this something the tribe is excited about or a necessary evil? Also, they are resource-based economy and they understand that; they do not want to compromise the land or their resources for their future generations for sustainable development. Initially, getting past local fears, lots of fear about wolf program, fear factors, ignorance factor—to handle the issue and deal with wolves when they come on the reserve. We have always managed our own resources. If we run into problems, how will we deal with these programs?

*Question:* How about getting respect for tribal and local knowledge, and getting scientist to accept it?

*Answer:* There is a whole issue about respect and understanding a tribal party at the table, honoring and accepting that way of looking at the resource. Our role is to accept that way of dealing with things.

# Pueblo of Sandia

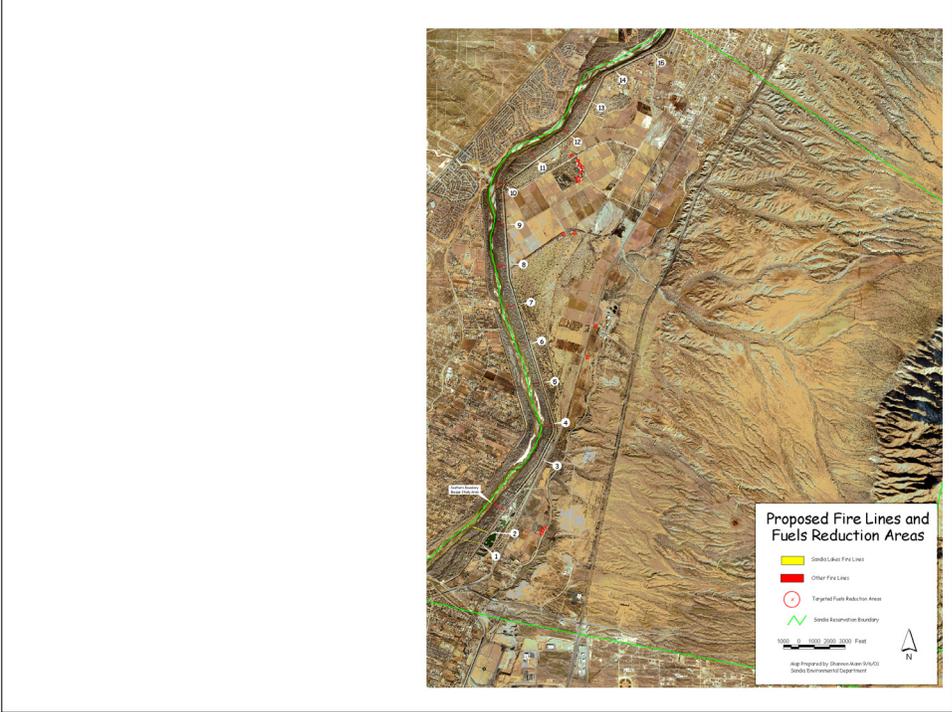


Environment Department



## Introduction

- Beth Janello, Director, Environment Department, Pueblo of Sandia, New Mexico
- 23,000 acres of reservation, 9 miles of Rio Grande river
- Adjacent to largest city in New Mexico (Albuquerque)
- Interstate 25 and railroad bisect reservation
- Tremendous pressure from surrounding development



# Scope of Presentation



- Accumulated thoughts about collaborative processes
  - Lands Director
  - Economic Development Director
  - Tribal Planner
  - Water Rights Manager and other environmental staff

## Collaborative Process



- Is a collaborative process difficult?
- Why is it difficult?
- What are the barriers to effective problem solving?
- What would make it better?
- Describe some experiences

## Collaborative Process



- Is it difficult?
  - Yes!
  - Collaboration does not = harmony
  - Problem or conflict
  - Different agendas
  - Different cultural values

## Collaborative Process



- **Barriers to tribal participation**

- Lack of knowledge about tribal sovereignty
- Lack of knowledge about tribal history
- Lack of understanding about tribal cultural values
- Lack of knowledge about tribal governmental process
- Assumption that all tribes are the same

## Collaborative Process



- **Barriers to tribal participation**

- Short term vs. long term solutions
- Not truly equal at the table
- Confidentiality
- Imposing views, pushing agenda
- Lack of respect
- Blaming Tribes

## Collaborative Process



- Examples
  - Tribal water quality standards
  - Endangered species issues
  - Economic survival
  - Land issues, jurisdiction

## Collaborative Process



- What would make it better?
  - Educate yourself about the Tribe
  - Respect sovereign status and act accordingly
  - Think long term, holistically
  - Learn and understand tribal concerns
  - Acknowledge barriers
  - Respect differences

## Conclusion



## Strengthening Tribal Sovereignty and Improving Environmental Decision Making...

*What Role For NEPA and TEPA?*

### NEPA's Potential...

- Prominent feature in federal statutory landscape.
- Broad scope and mandate bring many – including tribes – to same playing field.
- Consultation requirements encourage more robust environmental decision-making.

## NEPA Realities...

Tribal involvement is usually driven by **one part regulation, one part Indian law**, and occasionally, **one part collaboration**.

## Regulation

- Primary driver: CEQ's NEPA regulations
- Federal agency NEPA regulations
- Federal statutes that trigger consultation or that address cultural, historic, or religious resources

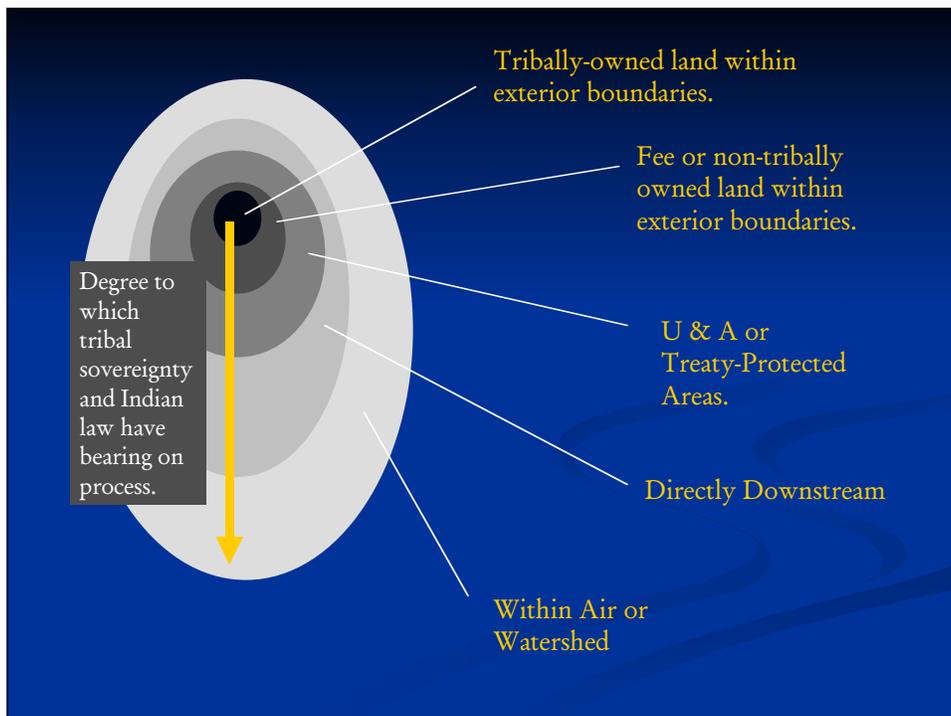
Reference:	Description:
•40 CFR /1501.2(d)(2)	•Apply NEPA early in the process – If a federal agency realizes that it will be involved in an action planned by a private applicant or other non-Federal entity, it must <b>consult early with any interested Indian tribe.</b>
•40 CFR /1501.7(a)(1)	•Scoping – As part of the Scoping process, <b>the lead agency shall invite the participation of any affected Indian tribe.</b>
•40 CFR /1502.16(c)	•Environmental consequences – This section of the EIS must <b>discuss possible conflicts between the proposed action and affected Indian tribes’ land-use plans, policies, and controls</b> for a reservation.
•40 CFR /1503.1(a)(2)(ii)	•Inviting comments on a draft EIS – The lead federal agency must <b>request the comments of Indian tribes</b> , when the effects may be on a reservation.
•40 CFR /1506.6(b)(3)(ii)	•Public involvement – Notice of preparation of NEPA document for an action with effects primarily of local concern would <b>include notice to Indian tribes when effects may occur on reservations.</b>
•40 CFR /1508.5	•Cooperating agency – when the effects of a proposed federal action are on a reservation, <b>an Indian tribe may, by agreement with the lead agency, become a cooperating agency</b> for an EIS.
•40 CFR /1508.12	•“Federal agency” – An <b>Indian tribe assumes NEPA responsibilities under federal law if it is an applicant for assistance under section 104(h)</b> of the Housing and Community Development Act of 1974.

•STATUTE	•CONCERN
<b>•CULTURAL AND HISTORICAL RESOURCE CODES</b>	
•National Historic Preservation Act of 1966 <sup>[1]</sup>	•Preservation of prehistoric and historic sites/structures.
•Archaeological Resources Protection Act of 1979 <sup>[2]</sup>	•Prehistoric artifacts including skeletal remains
<b>•NATIVE AMERICAN STATUTES</b>	
•Indian Self-Determination and Education Assistance Act <sup>[3]</sup>	•Self-determination for tribal governments
•American Indian Religious Freedom Act of 1978 <sup>[4]</sup>	•Right to practice religious beliefs.

<sup>[1]</sup> 16 USC 470-470t, 110.  
<sup>[2]</sup> 16 USC 470aa-mm.  
<sup>[3]</sup> P.L. 93-638.  
<sup>[4]</sup> 42 USC 1996 and/ 1996a.

# Indian Law

- Federal Trust Doctrine
- Treaties between the United States, American Indian Tribes, and Alaska Native Villages
- Executive Orders
- Case Law



## Collaboration



## TEPA's Potential...

- How TEPA can strengthen tribal sovereignty and improve environmental decision making.
- +/- of using federal prototype for environmental review.
- Why some tribes choose TEPA alternatives.

- Proactively controlling development within reservation boundaries
- Expressing and exercising tribal regulatory authority
- Establishing consistency and coordination of tribal environmental efforts
- Triggering federal environmental review and consultation requirements
- Demonstrating tribal sovereignty

Where state laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, federal agencies shall cooperate in fulfilling these requirements as well as those of federal laws so that one document will comply with all applicable laws.<sup>[1]</sup>

<sup>[1]</sup> 40 CFR §1506.2(c).

Adopting a TEPA *may* strengthen a tribes' sovereignty and provide opportunities for tribally initiated collaboration, by:

a) establishing a system that promotes prompt resolution of disputes involving land use and development decisions; and,

b) ensuring a fair and consistent means of enforcing tribal land-use actions and environmental permits.

## + /- of using TEPA

+

- Recognized, established process
- May mirror state & local processes
- Public familiar with opportunities for involvement

—

- Certain parties “expect” process to fail
- Applicants know and use the “short-cuts”
- Administratively cumbersome
- May be regulatory overkill

# EXPERIENCE FROM THE ENVIRONMENTAL DISPUTE RESOLUTION FIELD: ADJUSTING THE PROCESS FOR MAXIMUM INCLUSION OF INTERESTS

BY LUCY MOORE, MEDIATOR/FACILITATOR

## WATER PLANNING IN NEW MEXICO: WITH OR WITHOUT TRIBES?

### BACKGROUND

Water planning in New Mexico began in earnest after an attempt by El Paso, Texas, to appropriate New Mexico groundwater. This was a shocking prospect and seemed within the grasp of the greedy neighbor after the federal district court ruled that New Mexico's statute against exporting groundwater was unconstitutional. If the state were to deny Texas, it would have to prove that water supplies within the state were needed by New Mexican citizens. Terrified of losing out to a longtime rival, the New Mexico legislature passed legislation in 1987 to develop a water plan for the state, which would be based on regional water plans, and would prove the state's long-term need for all its water resources.

Since then, 16 separate water planning regions identified themselves on the basis of common political, economic, and hydrological interests, in hopes that the plans would both make sense and be implementable. Grants between \$25,000 and \$75,000 were awarded to these regions, with very little guidance about what a water plan should look like. Planning processes should be "appropriate," costs and time tables "reasonable," water conservation "adequate," and *all tribal governments within a region must be included*. A *Regional Water Planning Handbook*, developed by the regional planners and the state in concert in 1996, offered a water plan outline and further emphasized the need for all regions to engage a balanced and representative group of interests in the planning process, and to provide for meaningful public involvement of all interested citizens.

### THE CLOUD OF ADJUDICATION

New Mexico is a state rich in cultural diversity and poor in water resources. The scarcity of water adds tension and competition to the relationships among the interests and the cultures, and makes planning for a balanced and realistic water future very difficult. To add to the anxiety, water rights in the state are in the agonizing process of being adjudicated, and New Mexico boasts the oldest case in federal court in the country—the *Aamodt* case, which is in its 38<sup>th</sup> year. Adjudications like this one are feared by everyone involved, except perhaps the attorneys. They are endless, hostile, hopeless, and become bound up in hydrological, political, and legal minutiae, leaving neighborhoods divided and turning neighbors into enemies.

The *Aamodt* suit has been particularly damaging to relationships in these communities bordering the Rio Grande north of Santa Fe. With priority dates superior to any others, the four Native American pueblos in the region have a measure of security, but the price they pay in hostility and resentment is enormous. Many in the traditional Hispanic communities checker boarding the area are related in one way or another to pueblo members, and the two cultures have shared lifestyles, food, music, and farming practices for generations. Both cultures have viewed with some suspicion the arrival of the “newcomers,” relatively wealthy Anglos who have bought traditional compounds and remodeled them into luxurious haciendas. But the adjudication has exacerbated any tensions among the three cultures and thrown any alliances into question. Many *Hispanos* have sided with Anglos in opposition to the pueblo claims, and old friendships have been destroyed and new ones prohibited.

### **THE JEMEZ Y SANGRE WATER PLANNING COUNCIL**

Against this backdrop, the local governments of the region are attempting to undertake together regional water planning to insure a water supply for all interests in the region. Three counties, two cities, numerous irrigation interests, business interests, and environmentalists began to “plan to plan,” forming the Jemez y Sangre Water Planning Region, and receiving a grant from the state. Their first task was to form a steering committee, which would follow the guidelines in the *Regional Water Planning Handbook* and be representative of all interests in the region. They carefully identified stakeholders in the process, and among those were, of course, the four pueblos mentioned above and two others. As the organizers visited each stakeholder group, they described the process and invited participation on the Water Planning Council, which would take the lead in creating the plan. They created an agreement for each member to sign, pledging good faith, energy, and optimism for the effort. They were careful not to include any implications in the agreement that would bind any signatory to a certain action or implementation of the plan. The process was to be voluntary, and whatever the plan called for would be optional for those involved in the planning.

Part of the impetus behind this deliberate vagueness was to entice, or at least not frighten off, the six tribal governments. But the reassurance was not evident to the tribal leadership, and none of the six pueblos signed the agreement to become members of the Jemez y Sangre Water Planning Council. They each explained the hazards of tribal participation in processes over which the tribe has no control. A state process, like this one, was particularly suspect, since tribes must be extremely careful to protect their sovereignty and not put themselves in a position where that sovereignty might be compromised. Although implementation was not part of the planning process, the pueblos feared that commitments or agreements might emerge that would result in a tribal community being subject in some way to another authority. They also explained that their involvement in the adjudication of water rights in the region meant they should be extremely careful about revealing data about water supplies or use, now or projected. Even population figures could be sensitive. Finally, some of the pueblos expressed a reluctance to enter into a non-Indian dominated process, where tribal values, beliefs, and cultural information might not be respected or included in the discussions.

## **THE PROCESS ADJUSTS TO ACCOMMODATE TRIBAL INTERESTS**

Council organizers understood and let the invitation to join stand. But they knew that without the pueblo interests represented in the process, there would be no way of realistically assessing current and future supplies, and current and future uses. If tribal representatives or members ever wanted to attend a council meeting, they urged, or participate in any of the subcommittees or other activities of the planning process, they were more than welcome. Pueblos could join and become council members, or they could come and observe. In any case, their presence would be welcome. In addition, the council organizers offered to help the pueblos secure water-planning funds from the state to hire experts of any kind to help them develop their own water plan and hopefully link in some way with the Jemez y Sangre Regional Water Plan. The pueblos accepted the offer of resources for planning expertise, and \$72,000 was awarded the six pueblos as a group.

Four of the pueblos also accepted the invitation to attend council meetings, and observe the discussion. The monthly council meetings were held at a local community college, where those attending sat at tables arranged in a large hollow square. There was no distinction made between council members who had signed the agreement, and non-members or observers, some of whom were pueblo and some not. All sat together as equals. Pueblo observers offered their perspective freely, always prefacing their remarks with a statement about the impossibility of their pueblo participating in the planning process and the sanctity of tribal sovereignty. As the non-Indian members would nod in acceptance, the observer would proceed to offer a substantive comment that was relevant, and often key, to the discussion.

The council formed subcommittees to focus on different aspects of the plan, like population projections, water supply, conservation alternatives, and public involvement. Two pueblo representatives even agreed to form a Pueblo Subcommittee of the Jemez y Sangre Water Planning Council, with an eye to at least informing, if not coordinating, tribal and non-Indian water planning.

### **WHEN IS OBSERVING NOT OBSERVING?**

The progress to date has not been without crisis. Perhaps, both sides have learned most about each other during these moments when it is tempting to give up and walk away. One such moment came as a result of an article in a planning council newsletter. The editor wrote what he believed was a simple, uncontroversial description of the Jemez y Sangre Water Planning Council and the process they were undertaking. He listed the council members, and in another column he listed the observers who also attended meetings regularly. The list of observers included the pueblos who sent representatives. In response, the editor received a very angry call from a tribal official at one of the pueblos. How dare the council print the name of the pueblo in the list of observers? Yes, maybe people from the pueblo staff did attend council meetings, and did observe and even speak, but this did *not* mean that the pueblo was an “observer.” It

was a great affront to the pueblo that they had appeared in the newsletter, and that the insinuation was made that the pueblo was participating in the process in any way.

The editor struggled with the issue, confounded by the apparent fact that one could “observe” but not be an “observer.” As mediator/facilitator for the council, I supported his efforts to make it right with the angry pueblo official, who was demanding an immediate retraction be mailed to everyone who received the newsletter, or he would go to the media and severely criticize the planning process. We learned the reasons behind the outrage—some relating to the council, and some not—and we explored various resolutions. There were several phone conversations back and forth—the official wanting the retraction, the editor offering that the next issue focus on the tribal perspective and include a full apology for the inaccuracy about “observer.” Eventually, the tribal official agreed to an apology and explanation of the tribal perspective in the next issue, if the issue schedule was speeded up, and if the editor would allow all the pueblos to review the articles before publication.

That issue will be out soon, and the process of writing, reviewing, correcting and educating each other has been a good way of developing some degree of trust. The articles are actually co-written by the council and the pueblos, a painful but very effective way of really understanding each other. Not only will the issue be extremely instructive for all readers—Indian and non-Indian—but the way it was produced, through delicate negotiations of words, will carry the planning process a long way toward being inclusive in a very genuine sense.

#### **GUIDELINES FOR INCLUDING TRIBAL GOVERNMENTS AND COMMUNITIES**

The Jemez y Sangre Water Planning Council solution to the tribal dilemma seems to be a good one. The process is flexible. If the point is to include all key stakeholders, then the people take precedence over the process; and the process should accommodate the players to every extent possible. In this case, the council has let the issue of membership slide, and includes pueblo representatives as equals and with seats at the table. Pueblos have felt comfortable enough in this setting to participate in some important ways, offering perspectives, sharing plans, even submitting some data. And as we saw, the council and one pueblo survived, and learned from, a misunderstanding that could have sunk the whole effort. Some council members are concerned that relations will not be as smooth once the development and consideration of alternatives begin—when amounts and destinations of water will be negotiated, and values will win or lose. But in the meantime, there is a feeling of good will, of two parallel tracks undertaking plans with knowledge of each other. When the tough times do come, it is hoped there will be a degree of trust that will see them through.

The lesson for non-Indians who attempt to include tribal interests in their processes is clear.

- It is necessary to approach the tribe with true respect and without prejudging the result of the visit. Each tribe is different, each encounter will be different.

- Understand that tribal governments may have very different operating principles and structures from those we are used to. You will need to understand the nature of the government, and its accountability to its members, in order to work together successfully.
- Be ready to listen very carefully to what is said. The message may be clear and cordial. Or it may be confusing and offensive. Or it may be something in between.
- Clarify. If you are confused or don't understand, say so. Don't be shy. Make sure you leave understanding what the tribe needs, and that they understand what you need.
- Be prepared to make a mistake. We inevitably make mistakes with each other. If you are willing to learn from them, chances are you will be easily forgiven.
- Be patient. Keep pursuing a better understanding, a better relationship.
- Understand the stress on modern tribes. They are pulled in many directions at once, and the leadership has enormous demands placed on them. Where we may wear one or two hats in our work life, a tribal leader may wear five or six.
- Adjust your process—whether it's a mediation, a negotiation, a public meeting, or a potluck—in ways to accommodate those tribal needs.

## REPRINT FROM *DIALOGUE*, FALL 1999

### SOME THOUGHTS ON WORKING WITH TRIBES

By LUCY MOORE

- 1) Tribes are not just another piece of the public, or just another interest group. They are governments, sovereign, with authority, jurisdiction, and plans of their own. It is insulting for them to find themselves lumped as part of the public or another interest group.
- 2) It is risky for tribes to participate officially—or even unofficially—in processes that are created or sanctioned by the state or other entities that have no authority over the tribe. It is like submitting to a lesser authority, and they may find themselves subject to an agreement that compromises their sovereignty, or acts against tribal wishes. This means it is super important how a committee, or group, or council is organized, what its purpose and authority are, and how it operates, and how it pictures reaching agreements. Consensus, for instance, can be very scary for a tribe, if it is not exactly clear what is meant by consensus, how it will work, what will be the result if it fails, etc.
- 3) Visit a tribal government as early as possible in your process, hopefully before the process is created. Find out what it will take for a tribe to participate comfortably and organize your process accordingly. It may require certain times and places for meetings. It may require separate funds for separate technical expertise. It may require certain acknowledgements in writing about tribal sovereignty, etc.

- 4) Respect the right of the tribe not to participate. It is not the end of the world. In fact, there are creative ways that tribes can participate, without participating—like the Jemez y Sangre example where pueblos are attending meetings, reviewing all materials, and commenting on the development of the regional plan, but are engaging in a separate planning process for themselves. There may be some future merger of plans, or there may not, but the important thing is that there is communication and some exchange of information, and a mutual respect for choices made.
- 5) Be ready to make—and admit—mistakes. The relationship is inevitably difficult. There may be history that is painful, and still alive for many. There may be cultural differences, and conflicting views of the world. There may be decision-making processes on both sides that appear illogical to the other and result in frustration. All this means that it is easy to make errors, to offend, or to confuse. Don't over-react to the mistake of another, or to your own mistake. Name it, learn from it, ask how to do better, and move on.

# EVALUATING AND IMPROVING STATE AGENCY CONFLICT MANAGEMENT SYSTEMS THROUGH AN EXECUTIVE ORDER

WEDNESDAY, MAY 15, 2002—1:30–3:00 P.M.

## MODERATOR

Christine Carlson, Policy Consensus Initiative (PCI)

## PANELISTS

Dale Blanton, Oregon Department of Land Conservation and Development

Dawn Farr, Oregon Department of Environmental Quality

Bob Horwitz, New Mexico Environment Department, Administrative Services Division

Harry Manasewich, Massachusetts Office of Dispute Resolution

## PANEL ABSTRACT

Several state governments promote integrated dispute resolution systems through executive orders. The panel will explore ADR executive order implementation efforts from three distinct points of view. The first will discuss the utilization of executive orders from a national and state perspective. Next, panel representatives from Oregon, Massachusetts, and New Mexico will each share information on their respective ADR executive orders, highlighting some of the different criteria and implementation strategies that define those orders. Information will also be provided on accomplishments to date and challenges ahead. Finally, the point of view will shift to lessons learned at the agency level.

## PANEL SUMMARY

## PANEL SUMMARY

### MAIN DISCUSSION POINTS

- How are states integrating alternative dispute resolution (ADR) into state government and agency procedures?
- What are participant expectations for the panel?
  - How to build institutional capacity in Maine to deal with policy disputes (has no program).
  - Florida has recent executive order on ADR—how to implement, develop strategy, with no \$.
  - How is ADR applied in enforcement cases?

### CHRIS CARLSON

Chris Carlson, the moderator, opened the session by referring to their publications, one of which lists where ADR functions now occur within state agencies. She also listed 10 keys for a successful state ADR program:

1. Find champions to help achieve high level buy in and support.
2. Employ program managers who can provide skillful strategic direction.
3. Provide continuous education and training to build capacity.
4. Use a collaborative approach, involving stakeholders to develop your program.
5. Follow four basic steps to initiating the program: 1) assess the needs, 2) plan, 3) demonstrate or pilot the program, and 4) evaluate the results.
6. Employ a systems approach, adopting procedures to prevent as well as resolve disputes.
7. Create incentives and remove disincentives to the use of collaborative practices.
8. Develop policies and guidelines in support of the program.
9. Ensure resources to support the program.
10. Reward and celebrate accomplishments.

Chris handed out a report, “Solutions: Establishing Sound Government DR Programs,” on the use of the governor’s executive orders (EOs) to support ADR programs in states. She discussed the pros and cons of using executive orders.

EOs demonstrate the governor’s support and may help secure agency leadership. EOs add additional work burden and do not provide a new source of funding. Massachusetts, Oregon, New Mexico have had EOs creating DR programs in state agencies. Florida has just adopted a similar EO and several other states are poised to do so. Minnesota has an EO for workplace disputes; Montana has a new ADR group in the governor’s office.

## **DALE BLANTON**

EO requires agencies to do DR needs assessments. There is a challenge of integrating ADR into state government—want effective, high level of satisfaction with results. Government culture is a key component to developing a successful ADR program—in Oregon the governor models ADR in his own behavior, leadership style, etc. They have a culture of collaboration from top down.

State framework—have public policy program with staff. His sole job is to promote use of ADR by state government—works with 14 state agencies on ADR. Funded out of surcharge on court filing fees and is a stable source of funds. Hope to get future funding via assessment on agencies that use their ADR services to pay for staff.

Have a policy on ADR—first choice is parties resolve dispute themselves—if not, then turn to a third-party neutral to help resolve. Every two years the Dept. of Justice revises the model rules of procedure—has extensive component in these on use of ADR in various case types.

Have a governors advisory committee on ADR; governor also has an ADR advisor. Steering committee made up of representatives from the Dept. of Justice (DOJ), Dept. of Administrative Services and Oregon Dispute Resolution commission [ODRC]. His work guided by ODRC yet he works for a line agency. They may restructure and centralize all ADR coordinators. Wanted to expand use of ADR in state, steering committee advised/developed a draft EO for the governor. EO requires each agency with more than 50 FTEs to appoint an ADR coordinator, do an ADR needs assessment and annual report on ADR activities in each agency. Have annual ADR awards to agencies.

## **LESSONS LEARNED**

Culture varies within government agencies plus we see a lot of diversity in missions, leadership, and culture within state agencies—so it must be flexible to work. Second—support and nurture the ADR coordinators. Coordinators usually have other jobs so there is little time for ADR. Choose coordinators who are personally enthusiastic about ADR. Consider a bottom-up approach versus a top down in new EOs—negotiate individual agreements with agencies on how do ADR. He referred to his summary of needs assessment from their agencies.

## **DAWN FARR**

Formed team from different divisions of the agency as a steering board. First task was to decide on terminology—what ADR means. Talked about defining ADR as a continuum that flows from prevention, negotiations, to imposed ADR. This continuum includes prevention, education, outreach, advisory committees, facilitated discussions, negotiations, settlement, mediation, and arbitration.

## **To Do THEIR ADR ASSESSMENT**

- Chose to focus on certain areas of conflict—contentious rule making, permitting, new program development, complaint response, compliance, and enforcement only.
- Goal is to cover all sections of agency.
- Collected examples that tell the story—done by interviews of staff in those key areas.
- Involve a broad group of individuals—tried to interview a broad group within agency.

She referred to her chart on where they are currently doing DR and where they could improve/increase. Found need for more education and outreach to achieve prevention of conflict. Facilitation of task forces and advisory committees is needed—it is a challenge for a DEQ employee to be a neutral facilitator and staffer. Need third-party neutral. Mediation—interagency, workplace, compliance, complaint are key areas for it.

Training and skill development—need training that helps build skills. Deal with agency culture of “we regulate” to a collaborative problem-solving approach. Enforcement staff felt if it is in enforcement, it is not time for ADR—but do have a preliminary meeting to go over the facts and give a chance for settlement (without mediator). For very complex cases involving other agencies and parties—may be a good place for mediator.

After a needs assessment, they do a plan to implement. They have not done this yet—need more resources to complete. They have advisory committee processes with grants that are doing great work—see her for more info.

## **HARRY MANASEWICH**

Part of administration and finance agency so not part of a regulatory agency—helps establish neutrality. Serves the three branches of government. Training, consultation, mediation, and facilitation are services they offer.

Their EO grew out of an evaluation program. EO has Massachusetts Office of Dispute Resolution (MODR) as coordinator of ADR within state government. The advisory committee is at the secretary level of agencies plus coordinators. EO requires: ADR coordinator for each executive branch agency—coordinators are MODR staff, may be responsible to more than one agency; agencies must file annual report on use of ADR, annual plan for future use, and overall plan to MODR. Agencies are not forced to do ADR. Make an award to a person who promotes ADR in state government.

To implement—using orientations, brown-bags for coordinators. Have two main tools—an assessment tool for agencies to help develop their agency DR plans (questionnaire) and a format for the assessment report.

Findings from first round of reports: ADR goals for next year—to save staff time (not money). If something that goes to litigation is paid for by Justice Dept., staff time paid by their agency. They prefer to use their own agency staff to implement agency ADR pro-

gram instead of private sector neutrals (may be because they do not want to air dirty laundry; many disputes are intra or inter agency disputes). Lessons learned—maybe not to require all agencies to report (not for small). Include labor unions for government employees. Expect priority changes (like 9/11). Send questions to Cliff McCarthy at MODR.

## **BOB HORWITZ**

They have a state government ADR statute allowing ADR use plus EO, which created an ADR advisory council plus required executive agencies to develop an ADR program where they saw need. EO only as strong as the executive—their governor is not focused on ADR so there are no funds. To fund the program they went to the Hewlett Foundation, which funded initiative to create office of ADR coordination, identified a handful of agencies that want to do ADR.

Environmental Dept. want to use ADR—are training staff in mediation and facilitation but not pushing a particular application like enforcement. They are providing staff with skills, then let those trained decide where best to apply those skills. Human Services Dept. is developing collaborative capacity due to case load, complexity of cases, etc.—not regulatory issues, so need a different skill set from the environmental agencies.

Four agencies have started a leadership program, developed to grow a culture that values collaboration and capacity building and promote ADR (if you want a management job, you must take collaborative skills training). They offer training, coaching, mentoring to agency staff. Program in place for two years—participants now think about role differently—to deal with issues that cross-jurisdictional boundaries, etc. Risk Management division doing training on employment issues ADR.

Suggestions to other states for funding DR programs –rewrite federal grants to agencies to fund use of ADR. New Mexico also gets funding thru EPA and through EPA environmental justice grants. It has developed a way to pay/hire independent mediators without doing a separate procurement each time—saves time and money. Make it easier for staff to access ADR professionals and expect/ask staff to consider/use ADR.

## **QUESTIONS AND RESPONSES**

*Question:* Regarding the Florida EO process that Governor Bush signed EO last month, what happens to nonexecutive agencies? How do you bring them into ADR under EO?  
*Answer (Oregon):* Talk to those agencies about value of ADR. Do a needs assessment and appoint a coordinator. Help them understand how ADR will help them meet their needs.

*Answer (New Mexico):* Original EO went to 150 agencies—too large— so it was reduced to cabinet level plus volunteer agencies. Secretary of State and courts have volunteered because they saw the value—see a resource offered by the ADR program.

*Question:* If you have no champion from above, what's the best strategy?

*Answer:* A champion is not required at very top, but you must have them somewhere in the agency—maybe the ADR coordinator—find them where they exist and support them.

*Question:* How about a bottom-up strategy?

*Answer:* If do not do an EO, get groups of natural resource agencies together and work on interagency agreements so they get help and support.

*Question:* Regarding the EO in Massachusetts—does it filter down to community ADR agencies?

*Answer:* Massachusetts has long-standing community mediation centers but they are not part of state program—but state program does assist them. In many cases community centers preceded state ADR programs; some state programs train community centers.

*Question:* What are some funding sources for universities?

*Answer:* I don't know if it's not a state agency. Federal agencies are now under mandate to provide ADR capacity so you could look there.

*Question:* Regarding the state Department of Transportation agencies, are they part of your states ADR EO efforts?

*Answer:* Yes.

*Question:* What are the efforts to link ADR to current planning being done by agencies to reduce the burden of evaluation/assessment requirement of an EO?

*Answer (Mass):* The goal was to make it less onerous. Plan asked what/how to do ADR and his center offered to help them with their need to do a plan or implement programs.

# **FACILITATING COMPLEX ENVIRONMENTAL DECISIONS: TECHNIQUES AND APPLICATIONS**

**WEDNESDAY, MAY 15, 2002—1:30–3:00 P.M.**

## **MODERATOR**

Leslie Liberti, School of Renewable Natural Resources, The University of Arizona

## **PANELISTS**

Luis A. Bojorquez-Tapia and Theresa Mau-Crimmins, The University of Arizona  
Aregai Teclé, Northern Arizona University

## **PANEL ABSTRACT**

Public involvement is an important component of sound environmental decision making and is increasingly required by legal mandate, such as the National Environmental Policy Act. At the same time, environmental decision makers often use decision analysis tools and decision support systems that are incapable of explicitly considering subjective preferences in a systematic and comprehensive manner, particularly in situations characterized by significant conflict.

Recent developments in decision analysis have resulted in techniques that are theoretically more effective at participatory decision making. While these models have been utilized in several hundred military, corporate, and medical case studies, their applicability for environmental problems has not been fully addressed. The panel is intended to improve understanding of these models, their strengths and limitations, and how they can be used in an environmental decision context. The presentations will explore the ability of decision models to integrate public preferences into complex environmental decision situations in a manner that facilitates stakeholder consensus.

## **PANEL SUMMARY**

### **INDIVIDUAL PRESENTATIONS**

#### **Facilitating Complex Environmental Decisions: An Overview**

By Leslie Liberti

#### **The Analytic Hierarchy Process as a Group Decision Tool**

By Theresa Mau-Crimmins

# PANEL SUMMARY

## MAIN DISCUSSION POINTS

### **LUIS BOJORQUEZ-TAPIA—MULTICRITERIA ANALYSIS AND EIA: A CASE STUDY OF THE INTERNATIONAL AIRPORT FOR MEXICO CITY**

What does complex mean? Complex has nothing to do with the environment. It is related to the stakeholders.

The multicriteria analysis practitioner integrates the data supplied by other parties, such as specialists and stakeholders, and then conveys the integrated data to the specialists, decision makers, and others. Specialists work on producing information/data for use in the multicriteria analysis.

Decision analysis helps determine the rationality of a decision. The decision makers must be rational. It is useful when decision makers have to take into account the many perspectives in the public.

### **Frustrations in doing Mexico City Airport**

1. Quality of data.
2. Quantity of data.
3. Importance of achieving consensus among experts.
4. Dealing with complex systems (social/physical/biological).
5. Future is always uncertain.
6. Experts have values, biases, and interests as do the stakeholders

### **Case study: New International Airport for Mexico City**

- Two alternative sites were considered for an international airport in Mexico City.
- An old planning problem that had been around since the 1970s.
- Allowed only two months to do the EIA, but decision makers had four years to make a decision.
- High profile and contentious proposal with an open lobbying campaign, billboards, and movie announcements.
- Used three development scenarios: expected urban development of Mexico City.
- Methods: Analytic Hierarchy Process (AHP).
- Techniques: What is the distance to the ideal point? How close is each alternative to an ideal solution?
- Decision making mode and sensitivity analyses.
- AHP: Define the goal, objectives, alternatives, and attributes.
- Uses pair-wise comparisons to determine the relative importance of each objective, attribute. An expert-judgment based approach.
- Measuring distance can be achieved in several ways. Best alternative is the one with the least defects.
- Building consensus:

- Best hierarchy structures
- Errors in measurement of decision criteria
- Errors in the decision criteria weights
- Optimal combinations of weights
- Several workshops were conducted to develop the hierarchy structure. Alternative structures were developed (for instance, modifying where a variable such as land use was included in the structure with respect to the level in the hierarchy).
- Interval judgment matrix was used. Reveals the level of agreement or disagreement among the experts as to the relative weights of the criteria.
- The analysis revealed that some criteria were found to not be important but other decision criteria were viewed as very important.
- The judgment data was then given back to the experts and they refined their weights.
- The hierarchy structure then was employed for each of the three development scenarios.
- The best airport option may vary depending upon the development scenario.
- Sensitivity analyses were used to demonstrate how error could create a rank reversal. The greater the error needed for a rank reversal, the more confidence one can have in the ranking.

### **Conclusions**

- EIA is always political.
- Consider all viewpoints—if all viewpoints considered, then it becomes complex.
- Results are traceable using an AHP approach.
- A valuable technique for conflict resolution—can point to where more information may be needed and can reduce conflict.

### **AREGAI TECLES—THE ROLE OF MC DECISION MAKING IN MANAGING AND RESOLVING CONFLICTS IN ECOSYSTEM MANAGEMENT**

#### **There are different approaches to addressing conflict:**

- Neglect—ignore, do nothing
- Denial—refuse to accept existence of a conflict
- Containment—temporarily freezing a conflict from progressing. Cease-fire.
- Control—allows a conflict to proceed with limitations.
- Solution
- Resolution—seeks a compromise
- Dissolution—conflict elimination

Conflict resolution is the most common.

#### **MCDM—two stages**

1. Problem formulation
2. Analysis.

### **Problem Formulation Steps**

1. Identify conflicting parties.
2. Develop objectives representing the aspirations of all the stakeholders.
3. Specify objectives in terms of quantifiable sub-objectives.
4. Develop criteria.
5. Determine criteria measurement scales.
6. Develop criteria weights representing stakeholder preference structure. Requires interaction with stakeholders and decision makers (DMs).
7. Identify feasible management objectives that can achieve the desired objectives or resolve the conflicts.

### **Steps in Problem Analysis**

1. Collect available data (hard or soft).
2. Develop a composite evaluation matrix.
3. Select an appropriate MCDM technique for solving the problem. Some techniques are better than others for a particular problem.
4. Present findings to stakeholders and DMs. If not satisfied, then go back and revise.

### **Types of MCDM Techniques**

- Value or utility type methods: involves coalescing the multiple objectives into a one-dimensional, multi-attribute function.
- Distance based techniques: solution closest to an ideal point using a quasidistance measure.
- Outranking tech—pair-wise comparison approach such as AHP.
- Direction based methods—interactive or dynamic techniques.
- Mixed type of techniques—use some aspects of two or more of the above techniques.

### **Uses:**

- To resolve conflicts among scarce resource users.
- To manage ecosystems for multiple purposes.
- To manage international disputes.
- To examine international environmental quality problems.

### **Example from the Forestry Sector**

#### **Many stakeholders**

- Public sector—USDA Forest Service, FW, NPS, BLM, etc.
- State and local agencies—DEQ, Land Dept., etc.
- Private Sector—logging operators, recreation developers
- Other interest groups—environmental groups, Native Americans, recreationists, researchers

May be conflict within these groups and between the groups.

#### **Forest Ecosystem Management Objectives**

Wide range of objectives: aesthetic, water quality, wildlife habitat, flood hazard, forage/recreation, timber, exotic species, disease, and water yield.

**Twenty-one ecosystem component response functions were identified and modeled.**

- Example: aesthetic quality response function.
- Forage response function: more grass grows when there are fewer trees.
- Wildlife Response Function—different types of habitat favor different species. What is best for elk might be different for owls. Need to consider the forest as an ecosystem not single species management approach.

**Nine major concerns or conflicting interests—examples include:**

- Social benefits
- Disease and pathogens
- Exotic species
- Hydro concerns
- Wildlife habitat
- Forage

Used a compromise-programming model to determine which is the best solution for the 21 response functions.

All approaches other than the single objective approach can aid in conflict management. Outranking and distance based are best for group decisions. Direction and distance based good for operational decision making.

**Problems with MCDM techniques**

- Use of poor models
- Misuse of models
- Use of wrong models
- Model difficulty

**LESLIE LIBERTI—COLLABORATIVE DESIGN OF NATURE RESERVES: A PROPOSED METHOD**

- There is scientific support for the use of mathematical tools to select nature reserves but how do you incorporate public involvement in such a scientific or technical issue.
- The public wants to have a say in such an activity but there is debate over the usefulness of these models.
- There is concern over practical issues, such as social attitudes and political considerations.
- Problems such as nature reserves are political, social, and cultural, as well as scientific.
- They tend to be contentious with agreement difficult to achieve.
- Can the traditional approach be modified so that stakeholders feel that their perspectives matter and that the system is not biased? Public has been skeptical of mathematical models.
- Experiment conducted with 19 wildlife management university students. Used AHP to elicit public input using pair-wise comparisons.

- Want to minimize deviation from the defined goals. Used stakeholders to determine how much deviation would be acceptable. Relative importance of the criteria.
- Nineteen criteria were identified, e.g., shape, proximity to existing wilderness areas, riparian areas, etc.
- Used ExpertChoice AHP software that elicits individual level data. The various criteria were ranked differently by different individuals.
- Wanted to go a step further and obtain consensus judgments. Used a consensus session using working groups.
- Results: the consensus exercise did not go well.
  - It was hard to come to agreement on the set of criterion.
  - Conflicting personalities were a problem.
  - Value laden issues and thus people are not willing to move.
- Decided to average the weights.
- Then decided instead to sum the weights.
- Depending upon using the mean versus additive methods, there were some differences in the reserve design selected.
- Individual solutions varied quite a bit.
- How similar are these participants' views? Looked at percentage of agreement for each reserve cell.
- Compared the 3 approaches:
  - Averaging,
  - Additive, or
  - Overlap on the map.
- Percent agreement mapping approach: 18% of cells reflected full agreement; 80% of cells > 50% agreement among the participants.
- Percent agreement approach: 75% of what an individual would have in their own solution.
- Additive weights: 73% of chosen cells.
- Average weights: 61.8% of chosen cells. Eight cells selected, no individuals. Average was poorest.

Did the participants believe that the AHP facilitated their decision making? Yes.

#### **Some difficulties with the AHP consensus**

- People inflated their scores to get what they wanted.
- People not interested in giving reasoned arguments to support their choices.

#### **Feedback on the combined approach of individual and group ratings:**

- More comfortable.
- Less time, effort.
- Better basis for bargaining.
- Clearer picture of how criteria viewed.

Is this approach acceptable to the scientific community? It is consistent with the literature and provides a useful starting point for subsequent negotiation.

### **Conclusions**

- Average weighting was the weakest approach
- The additive method was viewed as less involving as the percent agreement approach.
- The percent agreement approach was viewed as less threatening than consensus on AHP weighting.

### **Next Steps**

- Involve the public in selecting criteria.
- Assess perspectives of public land managers, general public, and mediation professionals.
- Consider the logistics of a negotiation process using this approach.

### **QUESTIONS AND RESPONSES**

No time was left for questions.

# **FACILITATING COMPLEX ENVIRONMENTAL DECISIONS: AN OVERVIEW**

By **LESLIE LIBERTI, UNIVERSITY OF ARIZONA**

## **OBJECTIVE OF PRESENTATION**

The purpose of this presentation is to highlight some of the ways in which multicriteria decision models can enhance natural resource decision making through (1) improving the ability of natural resources managers to consider public input in their decisions, (2) facilitating collaborative decision-making through an improved understanding of stakeholder preferences, and (3) identifying areas of compromise and assessing trade-offs among stakeholder perspectives when overall consensus is not possible. The following panel presentations highlight the potential of decision tools by discussing specific group decision-making applications.

The overall goal of this panel is to build linkages between negotiation professionals and academics in the field of group decision making. These connections are essential to the development of decision tools that are “useful, meaningful, and applicable by practitioners” in the areas of environmental conflict resolution and collaborative problem solving (Spector, 1997).

## **SUMMARY OF PRESENTATION**

The role that decision models can play in facilitating public participation in a decision process depends on the context in which they are applied. Natural resource planning and decision making in the U.S. has ranged from technocratic resource control with limited public involvement to processes based on participatory democracy (Moote et al., 1997). As we have evolved, from the expert-driven resource management of the early 1900s into the “era of alternative problem solving” (Keeney and Lord, 1999, p. vii), the use of collaborative decision processes has been pursued “with a zealotry that strikes some as remarkably close to...religious fervor” (Weber, 2000). Part of this backlash against the scientific management of the past is a widespread disregard for the use of analytical decision models in collaborative contexts, as these tools are seen as symptomatic of the technocratic perspective. The basis for this reaction seems to be the assumption that, because traditional problem-solving methods did not work in the past, they cannot work in the future (Keeney, 2000). In reality, there is a place for decision models in both consensus-based and noncollaborative natural resource decision processes. It is the establishment of a dialogue between facilitation professionals and modelers that can help ensure that these traditional decision-making tools can be adapted into effective and acceptable decision aids.

## **NONCOLLABORATIVE DECISION PROCESSES**

It is often the case in natural resource problem solving or planning situations that public involvement in the process is important, but the ultimate decision-making authority resides solely with a resource management agency or governmental jurisdiction. These

situations may arise when the affected parties have little knowledge of the resource in question (Tonn et al., 2000), the issues involved do not incite considerable public interest, or the benefits of locally based, collaborative decision making are outweighed by the costs to the community.

In noncollaborative decision processes, the public is typically limited to the role of providing input regarding the acceptability of various agency-developed alternatives (Tonn et al., 2000). The role of multicriteria models in this context has received considerable attention. The benefits of using these models can include:

- Quantifying public preferences so that they can be more easily and consistently considered by the decision-making entity (Martin et al., 2000).
- Giving public input greater weight in the decision process by allowing explicit trade-offs between preference information and objective criteria (Martin et al., 2000).
- Allowing for more flexible public involvement activities as differences in opinion can be identified without face-to-face dialogue among stakeholders (Armacost, 1999).
- Predicting support for new or updated alternatives (Dennis, 1998).

One particularly important question remains, however. There is little agreement concerning the most appropriate manner for accommodating the differing perspectives of individual participants. Most multicriteria models are designed for use by a single decision maker. Researchers usually advocate the aggregation of individual preferences into an overall “societal” perspective and the selection of the alternative that best satisfies this global preference set (Leyva-Lopez et al., 2001). The best method of aggregating individual preferences is still the subject of much debate (Dyer and Forman, 1992).

## **COLLABORATIVE DECISION PROCESSES**

Alternative problem solving approaches, on the other hand, follow “a community/collaborative model of action” that involves extensive and representative public participation, voluntary and cooperative partnerships, locally based decision making, community governance, and bottom-up resource management (Keeney, 2000, p. 3). Central concepts include: alternative dispute resolution, consensus building, and “grass-roots ecosystem management” (Weber, 2000). One of the core assumptions of collaborative decision making is that local stakeholders will put aside their interests and “sense of duty to represent...a particular perspective” for the benefit of “the collective and ecosystem” (Sturtevant and Lange, 1995, p. 10). It is assumed that through decentralized and inclusive decision making and negotiation, “win-win-win outcomes” to resource problems are possible (Weber, 2000). Supporters of alternative problem solving claim that it promotes increased decision making efficiency, builds social capital, and results in more pragmatic solutions to resource conflicts (Keeney, 2000).

Evidence supporting the realization of these benefits, however, is scarce and inconclusive. Recent evaluations have led some researchers to question the effectiveness of collaborative methods for generating efficient, long-lasting, and publicly acceptable resource management solutions. As Keeney (2000, p. 2) notes, “collaborative

efforts...are largely unproven experiments, bolstered more by desperate enthusiasm and unsubstantiated generalizations than by real and documented results.” In particular, substantial concerns exist over the apparent inefficiency and limited success of collaborative problem solving efforts (Keeney, 2000). These problems suggest that the most appropriate roles of decision models in a collaborative process involve reducing the length and cost of the decision process and improving understanding of the problem. The type of conflict found among participants, however, may influence not only the effectiveness of collaborative decision process (Keeney, 2000), but also the potential role of decision models.

Keeney (2000) identifies two general types of conflict that can occur in a collaborative decision process. First, conflicts may be due to miscommunications and involve differences in “negotiable” interests. These situations often occur because various groups and individuals do not understand each other’s perspectives, or they evaluate problems and solutions on the basis of different sets of criteria. When collaborative processes fail to effectively address these problems, participants may become further alienated and compromise solutions may not be identified or implemented (Gwartney et al., 2001). The dangers of relying solely on collaborative processes include the potential that: solutions cost more, both in terms of time and money, to generate; that representation of community preferences may be limited to members of organized interest groups or the individuals who are most vocal about their perspectives; and that the information generated may be inaccurate or biased (Buchy and Race, 2001).

Supporters of alternative problem solving approaches also assume that, by placing natural resource decisions in the hands of local stakeholders, collaborative community-based methods empower people to determine their own fate and future (Buchy and Race, 2001). As David Wilcox notes in his *Guide to Effective Participation* (1994), however, “participation doesn’t always lead to empowerment. It takes a supportive environment in which to nurture people’s aspirations and skills for empowerment to ultimately occur.” He suggests that, rather than being shielded from complexity, citizens should be given the means to understand and manage complexity. He also suggests that people will benefit from understanding the full range of choices available and the implications of each alternative.

The second type of conflict occurs over differences in stakeholder values (Keeney, 2000). Collaborative problem solving is much less effective when conflicts are value related because these disagreements often cannot be negotiated. When this occurs, full consensus among negotiating parties is not possible. Many collaborative decision processes fail because of extensive hostility and irreconcilable disagreement among participants (Amy, 1990). When this level of divisiveness exists, the use of collaborative problem-solving methods may exacerbate conflict between stakeholders.

## **POTENTIAL ROLES FOR DECISION MODELS IN COLLABORATIVE DECISION PROCESSES**

The previous discussion suggests two different roles for decision models in collaborative decision processes. When conflicts involve miscommunication and disagreements over

negotiable interests, these tools can be used to clarify stakeholder positions and identify the impacts of changes in these positions. In these situations, decision models can be used to structure and inform the early stages of the decision process, such as problem definition, criteria selection, and alternative development and assessment (Tonn et al., 2000). This will allow participants, who are now assumed to be better informed about the implications of each choice option, to reach agreement through discussion and compromise. When value-related conflicts prevent stakeholders from achieving consensus, decision models also have an important role in facilitating the final decision.

From the perspective of negotiation theory, a variety of specific roles for decision support tools within a collaborative decision process have been identified. Past group decision support research has, for the most part, involved the development of computer-based decision aids for use by a facilitator, rather than the collaborating parties (Thiessen et al., 1998). Decision tools can be used to assist the negotiating parties, however, in much the same way as they aid a facilitator. The potential roles of decision models include:

- Determine the important factors (criteria) in a negotiation issue, the value of each factor to each stakeholder, and the full range set for each factor.
- Formally represent the issue space and specific locations within the issue space.
- Accommodate knowledge about stakeholders.
- Identify the feasible portion of an issue space and the acceptance region of one or more stakeholders.
- Update knowledge about stakeholders, keep track of changes in an issue space, and analyze these changes.
- Monitor and catalog all stakeholders' acceptance regions.
- Compute the agreement region.
- Portray all possible locations within the agreement region or within an acceptance region and detect whether a specified location is within the acceptance region.
- Evaluate the relative values of all locations within the acceptance region of a stakeholder.
- Measure the dispersion of current or potential locations and detect trends in dispersion over time.

—Adapted from Holsapple et al., 1996, pp. 261-2.

Decision models can be used to improve the performance of collaborative processes by filling the roles outlined above. Unfortunately, few case studies involving real-world problems and actual stakeholders exist. Past research on the use of these models in group-decision problems, however, has found that:

- The solutions generated with the help of multicriteria models were found in less time and with less effort and were a “higher quality” than solutions found through unaided group negotiation (Iz and Jelassi, 1990).
- By modeling uncertainty or “fuzziness” within individual preferences, decision models can be used to identify specific areas where there is disagreement, and more importantly, agreement among participants (Thiessen et al., 1998).

- Decision models can guide the decision process, provide insight into the decision problem, and evaluate “what-if” propositions, thus reducing conflict and facilitating “more favorable” outcomes (Hipel et al., 1997).
- Multicriteria models can accommodate decision heuristics that are compatible with collaborative group decision processes, specifically the “majority rules” principle in combination with “concessions to significant majorities” (Leyva-Lopez, 2001, p. 26).
- Participants found multicriteria decision models easy to understand and apply (Ehtamo and Hamalainen, 2001, and Bojorquez-Tapia et al., 2001).
- Multicriteria analysis is a “valuable tool for identifying, understanding, structuring, and solving the problem” (Malczewski et al., 1997).
- Multicriteria methods improved understanding of the resource and enabled negotiating parties to “reach a general agreement on the results” of the decision process (Bojorquez-Tapia et al., 2001).
- In international negotiations, the use of analytical decision support seems to give participants a sense of confidence in the quality of the negotiation outcome and has a direct impact on comprehensiveness of the outcome. This suggests that analytical support does indeed “facilitate an understanding of the issues, interests, and dynamics involved” (Spector, 1997).
- Multicriteria models can accommodate uncertainty in the performance of alternatives and the preferences of decision makers (Gurocak, 1998).
- By quantifying stakeholder preferences, more favorable alternatives can be developed in a natural resource management context (Kent, 2002).

## **CHARACTERISTICS OF A USEFUL MODEL**

Decision models will only be useful in facilitating collaborative decision making to the extent that they accommodate the needs of the collaborating parties and facilitator. Peniwati (1996) suggested a set of key functions that group decision models should fulfill. A group decision model should:

- Promote individual and group learning.
- Provide a structure that will facilitate achievement of the decision goals of the group.
- Give groups the means to solve problems through the analysis of prior knowledge.
- Facilitate the questioning of assumptions and shifts in knowledge that allow the identification of previously unconsidered alternative solutions.
- Facilitate the development of alternatives in a manner that is neither so narrow that solutions are not meaningful nor so broad that solutions are infeasible or irrelevant.
- Accurately represent stakeholder preferences.
- Include a feedback mechanism to guide parties in a manner that ensures the final outcome adequately represents stakeholder preferences.
- Be capable of equally representing the preferences of all affected parties.
- Support conflict resolution by providing a means for stakeholder groups to evaluate the trade-offs, e.g., costs and benefits, associated with various compromise solutions.

## POTENTIAL USE OF THE INFORMATION PRESENTED HERE

This brief overview has included a discussion of the both the roles that decision models can potentially play in collaborative problem-solving processes and the key characteristics that these models should have in order to be useful to facilitators and negotiating parties. It is the hope that this presentation, and the following panel discussions, will build linkages between the community of facilitation professionals and academics in the fields of group-oriented modeling and decision support. It is the presence of “minimal dialogue” between these two groups that limits both the transfer of group decision-making tools into real-world applications and hinders the design of more useful decision models (Spector, 1997).

Negotiation and mediation practitioners can benefit from these presentations through an increased awareness of the types of decision models available and the range of benefits that can be captured by using these methods to support collaborative decision processes. In addition, the development of group decision models should be guided, in part, by the needs of these practitioners and the parties they are involved with. In order to achieve the goal of widespread decision model applicability, modelers must understand the “needs, problems, and tasks” of potential users (Spector, 1997). Clearly, the modeling community stands to gain as much from interaction with professional facilitators as we hope practitioners can benefit from our discussion of models.

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## **THE ANALYTIC HIERARCHY PROCESS AS A GROUP DECISION TOOL**

**By THERESA MAU-CRIMMINS**

A wide variety of methods exist for facilitating group decisions, ranging from simple methods such as voting and anonymous questionnaires to quantitative methods such as multi-attribute utility theory. The Analytic Hierarchy Process (AHP), developed by Saaty (1980), is a powerful, systematic decision-making tool which has enjoyed application in many fields. Though not designed specifically for group decisions, several techniques exist for aggregating individuals' preferences generated through the AHP process into a single group decision. This presentation applies the AHP to a natural resource problem involving many decision makers. Several methods of aggregation were employed to determine which best represented the individuals' preferences.

AHP has been applied to natural resource problems only a small number of times (Peterson et al., 1994, Schmoldt et al., 1994, Schmoldt and Peterson, 2000). The AHP involves representing a decision problem as a hierarchy, employing experience-based judgment. An ordinal measurement scale ranging from 1 to 9 is employed to represent decision-maker preferences of criteria and alternatives in a consistent, pair-wise method. The resulting vectors of priorities numerically represent decision maker opinions and are used to generate a final ranking for the alternatives. The systematic method for quantifying preferences is ideal for complex decisions.

Several methods for aggregating individual AHP judgments have been developed. Preferences can be aggregated at the judgment level or at the priority level, and geometric and arithmetic means are appropriate, depending on the hierarchy level selected. Alternatively, groups' preferences can be captured through a consensus decision, where decision makers voice opinions until all agree on the value selected.

In this study, 20 decision makers worked through the AHP individually. Next, individuals with similar preferences were placed into small working groups. The participants were asked to come to consensus on the decision within their working groups. Finally, the entire group was asked to come to consensus on the decision.

Because the sample problem used in this study was so large (19 criteria, 8 alternatives), it was not possible to have the small groups or the large group work through the entire AHP during the consensus exercises. Rather, groups only generated reached consensus on the criteria weights. Forman and Peniwati (1998) demonstrate that a geometric mean is the appropriate mathematical tool for aggregation at this level of the AHP.

The individual AHP judgments and the geometric mean calculated at each decision level were compared with the results obtained through the consensus exercise. Within working groups, the values derived through consensus exhibited a stronger correlation with the individuals' original preferences than did the geometric mean of the individuals' preferences. This finding suggests that some information is possibly being misrepresented through the geometric mean calculation, as Ramanathan and Ganesh (1994) demonstrate. Participants with similar preference values were assigned to the same working groups. This situation should have minimized the amount of misrepresentation of information through the geometric mean calculation. However, the values derived through consensus still better represented the individuals' opinions, suggesting that this method is preferable in a small group setting.

Among all of the participants, the consensus approach again outperformed the geometric mean at representing the individuals' opinions. Again, this could be due to a misrepresentation of data in the geometric mean calculation (Ramanathan and Ganesh, 1994). Because the entire group was involved in this consensus exercise, a wide range of opinions was represented. The consensus exercise was time-consuming and tiring to the participants, but yielded results with which they generally agreed. Often, the lack of agreement led to bargaining, compromise, and in some cases, averaging of the participants' values. However, this active participation provided the decision makers with a sense of ownership in the final outcome.

Because the groups only reached consensus on the criteria weights of the problem, a major limitation of this study is that groups only worked through a portion of the AHP. Further investigation in this area should be performed with a problem where the entire AHP process was completed at all levels of the study. However, the results of this study suggest that decisions derived through group consensus perform better at representing the individuals' preferences than does a geometric mean of their preference values.

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# **SESSION III: PANEL PRESENTATIONS**

**WEDNESDAY, MAY 15, 2002**  
**3:30–5:00 P.M.**

# **ROSTER MANAGERS AND ROSTER MEMBERS: A DISCUSSION ABOUT THE ETHICAL, BUSINESS, AND PROFESSIONAL STANDARDS FOR ROSTERS OF MEDIATORS**

**WEDNESDAY, MAY 15, 2002—3:30–5:00 P.M.**

## **MODERATOR**

Dan Dozier, Marasco Newton Group, Consensus and Dispute Resolution

## **PANELISTS**

Joan Calcagno, U.S. Institute for Environmental Conflict Resolution

Robert Fisher, RESOLVE

Elissa Tonkin, U.S. Environmental Protection Agency, Region I

## **PANEL ABSTRACT**

The panel will discuss the various issues inherent in the management of rosters of mediators; whether the roster manager should also be a provider of services; what the qualifications for membership on the roster should be, the role of users of the services, quality control, business and professional ethics, and other, similar issues. Since, for many of these issues, there is no “right or wrong,” but simply different opinions, the panelists will respond to questions or challenges from the audience and engage in discussions about the issues.

# SUCCESSSES AND CHALLENGES OF USING PUBLIC PARTICIPATION DURING MEDIATION AND IN THE IMPLEMENTATION OF AGREEMENTS WHEN THE PUBLIC WAS NOT AT THE TABLE

WEDNESDAY, MAY 15, 2002—3:30–5:00 P.M.

## MODERATOR

Harry Manasewich, Massachusetts Office of Dispute Resolution

## PANELISTS

Timothy Conway, U.S. Environmental Protection Agency, Region I

Benno Friedman, GE-Housatonic River Citizens Coordinating Council

Bryan Olson, U.S. Environmental Protection Agency

Greg Sobel, Environmental Mediation Services

## PANEL ABSTRACT

The session will highlight the recent GE-Pittsfield/Housatonic River Site mediation which was a groundbreaking mediation involving General Electric, the U.S. Environmental Protection Agency, the Commonwealth of Massachusetts, the State of Connecticut, the U.S. Department of Justice, the U.S. Department of the Interior, the City of Pittsfield, and several other parties. The mediation resulted in a Consent Decree to clean up PCBs in the Housatonic River. The panel will discuss how public input was used during the confidential mediation process and its challenges, such as how to report back to the public on the use of their input and how “public” discussions occurred during the mediation (the “public” and other nongovernmental stakeholders were represented by government but not at the mediation table). The panel will discuss the mediation process including its convening, the simultaneous formation of a Citizens Coordinating Council (CCC) to provide input and facilitate communication with the public, and the current implementation of the Consent Decree in conjunction with the CCC. Panel participants will include one of the mediators, the U.S. EPA negotiators, the CCC facilitator, and a member of the CCC.

## PANEL SUMMARY

## **PANEL SUMMARY**

### **OBJECTIVE**

To demonstrate how using public input during a confidential mediation process leads to wider acceptance of the outcome versus the traditional method of including the public via the public review process after an agreement has been achieved.

The discussion started with an 8-minute video of a news story that had aired on television at the onset of the issue. It provided background on the issues (a bit sensationalized), public sentiment at the time, and demonstrated why the resolution of the issues needed wider public involvement.

### **MAIN DISCUSSION POINTS**

#### **HARRY MANASEWICH—GENERAL INTRODUCTIONS AND FACILITATOR'S PERSPECTIVE**

- Our conversation today isn't about the mediation per se, but about how to involve the public in a confidential mediation process.
- Overview of mediation process.
- CCC role during and after mediation.
- Mediation here was very lengthy but it resulted in a Consent Decree that was widely accepted by the public.
- The public needed to be involved, but how do you talk publicly about what is supposed to be confidential?
- Site: GE industrial site, in Pittsfield, Massachusetts —contaminants were PCBs.
- Mediation began in September 1997 and included Department of Justice, states of Massachusetts and Connecticut, City of Pittsfield, and EPA. The public was represented by the government agencies.
- Time line: talks collapsed in April 1998. Mediation restarted in June 1998, yielding a September 1998 Agreement in Principle. Mediation continued through October 1999 as parties negotiated Consent Decree terms.
- The CCC was designed to serve as a vehicle for community involvement in the implementation of the settlement agreement between GE and the government. There are 35–40 members of the CCC (representatives of the broad array of stakeholder groups), which consists of people selected by invitation. The CCC made their own mission statement, operating procedural rules.

#### **GREG SOBEL—MEDIATOR'S PERSPECTIVE**

Howard Bellman and I were selected by the negotiators to co-mediate their settlement negotiations. When we began mediating this case in fall of 1997, the ground rules, participants, and structure of the mediation had already been determined by the government agencies and the company. There was a history of litigation, and the parties were preparing for new lawsuits.

As a general principle, all stakeholders should be invited to participate in any collaborative process that addresses their interests. This does not mean that all affected parties must be “at the table” in all mediated negotiations. There are some forums/processes that cannot be successful if all interested parties are participating as negotiators. We will offer here two types of negotiations.

One example: Agencies use negotiated rule making (also called regulatory negotiation or “reg-neg”) to develop new regulations through consensus-based negotiations with representatives of affected interests. All stakeholders have a right to participate in developing the new rule. That does not mean that they should all be at the negotiating table. A common ground rule in reg-negs is that each negotiated rulemaking committee member commits to make a good faith effort to reach an agreement that satisfies all members. Some advocacy groups adopt strategies that do not allow them to make that commitment. If they are negotiators in a process with a consensus decision rule, no agreement is possible. There are a variety of appropriate ways those organizations can participate in working on the issue but membership on a consensus seeking negotiating committee is not one of them. This negotiated rule making example was not the situation in the Pittsfield PCB negotiations.

More relevant to the mediation we are discussing today are disputes in the courts. The litigants have the authority to decide who should be invited to negotiate which excludes from that forum parties with a legitimate interest in the negotiations. The idea of excluding stakeholders from negotiations about their interests may make some colleagues uncomfortable. But there are various ways for a stakeholder’s interest to be represented in a decision process.

In this mediation, several negotiators were representing the public interest: elected local officials, the EPA, the attorneys general of two states, and the state environmental agencies. Some of the negotiators made special efforts to exchange information and views with community leaders. These agency negotiators, especially EPA, assured the negotiating team that they always adhered to the confidentiality agreement.

There were at least two structured efforts to communicate with the public in this case: first, the CCC, and second, a listening session where reps of different groups met with the negotiators.

- Public involvement staff and senior officials of GE and EPA were involved in organizing the listening session.
- The listening session’s objectives, structure, ground rules and participants were all agreed in the mediated negotiation. Greg, on behalf of the negotiating team, invited the participants, communicated their concerns to the negotiators, and facilitated the listening session.

Audience question from someone currently in a reg-neg in Florida: What about our “sunshine law” requiring the process to be transparent?

Greg's answer: Negotiated rule makings are conducted in open and advertised meetings. The negotiations can be observed by any interested person and the media. Also, there are public comment periods during the reg-neg when anyone may address the negotiators. If there is a consensus and the agency uses the consensus agreement as the basis for its proposed rule, the regular notice and comment steps of promulgation apply.

## **BENNO FRIEDMAN—CITIZEN CCC MEMBER'S PERSPECTIVE**

Benno opened with prepared remarks, which were received with loud applause, as follows:

Theoretically, there is a strong and sympathetic alliance between citizen groups and the regulatory community. In addition to protecting the environment, the agencies you represent were created to protect us, the public, when greed or carelessness threatens our health and safety. We need you, and often times you need us, to provide your decisions with public support in the face of frequent opposition, from a variety of predictable sources. But this partnership, like all successful ones depends on trust, and for a variety of reasons, that trust is not always immediately forthcoming from either side.

Citizen groups are impatient, anxious, and often angry, for they believe, correct or not, that their lives, their neighborhoods, and their environment are being directly impacted by the presence of toxics or by irresponsible behavior. As well, we know that at some point after the negotiations have been completed and a cleanup has been accomplished, the politicians will no longer be in office, the regulators will have moved on to another site, and the potentially responsible party (PRP), if it exists at all, may have moved to another town or country. Remaining are the families, the children and grandchildren and their families, whose legacy is forever connected to the decisions that have been made by all those who are no longer around or accountable. We want to trust you, but we don't know who you are. And unfortunately, current and past records reveal a list of troubled sites, endlessly studied or entirely ignored; where corporate or political influence seems to have a much greater role in who gets protected and what regulations are enforced.

We are forever suspicious that there may be some form of deception behind the outstretched hand, that we have not been heard, that shortcuts will be taken, compromising the integrity of a thorough and just remedy. I sense that the regulatory community also has reasons to withhold their trust in us. Almost by design, we are often an annoying intrusion, an impediment to the successful accomplishment of your already difficult task. The complexity associated with even the simplest site is not readily grasped by the layperson, complaining about his or her yard, of their kid's asthma. Having little power otherwise, out of necessity we become the burr under the saddle, the squeaky wheel.

You often get caught in the crossfire. You are the professionals, with an education specific to the field. You are good, dedicated people, hoping to improve our world. Your agencies are understaffed and painfully under funded. To successfully negotiate the

needs and competing influences of all the stakeholders, as well as the political components and the bureaucracy, is an almost Herculean task for which the public should be grateful. Why should you want us at the table, voices powered by emotion, a sense of injustice and injury? And besides, if you let one of us in, what about the others? Who is legitimate, who is not?

This is the dilemma. How to overcome the distrust? How to partner with a public, to overcome their skepticism, their wondering whether or not your agency will impede or assist them as they stand up to a Goliath?

The CCC has been a most valuable addition to the existing mechanisms for public inclusion. For those of you who support the public's right to be a part of the process, as directly as circumstances allow, even if it cannot always be at the table, you will use this tool as a way to further mutual communication and understanding between the various stakeholders, including the PRP.

For those who continue to feel threatened or hampered by the public's messy presence, the form will be nothing more than another ritualized waste of time for all the attending parties. I urge you to make the additional effort, to welcome those of us, who in addition to the demands of our jobs and our families are also making a significant, voluntary effort to improve our lives and our world.

- One of the critical issues that affect every conflict resolution is the issue of trust between stakeholder groups. Citizens often question the ability of agencies to adequately represent them.
- Theoretically there should be a strong relationship between agencies and citizens. After all, agencies are created for citizens, both entities need each other.
- Citizen groups are often anxious and angry, when they feel that their lives are being affected by irresponsible behavior. They also are sensitive to turnover in political offices and agency positions. Citizens want to trust agencies, but they don't know who they are. Many times they feel that corporate interests affect agency decisions more. Citizens can feel like they are an impediment to agency process.
- Additional effort is needed by agencies to welcome public citizens to the table; they are making a voluntary effort to improve their lives.

Audience question: How is confidentiality maintained if the public was in the room but not at the table? And how is this related to the CCC?

Answer: We're getting to that!

## **TIM CONWAY—EPA'S PERSPECTIVE**

Tim will give a sense of how we initiated negotiations and set up the ground rules, Bryan will speak about implementation.

- Regarding the above question, when the decision was made to go into mediated negotiations, there were already 11 different government agencies plus GE at the

table. Discussions would be very awkward if more parties were involved and candid conversations would not take place in the presence of the public. The government and GE agreed to restrict parties to those involved in the litigation. In order to include the public in the confidential negotiations, the Mayor of Pittsfield and one city counselor were included.

- Lots of trust by environmental groups and citizens was lost because of the confidential nature of these negotiations. EPA decided that the agreement would be affected if the public wasn't at the table at all. After all, they live there, they know a lot. The eventual outcome will have to be blessed by a federal judge as procedurally fair, and who will look for public involvement.
- Confidential negotiations included: Comprehensive cleanup of contaminated soil other than on residential properties, cleanup of PCBs from the river sediments and bank soils, natural resource damage restoration, recovery of government costs, specific Consent Decree terms.
- Guts of the agreement: The confidentiality agreement sets up that certain specific proposals or written documents would not be available to the public, at the same time the government has an obligation to talk to the public during the course of a negotiation that affects them.
- One way of involving the public is to involve the city itself through its Mayor and the economic development authority.

## **BRYAN OLSON—EPA'S PERSPECTIVE**

The public wants to know the face of the government, Bryan's job was to put a face to the government and build trust with the citizens.

- Chronology: In 1995 he was involved in more informal negotiations with GE, which broke off because an agreement could not be reached.
- More formal negotiations started up again later.
- Bryan's job was to explain to the public why they would not be at the table.
- (In addition to the CCC, and beforehand, Bryan did outreach by going to individual homes and organizational meetings, he built a good relationship with the public.)
- EPA, GE, and the other negotiators agreed that the mediation would not include the contaminated fill in residential properties. They took the stance of not negotiating over residential properties. The residential landfill cleanup began before the mediation and continued.
- The media really picked up on the story, using the residential fill angle, which the EPA wasn't even negotiating with GE anyway. The ground rules and the confidentiality agreement allowed EPA to talk to the public, Bryan said he interpreted the ground rules fairly liberally, asking the public questions like: What is your biggest issue? Would you rather see the river cleaned up or extraction of historically landfilled\_waste from GE property?
- Office hours in Pittsfield evolved into a full time office; one-on-one meetings were held with key stakeholders. These meetings were not totally formal; they included neighborhood meetings at citizens' homes.

- The CCC brought everyone together and was more formal than the above meetings.
- The EPA saw this site as one of the two most important sites in New England
- The regional EPA administrator met with residents, local political leaders, environmental activists, business groups, press, and CCC.
- There are now five staff and two lawyers working almost solely on this case.
- Tim and the other lawyers going out into the community and establishing themselves as regular people was critical to building trust. Beforehand the public was skeptical about “bunches of lawyers” from EPA and GE talking to each other.
- EPA committed to cleaning up an elementary school and getting started on the river. This constituted an interim agreement. GE followed through.
- The interim agreement was presented to the public for comments. This has a lot of community support so far, but we won’t know if it’s a real success for a while since it’s still playing itself out.

### **TIM CONWAY—EPA’S PERSPECTIVE**

- After negotiations concluded, public involvement didn’t stop, in fact, a new phase of involvement started.
- An official public comment period was opened for the Consent Decree. Many groups filed public comments on the Decree, and four groups filed suit. EPA sat down with them and learned a lot. EPA ended up suggesting addressing a few more things as a result of these meetings. This was done outside the consent decree. Issues included more opportunities for public involvement, property value decline, and investigation of treatment technologies. The job is really just starting!

### **QUESTIONS AND RESPONSES<sup>1</sup>**

*Question:* What was GE’s role in the CCC? Were they at the table? Did they go with Bryan on his rounds? What was GE’s level of commitment?

*Answer:* GE was always there from day one, they had a team present consisting of a team leader and experts. GE was not at the informal citizen meetings, but was present at some of the more formal meetings between EPA and citizens.

*Answer (Sobel):* In preparing for this panel, I spoke with a GE employee who said he feels that the CCC is a useful forum where local citizens can express their concerns, some of which are resolved. He authorized me to relate those comments in this session.

*Question:* Did you invite someone from GE to be with us this afternoon?

*Answer:* This presentation wasn’t about GE, DOJ, and the others at the mediation table. Rather it’s about the process, and so GE and the others at the table were not specially invited. GE was made aware of this presentation and its presenters.

*Question:* Was a human health risk assessment ever conducted?

*Answer:* Yes, there was a risk evaluation. It was pretty clear based on the results that the clean up needed to happen. On the residential properties, GE agreed to go to a

<sup>1</sup>Questioners were not asked to identify themselves; all panelists participated in answering the questions.

default level of PCBs. We do have justification for all the cleanup levels in the agreement. The Consent Decree outlines a process to come up with more risk assessment to further inform the ongoing process.

*Comment (Benno):* Just spending time together for those years built a lot of trust—working directly with EPA and GE. Pittsfield citizens organized symposiums on PCBs but Pittsfield government didn't attend, they didn't care about health risks, only wanted economic benefits.

*Question:* Was there a litigation going on this whole time? How did the citizens feel and why were they excluded if they could have a representative from the CCC at the table.

*Answer:* While the governments each had claims regarding the contamination prior to the mediation, the government litigation commenced at the same time as the filing of the Consent Decree. Then, four groups filed to intervene in the suit to oppose the Decree because they thought their voices weren't being heard. The court heard all of their arguments, in addition to GE's and EPA's perspectives, and went with the Consent Decree. It should be noted that the four groups filing had different opinions and desires.

*Question:* With the benefit of hindsight, would you change anything about the CCC to make it more effective?

*Answer:* We did not see any outward major problems, but as part of the regular facilitation process, the facilitator checks with the CCC from time to time to make sure the original CCC goals are still appropriate, still being met, etc., and makes the adjustments the CCC agrees upon. We would have started the CCC sooner.

*Answer (Benno):* Some members were frustrated because they had been meeting with GE for years and then they got pushed back into a crowd of people in the CCC facilitation when they really wanted to be a direct part of the mediation. Some felt "back seated" in the mediation, with the CCC as messengers who would deliver limited information and choices to the public, but with no real power. It was clear that their right to have a standing in the mediation was violated. They were on an "information given as needed" basis. To this day, lots of CCC members and public citizens feel they weren't involved directly enough in the mediation.

*Question:* About the confidentiality agreement with reference to documents, in Canada they would have a splinter between groups going to the Freedom of Information Act early. Why didn't that happen here?

*Answer:* Maybe they felt involved enough not to have do that.

*Question:* What was the timeline of the listening session? Clarify what information was shared with public during the session.

*Answer:* It occurred before the agreement in principle, in the middle of heavy negotiations. We could have had that forum even within the confidentiality session, but it certainly wasn't contemplated when the confidentiality agreement was written.

*Benno's last message:* Generally, there is a huge gap between the agencies and the individuals. The regulations are there, but it's what you do with them and if they get

enforced that matters. Because this became an issue EPA decided to actually deal with, it was wonderful for the community, especially within the context of neighbors on the Hudson. The decision of the EPA administrator to actually do something was great!

## **OUTCOME**

Trust is earned by action. The public can be trusted to participate in a confidential process during negotiations. If this is done, it leads to wider public acceptance of the outcome.

# **POLARIZATION AND CONFLICT OVER WATER IN THE KLAMATH RIVER BASIN**

**WEDNESDAY, MAY 15, 2002—3:30–5:00 P.M.**

## **MODERATOR**

Peter Woodrow, CDR Associates

## **PANELISTS**

David Ceppos, Jones & Stokes

J. Michael Harty, CDR Associates

Stephen E. Snyder, Esq.

Zell Steever, U.S. Bureau of Reclamation

## **PANEL ABSTRACT**

In the spring of 2001, the U.S. Department of the Interior and the Bureau of Reclamation announced that there would be no water releases for that year from the federal Klamath Project, an irrigation project in Oregon and California, because of requirements to provide water for endangered species and federal tribal trust obligations. The panel will explore three separate yet linked efforts to make progress on the complex issues in the Klamath Basin, including a state-led water adjudication/mediation process, a federally authorized working group, and court-supported mediation under the auspices of a federal judge and a team of mediators. The panel will discuss issues of mediability, political constraints and drivers, and the interactions among local, state, and federal actors, among other issues and attempt to draw preliminary lessons from this ongoing dispute and offer insights regarding the prospects for coordination.

# THE NATIONAL POLICY DIALOGUE ON STATE CONSERVATION AGREEMENTS: PROACTIVE APPROACHES TO CONSERVATION OF SPECIES AND ECOLOGICAL SYSTEMS

WEDNESDAY, MAY 15, 2002—3:30–5:00 P.M.

## MODERATORS

Mette Brogden and Liz Taylor, Udall Center for Studies in Public Policy at The University of Arizona

## PANELISTS

Nancy Gloman, U.S. Fish and Wildlife Service

Nancy Green, USDA Forest Service

Chris Smith, Montana Department of Fish, Wildlife and Parks

Gary Taylor, International Association of Fish and Wildlife Agencies

## PANEL ABSTRACT

Panelists will introduce the new State Conservation Agreement tool recently adopted by the International Association of Fish and Wildlife Agencies. The tool resulted from collaborative discussions in eight workshops held across the country in which federal and state agencies, scientists, conservation groups, private industry, tribes, and local governments participated. Presenters will outline the challenges they experienced in meeting their statutory responsibilities for conserving species, why there was a need to develop a recognized, proactive approach that could complement the Endangered Species Act, and:

- Encourage dedication of resources earlier in the detection of species decline;
- Facilitate development of cross-jurisdictional agreements;
- Enable work on ecological systems and suites of species; and
- Foster partnerships with private interests and NGOs, using voluntary, incentive-based approaches.

Participants will talk about what made the national policy dialogue successful and how its political and ground-level implementation is progressing, and ask conference attendees to think with them about additional opportunities for operationalizing the tool on the ground.

## **PANEL SUMMARY**

## **INDIVIDUAL PRESENTATIONS**

### **State Conservation Agreements: A New Tool for Collaboration**

By Chris Smith

## **PANEL SUMMARY**

### **MODERATOR INTRODUCTION**

This panel of presenters includes key organizers of a national policy dialogue to develop a new conservation tool, called State Conservation Agreements (SCAs). The dialogue was sponsored by the International Association of Fish and Wildlife Agencies (IAFWA), took place from November 2000 through July 2001, and involved over 225 stakeholders representing state and federal agencies, conservation NGOs, industry, private landowners, tribes, and scientists. The resulting proposal for a policy tool was adopted by IAFWA in December 2001.

We want today to explain the need for such a dialogue, why federal agencies were interested in participating in the dialogue, the process challenges to developing effective collaboration and building consensus to support adoption of this new policy tool, and a description of why this represents an important emerging approach to a more proactive conservation of species and ecological systems that can complement what has been achieved under the Endangered Species Act (ESA).

### **GARY TAYLOR—INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES**

I appreciate the opportunity to be with you today to share some perspectives on the genesis of this proactive fish and wildlife conservation tool, a journey which the state fish and wildlife agencies actually started on almost a decade ago. I would like to provide you the context, including the political landscape, in which this originated and evolved.

First, you should know that the association represents the 50 state fish and wildlife agencies, that we've been around since 1902, and that our membership also includes most of the federal natural resource and agriculture agencies, and the federal and provincial fish and wildlife agencies of Canada and Mexico. As you are likely aware, the states have broad statutory, and in some cases, constitutional authority for the conservation of fish and resident wildlife within their borders. Where Congress has given the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) certain conservation responsibilities, for example for migratory birds, threatened and endangered species, and anadromous fish, the states retain concurrent jurisdiction with the federal agencies for those species. And while Congress has also affirmed the State fish and wildlife agencies' jurisdiction over fish and wildlife on most federal public lands, cooperation is compelled by the fact that the federal agencies manage the habitat. The bottom line is simply that the states need to continue to work closely with our federal colleagues to advance fish and wildlife conservation objectives.

The state fish and wildlife agencies have for the last 10 years built the case for and endeavored to secure consistent and assured funding for the so-called "nongame species" so that we could address the life needs and habitat requirements of declining

species in response to early warning signs of decline and thus preclude the need to list species as threatened or endangered. I'm sure most of you are aware of our funding initiative which became the basis, in part, for the Conservation and Reinvestment Act (CARA) which has been considered in the last three Congresses.

Also about a decade ago, the state fish and wildlife agencies engaged in a comprehensive effort—principally with the Western Governors Association and the Department of the Interior—to identify a set of legislative recommendations for improving the ESA. The last time the Act was reauthorized was 1988, and the States and Department of the Interior felt we knew enough about what worked and what didn't to advance some centrist, practical, credible, and politically doable recommendations that would improve species conservation, enhance landowner cooperation, and solve problems. After extensive deliberations, many of these recommendations became the basis for policies adopted by the Secretaries of Interior and Commerce in 1995, and subsequently many were incorporated into S1180, a bipartisan bill introduced by the leadership of the Senate Environment and Public Works Committee in 1997. A statutory construct for a version of an SCA was included in this bill. Although S1180 was reported out of the Senate Environment and Public Works Committee in 1998, the bill was never brought up on the Senate floor because the reformists felt it didn't go far enough to protect property rights. No comprehensive ESA reauthorization bill since has been given serious Congressional attention, and none likely will be for some time.

After failing to secure legislative reauthorization with our recommended improvements, the state fish and wildlife agencies decided that they couldn't wait for Congress to provide a "better way of doing business." The resource loses, landowners lose, industry loses, and society loses when we rely solely on the emergency room application of the ESA to conserve fish and wildlife. While the Act does a credible job of what it was intended to do, it was never intended to be the nation's principal means of conserving fish and wildlife. There has to be a better way, the state fish and wildlife agencies know what that is, and they set out to realize that two years ago. Under the guidance of the association's Threatened and Endangered Species Committee, the directors tasked the association to flesh out this idea of bringing parties to the table to address the needs of declining species earlier, so that the species doesn't end up in the ESA's emergency room. Under the leadership of a state-federal interagency steering committee, the SCA national dialogue was begun.

To help crystallize the need for preventative conservation through SCAs, let me share with you a few observations from my almost 30-year career in this field of endeavor both with a state fish and wildlife agency and representing the collective state fish and wildlife agencies interests.

Society places a high value on fish and wildlife. Polls repeatedly substantiate this, as do studies of how much Americans spend on fishing, hunting, and wildlife-associated recreation. Americans see wildlife as reflective of the vastness and great bounty of our country. They also are increasingly aware that the habitat that sustains fish and wildlife is the same habitat that contributes to our own safe and healthy environment and quality

of life. Our citizens, therefore, desire and support the presence of fish and wildlife as an integral part of their natural heritage. A majority of citizens also consistently support the protections of the ESA to prevent species from becoming extinct and would oppose weakening this protection.

Our nation is second to no other in responding to crisis, as has been recently demonstrated. What we sometimes do less than best is look far enough away from the immediate to be proactive with our efforts, particularly in the arena of natural resources conservation. By the time society rallies around a species in decline, often the only remedy is the ESA with its largely regulatory imposition of constraints on public and private actions. But there is a better way to approach species conservation.

Fish and wildlife are amazingly resilient, given half a chance. Take our national symbol, the bald eagle. Decimated by the indiscriminate use of organochlorine pesticides and pushed out of its preferred shoreline and riparian nesting habitat by people competing for those same spaces, by the early 1970s the bald eagle was well on its way to extirpation in the lower 48 states. However, with the ban on the use of certain organochlorine pesticides and prudent and informed land-use decisions that reconciled landowners' interest and needed conservation measures, the bald eagle will soon be delisted. However, we almost waited until too late.

*Most* private landowners are good stewards of their land and want to do the right thing. Knowledge about what fish and wildlife needs, technical assistance to provide that, and financial incentives are all welcome tools. Landowners also would like some predictability about the fate and future of their use of their land. Assurances about their use of their land are much easier to arrive at early on when a species first exhibits signs of decline and while there is flexibility and latitude in integrating the conservation programs for fish and wildlife into landowners' management plans. While some assurances can be provided to landowners even if a species is listed, listing comes at a tremendous cost to government, society, and individuals.

Federal public lands in this nation contribute to fish and wildlife conservation, but many of them must also satisfy other national objectives. Our public land managers face tremendous challenges in integrating all of their legal mandates with societies' competing interests in use of those public lands. These managers, like private landowners, would benefit from predictability about what is needed from them with respect to their unit's contribution to fish and wildlife conservation. While they have an affirmative responsibility to conserve a species once it is listed under the ESA, listing generally significantly reduces their ability to satisfy their other mandates.

The courts are the appropriate venue to resolve uncertainties and ambiguities in the interpretation and application of the ESA. However, the federal courts are de facto administering a large part of the ESA including directing the expenditure of program funds by USFWS and NMFS. Increasingly, professionally trained fish and wildlife managers are constrained in applying their best science-informed management to fish and wildlife conservation programs by court decisions, orders, and settlements. While there

certainly is a role for the courts in the application of the ESA, fish and wildlife management decisions need to be made by professionally trained fish and wildlife managers, informed by the public's interests.

We propose a better way of doing business—one that is proactive in addressing species needs, participant inclusive, science-informed with respect to needs and deliberations, flexible in its approach, comprehensive in its scale, and initiated by the state fish and wildlife agencies, which are frontline managers of fish and wildlife within their borders. This is not a new idea—*but* we have not been able to apply it all that successfully because of lack of resources. We propose to continue to secure and dedicate the resources to making this work because the alternative is simply unacceptable—and that is adding more species to the endangered species list, which quite frankly, is an admission of failure.

We want to demonstrate that these state-led conservation agreements can work—by reacting early enough to warning signs of decline; involving all parties early on; using flexibility in our decision making that is afforded to us by reacting long before the need to list species as threatened or endangered; by arriving at shared common ground in our decision making that is informed by the best available knowledge; by providing incentives that exist already or creating new ones for interested landowners; and by creating a track record of success that we can and will defend against challenges. We will seek mutually beneficial solutions that respect the core values of all the parties involved and are arrived at through collaborative, constructive dialogue.

Our goals with these conservation agreements are biological, social, and practical. Preventative conservation just makes good economic sense, good biological sense, and good common sense. It simply costs much less to preclude the need to list species by addressing their needs early on than it does to recover species once they are listed. The socioeconomic implications and costs of listing far exceed preventative conservation programs.

Our goal is to look far enough ahead, and be comprehensive enough in scale, that we sustain species and habitats without the need to list. We've had modest success with agreements of this type for some species tending toward listing but many other of these type of agreements have been overturned in the courts because they essentially have no record on which to judge the expected success of the effort. We want to react early and comprehensively enough to keep species out of the pipeline to listing.

There is great interest in this way of doing business. So many people, from all elected levels of government, to private landowners, to public land managers, to industry, to fish and wildlife managers have reflected on "if there was only another way (than listing)." The SCA provides another way. The state fish and wildlife agencies are committed to making this way of doing business work. We simply cannot afford to wait any longer.

## **NANCY GLOMAN—U.S. FISH AND WILDLIFE SERVICE**

Three of the reasons why the U. S. Fish and Wildlife Service (USFWS) participated in the SCA dialogue were:

### **1. Litigation and a time-consuming process have been diverting a lot of resources from proactive conservation.**

The service has been besieged by litigation over failure to meet deadlines for listing, critical habitat, and by responding to petitions. Once we make decisions, litigants sue over our decisions such as designation of critical habitat like the cactus ferruginous pygmy owl in Arizona and section 7 consultations. As of May 13, there were 45 active lawsuits covering 46 species. We are also complying with court orders for 24 lawsuits and 330 species. We have had 19 Notices of Intent to sue in the last year. All this costs money—money that could be spent on conservation. For FY 02, a majority of our \$9 million in listing is going for litigation-related activities. We need to redirect our resources.

The set of lawsuits that really pushed us into the SCA discussion were over a decision by the National Marine Fisheries Service (NMFS) and the USFWS not to list a species because of conservation agreements for such species as the Barton Springs salamander and salmon in the Northwest. The ESA says that in making listing decisions the services should use the best scientific data available after taking into account efforts being made by state and foreign nations to protect the species. Although the judges generally supported the concept of conservation agreements, they overturned our decisions due to the conservation agreements' reliance on measures that had not yet been implemented and voluntary measures. The judges were looking for a track record—a record of successful conservation. We realized that people were beginning conservation too late—after the species declined to the point where it was close to needing listing. There isn't enough time in these cases to build a track record and see results.

Since these decisions, the services have proposed a policy for the evaluation of conservation efforts in making listing decisions, in which we would assess the likelihood that the efforts would be both effective and implemented.

### **2. Reliance on the ESA for species conservation when the Act is designed as an emergency room for species, rather than a law that enables conservation of all species.**

The ESA is being used to address land-use conflicts. It is actually an emergency room for species—it is crisis-oriented, a last ditch effort for species in need of resuscitation, and this kind of effort requires more money and yet is less likely to be effective than if we began working earlier and proactively for conservation.

# Species and Conservation Tool Continuum

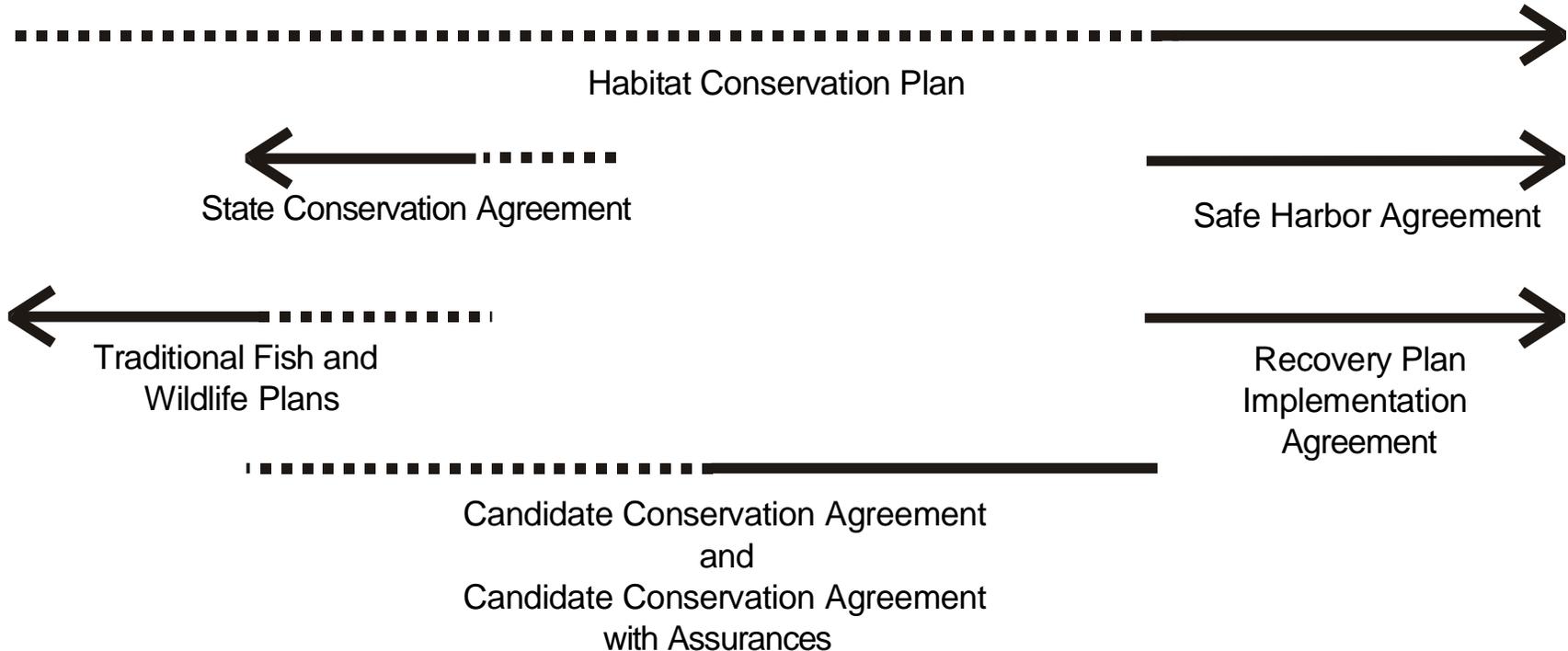
(44,359 Total Species Ranked)

Species'  
Status

Abundant	(10,224) At Risk, Of Concern, Declining	(5,000) Imperiled	(258) Candidate	(59) Proposed	(273) Threatened	(971) Endangered
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Conservation  
Tools



(Sources: ABI/TNC/NHP and FWS)  
January 23, 2001

Of the 1258 listed species, 983 are endangered and 275 are threatened. Seventy-eight percent are in danger of becoming extinct (the definition of endangered). We think that we wait too long to protect species. There are 21,000 species that have the potential to be listed—that may be rushed to the emergency room if we wait too long. We need to address species conservation early before they need the emergency room services of the ESA.

A related issue is what happens once a species is listed: We have to designate critical habitat, prepare a recovery plan, do section 7 consultation on federal actions and HCPs on nonfederal land. It throws conservation into a legalistic and process-oriented system. There are more conflicts, and conservation becomes prescriptive. It involves a lot of process and a lot of money spent on process, rather than on-the-ground conservation efforts.

### **3. We need to involve the private sector in species conservation.**

Regulatory agencies realize that we cannot conserve species on federal land alone. Eighty percent of listed species have 50% of their habitat on private lands. To conserve species we need to engage private landowners. However, private landowners are concerned that if an endangered species is found on their land, they will not be able to manage or sell their land. They are fearful of the regulatory hammer and that they will be “punished” for doing a good deed—conservation. This drives them to what is called the “shoot, shovel and shut up” syndrome. Instead, we should be working with landowners and rewarding them for their conservation efforts. We need to provide a mechanism for them to get more involved, and involved at the right stage.

SCAs represent a new way of business—a prescription for what ails our conservation system at present.

### **NANCY GREEN—USDA FOREST SERVICE**

I was the lead representative from the Forest Service to the SCA effort. Peggy Olwell was the lead for the Bureau of Land Management (BLM). I am speaking on behalf of both of us on what prompted these two agencies to engage in the SCA effort. And I will also talk about how this fits into the agencies’ work.

The Forest Service and the BLM are housed in different departments, and they have very different origins. But they have some major commonalities: both are multiple use agencies and face the inherent tension and increasing conflicts over realizing their multiple-use mandate. The Forest Service has historically managed for timber and livestock grazing. BLM has allowed livestock production and mining. The public is shifting in what they want to see as multiple use out of these lands. There’s increasing tension between recreation, naturalness, and still water, and the historic uses of these lands. The challenge is how to manage. This is public land, and the public has a say and managers are accountable to the public. Although both agencies put a premium of engaging people at the local/state level, anyone across the country can register opinion.

Between the two, these agencies manage 20% of the nation's surface area. The Forest Service manages 191 million acres; BLM manages 264 million acres. BLM also manages 700 million subsurface acres. This land base encompasses thousands of miles of streams, tributaries, and lakes. Most of the lands are located in the West.

Lands vary in ecosystem and status (condition). They provide habitat for thousands of species of plants and animals, varying in status. BLM has 1500 sensitive species, 59 proposed for listing, 306 T & E species. The Forest Service lands have over 400 T & E species.

The key laws that determine management of the resources on federal lands are:

- Forest Service: National Forest Management Act
- BLM: Federal Land Policy and Management Act
- For both agencies: Multiple Use Sustained Yield Act; the Endangered Species Act; and the Clean Water Act.

There are two levels of planning done by the agencies.

Broad scale plans are different for each agency. Forest Plans are based on administrative boundaries. A key approach is to develop the equivalent of zoning ordinances regarding different multiple uses. This is done through standards and guidelines for management, with monitoring and evaluation processes attached. Plans can be updated through amendment as needed.

The Forest Service also has a legal requirement to revise plans every 10–15 years. Most have not been met, resulting in lawsuits to get the Forest Service in compliance. Forty to fifty plans are in the process of revision.

With site-specific project planning, as more species have to be listed (ESA),

1. more biologists shift to section 7 consultations.
2. resources have to be shifted.
3. agencies are put into more a more reactive mode than being proactive with conservation.

Planning processes operate under NEPA, which required public involvement, the development of alternatives, and identification of their respective potential outcomes and effects.

The Forest Service also has a “diversity” requirement that says it must provide for the diversity of plant and animal communities. BLM has no similar legal requirement. Tied to the diversity requirement is a “viability” requirement. It is a unique, possibly stronger legal requirement than the ESA and is focused on habitat. Adopted in 1982, it requires that habitat must be well distributed so that reproductive individuals can interact with others in the planning area.

A better idea? Put more effort into planning and management that results in avoiding the need to list additional T & E species. Being more proactive rather than reactive is crucial for species conservation to be effective.

We need to collaborate across jurisdictions, need to be thinking about more appropriate ecological scales, share our time, money, and talent. We need to maintain more options for multiple uses of Forest Service and BLM lands. That will make it more likely that efforts will “add up” to the desired conservation outcome.

Collaboration is key, and we think that SCAs will provide the process that will lead to this goal.

**METTE BROGDEN—PROGRAM MANAGER, ENVIRONMENTAL AND PUBLIC POLICY  
CONFLICT RESOLUTION PROGRAM, UDALL CENTER FOR STUDIES IN PUBLIC POLICY,  
THE UNIVERSITY OF ARIZONA**

My job on the panel is to talk about the SCA dialogue as an “ECR case” and talk about how the facilitation worked to achieve a successful collaboration and building of consensus.

The SCA policy dialogue was a process that Liz Taylor and I were invited into as facilitators after a lot of discussions had occurred at the International Association of Fish and Wildlife Agencies (IAFWA), particularly within the committee on T & E species. That committee talked about the possibility of such a process for about two and a half years before a planning subcommittee contacted us to facilitate two national and six regional meetings.

#### **NATIONAL MEETINGS: PROCESS AND RESULTS**

At the first national meeting in Shepherdstown, West Virginia, the SCA planning committee had developed the agenda for the national meetings and arranged for the speakers. We listened to a review of the proposed PECE policy (see Nancy Gloman’s presentation) and existing species conservation tools developed by USFWS and NMFS, such as candidate conservation agreements (CCAs), candidate conservation agreements with assurances (CCAAs), Safe Harbor Agreements, and Habitat Conservation Plans. We also heard three case studies of conservation agreements completed in the late 1990s that were developed for species headed for listing. The cases were provided in order to set up a discussion about what had been learned so far by those trying to do these kinds of efforts as well as how proactive approaches might be improved in the future.

An attorney from the Department of the Interior’s Solicitor’s Office reviewed case law to date on conservation agreements. Litigation has occurred in some instances when the USFWS or NMFS has declined to list a species because of existing conservation efforts by states or other entities. The ESA contains a provision allowing the services to take these efforts into consideration when making listing decisions. The speaker noted that in general, judges had good opinions of agreements as long as efforts were underway and there was good evidence that implementation was assured. Where decisions by the service were overturned, it was because the conservation agreement and effort was made too late—that is, when the species was at the point of needing to be listed. In

such cases, there was neither time to institute corrective measures nor obtain any results.

After this presentation, we were asked to facilitate a discussion of barriers to success, lessons learned, how to construct a tool that everyone would agree to, what would constitute success for the tool, and what incentives would people have to participate in an SCA. These breakout sessions were to be conducted for the last hour and a half of the day and into the next morning, but by the end of the first day Liz and I had each reached the conclusion that participants were not going to get where they needed to go with the plan as it was.

So we did a quick reconnoiter that evening. Many participants had been speaking to us privately on breaks and at meals about issues that concerned them. We ended up doing the kind of conflict assessment that mediators undertake, looking at three kinds of issues that are often present in a conflict: What we realized was:

1. Substantively, the group was concerned about the enormous number of declining species coming down the pipe, when the services were already grid locked with listings and lawsuits and much of their funding was devoted to these tasks rather than conservation projects. In addition, once listed, management flexibility becomes very circumscribed and fairly top-down, which frustrates private stakeholders as well as state agencies.
2. Procedurally, states were frustrated with capturing enough funding to work on species they could see were declining but not yet to the point of needing to be listed. And once species were into the listing chute, state agencies ended up focusing on enforcement and implementation of on-the-ground measures, but were not involved in the decision making about what to do about the decline because the arena for decisions largely moves to the federal level.
3. Relationally, 30 people attended each national meeting from state and federal agencies. They were very experienced with policy development and implementation and it was clear that there were turf issues between agencies that surfaced once species were in the listing chute. They were having some difficulty partnering effectively so that species could be conserved.

From this quick conflict assessment, we realized that the facilitation Issues were rather different than what we understood from the planning committee, and we needed to

- surface relationship issues so that state-federal partnerships could work more effectively, and
- get a common definition of what people needed state conservation agreements to be and to accomplish from each agency perspective.

It had been clear from the first day's work that participants were using different definitions of SCAs. These were:

- A proactive tool that would be used prior to listing in order to take a more proactive approach, and

- An umbrella tool in which states would develop conservation agreements using existing tools (CCA, CCAA, HCP, Safe Harbor) and then use certificates of inclusion to add landowners. The umbrella approach would streamline the process for getting agreements in place and underway.

On Day 2 Liz and I went into the meeting and told the participants that we had listened very carefully to what everyone had told us and to their discussions during sessions yesterday, and here's what we thought:

- Everyone present really wants to see species persist into the future,
- In fact, everyone is passionate about it, and
- Everyone wants to bring their talents, education, experience, and creativity fully to bear on solving issues around species decline.

We suggested that they would not be able to move forward on the issues if they framed the problem as a states' rights issue. Instead, they needed to see how to improve their ability to partner between agencies so that together, their efforts would be effective.

So, we asked them to tell each other what they needed from each other and what they needed from an SCA tool.

- Representatives of state agencies wanted an arena for leadership that was commensurate with their skills and respected their statutory authorities, and funding to support proactive efforts.
- Representatives of regulatory agencies needed accountability as to what would be done for species, so that they could be assured that deciding not to list on the basis of a conservation agreement would be a good, defensible decision. They also wanted sharing of information and assistance with bringing in partners that had been reluctant to deal with a regulatory agency.
- Federal land management agency representatives wanted to retain management flexibility so they could meet their multiple use mandates. And they reminded everyone that federal lands cannot be the last refugia for species—they don't have the acreage or connectivity that some species require. So they needed mechanisms for partnerships that enabled them to work more regionally with their lands being seen in a larger context of management.

Since we didn't have time to elaborate both definitions of a potential SCA tool by the end of the meeting, we asked the group to focus on elaborating the SCA tool as a proactive tool because we assessed that the proactive tool would address more of the issues that people had raised in their discussions and in their interviews with us. They could elaborate the umbrella concept at the subsequent national meeting. (As it turned out, the umbrella concept was never taken up again because participants ended up satisfied with the focus on a proactive tool.)

Using a single-text format, participants drafted a pr-active tool to take into the regional meetings.

## REGIONAL MEETINGS: PROCESS AND RESULTS

The regional workshops involved over 200 people who, as a group, were experienced with policy, on-the-ground implementation, and conservation activism. The facilitation problem for the regional workshops was:

How you get buy-in and foster ownership of an existing proposal from stakeholders on the ground?

So we designed the meeting around that facilitation problem.

Meeting design: Regional meeting participants did not know each other and needed introductions to gain voice legitimacy. We collected stories (round robin) from each person on best/worst experiences with conservation, or, they could answer the question, “What will happen in 20 years if nothing changes with species conservation?” In addition to helping each participant to achieve voice legitimacy, the introductions evoked the link between personal experiences and the conservation initiative that the SCA dialogue was trying to develop so as to “prime the pump” for subsequent conversations during the meeting.

From there, speakers gave streamlined reviews of: the PECE policy, the continuum that was constructed following the national meetings to assist people to understand the complicated conservation picture, and one case study.

Then we asked participants to list the necessary elements of a proactive approach to species conservation. We saw the importance of this step as that it elicited their ideas *before* they received the tool drafted at the national meeting. We incorporated their ideas in red into flip charts that listed the elements of the draft tool from the national meeting while they were at lunch. Where their ideas paralleled what already existed, we could point that out, and where they were adding or elaborating based on their regional experiences, these became proposed additions to the text. After lunch, we then went through the text as modified with their ideas, and clarified and refined the entire set of ideas. They were told that their work would be collated with the results from other regional meetings into a final proposal that would go back to IAFWA for adoption and implementation. The SCA steering committee would draft the final tool. The process as designed created buy-in because they could see how their ideas matched and extended the work of the national meetings as well as how their work would be incorporated with other regions. Each regional meeting started with the draft from the national meetings; this enabled us to see where regions overlapped and what flexibility the tool would need to maintain in order to accommodate regional differences.

Next we asked them to test their abstract ideas using three local scenarios: two declining species and one declining ecological community. This step was designed to accomplish two things:

- A ground truthing of the abstract ideas contained in the draft tool. For example, during the single-text development of the SCA proposal, industry representatives had told us that there would need to be a point where they were “done” with their conservation activities. As the groups worked on local scenarios, however, they discovered in many cases that they could not see an exit strategy. This problem was reported back to the SCA project committee, which worked through how this would need to be handled so that conservation would be assured *and* stakeholders would be able to have a sense of successful achievement but move on to other projects.
- We hoped that it would encourage participants to imagine themselves using the tool in their local areas, and thus encourage actual implementation of the dialogue results. In fact, one state has reported to me that three projects are now on the ground a year after its regional workshop, despite the fact that no additional funding for these projects has been secured.

There is more to this story, and indeed it is still being written as efforts continue to achieve funding for states to be able to develop and implement proactive conservation projects for nonlisted species. I think that the reason these workshops were well received and generated significant enthusiasm for proactive work is that there was such a strong SCA “executive committee” of state and federal agency representatives who could shepherd the process and work on creating buy-in up and down their agency chains during the process. And, the committee gave us permission to really help them. It’s a facilitator-sponsor relationship that I would strongly recommend.

### **CHRIS SMITH—MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS**

The SCA is

1. a proactive tool, based on partnerships.
2. a prescription for species and habitat management.
3. an inclusive process for mutual benefit of species, ecological, and human communities.

I’m going to talk about the process to product to conservation outcome.

### **WHERE DO SCAs FALL IN THE SPECTRUM OF SPECIES ABUNDANCE/ENDANGERMENT?**

Traditional state Wildlife Conservation Plans for game species have a solid political backing and funding. On the other end, the ESA provides tools for responding to species emergencies. The gap was in those species not covered by the ESA or by game species management—those species at risk, in peril, but not yet to the point of needing to be listed. The SCA tool is designed to fill that gap and prevent the need to list.

### **Key advantages to using SCAs:**

- They are voluntary and incentive-based rather than regulatory
- They derive their power from participants’ willingness to do the right thing.
- They have the flexibility to deal with a broad range of issues.

**To be successful an SCA process needs eight things:**

- Effective leadership
- Engagement of essential partners
- Agreement on process and structure
- Foundation of information and funding
- Collaboration and commitment
- Effective linkage to other efforts
- Contingency planning
- Time!

**To be complete an SCA product must include:**

- Statement of the problem and needs
- Realistic goals and quantifiable objectives
- A prescription for adaptive management
- Clearly defined expectations and commitment
- A defined role for the public
- Methods to resolve conflicts and enforce commitments
- A way to join or exit the agreement
- Defined linkage of other plans of decisions
- Realistic description of assurances
- Criteria for gauging success and failure

To produce an outcome an SCA must be implemented and must be effective. These are the two evaluative criteria: ability to enforce in critical to implementation and adaptive management critical to effectiveness.

**TWO CASE STUDIES**

**Westslope cutthroat trout in Montana**

We did a Memorandum of Understanding and Conservation Agreement. It was a working group with federal and state agencies, conservation groups, land-use groups, landowners. A year-and-a-half process with four objectives.

Genetics were monitored, populations across the state were identified, and technical assistance was offered to landowners. They worked with forest service for specific outcomes in different regions.

**Sage Grouse**

This species has a huge range across entire western states. The challenge is how to develop a process that will involve all parties across affected states. Efforts are underway at both state level and range wide. The SCA may provide a way to accomplish this work.

## **CONCLUSIONS**

- No single organization or approach can ensure our natural resources will continue to provide the quality of life that we enjoy today.
- Success in conserving and recovering species depends on partnerships and everyone is a potential partner.
- Both regulatory and nonregulatory tools are important.

More details are available in the SCA Summary Digest.

Notes: Copies of a summary report of the national policy dialogue sponsored by the International Association of Fish and Wildlife Agencies, prepared by Mette Brogden, was made available to participants.

# STATE CONSERVATION AGREEMENTS

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## A New Tool for Collaboration

Chris Smith, Chief of Staff  
Montana Fish, Wildlife & Parks  
Helena, MT



## What is SCA?

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- A proactive tool, based on partnerships.
- A prescription for species and habitat management.
- An inclusive process for mutual benefit.

# SCAs are:

A Process

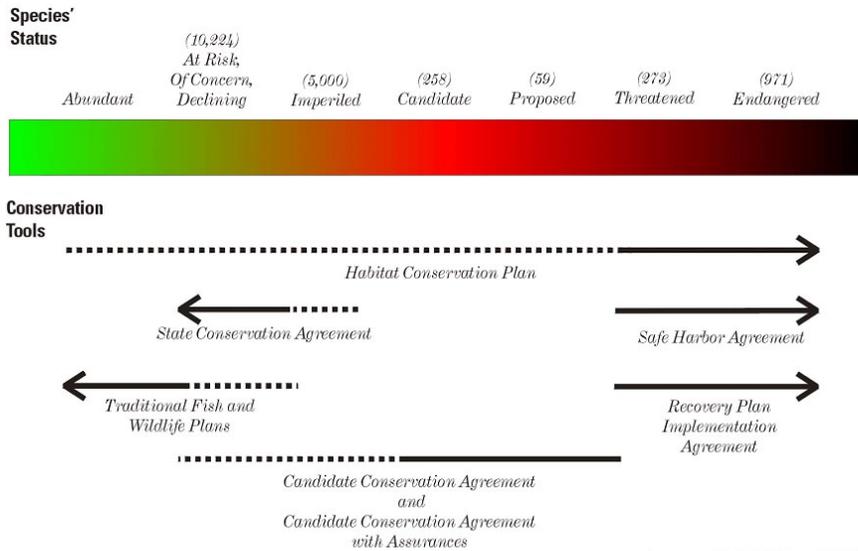
A Product

An Outcome:

Conservation

## Species and Conservation Tool Continuum

(44,359 Total Species Ranked)



(Sources: ABI/TNC/NHP and FWS)  
January 23, 2001

## What Sets SCAs Apart from ESA Tools?

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- Voluntary and incentive-based vs. regulatory.
- Derive their power from participants willingness to do the “right thing.”
- Flexibility to deal with a broad range of issues.

## Why Participate in SCAs?

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Stake holders with no inherent interest in conservation.

State & Federal Agencies

Stakeholders with no faith in voluntary efforts.

Threat of ESA is real and consequences are unacceptable.

It's our job.

Insufficient resources or grounds for ESA listing.

## Process:

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To be successful an SCA process needs:

1. Effective leadership.
2. Engagement of essential partners.
3. Agreement on process and structure.
4. Foundation of information and funding.
5. Collaboration and commitment.
6. Effective linkage to other efforts.
7. Contingency planning.
8. Time!

## Product:

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To be complete an SCA product must include:

1. Statement of “the problem” and “needs.”
2. Realistic goals and quantifiable objectives.
3. A prescription for adaptive management.
4. Clearly defined expectation and commitments.
5. Defined role for “the public.”  
and...

## Product (continued):

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6. Methods to resolve conflicts and enforce commitments.
7. A way to join, or exit, the agreement.
8. Defined linkage to other plans or decisions.
9. Realistic description of assurances.
10. Criteria for gauging success/failure.

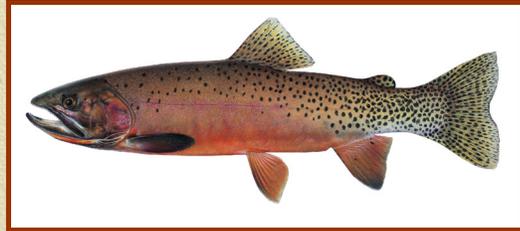
## To Produce an Outcome an SCA:

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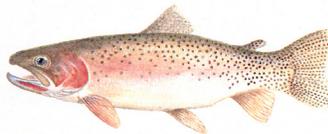
- Must be implemented.
  
- Must be effective.

# SCAs in the Real World

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MEMORANDUM OF  
UNDERSTANDING  
AND  
CONSERVATION AGREEMENT  
FOR  
WESTSLOPE CUTTHROAT TROUT  
*(Oncorhynchus clarki lewisi)*  
IN  
MONTANA



MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS  
1420 East Sixth Avenue  
Helena, Montana 59620



MAY 1999

## **Westslope Cutthroat Trout Conservation Agreement Steering Committee**

-developed the conservation agreement with FWP-

- 
- State Agencies (FWP, DNRC).
  - Federal Agencies (USFWS, BLM, USFS).
  - Conservation Groups (TU, MWF, American Wildlands).
  - Land User Groups [Farm Bureau, Stock Growers, IFIA(timber)], Society of American Foresters.
  - Land Owners - private ranchers.

## **Objectives:**

- 
- Protect all genetically pure populations (no net loss).
  - Manage as pure all populations that are >90% pure until their “fate” is determined through sub-basin planning to be done for each major watershed.
  - Establish or maintain at least 10 populations that comprise at least 50 connected stream miles.

## Objective 4:

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- Provide technical information, administrative assistance, and financial resources to assure compliance

## Genetics:

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- Approximately \$120,000/year (>3,000 samples) currently being spent on cutthroat genetics to determine hybridization.
- U.S. Forest Service also funding genetic analysis - may incorporate their funding through FWP contract - would enable regional prioritization.

## Pure Populations:

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- 530 known pure populations that occupy 2,630 stream miles.
- 819 stream miles occupied by 90-99.9% pure pop.
- 8,452 occupied stream miles for which the genetic purity is unknown.
- Total = 11,901 occupied stream miles.

## Technical Assistance =

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- “To ensure voluntary cooperation of landowners, CCAAS/HCPS will be completed with landowners if requested, as part of the planning process associated with expansion of existing populations.”
- The **USFWS and FWP** will jointly share responsibility for preparation of such agreements.
- One in progress...

**CANDIDATE CONSERVATION AGREEMENT**  
**BETWEEN**  
**SIEBEN LIVESTOCK COMPANY**  
**MONTANA DEPARTMENT OF FISH, WILDLIFE & PARKS**  
**AND**  
**U.S. FISH AND WILDLIFE SERVICE**  
**FOR**  
**WESTSLOPE CUTTHROAT TROUT**  
**IN THE HOUND CREEK DRAINAGE**  
**(Hound Creek Reservoir and upstream tributaries) and**  
**that portion of COTTONWOOD CREEK on the**  
**SIEBEN LIVESTOCK COMPANY RANCH**

**ACTIVITIES COVERED IN AGREEMENT**

GRAZING	UTILITIES
FARMING	AGRICHEMICALS
FISHING	TIMBER
WATER RESOURCES	GRAVEL AND ROCK REMOVAL
STRUCTURES	OIL AND GAS DEVELOPMENT

## Ongoing Efforts...

**Westslope  
Cutthroat Trout**  
*and the*  
**Helena National Forest**



*Montana's State Fish*

## Elkhorn's Plan:

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- 10-year plan to increase WCT from 6 populations occupying 7.6 stream miles to 12 populations occupying 69 miles of stream.
- Cooperative FWP-USFS biologist has been hired to spearhead this effort.

## Big Hole:

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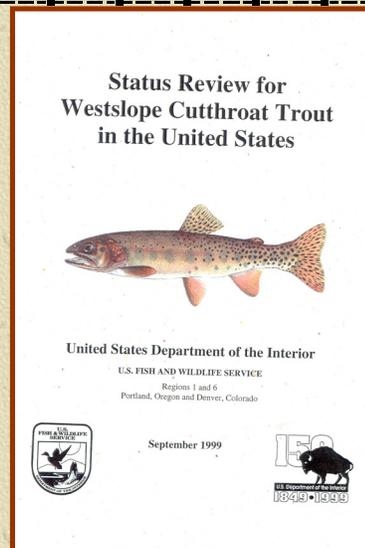
- Intensive survey efforts underway -238 miles of stream examined (out of 1995 total; 300+ had already been done); 10 new populations; 745 genetic samples (612 being processed).
- Survey every 2 miles in smaller drainages (<15' wetted width), every 10 miles in larger ones (>15' wetted width).
- Data will be used to write big hole sub-basin plan and manage populations.
- Cooperative FWP-USFS biologist spearheading effort, BLM providing additional funding.

## Judith River:

- Intensive survey and inventory conducted in 2000.
- Cooperative FWP-USFS biologist being hired - will start in June.
- Focus will be on securing and enhancing existing populations, and developing sub-basin plan.

## Petitioned for Federal Listing in 1997

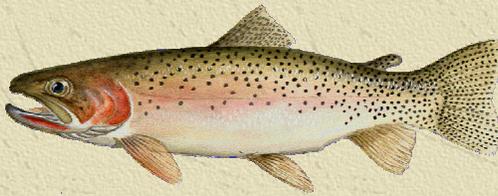
- Found “Not Warranted” in May 2000.



## Westslope Cutthroat Trout

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- Status review recognized “more than **700** ongoing actions directed towards protection and restoration of WCT and their habitats.”



*“THE SERVICE STRONGLY RECOMMENDS THAT STATE GAME AND FISH AGENCIES, FEDERAL LAND MANAGEMENT AGENCIES...AND OTHER CONCERNED ENTITIES CONTINUE TO WORK COOPERATIVELY TO DEVELOP AND IMPLEMENT PROGRAMS TO PROTECT AND RESTORE STOCKS OF WESTSLOPE CUTTHROAT TROUT....”*

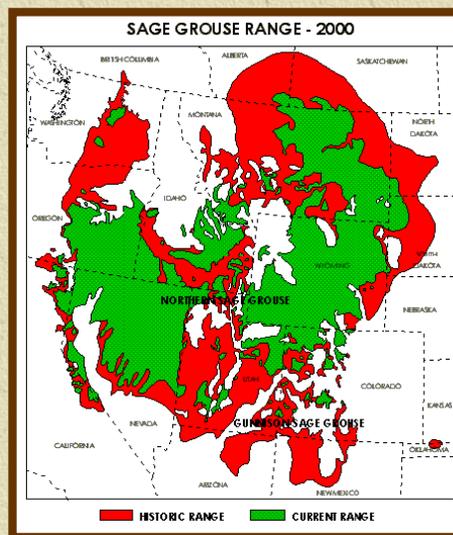
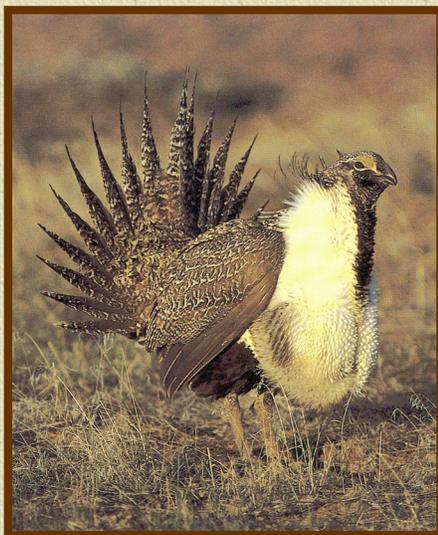
*“THE SERVICE IS ENCOURAGED BY ONGOING LOCAL PROGRAMS, **MOST NOTABLY IN MONTANA,** TO PROTECT AND RESTORE WCT WITHIN ITS HISTORIC RANGE.”*

*USFWS STATUS REVIEW - 1999*

## Summary

- No single organization or approach can ensure that our natural resources will continue to provide the quality of life that we enjoy today.
- Success in conserving and recovering species depends on partnerships, and everyone is a potential partner.
- Both regulatory and nonregulatory tools must be applied to achieve success.
- Habitat conservation is key to success.
- State Conservation Agreements could be an important addition to the Conservation Tool Kit.

## Sage Grouse



## Threats to Sage Grouse/ Sage Dependent Species

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- Cultivation



- Plant Community Conversion



- Sprawl



## Essential Partners for Sage Grouse

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- State/Federal Wildlife Agencies
- State/Federal Agriculture Agencies
- Landowners and producers
- Land developers
- NGOs:
  1. Environmental
  2. Agriculture
  3. Property Rights
- Others...

## State Level Efforts

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- Working group.
- On-the-ground meeting and workshops.
- Technical team writing; inclusive review and comment.
- Linkage to range-wide efforts.



## Range-Wide Efforts

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- 11 state MOU with guidelines.
- Technical team and coordination.
- Outreach to partners.

State  
Conservation  
Agreements

CREATING EFFECTIVE PARTNERSHIPS  
FOR PROACTIVE CONSERVATION



A national policy dialogue sponsored by  
the International Association of Fish and Wildlife Agencies

# **USING GEOGRAPHIC INFORMATION SYSTEMS (GIS) AND DECISION-SUPPORT TOOLS TO FACILITATE PUBLIC PARTICIPATION AND CONFLICT RESOLUTION IN ENVIRONMENTAL DECISION MAKING**

**WEDNESDAY, MAY 15, 2002—3:30–5:00 P.M.**

## **MODERATOR**

Robert Merideth, Udall Center for Studies in Public Policy, The University of Arizona

## **PANELISTS**

Thomas Gunther, U.S. Geological Survey

Barron Orr, Department of Arid Lands, The University of Arizona

Mark Schaefer, NatureServe

## **PANEL ABSTRACT**

Presentations will focus on the design, applicability, and value of using information technologies to aid public understanding of complex environmental issues and to facilitate broader involvement in scenario building and decision making.

# **SESSION IV: ROUNDTABLE DISCUSSIONS**

**THURSDAY, MAY 16, 2002**

**8:00 –10:00 AM**

# **BIRDS, FISH, LANDOWNERS, AND POLITICS: NEGOTIATING HABITAT CONSERVATION PLANS UNDER THE ENDANGERED SPECIES ACT**

**THURSDAY, MAY 16, 2002—8:00 –10:00 AM**

## **MODERATOR**

Alice Shorett, Triangle Associates

## **PARTICIPANTS**

Janet Bair, U.S. Fish and Wildlife Service, Nevada Fish and Wildlife Office

Robert M. Jones, Florida Conflict Resolution Consortium

Leo Lentsch, Jones and Stokes

## **ROUNDTABLE ABSTRACT**

After a brief look at the history of habitat conservation plans since they were first authorized in 1982, panelists will address three tricky issues the parties typically grapple with as negotiations proceed.

- Debates over scientific data often surface early in the process. What information is needed? What studies should be conducted? What assumptions should be built into the models? How do you decide when there is enough information on which to base decisions? How will the parties deal with the remaining uncertainties?
- Debates can escalate and disagreements among the parties, based on differing mandates and interests, can harden, threatening to deadlock the negotiations. How do you keep the parties talking and looking for mutually satisfactory solutions?
- Reaching agreement on an adaptive management structure for the Habitat Conservation Plan implementation agreement can pose real challenges. How will results be monitored and who will interpret the monitoring data? How will new information be fed into the process? Who will make decisions about its relevance and what it means for adaptive management?

## **PANEL SUMMARY**

## **INDIVIDUAL PRESENTATIONS**

### **Negotiating Habitat Conservation Plans in Urban and Rural Environments— The Role of the Fish and Wildlife Service**

By Janet J. Bair

**Habitat Conservation Plan Negotiations: Challenges and Strategies**  
By Robert M. Jones

**Habitat Conservation Plans**  
By Leo Lentsch

# Birds, Fish, Landowners, and Politics



## Negotiating Habitat Conservation Plans under the Endangered Species Act

### Panel

#### **Moderator:**

- Alice Shorett, Triangle Associates, Inc.

#### **Panelists:**

- Leo D. Lentsch, Jones and Stokes Associates, Bellevue, WA
- Bob Jones, Florida Conflict Resolution Consortium
- Janet Bair, US Fish and Wildlife Service, Reno, NV

## Objectives

- **Identify key obstacles that negotiators for federal agencies, public and private-sector entities, and nongovernmental organizations face in negotiating habitat conservation plans**
- **Share strategies to overcome them**
- **Discuss “lessons learned” for the future**

## Today's Agenda

- 1. Habitat Conservation Plans (HCPs)**
  - What are they?
- 2. Literature/Theory**
  - Negotiation obstacles in scientific cases
  - Creating options & breakthroughs
- 3. Three Tough Negotiating Issues**
- 4. Habitat Conservation Plan Negotiating Obstacles (Leo Lentsch)**
- 5. Case Studies in Urban and Rural Settings (Janet Bair)**
- 6. Case Experiences in Florida (Bob Jones)**
- 7. What have we learned about overcoming negotiating obstacles**
  - Discussion

## HCPs: Incidental Take Permits

- Private landowners, corporations, state or local governments, or other nonfederal landowners who wish to conduct activities on their land that might incidentally harm (or “take”) a species listed as endangered or threatened must first obtain an incidental take permit from the USFWS and/or NMFS
- To obtain a permit, the applicant must develop an HCP designed to offset any harmful effects the proposed activity might have on the species

## HCPs: Background

HCP program, under section 10(a)(1)(B) of the Endangered Species Act has grown

- 
- First 10 years of program, 14 HCPs approved (1983 – 1992)
  - Second 10 years of program, 379 HCPs approved, and hundreds under development (1992 – 2002)

## HCPs: History

HCP process patterned after  
San Bruno Mountain HCP



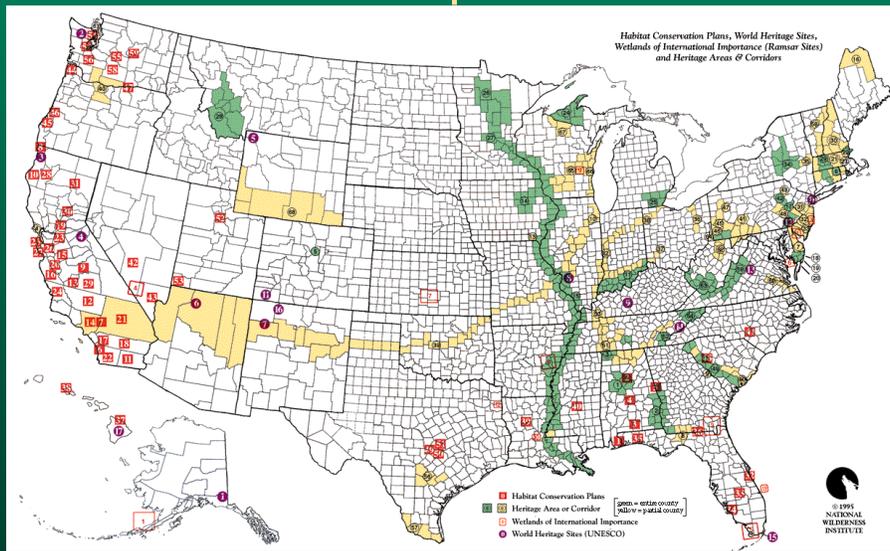
- Innovative land use planning in California's San Francisco by area
- Began in mid-1970s and resulted in first incidental take permit in 1983

## HCPs: Concept



Resolve conflicts between  
development activities and  
endangered species protection  
through negotiation rather than  
continued litigation

# ESA—Section 10 Exemptions



# General HCP Process

THREAD	TIME PERIOD 1	TIME PERIOD 2	TIME PERIOD 3	TIME PERIOD 4	TIME PERIOD 5	TIME PERIOD 6	TIME PERIOD 7	TIME PERIOD 8	TIME PERIOD 9
<b>HCP PREPARATION</b>	Define species goals in cooperation with TAGs	Finalize species goals	Draft Goals and Objectives chapter	Final draft Goals and Objectives chapter	Draft mitigation options in cooperation with TAGs	Draft mitigation chapter	Final draft mitigation chapter		
	Identify working list of covered activities	Finalize working list of covered activities	Perform impacts analysis in cooperation with TAGs	Draft impacts chapter	Final draft impacts chapter	Draft funding plan	Finalize funding plan		
	Collate environmental data	Identify data gaps and define baseline monitoring protocols	Finalize baseline monitoring plan and begin implementation		Draft monitoring and adaptive management plan	Finalize monitoring and adaptive management plan	Prepare administrative HCP draft	Prepare agency HCP draft; submit to Services	Prepare and release public HCP draft
	Identify related laws and regulations	Draft chapters 1 and 2 (covered area, activities, species; regulations)	Finalize chapters 1 and 2		Draft costing analysis	Finalize costing chapter			
<b>EIS PREPARATION</b>	Discuss purpose and need, alternatives	Draft EIS purpose and need chapter	Finalize purpose and need chapter	Develop alternatives, including alternative to take and higher mitigation alternative	Draft impacts-of-alternatives chapter	Finalize impacts-of-alternatives chapter	Prepare internal draft EIS	Prepare and release public draft EIS	
			Draft affected environment chapter in cooperation with TAGs	Finalize affected environment chapter					
			Draft Federal Register Notice of Intent	Publish Federal Register Notice of Intent					
<b>STAKEHOLDER</b>	Define scenarios for stakeholder participation and commitment in the planning process	Stakeholder participation		Identify stakeholder roles and responsibilities for mitigation		Prepare administrative draft implementation agreement	Prepare agency draft implementation agreement	Prepare public draft implementation agreement	
	Identify and pursue sources of planning and implementation funding			Identify stakeholder roles and responsibilities for funding		Finalize funding plan			
<b>PUBLIC INVOLVEMENT</b>		Workshop: baseline monitoring, goals and objectives	Workshop: Impacts		Workshop: Mitigation		Draft EIS comments		
	Educational activities (ongoing) Media management (ongoing)		Hold EIS scoping meeting						

## Elements of an HCP

- Goals and objectives for species
- Geographic coverage
- Species covered
- Activities covered
- Permit duration
- Impacts on species (level of take)
- Conservation measures taken by applicant
  - to mitigate impacts
- Expected outcome with conservation measures

## Elements of an HCP

- Funding mechanisms for the conservation measures
- Monitoring plan
- Adaptive management plan
- Assurances requested (*No Surprises* rule and other assurances)
- Permit amendment process
- Changed circumstances and remedial measures
- Additional measures required by USFWS or NMFS
- Alternatives to take

## Literature / Theory

- **Negotiating obstacles in scientific cases**
- **Creating options and breakthroughs**

## HCPs: Uncertainty

### **Uncertainty**

“Knowledge gained through the scientific method is the accumulation of bits and pieces of reality, voluminous but incomplete, and mediated by the collector. Competing visions of scientifically-derived truth can, and often do, coexist.”

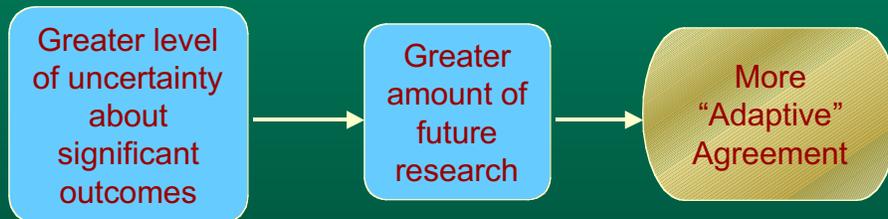
Connie Ozawa  
[Recasting Science](#)

### **3 kinds of uncertainties:**

- Measurements or observations insufficient to ground explanation
- Measurements conflict
- Competing or fragmentary theoretical frameworks

Scott McCreary  
Resolving Science-Intensive  
Public Policy Disputes

## HCPs: Adaptive Management



**Adaptive Management:** parties jointly design a decision tree with checkpoints (time, monitoring results) and thresholds for decisions if information shows certain results

## HCPs: Differing Mandates and Interests

- **Be explicit about mandates and interests of each party at table**
  - Written statements of mandates and interests
- **Commit to spirit of meeting mutual mandates**
  - “Tests” an agreement must meet
- **Provide checkpoints for reviewing mandates**

# Three Tough Negotiating Issues

- 1. Debates over scientific information**
  - What and how much information is needed? Models and assumptions? How to deal with uncertainties?
- 2. Recognizing differing mandates and interests**
  - How to keep parties working to mutual solutions?
- 3. Reaching agreement on adaptive management structures**
  - How will results be monitored? New information? Who make decisions?

# Current Protection

- 1,244 U.S. species listed
- 508 animals
- 736 plants
- U.S and foreign species
- Mammals, birds, reptiles, amphibians, fishes, snails, clams, mussels, crustaceans, insects, arachnids, and plants





## Negotiating Habitat Conservation Plans in Urban and Rural Environments – the Role of the Fish and Wildlife Service

Janet J. Bair  
U.S. Fish and Wildlife Service  
Nevada Fish and Wildlife Office  
Reno, Nevada

## Role of the Fish and Wildlife Service

- Statutory and Policy Guidance
  - Endangered Species Act (section 10(a)(2)(B))
  - Code of Federal Regulations
  - HCP Handbook
  - Five-Point Policy

## Role of the Fish and Wildlife Service

- Facilitating development of conservation program:
  - Covered species
  - Minimization, mitigation, monitoring
  - Ensuring no jeopardy or preclusion of species survival and recovery

## Technical Steering Committees

- Applicants
- Technical specialists
- Local interest groups
- Fish and Wildlife Service
- Other federal agencies
- State resource agencies
- Local governments and boards
- Nongovernmental organizations



## Clark County, Nevada

- Population: 1.3 million
- Total Area: 5 million acres
- Private Lands: 12.5 %
- Incidental Take Requested: 145,000 acres
- Types of Activities: Urban development



## Lincoln County, Nevada

- Population: 4,200
- Total Area: 6.8 million acres
- Private Lands: 2 %
- Incidental Take Requested: 40,000 acres
- Types of Activities: Limited urban development, ranching/agriculture





## Negotiation Issues in HCPs

- Acceptable levels of take/permit duration
- Technical Elements and Funding of the Conservation Program
- Adaptive Management Program and the Role of Science

## Negotiation Issues in HCPs

- Acceptance of federal law
- Willingness to participate in HCP development
- Understanding of the process
- Trust among the players

## Solutions – Communication

- Early and consistent participation
- Involvement of all interested parties
- Complete honesty and open dialogue
- Clear articulation of laws and regulations

## Solutions – Tools

- “No Surprises” Assurances
- Safe Harbor Agreements
- Candidate Conservation Agreements with Assurances
- Partnerships
- Funding assistance

## Habitat Conservation Plan Negotiations: Challenges and Strategies



### Big Pine Key Florida Habitat Conservation Plan:

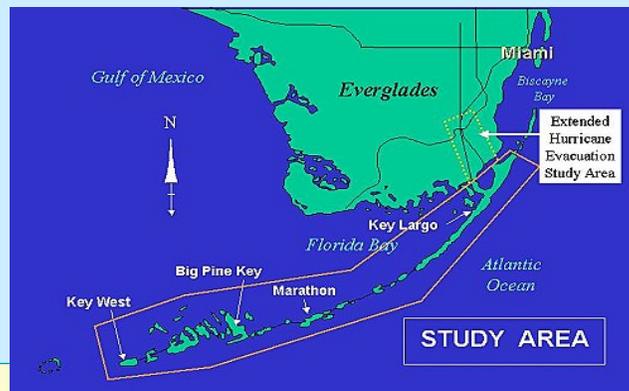
### Negotiating in a Complex Environment



Robert M. Jones, Florida Conflict Resolution Consortium

## Habitat Conservation Plan Negotiations: Challenges and Strategies

Florida Keys: ecologically rich, culturally significant,  
and environmentally sensitive.





## Habitat Conservation Plan Negotiations: Challenges and Strategies Big Pine Key

- The Florida Keys have more endangered and threatened flora and fauna than any other area except Hawaii.
- Big Pine Key is the principal population center for Key Deer and the location of the National Key Deer Sanctuary. Only key with year round fresh water sources
- The County has designated portions of the key as areas of critical concern to focus planning on efforts to reconcile the habitat needs of the Key Deer and the reasonable investment backed expectations of property owners and residents.



## Habitat Conservation Plan Negotiations: Challenges and Strategies Big Pine Key

- National Key Deer National Wildlife Refuge established 1957
- 8,542 acres mostly on Big Pine Key and No Name Key
- Big Pine Key is home to about 800 Key Deer (27 in 1957) and 22 federally listed endangered and threatened species of plants and animals, five of which found nowhere else in the world.



## Habitat Conservation Plan Negotiations: Challenges and Strategies Big Pine Key

- Complex environmental activities surrounding HCP:
  - \* Everglades restoration negotiations,
  - \* Development of a national marine sanctuary,
  - \* Nationally organized water quality steering committee,
  - \* U.S. 1 road widening (18-mile stretch at northern end)
  - \* Comprehensive plan impasse for Monroe county,
  - \* Private property rights challenges,
  - \* State critical areas designation since 1984

## Habitat Conservation Plan Negotiations: Challenges and Strategies—Big Pine Key

### Big Pine Key Habitat Conservation Plan Development Related Efforts

- Big Pine Key School Siting Mediation, 1993
- Monroe County Comprehensive Plan Mediation, 1997
- Habitat Conservation Plan initiated, 1999
- ACOE/ DCA Carrying Capacity Study, 1998-2002
- National Marine Sanctuary Plan Adopted, 1990-1998

## Big Pine Key Habitat Conservation Plan

### Big Pine Key School Siting Mediation, 1993

- Proposal for siting an elementary school inside the Key Deer Refuge prompted local conflicts starting in 1988.
- The county did not approve the Big Pine Key site as it was inconsistent with the county comprehensive plan.
- The School Board convened a mediation assessment followed by a mediation process over the site selection for the new elementary school.
- Mediation participants included: AARP, Big Pine Key Civic Association, Concerned Sugarloaf School Parents, Fl. Dept. of Community Affairs, Florida Game and Fresh Water Fish Commission, U.S. Fish and Wildlife Service, Key Deer Refuge, Key Deer Protection Alliance, & The Wilderness Society



## Big Pine Key Habitat Conservation Plan

### Big Pine Key School Siting Mediation, 1993

- ♦ Negotiated criteria for the siting included does the option:
  - Provide for the educational needs of elementary children in the area (both classroom and recreation).
  - Protect the natural environment?
  - Is it cost effective?
  - Can it be easily implemented?
- ♦ 7 public mediation sessions led to two alternate sites not on Big Pine Key. The School Board and County rejected this and proceeded with a proposal for a school on Big Pine Key.
- ♦ Administrative Appeals to the DOAH and Governor and Cabinet resulted in approval the mediation proposal with provision for a small school on Big Pine Key outside the Key Deer Refuge in 1995.



## Monroe County Comprehensive Plan Mediation, 1995-96

- In December 1995 the Governor and Cabinet entered a final order in the Monroe County Comprehensive Plan proceeding finding the plan not in compliance and directed the parties to a facilitated negotiation process to propose policies to bring it into compliance. The goal was “to identify, analyze and reach consensus on the most appropriate solutions and language consistent with the Commission’s adoption of the hearing officer’s recommended order.”
- The Florida Conflict Resolution Consortium was retained by the Governor’s Office to provide facilitation services.

## Monroe County Comprehensive Plan Mediation, 1995-96

- ♦ 6 days of mediation over two months with 18 parties to the administrative litigation.
- ♦ Negotiation was to develop rule language that would be added to the Comprehensive plan.
- ♦ The outstanding issues included:
  - The Permit Allocation System (ROGO)
  - Habitat Protection (Key Deer) and Land Acquisition
  - Drainage and Stormwater Management
  - Wastewater and Water Quality
  - Wetlands Protection
  - Dock Siting
  - Public beach access.



## Monroe County Comprehensive Plan Mediation, 1995-96

- Consensus was reached on many of the policies on permitting, wetlands protection and storm-water management.
- On Key Deer and Land Acquisition policies the parties agreed establish a habitat conservation plan process to address those issues.
- The parties did not reach an agreement on the wastewater policies.
- The Governor and Cabinet adopted all consensus recommendations and reached a decision on the wastewater issues after considering the issues raised and framed in the mediation.



## Habitat Conservation Planning Process 1999-2002

- Big Pine Key HCP Advisory Group—stakeholder process organized and facilitated by planning Consultant.
- 4 public workshops during the high tourist season.
- Sticking points include transportation options related to expanding lanes for U.S. 1. No permits have been issued for past two years because the road's level of service has been exceeded. Also linking incremental land acquisition to incremental building permits

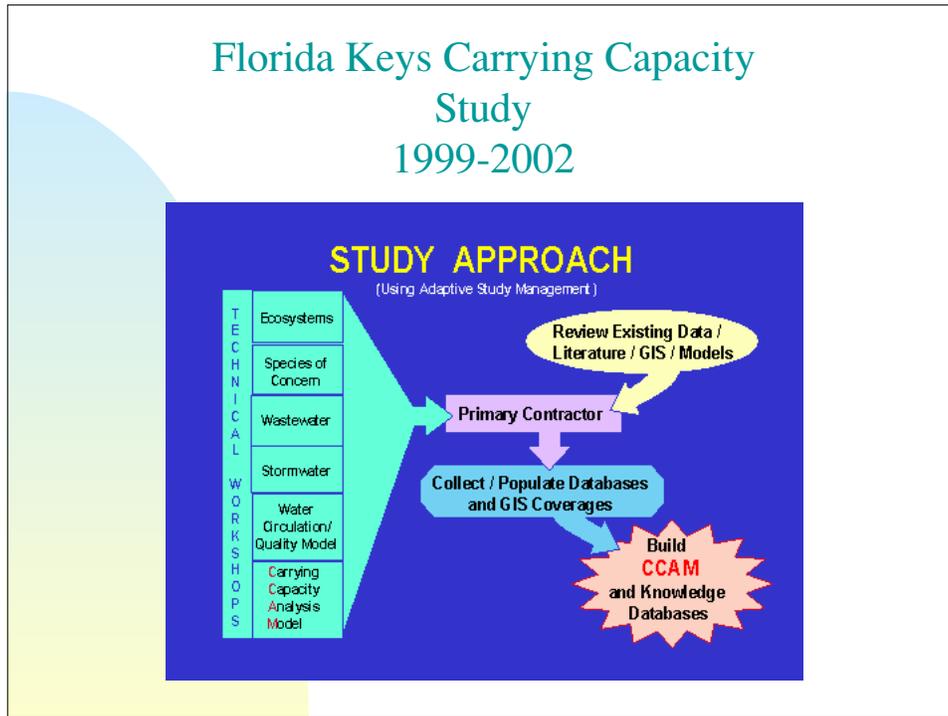
## Habitat Conservation Planning Process 1999-2002

- 2 years into the plan development process  
A draft Environmental Assessment and  
Draft Habitat Conservation Plan is being issued  
in June, 2002.
- National Key Deer Refuge cannot be counted as mitigation
- Developing a tiered approach:
  - Tier #1: National Key Deer Refuge area
  - Tier #2: Limited permitting and buy-outs/acquisition
  - Tier #3: Infill area
- HCP was included in ACOE Carrying Capacity Study  
which was prompted by a proposal for widening an 18-mile  
stretch of U.S. 1 at the top of the Keys.

## Florida Keys Carrying Capacity Study--ACOE

“The study shall be designed to determine the ability  
Of the Florida Keys ecosystem and the various segments  
Thereof, to withstand all impacts of additional land  
Development activities. It shall consider aesthetic, socioeconomic  
(including sustainable tourism), quality of life and community  
Character issues, including concentration of population, amount  
Of open space, diversity of habitats, and species richness.”

## Florida Keys Carrying Capacity Study 1999-2002



## Florida Keys Carrying Capacity Study 1999-2002

**ESTIMATED TIMELINE**

Begin Study	Winter 99
Complete Technical Workshops	Winter 00
Relationship--Impact of Land Development Activities on Natural Resources	Spring 00
Natural Resources--Requirements, Responses, Limiting Factors	Spring 00
Test Carrying Capacity Analysis Model	Summer 00
Complete Model	Fall 00
Technology Transfer	Fall 01

## Florida Keys Carrying Capacity Study 1999-2002

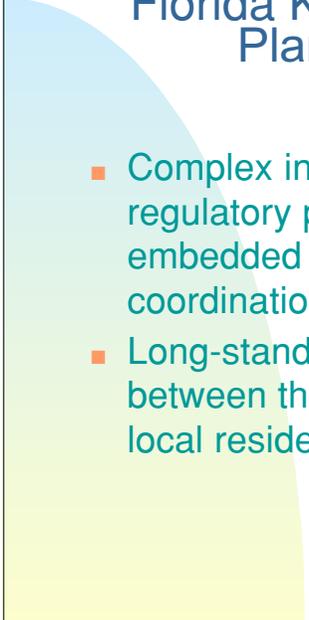
### CHARGE TO TECHNICAL EXPERTS

#### Ecosystems and Species of Concern

- Ecosystems and Species to be Considered in Study
- Requirements, Responses, Limiting Factors, Tolerance Limits (if possible) for those Ecosystems and Species

## Florida Keys Carrying Capacity Study

- Peer review by the National Academy of Sciences in 2001
- Currently consultants are responding to those comments and preparing the final model and report.



## Florida Keys Habitat Conservation Plan: Lessons Learned

- Complex interplay of a variety of planning and regulatory processes within which the HCP is embedded requires extra time and effort for coordination and consensus building
- Long-standing tension and lack of trust between the Fish and Wildlife Service and local residents provided special challenges.

## HABITAT CONSERVATION PLANS

- **Resolve Conflicts**

**between:**

Activities that result in take  
**and**  
Conservation of Ecosystems



## HCP NEGOTIATION CHALLENGES

- **Providing assurances to all parties**
- **Recognizing scientific limitations**
- **Establishing a collaborative process**



# HCP NEGOTIATION CHALLENGES

- **Providing assurances to all parties**
  - To the **public** and the agencies
    - ESA – Environmental legislation
  - To the ITP **applicant**
    - ITP – Formal agreement allowing projects to proceed

# PUBLIC ASSURANCES LAWS AND POLICIES



U.S. Fish & Wildlife Service

**The Endangered Species Act  
of 1973**

## PUBLIC ASSURANCES ESA ADMINISTRATION

- **U.S. Fish and Wildlife Service (FWS)**
  - Department of the Interior
  - Responsible for terrestrial and freshwater organisms
- **National Marine Fisheries Service (NMFS)**
  - Department of Commerce
  - Responsible for marine species: salmon, whales, etc.

## PUBLIC ASSURANCES ESA PROVISIONS

- **Permits for Incidental Take**
  - “scientific purposes or to enhance propagation or survival of the species”
  - “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity”



## **PUBLIC ASSURANCES**

### **ESA PROVISIONS**

- **Take -**
  - “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct”



## **PUBLIC ASSURANCES**

### **ITP ISSUANCE CRITERIA**

- Take will be incidental to an otherwise lawful activity
- Impacts will be minimized and mitigated to the maximum extent possible
- Adequate funding will be provided
- Take will not appreciably reduce the likelihood of the survival and recovery of the species
- Any other necessary measures are met

## **APPLICANT ASSURANCES** **INCIDENTAL TAKE PERMITS**

- **Formal agreement**
  - Covered activities
  - Covered area
  - Covered species
  - Permit duration
  - Level of incidental take
  - “No Surprises Rule”

## **QUANTIFICATION OF TAKE**

- **Habitat**
  - Volume of water
  - Acres of land (wetland, forest etc.)
  - Miles of shoreline
  - River miles
- **Number of Individuals**
  - Life-stage

## HCP NEGOTIATION CHALLENGES

- **Recognizing scientific limitations**



## HCP NEGOTIATION CHALLENGES

- **Recognizing scientific limitations**
  - Information Needs
  - Information Limitations
  - Consequences

## INFORMATION NEEDS

- Biological information for species
- Direct effects
- Indirect effects
- Cumulative effects

## INFORMATION LIMITATIONS

- **Species information can be limited**
  - Life-history
- **Effects can be unknown**
  - Species interactions
  - Habitat requirements
- **Effects can be difficult to assess**
  - Bioaccumulation
  - Ecosystem processes

## CONSEQUENCES

- **Conflict**
  - Interpretation of information
  - Uncertainty
- **Risk**
  - To species
  - To applicant
- **Cost**
  - Need for research

## HCP NEGOTIATION CHALLENGES

- **Establishing a collaborative process**
  - Identifying and engaging stakeholders
  - Developing an unbiased approach

## STAKEHOLDERS

- **Examples from HCPs**
  - Local agencies
  - Development interests
  - Agricultural interests
  - Environmental groups
  - Resource / Regulatory agencies
  - General public

## UNBIASED APPROACH

- **Elements**
  - Defined structure
    - Committees—Policy and Technical
  - Operational guidelines
    - Consensus
    - Compromise
    - Commitment
  - Well-defined objectives and goals
  - Communication

## SUMMARY

- **Conflicts with ESA are common**
  - Recognize where they arise
  - Identify the information needs
  - Have a collaborative approach
  - Develop creative solutions

# PREFERENCES AND CAPACITY OF ENVIRONMENTAL ADVOCATES AND PARTICIPATION IN COLLABORATIVE PROCESSES

THURSDAY, MAY 16, 2002—8:00 –10:00 AM

## MODERATOR

Frank Dukes, Institute for Environmental Negotiation, University of Virginia

## PARTICIPANTS

Gail Bingham, RESOLVE

Jeff Salt, Director, Great Salt Lake Audubon

## ROUNDTABLE ABSTRACT

Environmental advocates describe a range of views and experiences with collaborative processes. Some report positive environmental gains as well as improved community relations and environmental awareness, while others have experienced inappropriate compromises that weaken environmental protection. Like it or not, collaborative processes are increasingly used by both public and private parties. Some environmental advocates have convened such processes and others are devoting increasing resources to participation in such processes. What sorts of skills do environmental advocates need to bring to the table when they decide to work in collaborative forums? How might these skills differ from traditional environmental advocacy? How might they be similar? How can these skills be developed?

## ROUNDTABLE SUMMARY

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

### FRANK DUKES

Mr. Dukes introduced the session. He noted that his institute had developed a handbook addressing participation by environmental advocates in collaborative processes. The 70-page handbook, *Collaboration A Guide for Environmental Advocates*, is available from the Institute for Environmental Negotiation at the University of Virginia. The handbook was created through a joint project in cooperation with the National Audubon Society (NAS) and The Wilderness Society (TWS) to understand environmental concerns about collaboration and to create a tool to address those concerns. Interest in beginning the project was spurred, in part, by the process known as the Quincy Library Group in Quincy, California. Quincy was described as the “poster child” of collaboration who quickly became the unwanted “stepchild” of collaboration. In Quincy, several long standing adversaries were able to work together and develop a set of agreements that were hailed by many people as a new way of doing business. However, these agreements alienated regional and national environmental advocates who criticized the large scope and potential impact of those agreements on several national forests. Quincy caused further controversy when participants also sought and achieved passage of legislation to override the management authority of the USDA Forest Service.

Mr. Dukes later attended a meeting where TWS and NAS reflected their concerns about collaborative processes and their need to know more about whether, when and how to participate. The Institute for Environmental Negotiation (IEN) partnered with NAS and TWS to develop the guide based on the interests and needs of environmental groups to understand best practices. The process involved holding workshops with the environmental community to elicit their concerns as well as a review process with other interests, such as facilitators and agencies.

Some key concerns identified by environmental advocates included:

- Urban interests are disenfranchised by local processes held far from urban areas, although these processes affect public resources.
- Official and appointed boards lose their authority when collaborative processes replace their roles.
- Groups who participate in collaboration have to give up their legal authorities and rights.
- Agency authority is bypassed by collaborative processes.
- Many laws demand that resource protection be considered as a primary concern, which collaboration overlooks.
- There is an ideology that “agreement” is a chief desired outcome and this brings pressure to utilize collaborative processes.
- Decisions are only legitimate when acceptable to all parties in collaboration even though “unpopular” decisions may be needed.

- There is a need for advocacy and education that collaboration does not provide.
- There is a need to provide opportunities for all owners of a resource (e.g., the public for public lands) to participate rather than have more limited or closed processes.

Mr. Dukes then asked what issues workshop participants would like to address, resulting in the following list:

- How can we best “speak for the wolves”?
- When environmental advocates want to participate in a collaborative process, how do we address the issue of standing?
- When environmental advocates are involved, how can their interests in big picture issues be addressed in the context of a specific issue?
- How can we move people from a stance of “nothing” (e.g., no build) to be willing to discuss the issue?
- For a party who isn’t “at the table,” how do we provide an opportunity to participate?
- How do we deal with “burnout” or “stomp out” when people have been at the table a long time?
- What about when people have been very active and someone refuses to endorse the outcome?
- What about the disconnect between the local environmental groups and their national offices (incongruent perspectives)? Also, what about environmental advocates at the table who can’t agree at the local level?
- After years of advocacy and bridge burning (e.g., we won’t talk or work with your company), how do we bring those people to the table?
- It is difficult to get environmental advocates to participate early on, so how do we get them engaged at the beginning when input could be more constructive?

## **JEFF SALT**

Great Salt Lake Audubon (GSLA) is the oldest conservation group in Utah and the Intermountain West. They are also a member group of the Alliance of Water Keepers, and Mr. Salt is the first “Lake Keeper.” The local Water Keeper is designed to be an advocate for large groups of stakeholders or lake users. River keepers were formed in the U.S. first on the Hudson River and their first victory took a long time to achieve, but through the process, they learned to be skilled litigators.

The GSLA conducts advocacy as well as local planning and public education and provides tools for decision makers to make better decisions. They seek to be advocates for the public trust resource. In order to participate in a collaborative process, something has to draw in their participation, such as a proposed discharge permit issue or a community issue.

They also partner with NAS on projects, such as the campaign to prevent drilling in the Alaska National Wildlife Refuge. The campaign had a clear message: Stop ANWR drilling. They collaborated with other organizations in order to stop the drilling proposal and segmented out roles based on skills, networks, and abilities of the groups.

Understanding how to resolve the differences among groups is key for GSLA as they seek to achieve their goals. They seek to be solvers of problems so they are not seen as obstructionists. Forming partnerships is key as is capacity building. It's important to ensure that there are "places to play" for everyone at all levels—local, regional, and national.

Mr. Salt laid out avenues by which environmental advocates collaborate via coalitions or working with community leaders. One avenue is the advocacy framework, and the question is how to work in that context along with collaboration. For environmental advocates, process legitimacy is key and we should not imply that not collaborating is bad.

Two key questions are:

1. For groups considering participation is an agreement-seeking forum is the best way to achieve their goals?
2. How can all parties advocate for their interests in an agreement-seeking forum?

## **GAIL BINGHAM**

Ms. Bingham noted that one pattern of the audience's questions has to do with the choice of process or with the shaping of processes versus other choices available. A key concern has to do with how the questions are framed. Environmental advocates have a legitimate concern over the framing of the question that affects their ability to determine which process will best serve their interests. There is an initial need to determine the scope of the decision the group is being asked to tackle before the process begins. Mediators need to be careful not to convene a biased process. Some of the other questions identified by workshop participants have to do with needs and capacities once the process has begun.

## **QUESTIONS AND RESPONSES**

*Comment (audience):* We do a disservice by presuming that people ought to collaborate. Often the right choices are litigation or other venues and we ought to respect other processes. The issue is how to do the collaboration and issue assessment so that we can determine if the collaboration should be convened. We're faced with needing a process at the beginning so that the possibility of funding a solution is made clearer. This would help environmentalists and others have some tool to figure out the likely benefit of their participation.

Ms. Bingham replied that good mediators should mediate the scoping session to explore the feasibility of mediation. The Two Forks Dam dispute is an example. The question needed to be changed from "whether to build the dam" to "how to meet Denver's water needs."

Mr. Salt described the Mono Lake dispute as another good case example of an epic, long-term lawsuit which led to a court case *Audubon v. City of Los Angeles*. Mono Lake was finally decided, based on the need of Los Angeles for water that the city was able to supply via means other than Mono Lake, allowing the lake to remain protected. So the first step in considering collaboration is to make sure to identify everyone's needs. Advocacy groups might not want to collaborate because it can mean working with their enemies. The Western Governors Association's principles of *Enlibra* did not involve the environmental groups in their creation, only industry and states interests were allowed to participate. Since environmentalists were not involved in the framing of the principles, they don't support them.

*Comment (audience)*: I'm involved in an issue in Santa Fe, New Mexico, on a proposal for oil and gas drilling on Terra Mesa. Environmentalists don't want to come to the table since they don't want the drilling at all. Coming to the table implies support for some drilling and the environmentalists would like the area designated as wilderness.

Mr. Salt commented that the way the issue is framed currently has already commandeered the process. They should take a step back and begin to discuss the needs—does there need to be drilling, does there need to be a refuge, etc.?

Ms. Bingham added that there should always be an initial shared convening assessment. She noted that in past years, this assessment often resulted in deciding not to convene a process; now these processes seem to go forward more often. One concern is that when environmentalists will not participate, the convener goes “shopping” for the “agreeable environmentalist,” which harms the validity of the process.

*Comment (audience)*: People should first ask “What is the law, what is the regulation?” People should first consider their best interests and whether they can win using a regulatory framework.

Ms. Bingham replied that if people can win through the courts, campaigns, etc., then we are foolish to “shop” for environmental advocates who will participate. Conveners should be clear that they are open to creative options and open to other outcomes.

Mr. Salt added that a lot of the time we are looking at combatants as participants—there is a case where the ESA threatened the ranchers but a judge determined that everyone (environmentalists, fishing interests, ranchers, regulators, etc.) had to work together to address the land management issue. In the end, the fish were better off and more grazing was able to occur as a result of the collaborative process which created new options, such as creek habitat restoration.

Ms. Bingham then initiated a discussion of the question, “How can environmental advocates' capacity to participate be enhanced?” She described the interests of national environmental groups in collaboration. The Natural Resources Defense Council obtained a grant to reflect on their experiences with collaboration. Ms. Bingham suggested that all groups should engage in systematic reflection on their experiences. Five ques-

tions can be done for self assessment: What was my objective? What barriers did I encounter? What worked? What didn't work? What would I do next time? She added that RESOLVE has done training for environmental groups in how to negotiate, in an effort to build capacity. RESOLVE is also doing a feasibility assessment with Packard grantees in California, but they are realizing that training alone is not enough to prepare groups, due to the many variables groups experience in the real world. Additionally, it's important to understand that time to participate is a huge challenge for environmental groups.

Ms. Bingham next used a metaphor of learning to ride a bike as a simile to learning to do something by participating and gaining self-confidence. Mr. Salt observed that kids have to first want to ride the bicycle by seeing others do it, and at first, the interest in riding exceeds the child's capacity to ride. But, again, they have to first want to participate. So what is the incentive to participate? In Utah environmentalists' motto is they cannot be tamed but they can be coaxed or "incentivised." But they still need examples of what collaboratives can achieve. For example, Soil Conservation Districts usually don't involve environmentalists, but in Utah they do because they have identified shared interests, such as wildlife management.

Ms. Bingham highlighted another audience question, "What about bringing people together when there's a long history of not working together?" Mr. Salt responded that if we were all adversaries in a room, we'd need to allow for everyone being equal first so that everyone can begin to see overlaps and areas where all agree without giving up the individual perception. He highlighted the metaphor of drumming circles where all participate in drumming regardless of skill or type of drum—similar to how those in a collaborative group should be treated.

*Comment (audience):* The danger of language and implicit messaging is becoming ever more obvious and the use of the word "capacity" is becoming the watchword. A community may have all the capacity they need, but facilitators may be the ones who need to develop capacity to dialogue with and understand the communities, First Nations, etc. It's important to talk about all of our capacities.

Mr. Salt responded that the contributory model (the drum circle example of a collective sound) is what makes the group work and gives it power. Differences should be honored.

Ms. Bingham then commented on the "stomp out" phenomenon and creating a climate where people are welcome back. One should keep the message forward that the door is always open so that the people can come back.

Mr. Salt added the example of how to deal with a disruptive or antagonistic perspective by focusing attention on them and giving them the space they need to speak.

*Question (audience):* What about the issue of collaborating with an enemy and how to address the discomfort of participants in doing this?

Mr. Salt responded that the desire is there to work together so we need to try to find a vehicle where they can participate comfortably, or at their interest or ability level.

Ms. Bingham provided an example of a uranium mine reclamation planning process in the San Juan Valley where the environmentalists opposed the mining permit for different reasons—some wanted the reclamation to be done right, while others wanted no mining because they were opposed to nuclear power. Finally, all agreed the negotiation would go forward with half of the environmental coalition, and the coalition elected to separate over the process choice. The mining company took the risk that the other part of the coalition would litigate. Ms. Bingham then recommended a book *Smoke in their Eyes, Lessons in Movement Leadership from the Tobacco Wars*, by Michael Pertschuck (Vanderbilt University Press, 2001), as a useful tool.

Mr. Salt added an example of a Ski Resort in Utah that wants to develop their resort on private land. There is one group who wants to stop the resort. There are private property rights involved and everyone needs to listen to the developers about their needs, since they can develop their site by right. The GSLA recognized and effectively communicated to other environmental groups that they need to work with the developer to ensure the resort is better for the environment so only something, not everything, is lost.

## **OUTCOME**

### **KEY HIGHLIGHTS OF THE DISCUSSION**

- The framing of the issue is key. The true issue to be resolved must be framed first rather than forcing a limited choice.
- Environmentalists need the capacity to participate, including time, adequate knowledge, and expectations that they are not giving up their legal rights or missions.
- Mediators and convenors need to take care to build a fair playing field for collaborative processes.
- The environmental community is made up of diverse players and process conveners should avoid “shopping for agreeable environmentalists” or their process may lose legitimacy and the value of having key players at the table.
- Conveners and others should recognize that all issues may not be appropriate for negotiation or collaboration and this should be revealed in advance of the process by conducting a multiparty, mediated scoping session.
- It is important to identify mutual interests in seeking participation by environmental advocates, e.g., what issues to be addressed are of interest to them and how will the process include those issues?

# THE NATIONAL ENVIRONMENTAL POLICY ACT: OPPORTUNITIES FOR INNOVATIVE COLLABORATION BASED ON SECTION 101

THURSDAY, MAY 16, 2002—8:00 –10:00 AM

## MODERATOR

Timothy Mealey, Meridian Institute

## PARTICIPANTS

Dinah Bear, Council on Environmental Quality, Executive Office of the President

Kirk Emerson, U.S. Institute for Environmental Conflict Resolution

Lindell Marsh, Sieman, Larsen and Marsh

Gillian Mittelstaedt, Tulalip Tribe

Paul Orbuch, Western Governors Association

## ROUNDTABLE ABSTRACT

This roundtable session explores the potential for translating the aspirational provisions of Section 101 of NEPA into guidance for collaborative processes and sound environmental outcomes. Panelists will explore how to evaluate the potential role of collaboration, consensus building, and appropriate dispute resolution processes in improving implementation of the National Environmental Policy Act (NEPA) within the context of federal lands and natural resource management. There is a range of views regarding the effectiveness of NEPA implementation. These differences reflect legitimate underlying differences in values and perspectives about the nature and extent of environmental impacts for proposed projects and how these impacts can best be avoided or mitigated. The session will highlight the opportunities and challenges of collaborative NEPA processes from the perspective of practitioners, agencies, and tribes.

## ROUNDTABLE SUMMARY

## INDIVIDUAL PRESENTATION

### **Shared Governance in the Santa Ana River Watershed**

By Lindell Marsh

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

### MODERATOR'S INTRODUCTORY REMARKS

We are here to talk about the only statement of environmental policy in U.S. law: NEPA section 101. He refers to discussions on section 101 organized by U.S. IECR and visionary nature of s. 101.

Ms. Emerson refers to a one-page handout that gives a quick overview of the work and interest of ECR in s. 101 and makes reference to a report of the ECR excursion into exploring the possibility of developing pilot projects and other projects that may help us think through use of collaborative processes in the context of s. 101. She sees a great challenge (and desire) in addressing (implementing) the aspirational aspects of s. 101.

### DINAH BEAR

Looking at the legislative history of NEPA, many people do not recognize the policy statement of s. 101 as such. It is the only U.S. law that addresses the environment systemically. Section 101 contains specific charges, including: taking into account future generations (example, in the Philippines, regulations preserving forests for future generations). These specific principles have not been applied in the U.S. as much as they have may have been abroad.

The legislative intent of s. 101 should be translated into day-to-day federal agency policy. How do we do it and how do we relate it to individuals? The focus has historically been on procedural aspects of NEPA, with many court decisions focusing on procedural aspects and agencies seeing 101 as "hortatory" (not mandatory). There have been some attempts to incorporate s. 101 in more comprehensive decision making, but these have been controversial. There are a number of agencies trying to better fit s. 101 in their NEPA procedures. Some have been controversial (FHWA), but the Army has published a new set of NEPA procedures that incorporates s.101.

Section 101 is the ultimate promise of NEPA. Malpai Borderlands is a great example of incorporating environmental and socioeconomic values.

*Question (moderator):* Can CEQ provide the leadership for implementation of s. 101?  
Dinah's answer: We need to separate out s. 101 from the traditional framework and use more bottom-up examples, like Malpai.

### GILLIAN MITTELSTAEDT

S. 101 of NEPA was ahead of its time (written at a time when every threat came out of end of a pipe—water, air, or soil). We are now dealing with more complex issues of

urbanization, sprawl, habitat or other. This may be the right time for implementing s. 101.

In every deliberation with the Iroquois, we have to consider the impact of our actions on the next seven generations. This is inherent in tribal thinking and continues although tribes deal with many different issues (economic development). TEPA is the concept that tribes adapt a federal model to their circumstances. NEPA has a broad scope that may make it applicable to tribal circumstances/concerns. Tribes may not have codes requiring EA, but some planning provisions do require scoping, etc. As tribes are going through lots of changes (economic development, etc.) and realizing their limited land space, there may be a place for the concept of s. 101 where it requires looking at cumulative and system-wide impacts. Tribes may look at how to use their land in a spirit of s. 101.

### **LINDELL MARSH**

He told a story about work he is doing in the Santa Ana Watershed. He looks at s. 101 as follows: the standards are in s. 101(a), and a procedure for implementing the standards is in s. 101(b).

The problem relates to the process. We used to go head to head. We need to go to a different way of thinking. We need to view projects as part of the community, move from chaos to order where things work in a sustainable manner. The Santa Ana Watershed Group had five conveners: local government, water districts, and water quality agencies. We developed an MOU with federal agencies, state, and SAWPA.

How do we work a roundtable? We work in a scoping process with people speaking the truth; we need a space where people can speak their ideas. It is amazing to see people get to a common understanding through discussions. There is no need to call it a consensus-process.

Stakeholders include all those who are affected, in concentric circles. Congress and the Colorado River authority were not closely involved, but were involved. Communities are collaborating.

Transforming vision: A vision we can work off of. Cities are going to work with EPA, etc.

Shared governance: local, state, federal, private interests. How do you make a coherent government?

### **QUESTIONS AND RESPONSES**

- Scoping as a truth seeking process—transforming (a landscape) vision—concentric circles of stakeholders. Important elements of s. 101: cooperation; all practical means and measures; balancing social, economic, etc.; six ends in s. 101(b) are very instructive; section 101 (c) gives a right. What is it about s. 101 that gives it that promise—

what is it that these processes (Santa Ana, Bill McDonald) tell us about how we can use s. 101?

- How do you institutionalize what we heard from McDonald yesterday? For instance, years ago we heard from the Forest Service: we cannot do a habitat conservation plan. Now we use these all the time to look at things systemically. We need to look at the process.
- Leadership: MOU is a way of working together.
- Local groups have success in doing community work. They are not successful at doing things that are further away. How do you use s. 101 in scoping process?
- Working group on a conservation program—five-year plan that is then extended annually. Hope that this program will expand species by species.
- There is a delay in NEPA (community proposes an action and agencies have gone through EIS in order to address issues). We're rehashing issues that were discussed three years ago. How do we get other interests involved in the process early so we can avoid delays and avoid going over things several times?
- Dialogue process early on in scoping is really helpful—it creates a space to share what people have, and it helps build connections between key people. It's also conducive to have people tell stories. It brings together people who don't know each other or are warring with each other. We should say: let's not start the NEPA clock because the process gets pushed by others. Let's do prescoping—that gives people time to work through issues.
- How can we integrate processes in NEPA? How do you change the dance steps of the formal NEPA process that everyone knows?
- Watershed type processes are a place-oriented process: how many years does it take for something to take off? It can take many years to build trust. Institutions that have responsibilities for these landscapes need skills.
- Deeply engrained—effectiveness of people who share stories and information. There are expectations about collaboration.
- I think NEPA was wildly successful. People who thought this thing through came up with something revolutionary. Procedural requirement in s. 102 required culture change in agencies. Implementing s. 102 (through litigation) has had enormous impact on agencies; it has opened up traditional back-room decision making. It was successful because it was procedural.
- Stockholm conference—How do you integrate environment and development? That is what s. 101 is about. It took two years to produce agenda 21, which lays out how you may incorporate environment and development. Groups are working on it: TNC has set up situations where it pushes the 6 s. 101 criteria. After 1992, big corporations started embracing sustainable production. Others, like Malpai Borderlands, are doing it. Does it go far enough? No, sustainability requires cultural change. The Everglades is an example where the feds are really working with the state and local and private groups. What they are doing is implementing s. 101.
- Could you change s. 102 regulations to incorporate more of the standards of s. 101 beyond the existing provisions? Procedural support for this comes from CEQ. People in the West really asked for guidance to increase collaboration between the feds and with state, local and tribal government. CEQ guidelines require reporting back to CEQ about this collaboration. We try to focus on changes in culture of agencies that are

- refusing to bring stakeholders to the table.
- About prescoping: we are nation of laws—case law on NEPA. The greatest risk comes from procedural challenges. The feds that do want to expedite scoping process don't because they may face a serious legal challenge.
  - NEPA does not have regulatory requirements for hearings, meetings, etc. It has enormous flexibility about how you do the process. Institutions only think that the process is complex, etc. If you feel something goes against common sense, have your attorney call CEQ.
  - Local and state permits are there—people are going to be afraid of losing them due to NEPA. With any group you need an early success. Build something based on a waived permit.
  - We are going out in the field and talk to stakeholders before starting any formal process. Do this in addition to the NEPA process and build some early successes. It also helps to gather all local and informal knowledge, which is part of NEPA process.
  - NEPA can be strong catalyst. There was some strong local action in eastern Oregon and it took enormous energy to work through the disagreements, requiring lots of time and effort from citizens. The challenge is dealing with people who are not at the table; people in the collaboration can be discouraged to come to the table because they feel no progress occurs when those outside the process will shoot down results.
  - We need to recognize that there is a legal system and that people can block something they don't like. These people need to be involved. Resolution Programs Abroad: Lessons Learned and Opportunities on the Horizon
  - Wonderful stuff can be done by looking at systems level. It requires new kind of leadership.
  - It is powerful to have high federal officials say they want to include you and encourage you to look at system.
  - Funding issues: if local groups get funding, they may not have the infrastructure to participate in a meaningful way.
  - We are at a moment of great potential and great challenges. We are institutionalizing something that should come from those working on the ground without it developing into another set of guidelines about what is or is not collaboration. We need to validate work on the ground. The feds need to be comfortable to let a process go for a while.
  - State fish and wildlife agencies are getting funding to connect on the local planning level to deal with growth issues.
  - Communities of place are very powerful, but we are also a transitory society. Lot of collaboration is useful in existing communities. Who stakeholders are can be difficult to identify. We can adopt Web-based techniques to reach out to people.
  - Agencies are pushed to move very fast, and at the same time, they are required to involve stakeholders more. If you identify stakeholders up front, your process will be shorter in the long run.
  - Local groups need resources (NatureServe). Information has a big impact.
  - When community has been active with TNC and others, when there is major action is when you get problem. How do you give the Web some standing so you improve stuff in advance?
  - Mission statement makes people recognize that they are part of this initiative.
  - Diablo—identify disagreements that other might have.

- Challenge: Sustaining a collaborative process and sustaining long-term relationships and developing an institutional design to manage these relationships. Institutional designs for shared governance. Watershed organizations are a model.
- Ports of LA and Long Beach—goods moving from Asia to Europe. TEA3 is coming up. How do we address this? Decisions on the port were made 10 years ago. We are now starting to see the effects. How do we engage the feds in this issue? What we would like to do under Santa Ana MOU is engage the state transportation agencies and DOT to work with local groups to “scope” the problem.
- Ports issue: Could this be another national policy issue?
- What do people think of the combination of goals/visions and adaptive management (vision and idea of how you measure) getting you closer to the goal?
- Adaptive management: What do you do with interests of future generations? Problems with s. 101 (b)(5): not being addressed.
- “Profitable watershed”—economic systems. You may be more successful at managing the watershed, but regarding economic aspects you may be in a more difficult system. This creates frustration at local level. Economic issues will drive future decisions about ranches in Malpai Border Region.
- Conservation easements will constrain future generations’ options.

# Shared Governance in the Santa Ana River Watershed



The Santa Ana River Watershed Group

## Santa Ana River Valley

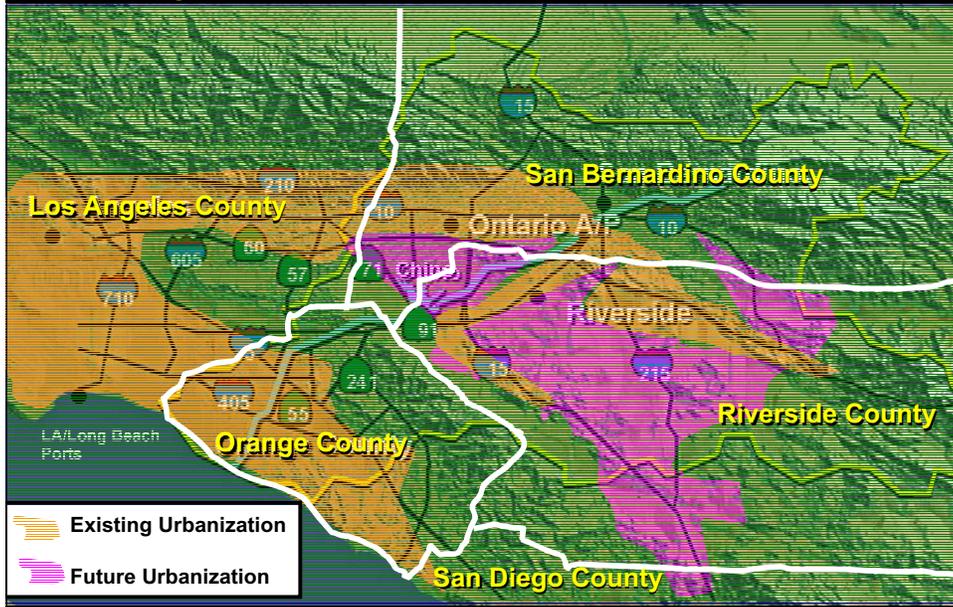
- Fastest growing Watershed in the nation: 5 to 7 million in 2020
- \$200 billion, 1/5<sup>th</sup> of State's production, ranks 23rd as a separate Nation
- 1/6<sup>th</sup> of Legislature, 11 members of Congress



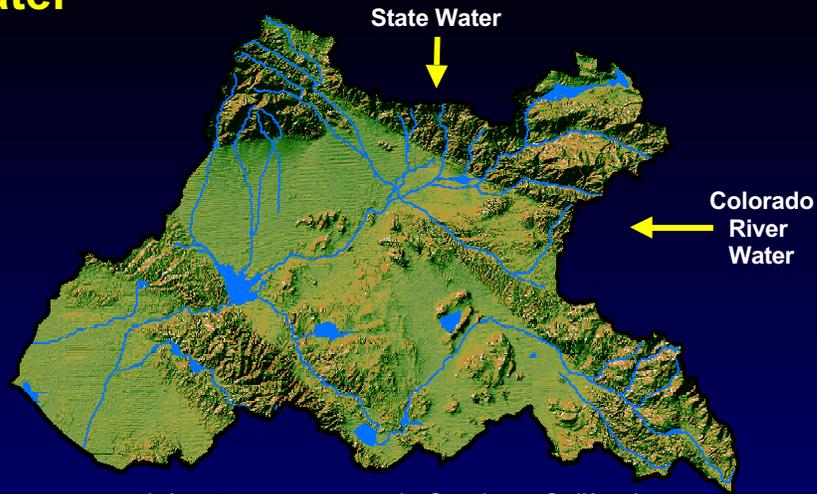
## Urbanizing Tier of the Los Angeles Region



## Focus of Growth -- Chino Basin / Riverside County



## Water



- Largest coastal river/stream system in Southern California
- 2650 square miles in parts of four counties
- Five SAWPA Members and over 100 water agencies

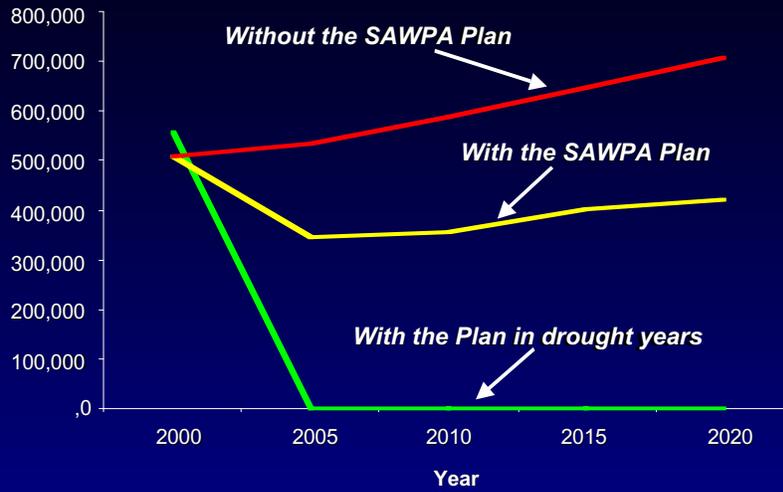
## SAWPA's Comprehensive Water Program -- 200+ Projects \$3+ Billion by 2020



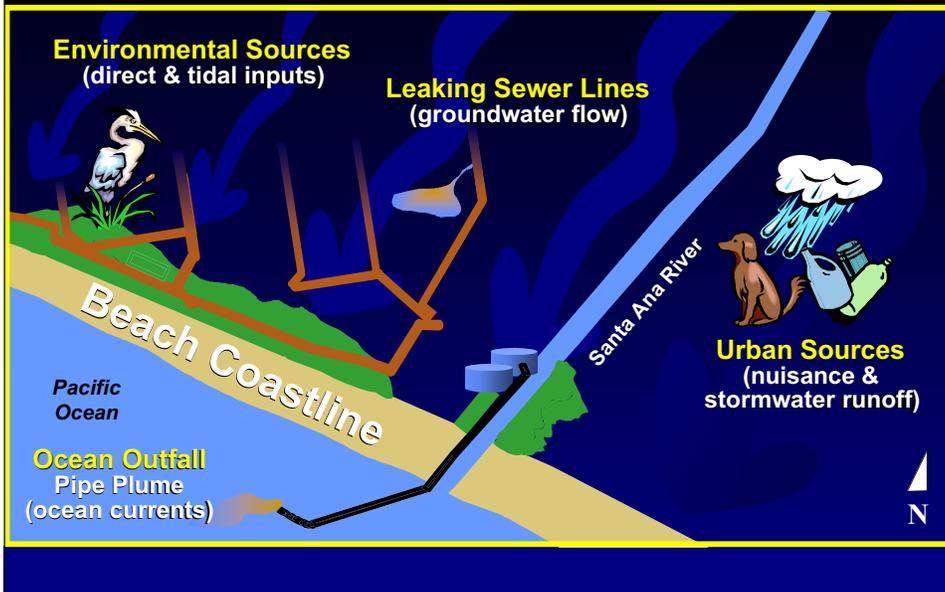
- Groundwater Cleanup
- Water Storage and Banking
- Flood Protection
- Environment – Wetlands and Habitat
- Water Recycling
- Recreation and Conservation

# Projected Water Import Demands of SAWPA Agencies

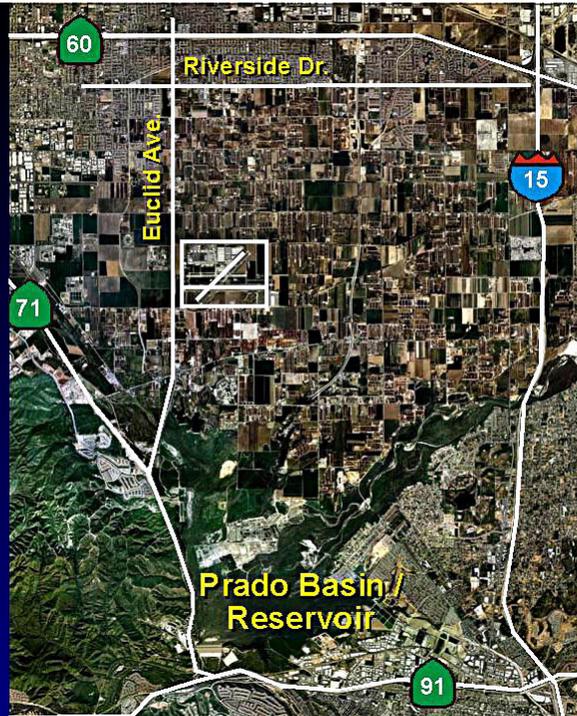
(AC - FT / YR)



# Urban Runoff Concern



## Chino Basin



## Chino Basin Concerns: Largest Concentration of Dairies in the World

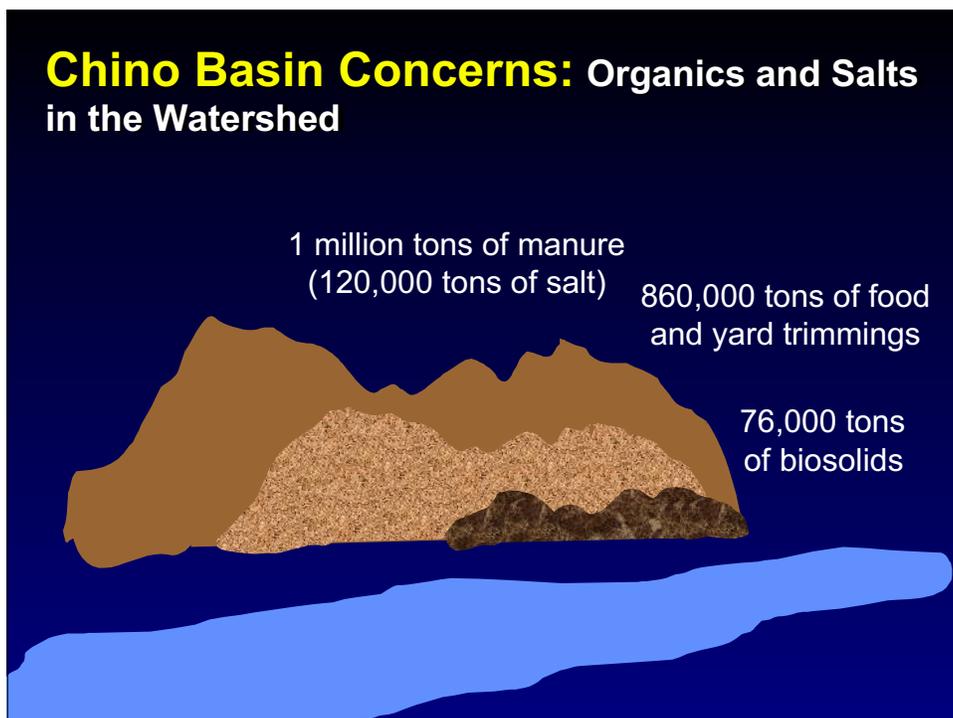
- 330,000 cows
- Wastes include 38,000 tons of salt per year that seep into the ground and river
- Air quality impacts = LAX
- \$1 billion economy
- Largest metropolitan "in-fill" site (50 square miles)



## Chino Basin Concerns: The Environmental Impact



## Chino Basin Concerns: Organics and Salts in the Watershed

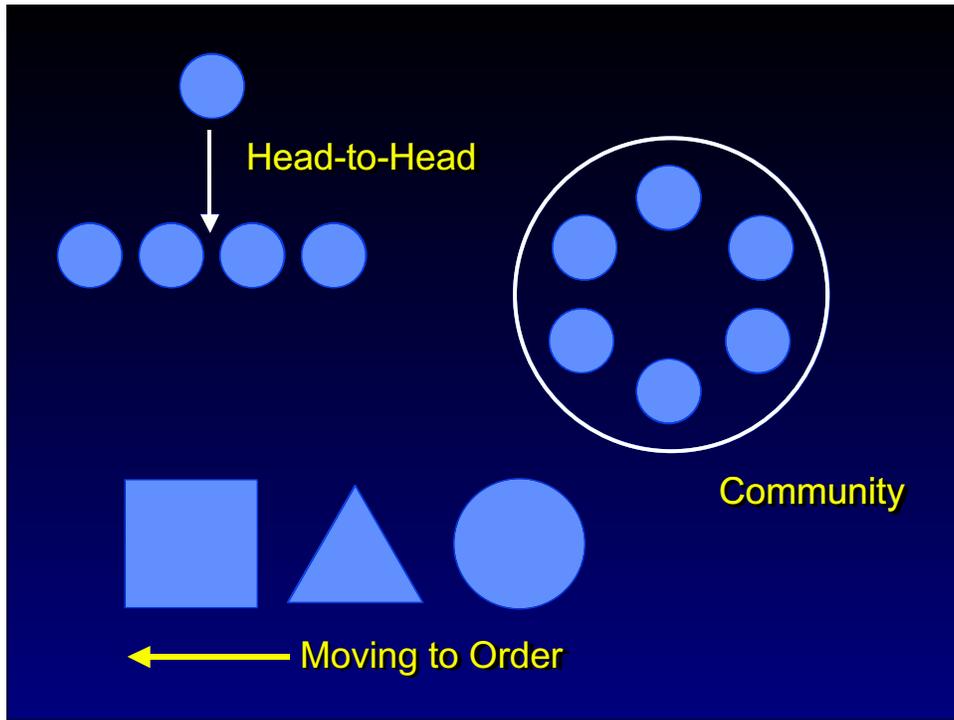


## Wildlife / Clean Water: Impacts to Wildlife Habitat



## Chino Basin: Dairy / Urban Conversion

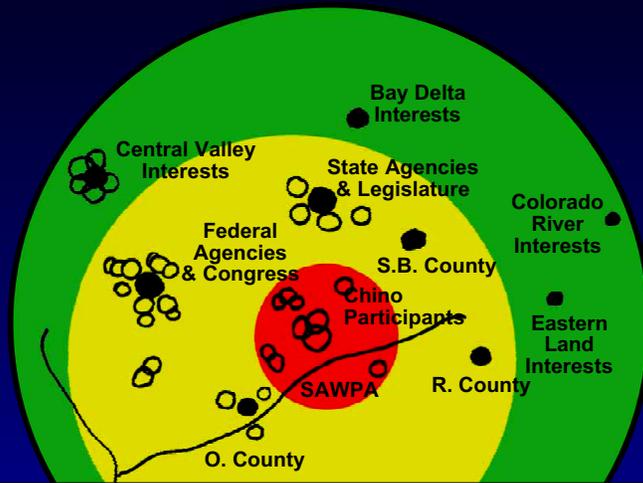




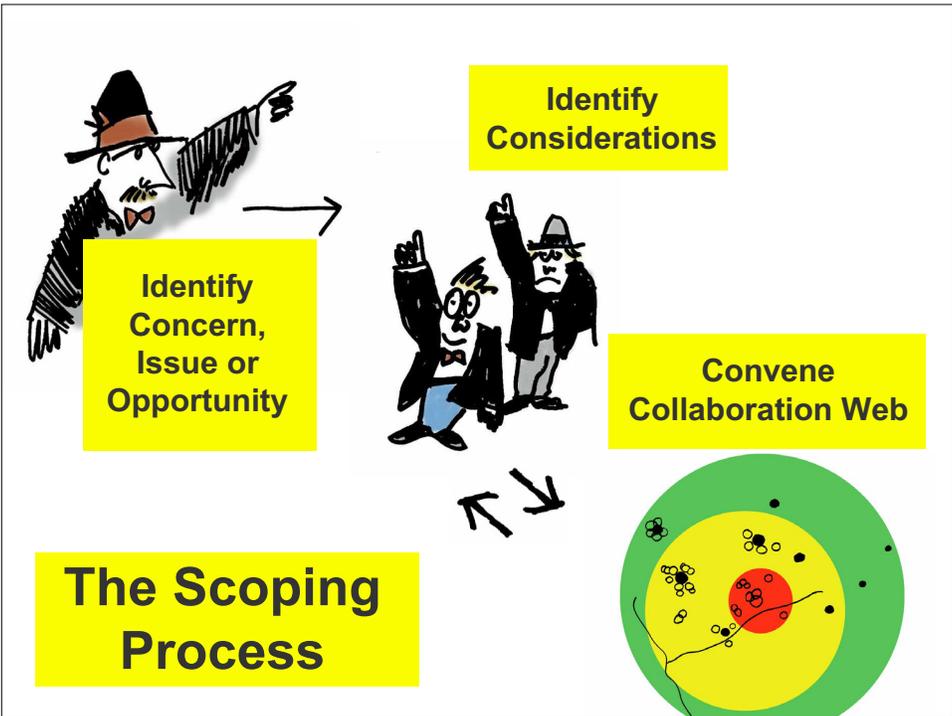
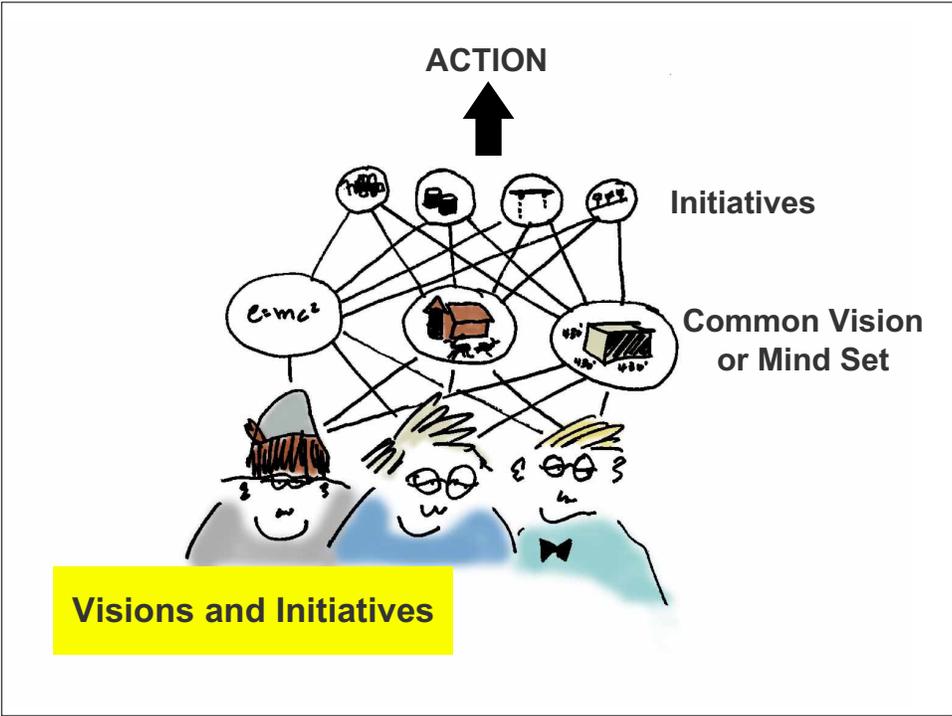
## The Watershed Group:

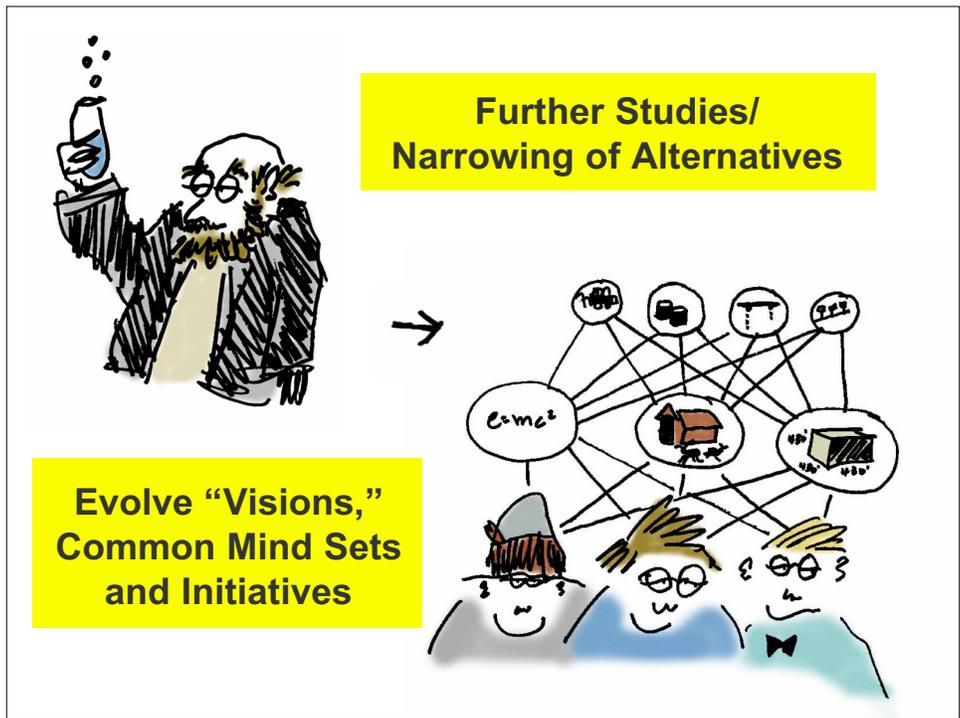
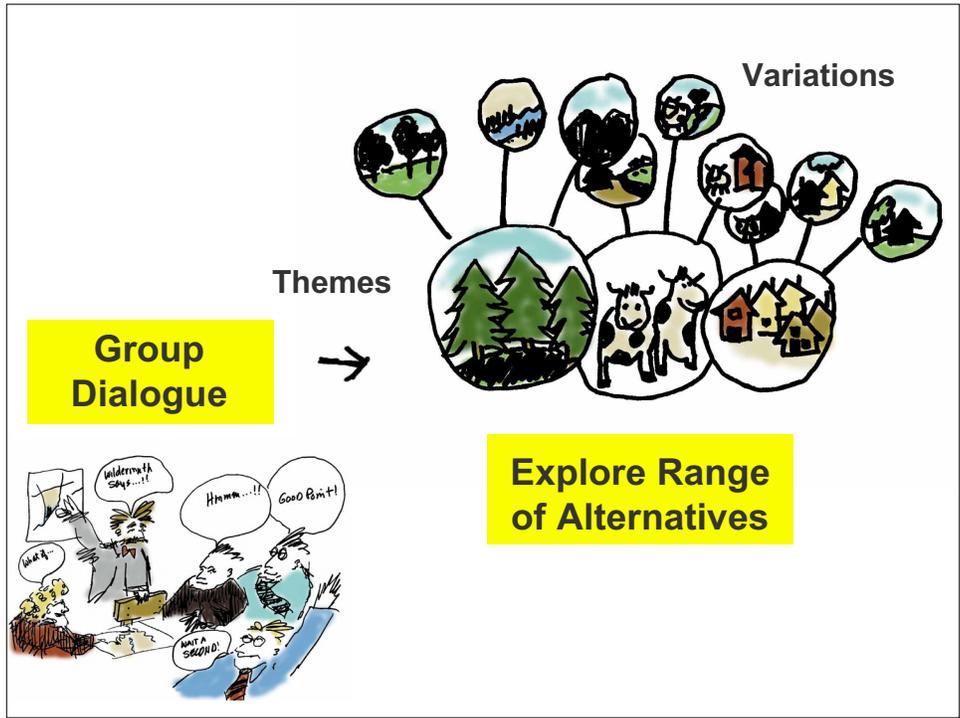


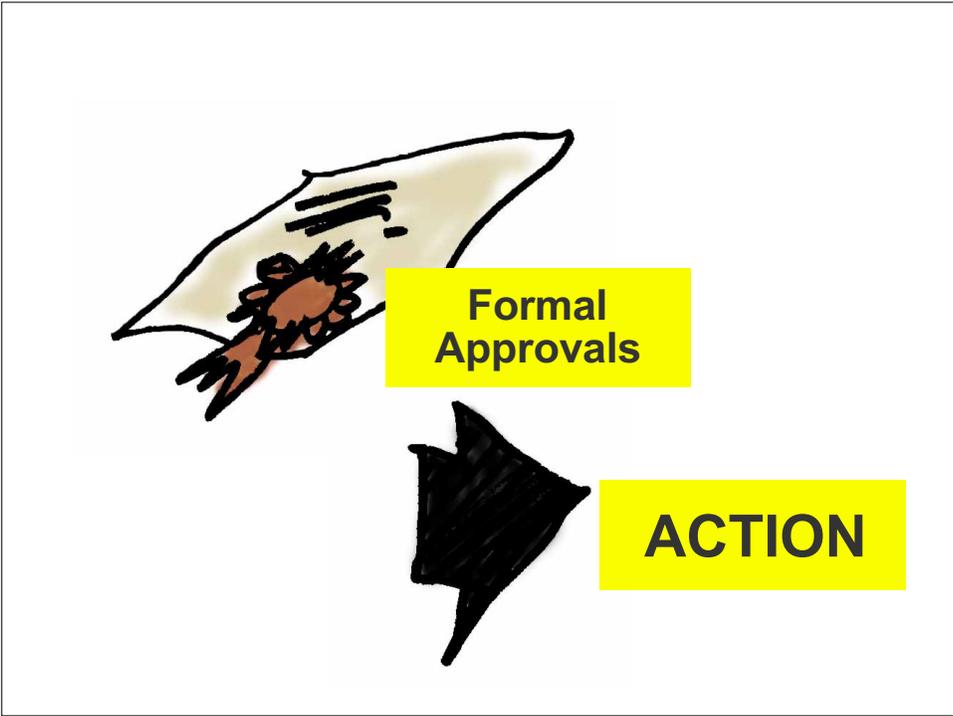
## Strategic Collaboration: Constituency of Affected Agencies and Interests



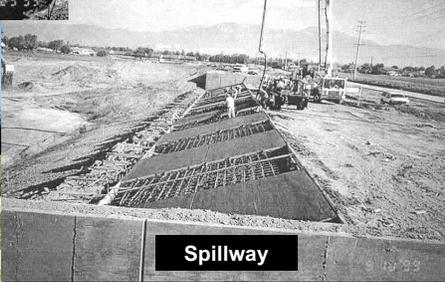
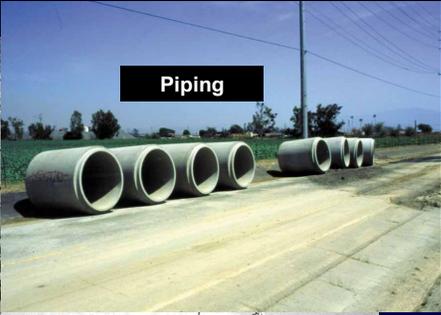
**Dialogue: Active listening, dialogue with civility and compassion**



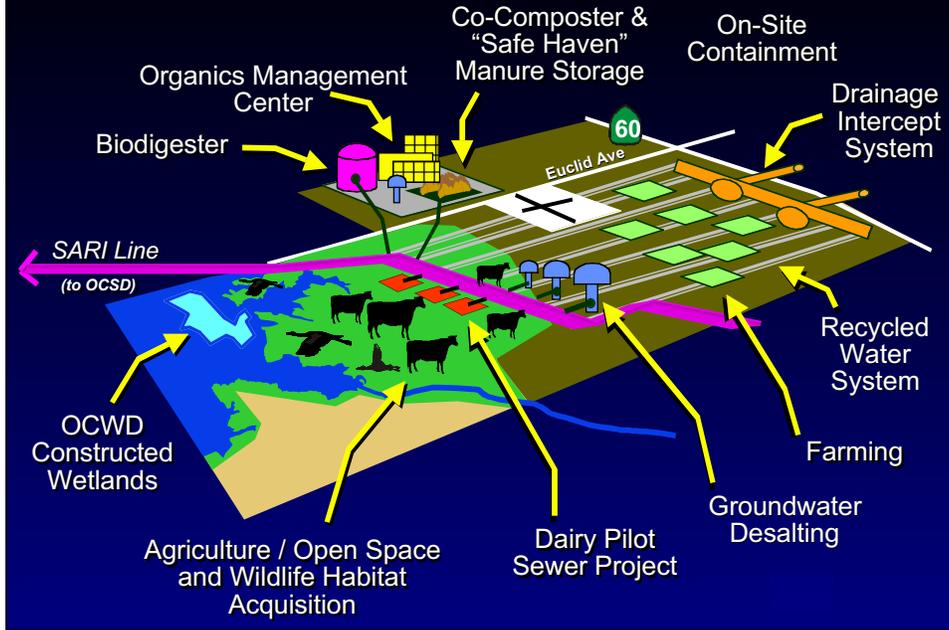




### Chino Basin Initiatives: Grove Avenue Basin

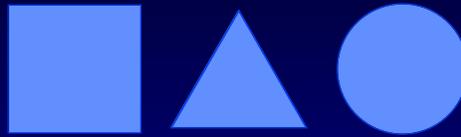
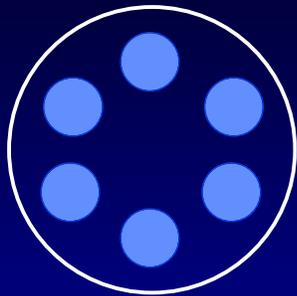


## Chino Basin: Transforming Vision



## Shared Governance

Community



← Moving to Order

# RESOLUTION PROGRAMS ABROAD: LESSONS LEARNED AND OPPORTUNITIES ON THE HORIZON

THURSDAY, MAY 16, 2002—8:00 –10:00 AM

## MODERATOR

Christine Carlson, Policy Consensus Initiative

## PARTICIPANTS

David Batson, U.S. Environmental Protection Agency

William Hartgering, JAMS Chicago

Pablo Pisani, Citizens Participation and Environmental Conflict Resolution, Fundación Casa de la Paz, Chile

Dr. Monthip Sriratana Tabucanon, Deputy Director General, Department of Environmental Quality Promotion, Thailand

Vanchai Vatanasapt, Chairman, Subcommittee of the Strategic Peace Institute, National Security Council, Thailand

## ROUNDTABLE ABSTRACT

Practitioners and federal representatives of international programs will talk about their work in Latvia and Lithuania to provide mediation training, and introduce environmental decision making through mediation in connection with issues arising out of oil spills and other environmental matters that affect the nine countries surrounding the Baltic Sea. Representatives from Thailand and Chile will also describe their experiences in identifying opportunities and barriers to evolving institutional capacity for environmental conflict resolution.

## ROUNDTABLE SUMMARY

## INDIVIDUAL PRESENTATION

### Developing ECR in Chile

By Pablo Pisani

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

Chris Carlson gave the introduction and we hear about the experiences with the use of dispute resolution in other countries.

### Two objectives of the roundtable

1. To hear about what it takes to successfully launch a program and compare the experiences to ours
2. To learn how the U.S. agencies and practitioners can work most effectively with those from other countries

## BACKGROUND ON PCI

### 10 keys to establishing a successful program to keep in mind while hearing other presentations

1. Champions within the leadership
2. Skillful and strategic
3. Capacity building needed more than education and training
4. Need for collaboration
5. Four planning steps: assess needs, make a plan to address them, pilot the plan, and evaluate
6. Take a whole systems approach
7. Create incentives for people to change and try new things
8. Develop policies and guidelines
9. Need resources
10. Remember to reward and celebrate accomplishments

## DR. MONTHIP—THAILAND

- Overview of the regulatory structure
- Challenges to institutionalization and the roles of public participation
- Statutory structure and government framework for public involvement.
- The main goal is to get people involved who are outside the main economy of Thailand.
- 1991—transparency, right to information act in Thailand to give people more access to information
- Public hearing laws: to get people to participate
- Commercial right to environmental management—in the past all decisions were made by the central government. This is to try to get local knowledge and culture involved in participation and the sustainable use of natural resources.
- EIA process—Needs to be done on 10 categories of projects, not only government ones like in the U.S.
- Local authorities are now imbued (decentralized) to make environmental management

decisions

- Land Use Act, 1975—several other acts that support public involvement in environmental management; NEQA, 1992—civil organization of the public to be involved in national environmental quality—major act
- 1997-2001, 2002-2006 National, Economical and Social Development Plan
- Public participation has at times been confused with the concept of public relations efforts.
- Environmental Action Planning Committees were formed with guidelines concerning participation.
- There is still some problem with transparency of the process—each CIO has to provide the information that is requested
- 7235 NGOs registered can request funds from her department to run their activities
- Cooperation between government and NGOs—they worked together in 1985 for the formulation of a national plan
- ECR has become critical in the implementation of these laws and natural resource management in Thailand
- Changed name to Ministry of Natural Resources and Environment—proposed to have an ECR department in the Ministry
- Civil service department is looking at staff for implementation of this new department and wants to understand how the U.S. model works; they need to build capacity with training of mediators and leaders; they need to change the attitude of the agencies

## **DR. VANCHAI—THAILAND**

- What's happening in reality—has been violence in public demonstrations.
- Value of tourism and attractions—very beautiful—now they are going to build a coal plant—problem of siting of facilities becomes major issues—they can't be sited everywhere and there are groups that are protesting them
- Now there are public hearings—will be done after the process, before any decisions have been made. People protest that they do not want to be involved in the public hearings.
- What were the traditional ways? Thai people honor and defer to senior people so that respected leaders do conflict resolution. Monks also were traditionally resolvers.
- Having public conflict is taboo—people avoid conflict but will say things behind your back. Nonconfrontation—compliance to the senior people. Some cultural implications.
- Gas Pipe Line mediation—They brought people together and peacefully. It started okay and then after a few meetings, it died politically.
- Court of Justice—sitting on throne to make decisions is not enough any more so they are implementing mediation training in the courts and also in the villages.
- There is a public participation act but not ADR.
- There is a security problem in Thailand—they believe that problems within the country come from within, not from without—there are not external threats. National Security Office—Institute of Strategy for Peace; Ministry of Science, Technology and Environment; Ministry of Education—President asked each Ministry to write a plan to reduce conflict—they are drafting curriculum for implementation in the schools.
- Center for Peace and Governance—should be knowledge-based—drafting three

curricula: mediation training, CR training—they are also trying to influence the legislators; wanting to talk to the MP in the U.S. and Canada

- Mekong River Commission has been established but not all the countries have signed—started to bring the people together from six countries to learn the economic transition—the process is to bring them together to learn each culture to build friendship understanding and trust.
- Also developed the Institute for Dispute Resolution at the University. Like to build international coalitions for sustainable peace.

### **PABLO PISANI—CHILE, CASA DE LA PAZ (CITIZEN/ENVIRONMENTAL NGO)**

- Overview of things that have happened over the past many years and where things are going.
- Background—CONAMA (Chilean Environmental department)—Environmental Framework Law (1994) was created in 1990
- Chile has been going through the process of democratization since the fall of the dictatorship. Up to 1990, most of the NGOs in Chile were working on human rights issues—a lot of money for that. Most of population didn't know about the ideas of a democratic society—voting and public participation.
- Also EIA, standards and norms, and contamination plans (prevention) were also part of the Framework Law. Mechanisms were created for PP for formal participation—very structured way of participating (60 days) happens once the document or report is presented to CONAMA.
- Other initiatives:
  - Collaborative Tools (voluntary agreements) (public-private partnership to reduce pollution, ISO 14000, etc.)
  - Presidential Order on Citizen Participation
  - Future Citizen Participation Law (discussion of this going beyond presidential order that would mandate collaboration and participation)
  - Zoning Plans
- Some key advances have been made but there are still obstacles:
  - Mistrust among the actors
  - Lack of skills: mediation, communication, and organization skills (locals don't have these and they are more inclined to protest in the street than to get involved in a process)
  - Limitations of citizen participation (timing and influence of the decision)
  - Use of judicial mechanisms as the first and only way to resolve environmental conflicts
  - Belief that people don't have the power to influence decision making
- In some cases these processes of public participation are successful and in others they are chaos. Some communities don't think that the outcomes are enforceable.
- Coal mine and hydroelectric plants are highly controversial. In Chile there is not an even playing field; local people don't have time, knowledge, or resources to get representation

## WORK IN ECR IN CHILE

- Training: Some going on with Casa de la Paz; some from outside people—some with universities in the environmental field; in the last year of education, there is one course offered.
- Case studies: Casa de la Paz and others have been done, 3-4 in the country, which can be applied to other processes; not many.
- Public awareness: Acuerdos have been published to ministers, governors, and undersecretaries—NGOs describing participation.
- Networking: Some initiatives for training have been established; 70-100 people that may be interested in the field but do not do it on a regular basis and there is no government promotion or initiative or demand in the market—but the people who are interested are there.
- General objective: To contribute to the country's governance through the implementation of alternative collaborative initiatives for environmental CR and to enhance consensus building.
- Many people feel that they have fought for democracy and that these types of decision-making processes are not what they fought for.
- They are creating a consortium or center for environmental conflict resolution with Casa de la Paz/University of Chile (Law Department) and plan to build alliances—Advisory Committee, Chamber of Commerce, and others.
- Virtual Advisory Committee: Bob Jones, Rafael Montalvo, Kirk Emerson, and Chris Carlson
- Working Areas
  - Promotion and information on ECR Issues
  - Research on environmental mediation and collaborative conflict resolution methodologies in Chile, Argentina, and Bolivia
  - Capacity building for ECR practitioners (here there are incredible things that have been established in the last 30 years that we can learn from). We don't see the center as the only one—we'd like to have regional centers and provide ECR services.
- Developing Initiatives—U.S. Embassy; Canadian Development Agency; Council of the Americas—finance projects like this.
- Challenges
  - Institutional structure
  - Demand versus supply
  - How to create partnerships
  - Legal aspects and enforceability
  - Types of training programs
  - Draw upon experiences in other fields—family and commercial mediation
  - Neutrality—how do we convince people that we trying to be neutrals today—where does the funding come from—this distorts the whole conversation.
  - Financing

## **BALTIC AREA**

David Batson and Bill Hartgering describe how U.S. EPA was approached and responded to a request from the Baltic Region.

### **DAVID BATSON—BALTIC AREA**

- Latvia and Lithuania—an oil spill in the Baltic Sea that involved several countries—there was a major concern of how to work together to respond to those spills and work together in the future on inevitable future spills.
- The Baltics themselves are going through political and social changes within the countries and this depends on culture and response. There are government interests in collaboration on environmental contamination in terms of their alliance in the EC and NATO. They have had very centralized governments and there is now more of a development of local power for dealing with these issues. There is a strong cultural identity to reach consensus—a strong desire to work together. There is a strong impetus between governments to agree, but in large disputes like the oil spill, the talks break down because there is a lack of framework—legal and financial.
- EPA's former regional administrator in Chicago is the president of Lithuania—and that is how the request came to EPA.

### **BILL HARTGERING—BALTIC AREA**

- U.S. EPA Office of International Affairs approached JAMS—not brought in to mediate but to get governments comfortable with this way OF dealing with the spills and their relationship on this very public issue. So we looked at how do we do training, to get them to work together. We wanted them to move away from resolving the spill and toward creating a mechanism. There is no treaty that dictates how to deal with the issues. Baltic Sea has nine different countries around it.
- We first did an assessment. We had separate and joint meetings in the two countries to get a sense of what people thought of the process and what people needed from training. We tried to create a possibility for this training by meeting with government, NGOs, and Green Parties. First task was to decide who would be invited to trainings—first get governments comfortable—contact NGOs and others to let them know that they would be involved later, but get governments involved first. Instead of having a treaty, they could have a mediation clause to mediate any situation where there would be a process or forum to resolve the specific type of disputes.
- Training—there was a fair amount of anxiety—representatives from middle and high ranking officials—neutral place, short time—separate meetings and then joint training—fluency in language was a challenge—designed a lot of role plays. The purpose is to plant a seed in the government to create comfort in the process for trying to deal with this. Who really ought to mediate this oil spill case if we can get the parties to the table? The idea would be to get them to mediate the first dispute. How does this training lead to training there? So they don't have to bring in outsiders.

## QUESTIONS AND RESPONSES

*Question:* What can we learn from these experiences to network and exchange information? What would be helpful for you (panelists) to have in the way of opportunities for networks and information exchange with people here? What would be most useful?

*Answer (Dr. Vanchai):* The best communication is e-mail—set up networks via e-mail—let us know your expertise. We are looking for people who have been working in schools on curriculum.

*Question (Charles Clements):* When you teach ECR is this perceived as a western import?

*Answer (Dr. Vanchai):* There are many who believe that this is western, but we do believe that this is applicable.

*Question:* How do differences in culture affect the way ECR/ADR gets implemented?

*Answer:* There needs to be more research on the cultural variables; ability of people to get close to decision making, especially where there are major power differentials—government doesn't want it and people don't expect to participate. Anglo Saxon culture, people have expectation of participation. We need to include analysis of this in order to avoid major implementation problems.

*Question (Diane LeResche):* How much we are imposing on others? Are there any people here with experiences that are “frameworks only” to help modified traditional ways of handling disputes?

*Comment:* Facilitating is a way for cultures to create their own processes.

*Comment:* Thailand community forestry (FAO) has collaborative relationships that have developed with Asitsar. We work together to create curriculum.

*Answer (Dr. Vanchai):* I don't think that this is imposing; but there are other questions. What is neutral? You have to be known in order to hold weight. This has to be looked into.

*Comment (Vincente Sanchez):* When you impose, it does not work—it has to get adjusted to the norms of the society. NAFTA and other international mechanisms are there.

*Comment (Batson):* Arbitration is more common in international conflicts. Mediation/ ECR is not the model. So that is the difference.

*Comment (Bill Hartgering):* EU is talking about it a lot, but in a commercial context.

*Comment (Pisani):* Web pages further explain what all this means to the actors—government, practitioners, potential practitioners, NGOs—we are arranging mechanisms such as chat rooms and teleconferencing.

*Question (Carlson):* What are the best mechanisms for communicating?

*Answer (Irmer):* Regarding the U.S. EPA, Thai experience, our office is working through the Office of International Affairs, with a wonderful group in Thailand from the press, government, NGOs, institutes, MP, and universities (30 people) with conflicting views—USAEP (Asia Environmental Partnership helped pull those 30 together) to begin the process and the talks. We have had two teleconferences of excellent quality. We had an agenda created beforehand via e-mail. The problem is the time difference.

*Question (Carlson):* Can we set up sister city/institution relationships? What if we find organizations that can be paired with others?

*Question (Hansen):* Which of these institutions would be the best to establish the nexus for bringing people together internationally?

Answer (Pisani): Organization of American States—we need strategies for incorporating citizen participation in Latin America.

*Answer (Bob Ward):* There already exists a body of common experience. We can learn from Chileans how they have brought those groups together and identify common experiences.

*Question (Carlson):* How you are thinking about putting together the group that needs to be involved?

*Answer (Dr. Monthip):* It would be good to have an inventory of experts as consultants that we can communicate with, and we could contact EPA to provide consultations. We have formal and informal needs; there is a need for training, including training of politicians. Environmental research and training center—training activities at different levels so we need training materials that are well established here. How can we get them, modify them as appropriate, and translate them into Thai? We need to make it simple and easy to understand because it is new. We need to network among ourselves—then we can compare the condition of other success stories. We should promote more Asian country participation.

*Answer (Victoria Duran):* Convening is the most critical issue—leadership to convene the parties. I like the idea of sister organizations. Maybe we need teleconferencing with private sector people explaining their experiences—need help finding people to talk in Spanish about their experiences and successes.

*Comment (Chaplin):* In getting people to the table, parties here come to the table to avoid litigation. In Canada there is little incentive to go to the table. From the department doing the assessment, the perspective is merely that the permit requirements need to be fulfilled and the permit is given—so there is again, no incentive to involve NGOs and others. Canada is somewhere between the U.S. and these other countries. How do we convince people that it's in their interest to use ECR?

There is an enormous applicability—how do we get the information out? There is an enormous need to educate potential customers of ECR. In the U.S. and in other countries—let people know what services are available. We need some type of alliance with the UN for dissemination of information.

*Comment:* Regarding educational materials, could the USIECR be the mechanism?

*Comment (LeResche):* UN University in Costa Rica does training in all those kinds of things. There is a need for some kind of directory with names and addresses that gives an abstract of what's available from an agency or person; there is a need for development of a second track diplomacy in this arena. If capacity building is more than education and training, what does that involve? Justice Institute in Vancouver is offering fantastic training of all kinds.

*Comment:* We need to involve practitioner experts from other countries—invite them to join this function.

*Comment (Dalton):* What about UNITARP? Geneva training—consensus-building training—some at program on negotiation at Harvard.

# Developing ECR in Chile

ECR 2002 Conference  
Tucson, Arizona  
05/16/02



## Background

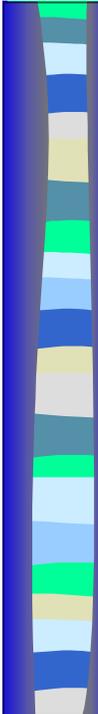
- CONAMA / Environmental Framework Law
- Citizen Participation Tools
  - EIA
  - Environmental Standards
  - Prevention and Decontamination Plans
- Other Initiatives
  - Collaborating Tools (Voluntary Agreements)
  - Presidential Order on Citizen Participation
  - Future Citizen Participation Law
  - Zoning Plans



## Diagnosis

**Key advances have been made,  
but:**

- Mistrusts among actors
- Lack of negotiation, communication, and organization skills
- Limitations on citizen participation (timing and influence in the decision)
- Use of judicial mechanisms as the first and only way to resolve environmental conflicts



## Work in the Field of ECR

- Training
- Case Studies
- Public Awareness
- Network

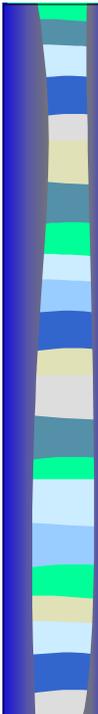


## Institutionalization of ECR

### *General Objective:*

*Contribute to the country's governance through the implementation alternative collaborative initiatives for environmental conflict resolution and enhancing consensus building*

- Consortium Casa de la Paz / University of Chile (ELC and Law Clinic Department)
- Advisory Committee (CONAMA, Chamber of Commerce, State Defense Attorney, and others)
- Virtual Advisory Committee



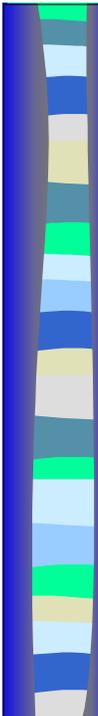
## Working Areas

- Promotion and information on ECR issues
- Research and systematization on environmental mediation and collaborative conflict resolution methodologies in Chile and selected countries
- Capacity building for ECR practitioners
- Provide ECR services



## Developing Initiatives

- FDLA
- CIDA
- US Embassy



## Challenges and Constraints

- Institutional Structure (Stages)
- Demand vs. Supply:
- Partnerships
- Legal Aspect
- Type of Training Programs
- Drawn upon experiences in other fields
- Neutrality
- \$

# **SESSION V: ROUNDTABLE DISCUSSIONS**

**THURSDAY, MAY 16, 2002**  
**10:30 A.M.—12:30 P.M.**

# **CONFIDENTIALITY, THE MEDIA, AND CONSENSUS BUILDING: CHALLENGES TO HOLDING PRIVATE CONVERSATIONS IN PUBLIC PROCESSES**

**THURSDAY, MAY 16, 2002—10:30 A.M.—12:30 P.M.**

## **MODERATOR**

Cherie Shanteau, U.S. Institute for Environmental Conflict Resolution

## **PARTICIPANTS**

R. Greg Bourne and Melinda Smith, Public Decisions Network

Alan Weisman

Ellen Wheeler, Morris K. Udall Foundation

## **ROUNDTABLE ABSTRACT**

Mediators and participants struggle with the need to convene private conversations and the requirements for open meetings. Tensions are created for both the participants and the mediator and can threaten the stability of multistakeholder processes. The roundtable will address questions such as:

- When are the media welcome?
- Under what conditions should the media be excluded? Who decides?
- Who should talk to the media?
- What kinds of challenges do mediators face in dealing with the media?
- How do the confidentiality provisions of ADRA apply to public policy processes, especially those involving many parties?

The presenters plan to actively encourage the audience to share their experiences and perspectives.

## **ROUNDTABLE SUMMARY**

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

### THE RECURRENT ISSUES

- When are private conversations possible in public decision-making processes?
  - ADRA
  - State and Federal Sunshine laws
- What is the value/importance of the “Fourth Estate” (the press)?
- Are there conditions when the press should be excluded?
- How should mediators and stakeholders work with the press?

### SHANTEAU—INTRODUCTION

Alan Weisman is here representing the “news media” in all its forms. Ellen Wheeler is representing the legal perspective on these issues. Melinda Smith is a practicing mediator. Greg Bourne has extensive policy experience and is a practicing mediator.

### Participant expectations

- How to respond to untrue or half-truths in the press?
- Who should be at the table versus having a closed process (participants versus observers)?
- As mediator, is it possible to negotiate with the press about holding off until the process has moved on a little?
- What is the advisability of having an open session with the press invited and also a closed session (possibly alternating)?

### ELLEN WHEELER—LEGAL CONTEXT

- Should ECR processes be done publicly or privately?
- Can we legally have closed conversations?

Note: The mediator asks if a legal requirement for open meetings is applicable.

*State open meeting laws* are applicable where state officials are involved. A quorum of a local decision-making body may require open proceeding. There may be a need to have less than a quorum present to have a closed meeting. The local body’s legal counsel needs to make the determination. The mediator needs to make sure that question is asked.

*Federal Sunshine Act* may apply if federal agency is involved (e.g., FCC, Federal Trade Commission, FERC). Agency legal counsel should make that determination.

*FACA* often does not apply in collaborative dispute resolution process. If a group is controlled or managed by federal agency and advises federal agency, then *FACA* may apply. Open meetings required, notices printed in the Federal Register, record keeping, and other requirements must be met.

*ADRA*: Communications between a party and neutral may be confidential and may be exempt from FOIA (notes and communications from neutral, documents exchanged, caucus or neutral-generated information are confidential). Exception: if documents or things are exchanged with all parties present, then no confidentiality protection is provided. *ADRA* applies to any process to resolve conflict using a third party (neutral or facilitator) if conflict relates to issue related to:

- Issue in controversy re: federal agency administrative program decision
- Conflicts between agency and stakeholders, or between stakeholders

Parties can agree to more confidentiality than *ADRA* (can agree to closed meeting; however, FOIA exemption may not apply to what goes beyond *ADRA*).

*Attorney-specific issues*: If attorneys are involved in the dispute resolutions processes (especially Department of Justice attorneys), federal guidelines may apply that prohibit them from participating in public sessions. (They may not comment on evidence.)

*State mediation laws*: If state agencies are involved, they may be bound by these. Mediator should ask the parties to determine state law applicability.

## **ALAN WEISMAN—PRESS AND CONFIDENTIALITY**

*It is difficult to represent all of "media."* Weisman works with print media. So he polled several members of press and experts in journalistic ethics/ journalistic realities. They are agreed on a couple points: They have a lot of respect for the idea of mediation. It can be a great tool for cutting through court system logjams. But why does mediation have to be held in secret? Why does it have to be confidential? Are we gaining something, but losing something much greater?

*In the area of public policy*, where the government is a party, the public has the right and need to know what its government is doing. When it comes to the government, there is a real question whether anything should ever be confidential. Regarding environment, can anything ever be confidential? Who are parties to an environmental dispute? The environment is the commons – “the stuff around us.” Weisman could think of no example of an environmental dispute where there are only two parties involved. These issues include public health, property values (e.g., TCE in drinking water in Tucson). The cost of cleanup affects all citizens (e.g., Arthur Kill case which was mediated; did \$10 million settlement really clean up and protect all potentially injured parties?). Everyone on the planet potentially loses if the environment is degraded. He referred to examples from his visits to Antarctica doing stories about the ozone hole—people affected by the ozone hole are not parties to disputes that deal with activities causing the ozone hole.

*Mediation can protect information* from disclosure. Might it not be better to have that information come out during a public trial? Our constitution makes provisions for public trials, usually for protection of defendants. But it is also for protection of the public's right to know. Press needs to be present to help protect public. Additionally, information may be leaked (possibly intentionally to benefit individual parties) from a mediation that might not then be admissible in a later trial. The process suffers in a way it would not suffer in case of a public trial.

*Grey areas: proprietary information.* Coca Cola's secret formula is an example. Do proprietary issues mean that they cannot be brought to trial? Proprietary information is not a blanket over all their activities. Also, proprietary information should not be used as a cloak to protect corporations or governments from being embarrassed.

*The press is becoming more and more concerned about secrecy.* Press will become itchier and itchier on this topic. Weisman holds up a *USA Today* with the headline "Secure Is Often Secret." He gives an example of government information that is being held secret—the "language of secrecy order itself is secret." The problem in this country currently is that "everything is being considered secret." In writing an article on electricity deregulation, he found that the present administration views its energy policy as secret as well. He asks: What could possibly be the defense for this position? This makes the press more concerned about what mediators are doing.

*Distinction between general press and advocacy press* (journalists who really represent one side in a negotiation or issue). Advocacy journalism has an important place in our society. Pre-Bill of Rights, there was no opportunity for the public to know what tax dollars were being spent on, or how these decisions were made. Benjamin Franklin, a general interest journalist, and Thomas Paine, advocacy journalist who wrote *Common Sense*, helped make it possible for all of us to "do what we do." And for as much money as goes into U.S. media, more money goes into public relations industry, paid for and used by all potentially polluting corporations and the U.S. government. Advocacy journalists become the public relations side for injured parties in environmental disputes. Weisman says that he'll give them the benefit of the doubt in countering the well-heeled onslaught from other side. Why should press be seen as an impediment to bringing companies to justice for environmental contamination?

Question: What about a transcript being made of mediations for the press? Press would like that. But, audience expresses concern, would it affect the mediation itself?

## **GREGORY BOURNE—CASE EXAMPLES**

In addition to being a professional mediator/facilitator, Bourne is a columnist, so he appreciates the role of the press in society. He is also the director of a small nonprofit that attempts to reengage citizens in the public process—it requires keeping people informed.

*Case:* The EPA asked Bourne and a colleague to conduct an assessment of prototypical environmental justice case—the siting of a PVC facility in a predominantly low-income neighborhood in “cancer alley” (Louisiana). The community was split along economic, rather than racial lines. Issue: Is this something that can be mediated to diffuse emotions and resolve issues? A civil rights investigation was going on; lawsuits were pending; therefore traditional mediation was not necessarily appropriate. They convened a series of three meetings to allow parties to learn what was going on. The case was highly covered in the national press. Meaningful discussions required private conversations. Three confidential meetings were held: state agencies and industry; state and proponents; state and opponents. At the first meeting, a press person arrived, and the mediator reported that the meetings were closed to the press. Had the press stayed, the meetings would not have occurred. The mediator indicated that he’d be glad to talk to the press about the present and future process, but the conversations themselves had to be held privately. The press left without controversy and agreements were reached.

### **MELINDA SMITH—CASE EXAMPLES**

*Case:* In Catron County, New Mexico, the heat of tension between the Forest Service, ranchers, and loggers arose over grazing and logging issues. Threats of violence in the community were covered by the national and international press. A local militia formed and a U.S. flag was burned by them on county steps, and a county ordinance was created that required every citizen to own a gun. A local doctor asked Smith to come into the community and see if anything could be done about the threat of violence. Many members of the community were not happy with how the press portrayed them. They felt their lifestyle was being misrepresented. The first challenge for Smith was that the funder of the process (the local physician) was a documentary filmmaker who wanted to bring a film crew for the first meeting. There was concern that the stakeholders, who had never sat down together before, would not establish trust with cameras in the room. The film crew came to the first meeting against the mediator’s request. He knew some members of the group and had asked the group whether they would allow filming. Despite some reluctance, the group did agree to allow them to film. Over the course of four years, the group had a film crew at every meeting and at field trips. An interesting effect occurred (the Hawthorne effect): All the participants were on their best behavior.

As the group matured, they developed a set of ground rules about working with the media. People could talk with the press, but they needed to represent only themselves and their individual perspectives. The steering committee was to be informed, and they informed all group members whenever the press would be present. There were no limitations on presence of press during group meetings.

*Case:* This was a hot community dispute where the mediators wanted to create an atmosphere of trust, which is the basis of concern about press participation. The dispute involved the decline of the antelope population. Parties were the Forest Service, state Game and Fish Dept, ranchers with good land stewardship and collaborative processes, and a wildlife group. The concern was that a wildlife group had used the press to their advantage to malign ranchers and compromise the Forest Service regarding the lack of

action. Personal enmities had gone on for 20 years. There was a desire on the part of the ranchers to bring everyone to the table in a confidential setting to exchange goals and do some problem solving. It took two months for the mediator to get an agreement to come to the table. Most groups did not want media coverage at the meeting; they wanted to create trust. A set of ground rules was negotiated for the first meeting including that it would be a confidential meeting. But someone let reporters know that meeting would occur; three reporters showed up at first meeting. Several groups threatened to leave the meeting if the media stayed. This was contrary to the ground rules everyone had agreed to.

*Questions:* Allow press to stay? Should we spend meeting time discussing whether to let the media stay or not? Should we tell the media to leave? What happens next if they don't?

*What happened?* Reporters were told that the group had decided on confidentiality as a ground rule, talked about ADRA, and told the press that they would be welcome to a full report (including flip charts and the decisions made), and that at the meeting, the group would take some time to discuss within itself how they wanted to deal with the press. One of the three reporters insisted on staying—and after an “eyeball to eyeball discussion,” finally left. The press was given a full report after the meeting was over. Question: Did the mediator take on too much authority for the group? Should the group have dealt with it themselves? Smith: I felt that getting the meeting to occur had been so difficult that discussion of the press issue would have undermined the willingness to continue. On the second day of the meeting, the group decided that all future meetings would be open to the press.

## **QUESTIONS AND RESPONSES**

*Question:* Does ADRA take precedence over state sunshine laws?

*Answer:* No. States are governed by state sunshine laws. Are there ways to avoid it? Don't have a meeting with a quorum of the group. It's a tricky legal analysis regarding overlapping legal requirements (e.g., state open records law may be more expansive than FOIA).

*Question:* What is the obligation of the media to be accurate and truthful?

*Answer:* The media is obliged to be accurate and truthful. Lazy, irresponsible and corrupt journalists exist. That's true of all other professions as well. Journalists police each other. It is incumbent on anyone who feels that the press got it wrong or they were maligned to complain directly to the press. Corrections are printed regularly. There is a fact-checking process—editors assign a fact checker to call all interviewees to make sure the writer got it right and verify the facts with other sources. More mistakes are printed in books than anywhere else.

*Question:* What should public policy professionals be doing when communicating with the press to ensure accuracy?

*Answer:* The press gets flooded with press releases, and it's hard to fact check them. A

good press agent will be making contacts with the press and will make an attempt to know them. Federal agencies have press advisors. A good press officer will be alerting editors and reporters about upcoming controversial issues and giving significant points. Anyone can call the press; you do not need to be a press officer. Every newspaper in U.S. has made phone numbers and e-mail addresses of reporters available. Reporters do read those letters.

*Question:* Are journalism, news business and entertainment really mixed these days?

*Answer:* The blurring of the line between journalism and entertainment is disturbing. Entertainment is the biggest industry on the planet and it should not be used as news. There is a “tyranny of entertainment.” People have stopped reading. Authors especially need to compete with this to communicate in a language that people are most likely to pay attention to. Weisman represents informative journalism. When he refers to media, he means the news-rendering branches of the media. To the extent that news media has been taken over by large corporations that also run entertainment businesses, there is a big problem. Internal censorship is a problem. Balance and accuracy are two different things.

*Question:* Is talking to press “on background” a way to bring the press into mediation process?

*Answer:* This is an interesting idea. Perhaps even mediators have spoken “on background” or leaked news when they’re disgruntled with how a process is going. Is there a difference? For example, for a mining company and various citizen groups, the mediation process turned out to be beneficial to all involved. Policies about future mining processes were agreed to before the mining occurred. It was pretty boring for the press to be involved, but if a government agency had been involved, it would have been incumbent on the press to be involved (boring or not). Another example muddled by leaks. If there had been a public trial, information would have been public. A lawsuit ensued, information did become public. Are taxpayers paying for public mediation as a substitute for a trial? The public wants to know where their tax dollars are going.

*Question:* How, as neutral, do you manage effects of media war that may ensue when media has been excluded from meetings?

*Answer:* If a position battle occurs in the press, this creates more animosity and may prevent productive conversations from going on.

*Question:* Could you widely invite the media, with one specification: if they come, they must stay throughout the whole process?

*Answer:* This would ensure that the press got the “whole story.” Complete coverage is an important issue in journalism. It would provide a context for the meeting, not encourage focus on one side only.

*Question:* Did Melinda Smith’s second example potentially fall under the ADR Act?

*Answer:* This is related to a decision about grazing policy. An audience participant argued that the parties made a decision to have a closed meeting, which is supported by ADRA; the press has no right to change what the parties wanted.

*Comment (Weisman):* Case-by-case, Weisman cannot think of any cases regarding public lands where the public should not have a right to know what is going on in the meeting, which right can be protected by the press. There is an ADRA exception to confidentiality—where disclosure is necessary to protect public health and safety. If the press were allowed to observe any meetings that involve the use of public lands, there would be no problem. He gave an example in which a journalist convened the meeting of the adverse interests.

*Comment (Wheeler):* Maybe the stage at which meetings are being held is determinative of need/opportunity for public scrutiny. Make press representatives stakeholders, and work with them to identify confidentiality-related interests and work out a process that can address the need for privacy and public right-to-know.

*Comment (Weisman):* There might be such a situation. A blanket law does a poor job of dealing with reality. Using Greg Bourne's example, why should we be "catering" to the company's needs?

*Comment (Bourne):* There are situations in private brainstorming where parties would be comfortable to consider possible solutions that they would never allow to be attributed to them in a public arena. He feels you would undermine the public interest if you do not allow private brainstorming to occur.

*Comment (Weisman):* He feels ADRA was passed by interests that wanted to negotiate important issues in private. More and more is getting proprietary in today's world. Water, plant genetics—all becoming private commodities. He reiterated his concern about "creeping secrecy."

*Comment (audience member, who has worked both sides of the issue):* I strongly support inviting the press in. Otherwise, it encourages distrust and questions about secrecy.

*Comment (audience member):* I suggest briefing and educating the press about what's going on before it occurs. For example, the Gang Summit in Pittsburgh—the press coverage was positively affected by educating them about the objectives of the meeting.

*Comment (Weisman):* This would incur gratitude from the press.

*Comment (audience member):* In the situation where there is an intra- or interagency conflict, what might be ways of handling the dispute? Certain agency personnel might be selected to represent an agency in negotiations. A representative might be willing to take positions in negotiations that will require a good deal of "marketing" internally. The early revelation of position could negate the viability of an option. What happens if information made public gets ahead of mediator's ability to pave the way with parties?

*Answer (Weisman):* These types of things happen all the time. You can negotiate an embargo of information with the press. "On the record," "on background," and "off the record" can all be negotiated. Press challenges to these requests are rare.

*Comment (Bourne):* This is ironic, because openness is what our business is all about. In over 20 years, he can count on one hand the cases where the press has been an issue and feels that having confidentiality protection for certain situations is helpful. For the most part, "the press is our friend." The entire process should be open and transparent. The public should understand how the decision came about and what it is based on. An informed reporter can be a terrific asset to educating the public about the process.

*Question:* Can the mediator go “off the record”? Or is that a breach of our obligations of confidentiality?

*Answer (Weisman):* All experts he talked to had no objections to confidentiality in mediation for private parties. But when government entities and the environment are involved, the objections arise. There are more parties than you can fit into a single room on any environmental issue.

*Question:* How does this relate to executive sessions of public entities? Decisions are still made in public. And executive sessions are the way the press is most abused.

*Answer (Wheeler):* The first question is not whether it must be open; it is “Is there such a level of public interest that the meeting should be open?” Ask, should we be proactive about how we report, how the local press will be satisfied that they are getting the information?

*Comment (audience member):* There is a distinction here between negotiated mediation agreements that include confidentiality provisions versus public processes that are usually open and suddenly become closed.

*Comment (audience member):* Ms. Smith’s second example—respect ground rules, and if the press is unwilling to leave, negotiate with the press.

*Question (audience member):* There are times when members of the press do not see that a particular way of reporting the issues that does not contribute to public understanding, but may contribute to maintaining hostility. What can the press do to assure more responsible reporting?

*Answer (Weisman):* It is a shame that we do not live in a perfect world. He prefers magazine article writing, because he gets more space to cover an issue fully. His view is that regarding the 9/11 coverage, Peter Jennings was the more responsible journalist because he put events in a historical context. The more open (and less adversarial) the mediator and parties can be with the press, the more likely that coverage will be accurate and responsible.

*Comment (audience member):* There are lots of opportunities for negotiation of coverage with media. But mediators need to be careful about being overprotective about the media. If we do our job of creating a safe and comfortable environment for conversation, participants will no longer notice that media is there.

## **OUTCOME**

- Involve the media more widely by:
  - Request they stay for the duration of process
  - Provide a context for the meeting (avoid one-sided reporting)
  - Make transcripts available for portions that the press could not attend
  - Devise a way to provide all media with a complete opportunity to learn all the views (press conference?)
- ADRA / blanket laws do not deal with the usual scenario.
- Preliminary private meetings may be okay, if they’re focused on convening, or where privacy is critical to getting the process off the ground.

- Brief the press early/in advance of discussions occurring.
- Look at the potential of “embargoing” information—this is negotiable with the press.
- “Off the record” is also negotiable with the press, but parties and the reporter must agree.

# RESTORING THE EVERGLADES: EVOLVING STRATEGIES FOR BUILDING CONSENSUS AND RESOLVING CONFLICTS

THURSDAY, MAY 16, 2002—10:30 A.M.—12:30 P.M.

## MODERATOR

Michael Eng, U.S. Institute for Environmental Conflict Resolution

## PARTICIPANTS

Dennis Duke, U.S. Army Corps of Engineers

Robert M. Jones, Florida Conflict Resolution Consortium

Analee Mayes, Consensus Builders Inc.

Dick Pettigrew, Florida Audubon Society

Rock Salt, South Florida Ecosystem Restoration Task Force

Jay Slack, U.S. Fish & Wildlife Service

## ROUNDTABLE ABSTRACT

The roundtable will focus on a thoughtful consideration of the evolving strategies for building consensus and resolving conflicts associated with recent and ongoing federal and state efforts to restore the Everglades. The discussion will emphasize process design approaches used, along with evolving institutional structures and capacity building, and their contribution to improved environmental decision making. A roundtable discussion will follow involving several third-party neutrals and participants in these processes to highlight some of the lessons learned that might be applied to other complex ecosystem restoration efforts.

## ROUNDTABLE SUMMARY

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

### MICHAEL ENG: INTRODUCTION

Session overview: We will first talk about the process of reaching a broad-based consensus on restoring the Everglades, then the challenges of actually implementing that consensus.

### BOB JONES

Mr. Jones provided background on the consensus-building and conflict resolution efforts related to Everglades restoration.

- Key: Politics moved from confrontation/federal/regulatory approach to collaboration/state/nonregulatory approach
- Maps and history of the region
  - National park formed in 1947; sugar industry grows in 1960s; Everglades Coalition of environmental groups formed in 1968; population growing in the region; mediation and lawsuits in the 1980s.
  - Policy focus changed from agricultural use to flood control and pollution to restoration
- Steps in addressing ecosystem problems: 1) identify threats; 2) accept responsibility for taking action; 3) design and implement appropriate measures
- 1980s lessons learned: 1) leadership counts; 2) Muir's Law applies: "Everything is connected to everything else"; 3) Everglades is a complex system—should deal with it more broadly as a system
- 1990s challenges
  - Poorly connected regulatory and planning frameworks
  - Multiple stakeholders & decision makers; intergovernmental wrangling
  - Short and long term impacts of water policies
  - Uncertainty leads to challenges
- Restoration Task Force created in 1990s; Comprehensive Everglades Restoration Plan (CERP) passed 2000—many steps in getting to the plan

### RICHARD PETTIGREW

Mr. Pettigrew provided overview of the Governor's Commission on a Sustainable South Florida process used to achieve consensus on conceptual agreement for restoring the Everglades.

- Canals and rivers drain water away from Lake Okeechobee
- Three categories of land use: for water conservation areas; for sugar farming; and for residential development

- Coastal ridge on the east keeps Everglades water moving south
- Canals built to west coast and water removed by rivers reduced water flow to Florida Bay—ecosystem suffers as a result
- Problem: No way to store surface water (important because there are rainy and dry seasons)
- Threat: Farmers rely on water from the Lake Okeechobee (problematic if they want to put the water back into the Everglades)
  - Also threat to utilities
- Key: Take water we're wasting and find ways to store it, distribute it in a timely manner to replicate former ecosystem
  - Also stop seepage loss out of Everglades
- Additional goals: Maintain water supply to agriculture and urban areas (provide assured allocation of existing water)
  - Future increased demands not guaranteed to be met; depends on project outcomes
- Lessons learned
  - Key stakeholders must be represented (because the consensus building process can be stopped at so many places) and there must be benefits to them
  - There are extremists on all sides (do not bring people to the table who will never agree)
    - ΔHear their concerns but you don't have to give them a vote on the commission
  - Do not try to end-run the process once consensus has been achieved
  - Establish fair rules and a transparent process
- Try to push development back to the coastal ridge
- Many other initiatives recommended by the commission: improving economy, brownfields, etc.
- Conceptual plan unanimously approved by everyone at the table
- Key to reaching agreement: Plan did not take water away from anyone
- Key in developing trust: Must have sufficient time; don't push it—also, getting to know one another personally
- Key: Great amount of commitment required
- They used committees and reports back to the whole group
- Public could attend any meeting and comment on any part of the process
- Consensus had to be reached because the outcome was final
- Patience, time, quality of people participating are key

## **Rock SALT**

Mr. Salt provided an overview of interagency cooperation.

- Interagency agreement was developed to include many federal, state, tribal, and local governmental groups
- Duties of task force: Coordinate restoration programs among various governmental entities
- Three reflections:
  - Intergovernmental coordination is fundamentally different from the stakeholder process

- ΔAccountability is more specific
- Preservation of authority and jurisdiction of all entities; did not try to develop inter-agency plan; each entity makes decisions in accordance with their mandates
- Must go big to get above intractable issues (i.e., work at high enough levels within agencies)

## **DENNIS DUKE**

Mr. Duke talked about challenges of implementing the agreement on a conceptual plan.

- Keep eye on big picture—don't get bogged down in the details
- Engineering alterations to Everglades area for flood control were successful but hurt ecosystem
- Ecosystem problems: water quality, water shortages, reduction in wetland areas, declining estuary health
- Specific case study: an endangered bird (Cape Sable Seaside Sparrow)
  - Discussed water management plans to try to move water and provide sparrow habitat with appropriate amount of water
  - Problems: plans worked technically for moving water from one area to another but natural rainfall events presented a continual challenge; in addition, differences were seen between modeling results and on-the-ground operations
  - Conflict resolution process was used to address these problems in an interim operational plan (IOP) for the Cape Sable Seaside Sparrow
  - Challenging issues:
    - ΔOther endangered species impacts
    - ΔEndangered Species Act requirements vs. private property rights
    - ΔSatisfying all parties
    - ΔMeeting statutory requirements for other purposes (i.e., flood control)

## **JAY SLACK**

Mr. Slack talked more about implementation of the Interim Operational Plan (IOP) for the Protection of the Cape Sable Seaside Sparrow and keys to the success of the negotiation process.

- Intergovernmental players—U.S. Army Corps of Engineers, South Florida Water Management District, Everglades National Park, U.S. Fish & Wildlife Service
- Lot of projects going on as part of Everglades restoration program are moving into the implementation phase
- U.S. Fish & Wildlife Service look at endangered species and whole ecosystems—developed multi-species recovery plan—holistic management (new approach)
- Going well so far
- Sparrow is symptomatic of the ecological conditions—used as a measure of ecosystem health
- Conflict resolution process—got everyone together, got everyone speaking the same language

- Set ground rules for the process and established shared goals for the process
- Spent a lot a time understanding each other’s roles and agency capabilities
- Separated technical issues from management/policy issues
- Removed roadblocks to reaching agreement
- Provided fresh leadership for the issues
- Focused on common ground
- Distinguished between the wants and needs of everyone
- Identified key people within each agency
- Set up elevation process to resolve impasses and make policy decisions as required
- Tried to represent all stakeholders
- Provided adequate resources and support so staff can devote time and energy to the project
- Preferred to have decision makers at the table, so issues don’t have to be elevated
- Empowered people going to technical discussions and meetings to negotiate and reach agreements
- Nine words of wisdom
  - Don’t change the ground rules once established
  - Don’t wait too long to elevate unresolved issues
  - Be direct about your needs and interests; don’t focus on positions
  - Last minute changes are bad
  - Litigation issues need special consideration
  - End-running by staff is bad because it undermines the process
  - Public outreach is important to be sure they are in agreement and the agencies are explaining themselves well
  - Stick with the decision you’ve made

## **MICHAEL ENG**

Mr. Eng talked a bit about the interagency conflict resolution process.

- Started with conflict assessment
- Because there were long-standing interagency conflicts, it was necessary to work on building familiarity and mutual trust, in part, through an interagency retreat
- Interagency teams are working together collaboratively now

## **ANALEE MAYES**

Ms. Mayes talked about a facilitator’s perspective the interagency conflict resolution process.

- Working on an interim agreement (IOP) and a long-term solution (CSOP)—Combined Structural and Operation Plan
- Achievements
  - Dialogue/engagement of the agencies
  - Collaborative skill building involving use of single text, use of neutrals, joint problem

- solving, and establishment of ground rules for the process
- Common vision for the project was developed at an interagency retreat
- Agreements have been reached on IOP
- Challenges
  - Trust (especially among stakeholders who were not included in IOP negotiations)
  - Large number of stakeholder parties
  - Mistrust of government
  - Ongoing litigation
  - Skepticism about agency commitment of collaboration
  - Meeting fatigue/staff burnout
  - Confidentiality of negotiation discussions
  - Staff turnover—has had both good aspects, but also presented additional challenges
  - Time required to build agreements and time constraints of project schedules
  - Coordination with the Comprehensive Everglades Restoration Plan
  - Modeling issues and technical nature of solutions

## QUESTIONS AND RESPONSES

*Question:* These challenges you discussed are challenges for every collaborative issue. How are you managing these challenges? Trust?

*Answer:* Bring people together. Hold an interagency retreat. Build in time for people to get to know each other. Use the Internet to post options being evaluated, have comment panels to discuss each of the options—openness. We need to proceed despite the lack of trust. Get initial buy-in through establishing ground rules, etc., and then give it some time. Give trust-building challenges. Have people hold themselves accountable if they're interested in building trust. This can be solved with good leaders.

*Question:* What is it about the nature of the leadership that made the difference?

*Answer:* On the stakeholder side—people who can represent their interests effectively and not be on the fringe (they need broad-mindedness in representing their interests). On the governmental side—keep your eye on the larger goal and make sure people are proceeding effectively. Challenge the staff to consider alternative views. Also, create opportunities for leadership—in committees, etc.

*Follow-up question:* Are you saying that through the development of their capacity for collaboration, the group developed as a team?

*Answer:* Yes.

*Question:* How did you identify these “extremists” that were excluded from a place at the table?

*Answer:* The extremists really identify themselves through their reputation. These are people who are always critical of anything moving forward, yet they never come forward with suggested solutions.

*Question:* How did the Governor’s Commission manage the media?

*Answer:* The Governor’s Commission was an open process with no restrictions on

media access. If you said something, you would have to face your peer group. The media attended early but not attend continually because it was a slow process.

*Question:* How can you keep up the momentum during the implementation phase? What roles do you see of advisory groups in the implementation and how do you keep them involved?

*Answer:* The new governor's team allowed the original commission to expire and then created a new Everglades Commission. However, it was a missed opportunity since there was no commitment to build consensus. There is now a second attempt at establishing another commission. It has potential but hasn't fully bought into yet using a collaborative approach.

# **MENTORING, COACHING, AND BUILDING INSTITUTIONAL CAPACITY: WHAT ARE WE REALLY TRYING TO ACHIEVE AND ARE WE APPROACHING THE TASK STRATEGICALLY?**

**THURSDAY, MAY 16, 2002—10:30 A.M.—12:30 P.M.**

## **MODERATORS**

Juliana Birkhoff, The Policy Consensus Initiative and RESOLVE  
Marion Cox, RE\*SOURCE Associates

## **PARTICIPANTS**

Deborah Dalton and Lee Scharf, U.S. Environmental Protection Agency  
Lucy Moore, Lucy Moore Associates

## **ROUNDTABLE ABSTRACT**

The field of ECR is in the early stages of building institutional capacity through initiatives such as mentoring and coaching. These strategies are very different from training programs and different resources have to be mobilized to support such efforts. Agencies with different organizational structures will likely need distinct approaches to truly support capacity building within their own organization. The roundtable discussion brings together senior practitioners and agency ADR specialists who share a passion for developing effective ways to build capacity through mentoring and coaching. Each participant has approached this type of institutional capacity building from a different perspective, has different ideas about what needs to be achieved, and uses different techniques.

## **ROUNDTABLE SUMMARY**

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

### DEFINITIONS

The panelists began by discussing their definitions of mentoring. Lee Scharf explained that mentoring is a state of mind, a conviction. She stressed that it is our responsibility to pass on our knowledge. Deborah Dalton defined mentoring as a continuous learning process for both people. She believes we learn as much as we teach and train in the mentoring process. Lucy Moore stressed there should be a loop to continue passing knowledge along for others. This is how the field will insure that new people continue to come into the field. Juliana Birkhoff summarized the key aspect of everyone's definitions of mentoring as the developmental learning aspect. In mentoring, we enter into developmental relationships where we work with people to develop their knowledge, skills, and attitudes.

### APPROACHES

The panelist next turned to the mentoring approaches that they and their organizations have taken.

Lee noted she had been mentored by many of the people present in the room. She was grateful for others who had given her confidence. She continues to seek out mentoring relationships and explained that it can be extremely valuable to ask mentors specific questions regarding cases. Lee explained that it takes a lot of time to mentor people well. For her, mentoring is an information process full of potential.

Lee described the U.S. EPA's Brownfield program and how it provides opportunities for mentoring in the Superfund program. They have twelve pilot projects under this program. There have been several opportunities for mentoring. The facilitator can use the pilot to work with community members to teach them how to facilitate. She noted success in the Shenandoah Valley in Virginia for community members to learn how to facilitate and become part of the process.

Deborah was mentored into the conflict resolution field when she moved out of Superfund litigation. She explained that she has had excellent experiences working with interns, which has taught her a lot about mentoring. Several years ago SPIDR discussed how to increasing diversity in the field. That conversation challenged her to come up with a program. They are working with an environmental careers organization in Boston to begin an internship programs focused on increasing the diversity of practitioners in the field. They will be looking to catch people before they begin other environmental careers. These would be people who have little to no experience with conflict resolution. They will identify 8–10 people for a weeklong summer course and then send them out to their mentoring/interning site. Although they will begin the program next

summer, they are beginning the process now. She explained that there are a number of private organizations interested in the mentoring program as well.

Deborah said they would also have a session for those who are interested in mentoring to teach them how to develop “purposeful developmental relationships.”

Lucy decided to do something to diversify the field. Since she is a solo practitioner, she decided that her tactic would be to implement mentoring clauses in contracts. The clause states that as she works with a particular organization she will donate at no cost to the process, the cost to mentor a person, one hour before and after each session. She is pleased she has a way to give back to the field. She also hopes that besides giving people specific skills, the idea would spread throughout the field.

Lucy said there were tremendous benefits from the mentoring. She has gotten process help from those she has mentored, which can be a very valuable learning experience for them. She has had interesting experiences and some of the people she has mentored have shifted their work towards mediation.

She said she has been surprised that clients do not always notice the mentoring clause. She is also surprised that she has not produced a big change in the field. Besides the mentoring, she has also offered day-long trainings for those interested in facilitation or mediation (including an experience in a junior high school, which she will not do again!). She urged people to try mentoring, that we needed to keep the field revitalized with new faces and blood.

Juliana explained that the RESOLVE program had a different focus—how to mentor and coach people into collaborative leadership roles. She began by looking at different types of programs in communities, especially Big Brother/Big Sister programs. She also talked to people in business to learn what they had developed. Finally, she read the research on mentoring and coaching to find out what worked. From this, they developed a 40-hour curriculum to teach mediators how to mentor and coach stakeholders. The program includes several goals:

- To help mediators understand the concepts and dynamics of the coaching and mentoring process.
- To train mediators in coaching skills.
- To teach mediators how to support their learning partners in their growth and learning.
- To help mediators gain confidence as coaches and mentors.

She explained that the training covered several topics including:

- How to do goal assessment, how to create a climate for mentoring and coaching
- How to develop trust and confidentiality, support, etc.
- How to manage expectations and requests
- Learning when to use what type of model
- How to ask good questions
- How to frame or set up challenges (for specific learning situations)

- How to uncover hidden assumptions when things don't work out
- How to bring dilemmas to the surface
- How to let go gracefully of your learning partner

RESOLVE mediators have used the skills in a number of ways. Some mediators developed mentoring and coaching projects and others included the skills into their regular case and training projects.

Lee concluded the presentation by sharing some resources with participants. She noted that there was an article by Lucy in a SPIDR newsletter from a few years ago, which discussed mentoring. *The Mennonite Conciliation Quarterly* (Summer 2000, Vol. 19, No. 3) is devoted to mentoring. RESOLVE's Web site has ideas on mentoring. Finally, Lois Zachary wrote a book on how to become a mentor, published by Jossey-Bass.

## QUESTIONS AND RESPONSES

The panelists invited the participants to ask questions or share their experiences with mentoring.

*Comment:* We need to be aware of the type of role model we set. Mentoring takes a level of risk taking that is different. She explained that it has been a journey in her organization to recognize what they do not know.

Lee noted that there were several tips for mentees:

- Think critically
- Take your own power
- A good mentee pushes a mentor from behind
- Know when it is time to move on
- Know you will eventually move on
- Look for someone you respect

*Question:* An audience member said she was working with conflict resolution organizations on how to bring members from the Latin American community into the field. She believes mentoring is important because there are not a large number of Spanish speaking mediators currently. She wondered if there were incentives to draw people from the conflict resolution field into the community. How do you create incentives to bring mentors in?

*Answer:* Lee suggested that she should just start asking. She explained that one of the problems in the conflict resolution field was in getting attached to cases. She urged people to call a practitioner and ask if you can help record with a particular session.

*Answer:* Lucy recommended that people be as forceful as possible. However, she noted that you are lucky if you get a chance to be mentored. She also explained that she had gotten work through people she had mentored. It is very much a two-way street.

*Answer:* Juliana suggested that when you ask practitioners you should be as specific as possible about details, expectations, time commitments, relationships, etc., with mentee and mentor. It helps if people know what they are getting into.

*Question:* An audience member said she wanted to discuss institutional capacity. She was thinking about this at both the individual and system level. She noted that we were not only discussing practitioners, but were talking about users as well. We were talking about doing this at a number of levels.

*Answer:* Juliana said that this is one of the reasons RESOLVE developed their capacity building program. As an organization, of course, they are worried about the diversity in the field and are working with others on that. However, RESOLVE is also concerned about people who are asked to lead or participate in a process they are not ready for yet (it is a stretch just beyond their capacity). She worried that strategically we are linking all of the pieces in the field together.

*Answer:* It was noted that it is important to begin this process, and a good point is through mentoring and coaching.

*Question:* An audience member explained that she was currently a graduate student. She asked where she could get opportunities for concrete facilitation/mentoring positions.

*Answer:* Lucy explained that larger organizations have opportunities for internship programs. She agreed that it is a dilemma of how to start in the field. A mentor gave her some experiences to become good at what she does. However, there remains a problem of how to jump into the field.

*Answer:* Juliana outlined several steps the student could take. First, apply to the big organizations, state, and federal agencies. She said to call them, tell them what skills you have. Second, she said call the senior mediators in your area. Tell them you will do any administrative or organizational work, do the menial work at first, and then slowly work up into facilitating smaller break out sessions.

*Answer:* Deborah reminded the group that many people have gotten jobs doing other things in agencies and then used their skills to pursue ADR work. She explained that you start by facilitating meetings, etc., within your organization. She also noted that there were a number of other things that were related that you could do with a background in conflict resolution. How do we increase demand? We need more paying clients for many of the people coming out of the university program. She suggested that there were a number of community disputes that one can take part in. There are a lot of community groups—look for community conflict where they might not be aware of ADR processes. Finally, she urged the student to find senior mediators in her area and ask them to work with her on a project that she had identified.

*Question:* An audience member that said we have a large environmental community on the reservation. Conflict, at a large scale, is not part of our daily life. What advice do you have to be able to overcome systems, people who are not interested, how to start the process of mentoring, and how to educate others about the mentoring process?

*Answer:* Lucy suggested that a cultural training program could be an interesting way to educate others about this process.

*Answer:* Deborah replied that she had been to a number of diversity trainings, but one that she went to recently really gave her some specific tools that were helpful. This could be a good way to begin the dialogue process.

*Answer:* Juliana said not everyone is in the right place to be a mentor. We have talked a lot about how to match up the right people and process. Mentoring is about developmental relationships, if people are not interested in being in that kind of relationship, then this approach will not work.

*Comment:* An audience member remarked about questions from people on how to get into the field. She suggested that there was a tendency to not be bold and to follow the direction you want to go. Follow the direction that you are really interested in. If your goal is to be a mediator (or whatever it may be), follow that!

*Comment:* An audience member noted that she taught conflict resolution in the University. She has students immerse themselves in a situation that they have not had a lot of exposure to. She does this to build cultural confidence. She suggested that this could be something that can be adapted to training.

*Question:* An audience member wondered if the field could create, between perspective mentees and mentors, a job-posting/mentoring-posting board on the ACR or similar Web site?

*Question:* An audience member explained that he had often found that people of similar cultural background could provide positive collaborative situations, especially guided mentor situations or programs. A mentoring program has to be self-sustaining. He asked how we effect change, how to go beyond training?

*Answer:* Juliana responded that you had to deliberately create and support peer networks and knowledge transfer. You have to integrate these ideas into your training approach. Without follow-up and support, including mentoring and coaching, people cannot apply the new knowledge, skills, and attitudes in their own environment. You cannot build institutional capacity unless you support individuals as they apply their new skills in their own institutions.

*Question:* An audience member noted that she had a number of experiences, was interested in getting into the field, and had lofty goals. She wondered how she could get into the field without doing an internship (need to pay the bills).

*Answer:* Juliana explained that she needed to take her resume, and using the ACR Qualifications for Environmental Practitioners publication, repackage it. Take every experience and list it according to the sets of skills that an environmental mediator needs to have. Then she should take her resume to a senior mediator in her area for review. After review, send it to the people in her community, area, and around the country.

*Answer:* Lucy suggested that she needed to put herself in the position that you wanted to be in.

*Comment:* A panel member recommended: Get a dirt bike, or join an organization, or get a jeep, or a mountain bike, and join the group. Follow your recreational pursuit and then help that group out because they are bound to have conflicts.

*Question:* An audience member thanked the panelist, noting that strategic thinking was very helpful. She said in her group they had difficulties in mentoring—finding time, funding, etc. She asked, if we are going to think strategically, what should we be doing in the field to match people up and to fund this type of mentoring program?

*Answer:* Deborah noted that it comes back down to needs and demands. There is a strong need to create demand for the people who are graduating from universities and others with skills.

*Comment:* A panel member ended the discussion by explaining that there is demand. The field needs to recognize what is going on, the demand is there; but we need create a higher level of thinking on these issues.

# ANALYZING CONFLICTS FOR DIAGNOSTIC CONSULTATION AND ASSESSMENT

THURSDAY, MAY 16, 2002—10:30 A.M.—12:30 P.M.

## MODERATOR

Scott McCreary, CONCUR, Inc.

## PARTICIPANTS

J. Michael Harty, CDR Associates

Howard Raiffa, Harvard Business School

Greg Sobel, Environmental Mediation Services

Elissa Tonkin, U.S. Environmental Protection Agency, Region I

## ROUNDTABLE ABSTRACT

Conflict assessment is increasingly being used prior to advising or engaging parties in ECR processes. Some practitioners assert that a well-designed conflict assessment is a vital precondition to a successful mediation. Others are more circumspect about the scope, value, and attention that a conflict assessment should get in the context of a proposed mediated negotiation or other consensus-based process. Still other practitioners (and many academicians) suggest that if we paid more attention to theory, we would conduct our conflict assessments in a more effective manner.

This roundtable will seek to examine and catalyze discussion on the following questions:

- How can we better apply theoretical insights and analytical rigor to these assessment processes?
- What role does strategic planning play in launching, conducting, and interpreting conflict assessments?
- Is there a meaningful typology of conflict assessment methods?
- What role should agency proponents of the use of ADR play in helping shape best practice on the use of conflict assessments?
- Where should the field go next on conflict assessment?

Participants in this roundtable will discuss classic and emerging theories of social conflict and negotiation processes as they apply to this work. A strong synthesis of theory and practice is expected.

**ROUNDTABLE SUMMARY**

**INDIVIDUAL PRESENTATION**

**What Is Conflict Assessment?**

By Howard Raiffa

# ROUNDTABLE SUMMARY

## SCOTT McCREARY—INTRODUCTION

Over the next two hours, we aim to engage our panel and the other participants in discussing the following:

1. What is a conflict assessment/conflict diagnosis?
2. Is there a useful typology of conflict assessment activities?
3. How can we make fuller use of theory and research? What cues can we take from bargaining theory? What tools and methods can we take from social science research to beef up conflict assessments?
4. What strategic considerations should shape a conflict assessment process? Are there meaningful distinctions across domains of conflict resolution activity (litigated versus nonlitigated context)? What are the respective roles of convener, assessor, and mediator?
5. What is the role of convening agencies? What are the current roles of convening agencies in encouraging preparation of conflict assessment/conflict diagnosis? What special relationship, if any, does a conflict assessor have with the convening agency? What ethical or practice problems does the special relationship pose?

I predict with some confidence that this will be a lively session, because this morning at breakfast, in reviewing these questions, we actually started having this debate. So let's go.

## QUESTION 1—WHAT IS A CONFLICT ASSESSMENT/CONFLICT DIAGNOSIS?

### ELLIE TONKIN

There are conflict assessments and there are conflict assessments. It is hard to imagine an ADR process without some kind of assessment/diagnosis phase, regardless of how formal or informal. It may take a minute or a year; it may be unspoken, oral, or written; it may or may not be based on an established model. Formal, comprehensive Assessments, with a capital A, that result in lengthy written reports seem to be taking hold—and I'm not sure this is a healthy trend.

When you're facing a difficult challenge, it's not always useful to appreciate the full force of what you're getting into. Parties who are stuck need a way to move forward. Being confronted with an exhaustive review of the issues and interests and obstacles to resolution may be more paralyzing than motivating. Moreover, these elements are generally in flux and are, in many cases, not easily accessible to early evaluators no matter how sophisticated their interviewing skills. In addition, writing them down for all to see can have the adverse effect of gluing them into place. This calls the analysis and recommendations into question.

At best, a careful, modest assessment can give parties useful insight into their situation and provide a vehicle for progress that otherwise might not be possible. At worst, a formal, comprehensive, written assessment can do damage. Initiated without the consent of all parties (often by necessity, because it isn't yet known who they are), it might have the effect of benefiting some parties at the expense of others; it might mislead parties with speculative or incomplete information; or it might overwhelm the parties and inhibit constructive dialogue. It might also presume to do or say for them things that they would be better doing or saying for themselves. Less alarming but still troubling is the overkill factor. Formal conflict assessments cost a considerable amount of time and money, two things that are usually at a premium and should not be squandered.

The challenge is to find the right balance. I favor a more incremental approach in which the parties have more responsibility for shaping the process as they go along and the neutral's written products—especially to the extent that they characterizes parties' perspectives—are kept to a minimum.

### **GREG SOBEL**

*Conflict Assessment:* "Objective evaluation of the situation conducted by a neutral process expert, based on confidential interviews with stakeholders, to recommend whether a consensus-based process is likely to be fruitful, and if so, how it should be structured and prepared."

The key elements of this definition are as follows:

*Objective evaluation:* A conflict assessment looks at all perspectives from a viewpoint that isn't biased towards any particular outcome.

*Conducted by a neutral process expert:* The term conflict assessment is generally used for evaluations by mediators or other nonbiased third-party neutrals.

*Confidential Interviews:* Conflict assessment findings and recommendations are based on data from interviews. Confidentiality (i.e., no attribution by name or organization) encourages candor and helps establish trust.

*Whether:* A pitfall of some is an undue bias toward recommending a consensus process. A poorly timed or ill-conceived consensus process can waste resources, exhaust participants, and leave the parties worse off than before.

*Likely to be fruitful:* A consensus outcome is only one measure of success.

*How it should be structured and prepared:* If a conflict assessment finds the likelihood of success is sufficient to justify the effort, it should address—for stakeholder consideration—the type of process, scope, objectives, participation (representation and authority), time lines, draft ground rules, information needed, and other process design issues.

## **Conflict Diagnosis**

Conflict assessment conducted by a non-partisan a mediator is considered one type of conflict diagnosis. Agencies and others directly involved in the conflict can diagnose some situations without the assistance of an outside neutral.

Proposed definition: “Dispassionate evaluation of the situation, based on the understanding of the stakeholder perspectives, to determine a course of actions that is likely to resolve all or part of the conflict.”

## **QUESTION 2—IS THERE A USEFUL TYPOLOGY OF CONFLICT ASSESSMENT ACTIVITIES?**

**GREG SOBEL**

### **Conflict Diagnosis Typology: Two Types, Six Approaches**

All approaches involve asking a series of questions to understand the situation from the perspective of each of the interested parties.

#### **External, Nonpartisan Diagnosis**

(often called “conflict assessment” or “issues assessment”)

##### *Approach 1*

- Two rounds of confidential interviews
- Detailed written draft report to interviewees, revisions
- Final report to all parties

##### *Approach 2*

- Interview smaller number of “key” participants
- Detailed final report (no draft reviewed by interviewees)

##### *Approach 3*

- Interview “key” parties
- Verbal report only to sponsoring agency

#### **Internally Conducted Diagnosis**

##### *Approach 4*

- Interagency team or single agency team analyzes situation including conversations with key parties

##### *Approach 5*

- Internal agency team analyzes situation without reaching out to other stakeholders

##### *Approach 6*

- One or two agency staff analyze situation

## **Additional Considerations**

Any thoughtful conflict diagnosis is preferable to none, and there is no one best approach. Each approach has its place, depending on variables, such as the amount of time and money available, the number of stakeholders involved, and the depth of that stakeholder involvement, to name a few. Also, the different types of approaches are not mutually exclusive; an internal diagnosis could lead to Conflict Assessment by external mediator.

**HOWARD RAIFFA**

## **What Is a Conflict Assessment?**

I am a newcomer to this field and frankly it was only a few days ago I learned about the subject matter of this panel. But I have been struggling for the last couple of years with an allied topic: how can a neutral analyst (or analytical team), working jointly and perhaps in seriatum with negotiators and their surrogates, identify the potentialities of joint gains and indicate how these can be distributed equitably. When I was introduced by Kirk Emerson and her staff into the world of conflict assessment, I said to myself, "Oh, I have been doing some of that under different names." Before I learned something about the literature in your field I thought that it would be nice to have some clear examples of what a conflict assessment is, what it isn't, and some borderline cases. For example, does there have to be a "conflict," or could it be a broader opportunity to analyze "deal making" or opportunity enhancement?

## **The aspirations of what conflict assessment could achieve include:**

- Clarification of the problem,
- Getting a better feeling for potentialities of negotiation,
- Jump starting a negotiation process,
- Structuring the scientific background of the conflict: looking at uncertainties, accumulating evidence, conducting experiments, etc., and
- Keeping the problem informed along the way.

## **What elements should be considered in a conflict assessment?**

- Early investigation of a problem that might be resolved by a negotiation
- Who invites whom to do what?
- Scoping and defining the problem
- Identifying stakeholders
- Interests, objectives of stakeholders (and society?)

## **The Negotiator's Dilemma**

What we are advocating is principled negotiations seeking joint gains. This can be accomplished by working together as a problem-solving team with truthful exchange. The rub is that the negotiator will also want to get a large slice of the pie that is created by the full, open, and truthful exchange. However, the tactics used to create a large pie

(e.g., full, open, and truthful exchange) is at variance with the tactics used to divide up the pie (e.g., exaggerating, strategizing). In negotiations one must create and claim. In conflict assessment, the parties do not need to select a single compromise candidate, and therefore they do not have to engage in claiming.

Here is an example, which I have been marginally involved in, of a prenegotiation experience that lubricated the way to a more formal agreement.

### **PERU-ECUADOR CONFLICT 1995—FACILITATED JOINT BRAINSTORMING**

The conflict between Peru and Ecuador in 1995 was highly contentious, and negotiations seemed remote. In an attempt to resolve the conflict, the Harvard Negotiation Project Initiative was launched. It involved inviting 11 surrogates to Cambridge for one week, all expenses paid. The surrogates were all credible and influential, but up front it was elucidated that they were not there to negotiate, they were there to explore. The goal was to create without claiming.

Participants discussed the ideas that Peru and Ecuador are not in a zero-sum game, that joint gains could be achieved by brainstorming creative options based on the truthful shared interests of the two sides. They were not there to negotiate, so claiming should be kept to a minimum. The facilitators had to keep reminding people that they were not negotiating, but instead creating, and it took some days for the group to relax into this idea.

There was no report at the end of this meeting. However, three months later, Peru and Ecuador signed an historic peace agreement. Was there any relationship between the Harvard Initiative and the agreement? In a visit to Ecuador and Peru with my wife, conducting post evaluation interviews of the participants, they were convinced that they contributed to the change in mood and the successful negotiation between the two countries. There is some additional evidence to this: both countries honored Roger Fisher.

There are some difficulties, though, with facilitated joint brainstorming. It is often difficult to find surrogates to come for extended meetings at the same time. For example, A won't come if B is there. It can also be quite expensive.

An alternative method is to have a single investigator go to suitable surrogates seriatim, not unlike shuttle diplomacy, and write a *pre-mediation briefing report* (PMBR) whose audience might be a mediator who wants to be briefed about the nature of the dispute.

A PMBR should include the following elements:

- \* A brief history of the conflict, including past attempts at negotiation and partisan reviews of the history.
- \* Identification of those who have influence over the conflict, including biographies of the key parties, how they negotiate, and their ideologies.

- An examination of the internal political structure surrounding the conflict. Who decides? Who must influence whom? What are the internal vulnerabilities?
- Identification of the interests and values of the key parties. What are the fundamental values and derived interests elicited from surrogates?
- A vision of the future with an agreement that discusses the long run advantages of a settlement.
- An analysis of alternatives to negotiation. In a scenario where no agreement is reached, what is the best alternative for each party?
- An exploration of options constructed from joint devising with surrogates, creating options without claiming.
- Construction of a negotiation template listing possible issues to be negotiated and resolutions for these issues.
- \* Identification of legitimate criteria and objective standards of fairness, precedents.
- \* Evaluation of the negotiation template by eliciting tradeoff and preference data from the participants.
- \* Determination of a range of possible appealing agreements to lure the parties into negotiating by making joint gains salient.
- \* Identification of external parties who may contribute resources. For example, outsiders who will gain or garner compensation from a positive outcome.

Here is an example of the PMBR put into action.

### **FINLAND CARBON DIOXIDE TAX**

In this case, the two parties to the dispute were Finnish industry and Environmentalists, and the problem at the center of the dispute was a tax on carbon dioxide emissions in Finland in the early 1990s. A Ph.D. student from the Helsinki School of Economics and Management, Johanna Pajumen, was the neutral analyst conducting the PMBR.

Pajumen sought out surrogates to participate, two from industry, two from the environmental side. She helped develop a template for a negotiation, analyze the template (i.e., BATNA), and establish the existence of qualitative, feasible solutions. In this example, surrogates did not enter into face-to-face negotiations, which helped to discourage claiming tactics.

At the end of the analysis process, all of the surrogates decided to enter a face-to-face negotiation using the PMBR to help negotiators find a compromise solution, went public with the process, and eventually the solutions were passed through government with some amendments.

This may be a good example of the benefits of a PMBR. It investigates the feasibility of an agreement without much commitment from stakeholders. The cost is low, and it's easy to start. If the PMBR is successful, it can help jump start actual negotiations by designing the template of the negotiations (listing the issues that have to be resolved and multiple, possible resolutions of these issues), visioning the future after an agreement is made, jointly reporting what is known about key uncertainties, and strategizing about next steps to be taken to learn more about these uncertainties.

*McCreary:* All three panelists we've heard from have stretched the definition of conflict assessment. Michael Harty also has strong convictions about the form of a conflict assessment.

## **MICHAEL HARTY**

Intuition is the basis of these analyses, just like the negotiation and mediation process itself. One analogy is—what would result if five practitioners were asked to assess the same situation? I think there's a good chance we would get five different impressions, or paintings. I realize others disagree.

Two analysts, Judith Innes and David Booher, wrote about this in "Consensus Building and Complex Adaptive Systems" (*APA Journal*, Autumn 1999, Vol. 65, No. 4). Their summary: There has been limited systematic assessment of consensus building techniques, so consensus building is intuitive and practitioners are like craftsmen. Consumers of consensus-building services do not, in many cases, have a clear idea of what they should expect from consensus building.

My belief is that practitioners need to be able to communicate clearly with consumers about how an assessment is done and what it can accomplish, so there are clear and consistent expectations. At this point in the field's development we do not communicate this information clearly.

### **The audience is asked:**

*Question:* How many people have had to write an assessment?

*Answer:* About half the room.

*Question:* How many have read somebody else's assessments?

*Answer:* Not many.

Based on what I have heard from people that read lots of assessments from different assessors, we should not assume that there is uniformity about approach or quality. In fact, what I have heard is that the quality, particularly in the synthesis, is quite uneven. This should be a concern.

Mediators need to do better job of defining and predicting what a conflict assessment looks like if they expect parties to seek their help.

This is the difference between objectivity and neutrality. In the process of a Conflict Assessment, Michael Harty feels it is appropriate to offer a perspective to the client about participation in collaborative processes, democracy and good public process

Ellie Tonkin disagrees.

In Mr. Harty's opinion, elected and appointed officials, and career government employees are contributing to conflict by not "doing their job," whereas Ms. Tonkin thinks it is

not for the neutral third party to decide what constitutes good government. Put another way, the neutral has no business telling any party, including the government, how it should do its job. Certainly it is appropriate for the neutral to assist individual parties, including the government, in clarifying their own goals and considering how best to achieve them. But the strongly held belief that people have a right to participate in a particular way in decisions that affect them—and specifically, to participate at a level that goes beyond what is legally required—is a political bias that mediators must check if they are to be neutral. It comes into play when, as is often the case, the nature and extent of public involvement is an issue in controversy. Ms. Tonkin perceives that this is a more insidious, prevalent bias than the more acknowledged concern that the neutral assessor will favor the sponsoring (i.e., paying) party.

One important factor that differentiates the approach to an assessment is whether you are in a litigated case context or not. If so, issues are preframed, and the parties are usually well identified. This is one of the benefits of a litigated case, it appears that you know who is involved and what the issues are. If not, it's a much fuzzier process.

What about a 1-page assessment versus a 50-page assessment? One alternative is to eliminate all the context and synthesis and give a very brief recommendation to the client about “go” or “no go.”

Michael Harty's assessments become a “big painting,” in his perspective. Therefore, bias, filters, and epistemologies are inevitably included in the assessment. If five mediators assessed the same situation, different conclusions about the viability of the process, among other things, would likely be different. This represents a challenge to a systematic or consistent answer to the question: What's going on? It's important to see how far we can push standardization, without eliminating the creative, intuitive elements of this process.

*Raiffa:* We need to assess for value-creating opportunities. These are often overlooked in the process of assessing conflict.

## **QUESTION 2—IS THERE A USEFUL TYPOLOGY OF CONFLICT ASSESSMENT ACTIVITIES?**

*McCreary:* Greg Sobel has proposed several important dimensions in constructing a potential typology of conflict assessment. I would propose that there are still others.

The context matters a lot. In one context, a convener or group of parties may assume that a mediation is going forward, but does not see the value of an up-front assessment. In that setting, the neutral must push hard for the opportunity to do the assessment. In another context, parties are unsure whether mediation is a good idea, but are committed to completing an initial assessment.

Still another dimension is the political and institutional context of a case. Is it highly charged? Are senior political leaders weighing in? Is there a shift in administration, or in overarching policy for a given area of environmental decision making?

These kinds of factors need to be taken into account in scoping and shaping a conflict assessment activity.

*Tonkin responds to Harty:* To the extent that the conflict assessor is painting a picture, there is a danger that when the parties receive the painting, they will think it is complete because it has a static quality. In fact, the assessment function occurs throughout the process. The assessment is in constant flux.

*Sobel:* Antagonists in conflict often do not appreciate one another's understanding of the situation. A conflict assessment report can provide the paint and brushes to allow each side to provide its own "painting," so that it can be more clearly seen by others than before. Then, the assessor's findings and recommendations can offer a composite painting.

*Harty:* Is a convener willing to get the news about how the public feels about what they are doing or not doing? It is appropriate to talk about that in an assessment. In particular, it is important to identify all factors contributing to conflict, including actions (or failure to act) of government employees. In a public context, government is inevitably part of the conflict dynamic. This is not the same as saying, "Hey, government agency, you did this right or wrong." Rather, it is saying, "Here is what we heard about how you are contributing (or not) to this set of problems. Here is what we heard about how you are helping, and what you might do to improve the situation." The problem is, as our informal poll earlier shows, there is resistance to this, both among government staff and, I think, among practitioners.

*Question (audience member):* Please talk more about parties helping to write assessment. Part of the reason to do the assessment is because people have very different views of the issues and are committed to those views. Does that make them suitable for being the "painters"?

*McCreary:* This enters into the relationship between the convening agency and the assessor.

*Tonkin:* Because the truest picture is what evolves through the process, I mistrust the accuracy of the neutral assessor's up-front painting. An alternative approach is to talk to parties individually and to do the minimum of writing and recommending necessary to convene the parties on whatever general or specific point they can meet. Then let the parties assess for themselves whether and how to proceed, providing neutral assistance as needed.

Let's consider the example of the New Bedford Harbor remedial controversy. This was a volatile, politically charged situation in which the parties came together to collaboratively select a facilitator for a vaguely defined "forum." They could agree that they needed a facilitator to talk to each other no matter what the topic or goal. There was no initial commitment to a consensus process or an ongoing process of any kind. As they jointly interviewed potential facilitators (a process that was managed by an understated interim facilitator provided by a state dispute resolution program), the parties identified some

common objectives and discovered their capacity to sit in the room together and make certain choices together. To their astonishment and delight, they quickly reached consensus on a facilitator. In the ensuing months, their chosen facilitator helped them make some short-term decisions and develop a set of protocols for an ongoing consensus process. No formal assessment was ever conducted and various participants take credit for initiating the process. They are, of course, all correct.

A mediator can paint an initial painting, with parties contributing along the way and building a new painting. And the analysis process can illuminate potential outcomes to parties.

*Question (audience member):* What are the criteria to be used to decide whether it is worth going forward in a mediation? Are there threshold criteria for the determination of the usefulness of a mediation?

*Raiffa:* Should a preliminary mediation be done? To my way of thinking that's a decision question and I have a fallback set of stock questions that I would like to consider: What's the problem? The objectives? The alternatives? The possible consequences? The necessary trade-offs? Let me add that in addition, in early interviews, privacy ... the mediator could be organizing the parties into a blocking coalition of losers.

*McCreary:* Are you saying that the assessor can offer potential trade-offs?

*Harty:* There is not a single criterion for going ahead, but there may be a number of key factors. Possible criteria:

- Are the key parties or stakeholders here?
- Do we think we know what the key issues are?
- How well do we really understand the issues? (Especially in the face of strategic nondisclosure or the fact that participants haven't thoroughly thought out what their positions are at the time of an assessment.)

Reemphasize, an assessment can be an educational process. Reemphasize, as in the Klamath case, early in the process, parties had not fully developed their viewpoints.

*Tonkin:* I think it's dangerous to be in the posture of predicting whether a process will be successful or not. I know that I never want to be the one everyone blames when the going gets rough. The Milagro Beanfield War film clip that Peter Adler showed during the plenary session may have some relevance here. I thought it was terrific assessment/mediation practice when the Sheriff validated the legitimacy of the forest service guy's fears by asking the farmers with their rifles strategically aimed, "If he puts away his gun, are you really gonna shoot his nuts off?" (to which they, of course, nodded "Yup"). Instead of pushing the boxed-in enforcement agent to disarm when he had good reason to hesitate, the Sheriff gave him some room to maneuver and let him get there on his own. The Sheriff's reluctance to weigh in too heavily about what risks the guy on the hot seat should take seems like a good policy. Parties crave predictions about the

big picture because committing to a big ADR process feels risky. I think the best way to allay such fears is to help parties ease into a process and slowly test their fears without ever being called on to jump off a cliff at the outset. This means being patient and not being invested in whether a particular ADR process goes forward.

*Question (audience member):* How does someone decide whether a mediation is workable or not when parties continue to act to improve their BATNA?

*McCreary:* The mediator needs to take a realistic approach to this and write up possible contingencies or precursors for alternatives.

*Raiffa:* Parties are usually well advised to think hard about their BATNAs and if anything dramatic happens during the course of pre-mediation that changes a party's BATNA, then this should affect the distributional aspect of allocating joint gains. Let me add a word about the articulation of values. During the process of analysis, interests are articulated. The "why" questions get you deeper and deeper towards motivations and interests. So, if you have someone who has gone through this process a number of times, probing and revealing interests is easier than if not.

*Comment from the floor:* I hire people to do situational assessments: key point, watch verbiage. Anyway, I do this to assess whether ADR is a good/appropriate option. So the assessment, in my mind, is different from a convening. This allows some parties to feel more comfortable about beginning discussion without feeling that negotiations have already begun. However, in internal disputes/assessments, it's very difficult to find an appropriate, skilled, neutral person for a situational assessment.

*Kirk Emerson:* Assessment is already the start of the process, not entirely a separate process. You are engaging the parties in a discussion on how to structure the process, therefore, the process has already begun. Dealing with incomplete information, given levels of uncertainty at this point in the process, what are some of the possibilities for moving the "ball down the court"?

*Harty:* These things (CAs) are expensive. What if we did an oral assessment told by the parties? Bring them together. On the first day, with convener, we conduct a series of individual and small group interviews, and on the second we talk about the threshold criteria—nothing written down. Then everyone can take away whatever they want at the end of the day, and then can talk about the options. We don't have an extended, expensive interview process, and don't have a complex document. Would this meet Ellie's concerns?

*Tonkin:* Maybe. Any number of things might work really well—let's not rush to substitute one overly prescriptive model for another.

*Comment (audience member):* We need to rethink the idea: Have process will travel. Parties enter assessment and mediation process in a different mindset than the mediator who has a goal or a process goal in mind.

*Comment (audience member):* Conflict assessment is art and a science. There is no black and white, there are many judgment calls, which stresses the importance of neutrality. The Hawthorne effect applies here: by merely entering a process, you are affecting it, changing it. Therefore, the value of neutrality is essential. The precursors to the point where parties begin to articulate and begin to “move” are not always revealed through assessments. Likewise, ADR is not always appropriate. Reemphasize, verbiage, conflict assessment versus situational assessment. There are many ways to recommend convening, not necessarily just recommending a full-blown ADR procedure. Other dialogue options are viable for progress.

*Comment (audience member):* A basic starting point is information for assessment. The process itself becomes educational, including on background information on the issues themselves—in other words, not just BATNAs, etc., but on water issues, basic situational knowledge, etc.

*Comment (audience member):* Cultural issues are sometimes overlooked and are hard to filter when deciding whether or not to move forward.

*McCreary:* Maybe these questions and assessments should be done with the viewpoint of the parties in mind.

### **QUESTION 3—HOW CAN WE MAKE FULLER USE OF THEORY AND RESEARCH? WHAT CAN WE TAKE FROM BARGAINING THEORY? WHAT TOOLS OR METHODS CAN WE TAKE FROM SOCIAL SCIENCE RESEARCH TO BEEF UP CONFLICT ASSESSMENTS?**

*Raiffa:* We need dual improvement—not only better social science, but better problem-solving skills (or better decision science). Mediators are drawn primarily from the background disciplines of the social sciences and they might have great talents in handling “people problems,” but they often lack the skills of trained problem solvers. True, if you cannot cope with handling emotions, you cannot engage in more rational analysis. But all too often some mediators know how to calm down protagonists but then have no idea what to do next.

*Harty:* Conflict of interest in assessment and follow-up work is a dilemma. If I am doing the follow up, then I have to rely on someone else’s methodology and judgment. I think this is problematic given the current state of inconsistent assessment. If assessment gets more rigorous, more consistent, follow up could be more fruitful. I think it’s okay to be skeptical of other’s assessments and reports. Judgments from assessors are appropriate, but we also need more rigor in assessment.

We ought to consider opportunities to incorporate knowledge and tools from other disciplines. One example would be the use of polling techniques. Social science offers lessons in potentiality and causation.

Another challenge is how to manage multiple assessors (versus a single assessor).

I think Howard's suggestion that we assess for value-creating opportunities is a good one that I will work into my approach. A second idea is the notion of assessing for the presence of transformational leadership in a community, if appropriate. Finally, I think we need to be able to validate the conclusions we draw, rather than simply offer our own views.

*Sobel:* In reading a conflict assessment report, one should find that the recommendations should flow logically from the findings. While protecting confidentiality, the CA report should present the stakeholders' points of view in their own voices. The interview protocols should be included. If the findings and recommendations are not supported by the information provided about the involved parties' points of view, there is a problem with the report. Perhaps there is the opportunity for improved rigor. Perhaps we should include in our research agenda the evaluation of assessments.

*Tonkin:* This is exactly what I think of as overkill. I don't think parties care about how the protocols were developed or need to read about them in a report. From their point of view, they either trusted the person who interviewed them and found it a good use of their time or they didn't. These documents are not intended to be peer-reviewed for publication in an academic journal. That's not what parties want or should be expected to pay for—they're just trying to figure out what to do next. And I suspect that subsequent mediators never rely too heavily on the assessor's interviews—they want to do their own party assessments and feel judgmental about the conclusions and recommendations laid out in the assessment report, unless, of course, they wrote it.

Here's a thought. The generation of public policy mediators who have shaped this field worked from some useful models about how to design and initiate a process. Some of us perceive that these models are now taking on a life of their own and are sometimes at odds with our ideas about good mediation practice. As the field matures, there are new perspectives from those of us who have come to this work from a different cultural background—that is, from "inside of agency" culture. We have enormous respect for the talent, experience, and wisdom of the environmental and public policy dispute resolution practitioners who developed the models we are so feistily critiquing. These mediators are not only our mentors—they are our inspiration. Now we are watching how some of these models are playing out and we are experimenting with variations, evolving some models of our own that we think make sense in the world we work in. Maybe this is the dialectic that will point us to the future of conflict assessment.

*McCreary:* Pay attention to the terminology that our panelists and discussants have used in this session. We've heard about the need for increased rigor, about the art and science inherent in conflict assessment, that conflict assessment is an impressionist painting. Clearly, we are coming to this with very different worldviews. So, where do we go next?

*Harty:* Let's take a look at a number of different types of assessment, e.g., oral versus written, and evaluate with greater consistency and rigor.

*McCreary:* I like the idea of treating conflict assessment as an opportunity to do some experiments. I would propose that several of the organizing questions from this session definitely merit in-depth deliberation and discussion. We are moving forward on this discussion, but are still early in the process. We noted that Greg made a useful cut at a typology, and now we've added several additional dimensions.

*Tonkin:* It feels like an enormous privilege to be part of a community that is able to have this kind of discussion with itself—rigorous, blunt, respectful—and a lot of fun.

*Harty:* Thanks to Scott for his leadership in organizing this session.

## Conflict Assessment

## Conflict Assessment

### What Is It?

## Conflict Assessment: What Is It ?

Some clear examples of

- What it is
- What it isn't
- Borderline cases
- What are the goals or aspirations of a conflict assessment ?

## CA: Goals, Hopes

- Does there have to be a conflict?
- How about Opportunity Enhancement?

## CA: Speculations of What It Is

- Aspirations:
  - Clarify problem
  - Get better feeling of potentialities of negotiating
  - Jump-start negotiations
  - Structure scientific background
  - Structure uncertainties
  - Accumulate evidence: experiments, surveys, ...
  - Keep public informed

## CA: Speculations of What It Is

- Early investigation of a problem that might be resolved by negotiation.
- Who invites whom to do what?
- Scoping and defining the problem
- Identifying stakeholders
- Interests, objectives of stakeholders (and of society?)

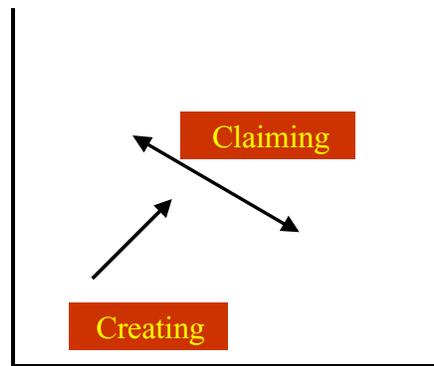
## The Negotiator's Dilemma

- What we are advocating: principled negotiations seeking joint gains
- How can this be accomplished?
  - By working together as a problem-solving team with truthful exchange
- What's the rub?
  - Want to get a large slice of the pie created

## The Negotiator's Dilemma

- Tactics used to create a large pie (e.g., full, open, truthful exchange) is at variance with tactics used to share the pie (e.g., exaggerating, strategizing).
- In negotiations one must create and claim.
- In conflict assessment, the parties do not need to select a single compromise candidate, and therefore they do not have to engage in claiming.

## The Negotiator's Dilemma



### Case Study: Peru-Ecuador Conflict 1995

- **Facilitated Joint Brainstorming**
  - The conflict
  - Negotiations seem remote
  - Harvard Negotiation Project Initiative
    - Eleven surrogates invited to Cambridge for one week, all expenses paid
    - Surrogates are influentials
    - Not here to negotiate but to explore
    - Creating without claiming

## Case Study: Peru-Ecuador Conflict 1995

- **Facilitated Joint Brainstorming**
  - Peru and Ecuador are not involved in a zero-sum game;
  - Joint gains can be achieved by brainstorming creative options based on the truthful shared interests of the two sides;
  - They were not there to negotiate, so that claiming should be kept to a minimum.

## Case Study: Peru-Ecuador Conflict 1995

- **Facilitated Joint Brainstorming**
  - No report at session ending
  - Peru and Ecuador sign historic peace agreement
  - Cause and effect ????
  - My wife and I visit Peru and Ecuador
  - Tribute to Roger Fisher

## Pre-Mediation Briefing Reports (PMBR)

- Difficulty with FJB
  - Finding surrogates to come for extended meetings at the same time
  - A won't come if B is there
  - Expenses
- Alternative:

Single investigator goes to suitable surrogates seriatim, not unlike shuttle diplomacy, and writes a *premediation briefing report* (PMBR) suitable for a mediator who wants to be briefed about the nature of the dispute.

## Premediation Briefing Report

- **CONTENTS OF A PREMEDIATION BRIEFING REPORT**
  1. Brief history of the conflict.

*Past attempts at negotiation, partisan reviews of the history.*
  2. Identifying those who have influence.

*Biographies of the key parties, how they negotiate, their ideologies.*
  3. Examining the internal political structure.

*Who decides, who must influence whom, internal vulnerabilities.*
  4. Identifying their interests and values.

*Fundamental values and derived interests elicited from surrogates.*

## Premediation Briefing Report

5. Visioning the future with agreement

*Long-run advantages of a settlement; e.g., development.*

6. Analyzing alternatives to negotiation

*Scenario if no agreement is reached, best alternative for each party.*

7. Exploring options

*Joint devising with surrogates, creating options without claiming.*

## Premediation Briefing Report

8. Constructing a negotiation template

*Listing possible issues to be negotiated and resolutions for these issues.*

9. Identifying legitimate criteria

*Objective standards of fairness, precedents.*

10. Evaluating the template

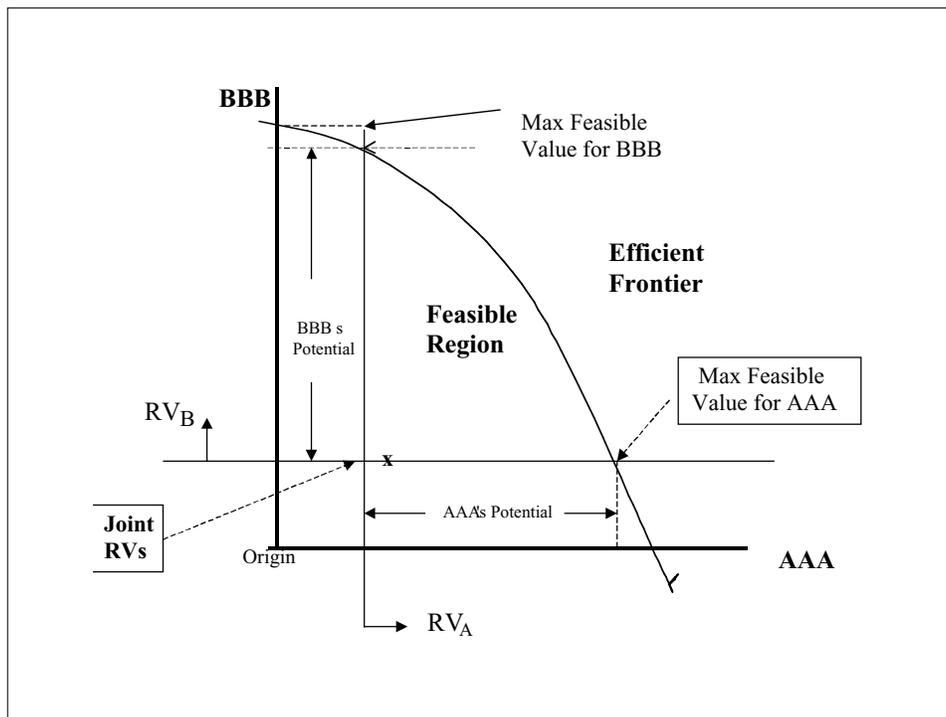
*Eliciting trade-off and preference data from the participants.*

11. Determining a range of possible, appealing agreements

*To lure the parties into negotiating by making joint gains salient.*

12. Identifying external parties who may contribute resources

*Identify outsiders who gain, garner compensation.*



## Case study of a PMBR

- Problem :
  - Tax on CO<sub>2</sub> emissions in Finland in early 90s
- Parties to Dispute:
  - Finnish Industry (FI) and Environmentalists (E)
- NJA: Johanna Pajunen, Ph.D. student, Helsinki School of Econ. And Man.
- Methodolgy
  - Use of a PMBR using shuttle analysis and surrogates

## Case study of a PMBR

- Surrogates:
  - Two from Ind. two from—Env
- NJA helps parties to:
  - Develop template
  - Evaluate template (including BATNA and RV analyses)
  - Establish existence of feasible solns.
- Surrogates do not enter into face-to-face negotiations
  - Discouragement of claiming tactics

NJA is invitor, not  
invitee

## Case study of a PMBR

- Surrogates request face-to-face negs.
- NJA uses PMBR to help negotiators find a compromise solution
- NJA uses sequence of SNTs to arrive at a final agreement
- Surrogates help publicize the entire experience in the Finnish press
- Parliament adopts modification of compromise solution in fall of 1996

## Case study of a PMBR

Panmunjon: This study was a clear demonstration of the applicability and usefulness of the premediation concept in a conflict situation where the disputants have not before tried to resolve their disagreement through negotiations. Consequently, we can sincerely recommend the application of the analysis in other conflicts, be they environment-related, intra-organizational, or any other type.

## Comparing the PMBR Process and Conflict Assessment

- Advantages of the PMBR study:
  - investigates the feasibility of an agreement without prior commitment of official stakeholders
  - low cost, ease of getting started
  - the PMBR if successful, can help jump-start actual negotiations:
    - design of the template
    - envisioning future
    - preliminary analysis of the scientific uncertainties

## Uncertainty Analysis in Conflict Assessment

- Often looms large
- Advantage of central combined studies in contrast to competing separate studies.
- Helps if there is a central organizing group that can act neutrally.
- Helps if NJA has a team member who can help structure the uncertainties of the problem.

## Conflict Assessment vs. the PMBR

- Environmental disputes usually have many stakeholders
  - Might choose to do prenegotiating brainstorming with a mixture of official delegates with surrogates filling gaps.
- Lots of uncertainties
- Hard to get commitment of stakeholders to negotiate

## Conflict Assessment vs. the PMBR

- Environmental disputes usually have many stakeholders
- Lots of uncertainties
- Hard to get commitment of stakeholders to negotiate
- Blocking coalitions
- Creative compensation of losers
- Organizing winners not to free ride

## CA: Concerns

- Difficulty of getting unanimous agreement
  - need for creative compensation
- Role of neutral joint analyst (NJA)
  - for design of template
  - as custodian of confidential information
  - as problem solver who can find efficient and equitable compromises

## Need for Creative Compensation

- Winners and losers
- Losers may form blocking coalition
- An insistence of unanimity may empower an otherwise ineffectual coalitions
- Many winners are unorganized—free ride
  - need to get free riders to contribute resources to compensate sincere losers

## Difficult Problem to Solve

- Not easy for parties to find eff. & equitable compromise—especially if the parties are strategic players
- Much easier with NJA
  - Problem can be formulated as a complex LP problem
- Easier for parties to adopt a FOTE posture confiding to an NJA

## Uncertainty Analysis

- Many uncertainties involve expertise from many sources
- Must worry about conflicts of interest of scientific community
- Structuring problem can help narrow expert to contribute his or her knowledge

## Uncertainty Analysis

- Problems only rarely allow expert to give purely objective evaluations
- Need for judgmental inputs that are believable
- **Need for analytically inclined external intervener**

## Uncertainty Analysis

- **Qualitative structuring of uncertainties**
  - in terms of importance
  - in terms of dependence

## Interventions: External Helpers

- Facilitation
- Mediation
  - Passive
  - Proactive

## Interventions: External Helpers

- Neutral Joint Analyst (NJA)
  - on process
  - preaching merits of collaboration
    - FOTE or POTE
  - on brainstorming
  - on template design and construction
  - on template evaluation (preferences, BATNA, RV)
  - on template analysis ( problem solving)

### Checklist for Conflict Assessment

#### Activity

Identifying problem to be investigated  
Informing public of intent  
Identifying stakeholders  
Clarifying interests and objectives  
Emphasis on FOTE or POTE  
Joint brainstorming  
Template design

- Issues to be resolved
- Resolutions for issues

Template evaluation

- Qualitative within issues
- Qualitative between issues
- Quantitative within issues
- Quantitative between issues
- Additive scoring

### Checklist for Conflict Assessment

- BATNA analysis
- Reservation value analysis
- Coalitional analysis
  - Allies
  - Antagonists
- Joint uncertainty modeling and analysis
- Other joint modeling and analysis
- Feasibility search for an acceptable contract
  - Efficiency analysis
  - Equity analysis
- Winners and losers
  - Potential blocking coalitions
  - Compensatory analysis
- Publications document to initiate negotiations
- Report to negotiating helper (PMBR)

# **SESSION VI: ROUNDTABLE DISCUSSIONS**

**THURSDAY, MAY 16, 2002**

**2:00–4:00 P.M.**

# EXAMINING THE IMPACTS OF COLLABORATIVE EFFORTS TO ADDRESS ENDANGERED SALMON IN THE PACIFIC NORTHWEST

THURSDAY, MAY 16, 2002—2:00–4:00 P.M.

## MODERATOR

Suzanne Orenstein

## PARTICIPANTS

J. Michael Harty, CDR Associates

Jim Kramer, Ross & Associates

Alice Shorett, Triangle Associates

Donna Silverberg, DS Consulting

## ROUNDTABLE ABSTRACT

Issues of recovery planning, mitigation, and avoiding take of endangered salmon have been the subject of perhaps hundreds of workshops, dialogues, and negotiations over the past decade or more. Many ECR practitioners have assisted regulators and stakeholders in these efforts with varying outcomes. The session will focus on how issues of representation and implementation have been handled in collaborative forums as well as on the special challenges posed by a complex, interagency regulatory arena. Lessons will be drawn from the successes and impasses that have been encountered.

## ROUNDTABLE SUMMARY

## INDIVIDUAL PRESENTATIONS

### **Puget Sound Salmon Recovery: A Shared Strategy**

By Jim Kramer

### **Selected Experience: Mediation in Salmon Cases**

By Alice Shorett

### **The North Umpqua Relicensing Settlement Agreement**

By Alice Shorett

### **Salmon Related Conflict Management Projects**

By Donna Silverberg

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

1. Describe the collaborative processes you have experience with, especially anything unique or nontypical.
2. How would parties to these processes describe the environmental results achieved as a result of the process?
3. What are the most significant barriers to achieving results in collaborative processes regarding endangered salmon in the northwest?
4. What can be done to enhance the use of ECR for salmon issues?

## SAMPLE DRAFT PROTOCOLS FOR COLLABORATIVE RECOVERY PLANNING FOR ENDANGERED AND THREATENED SALMON

### EXECUTIVE COMMITTEE FOR LOWER COLUMBIA AND WILLAMETTE RIVER SALMONID RECOVERY

#### PROPOSED OPERATING PRINCIPLES<sup>1</sup>—MARCH 2002

For any collaborative forum to operate smoothly, it is helpful for those involved to agree at the outset on the purpose for the process and on the procedures by which the group will govern its discussions, deliberations, and decision making.

#### PURPOSE AND GOAL OF THE EXECUTIVE COMMITTEE FOR LOWER COLUMBIA AND WILLAMETTE RIVER SALMONID RECOVERY

The purpose of the Executive Committee is to develop a recovery plan that is highly likely to be implemented and effective for all threatened and endangered salmon species and their habitats. The goal of the collaborative effort will be to develop a plan that:

- Restores listed salmon and steelhead populations, habitat, and water quality;
- Is supported by all implementing authorities, and is approvable by NMFS;
- Integrates and is consistent with the NPPC sub-basin planning process that involves states, tribes, federal land managers, and local entities;
- Addresses issues of equity for sharing the recovery burden;
- Provides certainty at the local and state levels regarding recovery goals and actions;
- Is a unified plan for all stakeholders; and
- Is based on credible and reliable information.

In order for a recovery plan of this scope to be acceptable to all authorities and implementable at the local level, those involved in recovery planning agree to work together to produce a plan that integrates the mandates, concerns, and ideas of all those significantly affected by the plan.

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<sup>1</sup> These operating principles were drafted by Suzanne Orenstein, Facilitator, and negotiated among the Executive Committee members over four months. All but one member had signed off on them as of May 2002.

## 1. STRUCTURE OF COMMITTEE

The Executive Committee will be the concurring forum at the policy level for collaborative efforts on the salmon recovery plan. The committee will be the group responsible for all decisions and actions that are publicly identified as committee products.

The committee, as a whole, will:

- Concur in all committee decisions, as well as on the final recovery plan product;
- Concur in the recovery goals;
- Agree on the desired level of consistency and specificity among subplans;
- Review and concur in public involvement strategies and ensure that they meet legal requirements for public involvement;
- Review and comment on recovery actions and strategies and serve as a vehicle for integrating plan subcomponents;
- Review and concur in monitoring plans for recovery actions, in consultation with the Technical Recovery Team (TRT);
- Ensure adequate integration of the scientific information with the eventual actions and strategies;
- Concur in decisions about the committee process, including overseeing the implementation of the operating principles, the working group, and committee membership;
- Work to identify resources needed to develop a workable and credible recovery plan.

*Working groups* will be created from time to time to address specific issues and prepare documents for Executive Committee review. Working groups will, as a rule, include a balance among interest groups on the Executive Committee.

The working groups will not make decisions on behalf of the committee, unless explicitly authorized by the committee to do so. The working groups may:

- Oversee the development of draft products for committee consideration, including the recovery plan outline, templates for actions and strategies, public involvement plans, and monitoring procedures;
- Work with the TRT as needed to produce draft products and otherwise plan for Executive Committee tasks;
- Identify issues that require concurrence by the committee as a whole.

*Subregional entities* will provide input and/or plan development at the state and/or watershed(s) level. These partners will contribute expertise, and in some cases recovery plan assessments, actions, and strategies to the overall recovery planning effort. The roles of the subregional partners may include:

- Participating in the committee;
- Concurring in the recovery goals;
- Submitting draft assessments, actions, public involvement proposals, etc., to the committee for comment;

- Making recommendations to the committee for plan-wide guidelines and decisions;
- At the option of the subregional entity, conducting assessments, identifying actions, implementation strategies, and creative local voluntary approaches, as well as conducting public involvement and outreach.

*Scientific and technical input* will be provided by the TRT and other technical experts. The TRT and other technical teams will:

- Develop the biological delisting criteria and recovery goals, with supporting documentation;
- Discuss these recovery goals with the committee and subregional partners before going public with them;
- Assist the subregional partners to develop the assessment portion of their planning processes;
- Provide advice on key limiting factors and potential management actions to address them.
- Review and comment on the Endangered Species Act (ESA) action scenarios that are developed;
- Assist subregional partners in developing a monitoring and evaluation strategy for subregional components of the plan and the committee in developing a monitoring and evaluation strategy for the plan as a whole, and discuss these proposed strategies with the committee.

## **2. PARTICIPATION**

*Interests represented.* Executive Committee members represent interests and authorities that have responsibility for implementing salmonid recovery plans. These interests are working together on a variety of projects as part of the ESA Executive Committee appointed by the Governors of Washington and Oregon and operating under the sponsorship of the Lower Columbia River Estuary Partnership. For salmonid recovery planning in the Lower Columbia and Willamette Rivers, the Executive Committee will be the coordinating forum for collaborative recovery planning.

*Additional parties.* Additional members may join the committee only with the consensus of the committee.

*Attendance at meetings.* Each member must make a good faith effort to attend each full meeting. If a committee member cannot attend, he or she may designate a regular alternate to attend. It is the responsibility of the member and alternate to stay fully briefed on all committee meeting discussions and deliberations to minimize disruption when different representatives attend various meetings.

*Constituent interests.* Committee members are expected to consult with and represent the concerns and interests of the organizations and constituents they were appointed to represent. They are responsible for ensuring that all significant issues and concerns of their organizations and constituents are fully and clearly articulated during committee

meetings. Members are also responsible for ensuring that any eventual recommendations or agreements are acceptable to their constituents and/or the agencies they were appointed to represent.

### **3. MEETINGS**

*Agendas.* The facilitator, after consultation with the working group and committee members, will draft proposed agendas and circulate them in advance. Agendas will reflect the issues important to all members.

*Meeting summaries.* Meeting summaries will be prepared by [the facilitator] to assist the committee in documenting its progress and activities. Draft meeting summaries will be provided to the committee for correction and comment prior to public distribution.

*Breaks.* Meetings may be suspended at any time at the request of any member to allow consultation among interest group members.

*Facilitator.* The committee meetings will be facilitated. The facilitator will not take positions on the issues before the committee. He or she will work to ensure that the process runs smoothly. The facilitator's role usually includes developing draft agendas, distributing meeting materials, facilitating meetings, working to resolve any impasse that may arise, preparing meeting summaries, and other tasks as requested. The facilitator will keep confidential information disclosed to him or her in confidence. He or she will serve at the will of the group and may be replaced by another facilitator as agreed upon by the members.

*Open to the public:* The Executive Committee meetings will be open to the public. As time allows, opportunities will be provided for comments from nonmember participants.

### **4. DECISION MAKING AND COMMITMENTS**

*Consensus.* When concurrence among members is desired, the committee will make decisions by consensus. Consensus is defined as all committee members can live with the recommendation or decision. If the group cannot reach consensus, members will evaluate the consequences of their disagreement and decide together how to address their lack of agreement. This may include a recommendation to convene a discussion of the executives of their organizations to resolve the issue.

*Decision making:* Decisions will be made by consensus of those present at the meeting, except for concurrence on major products, where consensus will be sought from all committee members. Major products include the recovery goals, the monitoring plans, recovery plan consistency requirements, and the final recovery plan. Those absent from the meeting will be asked to provide written comments within three weeks of notification of a decision, and if they do not, their agreement will be presumed.

*NMFS intent and commitment.* Committee members recognize that under the ESA, authority to promulgate a recovery plan rests in the hands of the National Marine Fisher-

ies Service (NMFS). NMFS is committed to a collaborative recovery-planning forum in order to achieve concurrence and support from potential objectors and partners on the proposed plan. Thus, if all members, including NMFS, agree on a set of goals, actions, and methods for salmon recovery, NMFS will view that agreement as significant and will not change those elements of the product without bringing the topic back to the committee for discussion. NMFA is committed to providing ESA assurance through the recovery planning process, and will pursue options for providing this certainty under sections 4(d), 7, and 10 of the ESA.”

*Commitments of all members.* All members agree to:

- Attend meetings and follow through on promises and commitments;
- Bring concerns from their interest group or organization up for discussion at the earliest point in the process;
- Share all relevant information that will assist the group in achieving its goals;
- Resolve issues being addressed by the Executive Committee within the committee structure, not through sidebar discussions and agreements that may place other committee members at a disadvantage;
- Keep its organization’s decision makers informed of potential decisions and actions, in order to expedite approval for the final product;
- Support the eventual product if they have concurred in it.

## **5. SAFEGUARDS**

*Good faith.* All members agree to act in good faith in all aspects of the collaborative effort. Specific offers made in open and frank problem-solving conversations will not be used against any other member in future litigation or public relations. Personal attacks and prejudiced statements are not acceptable.

Good faith requires that individuals not represent their personal or organization’s views as views of the committee, and that they express their own views and opinions consistently in the committee and in other forums, including in press contacts.

*Right to withdraw.* Any member may withdraw from the committee at any time after discussing the reasons for withdrawal with committee members. Good faith provisions apply to those who withdraw.

*Press.* All committee members agree to refrain from characterizing the views of other committee members in contacts with the press. They also agree not to knowingly mischaracterize the positions and views of any other party, nor their own, in public forums. The committee will agree on any press releases on committee products.

## **6. SCHEDULE**

The committee as a whole will meet every two months, or as needed, to meet its responsibilities. The working groups will meet as needed.

The target date for completion of the recovery plan is 2004. The target date for concurrence of the committee and subregional entities in the recovery goals is mid 2002.

## **BACKGROUND AND MEMBERSHIP OF EXECUTIVE COMMITTEE FOR LOWER COLUMBIA AND WILLAMETTE SALMONID RECOVERY—MARCH 2002**

### **ESA Executive Committee of Lower Columbia Estuary Partnership**

On December 22, 2000, Governor Kitzhaber (OR) and Governor Locke (WA) requested the Lower Columbia River Estuary Partnership address two ESA-related issues. They requested the Estuary Partnership coordinate to efforts to identify on-the-ground actions that could be implemented in the next five to ten years. They asked the Estuary Partnership to coordinate a policy level collaborative effort, largely among federal agencies, to secure the significant funding necessary to lead to species recovery.

In early 2001, the governors appointed a policy level ESA Executive Committee to coordinate recovery efforts on the mainstem Columbia River. Its membership includes National Marine Fisheries Service; U.S. Fish and Wildlife Service; the Northwest Power Planning Council; U.S. Environmental Protection Agency; Governor Kitzhaber's Office; Governor Locke's Office; U.S. Army Corps of Engineers; Bonneville Power Administration; the Northwest Tribes; Estuary Partnership Board of Directors representing local government and local watershed initiatives; and the chair of the Estuary Partnership Board.<sup>2</sup>

The Executive Committee was charged with coordinating species recovery on the mainstem lower Columbia River, specifically by working to get on-the-ground projects underway. Its tasks include:

1. Make recommendations to the Board of Directors on how the management plan can be adjusted to more closely align with the BiOp.
2. Identify specific actions and time lines that can be undertaken in the next five to ten years. (These are to be actions that all parties can agree on now without need for further research or study and that parties concur would help advance species recovery.)
3. Identify funding sources for individual actions and work with the Board of Directors to direct funds to those actions.
4. Identify the needs of local governments in meeting ESA requirements and make recommendations to the Board of Directors on how to help meet those needs.
5. Identify what is needed for salmonid recovery. This long-term process will involve many parties.

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<sup>2</sup>The Governors' offices wanted a small committee; it did not wish to duplicate the larger Estuary Partnership already established to include diverse stakeholders, but to capitalize on that diversity by including some Estuary Partnership members to provide direct and established communication paths to their various constituencies. The Executive Committee could be viewed as a pyramid, with a few members each supported by and connected to many large diverse interests.

### **Specific Focus on Lower Columbia and Willamette Recovery Planning**

In May 2001, NMFS invited a large group of interested parties to join them in a discussion about how they could proceed with recovery planning, specifically writing a recovery plan for the Lower Columbia and Willamette listed species. Parties agreed that the ESA Executive Committee provided a ready-made policy level group to address this. ESA Executive Committee provides regional leadership and guidance on recovery planning as well as a forum to resolve regional policy issues. The committee added several members and has developed a project scope and implementation strategy with process design expertise sponsored by U.S. EPA. The Committee recognizes the value of existing subregional efforts in species recovery and seeks to integrate them in the recovery planning effort that is broadly supported.

### **Membership**

In August 2001, five members were added to the ESA Executive Committee, two from the Willamette Restoration Initiative (the Executive Director and one WRI Board member), one additional from the Lower Columbia Fish Recovery Board (LCFRB) to be named by the LCFRB, one each from the Oregon Department of Fish and Wildlife and Washington Department of Fish and Wildlife. The Estuary Partnership serves as the coordinator for the committee in part because collaboration is a primary role for the Estuary Partnership. As well, the Estuary Partnership Board already includes most of the interested parties and stakeholders and it had established the means to reach out to broad constituencies.

The complete list of members who agreed to work under the Operating Principles for the collaborative recovery planning process follows.

### **ESA EXECUTIVE COMMITTEE—MARCH 2002**

Rick Bastasch  
Willamette Restoration Initiative  
P.O. Box 13026  
Salem, Oregon 97309  
(503) 375-5718

Eric Bloch  
NW Power Planning Council  
Oregon Office—West  
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## BACKGROUND

FROM THE *COLUMBIA BASIN BULLETIN*, AN ELECTRONIC NEWSLETTER

### **KITZHABER WARNS FEDS ON MISSING RECOVERY TARGETS**

**By Barry Espenson**

Oregon's governor on Tuesday again challenged the Northwest and the country as a whole to attack the salmon recovery issue at full power or be turned down a road of social, economic, and legal chaos that leads ultimately to dam breaching.

The 29-dam federal Columbia Basin hydrosystem has been a blessing, literally building and sustaining the region's strong industrial base. It has also "allowed irrigated agriculture to flourish in an otherwise arid basin—and they have given us a low-cost transportation route from the Pacific Ocean all the way to Lewiston, Idaho, more than 400 miles inland," Gov. John Kitzhaber said in a speech to participants at the "Toward Ecosystem-based Management: Breaking Down the Barriers in the Columbia River Basin and Beyond" conference in Spokane.

But the hydrosystem also has a "dark side," Kitzhaber said, drastically changing the natural environment and imperiling fish and wildlife, including 12 species of salmon and steelhead listed under the federal Endangered Species Act.

The conference included gatherings of the American Fisheries Society's Western Division and North Pacific International Chapter, the Lake Roosevelt Forum, the Sustainable Fisheries Foundation and the Transboundary Group.

Kitzhaber twice drew standing ovations from the crowd of scientists, biologists, policy makers and others as he described a salmon recovery effort that has foundered and inappropriately dismissed the option of breaching four lower Snake River dams. "I entered into that debate on Feb. 18, 2000, in a speech to the Oregon chapter of the American Fisheries Society. The statement I made then is as valid now as it was 26 months ago—perhaps, even more so," Kitzhaber said of the speech that he admits caused him to lose more than a pound of political flesh. He remains the only major political figure in the Northwest that views dam breaching as a viable tool for salmon recovery.

"That fact is that if we look at the policy trade-offs involved—at the other choices we must make if we choose to leave these dams intact—breaching emerges as a responsible and cost-effective option. It is not the only option, but it is a responsible one that should not be disregarded out of hand," Kitzhaber told the crowd of more than 500 conference attendees. "Some will say that we have not done enough science. I say that we can always play that card as an excuse for inaction and as a justification for avoiding tough choices. But exactly what additional scientific experiment is necessary to demonstrate that it is easier for salmon to migrate in a free-flowing river than to negotiate a several hundred foot high concrete barrier?"

“Some will say that it is too expensive. I say, look at the other alternatives. There are similar—if not greater—costs associated with a nonbreach strategy,” Kitzhaber said. “Some will say that it is too controversial. I say, what isn’t? Who here thinks that it is not controversial to cut harvest levels? To change agricultural and timber practices on private land or to significantly augment flows?”

Kitzhaber said the federal government has essentially dodged the dam breaching issue by announcing a recovery plan in December 2000 that focuses on making the hydrosystem more fish friendly, restoring habitat, and modifying harvest and hatchery operations. The governor cited a recent Save Our Wild Salmon report that gives the federal government failing grades for implementation of the recovery plan. “The federal government must honor the Salmon Plan and demonstrate its success, or be prepared to embrace lower Snake River dam removal,” Kitzhaber said.

“Now, for those who think that this report and its conclusion are merely the biased product of a subjective stakeholder in this debate, I suggest a brief examination of the federal funding commitment to implementing the plan for 2003—the first checkpoint. The federal caucus—the nine federal agencies with responsibility for carrying out the plan—concluded that full implementation in 2003 would require an annual budget in excess of \$900 million. The Bush Administration has requested \$506 million, only 55 percent of what is needed,” Kitzhaber said.

“Given that the 2001 and 2002 budgets to implement the plan were both under funded by 50 percent, we see a disturbing pattern emerging. And unless something changes dramatically in the near future, this rate of funding and effort will virtually ensure that we will not meet the targets next year or in 2005.

“There are two theories about the current ecosystem recovery effort. The more cynical one is that it represents little more than a strategy to avoid the dam breaching issue, to maintain the status quo and to just hope that the problem will go away.

“The second theory—and the one to which I have given the benefit of the doubt for the past two years—is that we are engaged in a sincere and committed effort to restore the ecosystem. That viewpoint, however, is becoming increasingly difficult to justify. “Without full funding of the recovery plan for 2003, without taking on the politically difficult actions—ensuring adequate flows, for example, or modifying the operation of the dams to comply with the temperature and dissolved oxygen requirements of the Clean Water Act—the sincerity of this effort will be called into question,” the governor said.

“As I pointed out two years ago—we have to stop deluding ourselves into believing that our choices will be easier and cheaper if we just leave the dams alone. Our choices won’t be easier. They’ll be just as tough. Our costs might be lower, but only on the margin. And that is proving to be exactly the case.

“In essence, the 2000 NMFS Biologic Opinion shifts the responsibility of recovery from the hydroelectric system to the other three *H*s: habitat, harvest, and hatcheries. But if

we do not adequately fund these efforts nor aggressively pursue their implementation, it should come as no surprise to the Northwest political establishment—or the Administration—that the focus will inevitably shift back to the dams—not just in the form of renewed calls for breaching, but in a flurry of lawsuits targeting the entire Federal Columbia River Power System.

“It is already happening. As a former emergency room physician, I am as leery of lawsuits as one can get. Suing people has never been my tool of first choice. But as governor, I find myself involved in no less than three lawsuits on the Columbia: the lawsuit over the Biologic Opinion itself, the lawsuit over whether or not the dams have to comply with the Clean Water Act, and the lawsuit over whether fish and wildlife have receive equitable treatment as called for in the Northwest Power Act.”

The powers that be must embrace the plan fully, or face the consequences, he said.

“I submit to you that we are headed for the same future here in the Columbia River Basin—an environmental, economic, and a community crisis—similar to what is playing out in the Klamath, except on a far larger scale,” Kitzhaber said of the ongoing tug of war over precious water in the southern Oregon-northern California river basin.

“The result has been an economic, environmental and community disaster—leaving 200,000 acres of irrigated farmland without water; inadequate stream flows and lake levels to support endangered fish and wildlife; and a community torn by fear, doubt, unemployment and—increasingly—by anger, alienation, polarization, and acts of civil disobedience,” the governor said of the Klamath situation.

And the fundamental question before us is whether we are going to go the way of the Klamath here on the Columbia, or whether we will choose a different future. The question is whether we will be architects of our own destiny, or simply fall victim to the circumstances we have created.”

Link information: Gov. John Kitzhaber: <http://www.governor.state.or.us/>

# **PUGET SOUND SALMON RECOVERY: A SHARED STRATEGY**

**By JIM KRAMER, ROSS & ASSOCIATES**

Puget Sound salmon were listed as threatened under the Endangered Species Act (ESA) in 1999. In response to the listing and a deep interest in salmon, local leaders created a collaborative effort to recover salmon. In May 2002 a nonprofit organization, the Puget Sound Salmon Forum, was established to work with federal, state, local, and tribal governments as well as watershed groups to build consensus for how to recover salmon and craft a recovery plan. The Puget Sound region in the northwest portion of Washington State encompasses over 15 major river systems, a large marine ecosystem, 12 counties, 16 tribes, over 100 cities including Seattle, and a diverse landscape of forests, farms, rural, and urban areas.

Federal, tribal, state, and local leaders are not new to the salmon crisis. Over the past two decades, in response to dwindling populations and a commitment to sustainable fisheries, treaty Indian tribes and Washington state have worked together to reduce harvest of Puget Sound salmon by as much as 90 percent on some runs. Local governments have also made strides to protect salmon through land use, storm water, and growth management authorities. More recently, spurred by the ESA listings and new legal requirements, local governments have begun to work with other stakeholders in their watersheds to develop comprehensive strategies that meet the needs of people and salmon. But as the complexity and number of processes increase, as more and more levels of government and private landowners launch salmon related initiatives, recovery efforts are missing important opportunities for collaboration and increased efficiency, risking redundancy, confusion, and erosion of public support.

The Shared Strategy for Puget Sound Salmon Recovery is a five-step planning process ultimately involving several thousand people from all levels of government and the private sector to develop a recovery plan. It will integrate for the first time the management efforts in habitat, harvest, and hatcheries. The main objectives of the plan and its implementation are:

- The recovery and maintenance of an abundance of naturally spawning salmon at self-sustaining, harvestable levels;
- The broad distribution of naturally spawning salmon across the Puget Sound region;
- Genetic diversity of salmon at levels consistent with natural evolutionary patterns;
- Recovery of salmon in a manner that supports the other social interests of the region.

Puget Sound salmon recovery leaders believe that a strategy is needed to link the individual efforts of many existing organizations to protect and restore salmon runs. The growing list of salmon recovery efforts includes the development of new shoreline management, land-use regulations, stormwater management, and restoration projects. Efforts also include recovery efforts occurring in local watersheds or for listed stocks such as the Hood Canal—Strait of Juan de Fuca summer chum, hatchery reform activities, and comprehensive harvest management planning. The shared strategy is not

designed to add to this list; rather, the strategy is intended to connect these and other efforts through common goals and a clear plan for achieving them. The Washington State Department of Fish & Wildlife (WDFW) and Puget Sound tribes, as comanagers of salmon fisheries, are working to develop goals for all Puget Sound salmon. At the same time, the National Marine Fisheries Service (NMFS) has initiated a process to set goals for those Puget Sound salmon runs currently listed under the ESA. This shared strategy integrates federal, tribal, and state goal-setting processes.

A successful shared strategy must also establish a collaborative process to identify the best means to achieve recovery goals once established. The strategy does this by ensuring that local governments, watershed and marine waters groups, and private sector representatives work together with tribal, state, and federal agencies to develop a recovery plan for Puget Sound. While the shared strategy does not diminish federal agencies, tribes, and state authorities to establish recovery goals for the Puget Sound, it links local governments, watershed groups, and others to the critical process of identifying how to achieve these goals. By establishing a forum to discuss on-the-ground watershed and marine waters efforts and important policy initiatives, the strategy helps move the region together along the same road to recovery.

NMFS and U.S. Fish and Wildlife Service (USFWS) are responsible for developing a recovery plan for ESA-listed Puget Sound salmon and bull trout, respectively. NMFS and USFWS also have a trust responsibility to the tribes. The services believe the shared strategy is both an effective process for developing a recovery plan and an efficient means to involve those essential to its success. They are committed to participating as full partners so long as the ESA is satisfied, and the process and its results are consistent with treaty rights and the federal trust responsibility to tribes. As comanagers, treaty Indian tribes are committed to the return of salmon stocks to a level that meets treaty rights.

The relationship between federal, tribal, and state resource managers is complex. So too is the relationship between Indian treaty rights and the state and federal laws designed to protect and recover salmon. The exact parameters of these relationships have not been clearly defined in all instances. Notwithstanding these areas of uncertainty, participating tribes, the state, the federal agencies, and others in the Puget Sound region are committed to working together to protect and enhance salmon runs. At the same time, each participant in the shared strategy understands that this collaborative effort is not intended to diminish, expand, or define the rights of any participant. The tribes, as well as the other parties, reserve the right to seek different or additional measures viewed as necessary to carry out treaty promises and/or effect compliance with other state or federal laws.

The proposed strategy focuses on the Puget Sound basin, including its marine waters and individual watersheds, and groups of Puget Sound fish whose genetic, ecological, and life histories distinguish them from other groups within their species. The initial goal setting process of the strategy focuses on Puget Sound species listed under the ESA: Puget Sound chinook, Hood Canal summer chum, and bull trout. The shared strategy

will not only work to promote the recovery of these species, it will also promote and protect the continued health of thriving stocks to avoid further ESA listings. It will address broad biological needs by supporting an ecosystem-based approach to salmon recovery, an approach that addresses the needs of salmon through protections and improvements to the land and water they need to survive. The strategy will provide predictability and consistency when applied across Puget Sound and will address the social, economic, and cultural implications of recovery.

To achieve the region's overall goal of self-sustaining harvestable Puget Sound salmon, the shared strategy sets forth: (1) a step-by-step approach to establish recovery goals and identify actions to achieve those goals through a comprehensive recovery plan; (2) a means to help guide near term actions to protect salmon while the recovery plan is under development; and (3) an initial structure to organize and implement the shared strategy effort.

For more information, visit our web site at [www.sharedsalmonstrategy.org](http://www.sharedsalmonstrategy.org).

## **SELECTED EXPERIENCE: MEDIATION IN SALMON CASES**

BY ALICE SHORETT, TRIANGLE ASSOCIATES, INC.

### **MEDIATION IN WASHINGTON FEDERAL DISTRICT COURT: THE FISHERIES ADVISORY BOARD AND STEELHEAD/SALMON MANAGEMENT PLANS**

In two court decisions, *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969), and *U.S. v. Washington*, 384 F. Supp. 312 (W.D. Wa. 1974), federal district courts in Oregon and Washington reaffirmed the treaty-preserved tribal fishing rights and significantly challenged the manner in which the states managed their salmon and steelhead assets. In *Sohappy*, Judge Robert Belloni held that the treaties signed by the Columbia River tribes guaranteed them a right to a "fair share" of the fish. A significant analysis of the right reserved by the treaties occurred in *U.S. v. Washington* when Washington Federal District Court Judge George Boldt specifically ruled that the treaty tribes were entitled to fifty percent of the harvestable salmon and steelhead in Western Washington. The Boldt Decision was affirmed by the Ninth Circuit Court of Appeals in June 1975, appealed, and the U.S. Supreme Court affirmed Boldt's ruling in July 1979 in the case designated as *Washington v. Passenger Fishing Vessel Association*, 443 U.S. 658 (1979).

The Washington District Court established management control through the Fisheries Advisory Board (FAB), created in 1975 by Judge Boldt. The FAB dealt with technical disputes arising in day-to-day fisheries management in the Boldt case area, when tribal and state fisheries' staffs compared management plans and data analysis. Data disputes often related to catch allocations, run size estimates, anticipated harvests of certain fisheries, and escapement requirements for spawning purposes.

When Judge Boldt created the FAB, he appointed Richard Whitney as the first FAB chairman. Whitney would convene a meeting of the FAB for a specific issue in dispute, either at the court's request or the request of a party. A tribal and state representative, who were selected based on the particular issue in dispute, worked to reach agreement or compromise. Whitney would moderate the proceeding and prepare a written report. Ordinarily he tried to mediate, but if no agreement were reached, Whitney recommended a solution to the parties. Judge Boldt would not consider a technical issue unless it had been reviewed by the FAB.

During the 1977 salmon and steelhead seasons, there were disagreements over completing a steelhead management plan for the season and Dr. Whitney requested the mediation assistance of Alice Shorett to work with the tribal governments and state fish and wildlife officials to produce a management plan for the steelhead season. The resulting plan was submitted by the parties to the technical adviser and the Court.

## **MID-COLUMBIA HABITAT CONSERVATION PLAN**

*Situation:* Three public utility districts (PUDs) on the middle reach of the Columbia River in Central Washington operate five hydroelectric dams. In addition to producing some of the cheapest electricity in the country, however, the dams also have an impact upon the Pacific salmon. The PUDs saw that if this impact continued, the federal government might be forced to take drastic action under the Endangered Species Act (ESA). In order to avoid such a situation, the three PUDs decided to develop a habitat conservation plan (HCP). An HCP would outline specific steps the PUDs would take to protect the fish. In exchange for this commitment, the federal government would grant the PUDs a Section 10 permit to allow continued operation of the dams in the event species in the HCP were listed. In addition to obtaining the Section 10 permit, the PUDs hoped that the HCP could simultaneously meet many of the requirements of the Federal Energy Regulatory Commission (FERC), which issues the licenses required by the PUDs for dam operation.

*Participants:* The negotiations included representatives of the Chelan County PUD, Douglas County PUD, Grant County PUD, the National Marine Fisheries Service, and the US Fish and Wildlife Service. Due to the desire to simultaneously meet the requirements of FERC, the negotiations also included those parties that have standing in FERC proceedings: the Washington Department of Fish and Wildlife Service, the Yakama Indian Nation, the Confederated Tribes of the Colville Reservation, and the Confederated Tribes of the Umatilla Indian Reservation. In addition, given the importance of the issues, there were a number of observers, such as power purchasers and environmental groups.

*Process and results:* In 1995, Triangle Associates was asked to facilitate the development of the HCP among the three PUDs and the participating government agencies and treaty tribes. For the first year and a half, the process advanced by means of alternating policy level meetings and technical level meetings. In addition, subgroups addressed particular issues while the main negotiations moved forward. Negotiations addressed two principal topics: 1) measures at the dams and reservoirs designed to increase

juvenile and adult fish survival rates on the main stem of the Columbia River, and 2) hatchery production and tributary habitat measures to compensate for unavoidable losses on the main stem. The Agreement was largely completed by the summer of 1998 and was being adopted in 2002.

## **NEZ PERCE TRIBE / AVISTA CORPORATION MEDIATION**

In 1992, the Nez Perce Tribe of Idaho sued Washington Water Power (now Avista Corp.) concerning alleged violation of treaty rights in connection with the construction and operation of two dams on the Clearwater River. When the case was taken on appeal to the U.S. Court of Appeals for the Ninth Circuit in 1996, the two parties agreed to seek a mediated settlement.

Triangle Associates was hired jointly by the tribe and the company to serve as mediator. Joint sessions of negotiating teams from both parties and the mediator, including an independent technical expert jointly agreed to by the parties to bridge the gap between estimates of fishery losses and economic valuation of those losses, were held over one and a half years. Triangle prepared an independent recommendation for a settlement, to which the parties agreed in late 1998. The resulting settlement was filed with the Ninth District Federal Court and resolved the lawsuit.

## **THE NORTH UMPQUA RELICENSING SETTLEMENT AGREEMENT**

**BY ALICE SHORETT, TRIANGLE ASSOCIATES, INC.**

### **THE PROJECT**

The North Umpqua Hydroelectric Project is located in the headwaters of the North Umpqua River near Roseburg, Oregon, on 3,000 acres within the Umpqua National Forest. It is owned and operated by PacifiCorp, which serves 520,000 customers in Oregon. Project facilities, constructed between 1947 and 1956, include eight hydroelectric developments with a generation capacity of 185 megawatts.

### **THE RELICENSING ROAD**

On June 13, 2001, representatives of eight state and federal agencies and PacifiCorp signed the North Umpqua Hydroelectric Project Settlement Agreement. The agreement documents their success in reaching consensus on a multitude of issues related to relicensing the project. It is a rare national example of a relicensing agreement being reached based on consensus. In Governor Kitzhaber's words, the agreement "will protect the North Umpqua River and its prized salmon and steelhead, while maintaining a valuable source of low-cost hydroelectric generation that this region badly needs right now." The agreement contains detailed, negotiated environmental improvements that will move the North Umpqua project toward current environmental standards.

The road to the settlement agreement had been long and far from straight. PacifiCorp's efforts to relicense the project started in the winter of 1991. Since the dam's first license was issued in the late 1940s, the regulatory and political landscape had changed greatly. The years had witnessed the emergence of the environmental movement and the adoption of many environmental laws, including the Clean Water Act, the Endangered Species Act, and the Federal Power Act. Issues involved with relicensing were now far more complex and wide ranging, and allowing anadromous fish access to their habitat was a central issue.

These laws also changed the number of participants in the relicensing process. Federal and state agencies now had responsibilities for implementing the environmental laws related to relicensing. In addition, numerous environmental organizations advocated for their respective interests.

Discussions over many complex issues continued, often haltingly, over the next nine years. In an effort to establish a solid scientific foundation for discussions, PacifiCorp initiated a collaborative watershed analysis. As discussion ensued, what to do about Soda Springs Dam emerged as the key issue and a stumbling block to the success of relicensing discussions. Despite their best efforts, the parties acknowledged a stalemate after nearly a decade's work.

## **THE MEDIATION**

In the summer of 2000, the parties agreed to try mediation to reach agreement and received an extension from FERC. Negotiations began in July with Governor Kitzhaber's Office; Oregon Departments of Environmental Quality, Fish and Wildlife, and Water Resources; U.S. Fish and Wildlife Service; National Marine Fisheries Service; USDI Bureau of Land Management; USDA Forest Service; American Rivers; Umpqua Watersheds; and Umpqua Valley Audubon Society. At the end of September, the non-governmental organizations withdrew from the negotiations.

Most of the effective problem solving occurred in small policy, scientific, legal, and operational work groups. Lead negotiators for the nine parties served as an executive group to resolve policy issues and guide other work groups. Issue-oriented work groups were formed with specialized professionals from each negotiating team. These knowledgeable people worked elbow-to-elbow with their colleagues from other negotiating teams. They tamed complex, unwieldy issues and creatively uncovered informed, fair, and long-term solutions that would have eluded any one individual.

Technical work groups were established for each issue area and their resulting agreements-in-principle provided the foundation of the settlement agreement. The attorney work group hashed out implementation issues, relying on the technical work groups to verify intent, as they painstakingly agreed on formal legal language.

Since the fate of Soda Springs Dam and the salmon species that once migrated into the reaches upstream of it represented the greatest and most controversial of the relicensing issues, we began negotiations there. The first work group established by the

mediation team was the fish passage work group. The fish passage agreement-in-principle, forged by this work group, represented the mediation team's first success and spurred the other work groups on to similar successes.

### **Elements of the Final Settlement Agreement**

- Immediate restriction of project-induced flow fluctuations in the Wild and Scenic River reach. (2001)
- Expansion and restoration of anadromous fish habitat to a disturbed reach below Soda Springs dam to provide spawning habitat in the Soda Springs bypass reach where anadromous fish are currently present. Simultaneous increase of the instream flows in this reach to eleven times the current flow. (2003)
- Upstream and downstream fish passage at Soda Springs dam will restore access for
- Anadromous fish to 6.6 miles of their historical range above Soda Springs dam.
  - Vertical slot fish ladder for upstream passage of adult salmon and lamprey
  - Fish screen for safe, efficient downstream passage of juveniles
- Modification of the spillway to improve downstream fish passage at Soda Springs dam.
- Expansion and improvement of anadromous fish spawning habitat above Soda Springs dam in the Slide Creek bypass reach by placing boulders to trap spawning gravel emanating from Fish Creek.
- Increased instream flows in project bypass reaches by 3-to-12 times the current instream flow (2005) will
  - improve the quality and increase the quantity of stream habitat,
  - expand the amount of wetted stream channel area,
  - improve temperature and other water quality attributes for fish, and
  - increase habitat availability during low-flow periods.
- Increased restrictions on project-induced flow fluctuations (ramping) in project bypass reaches.
- Upgraded fishway at the Rock Creek diversion dam to improve upstream passage for migratory fish and to allow for sorting of hatchery from wild fish.
- Addition of large woody debris to East Fork Rock Creek to create and improve fish habitat.
- Increase of riparian habitat protection through purchase of conservation easements or other enhancement measures in portions of the Rock Creek basin.

### **HOW WERE THE PARTIES ULTIMATELY ABLE TO OVERCOME THE MOST SIGNIFICANT BARRIERS TO REACHING AN AGREEMENT REGARDING SALMON AND ENERGY IN THE NORTHWEST?**

#### **A SOLID SCIENTIFIC FOUNDATION**

“The North Umpqua Watershed Analysis—Synthesis Report” and other reports established a factual base for negotiations that we returned to again and again. A science team, formed of experts from the different negotiating teams, constituted a trusted peer

review for technical studies and information. These tools allowed the mediation team to move away from technical squabbles into creative solution seeking.

### **CLEAR UP-FRONT GOALS**

The parties first negotiated and agreed on resource management goals to set the standards an agreement would have to meet. They agreed up front that both environmental resources and power generation would be protected to the maximum extent possible. Since the goals were collaborative, they formed a foundation that the mediation team could return back to again and again to test the strength of various solutions.

### **POLICY DECISION-MAKING FORUM**

We establish the executive policy group up front, ensuring that the head decision makers were represented in the group. We had to guarantee that we had the power in this group to act quickly on tough policy issues. We ensured that the issues were framed precisely and options were laid out.

Throughout the process the mediation team relied on this executive policy group to tackle issues on which the work groups had exhausted their negotiating range. This moved negotiations along, preventing any one issue from paralyzing the broader tasks of each work group.

### **MUTUAL RESPECT**

Respect for each other's responsibilities as caretakers of the public trust, the environment, energy production, and ratepayer costs allowed tough and productive discussions to take place without extreme gamesmanship. At the outset of the mediation, we developed a "Mediator's Test" of what tests the agreement would have to meet. This included all legal and regulatory mandates, as well as parties' obligations to their constituents or governing bodies (e.g., clients, ratepayers, taxpayers, boards of directors, bylaws).

If the parties have confidence in the process—that it is fair, inclusive, programmatic, and that it will produce results—they are able to push up their sleeves and get to work. As a result of their work together, the professionals engaged in the negotiations now better understand and respect each other's responsibilities. This understanding and trust will improve the quality and efficiency of carrying out the details of the agreement on the ground.

## SALMON RELATED CONFLICT MANAGEMENT PROJECTS

Donna Silverberg, DS Consulting

Name of Project	Process	Parties
American Rivers v. NMFS (1996)	Mediated settlement of lawsuit regarding implementation of a 1995 Biological Opinion regarding operation of the Federal Columbia River Power System	Environmental groups, state, federal, and tribal governments (policy level, attorneys and top technical staff)
Columbia River Regional Forum: (1998-present) Implementation, Technical Management, Water Quality and System Configuration Teams	Facilitated forums to negotiate on-going implementation of Biological Opinions related to recovery of endangered salmon (and other species) while balancing hydro-electric operations, water quality, irrigation, navigation and other uses	<p>States: Fish &amp; wildlife managers, hydrologists, environmental quality staff, and governor's staff from Washington, Oregon, Idaho, Montana</p> <p>Feds: NMFS, EPA, COE, BOR, BPA, USFWS—technical, upper management and Executive levels</p> <p>Tribes: 13 tribal governments on or near the Columbia River</p>
NMFS' 2000 FCRPS Biological Opinion (1999-2000)	Facilitated consensus negotiations between federal agencies on appropriate actions needed to avoid jeopardizing and recover endangered salmon passing through the federal Columbia River power system. ESA and Clean Water Act issues.	NMFS, USFWS, BPA, COE, EPA, BOR, BLM, USFS, BIA
Oregon Plan for Salmon and Watersheds (1996 & 2002)	<p>Provided initial system design assistance to Governor's staff for public involvement and long-term voluntary recovery process</p> <p>Facilitating policy level dialogues regarding implementation of the Plan</p>	<p>Governor's office, state natural resource agencies, local governments, the public</p> <p>Governor's office, state's natural resource agency directors, regional directors of NMFS, USFWS &amp; EPA</p>

<p>Oregon Fish Passage Task Force (2000-2001)</p>	<p>Co-mediated a legislatively mandated stakeholder group to review and revise conflicting and contentious laws regarding removal of barriers that effect passage of fish that “migrate for their life cycle”</p>	<p>City &amp; county associations, special districts, state and federal governments, conservation groups, recreation groups, hydroelectric dam operators, fish protection groups, agricultural associations, water users, and Governor’s office.</p>
<p>Native Fish Conservation Policy Work Group (2002)</p>	<p>Negotiated rulemaking effort seeking to establish rules regarding the appropriate protection of native fish in Oregon</p>	<p>Department of Fish and Wildlife, local state and tribal government, conservation groups, fish protection groups, property rights advocates, water users, fishing groups, recreation groups</p>
<p>Regulatory Coordination Group (2002)</p>	<p>Providing conflict management &amp; system design assistance to federal regulatory agencies seeking better coordination and collaboration on ESA &amp; CWA issues</p>	<p>EPA, COE, NMFS, USFWS</p>

**OTHER SALMON RELATED PROJECTS/WORK**

- Negotiation and collaborative problem solving skills trainings: NMFS’ NW Region Habitat and Hydro Divisions, BPA’s Fish Division, and Columbia Basin Fish and Wildlife Association (state, federal, and tribal representatives)
- Moderated public EIS hearings regarding possible removal of four Snake River dams as a means of recovering ESA listed salmon populations
- Facilitated an international technical and policy level “Ocean Conditions Symposium” that looked at the role of ocean conditions on migrating salmon populations
- Facilitation/conflict management consultation: Caspian Tern Work Group (re: relocation of birds to reduce predation on baby salmon)

# ENVIRONMENTAL JUSTICE: DO ALTERNATIVE DISPUTE RESOLUTION PROCESSES DO JUSTICE?

THURSDAY, MAY 16, 2002—2:00–4:00 P.M.

## MODERATOR

Robin Roberts, RESOLVE

## PARTICIPANTS

Larry Charles, O.N.E./C.H.A.N.E.

Elisabeth Evans, Environmental Justice Program, U.S. Environmental Protection Agency, Region VIII

Cheryl Johnson, People for Community Recovery

Gregg Macey, Program on Negotiation at Harvard Law School

## ROUNDTABLE ABSTRACT

The environmental justice (EJ) movement first took hold in the early 1980s stemming from demonstrations over the siting of a PCB landfill in North Carolina. How, over the last twenty years, have alternative dispute resolution and agreement seeking processes been used to address EJ issues and to what effect? This roundtable, composed of leaders of local and regional community organizations, researchers, and federal agencies, will share their current or past experiences (successful, moderately successful, less successful, or unsuccessful) and discuss the following six overarching issues:

- How can EJ issues be kept on the agenda in communities that must also focus on basic survival issues?
- Who is and how is “the community” defined (e.g., along geographical or political boundaries, race, culture)?
- What kind of capacity building has to occur to optimize each stakeholder’s participation in the negotiation process?
- How can community stakeholders maintain solidarity/unanimity over the course of a negotiation?
- How do power imbalances (real and perceived) among stakeholders affect the conflict?
- When do you know when environmental justice has been achieved? Attendees will be invited to share their thoughts on these six questions in the last half of the session.

## ROUNDTABLE SUMMARY

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

### ROBIN ROBERTS—BACKGROUND

Environmental Justice (EJ) was first coined as environmental racism. Can we first define what EJ means to you?

### GREGG MACEY—HOUSTON CASE STUDIES

Kennedy Heights subdivision—family documents continuous water line breakages 1970–1991. In 1991, the contractor collapses while excavating water line site—city found some contamination but did not disclose this to contractor or residents. There was evidence of hydrocarbon contamination. By 1995 residents learned that the subdivision was previously a tank farm, each four acres owned by Chevron—plans for an all black subdivision without remediation were put in place. In the 1990s the issue went into mediation—terms of settlement lost, and issue became a pure cost allocation issue.

Rhodia sulfur dioxin site—developed advisory committee, emission notification, and other tools. Interpretation of a variety of issues has changed over time by members of the community.

How do we make sure that processes protect the community rather than polarize the community?

We need to think about the interpretation of the agreement and its impact on the sustainability of the community—need to redefine stakeholders.

### CHERYL JOHNSON—HISTORICAL CONTAMINATION

Proof relies on the residents—public housing was built over a sewage disposal and electrical transformer site that included PCBs. Community plagued by water, air, and land contamination. EPA did a site assessment. Over 368 pollutants were identified. Chicago Housing Authority (CHA) met with the community to develop a remediation program. The level of remediation was an issue of concern and negotiation. They excavated to 20 feet, hit groundwater. They put rock and soil over the groundwater rather than clean up. Thirteen hundred residents filed suit—the suit brought the cleanup to a halt. CHA used the cleanup to begin evicting families—no remediation is occurring.

PAHCs and benzo-a-pyrene are known skin irritants and carcinogens with prolonged exposure. The health practitioner focused on social illnesses and diseases, not environmental. Quality of health is crucial to the community. Ten years ago—tried to establish a good neighbor dialogue with Ford Motor Co.—sat at the table only in the last three years. Ford wanted to bring in its suppliers adjacent to the plant. Community wants

assurances that the suppliers will be compliant with existing regulations. Practitioner neutrality is critical—mediator in Ford appears non-neutral to the community.

Mediators are needed in urban areas and suburbs.

### **ELISABETH EVANS—EPA EJ PROGRAM AT REGION VIII, DENVER**

Can we prevent a community from bearing a greater proportion of environmental harm?

- Example: I-70 is elevated over the community in north Denver. Highway is over a school. The interstate needs to be expanded. How? Should it be widened? Add another layer?
- Barriers include—within the agency
- Within the community—agency lacks a venue for meeting with the community. No venue for up-front work. Agency lacks training to work with and communicate with the communities.
- Challenge to EPA staff—how to simplify the explanations of scientific and technical terms? What's a composite sample? What is an aliquot? Why not say that you put a scoop of soil in a bucket?
- Challenges also include the level of organization at the community level. They need to galvanize their interests and transmit the information to the community.
- Overcoming barriers
  - Convening the parties: Interagency and intergovernmental coordination and communications, members of the public
  - Looking for creative ways to fund—across and within agencies for monitoring, research, education
- Successes
  - Convinced a refinery not to site near a low income community
  - Used SEP funds to leverage community project.

### **LARRY CHARLES**

King speech—birth of a new age—conflict is similar to labor pains. Be encouraged that these pains signal new institutional arrangements. We are evolving from conservation movement to that of environmental and social health, evolving from rural communities to those of urban communities. Approaches of the past don't necessarily work in engaging EJ communities. Practitioner community lacks racial capacity. Need scientists, attorneys, and practitioners to assist the EJ community.

In Hartford, the management of waste and pollutants and their location were racially motivated decisions. Communities are consumed with issues of survival, not environmental issues. People are now beginning to make the linkages.

## Principles of Engagement

- Respect—if you do not convey genuine respect—trust is not created. •First respect community and then take stock of the following:
  - Community Ownership—community should decide priorities and define solutions.
  - Community Control—millions spent to impact the poor but the outcomes are minimal. Community should be able to control and make decisions.
  - Community Accountability—take ownership of the events of the happenings of the community.

Learn by sharing the light or feeling the heat.

### LANDFILL STORY

Article in paper documenting the doubling of a landfill site. Community works with block captains, hard to identify the regulators or implementer. Lacked the financial resources and scientific expertise, so used political power to take charge.

- Went to elders linked issue to respiratory issues
- Went to young mothers—linked issues to lead in soft tissue
- Went to student activists
- Went to the churches—racial injustice
- Went to black experts in EPA

Built the coalition.

\$13 million to cleanup.

\$9.7 million of unrestricted funds to assist the community.

Resulted in successful cessation of expanding the landfill site.

### QUESTIONS AND RESPONSES

1. How can EJ be kept on the agenda when survival issues are paramount?
2. Who is the EJ community?
3. How do you know when EJ is achieved?

*Question:* Who defines EJ and who and how is the goal defined?

*Question:* Is the mediator hired by Ford viewed as biased because the person is paid by Ford, and/or because the community was not involved in the selection?

*Answer:* The perception is that the solutions are skewed toward Ford and that the company is being deceptive. Eighty percent of the work force comes from Indiana, not the community. The community forced the company to open up the hiring process. The company never communicated to the community that employment opportunities were available. Because the company opted to hire a mediator, it implies that they recognize the power of the community. The first step of the mediator should be to engage the community. They need to develop two work products, first to build consensus, then to

work out products. EPA Region VIII—hires directly, community selects, EPA hires a neutral in the community.

*Question:* There are growing Latino and Laotian communities—have any of you had experiences with these communities?

*Answer:* Eighty percent of Hartford is minority, of which half is Spanish speaking. This underscores the importance of gaining unanimity of the community. Keep the process open to all and provide opportunities to participate at all levels.

*Answer (Lis):* Half of EPA work in Denver is with Hispanics; we deal with translation issues, fear of government, fear of INS, and association (misperception) with EPA and INS.

*Answer (Gregg):* In Chelsey MA, there is a challenge to practitioners when national groups enter into a process. Often they select the most victimized groups with the end result of excluding other local groups.

*Answer (Cheryl):* The Chicago group includes Hispanics, Irish, blacks, all with different issues, but we meet once a month to help each other engage. It is difficult to be a place-based mediator when you are emotionally invested.

*Answer (Larry):* No books exist on the practices and principles of mediating EJ issues. Capacity building should be addressed early in a process. The expectation that the issue will be resolved in 2-3 meetings should be dispelled. Corporations, scientists, and agencies all need to learn about engaging communities in mediating EJ issues.

*Answer (Gregg):* There are EPA and Harvard programs for engaging community leaders to receive training as facilitators and negotiators.

*Comment:* Protracted international conflicts identify the basic human needs that are non-negotiable such as respect, identity,

*Question:* Is it a mediator's job to achieve justice?

*Answer (Larry):* I wish every mediator's goal were to make justice the end goal of every process.

*Answer (Lis):* Don't have any preconceived notions of what the community wants, needs or will settle for. Be open-minded. But keep justice in mind for creative solutions.

*Answer (Larry):* EJ struggles often evolve into justice struggles.

*Question:* Regarding Title VI complaints and recipients, what can be conveyed on the pros and cons of ADR to those who file complaints?

*Answer (Liz):* What standard do you use to define the cumulative impacts? It is our responsibility to level the playing field and address the power imbalances. The feds have power by their mere presence. Can the feds give money to help participants engage in the process?

*Answer (Larry):* Title VI has a great significance, but you can't use federal funds in a way that is disproportionate to the communities. But, anything that looks like affirmative action comes to a halt with respect to EJ issues. Use Title VI as a negotiating tool.

*Question:* Clearly we need to even the playing field before initiating conversations. What is the ethical responsibility of the practitioner when the playing field is clearly not level?

How should they even be at the table, if at all?

*Answer (Larry):* Money and the prospect of losing it is always an attention getter of operators. If it is demonstrated that the operator is at financial risk if not leveling the playing field, this can be very helpful. The positional dance must take place before the dialogue between the community and the operator can begin. Practitioners do have a professional responsibility to demonstrate leveling the playing field.

*Answer (Lucy):* The table should be set—the people at the table are capable of participating in a strong way, be it financial, day care, field trips, language, or tutors in technical issues.

*Answer (Gregg):* We should advocate for more joint fact finding by all parties. We need to find a way to incorporate local and place-based knowledge; the community should help establish the assumptions and assist with the definition of the analysis.

*Question:* What is the relative value and appropriate uses of mediation?

*Answer (Larry):* Mediation is the end point; we can negotiate concessions that may never get in the court. Operators prefer to bypass mediation; operators need incentive to get to the table rather than taking passive resistance. Incentive can be the heat.

*Question:* How does the cessation or limitation of public information impact EJ processes in the name of national security?

*Answer (Cheryl):* The precautionary principle remains—rely on local knowledge and define what the risks are. Limited information makes it harder for EJ issues to be defined, groups to organize, etc.

*Answer (Lis):* It's about getting and sharing information. EPA has closed up much of its information because of national security issues. DOD does not need to go through permitting processes on matters of national security.

*Question:* In producing the heat, how do you keep a community from going way overboard, or buying into the rhetoric needed to get the process kick-started?

*Answer (Larry):* Don't underestimate the community's ability to get into an issue and find a creative solution. If the process is set up properly, the community will stay focused.

## **OUTCOMES**

*Robin:* Presenters, tell us what your observations are about this conference.

*Larry:* I'm shocked and amazed at how wonderful and helpful people in Arizona have been. I saw all white faces talking about EJ issues. My myths were burst—I realized that goals are not financial, people want to help engage our communities—that perception about our communities needs to be destroyed by experiences in engaging in EJ communities. There is a strong need for capacity building not only in communities but also in the regulatory, practitioner, and operator communities. We need to recognize our inter-relatedness. The problems of urban communities also belong to the suburbs and rural communities. I applaud EPA to use community-based strategies to engage and understand problems. Never underestimate the capacity of the community and the opportunities before us.

### **Elements of an EJ agreement (each step is negotiated by the parties)**

- Operator cleans up facility
- Install maximum technologies to assure safer operation
- Extreme testing to prove goal of zero emissions
- Community controls on testing and monitoring to assure zero emissions
- Community shares revenues to rebuilds community

# UNIVERSITY-BASED PROGRAMS THAT EXTEND COMMUNITY CAPACITY: LESSONS FROM THE TRENCHES

THURSDAY, MAY 16, 2002—2:00–4:00 P.M.

## MODERATOR

Tanya Denckla, Institute for Environmental Negotiation, University of Virginia

## PARTICIPANTS

Juliana Birkhoff, The Policy Consensus Initiative, RESOLVE

Marshall Breeze, Agricultural Education and Communication, University of Florida

Steve Daniels, Western Rural Development Center, Utah State University

Eric Thor, Rural Mediation and Finance Training Unit, Arizona State University East

## ROUNDTABLE ABSTRACT

Universities have long been seen as a source of research on conflict resolution, but they remain a largely untapped resource for assisting with environmental conflict resolution at the local, regional or national levels. Three different, innovative university-based approaches to environmental conflict resolution will be presented along with lessons learned for effective environmental conflict resolution:

- The work of Extension specialists as impartial interveners in environmental conflicts as well as conveners of collaborative problem solving;
- The Natural Resources Leadership Institute model for building a statewide community of leaders, across all sectors, who are capable of convening and engaging in collaborative problem solving; and
- The Rural Mediation and Finance Training Unit in addressing conservation compliance, public lands grazing, water allocation issues, and other topics.

Come prepared to think about how these approaches and lessons might be applied to your own challenges and needs. This session has been designed with group activities and discussion to capture the energy and expertise of the audience.

## ROUNDTABLE SUMMARY

**INDIVIDUAL PRESENTATIONS**

**Natural Resource Leadership Training: A New Model for  
Preparing Stakeholders for Collaborative Problem Solving**

By Mary Lou Addor, Marshall Breeze, Tanya Denckla, Mike Ellerbrock, Steve Smutko

# ROUNDTABLE SUMMARY

## MAIN DISCUSSION POINTS

- Universities are a largely untapped source of research on conflict resolution; through Extension they are involved in numerous different kinds of community dispute resolution projects. These projects are locally created and driven and are primarily in the Western U.S.
- Through the Department of Agriculture and NRCS, there is a significant amount of ag-oriented mediation being conducted by mediators certified by the USDA, often with high moneys, takes, and tremendous dollar savings resulting.
- Possibilities of university-based programs as potential partners for environmental conflict resolution are still relatively untapped.
- Universities have initiated a new model for building capacity for environmental dispute resolution: the Natural Resources Leadership Institute (NRLI).

## QUESTIONS AND RESPONSES

- 1. How do you apply, expand, and adapt the presented projects?**
- 2. What are the challenges that all the university based projects are facing? What can we learn from each other?**
- 3. How do you identify people to enroll in the NRLI the first year it is offered?**

- An advisory board can help identify potential applicants.
- Recreation management is one area to explore, since there is a lot of conflict in this area. There are Web sites, clubs, and grassroots leaders, all looking for assistance.
- There is a gap between academia and institutions needing help.
- We send out e-mails to a variety of key people in different sectors asking them to send out the information about the NRLI program by e-mail to their own listservs.
- Applications are available on-line and can also be submitted online.
- The first class was hand picked by an advisory committee.
- Partnering with other organizations allows us to use their contacts.
- Conduct a shorter pilot training (3 days instead of 18-25) and use these people to help recruit.

- 4. The Extension budget is being cut severely. The biggest problem for extension is visibility. How do you get the community interested in working with the Extension for dispute resolution?**

- In some communities there are offices for dispute resolution. The Extension needs to work through/with the local government.
- Local community mediation centers are good resources for recruiting volunteers for other kinds of dispute resolution, such as rural agricultural mediation.
- There are interesting networks that do collaboration work, e.g., parent community network. Bring the different streams of the Extension's community resolution to work together.

**5. What is the relationship between university public policy programs and dispute resolution efforts programs?**

- The Florida NRLI collaborated with three persons from the law school.
- Not a lot of intradepartmental university collaboration. Extension didn't want to collaborate with us—said take the lead and we'll support you.
- We have a similar goal: to involve other parts of the university community.

**6. Regarding capacity and individual programs: Are there ways of networking, developing policies and connections, sharing resources between states? How can one state learn from another?**

- The common thread among these programs is that they are all involved in building capacity in dispute resolution; but they are all individual programs.
- One possibility would be to do a joint proposal to fund a network.
- Develop a joint program at different universities to find out who the leaders are in building community capacity at the universities. Work with local councils in training leaders for building capacity.
- Western Governors Associations is one possible source of funding - Governors of Western States get together and discuss their common issues and problems, but they might be too political.

**7. Is there a mechanism through which university based programs communicate?**

- There are state offices of dispute resolution, but these are almost exclusively concerned with court related issues, with the exception of Maryland maybe one or two other states.
- There isn't yet a mechanism to facilitate communication between Extensionists and academics.
- The gap in terms of coordinating structures is enormous.
- There is also a CAMP, a Coalition for Ag Mediation Programs around the country, related to USDA programs. They are funded every year from Congress. Supreme Court Justice of AZ has sent 38 different cases to mediation.

**8. What is appropriate behavior for people in academia? Is a single code of ethics for mediators possible, or are there certain additional standards that university-based mediators must uphold in terms of research, scientific rigor, and impartiality?**

**OTHER COMMENTS**

- Enlarge the circle of people involved; collaborate with Extension.
- There is a great USDA competitive program with a rural component in it, in which dispute resolution fits perfectly!

- In New York City, local disputes tend to be citywide issues that involve seven million people (at least at the policy level). There are a relatively small number of key players, and they are highly politicized. Even if we get the funds for dispute resolution, we often can't use them, because it's so difficult to get the community involved.
- There is a shortage of time and energy to put together something new, given the current conditions of the country and the economy.
- Our program started as a response to highly demanded issues.
- Even if we call it Natural Resources Leadership, we do address much broader issues; however, we do not focus as much on air as we do on land use and water issues.
- Communities are concerned with public health issues, and it often seems more appropriate for them to initiate a process around public health than natural resources, which automatically gets interpreted as "environmental."
- A crisis is often needed to get people mobilized in a community to get something solved.
- Extension is not only interested in how to grow alfalfa, but how to build capacity. Extension needs to broaden the issues they are dealing with and needs to create a new paradigm for their role and work in their communities.

### **9. For those who want to build a university-based network, what could be done?**

- Assemble mailing lists.
- Do some things together that haven't been tried before.

### **OUTCOME**

- There is an interest in putting together joint proposals.
- Universities should be working together to share information.
- Marshall Breeze will create a mailing list of those at the session and send it out to everyone.

# **NATURAL RESOURCE LEADERSHIP TRAINING: A NEW MODEL FOR PREPARING STAKEHOLDERS FOR COLLABORATIVE PROBLEM SOLVING**

**BY MARY LOU ADDOR, MARSHALL BREEZE, TANYA DENCKLA, MIKE ELLERBROCK, STEVE SMUTKO**

## **INTRODUCTION**

A state agency is besieged with complaints and vituperous accusations about the stench, flies, groundwater contamination, and public health hazards caused by biosolids—processed human manure—which has been spread on thousands of acres in various counties. Not sure what to do, the program director might decide to issue a letter to all complainants, to explain that the biosolids meet federally established standards and as a result pose no threat to public health. Or she might decide to hold several public meetings where people can voice their complaints and feel that they have been heard. Or in yet another scenario, she might decide that the problem has reached critical mass and that it is time to pull together the various stakeholders to see if they would be willing to work together, collaboratively, to explore how the increasingly difficult problems associated with biosolids might be resolved.

A river conservation group is drawn into a growing regional battle over water: can the upstream city with reservoirs and water treatment plants be the sole determinant of how much water is released from the dams into the river? Do downstream counties have a right to demand a certain standard of water releases, to ensure water to their communities? And what about water for the wildlife and river ecosystem? And water for recreationists? Not sure what to do, the conservation group might decide to write a letter-to-the-editor that attacks the city's water policy. Or it might decide to speak out at City Council meetings on a regular basis, ensuring that its concerns are heard. Or it might decide to initiate a series of regional meetings for educational and information-sharing purposes, drawing on local experts and the various stakeholders to develop a base of common understanding about the problems and potential solutions.

Choices are a critical aspect of modern life. Our actions—as individuals, groups, communities, and nations—incur reactions and impacts that are often unintended or unforeseen. More and more people using the same limited resources create a recipe for increasingly complex interrelationships and decision making about those resources. While this drum has been beaten for decades, a new rhythm is beginning to emerge about how to empower people in positions of leadership to understand and assess their full range of choices. It might be said that the greatest problem in today's world is not a lack of leadership, but a lack of leaders who understand and appreciate the full range of choices, including the option to seek win/win outcomes for everyone. One root of the problem is that our Western culture traditionally upholds a competitive spirit as a human virtue and often denigrates a collegial manner as a sign of weakness.

## GENESIS OF THE PROBLEM: BIOLOGICAL IMPERATIVES AND CULTURAL WORLDVIEWS

As a parent in the Western World, how would you feel if your child came home from school and told you that she made straight A's on her report card ... and that everyone in her class made straight A's ... and that everyone in the school made all A's? Would your reaction be: *What's wrong with that school? What's going on over there?* Or, would your response be: *What a great school, with outstanding teachers!* Can we envision, even hypothetically, a situation in which everyone succeeds?

Environmental decisions are often framed within a context of conflict, perhaps because much of our lives are experienced through forces of competition. Even our image of the natural world is that of a harsh place of conflict. From birth we are predisposed to seeing things with a competitive mindset because we are programmed by the external world around us, and perhaps even internally by our genes, that life in almost all of its dimensions is governed by competition, with winners and losers:

- *Nature*—characterized by many predator/prey relationships, evolution ruled by survival of the fittest and natural selection of the most desirable traits.
- *School*—grades are relative measures, standardized testing for school accreditation, college rankings, beginning salaries of graduates;
- *Science*—scientific method based on model of competing ideas, research agendas, and funding agencies;
- *Law*—based on an adversarial system and competing arguments, win/lose outcomes;
- *Politics*—competing party system, muckraking campaign strategies, statistical polling of favorites, majority rule via voting;
- *Entertainment*—five star ratings of movies, restaurants and hotels, cutthroat advertising, computer-scored beauty pageants;
- *Media*—fierce competition for viewers, success measured by market share of audience;
- *Music/Art/Literature*—golden records, Grammy and Emmy and Pulitzer Prizes;
- *Economics*—Western capitalism institutionalizes competition with winners and losers, financially rewards behavior driven by self-interest, wealth and poverty are relative constructs;
- *Religion*—success often measured by number of members, dualistic paradigm of good vs. evil and heaven vs. hell;
- *Sports*—discrete outcomes via scores, rankings, trophies, ribbons, newspaper photos of the championship teams, media glorification of the winners and humiliation (or silent dismissal) of the losers;
- *Crime/War*—negative aspects of life that reinforce the notions of good guys vs. bad guys and winners vs. losers.

Hence, conflict is inevitable, and in our culture, not readily resolved in a collaborative or creative manner. Preparing environmental stakeholders for collaborative problem solving requires a change of mindset. Even in democracy (arguably the fairest form of governance) there are seldom easy solutions to conflict. Recall the skeptic's view of democracy—three wolves and a lamb voting on lunch!

As pervasive as the Darwinian view of life has proven to be, cooperation is also essential to life. Given our physical limitations relative to animals, we humans may not even be here today if we had not learned to cooperate with each other. With comparatively poor senses (sight, smell, hearing), meager strength and speed, and a rather thin hide, we are individually no match for most animals and insects. We have survived and prospered because we learned to cooperate in hunting and farming, defending against predators and enemies, and building sustainable villages. Today, our greatest threats—and opportunities—are posed by each other. Conflicts arise partly because cooperation and collaboration do not always come naturally to us, reflecting our need for lifelong training in the art and science of leadership.

### **AN INNOVATIVE MODEL: NRLI**

A proactive concept for training natural resource leaders, drawn from existing leadership training models, was initiated in 1995 in North Carolina at North Carolina State University. With funding provided by the Kellogg Foundation, the North Carolina program established itself and also provided start-up funds to assist the launching of similar programs in Kentucky, Florida, Maryland, and Virginia. Based on the success of the concept, Montana and Alaska have established a similar program, Washington is in the process of establishing one, and Missouri and others are considering the initiation of similar programs. While five of the early programs were initiated by Extension faculty at universities (North Carolina, Florida, Kentucky, Maryland, Virginia), the Montana program was established by a state-funded nonprofit organization, the Montana Consensus Council, and still others are now being explored by private individuals and organizations who hope to establish partnership programs for their states.

The Natural Resource Leadership Institute (NRLI) concept arose as a response to the increasing complexities of managing natural resources and environmental policy faced by political and professional leaders. Natural resource conflicts often center on issues such as water resources, water quality, pollution, community and rural forestry management, land use, and waste management. These kinds of conflicts offer distinct challenges, not only because of impacts on multiple communities, but also impacts on multiple levels of governmental jurisdictions. When community leaders and officials are unable to resolve conflicting demands, “interim” plans are often put into place or gridlock occurs, moving decision-making from the meeting room to the courtroom.

It is not clear what unresolved environmental conflicts cost our world, in terms of our way of life, the global economy, or the environment itself. What is evident, however, is the increasing demand on our natural resources and the increasing difficulty in deciding how to use or not use them.

Although common, gridlock is not necessary. Mutually acceptable solutions can be sought by leaders in the field, but for this to succeed our leaders must develop the knowledge and skills for making critical choices in shaping environmental decision making. And most important, they must understand the full range of choices available to

them. After seven years of experience and evaluation, the NRLI can be said to be a successful model for providing these to our leaders.

## **THE NRLI CONCEPT: TWO KEY FEATURES**

The NRLI has two key features. At one level, the Institute is a training program to develop leaders who will be more prepared to participate in and shape collaborative problem solving about complex natural resource issues within their sponsoring organizations. This aspect of the training program provides the leaders with a knowledge and skill base for understanding the range of options available to them, so that decisions made are appropriate to each situation.

On another level, the Institute creates a network of trust among leaders from all sectors—from local, state, or federal government; industry and private businesses; academia; nonprofits; and community civic organizations. Over the course of nine to eighteen months, depending on the length of the individual program, a safe space is created for Institute Fellows to meet periodically, share perspectives, tell war stories, and work together in skill-building experiential exercises. Diverse perspectives are critical. This enables Fellows to put a “name and face on the opposition,” to interact and learn from each other in a safe, nonthreatening environment. Eventually Fellows reach a point where they are transformed in each other’s eyes from “the enemy” to individuals they may like, but with whom they can respectfully disagree.

What emerges from these interactions is a network of: *personal trust* where previously there was little or none; *reflective learning* where people can call on each other for ideas and assistance; and *efficacious change* where people can plant new ideas in their own spheres of influence and slowly transform the way business is conducted. In the field of environmental conflict resolution these kinds of interactions are laudable and lead to citizens engaging each other “upstream”—before a conflict occurs—which increases the capacity for collaborative problem downstream when a problem needs to be resolved.

Over the long term, perhaps it is this transformation of perceptions and emerging network of trust that may be the most important feature of the Institute, perhaps more important than the knowledge and skills base. While time and further evaluation will reveal whether this tentative conclusion about the NRLI model proves true, it is our belief that changed perceptions of the *human* element of conflict can open a world of new possibilities seldom considered about how problems might be addressed productively. And because actions often follow attitudes, a transformation of leaders’ attitudes towards each other can fundamentally alter the dynamics of problem resolution.

## **THE NRLI CURRICULUM**

The Institute curriculum provides a framework in which Fellows can learn from technical experts in the field, specific situational environmental conflicts with their diverse stakeholders, and perhaps most importantly, each other. With interactive and dynamic instructional elements, the Institute enables Fellows to acquire new knowledge; enhance

critical thinking and other process skills; model new behaviors; and experience changes in their attitudes. The core curriculum components shared by all Institutes include:

- Leadership development and relationship building;
- Interpersonal development and understanding;
- Processes for collaborative problem solving;
- Specific natural resource challenges and substantive issues;
- Mechanisms for facilitating a transfer of learning.

These curriculum components are integrated into a series of three-day workshops held in different locations throughout the year. The number of workshops varies from state to state, from three workshops (or 9 days) to a total of eight workshops (or 24 days), plus a practicum. In some states, workshop schedules include a Saturday to avoid missing additional work time, while others occur wholly during the week. Most incorporate at least one evening session. An Institute workshop usually begins with lunch and ends with lunch on the third day, which helps to foster the development of the learning network.

Each workshop uses a range of teaching methodologies. Instructed by both practitioners of environmental conflict resolution and academic faculty, the pedagogy includes minilectures, expert panels, stakeholder panels, large and small group exercises, case studies, and field trips. The Institutes tend to emphasize hands-on experiential learning techniques to develop and practice skills taught in the workshops. In addition to the perspectives that Fellows offer from their own experiences, the case studies and field trips are important to broaden Fellow knowledge and understanding about the complexities of the natural resources issues.

A basic tenet for professionals participating in educational programs is to have the ability to transfer learning from the training environment to the work environment. Sponsors want to know that outcomes are intentional, applicable, and make a difference. Each Institute program uses specific mechanisms to enhance the Fellow's ability to integrate what they have learned back into their work place, community, or personal life. As part of field instruction, several programs request their Fellows to engage in a "practicum" where they assume a leadership role during a mentored project and apply skills learned to an organizational or community natural resource issue. The Fellows complete this experience with a written reflection on the immediate changes that occurred and anticipated long-term impacts of their project. Below is a more detailed description of each of the five core curriculum components.

## **1. BUILDING A NETWORK: LEADERSHIP DEVELOPMENT & RELATIONSHIP BUILDING**

- *Bringing together diverse stakeholders:* The NRLI seeks diversity in its participants, individuals to achieve balanced representation from business and industry, the regulatory and other natural resource agencies at the state and federal level, educators, the nonprofits, and the environmental and grassroots communities. Additional characteristics reflected in the spectrum are gender, age, race, professional and life experiences,

including offering scholarships to ensure that leaders from different socioeconomic situations are able to attend. Diversity is essential to the success of the Institute and advancing the capacity for collaborative problem solving in environmental disputes.

- *Interdependence/team building:* Competitive settings often obscure the underlying interdependence among “players.” Experiential exercises are aimed at developing trust and understanding among participants. Through perceived risk activities, such as a ropes course, participants build a sense of trust and willingness to communicate with each other, facilitating future learning, an essential goal of the NRLI curriculum.
- *Socializing:* Time for socializing also contributes to team building throughout all of the NRLI sessions. A social may be scheduled for the opening session, as well as at least one dinner and lunch together. For programs with low funding, Fellows may be asked to bring a bag lunch so that a meal may be shared with no cost to the program. Fellows also organize their own informal social gatherings during the program year.
- *Exploration of key characteristics and qualities of leadership:* This may be accomplished through a variety of guided discussions and exercises, ranging from those based on Stephen Covey’s *Seven Habits of Highly Effective People* to those developed by Cooperative Extension and others. This discussion is initiated at the first session, and carried through the remaining sessions.
- *Personal reflection:* Time is built into the curriculum for reflection about self, balance in life, goals, and development of personal mission statements. Development of a personal mission statement, started within the first or second session, is considered important for the leadership aspect of the Institute.

## **2. INTERPERSONAL DEVELOPMENT AND UNDERSTANDING**

- *Knowledge about own personality and conflict management “styles:”* This may be accomplished with facilitated discussion of a variety of instruments, such as the Myers Briggs or Enneagram personality type assessments; and the Thomas-Kilmann or the Ron Kraybill conflict assessment instruments. Usually at least one-half day is spent on these in the first session.
- *Introduction to conflict and conflict theory:* This element can include a discussion of the nature of conflict, sources of conflict, how conflict may be seen as normal, neutral, and an opportunity. The five basic conflict management styles are also introduced and discussed: avoiding, accommodating, forcing, compromising, and collaborating.
- *Communication skills:* This includes an introduction to active listening, including exercises in nonverbals and paraphrasing. Some programs also address persuasion theory and technique, risk perception, and the use of “expert” information in decision making.

## **3. PROCESSES FOR COLLABORATIVE DECISION MAKING**

Each session usually includes a focus on one of the following:

- *Facilitation:* A module on facilitation skills with exercises or role-plays designed to give Fellows practice in the basics.
- *Interest-based negotiation:* An introduction to interest-based negotiation, that includes

one or two negotiation role-plays around a natural resource issue.

- *Consensus building:* An introduction to the process of consensus building, with an exercise or role-play about a natural resource issue that engages Fellows in working through questions that should be asked during the “convening” phase, as well as an exercise or role-play that engages Fellows in experiencing a consensus-building process.
- *Mediation:* An introduction to the process of mediation, with a live demonstration mediation, or video, or role-play about a natural resource issue.
- *Decision making:* Group decision-making and decision-aiding tools and processes are introduced as a component of the facilitation, negotiation, and consensus-building modules. Key concepts are methods for making group decisions that enable thoughtful integration of scientific and technical data with stakeholder interests, values, and experiences.

#### **4. SUBSTANTIVE UNDERSTANDING OF THE ISSUES**

Each session usually includes a focus on specific natural resource issues, e.g. restoration of the Everglades, Blue Crab management in the Chesapeake Bay, sustainable forestry, etc. Each state decides the most timely and pressing natural resource issues suitable for discussion. The format for covering the natural resource issue will vary from state to state, and depends on the needs and conditions of each session. Ways in which these issues are addressed include:

- *Background packets:* Book chapters, brochures from agencies or interest groups, newspaper and magazine articles and Web site URLs are provided to fellows in advance of each meeting to familiarize them with the issues and prepare them to make the best use of the experience.
- *Stakeholder panels:* Representatives of different viewpoints are invited to speak on a stakeholder panel, moderated by NRLI faculty. Specific questions are posed to each panelist in advance, and may range from questions about the substance of the conflict to questions about the process: what has not worked, what has worked and why, to either reduce or resolve the conflict.
- *Guest speakers:* Someone who is knowledgeable about substance of the issue is invited to speak, as well as someone who is able to speak to the range of stakeholder interests and perspectives involved in the issue.
- *Fieldtrips:* Fellows routinely rate the fieldtrips to sites that illustrate the natural resource conflict as a high point of their learning experience. Field trips usually include tours by persons who are considered “neutral” or by a range of different stakeholders who are given the opportunity to explain the issue from their perspective.

#### **5. TRANSFER OF LEARNING**

- *Group processing:* A key aspect of the NRLI model is that participants are given time to process in a group setting what they have learned and think about how they can or will use what they have learned. This is accomplished very simply; every segment of the curriculum concludes with time for group discussion about what was learned and

how this can be applied to community work.

- *Individual reflection:* Some of the state NRLI programs encourage participants to use a private “learning journal” to distill their learnings, and to identify specific ways in which they plan to apply what they have learned.
- *Practicum:* Some of the state NRLI programs also include a mentored practicum in their curriculum in order to provide Fellows with an immediate and direct way to apply their new skills and knowledge to a project of their choosing.
- *Graduation or certificate of completion:* Some programs hold a graduation ceremony and provide certificates of completion.

## **NRLI PRINCIPLES: GUIDANCE FOR PROGRAM FACULTY**

While the phenomenon of leadership did not become the focus of serious study until the 1900s,<sup>1</sup> and the leadership movement wasn’t born until the mid-twentieth century, a significant amount of literature exists on leadership. The concept of leadership—and what constitutes *effective* leadership—has evolved over time and space, so that today, the sense of what kind of leadership is needed may differ significantly depending on the geographical setting, the specific situation, the organization, the stakes, the culture, and so forth. Clearly, leadership is a concept in evolution, as it must be, to reflect the changing nature and demands of our evolving societies.

Leadership institutes now exist for virtually every conceivable purpose: political leadership, human services leadership, wilderness survival leadership, student leadership, civic leadership, business leadership, to name a few. And now, a model for natural resources leadership development has been tested and found to be effective, as indicated by the following measures of success:

- Reported changes in Fellows’ behavior at work and home;
- Highly positive ratings and comments by the Fellows in formal evaluations of each session and overall program;
- Continued strong enrollment by diverse applicants in spite of significant registration fees and travel expenses;
- Significant institutional support by sponsoring universities and state agencies,
- Steady levels of outside funding;
- Demonstrated desire of NRLI graduates to return as instructors and/or panelists;
- Community requests for mediation services by NRLI graduates; and
- Development of new programs in other states modeled after NRLI.

The faculty of a leadership institute is faced with specific challenges that differ significantly from a standard training or class. Unlike some classes, a leadership institute is usually self-selecting and filled with highly motivated, purposive individuals who are interested in self-improvement and becoming more effective. Participants are inevitably demanding and challenging.

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<sup>1</sup> *Leadership Effectiveness Training*, Dr. Thomas Gordon, 1978.

Hence it is important to identify and understand how a leadership institute may differ from typical classrooms and even from typical adult education classes. The following is an attempt to crystallize the principles for faculty attitudes and behaviors that are essential for an effective leadership development program.

### **BALANCE ADVOCACY WITH INQUIRY**

Topics and situations explored are often quite controversial and polarizing. Issues are often chosen *because* they are problematic; the goal is for Fellows to gain a deeper understanding of how and why such issues are so difficult to resolve, and to create “Aha!” teachable moments about how such issues might be resolved in the future. To achieve this outcome, it is important for the diverse perspectives to be fully aired, whether by stakeholders, experts, the Fellows themselves, or all of the above.

It is only natural, then, that participants will advocate particular perspectives during workshop discussions. When this occurs, it is important for Institute faculty to facilitate a discussion where the reasoning, data, and values that lead to a point of view are explained; where others can express alternative values; and where participants can deepen their understanding of the issue and each other.

This approach differs significantly from a typical training or classroom, where the teacher’s expert knowledge and insights are sought and usually serve as the final arbiter of any classroom disagreements. In the Leadership Institute, faculty knowledge and insights about substantive environmental issues are less important than the process of balancing advocacy with inquiry during the Institute discussions.

### **MODEL BEHAVIORS FOR PARTICIPANTS TO LEARN**

An important part of leadership training is to model the behavior and principles being espoused. If a problem arises during the Institute program the problem can be addressed by faculty in a way that enables the class to learn from the faculty’s interaction and decision-making process, or even to participate in the decision-making.

For example, one of the principles of good public involvement processes is to share participant evaluation, and convenor feedback on those evaluations, with the participants themselves. To model this in the Leadership Institute, faculty may use compile Fellow evaluations and provide feedback on those evaluations back to the class. Awareness of the importance of modeling behaviors and processes can lead to the creation of other important learning opportunities in the Leadership Institute.

### **ALLOW SUFFICIENT TIME FOR LISTENING, REFLECTION, AND LEARNING**

Leadership training differs from other kinds of training in that the people who are attracted to it are seeking (and need) time for listening, reflection and learning from one another. Other kinds of training usually focus more specifically on learning more exclusively from the trainer or faculty. To build in sufficient time for Fellows to listen and learn

from each other, each module should incorporate time for some questions and group discussion. In addition, modules concerning natural resource issues can benefit greatly from a “group debrief” after the panel or speaker has departed or field trip is completed, as this is where Fellows will learn most from the *range* of different reactions to what has been seen or heard. One of the most powerful lessons learned by NRLI Fellows is to not dismiss the views of someone with a different perspective. The role of faculty is also different in that they, too, are in “learning” mode, and need to listen carefully, reflect what is heard, and learn from Fellows.

### **TREAT FELLOWS AS LEADERS**

The NRLI model defines leadership in a way that moves beyond the concept of leader as CEO, agency head, or decision maker and towards the concept of leader as principled stakeholder, process participant, and convenor. Using this concept, people from a wide range of positions throughout the public, private and community sectors, with varying degrees of responsibilities, can have opportunities to exert influence and apply leadership skills. Indeed, we have found that a wide range of people are attracted to apply to the NRLI programs, ranging from the individual citizen activist engaged in developing a watershed plan, to the elected politician, to the program director for a federal or state program. All participants must be recognized for their leadership, at whatever level of activity they are engaged.

One way that faculty can achieve this goal is to recognize or elicit, at the outset, the significant expertise that participants have in different arenas. Another possible behavior is to purposively involve Fellows, where appropriate, in designing a particular field trip, or even engage them as a presenter or a stakeholder on a specific environmental issue panel.

### **MAKE IT RELEVANT**

Each leadership class will be different in its temperament, interests, and needs. Where possible, an “elicitive” approach is beneficial in identifying the real issues and problems that Fellows are facing, so that these issues may serve as the basis for class exercises, role-plays, and practicums. For example, a facilitation exercise in “identifying the problem” or an exercise in “dialogue” is far more compelling to Fellows when it involves a real issue that is current and relevant to their work. This approach certainly takes more time on the part of the faculty and may not always be practicable, but it also can enrich the learning experience. A class “audit” can identify which topics are most important to the fellows and where they would like to focus their efforts.

### **“LEADERSHIP IS A PROCESS, NOT A POSITION”**

As noted above, the concept of leadership used in the NRLI model is that effective leaders in natural resource management will understand the range of choices available to them when faced with difficult, seemingly insoluble problems. The Leadership Institute emphasizes that adopting a positional response to a situation is not effective in

problem resolution. An effective natural resource leader will seek to understand the underlying issues, assess whether collaborative problem solving may or may not be appropriate, and if appropriate, explore what specific processes might be effective and help the parties move beyond conflict to collaborative problem solving. In short, the natural resource leader will focus on *process*, not positions, for problem resolution. The Leadership Institute accomplishes this by working upstream, by building leadership capacity at all levels of decision making within a community so that, when a problem occurs downstream, the chances of gridlock are reduced and successful problem resolution enhanced.

## **NRLI PROGRAMS' IMPACTS**

While it may be too early in the NRLI program's evolution to assess its full impact on the resolution of environmental issues and the quality of environmental outcomes in a particular state, some early indicators of potential impacts can be discerned. Some of the categories of impacts of the NRLI program impacts may include:

- Economic benefits to communities because of collaborative problem solving efforts, as indicated by enhanced sources of community revenues, jobs, and other standard economic factors.
- Greater community involvement in decision making, as indicated by more frequent use of different kinds of public involvement for community decision making.
- Organizations better linked together, as indicated by their formal and informal communications, networking, and Web linkages.
- Improvement in the management of natural resources, as indicated by a restoration of ecological function or environmental improvement or prevention of a decline.
- Shaping policy through formal mechanisms, such as consensus-building efforts, or through informal mechanisms such as lobbying or information campaigns.
- Enhanced awareness about environment and natural resource policy, as indicated by such things as greater news reporting on these issues.
- Expanded capacity for collaborative problem solving, as indicated by NRLI graduates' initiation of different processes, as well as greater participation in collaborative processes.
- Increased ability to work, communicate, and resolve problems with others that hold different ideals and perspectives on natural resource issues.
- Enhanced ability of NRLI graduates to recognize situations or issues that can benefit from a structured public participation/conflict resolution process, and increased efforts to persuade decision makers in their own organizations to take this approach.

The states with NRLI programs have undertaken individual evaluations of their programs. Some of the preliminary outcomes identified by NRLI graduations are highlighted below, but it is important to stress that the outcomes of the NRLI program are expected to occur over the long term. So, while the outcomes listed here are by no means comprehensive or final, we offer them as examples of the outcomes that this kind of program may be able to generate.

The North Carolina program conducted a post-graduation survey and is able to report that, when asked about the degree of effect that the Institute had on their ability to perform their job or volunteer activities, 18 out of 26 respondents indicated a significant positive effect, and 8 reported a moderate positive effect. None reported little or no effect. The most common response reported (19/26) was an increased ability to work, communicate, and resolve problems with others who hold different ideals and perspectives on natural resource issues.

The second most-cited effect was the establishment of new professional networks (9/26). Enhanced leadership skills was identified by 8 of 26 respondents as a major effect on their ability to perform their job/volunteer activities. Many identified an increased confidence to deal with tough issues, an improved ability to prioritize, and an overall improvement in leadership as a result of their experience in the Institute.

Skill in facilitating groups was another positive effect on job/volunteer performance cited by many participants (8/26). Also significant is that most respondents indicated that their personal relationships benefited from an enhanced ability to communicate with others, particularly through improvements in their listening skills.

Specific projects resulting from participation in the NRLI program, as reported in post-graduation surveys, are another indicator of the program's impact. Examples include:

#### **NRLI graduates initiate new professional partnerships**

- Established a working partnership between the NC Department of Transportation and the Department of the Environment and Natural Resources on stream mitigation requirements.
- Collaborated with an historic church in Virginia in planning how to involve its neighbors, city, and members in meeting its new space needs within the constraints of the property available.

#### **NRLI graduates initiate new collaborative processes**

- Development of a stakeholder process to build public awareness about the effect of residential lawns and gardens on the environment and water quality.
- Development of a stakeholder process to provide input into the Federal Energy Regulatory Commission (FERC) relicensing process for the Hydroelectric Project in the East and West Fork river basin in NC.
- Convened the Smart Growth Roundtable in South Hampton Roads to develop proactive guidelines and principles for the region.
- Conducted public hearings to resolve conflict and develop protocols for mosquito control spraying in rural Florida counties dealing with a West Nile virus outbreak.
- Conducted a series of public participation meetings over protocols and liability limitations to enhance the use of control burning on forest lands in Florida.

### **NRLI Graduates use and further develop skills to assist with collaborative processes**

- Facilitation of a conflict between a community and an oil refinery in Louisiana.
- Implementation of a stakeholder participation process for water pollution abatement (TMDLs or Total Maximum Daily Load limits) in Florida.
- Two NRLI graduates from Florida have become professional environmental mediators.
- Currently in the process of developing a public participation process involving homeowners, developers, environmentalists, pesticide manufacturers, pesticide applicators, Florida regulatory agencies, and others in negotiated rule making on termite control standards.
- Facilitation of group discussions at the Land Conservation conference on June 14, 2001, which set the stage for a Conservation Plan for Virginia.
- Chairing a Sustainable Initiative Committee on developing a process for reporting inconsistent forestry practices and used small group facilitation techniques to achieve consensus on a Standard Operating Procedure for member companies involved in this program.

### **NRLI graduates establish new cross-sector linkages and means of communication**

- Establishment of the Natural Resource Leadership Association (a professional development association for Fellows of North Carolina NRLI).
- Establishment of NRLI Alumni Association in Florida. Alumni are active in recruiting, fund-raising, and venue planning.

## **CONCLUSION**

The NRLI offers a different model for adult learning that brings together diverse stakeholders involved in environmental issues. Rather than the typical adult education offered by corporations, nonprofits, or state agencies—where people learn to deal with “the enemy”— the NRLI program helps people learn to deal with each other in creative ways, becoming respected colleagues and even friends.

The NRLI model is unusual in that it is designed specifically to help break down barriers caused or fostered by exclusivity, by the “us vs. them” mentality, and by difficult interactions in the heat of the moment. It accomplishes this by bringing people together in a safe educational environment, where everyone is learning together at the same time as well as from each other. In this model, participants engage each other over the hot issues “du jour,” but in an educational environment, not when their own career or environmental issue is at stake.

There are many potential applications for this model beyond statewide environmental issues, and it is the authors’ hope that the NRLI model will be adapted and expanded as needed to address the many environmental issues faced by our world. A regional Institute, for example, might be established to deal with a specific regional issue(s), to enable the different regional stakeholders to come together in a safe manner; this also might be offered as a summer residential Institute rather than a year-long program. A

national Institute—or for that matter, an international Institute—can also be envisioned. Such an Institute might be based in a particular location, with “virtual” field trips through slides, films, and speakers; or it could be that the Institute would actually travel to different locations to discuss different environmental issues. When stakeholders with different perspectives and different ways of experiencing their involvement with the environment are brought together to learn about the issues, learn from each other, and learn new skills in collaborative problem solving, good things inevitably happen.

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# TRACKING ENVIRONMENTAL OUTCOMES OF ENVIRONMENTAL CONFLICT RESOLUTION PROCESSES

THURSDAY, MAY 16, 2002—2:00–4:00 P.M.

## MODERATOR

Jack Wofford

## PARTICIPANTS

Bonnie Colby, Department of Agricultural and Resource Economics, The University of Arizona

Jennifer Pratt Miles, Meridian Institute

Andy Rowe, GHK International

Steve Yaffee, The University of Michigan

## ROUNDTABLE ABSTRACT

How do we know that sound ECR processes yield optimal environmental outcomes over time? Bearing in mind that environmental impacts are just one of the many issues and conditions affected by environmental collaborative agreements, increasingly the field is being asked to demonstrate the cumulative benefits of ECR on the environment. The roundtable will explore the important challenge of tracking and measuring the substantive outcomes of ECR process agreements. Conceptual and methodological barriers to assessing environmental quality and natural resources condition and approaches for overcoming them will be discussed. Participants will discuss the potential for monitoring the effectiveness of ECR agreements and on-the-ground accomplishments over time.

## ROUNDTABLE SUMMARY

## INDIVIDUAL PRESENTATIONS

### **Environmental Outcomes and Collaborative Processes**

By John G. Wofford

### **Negotiated Agreement Checklist: Economic and Financial Considerations**

By Bonnie G. Colby

**The Impact of Dispute Resolution Practices  
on Environmental Decision Making in the U.S.**  
By Jennifer Pratt Miles

**Is It Feasible to Evaluate the Environmental Contributions of  
Collaborative Dispute Resolution Processes?**  
By Andy Rowe

# ROUNDTABLE SUMMARY

## WOFFORD—INTRODUCTION

Extensive personal experience facilitating collaborative processes in environmental conflicts provides a clear and emphatic “yes” to the question of whether sound collaborative processes produce sound environmental outcomes. The issue for this roundtable is how to test, document, and refine that hypothesis.

The presenters and moderator have collaborated on producing the following discussion outline as the start of a guide to the issues, both for this session and for conceptual work in the future.

## DISCUSSION OUTLINE

### 1. Assumptions

- Broad definition of “environmental”—including natural, human, social, economic
- Good collaborative process in place—no discussion of process choices
- Process can cover a variety of conflict situations, from short-range litigation context to long-range planning context
- Good outcomes have multiple causes, often including:
  - A good process,
  - Strong and flexible project leadership,
  - Receptive political context,
  - Creative technical resources,
  - Funds.

### 2. Reframing the question

- Do effective collaborative processes help produce good environmental outcomes?

### 3. The concerns

- What is behind these questions? Who is asking them, and why?
- Are political officials concerned about alleged “delays” and “costs”? What about challenges to their authority?
- Are activists concerned about being co-opted into only “so-so” outcomes?
- Are funders asking whether their investment is worthwhile?
- Is the process producing mostly talk and inadequate tangible outcomes?

### 4. Conceptual issues

- How do we recognize good outcomes? What are the criteria/standards?
- The collaborative process compared to what? Dictatorial? Adversarial? Consultation? Review and comment? Public agencies only? What are the alternatives?
- How to deal with multiple causation? How to isolate the process as a variable and still take into account variations of the other causes? Are there so many other elements (or “noise”) that a purist approach to the question is not possible? What is an “impurist” approach that might acknowledge these intermediate elements but nevertheless try to

find some pattern, and some probabilities, that connects good process with good outcomes?

- How to deal with the fact that outcomes are not static, but change over time?
- Conflicts may have many stages of process—how to assess the impacts of different phases?
- Outcomes also have many stages—how to assess them over time?
- What is the scope of the field being compared? Project mediation may be different from long-range, consensus-building planning processes. How do we compare apples and apples across time and geography?

## **5. Methodological issues**

- How do we measure outcomes? Some outcomes may lend themselves to being evaluated, others may not. How do we tell the difference? How to deal with it?
- Are the criteria: Subjective? Objective? Anecdotal? Systematic? Can they be articulated? How to vary them to fit particular circumstances and patterns?
- Can we aggregate data across different sites, or are they unique to each site?
- Do measurements get more difficult the broader the field, i.e., moving from projects to broad plans and programs?
- Who sets the standards/criteria? Should these be the subject of a collaborative process? Should they be (in whole or in part?) community-based? What are the positives and negatives of this? Who or what might be left out if the parties set the criteria?
- Should the collaborative process attempt to establish measurement and evaluation standards and methodology from the outset? If so, how?
- Without getting too precise in identifying criteria up front, should there at least be an effort to identify what could be called “flagship indicators” of successful outcome, i.e., main elements, easily identifiable and perhaps measurable?
- How can we get “large,” “robust,” and “relevant” data to answer the questions?
- If evaluation should be participatory, how to deal with changing parties over time?
- In the midst of a conflict resolution process, can the participants identify hoped for or expected outcomes, and begin to articulate how to measure them?

## **6. Practice issues**

- Evaluation, like collaboration, takes energy. Is there energy, time, commitment, motivation? Where does it/will it come from? Academics? Practitioners? Others? What capacities do participants have, need, or want?
- What data is easily accessible, and what is not? How to design realistic methodologies?
- What is the role of case studies? Corps of Engineers series and Lincoln Institute on Land Policy exist. Should agencies/others develop more?

## **7. Next steps**

- Where are we? Where do we go from here? What do we need to tackle?
- What do we not want to do? Can we learn from past mistakes and not repeat them?
- Can we make evaluation of outcomes a positive, creative part of the process?

## **WOFFORD**

Multiple causation is key to a sensible approach to these issues. How do we isolate the collaborative process as a variable, and still take into account variations in the other major causes of an outcome? Is there an “impurist” approach that might acknowledge these intermediate elements but nevertheless try to find some pattern that connects good process with good outcomes?

In this regard, we need to avoid becoming trapped by metaphors. While we sometimes speak of “upstream” collaborative agreements “flowing into” “downstream” results, we need to recognize that there are many upstream tributaries (including strong and flexible project leadership, a receptive political context, creative technical resources, and funds to implement the outcome).

Four projects, all in the Boston area, that dramatically illustrate that a collaborative process was one key element in turning a bad situation into a positive environmental outcome, are (Wofford showed “before” and “after” slides of each):

- Southwest Corridor Park in Boston—a 5-mile meandering park built over underground railroad and transit;
- Canal Park in Cambridge—vast improvements to an abandoned 19<sup>th</sup> Century industrial canal next to the Charles River;
- Post Office Square—transformation of a site with a dilapidated two-story parking garage into a beautifully landscaped park in the midst of Boston’s financial district, with underground parking subsidizing the costs of the park;
- The new bridge being constructed across the Charles River as part of Boston’s “Big Dig” project, transformed from a mass of ugly ramps into a stylish bridge that has already become an icon.

In these four projects, it was the collaborative process that established the positive public energy to focus many forces on the task of resolving conflict and creating an environmentally excellent outcome at the same time. The collaborative process produced better options, better evaluation criteria, and better results.

## **PRATT MILES**

The Meridian Institute conducted a study to assess the impact of ECR on the environment and environmental decision making. They conducted 18 interviews with professionals in dispute resolution and participants in collaborative processes, and complemented these with a review of relevant literature.

Meridian’s report outlines 10 sets of criteria for evaluating cases that appear in the literature and suggests that these criteria could be used to devise a methodology for evaluating the impact of the field on environmental resources.

Professionals involved in dispute resolution have observed tangible, positive impacts on the environment as a result of the use of collaborative processes in their practice, but state that we don't currently have a good way to measure this.

Practitioners notice parties to collaborative process trying to understand interests rather than positions, and they note that relationships and decisions are often improved as a result of this.

The interviews conducted and literature reviewed show that a wide range of natural resources has been impacted by the application of dispute resolution processes—including air, climate, land, water, and wildlife, among others. The authors find that while the impacts to these resources have been largely positive, it is challenging to quantify this, not only because methods for evaluating consensus building are still in the formative stages, but also because very little evaluation is completed on traditional forms of dispute resolution to which ADR might be compared.

As the field of ADR has grown, so has the institutional support of this work at the state and national levels. This is evidenced by the extent of consensus building and collaborative problem solving at the local and state level and the growth in numbers of institutions and organizations to support this, formation of the U.S. Institute for Environmental Conflict Resolution in 1999, the increase in number and function of federal offices designed to address conflict resolution, and the rise of corporate-environmental partnerships.

## **COLBY**

Often heard ECR and ADR practitioners talk about how they felt that collaborative processes, etc., were really making a difference. As an economist she would then wonder how they were actually measuring this improvement or difference. They studied western water quality cases to find outcomes that could be measured and then compiled data. They also looked at the agreements to see what types of outcomes happened, how the outcomes of the mediation process were going to be implemented, who was going to pay, how was enforcement going to take place, etc. They learned that it was hard to measure cases from the past and found distinct differences between litigated cases versus those that were facilitated.

We need to think of ECR processes as having many stages, “upstream” of the negotiated agreement includes the process of convening, negotiating, etc. “Downstream” of the agreement includes the tough work of implementation, monitoring, enforcement, and adapting to the unexpected. Many ECR agreements are achieved after many years of tough negotiations and effort, yet fail in the downstream phases due to neglect of implementation details. We need to develop a “best practices” approach to crafting implementable agreements.

Challenges that face future formal data gathering are how to carefully attribute changes that occur due to the negotiated agreement when many other changes also are occurring that the agreement should not get credit or blame for:

- External environmental factors (drought, fire, floods, etc.) that take place during the time of the conflict resolution process.
- Lawsuits that take place during the time of the conflict resolution process.
- Introduction of new parties.

## ROWE

We have heard the impressive stories of the Malpai area and see that there are great improvements, but how can we know to what extent this is because of the collaborative process?

Evaluation usually approaches this question with comparison to other settings where the intervention was not applied, but each environmental and complex public policy case is relatively unique. Thus, due to their differences, it is very difficult to compare cases. This makes it very difficult to measure the contribution of collaborative processes to environmental and other substantive outcomes.

The second aspect of evaluation where we currently face serious challenges is assessing the effectiveness of ECR processes. We currently run a serious risk of systematically underestimating the effectiveness of ECR processes because we do not have the conceptual knowledge necessary to develop appropriate, valid, and reliable evaluation approaches. This challenge can be addressed fairly quickly with good and appropriate applied research on the longer-term costs and benefits of collaborative processes.

*Case example of a Salmon enhancement program that had five sub programs: enhancement, habitat, enforcement, management, and research.* One of the desired outcomes was to reduce poaching and limit excesses through surveillance, river wardens, and river watch. The results measured with traditional information from administrative data, interviews, and focus groups were that poaching was significantly reduced, limit excesses were significantly reduced, and communities were no longer buying from poachers. There were some indications, however, that this might not be the full story, so we used a cultural anthropologist who hung out around the rivers and pubs where poachers were likely to frequent. He found no change in poaching effort or returns, minor reductions in excesses in some sites, and communities were actually continuing to buy the poached fish. Substantive outcomes such as environmental impacts can be difficult to measure and require serious efforts to triangulate and ensure that the information being used is valid and reliable.

Be strategic! Current possibilities for evaluating environmental impacts of collaborative processes are unlikely to pass an evaluability assessment. He recommends using the World Bank strategy called “likely to.” Put together a conceptual hypothesis about the program that you are evaluating and how, based on contemporary and relevant good practice and theory, it contributes to the substantive outcomes. Be careful not to be too ambitious with your claims of what can be achieved with evaluation.

## **YAFFEE**

Mr. Yaffee has studied what environmental outcomes practitioners feel have occurred from their work. Much of this work has been done through interviews. He has found that there is a statistical measurement for positive outcomes.

Now he is doing work on alternative forms of outcome assessment and feels positive for the future and finding new processes. One of the cases that they are using is the Oak Openings Working Group (made up of NGOs and several government agencies).

### **ELEMENTS OF EVALUATION PROCESS**

1. Developing the situation map (five-step process: targets, objectives, threats, strategies, activities)
2. Developing an evaluation plan (four-step process).

### **Challenges of effective evaluation include:**

- Objectives are rarely clear and agreed upon
- Few absolutely correct normative directions
- Ecological processes are not well understood
- Systems and strategies operate at multiple scales
- Collaborative projects move through different stages
- Lack of motivation; limited capacity
  - Standard evaluation issues: controls, causality
  - People resist evaluation because it is hard and people resent it.

### **Tendency is to:**

- Use process improvements as proxies
- Measure success of strategies
- Measure what is easiest to measure

We need to view evaluation as a process integrated with and integral to the success of a collaborative process. Good evaluation requires good process skills. As a key part of the process, specify: system components, objectives, and reference state/comparison. We also need to consider motivation and capacity of members of collaborative (i.e., make data needs simple, ensure that evaluation produces recognizable benefits to the project, and build capacity through training and other means). Also, link evaluation to reassessment and decision making (i.e., close the loop).

We need to be open to use a mix of evaluation approaches (subjective: participant self-assessments, experts assessments—and be objective).

## QUESTIONS AND RESPONSES

### PANELIST QUESTIONS

- How do we know that sound ECR processes yield optimal environmental outcomes over time?
- In environmental conflict, who is behind the comments?
- What is the impact of ECR on the environment?
- How do we carefully trace cause and effect?
- If we spend more (time and money) “upstream,” do we get better outcomes “downstream”?
- Is it feasible to evaluate the environmental contributions of collaborative dispute resolution processes?
- How much good did you get for how much you invested?
- What credit can collaborative processes take for environmental change?

### AUDIENCE QUESTIONS

- What are the criteria for the quality of the agreements as a place to start?
- Who is collecting what data and how often?
- What would we learn about adaptive management strategies?
- Are there better models for collecting outcome data?
- Can good science carry implementation?
- How do we get stakeholders to think about measuring outcomes earlier?

### OUTCOMES

- The future of measuring outcomes is going to be based on these measurement tools being built into the collaborative process.
- Give a brief, practical, almost “sales” type document to local, state, and federal government agencies to help show the benefit of collaborative processes and measurement. Illustrate vivid “before” and “after” examples with short case studies.
- Beware of the tendency to oversell what we say will be the benefit of collaborative processes over time.
- Monitoring throughout the process is the key to good measurements of the benefits of the collaborative process. This helps circumvent the problems inherent with overselling the environmental benefits of the collaborative process. Monitoring is also key for the long-term gauging of the success of the process.
- We need to use local sources of data so long as they are valid. Thus, local sources of data are acceptable so long as validity can be proved. Expectations can be moderated through gaining trust among data providers.

## CONCLUSIONS

- The future looks very hopeful. There has been a lot of progress.
- From interviews it was learned that continuing this conversation is going to be a key. The panel feels that this is happening.
- Program theory is very well grounded in literature, so with additional efforts we should be able to measure collaborative processes into the future and see the benefits.
- The activities of evaluation are very supportive of the collaborative process. They are reinforcing and are optimistic for the future even with very simple environmental indicators.

# ENVIRONMENTAL OUTCOMES AND COLLABORATIVE PROCESSES

By JOHN G. WOFFORD, FACILITATOR, MEDIATOR, AND ARBITRATOR, CAMBRIDGE, MA

When Kirk Emerson asked me to moderate a panel on the issue of whether, in environmental conflicts, sound collaborative processes produce sound environmental outcomes, I was skeptical because I thought the answer was so clear that the question hardly needed to be asked. My extensive personal experience facilitating collaborative processes in environmental conflicts, stretching back over 30 years, provides a clear and emphatic “Yes” to the question. Sound environmental collaborative processes do produce sound environmental outcomes. Indeed, if I may elevate the adjectives significantly, I have seen numerous good processes involving entrenched conflicts produce *superb* results—results that often far exceed the initial hopes of the participants.

I told Kirk I would get back to her in a day or two as I considered whether I could do justice to the topic, given my strong views. During that period, I went to a Chinese restaurant for dinner, and at the end opened my fortune cookie. It read: “In every enterprise, consider the outcome.” With fate thus intervening to establish that outcomes were in my future, I resisted no longer, and enthusiastically began to address the topic.

My role has been made more interesting and more challenging by the superb panel that Kirk has assembled. Each is a recognized expert in the field of evaluating outcomes—Bonnie Colby as a professor of Agricultural and Resource Economics at the University of Arizona here in Tucson, Jennifer Pratt Miles of Meridian Institute in Colorado, Andy Rowe of GHK International, and Steve Yaffee as Theodore Roosevelt Professor of Ecosystem Management and Professor of Natural Resource and Environmental Policy at the University of Michigan. In working with Kirk and these four panelists, I have been persuaded of the importance of the question, stimulated to think about it from my own perspective as a practitioner, and energized to try to tackle it head on.

The six of us have had several conference calls to prepare for this presentation, and one product of these calls is my attempt to synthesize the major points in a two-page discussion outline for this session. The outline is included in the preceding Roundtable Summary. One of our hopes for the session is that the outline provides the beginning of a coherent conceptual structure to consider the issues further.

## A. ASSUMPTIONS

In discussing the question, we have made several key assumptions:

1. *Broad definition of “environmental.”* We are assuming a broad definition of “environmental”—including the natural, human, social and economic—along the lines set forth in the National Environmental Policy Act of 1969.
2. *Effective process in place.* We assume that a good collaborative process is in place. We do not intend to discuss process choices except as these choices may relate to the issue of evaluation of outcomes.

*3. Variety of conflict situations, from short- to long-range.* We assume that a good collaborative process can cover a variety of conflict situations—from a short-range litigation context, to a long-range planning context, and everything in between. As we will discuss, approaches to evaluation of outcomes may be different depending upon the context. We are attempting to cover the full spectrum of processes and contexts as they relate to the issue of outcomes.

*4. No simple cause/effect relationship.* We assume that there is no simple cause-and-effect relationship between sound process and sound outcome. A beneficial outcome has multiple causes, not simply a single cause (such as a good process); and by the same token, a good process has multiple results, not just a particular physical environmental outcome. In other words, we seek to avoid the logical fallacy that every cause has an effect, and every effect has a cause. Life is much more complicated than that.

## **B. MULTIPLE CAUSATION**

Multiple causation is key to a sensible approach to this issue. Indeed, in considering what factors may contribute to beneficial environmental outcomes, five are probably most important:

- A good process;
- Strong and flexible project leadership;
- A receptive political context;
- Creative, responsive technical resources; and
- Funds to implement the outcome.

Likewise, the results of a sound collaborative environmental process can be several, in addition to any particular tangible outcome. Results can include, as well:

- The emergence of positive, new working relationships among participants that may affect other issues and projects;
- The emergence of new and creative leadership in organizations and projects;
- Possible new projects or programs that “spin off” from the main focus of the particular collaborative process;
- Continued engagement in similar issues by participants who previously felt excluded; and
- Increased general satisfaction with the responsiveness of government or corporations to a broader set of perspectives and concerns.

At the outset, therefore, it is essential to deal directly with the challenges presented by multiple causation. How do we isolate the collaborative process as a variable, and still take into account other major contributing causes? Are there so many other elements involved (“noise” in the system, as some would call these other elements) that a purist approach to the question is not possible? Is there an “impurist” approach that might acknowledge these other elements but nevertheless try to find some pattern that connects good process with good outcomes?

In this regard, we need to avoid becoming trapped by metaphors. While we sometimes speak of “upstream” collaborative agreements “flowing into” “downstream” results, we need to recognize—as noted above—that there are many upstream tributaries—four or five major rivers coming together—and that the outflow can have multiple results, from river to rapids, from waterfall to water table, from lake to lagoon.

In light of the centrality of concerns about multiple causation, we have reframed the questions to be addressed at this session:

1. Do effective collaborative processes help produce good environmental outcomes?
2. How do we track answers to this question?
3. How do we document the results in a solid and persuasive manner?

### **C. COLLABORATION COMPARED TO WHAT?**

It is also important to note that in framing the question about the relationship between process and outcome, we need to think carefully about what, if any, are realistic alternatives to a collaborative process. Among such process alternatives might be approaches that could be described as:

- 1. Dictatorial.* Is a Robert Moses approach viable today, if indeed it ever was? Perhaps in some parts of the world a dictatorial approach to environmental outcomes is acceptable, but not in North America. Even if it were acceptable, such an approach—missing the benefits of different perspectives—is not likely to produce optimum results.
- 2. Adversarial.* Are we suggesting that instead of a collaborative approach, we should have an adversarial approach, possibly of the kind displayed in litigation? Litigation may (or may not) have a positive effect on establishing a process or producing an outcome in particular cases, but few would claim that litigation alone is the best forum to consider the complexities of environmental issues.
- 3. Consultative.* Is consultation a sufficient alternative to collaboration? Consultation can be extremely useful, but it is not the same as collaboration, which goes further by attempting to establish a shared process to deal with a shared problem. Consultation may include a limited opportunity to improve a project by considering several other perspectives, usually on a one-at-a-time basis, but that is not the same as a structured process in which a number of stakeholders are around a table trying to hammer out a joint solution.
- 4. Review and comment.* Is the widely used “review and comment” process an alternative to a collaborative process? Review and comment may play a useful role, and is probably essential in establishing formal requirements for structured and timely advisory comments, but review and comment alone is not a process designed fully to tap the creative energy of multiple perspectives focused on options, criteria, and outcomes.

Thus, in the absence of any other major alternative, a collaborative process is the most likely way to achieve optimum environmental outcomes.

#### **D. CONCERNS OF THOSE ASKING THE QUESTION**

In addressing the questions, as reframed above, it is helpful to apply dispute resolution techniques to the analytical process of trying to answer them. In conflict resolution, we believe that if we fail to push beyond initial “positions” to deeper concerns, we are much more likely to be “stuck” in continued impasse or in suboptimal and unsatisfying compromises. Instead, our experience has shown, communicating and addressing underlying concerns and interests is an essential ingredient in finding common ground. To explore those underlying concerns, we keep coming back to the key question of “why?” Why are you opposed to that? Where are you coming from in saying that? What are you trying to accomplish?

In dealing with the issue at hand, therefore, it is useful to consider what may be behind questions about whether good environmental processes help to produce good environmental results. Who is asking this question, why are they asking it, and what are they trying to accomplish?

*1. Political officials.* Are political officials concerned about alleged “delays” and “costs” that they may attribute to a collaborative process? Are they concerned about what they may perceive as challenges to their authority?

*2. Activists.* Are activists concerned about being “co-opted” into only “so-so” outcomes, when if they had maintained an adversarial stance they think might have forced a much better result?

*3. Funding sources.* Are funders asking whether their substantial investments in collaboration are worthwhile? Are they concerned that the process may appear to be producing mostly talk at considerable expense and inadequate tangible outcomes to justify further large expenditures?

*4. Consultants.* Are design and environmental consultants on plans or projects tired of defending their work and developing additional options long after the major options have been developed and presumably decided? Are they feeling that their professional expertise and views about what is best are being inappropriately challenged or even ignored, with results far less than (their view of) optimal?

It is likely that any or all of these concerns may come into play to some extent in different contexts. It would be useful to engage these various groups in addressing the question in a collaborative fashion, so that we might better understand the concerns and thereby figure out more precisely what the issues are and how they should be addressed. Sensible approaches to evaluation are likely to be identified by considering these differing perspectives from the outset. There is no substitute for collaboration in trying to sharpen the dialogue and point us toward creative resolution.

#### **E. SUPERB OUTCOMES FROM COLLABORATIVE PROCESSES**

My own experience as a practitioner—both facilitator and mediator—began over 30 years ago. Let me briefly illustrate from those years four superb environmental outcomes that would not have been possible without a collaborative process. Two of these

processes I facilitated, on one I was special counsel to a city, and on the fourth I watched with enthusiasm as it took shape. For those here in the audience, I will show a few “before” and “after” slides to demonstrate my point. For those reading these proceedings, brief descriptions will have to suffice.

In each of these projects:

- The political climate was ripe for changed plans;
- Creative leadership seized the opportunity;
- Professional experts of the highest caliber created thrilling designs in response to the collaborative process;
- Strong project managers showed the way with a combination of firmness and receptiveness to new ideas; and
- Funding mechanisms were created to implement the agreed plans.

These factors created the context in which the collaborative process could be the focal point for extraordinary creativity.

In chronological order, the projects are:

### **1. SOUTHWEST CORRIDOR PARK, BOSTON, MA**

In the last week of December 1969, the then Governor of Massachusetts imposed a moratorium on further planning and construction of most major proposed highways in the inner Boston area, and ordered instead that the Boston Transportation Planning Review be created to analyze the need for these facilities, their relationship to an existing and an expanded transit system, and their compatibility with a wide array of environmental criteria. He directed that the Restudy, as it was called, cover highway and transit proposals in five major corridors in the region. It must be conducted with open consideration of a wide range of new options, with maximum participation of local elected officials, private groups, and citizens, and with full consideration of the advantages and disadvantages, the costs and benefits, of each major option. The study and process would be advisory to him as the ultimate decision maker, and he established deadlines within which the process had to work. The governor made his decision to establish this process the same week that the U.S. Congress passed the National Environmental Policy Act (NEPA). Both these actions, at state and federal levels, were responses to a changed set of societal values that elevated environmental concerns far above where they had been before.

The Restudy, with a consultant team of about 75 professionals at its peak, was the first process in the country that, in compliance with NEPA, produced draft environmental impact studies for proposed highway and transit projects—in 1972 and 1973. I was the state’s director of the Restudy. As you can imagine, we were in a fishbowl. Observers came from around the country to watch the process unfold, and we in turn demonstrated true “learning-by-doing,” as we created and carried out the restudy process. We were charting new territory.

The Restudy had a mandate to develop extensive collaboration, and collaborate we did. We had a “brown bag” lunch advisory Steering Group, drawn from public and private entities representing the widest possible spectrum of views about outcome, that met at least monthly and often weekly. This Steering Group made no recommendations about outcomes—the participants conveyed their views on outcomes individually, both formally and informally, at the end of the Restudy process. But the Steering Group continually guided and monitored the process as it dealt with such issues as allocation of Restudy resources to various options, quality of public meetings (from neighborhood workshops to formal regional hearings), thoroughness of draft staff analyses, identification of key and often controversial assumptions, structure for the draft reports, timetable and process for both the technical and the public process, and allocation of 10 percent of the restudy budget to technical assistance and community participation. Remarkably, the Steering Group made its process recommendations with complete consensus for the entire three years of the restudy.

At the end of the Restudy process, based on the study reports and responses to them, the governor made his decisions—to eliminate most of the planned highways, build two major transit extensions and relocations instead, develop fringe parking at the ends of these transit lines, preserve and improve the existing commuter rail system, and mobilize states and cities around the country to seek changes to federal highway funding so that funds allocated to interstate highways could be used for transit instead. This provision, known as the Interstate Transfer Provision, was enacted in the Federal Highway Act of 1974.

As a vivid example of how the Restudy process produced a number of superb outcomes, I want to point to one particular issue that the governor had to decide—what to do with a 12-mile swath of land, substantial portions of which had already been acquired for a highway. Extensive demolition of houses, many of them occupied by low-income families, had already taken place. Other portions of the future right-of-way were in dense urban neighborhoods on two sides of an existing inter-city and local railroad corridor.

Those opposed to the new expressway realized that for the governor seriously to consider not building the highway, they needed to create a plan that would accept the relocation of the transit line to the corridor but also demonstrate that the land already taken for the highway could be put to important new and beneficial uses—but not, in their view, an expressway. So with technical assistance from the Restudy and elsewhere, the neighborhoods and the City of Boston created a conceptual plan for an arterial boulevard, moderate scale public and private development, return of many parcels to former owners, and—for a five-mile stretch nearest downtown Boston—a long surface park on top of a modernized railroad and a relocated transit line. The park would occupy the deck over the rails.

In the end, the governor picked this option for this corridor. After his decisions, he created and filled a new position, Director of the Southwest Corridor, and established an ongoing advisory process. From then on, every stage of the development of this corridor

in general and this park in particular had extensive collaboration—from a corridor-length working group at the beginning of the planning process to separate groups working intensively on the implementation details of the park and transit—station by station, mile by mile, construction truck by construction truck, for over 10 years.

Over the next 10 years a prize-winning Southwest Corridor Park was created where a devastated tract of land had existed. The park is extensively used for biking, walking, running, and skateboarding. It has playing areas from tot lots to basketball courts. It has tranquil sitting areas. It has landscaping to bring it alive at every season, from forsythia, magnolias, and dogwoods in the spring, to maples and locusts in the summer, to pines and spruce in the winter. Every day, thousands of people walk along the corridor to and from work, shops, and major educational, religious, and cultural institutions. And below the surface modernized transit and Amtrak carry even more people.

The outcome is an extraordinary asset for Boston. It exists because there was a collaborative process from beginning to end.

## **2. CANAL PARK, CAMBRIDGE, MA**

A decrepit canal built for 19<sup>th</sup> century industrial uses became the focal point for a development and restoration program along the Charles River at the eastern end of Cambridge, MA. The riverfront land was primarily old warehouses, a two-story retail discount store, and wasteland around the unused canal. There was also an old brick courthouse, designed by the architect Charles Bulfinch in the early part of the 19<sup>th</sup> century, that was in disrepair and slated to be torn down. Over about three years in the mid to late 1970s, a planning process involving extensive collaboration with a neighborhood advisory committee created a plan for mixed-use development, with commercial, retail, and mixed-income residential uses.

Key to the plan was a reconfigured and refurbished canal, with pedestrian green space and bike and pedestrian pathway along the restored canal to the greater Charles River network of regional paths. At the end of the canal, a round lagoon was to be created, with a fountain in the center. Surrounding this lagoon would be office, retail, and residential uses. Some offices would be in rehabilitated historic buildings; others would be in new structures. Many of the retail uses would be in a sparkling new urban mall, served by free shuttle bus service to nearby rail transit, with a major promenade and eating facilities along the canal.

The canal was restored, the development occurred, and Canal Park was created—all pretty much as planned by the neighborhood, the city's Community Development Department, and extraordinarily creative and responsive architectural and planning consultants. Canal Park is widely used and widely admired. The whole redevelopment would not have happened without a collaborative process.

### **3. POST OFFICE SQUARE, BOSTON, MA**

For many years, a dilapidated two-story, aboveground, 950-car parking garage existed on an island of land surrounded by four historic streets at the center of Boston's financial district. Major business and government buildings looked out on the eyesore. In 1983, civic and business leaders representing the abutters and the wider community incorporated a new civic entity, Friends of Post Office Square, Inc. The new entity is comprised of 19 firms who donated \$1 million needed to launch the project, leveraging an \$80 million project that involved purchase of the remaining years on the garage operator's lease, demolition of the existing garage, construction of a new 1,400 space garage underground, and a new 1.7 acre public green space in the center of downtown Boston. The new garage would subsidize the park.

The Mayor of Boston appointed 11 members to a Design Review Committee. They were drawn from major businesses, city government, environmental groups, artists, and major architectural firms. Led by a strong president, the new entity retained seven major architects, landscape architects, planners, and engineers to plan and design the garage and park. The collaborative process involved the abutters, the Design Review Committee, and city government—an effective public-private partnership. The process focused on such key details as hiding the entrances to the garage ramps as much as possible, installing elegant lamps and benches, providing space for an indoor-outdoor café, planting trees and grass for a mix of sun and shade, and creating maximum space for sitting and relaxing with friends and colleagues.

The garage was completed in 1990 and the park in 1992. Everyday, the park is viewed by tens of thousands of people from their windows above it and is used by thousands more for outdoor lunches, concerts, and just walking to one's destination through luxurious plantings. The park is both a passageway and a destination. The park and garage together have won over 20 awards for excellence.

The result would not have happened without strong project leadership, creative financing, a receptive political climate, determination to cut through many bureaucratic, administrative and financial hurdles, and a collaborative process that brought the abutters and the city together around a common objective—creating an environmental oasis in the midst of urban density.

### **4. BRIDGE OVER CHARLES RIVER, BOSTON/CAMBRIDGE, MA**

In 1990 five lawsuits were threatened against the largest public works project in North America—Boston's so-called "Big Dig." This project, now estimated to cost nearly \$15 billion, has completed construction of a third tunnel across Boston Harbor to Logan Airport (the Ted Williams Tunnel) and is completing the removal of a 1950s elevated highway that is one of the most congested, least safe, and ugliest roadways in the country.

For over 50 years, the elevated highway has been a blight on Boston's landscape by dividing the heart of the city from its waterfront, spewing pollution into the air, subjecting drivers to bumper-to-bumper traffic much of the time, and acting like a wound and barrier cutting through the entire downtown. And traffic to and from the airport has been extremely constrained for many years.

Plans for a new tunnel across Boston Harbor had been around for decades, but the first idea for depressing the Central Artery emerged in 1972 from participants in the Boston Transportation Planning Review, described above. In the next 10 years, changing state priorities (resulting from changing governors) flip-flopped between the airport tunnel and the depressed Central Artery. Then, in 1983, the state finally coalesced around building both. Together, they were the "Central Artery/Tunnel Project," or later, "The Big Dig." Preliminary design and environmental process took another eight years. By December 1990, the state and federal environmental processes were finally complete—only to face intense opposition to one aspect of the project: the proposed bridge over the Charles River.

A gubernatorial election in 1990 meant that on January 1, 1991, a new state administration was in place to carry on this project. In certifying that the new project would meet all state environmental requirements, the Commonwealth's outgoing Secretary of Environmental Affairs established two main conditions for going forward with construction. One was more effective attainment and monitoring of air quality standards. The other was an improved design for the proposed bridge that would cross the Charles River, carrying the depressed highway out of its new tunnel through the downtown, up and across the river into Cambridge and Charlestown. The secretary required that the new administration convene a Bridge Design Review Committee to find ways to improve plans for the bridge.

The 42-person committee was convened on February 1, 1991, and was required to report to the state's Secretary of Transportation within five months. The committee was composed of all the key neighborhoods affected by the bridge, representatives of Boston, Cambridge, and state government agencies, and major environmental, business, labor, and professional groups. It included some of Boston's leading architects, engineers, planners, and environmentalists. The committee had a strong and respected chairman. I was its facilitator.

The bridge design selected by the state in early 1990 was called Scheme Z, signifying its status as number 26 out of 32 options developed, from A to EE. Scheme Z would have required all traffic between the newly depressed highway and an existing riverfront parkway, both on the Boston side of the Charles, to cross the river twice—over to Cambridge and back—to get from one road to the other. This was dubbed "the double-crossing of the river," increasing the number of trips across the bridge and requiring a wider bridge to handle them. The resulting spaghetti of ramps was viewed as an urban design horror by most of the committee. Five threatened lawsuits—all by groups or municipalities (such as Cambridge) that sat on the committee – focused on the bridge proposal. In making certain that the opponents were on the committee, the new secretary said: "How can we expect to get anywhere if the opponents are not at the table?"

The new administration provided substantial technical resources to the committee from the Central Artery/Tunnel staff. In addition, the committee was given the authority to identify five independent experts, including a bridge designer to work directly with and be directly accountable to the committee. A working team was created among members of the committee; existing staff of the Central Artery/Tunnel project; and the independent experts, including the world-renowned designer. The *Boston Globe* announced the selection of the bridge designer with the headline, “Bridge Doctor to the Rescue!”

Within two months of convening, the Bridge Committee, using these resources, unanimously recommended scrapping Scheme Z and developed three main alternatives in its place. All three alternatives had one new feature that Scheme Z had lacked—a pair of land-based tunnels, wholly on the Boston side, underneath a major railroad station, carrying traffic between the new highway and the existing riverfront parkway. Other features common to all alternatives included a handsome new bridge design, major new parks on both sides of the river, and the final connection of the “missing link” in Boston’s system of paths for biking and walking along the Charles River.

The idea for this new set of land-based tunnels was derived directly from a combination of the Bridge Committee’s determination to solve the problem without requiring traffic to cross and re-cross the river, engineering creativity provided by existing project staff, and new design concepts from the independent expert. The new state administration accepted the committee’s recommendation enthusiastically, even though the new solution cost roughly \$200 million more than Scheme Z and delayed completion by about a year. The administration decided that the money and time were worth the result. Lawsuits would have delayed matters more, and even if the state had prevailed in court, which was by no means a foregone conclusion, the result would have been a lasting eyesore on the Boston skyline. (Two of the lawsuits actually continued, but ultimately—based partly on the intervening collaborative process and partly on the new design—they were dismissed, with no impact on project timetables.)

The Ted Williams Tunnel has been open for several years. And construction of the newly named Zakim Bunker Hill Bridge is nearing completion, with the bridge’s north-bound lanes scheduled to open in November 2002. As the bridge takes shape, it is widely viewed as breathtaking in its beauty. An estimated 200,000 people celebrated the bridge by walking part way across it in drenching rain on Mother’s Day in May 2002.

As a new icon takes shape in Boston’s landscape, it is clear that this bridge would not look the way it does without a vigorous collaborative process, involving 42 committed citizens, project staff, and outside experts. The process made it possible for these forces to work together to create a new solution.

## **CONCLUSION**

These, then, are four specific outcomes that would not have occurred but for a collaborative process tailored to the particular circumstances of four different controversies. Of course, other factors also played crucial roles—a receptive political context, vigorous

project leadership, creative and responsive technical resources, and funds to implement the results. But it was the collaborative process that established the positive public energy to focus many forces on the enormous task of resolving conflict and creating an environmentally sound outcome at the same time.

Even in the face of the complexities surrounding evaluating environmental outcomes that this panel is addressing, we should never forget that, in many instances that can be thoroughly documented, a collaborative process has significantly shaped superb environmental outcomes. In the right context, a collaborative process produces better options, better criteria, and better results.

## **NEGOTIATED AGREEMENT CHECKLIST: ECONOMIC AND FINANCIAL CONSIDERATIONS**

**BY BONNIE G. COLBY, PROFESSOR, DEPARTMENT OF AGRICULTURAL AND RESOURCE ECONOMICS,  
THE UNIVERSITY OF ARIZONA**

*Note: All examples below are illustrative and not intended to describe actual cases.*

### **1. Does the agreement specify well-defined baselines and measurement protocols for each objective identified in the agreement?**

*Example:* “Irrigators will reduce their water use by half” versus “Irrigators will reduce their water diversions to 150,000 acre-feet per year (50 percent of their 1990 diversions), as measured weekly at Irrigation District Pumping Station 1A with records to be compiled by the Bureau of Reclamation.

*Example:* “Power plants will improve their pollution control efforts” versus “The 20 power plants located in EPA Region X will reduce their overall SO<sub>2</sub> emission levels to 50 percent of baseline 1995 emissions, as measured and recorded by EPA using round-the-clock monitoring devices, to be installed at each plant at the expense of the power plant owners.

### **2. Does the agreement include the principle of achieving goals and raising funds to cover implementation costs in a cost-effective manner, with a commitment to use cost-sharing agreements and transfer payments to make equity adjustments?**

*Example:* The irrigation district will borrow money under a federal program at low interest rates, and other parties agree to make regular payments to the district to assist with repaying the loan—which provided funds for implementation programs that benefit other stakeholders.

*Example:* A conservation organization has donor funds to immediately purchase an environmentally valuable property, without incurring debt to do so. Other stakeholders agree to repay the purchase price over time, recognizing the benefits of the acquisition in implementing a negotiated agreement.

**3. Are the actions that must be taken by different parties to achieve the goals of the agreement clearly specified? Agreements can be very specific regarding technologies to be used and management practices to be followed, or the parties may be left free to evaluate and use whatever means seem best to them to achieve the goals. Specific requirements make it easier to verify compliance, but may limit parties' flexibility to adapt to changing conditions and to explore new opportunities to accomplish objectives in a more effective manner.**

*Example:* "The irrigation district must implement the five best management practices for water conservation detailed in *Bureau of Reclamation Manual 1996B*, with full implementation to be certified by the Bureau no later than December 31, 2001."

*Example:* "Power plant operators must evaluate the comparative costs and effectiveness of installing scrubbers (or other technologies) versus trading discharge permits among plant locations and present a compliance plan annually to cost-effectively achieve compliance for the following year."

**4. Are the mechanisms selected the most cost-effective means to achieve goals? Incentive-based mechanisms generally are more cost-effective and flexible than mandating a specific technology or management practice. If costs change or new technologies become available, then the specific actions that seemed most desirable when the agreement was drafted may become outmoded.**

*Example:* "The irrigation district commits to alter its water rate structure to promote water conservation and to establish trading mechanisms for water permits, in order to promote more efficient water management and to comply with the annual cutback in water use mandated in the negotiated agreement."

**5. Are the types of costs involved in implementation fully identified, including direct monetary outlays, contributions of staff time and other resources, costs of borrowing and raising money and transactions costs?**

**6. Are the costs to all affected parties considered—those stakeholders at the table, public agencies and taxpayers, and dispersed interests not at the table who may be affected?**

**7. Are cost-sharing principles and compensation packages well defined? Keep in mind that costs include not only monetary outlays, but also reduced access to natural resources.**

*Example:* "Historical fish catch quotas will be cut 20 percent during the next five years, to allow fish stocks to improve. Job retraining will be provided to all persons employed

on fishing boats during the past three years, along with an expanded unemployment compensation program. Economic development grants will be provided to towns in which 10 percent or more of the employed population has been employed in the fishing industry over the past three years. The federal government will provide economic development grants and unemployment compensation. The State of Alaska will provide job retraining.”

**8. Are the costs assigned to various parties realistic, in terms of their ability to pay and the financial mechanisms available to each of them? Are loan repayment assumptions based on realistic projections about economic growth, future costs of inputs (cheap water or electric power), access to subsidies, etc.?**

**9. Are the financial instruments necessary to raise implementation money specified and is the overall mix of financial instruments cost-effective, given the powers of the various parties to levy taxes, issue bonds and otherwise raise money?**

*Example:* “The municipality will issue bonds, the public utility will obtain a low interest public loan, the water agency will increase its pumping a tax on groundwater use and the NGO will provide foundation money to begin the most urgent habitat restoration projects.”

**10. Do cost sharing agreements provide a contingency fund (as with construction projects) for unanticipated costs, or specify the share of such unanticipated costs to be paid by the parties?**

**11. Are sanctions for noncompliance specified, including deadlines, performance benchmarks, and assessment of penalties?**

**12. Has an implementation team been designated, with authority to monitor compliance, impose sanctions, and evaluate progress toward achieving the goals specified?**

**13. Is there an adaptive management team and process—to respond to unexpected changes in natural, political, or economic conditions relevant to implementing the agreement?**

**14. Does the agreement incorporate incentives to help achieve goals, such as directing parties to set resource prices and user fees in a manner consistent with the objectives of the agreement?**

*Example:* Alter water rate structures to encourage water conservation; charge visitors higher entry fees during peak use seasons and days at national parks to ease congestion problems.

Note: An agreement that requires parties to undertake specific expenditures and alter pricing structures can assist them in getting approval from regulatory authorities (if

needed) for new expenditures and changes in pricing structures. Such regulatory authorities could include state corporation commissions or water boards, for instance.

**15. Are new decision-making structures and resource management tools, that have proved effective and acceptable to the parties, been “institutionalized” in the agreement—so that the parties return to these venues for problem solving, and they become the new way of doing business?**

**16. Have formal policy changes to support the agreement been achieved (or are underway), authorizing legislation, public appropriations, etc.**

**17. Are documentation protocols incorporated into agreements—such as monthly reporting of staff time, travel, professional services, and other financial expenditures associated with implementation, compiled by a central recorder. Documentation should also include changes in resource pricing and subsequent changes in resource use, so that price elasticities can be more accurately estimated and used in the future. Reports on related disputes and how they were handled also would be useful in observing how problem-solving capacity changes over time.**

## **NOTES FROM THE IMPACT OF DISPUTE RESOLUTION PRACTICES ON ENVIRONMENTAL DECISION MAKING IN THE U.S.**

**BY JENNIFER PRATT MILES, MERIDIAN INSTITUTE**

### **PRESENTATION OBJECTIVES**

- To communicate the preliminary findings of Meridian Institute’s study of the impact of dispute resolution practices on environmental decision making.
- To gather reactions to and feedback on the findings, and to identify individuals interested in reviewing the draft report.

### **PRESENTATION DESCRIPTION**

In the last 30 years, the use of environmental dispute resolution and collaborative problem solving has become popular in U.S. policy and regulatory decision making. Growth in the field is well documented (Sander and Goldberg 1994, Susskind 1997, Sipe 1998, Beierle 2000). We hear that environmental policy and regulatory decision making have changed dramatically as a result of the introduction and pervasive use of these practices. However, it remains challenging and elusive to document the impacts.

The Meridian Institute received a grant from the Emily Hall Tremain Foundation to begin to explore the impact of the field of dispute resolution on the environment and environmental decision making, as part of the Foundation’s assessment of the work they have supported in this field. The resulting study builds upon the cumulative experi-

ence of a number of prominent dispute resolution professionals and participants in collaborative processes through a series of interviews. In addition, Meridian completed a focused literature review, consulting nearly 50 sources.

Several authors mention the void in understanding the impacts of dispute resolution on environmental decision making. Everyone comments that it is hard to measure. Few, if any, have found a way to examine the issue in depth. Thomas Beierle may come the closest by documenting that stakeholder processes are producing high quality outcomes and processes in his case survey, "Quality of Stakeholder Based Decisions: Lessons from the Case Study Record." The report outlines ten sets of criteria for evaluating cases that appear in the literature and suggests that these might be used to devise a methodology for evaluating the impact of the field on environmental resources.

The interviews were based on a set of six questions and yielded a wealth of information. The issues investigated with interviewees include:

- The most significant impacts they had observed in their practice or experience.
- Their recommendations for improving the field.
- Recommendations for increasing the impact of the field of collaborative problem solving.

Professionals involved in dispute resolution have observed tangible, positive impacts on the environment as a result of the use of collaborative processes in their practice, but state that a good way to measure this does not exist currently. The interviews conducted and literature reviewed show that a wide range of natural resources has been impacted by the application of dispute resolution processes—including air, climate, land, water, and wildlife, among others. The authors find that while the impacts to these resources have been largely positive, it is challenging to quantify this, not only because methods for evaluating consensus building are still in the formative stages, but also because very little evaluation is completed on traditional forms of dispute resolution to which ADR might be compared. As the field of ADR has grown, so has the institutional support of this work at the state and national levels. This is evidenced by the extent of consensus building and collaborative problem solving at the local and state level and the growth in numbers of institutions and organizations to support this, formation of the U.S. Institute for Environmental Conflict Resolution in 1999, the increase in number and function of federal offices designed to address conflict resolution, and the rise of corporate-environmental partnerships.

Extensive further study is recommended to continue to explore the question of if and how collaborative processes affect environmental outcomes.

# IS IT FEASIBLE TO EVALUTE THE ENVIRONMENTAL CONTRIBUTIONS OF COLLABORATIVE DISPUTE RESOLUTION PROCESSES?

Andy Rowe  
GHK International



18 March 2002

## WHAT IS THE PURPOSE OF EVALUATION?

- Evaluation encourages better use of resources by providing information and advice to improve programs
  - At the funder level, the decisions are to continue, discontinue, or modify programs depending on their effectiveness
  - At the program level, the decisions are about improving programs
- Evaluation is about judging the merit or worth of programs
- There are two fundamental evaluation challenges with environmental conflict resolution
  - Effectiveness = benefits compared to the resources expended
  - Incrementality = effectiveness of ECR compared to a reasonable alternative



18 March 2002

## FACTORS AFFECTING EVALUABILITY OF ENVIRONMENTAL CONTRIBUTIONS

1. Level and type of intervention
  - Evaluability is better when effects are closer to the intervention
  - Evaluability is better when the effect size is larger
  - Evaluability is better with more homogeneous interventions, cases and settings
2. Types of Evaluation Questions
  - Descriptive questions much more possible than incrementality or causality



18 March 2002

## LEVEL OF INTERVENTION

- Evaluability is affected by the level and specificity of the intervention
  - ✓ Project or case
  - ✓ Program addressing focused issues
  - ≈ Multiple interventions in a location
  - ≈ Aggregation of geographically dispersed interventions if homogeneous
  - ✗ Dispute resolution in general



18 March 2002

# TYPES OF EVALUATION QUESTIONS

1. Program processes
  - ✓ Fidelity of program implementation to design
2. Program outcomes
  - ≈ The environmental contributions associated with collaborative processes
3. Attributing outcomes to the program
  - ✗ What credit can collaborative processes take for environmental changes?
4. Links between process and outcome
  - = What elements of collaborative processes make a difference to environmental changes?
5. Explanations
  - ✗ Why do collaborative processes make (not make) a difference to environmental outcomes?



18 March 2002

# LIKELY EVALUABILITY

LEVEL AND TYPE OF INTERVENTION	EVALUATION QUESTION				
	Program Process	Program Outcome	Attribution of effects of interventions	Linking process, outcome	Explanation
Project or Case	✓	✓	?	✓	✓
Program	✓	✓	?	✓	✓
Geog concentrate interventions	✓	✓	?	✓	✓
Similar interventio dispersed	✓	✓	✗	✗	✗
Dispute resolutior general	✓	✗	✗	✗	✗



18 March 2002

## WHAT ON EARTH ARE THESE GUYS DOING?



18 March 2002

## EXAMPLE OF MEASUREMENT ISSUES SALMONID ENHANCEMENT PROGRAM

PROGRAM	DESIRED OUTCOME	MEASURED RESULTS	
		STANDARD SOURCES	WITH CULTURAL ANTHROPOLOGY
<b>PROGRAMS</b> • Enhancement • Habitat • Enforcement • Management • Research	<b>REDUCE SUPPLY FROM POACHING AND LIMIT EXCESSES</b> • Surveillance • River Wardens • River Watch	Poaching significantly reduced	No change in poaching effort or returns
		Limit excesses significantly reduced	Minor reduction in excesses in some sites
	<b>REDUCE DEMAND</b> • Community Watershed Management	Communities will no longer buy from poachers	Communities are buying as much or more as previously



18 March 2002

## EXAMPLE OF MEASUREMENT ISSUES DISPUTE RESOLUTION

PROGRAM	DESIRED OUTCOME	EVALUATION CHALLENGES	
		CONCEPTUAL	MEASUREMENT
Collaborative dispute resolution processes	<b>AGREEMENT OUTCOMES</b> Agreement contributes to environmental improvement	Contingent effects	Effects too small to notice
	<b>PROCESS OUTCOMES</b> Future negative environmental impacts will be less because parties will cause less harm through collaboration	Observability of effects	Short shelf life of effects
		Time and location effects	Effects are intercepted
		Limited homogeneity	Effects are offset
		Setting benchmarks	Effects inflated
		Incrementality & effectiveness	



18 March 2002

## RESPONSE A CHALLENGE TO SELL TO KEY STAKEHOLDERS

- *LIKELY TO*
- World Bank uses likely to in assessing contribution of programs to Bank goal of poverty reduction
  - Urban environmental improvement will not have an observable effect on poverty
  - Program theory indicates that urban environmental improvement contribution to poverty reduction is not an exceptional claim
  - If program theory is implemented with fidelity to program theory as demonstrated through process and outcome evaluation, claim is *likely to* be valid
- I doubt that Congress, OMB, State Legislators will accept *likely to*
- Empowerment evaluation offers some incremental measurement potential but has reduced credibility



18 March 2002

## BE STRATEGIC

- Effectiveness of ADR cannot currently be substantiated for settings such as ECR and complex public policy
  - Cheaper faster better = more effective. This requires further applied research before evaluation can assess effectiveness
  - Our current ability to assess environmental contributions of ADR are limited to intervention specific settings
- Claims that exceed current evaluation capacity should not pass an evaluability assessment
- Strategy is to buy time through *likely to* until we can improve the acceptability of this statement and build research base



18 March 2002

**CLOSING PLENARY:  
REFLECTIONS ON THE EXPERIENCES SHARED  
AND LESSONS LEARNED**

**THURSDAY, MAY 16, 2002  
4:15-5:00 P.M.**

# **CLOSING PLENARY: REFLECTIONS ON THE EXPERIENCES SHARED AND LESSONS LEARNED**

**KIRK EMERSON, MODERATOR**

## **PROGRESS IN THE PROFESSION**

**BY GAIL BINGHAM, RESOLVE INC.**

Overall, a number of themes emerged from the sessions. First, as practitioners, we should accept what is possible. We won't know until 20 years from now what the results of our work today will be.

When is mediation not appropriate? As a field we are still dealing with issues of justice, power, and politics. Power controls representation and who sits at the table. Who gets to frame the questions? The role of the public and aspects of confidentiality and the media reflect the issues of power, equity, and the role of politics. Throughout a number of the sessions, it was apparent that we are more sophisticated in addressing the challenges of science, the linkage of EJ and power, and identifying opportunities for the role of joint fact-finding.

## **WHERE DO WE GO FROM HERE?**

Start with results. Parties have fights because they care about the outcomes. Attention to design and implementation remain critical issues. Does the mediator have a role in the outcomes? The mediator's openness of what we do and don't do and the dilemmas that we face remain a challenge to all of us as a profession. The debate remains on how practitioners engage in process. At the same time, we still face a delicate balance of owning the outcome measures without entering into the dispute itself. Here are some specific examples from sessions at the conference.

The Klamath Basin roundtable was an extraordinary session; it demonstrated the importance of asking when it is appropriate for parties to enter into mediation. As a field, it is important to be able to say that a mediated process is not the best process, but at the same time, we don't want to avoid a challenge or hard problem that could benefit from mediation. As the level of political involvement in an issue increases, the challenges become greater and the Klamath demonstrated this. It is the type of political leadership and behavior that is important to the process and the durability of agreements. Politicians can create incentives and shift processes away from conflict, or alternatively, can destabilize the process and steer the group towards greater conflict. Senator Reid created incentives to get people to the table and serves as a good example of politicians committed to resolving environmental conflicts. The Klamath session also illustrated themes of justice and identity. I am using identity here to describe not just the issue, be it water or landfills, but also respect for community identity and community control. This community identity and control ties into power, and in a process, we need to address power first and develop ways to create a level playing field.

The presentation on GE Pittsfield negotiated settlement demonstrated the creative application of public involvement and settlement agreements. The Verona Well Field session really demonstrated that the more things change, the more they stay the same. The session focused on interest-based negotiation that occurred without a mediator where the group created an agreement themselves, with a process they developed.

Raiffa brought game theory into the profession years ago. In this conference, game theory is clearly emerging, applying in practice across positive, zero, and negative sum games.

When I started working in field in 1979 to promote effective use of consensus and effective decision making, I put together a list of mediators that I knew at the time. By the mid-1980s Suzanne Orenstein and the EPA worked to create a roster. Always at issue were questions of who gets work, how big should the roster be—should it be all-inclusive or selective based on criteria, and who should set the criteria? Today the rosters are so sophisticated, with search criteria, on-line search tools, and information. I am so impressed with Joan Calcagno and other roster managers. The roster managers are asking what their obligations are as roster managers, who are they responsible to—other practitioners, the clients—and what happens when there are complaints?

## **EVOLVING INSTITUTIONAL CAPACITY**

**By BOB WARD, U.S. ENVIRONMENTAL PROTECTION AGENCY**

The tracks make a lot of sense. Agreeing to observe the sessions on evolving institutional capacity stopped me from jumping from session to session. I heard about institutional capacity building efforts throughout the conference and I found it significant that over half of the sessions focused on institutional development.

Some of my first impressions included—how different the languages were in the room. For example, traditional Native American communications may include long periods of silence, openings and closing blessing, and deference to Elders. These approaches were countered in a different session the focused on terms like alignment, cost basis, etc. At the same time there were common words: homeland, access to information, tribal homelands, states and state sovereignty. I also noticed features of credibility—I was struck by how often traditional knowledge was illustrated as being so important in several sessions. I also thought it was interesting how often our oldest environmental laws such as NEPA and ESA were discussed. Even though we see the need to reach out to new groups, it is also important to go back to the frequent participants. This will help us build the principles of the field.

At the conclusion of the opening plenary, the last question Peter Adler asked the panelists: “Where will we be in 10 years?” From the responses two themes emerged: First, we should expect an increased familiarity with ECR. Those who don’t know the field now will in 10 years. Second, there is, and will continue to be, an increased credibility in the field and therefore, growth. The sessions that I sat in on affirmed these insights.

I'd like to characterize the new programs, new resources, and capabilities that I heard about.

- Early case assessment work occurring at DOI;
- State programs on conservation agreements, the role of state executive orders on ADR;
- The role of local government and organization participants in processes such as the Everglades;
- The importance of a tribal perspective to processes was well integrated into many of the sessions;
- The growth and development of international institutions and how foreign governments and partners are building ECR processes. There are also opportunities abroad from which we can learn;
- University-based programs and their important role in community-based programs; and
- Mentoring and the role of private firms, build on the notion of an increased public familiarity of the field.

There were several broad themes that emerged from the sessions. First, as we build our institutions they can provide us with a cushion, absorbing our failures and not undermining our credibility as a field. As peers and colleagues we can support each other and share what we've learned to build the field. The field is now creating a rich institutional memory through efforts such as conference proceedings, stories, case studies, and findings from evaluation. Returning to Peter's question, I think 10 years is too short of a time frame to look at the field, and depending on the lens, be it a traditional perspective, management perspective, or community perspective ...

## **ENHANCING ENVIRONMENTAL DECISION MAKING**

**BY DARYL FIELDS, BC HYDRO**

First of all, I would like to congratulate the Institute, the hotel, and all of you for a fabulous conference. The diversity of topics, perspectives, and morning walks were inspiring. I leave here with a full head and energized heart and for that, Kirk and the Institute, I thank you.

The diversity of the conference as a whole was reflected in Track 3: decision making. We saw a wide range of decision tools and different steps where decision tools may fit into facilitation/mediation. We heard, for example:

- Tom Gunther, who showed how powerfully a GIS "movie" of urbanization from 1972–1992 can communicate the need for land use planning.
- Luis Bojorquez-Tapia demonstrated how scientific uncertainty can be integrated to better assess different solutions.

- Jonathon Rabb and Colin Rule got me fairly excited both about administrative efficiencies from Web-based technology but also about the potential (and pitfalls) of the Web for dialogue and on-line dispute resolution.
- Howard Raiffa challenged us (as Howard inevitably does) to use analysis to redefine possibility frontiers, to move away from win/lose, and to enlarge the set of choices.
- Andy Rowe reminded us that the evaluative sciences can provide tools that put discipline on the cheerleading we do as a field.

Lots and lots of ideas, approaches, and philosophies. No one had a nice, neat single package complete with a bow. But there was tremendous enthusiasm.

The enthusiasm emerges, I think, from the goals of decision support science. Mark Schaefer of NatureServe, right in the opening plenary, talked about enabling citizens to engage more effectively—“Jeffersonian techniques.” I believe some of the tools and techniques in Track 3 do just that. They:

- Can simplify data and analysis, which is critically important as a broader range of stakeholders are faced with more and more—and more sophisticated—information;
- Develop more informed decisions by enhancing learning—learning about impacts, alternatives, and personal values;
- Offer frameworks for greater creativity; and
- Enhance transparency of decisions and the decision process.

But there is tension—or perhaps it is more usefully thought of as ponderings over balance. That is, the balance between:

Art and Analysis  
Creativity and Structure  
Stakeholder-defined processes and Independent external analysis

Based on the turnout to the decision-making sessions and conversations that surfaced throughout the two days, we need both analysis and mediation/facilitation. But the mix is not clear and often we fall to one side or the other.

Where we are at in combining decision sciences with facilitation/mediation reminds me of a junior high school dance (you know, 12, 13, 14 years old). At the risk of caricatures, let me try to paint you a picture ...

*Finally you have got up the nerve to ask that guy in the other grade to the first school dance. He's kind of different— actually really different from you. He likes talking a lot, seems really outgoing and nice to people, with a certain artistic flair. You, on the other hand, are very methodical and, well, admit it, you are the class math whiz. But there is something intriguing about him. So there you are at the dance ... and there is the dance floor ... everyone watches you walking out together and you think to yourself, "What the heck am I doing with this guy?!"*

*Thankfully, the first couple of songs are fast, so while you are together, you are really dancing on your own. But then the slow dance. As you get closer together the awkward factor goes way up. You bump noses. You step on his foot. He yells in your ear to be heard. But you stick it out. You don't know if it's the force of his personality, the intrigue of the unknown, the comfort that not all dances are slow, or simply the lure of possibility.*

*But as you arrive home that night, something has shifted, and you are nurturing the sense that a powerful partnership is in the making.*

So, decision analysts and mediators/facilitators, find your partners. With them, I wish you many dance floors and much great music—fast and slow!!

# PHOTO GALLERY



Facade of Loews Ventana Canyon Resort, site of the conference



Small group problem solving during a pre-conference training session

Training session moves outside



Thai and Indonesian delegates on a field trip to Sonoita, AZ





Meeting of Indonesian and Thai delegates



Dawne Wilson and Patricia Orr

A Harris' hawk from the Arizona-Sonora Desert Museum delights conference attendees



An Arizona-Sonora Desert Museum volunteer shares her knowledge of Sonoran wildlife





Elizabeth Monroe and Mike Eng are mesmerized by a gopher snake



Conference participants engage Dale Keyes in a lively conversation

Ric Richardson, Jonathan Raab, and Colin Rule



Kathy Bond and Mette Brogden





Kathleen Conway and  
Ann MacDonald



Anne Udall, Udall Foundation  
Board of Trustees Vice Chair;  
Terrence Bracy, Udall Foundation  
Board of Trustees Chair; and  
Christopher Helms, Udall  
Foundation Executive Director

Diane LeResche and  
Monthip Sriratana Tabucanon



Chris Carlson, Paul Orbuch,  
and Robert Varady





Practitioners hear about Chilean experiences from Vincente Sanchez



Melanie Emerson



Anne Udall and Sarah Palmer

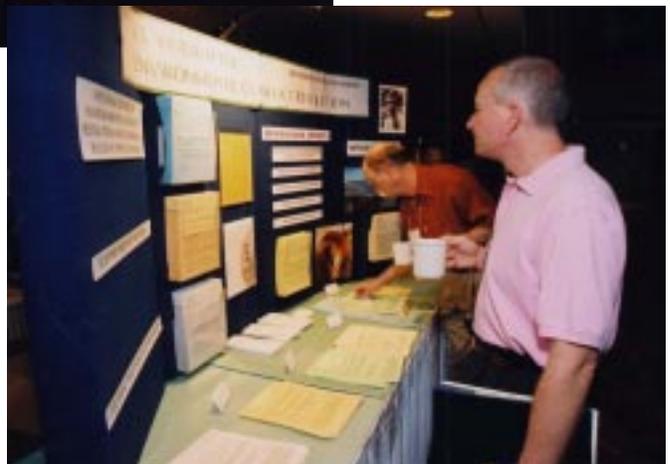


Exhibit booths



Stephen Cornell, Director, Udall Center for Studies in Public Policy, The University of Arizona, welcomes conference delegates



Opening plenary moderated by Peter Adler

Lively conversation following the Department of Interior's Collaboration and Successful Resolutions panel session



Beadie Kanahele Dawson greets participants after the traditional peacemaking session





Journalist and roundtable presenter Alan Weisman engages conference participants following the confidentiality and the media session



Robin Roberts “exercises” his moderating skills during the environmental justice roundtable

Larry Charles continues the EJ discussion



Post session Q & A





Ellen Wheeler, General Counsel, and Kirk Emerson, Director, USIECR



Evening reception offers an opportunity for dynamic interaction

Practitioners exchange experiences with Chilean delegates Pablo Pisani and Valentina Duran



Marci DuPraw and Terry Amsler





Bill McDonald, Malpai Borderlands Group and keynote speaker, with Kirk Emerson and Dinah Bear



Terrence Bracy, Udall Foundation Board of Trustees, Chair; Honorable Robert Walkup, Mayor, City of Tucson; and P. Lynn Scarlett, Assistant Secretary Policy, Management & Budget, U.S. Department of the Interior

Dinner conversation



Olivia Montes and Sonia Colmenero





Tina Gargus and  
Emily Dabner



Marilyn Masayesva  
and Anna Masayesva

Cherie Shanteau  
and Larry Fisher



Closing Plenary: Bob Ward, USEPA; Daryl Fields,  
BC Hydro; and Gail Bingham, Resolve,  
summarize their observations for  
each of the three conference tracks



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Wastes

# **BIOGRAPHIES OF PRESENTERS**

**Joel Ames**, Commander Navy Region Northeast, Regional Environmental Compliance Officer, is an American Indian of Osage decent. He entered the Navy in 1976 with the designation Submarine Sonar Technician and served on several Fast Attack and FBM Submarines. Upon reporting to Naval Submarine Base, Groton, Connecticut, in 1990, he became involved in the environmental field working in all environmental program areas. He was also tasked as the legal consultant on the successful litigation of the lawsuit, *United States vs. the State of Connecticut*. During his time at SUBASE he also assisted the U.S. Coast Guard, Naval Undersea Warfare Center, and NETC in the development of their environmental programs. He retired from the Navy in 1995 and is currently working for Commander Navy Region Northeast as the Regional Environmental Compliance Officer. He also fills the position of Federal On-Scene Coordinator and Regional Tribal Program Coordinator. As a Federal On-Scene Coordinator, he has managed to get the Tribes, in EPA Region I, seated as full members of the Regional Response Team and the associated Area Committees.

**Denise Antolini** joined the University of Hawaii William S. Richardson School of Law faculty in the 1996-97 academic year to teach torts, environmental law, and legal writing after eight years of practicing public interest law with the Sierra Club Legal Defense Fund ("SCLDF") (now called EarthJustice Legal Defense Fund) in Seattle and Honolulu. Ms. Antolini became an Assistant Professor of Law (tenure track) commencing with the 1997-98 academic year. Professor Antolini teaches environmental law, environmental litigation seminar, torts I and II, and legal writing courses. She serves as the faculty co-adviser to the student Environmental Law Society, and as faculty coach of the Environmental Moot Court Team. She also assists Professor Casey Jarman with the Environmental Law Program at the Law School.

**Saradhi Balla** is a project engineer and Web master for the U.S. EPA-funded Technical Outreach Services for Communities (TOSC) program, based at Michigan State University. He has a bachelor's degree in civil engineering and is currently pursuing a master's degree in environmental engineering at Michigan State University. Mr. Balla is a principal author of outreach publications for the TOSC program and has three years' experience as a Web publisher and developer. He has led the development of the TOSC program web site and the site cleanup resource site, [www.envirottools.org](http://www.envirottools.org). He has also worked as a technical assistance provider/educator for Superfund communities as part of his work for the TOSC program.

**Todd Barker** is a partner with Meridian Institute. He has served for 10 years as a respected and trusted convener, facilitator, and mediator of numerous dialogues, public processes, and negotiations aimed at resolving a wide variety of problems and challenges at the local, state, national, and international levels arising from the intersection of environmental, economic, and social issues. These projects have addressed issues such as agriculture, biotechnology, natural resource and ecosystem management, chemical and nuclear weapons, forest management, land reclamation, and air and water quality. Mr. Barker is experienced in application of Internet-based tools (e.g., e-mail, Web-based conferences, list serves, public and secure Web sites) to collaborative processes to increase the efficiency, effectiveness, and transparency of these processes. Prior to joining Meridian, Mr. Barker worked for The Keystone Center for more than five years as a mediator. Mr. Barker received an M.S. from the University of Michigan where he focused his studies on environmental policy and dispute resolution.

**Martha Bean** is a mediator in Seattle. Her cases include: multiparty settlement of license provisions for two dams within the Columbia River system; mediation of options and outcomes for siting utility facilities; and mediation among a consortium of NGOs to solidify an approach to an environmental issue. Ms. Bean is frequently called on to design and illuminate decision steps using graphic imagery. She holds degrees in environmental planning from Western Washington University and UC Berkeley. Ms. Bean is a doctoral student at the College of Forest Resources at the University of Washington, exploring the role of science and technical information in public policy.

**Dinah Bear** is General Counsel of the Council on Environmental Quality (CEQ), in the Executive Office of the President. Ms. Bear joined CEQ as Deputy General Counsel in 1981, and was appointed General Counsel in 1983, serving in that capacity through September 1993 and resuming that position in January

of 1995. She has chaired the Standing Committee on Environmental Law of the American Bar Association and the Steering Committee of the Environment, Energy, and Natural Resources Division of the District of Columbia Bar. She has received the Distinguished Service Award from the Sierra Club and the Chairman's Award from the Natural Resources Council of America. Ms. Bear graduated from McGeorge School of Law, Sacramento, California, in 1977, and received a Bachelor of Journalism degree from the University of Missouri at Columbia in 1974. She has been admitted to practice by the State Bar of California, the District of Columbia, and the U.S. Supreme Court.

**Dale Blanton** is the ADR Coordinator for Natural Resource Agencies as part of the State of Oregon Public Policy Dispute Resolution Program. His public policy and dispute resolution experience includes work on complex multiparty public policy efforts, collaborative approaches to legislation, collaborative rule making, and mediation. He is one of the primary authors and editors of the State of Oregon Public Policy Dispute Resolution Program's handbook entitled: *Collaborative Approaches: A Handbook for Public Policy Decision-Making and Conflict Resolution*, August 2000. Dale is a practitioner member of the Association for Conflict Resolution (ACR) and the Oregon Mediation Association (OMA).

**Richard Boice** is the U.S. EPA Remedial Project Manager for the Verona Well Field Site. Since 1983, Mr. Boice has worked as a remedial project manager in the Superfund program for the U.S. EPA, Region 5. Other sites include MIDCO I and II Pristine, Inc. and Schmalz Dump and a number of other sites in the Midwest. Mr. Boice has a B.S. in chemistry and chemical engineering from the University of Michigan, and an M.S. in environmental engineering from Illinois Institute of Technology. He is a registered professional engineer in the State of Illinois.

**R. Greg Bourne** has been involved with conducting public involvement processes and mediating public policy issues for about 20 years. He is affiliated with the Public Decisions Network and the California Center for Public Dispute Resolution. He also is Director of the Center for Civic Participation and Renewal. Recent projects have involved: land use and pesticide use on tribal lands in Arizona, management of pronghorn antelope in northern Arizona, water supply in central California, air quality in the Los Angeles basin and evaluation of facilitated brownfields redevelopment efforts throughout the U.S.

**Terrence L. Bracy** is the Chief Executive Officer of Bracy Tucker Brown, a respected public affairs firm in the nation's capital. The 20-year-old firm represents several of the nation's large cities, airports, and public telecommunications agencies, as well as corporations seeking assistance settling environmental disputes. Before coming to Washington, Mr. Bracy was news editor at the NBC affiliate in Tucson, Arizona. He also taught courses in American government at The University of Arizona. In Washington, D.C., Mr. Bracy was a legislative assistant to Congressman Morris K. Udall from 1966-1976. He played a key role in Mr. Udall's campaigns, including his race for the presidency in 1976. In January of 1977, President Carter appointed Mr. Bracy to the post of assistant secretary of transportation. Mr. Bracy was appointed by President Clinton to the board of trustees of the Morris K. Udall Foundation in 1994 and subsequently elected the first Chair.

**Marshall H. Breeze** is an associate professor in the Department of Agricultural Education and Communication at the University of Florida. He teaches graduate courses in communication and conflict resolution, diffusion of innovations and public opinion on natural resource issues. He is also Co-Director and Curriculum Coordinator for the Florida Natural Resources Leadership Institute which provides training on natural resources issues, policy and conflict resolution. He received his Ph.D. in communication theory and research from the Florida State University College of Communication.

**Mette Brogden** manages the Environmental and Public Policy Conflict Resolution program at the Udall Center in Tucson. Her recent projects include facilitation of the Arizona Common Ground Roundtable, a statewide policy dialogue concerning land-use issues. She co-facilitated the initial PCI-USIECR workshop for their project on ADR program evaluation. She led the facilitation team for the national policy dialogue on State Conservation Agreements sponsored by the IAFWA. Her research interests focus on how collaborative dialogues can successfully tie into existing political processes, determining environmental

outcomes of ECR processes, and theorizing conflict resolution in the face of emergent systemic change. A former psychotherapist, she is finishing a Ph.D. in anthropology at The University of Arizona.

**Joan Calcagno** is the Roster Manager at the U.S. Institute for Environmental Conflict Resolution. Since September 1999, Joan's primary responsibility has been development and management of all aspects of the National Roster of ECR Practitioners and the related referral service. She recruits members, reviews applications, administers the computerized database and search function, and assists applicants and members. She also provides roster search and referral services to people seeking to engage a neutral third party, as well as advice regarding and facilitation of the process of selecting an appropriate neutral. Joan has been a professional mediator and trainer, and prior to that, practiced law for 11 years.

**Francis X. Cameron** is Special Counsel for Public Liaison and Waste Management within the Office of the General Counsel at the U.S. Nuclear Regulatory Commission. In this capacity, he is responsible for the design and implementation of collaborative and conflict resolution processes for use in Commission regulatory activities. Mr. Cameron also serves as the Commission's Dispute Resolution Specialist under the Administrative Dispute Resolution Act and provides facilitation and mediation services for the Commission. He is responsible for special legal projects in the waste management and decommissioning areas. His previous positions at the NRC include Deputy Director of the Office of the Licensing Support System Administrator and senior attorney in the Office of General Counsel. Prior to joining the NRC's legal staff, Mr. Cameron was a member of the technical staff in the NRC Office of Nuclear Regulatory Research. Before joining the Commission, Mr. Cameron was an associate professor at the University of Rhode Island, specializing in environmental law.

**Christine Carlson** is Co-executive Director of the Policy Consensus Initiative (PCI). PCI is a national, nonpartisan organization that works with state leaders—governors, legislators, and others—to promote the use of consensus building and conflict resolution practices in order to address difficult policy issues and achieve more effective governance. Chris has been active in the public policy dispute resolution field for over 20 years, serving as mediator, facilitator, trainer, and consultant. Chris has authored several articles and publications. Prior to serving with PCI, Chris was executive director of the Ohio Commission on Dispute Resolution and Conflict Management. Chris has served as a local elected official and in advisory positions in state and national government.

**David Ceppos** is a Senior Facilitator/Mediator at Jones & Stokes. David is a dispute resolution, mediation, and natural resource planning specialist. With a comprehensive background in public involvement and facilitation, focusing on consensus-based, stakeholder-driven, resource management solutions involving agricultural, environmental, tribal, and urban users. David has considerable experience in watershed planning, ecological assessment, hydrology, hazardous waste management, and habitat restoration. He also has extensive experience with conservation organizations; public interest groups; state agencies in California, Oregon, Florida, Georgia, Tennessee, and Alabama; federal agencies within the U.S. Departments of the Interior, Defense, Commerce, and Agriculture; and the governments of Mexico, Indonesia, and the Philippines. He received his B.L.A. from the University of Florida, Gainesville, in 1985, and completed his post-baccalaureate research on environmentally related behavior at the University of Florida, Gainesville, in 1985.

**Larry Charles, Sr.**, is the Executive Director of ONE/CHANE, Inc., a CDC in Hartford dedicated to rebuilding North Hartford through community organizing, affordable housing development, employment training and economic development. He is an appointed advisor to U.S. EPA Administrator for Environmental Justice. He is board president of the Long Island Sound Keeper Fund, vice president of the Long River Council of Boy Scouts of America, board treasurer of Hartford Behavioral Health, and past chief of state of the Alpha Phi Alpha Million Dollar Fund Drive, raising \$1.2 million for the NAACP, U.N.C.F., and the National Urban League.

**Tony S. Cheng** is an Assistant Professor of Forestry and Natural Resource Policy in Colorado State University's Department of Forest Sciences. His professional interests include the politics of natural

resource management, especially how different decision-making processes integrate public demands with scientific/technical criteria. Current areas of interest include the role of “sense of place” in affecting public participation in natural resource planning processes; the social psychological dimensions of natural resource decision processes; and conflict, negotiation, and collaboration between scientists and nonscientists in landscape-scale planning. He received his Ph.D. in forest resource policy from Oregon State University, his M.S. in forest resource policy from the University of Minnesota, and a B.A. in politics from Whitman College.

**Bonnie Colby** is Professor of Agricultural and Resource Economics at The University of Arizona, where she has been a faculty member since 1983. Her expertise is in the economics of natural resource policy and disputes over water, the public lands, and environmental regulation. She has provided invited testimony on these matters to state legislatures and to Congress. She served on the National Research Council’s Committee on Western Water Management and currently is serving on the National Academy of Science committee investigating use of economic methodology by the U.S. Army Corps of Engineers, involving billion dollar proposed projects on U.S. waterways. Dr. Colby advises public and private sector organizations on managing natural resources and resolving environmental disputes.

**Timothy M. Conway** is currently Senior Enforcement Counsel at U.S. EPA’s office in Boston. Among his responsibilities in this position, Tim has been lead attorney for the EPA in negotiating and implementing the comprehensive Consent Decree regarding the GE-Pittsfield/Housatonic River Site. Prior to his current position, Tim served as Deputy Commissioner for Legal Affairs for the State of Indiana’s Department of Environmental Management, as a supervisory attorney for EPA in Boston, and as a staff attorney at EPA’s offices in Boston and Chicago. Tim has been with EPA for 17 years. Tim is a Phi Beta Kappa graduate of Indiana University and holds a law degree and a master’s degree in public affairs from Indiana University.

**Cindy Cook** is the principal of Adamant Accord, Inc., whose main (read: “only”) office is in Adamant, Vermont. She has been involved in environmental dispute resolution for longer than she cares to admit.

**Jon Cooley** was born and raised on the Fort Apache Indian Reservation in east-central Arizona. He completed his B.S. in wildlife ecology from The University of Arizona, Tucson, in 1982. Upon completing his undergraduate studies, Jon worked a brief stint as a Wildlife Biologist for the White Mountain Apache Tribe Game and Fish Department before entering graduate school at Arizona State University’s College of Business, where he received his MBA-Finance in 1985. After receiving his MBA, Jon worked in the fields of corporate finance and commercial lending with Fortune 500 companies. Jon returned home to the WMAT in 1994 to head a newly created tribal endangered species program and to coordinate the development of the Tribe’s accompanying legal/policy platform on Endangered Species Act-related issues. Later, Jon developed and launched the Outdoor Recreation Department (a Department within the Wildlife and Outdoor Recreation Division) that is dedicated to enhancing the Tribe’s recreation/tourism-based economy. Jon was promoted in 1997 to the division director post, where he oversees the effort of balancing viable recreation/tourism enterprises operations with sustainable management of underlying natural resources.

**Marion Cox** owns and manages RE\*SOURCE Associates, a consulting firm with locations in Bethesda, Maryland, and Santa Fe, New Mexico. Ms. Cox has over 25 years of experience in environmental planning and resource management. The company provides services to government agencies, private clients, and local communities in the primary areas of public participation planning and program implementation, collaborative planning and consensus building strategies, conflict management and negotiation, risk, communication, and training related to each of these substantive areas. Ms. Cox has broad experience in a variety of domestic and international environmental and resource management programs.

**Steven E. Daniels** is Director of the Western Rural Development Center (WRDC) at Utah State University in Logan. The WRDC is one of four regional centers for applied social science and community development. The WRDC cooperates with Land Grant Universities in the 13 western states and Guam. The mission of the Western Rural Development Center is to strengthen rural families, communities, and

businesses by facilitating collaborative socioeconomic research and extension through higher education institutions in the western region. Steve is both a researcher and practitioner in the areas of natural resource collaboration, public policy decision making, and community development. For the previous 10 years Steve was a faculty member in the Department of Forest Resources at Oregon State University. He has written numerous articles and papers on natural resource management, public participation, and collaboration, and is coauthor (with Gregg Walker) of *Working Through Environmental Conflict: The Collaborative Learning Approach* (Praeger 2001). Steve earned his Ph.D. and M.S. degrees in economics at Duke University, and a B.A. degree from Whitman College.

**Deborah Dalton** is a Senior Conflict Management Specialist, Conflict Prevention and Resolution Center, U.S. EPA, Washington, D.C. Ms. Dalton advises EPA management on public involvement and dispute resolution processes for developing rules and policy and for resolving enforcement actions. She has assisted in the design and conduct of more than 20 regulatory negotiations and policy dialogues at EPA and other agencies. She has managed EPA's national contract for public involvement and dispute resolution services since 1988. She is coauthor of the *Sourcebook on Negotiated Rulemaking*, published by ACUS in 1995, and has served as an expert resource on ADR and public involvement for international programs in Russia, Chile, Indonesia, and Thailand.

**Polly Davis**, CRI's Associate Director, is responsible for developing human rights conflict resolution projects in Central America and Poland. She is a certified mediator and has conducted trainings in negotiation and mediation in Russia, Poland, Guatemala, and Costa Rica. She also participated in project development in Cuba. Polly has been a certification examiner for CRI, R-APC mediation projects, and the King County (Washington State) Inter-Local Conflict Resolution Group, and performs considerable work in the private sector. Outside her work with CRI, she mediates victim/offender cases.

**Beadie Dawson**, is the CEO and general counsel of the Dawson Group, a Native Hawaiian woman-owned environmental, construction, and information technology corporation. Ms. Dawson is a Native Hawaiian attorney, earning her J.D. from the University of Hawaii's William S. Richardson School of Law in 1981. Since that time she has served in numerous roles including Deputy Attorney General for the State of Hawaii from 1982-1996, and served as a lead litigator in land and transportation related cases. Ms. Dawson has worked tirelessly to promote grassroots organizations in support of preserving Hawaii's natural environment and to advance Native Hawaiian issues. She is a member of the Native Hawaiian Consensus Building organization and is a board member of the Native Hawaiian Bar Association and sits on several committees of the Hawaii State Bar Association and the American Bar Association.

**Dan Dozier** has over 30 years of experience as an attorney, negotiator, and mediator, including 15 years of experience as a mediator and facilitator of complex multiparty environmental, technical, and public policy disputes. His mediation experience is broad, encompassing land use, hazardous waste, fisheries, water and other types of environmental disputes, large case civil litigation, labor and employment cases, and negotiated rule-making proceedings. He has been appointed by the U.S. District Court for the District of Columbia to mediate civil litigation cases and is listed on the court's roster of mediators. Mr. Dozier has facilitated negotiated rule making and public policy dialogues between representatives of federal, state, local government, environmental, community, industrial, and trade association groups. He has mediated numerous high profile employment cases, including several for the U.S. District Courts, and has designed dispute resolution procedures and mediated contract disputes for both public and private sector clients. He is Director of Consensus and Dispute Resolution at the Marasco Newton Group where he manages a roster of environmental and public policy mediators for the U.S. EPA under the government's largest mediation and neutral services contract.

**Dennis R. Duke** is the Program Manager for Ecosystem Restoration for the Jacksonville District of the U.S. Army Corps of Engineers. He is responsible for the South Florida environmental restoration program that includes the \$7.8 billion Comprehensive Everglades Restoration Plan. He holds a bachelor's and master's degree in civil engineering and water resources planning from the Georgia Institute of Technology. He is a registered professional engineer with over 28 years of experience with the Corps in planning, construction, disaster recovery, and project management including three years in Saudi Arabia.

**Frank Dukes** is the Director of the Institute for Environmental Negotiation (IEN), University of Virginia. Dr. Dukes designs dispute resolution and public participation processes, mediates and facilitates, teaches and trains, and conducts research. His book *Resolving Public Conflict: Transforming Community and Governance* describes how public conflict resolution can help vitalize democracy. He is coauthor of *Reaching for Higher Ground in Conflict Resolution*, which describes how diverse groups and communities can address conflict with integrity, vision, and creativity. IEN's "Collaborative Stewardship Initiative," includes the "Community-based Collaboratives Research Consortium" (cbcrc.org), and the publication of "Collaboration: A Guide for Environmental Advocates," with The Wilderness Society and the Audubon Society.

**Kirk Emerson** is the Director of the U.S. Institute for Environmental Conflict Resolution of the Morris K. Udall Foundation. In addition to overseeing the Institute's programs and administration, Kirk assists federal agencies in ECR program development and provides early case consultation, process design, and facilitation services, primarily for interagency and intergovernmental conflicts. Kirk's interest in collaborative processes began in the mid-1970s as a graduate student at MIT where she studied citizen involvement in community planning and continued throughout her early career as a county planner. Kirk trained and practiced as a community mediator in the Philadelphia area, where she began mediating land use disputes. Her interest in environmental and public policy led her to complete a Ph.D. in political science and public policy at Indiana University where she focused her research on property rights and land-use law and policy. Prior to her work at the U.S. Institute, Kirk coordinated the ECR program at The University of Arizona's Udall Center for Studies in Public Policy, where she conducted research, taught, and directed several conflict management and public involvement projects involving water resources, endangered species, and western range policies.

**Melanie Emerson** is a Program Associate at the U.S. Institute for Environmental Conflict Resolution. Melanie's work at the Institute focuses primarily on education and outreach of Institute programs and sectors, including coordination of the national conference. Before her recent move to Tucson and the Institute, Ms. Emerson worked for an environmental mediation and public involvement firm in Seattle, Washington, supporting scientifically complex, multiparty mediations and collaborating extensively with public information officers. She has spent substantial time working in Central America through the U.S. Peace Corps, the U.S. Agency for International Development, and the government of El Salvador. Melanie is currently working toward her M.A. in dispute resolution at Antioch University McGregor.

**Michael Eng** is a Senior Program Manager with the U.S. Institute for Environmental Conflict Resolution, focusing on collaborative multi-stakeholder planning processes involving protected areas and resources. Projects have included: interagency efforts to restore the Everglades; Columbia River salmon litigation; marine protected area planning for the Channel Islands, Northwestern Hawaiian Islands, and Dry Tortugas; and watershed restoration planning in the Upper Klamath Basin. Mike holds a B.A. in psychology and a M.M.A. in marine affairs. He is on the board of The Coastal Society and is active in the Environmental and Public Policy Sector of the Association for Conflict Resolution.

**Elisabeth Evans** is the Director of the U.S. EPA Region 8 Environmental Justice Program. Ms. Evans has a wide variety of experience in convening groups of stakeholders to address environmental contamination, cleanup activities, and conflict. Utilizing her perspectives from technical, management, facilitative and environmental justice experiences, she has initiated many cooperative efforts to investigate and clean up hazardous waste sites, including mine wastes, pesticides, ground water contamination, and chemical dumps. Her focus in environmental justice has been on convening different EPA media programs, state and local government, industry, and community to utilize all resources available to address instances of disproportionate environmental impacts. Much of her work has addressed rural and tribal concerns, as well as cumulative impacts in urban areas. She successfully initiated a participatory workshop on environmental justice that has become the model for national EPA environmental justice training. Ms. Evans has an M.S. in water resources administration with a minor in hydrology and an M.S. in urban planning, both from The University of Arizona.

**Dawn Farr** is the Organization Improvement and ADR Coordinator for the Oregon Department of Environmental Quality. She coordinates agency-wide strategic planning, and measures development and the implementation of Governor John Kitzhaber's Executive Order, (EO 00-09) *Integrating Dispute Resolution into State Government*. Dawn serves as a volunteer mediator with the Clackamas County Dispute Resolution Center and is a member of the Oregon Mediation Association (OMA).

**Patrick Field** is Vice President of North American Dispute Resolution at the Consensus Building Institute. He has convened and facilitated numerous complex environmental and organizational disputes, including the consolidation of three Department of Energy federal laboratories, the cleanup of the Massachusetts Military Reservation superfund site, and the Massachusetts Military Reservation Natural Resource Trustee Council. He is experienced in working with multiple parties in politically and technically complex multi-year cases. Patrick Field was awarded a Master of City Planning from the Massachusetts Institute of Technology with a concentration in environmental planning and policy in 1994. He received a Bachelor of Arts *summa cum laude* from Carleton College in May 1986.

**Larry Fisher** is a Senior Program Manager with the U.S. Institute for Environmental Conflict Resolution. Larry's principal program responsibilities are focused on public lands and natural resources management, with special emphasis on planning and decision processes within the Forest Service, the Bureau of Land Management, and the Bureau of Reclamation. Prior to joining the Institute (in August 2001), Larry worked with a range of agricultural and forestry extension programs, and with watershed management and forest conservation programs, both in the northeastern U.S. and internationally. Larry holds a Ph.D. in Natural Resources from Cornell University.

**Robert Fisher** is a Senior Mediator and General Counsel at RESOLVE. He has expertise in complex, multiparty disputes involving government programs and actions, scientific and technical issues, and interpersonal dynamics. Mr. Fisher has extensive experience mediating and facilitating a wide range of environmental, land-use, transportation, health, natural resources and other issues. He also designs and conducts training in dispute resolution and negotiation. He received a J.D. from the Antioch School of Law (1980) and a B.A. from the Elliot School of International Affairs at the George Washington University (1977).

**Emmett P. Fiske** has been associated with Washington State University since 1979. His course, Resolving Environmental Conflicts, was recently adapted and offered as part of WSU's distance education program. Fiske has facilitated numerous collaborative processes, including pesticide application, agricultural burning, water resource policy development, endangered species protection, and watershed planning. He has written articles, case studies, and simulations in support of building institutional capacity to respond to environmental conflicts with timely and meaningful educational programs.

**Carie Fox** is a former lawyer and soil scientist with a private practice in mediation. Much of her work is in the natural resource and land use arena, with a recent emphasis in transportation issues. Carie integrates organizational development principles, a critical legal understanding of options, and a warm and empathetic approach to the very human side of conflicts. Recently, Carie settled a 70-party (16 attorney) dispute that the *Oregonian* described as "the longest running land battle on the Oregon coast." She has helped 11 agencies establish a dispute resolution system, as well as a streamlined approach to major highway projects. Carie was instrumental in establishing a cooperative workplace mediation program among city, state, and federal agencies in the Portland, Oregon, area.

**Benno Friedman** is a member of the GE-Housatonic River Citizens Coordinating Council, where he represents the Town of Sheffield, MA. He has a dual-track career in photography, both exhibiting in galleries and working on assignment; illustrating articles, annual reports, advertisements and producing book and record covers. Over 10 years ago, he helped create a local grassroots organization, the Housatonic River Initiative, dedicated to achieving the removal and remediation of PCBs from the Housatonic River and its environs. He continues to actively participate as a board member and activist. Benno graduated from Brandeis University with a major in fine arts.

**Lucy Garliauskas** is the Federal Highway Administration's Program Manager for Environmental Streamlining and NEPA Reinvention in the FHWA's office of NEPA Facilitation. She is responsible for managing the U.S. Department of Transportation's efforts to coordinate the implementation of Section 1309 (Environmental Streamlining) of TEA-21 among seven federal agencies; collaborating with U.S. DOT customers to seek new and innovative NEPA reinvention strategies; and developing related regulations, policies, and guidance. Ms. Garliauskas received her master's degree in public policy and community planning from the University of Chicago. She was awarded a post Graduate Fellowship in intergovernmental relations.

**Nancy Gloman** is a Chief at the Division of Conservation Planning and Policy, National Wildlife Refuge System, U.S. Fish and Wildlife Service. Her areas of expertise include environmental assessment, endangered species policy, wetlands policy, and natural resource planning. Nancy has over 26 years of experience in the field. She received her B.A. in biology from Hanover College in Indiana, and her M.S. in Environmental Science from Indiana University.

**Maria Elena Gonzalez** is the Dispute Resolution Specialist for the U.S. Department of the Interior and Director of the Department's Office of Collaborative Action and Dispute Resolution. She has 16 years experience as an attorney in the federal government. Ms. Gonzalez began working at DOI in 1996 in the Director's office of the Office of the Hearings and Appeals. Her prior experience includes working for the U.S. Department of Labor as an attorney-advisor and supervisory attorney at the Benefits Review Board and the Office of Administrative Appeals, and serving as the first Deputy Secretary of the National Administrative Office established in the Division of International Labor Affairs under the North American Agreement on Labor Cooperation. Ms. Gonzalez received a B.A. in psychology from Newcomb College of Tulane University in New Orleans, Louisiana, and a J.D. from George Washington University in Washington, D.C.

**Barbara Gray** is Professor of Organizational Behavior and Director of the Center for Research in Conflict and Negotiation at The Pennsylvania State University. She earned a B.S. in chemistry (University of Dayton) and a Ph.D. in organizational behavior (Case Western Reserve University). She has been a visiting professor at the Harvard Law School's Program on Negotiation and a TVA Fellow at the Darden School, University of Virginia. Dr. Gray has studied environmental conflict, mediation, and collaborative processes for over 25 years. As a mediator and trainer, she has worked for the U.S. Department of Energy, the U.S. Fish and Wildlife Service, the Pennsylvania Department of Environmental Protection, the Federal Highway Administration, the Pennsylvania House of Representatives, and many other public and private sector organizations. She helped to design the Citizens' Radiation Monitoring Program at Three Mile Island and has designed dispute resolution processes for conflicts over intensive livestock operations in Pennsylvania. She also heads the Inter-University Consortium on the Framing of Intractable Environmental Disputes, a group of universities who are studying the role of framing in perpetuating intractable disputes.

**Nancy Green** recently accepted a position at the U.S. Fish and Wildlife Service, Endangered Species Division. Her interests involve the intersection of public policy, planning, and species conservation. She has worked on a variety of issues at regional and national scales, e.g. old growth forest management; livestock-wildlife conflicts; timber salvage; national fire plan. Accomplishments include coauthoring a recovery plan for the bald eagle, developing the concept paper that launched *Partners in Flight*, formulating the concept for the interagency *Southwest Strategy*, and participating on the interagency team for creating partnerships for proactive conservation through State Conservation Agreements. Following graduate study in wildlife ecology, her career began 23 years ago with the Bureau of Land Management, and she has worked in the field and national offices of the BLM and the USDA Forest Service.

**Thomas Gunther** is Senior Advisor, Strategic Planning and Analysis Advisor to the U.S. Geological Survey and the U.S. Department of Interior in areas of decision support, operations research, and the social and economic dimensions of natural resource and environmental issues. He has held faculty positions at the University of Alabama and George Mason University; developed and conducted multiple conferences and workshops on modeling, GIS, and decision support; and is currently working to enhance

“science impact.” Dr. Gunther has served on various government and academic panels on ecosystems management, environmental policy, economic development, and decision support, and holds degrees in economics, business administration, anthropology, and a doctorate in decision sciences from Kent State University.

**Bill Hartgering**, a full-time mediator and arbitrator since leaving a litigation practice in 1981, established the Chicago ENDISPUTE (now JAMS) office in 1982. His experience includes the resolution of over one thousand commercial and public interest matters arising in over 40 states and countries, training with 3 foreign governments, and appointments by federal and state judges in 10 states. Over the last 21 years, parties have worked with Bill to resolve a diverse range of environmental matters involving multiparty Superfund sites, tank farms, implementation of creative remediation plans, and complex allocation, siting, permitting, construction, and insurance coverage issues. Mr. Hartgering earned his J.D. from Northwestern University.

**J. Michael Harty** joined CDR Associates in 1995 after a decade of civil litigation experience in Washington, D.C., New York City, and Denver. Mr. Harty focuses on western natural resource issues, including watersheds and water rights, mining, ecosystem restoration, and endangered species. He has significant experience with hazardous waste cleanup and toxic exposure issues. He consults with federal and state resource agencies, environmental groups, and businesses on conflict management, and conducts situation assessments, facilitates decision making, and mediates complex, multiparty conflicts. Mr. Harty also serves as a trainer for CDR Associates’ training programs. He currently lives and works in Davis, California.

**Hale Hawbecker** is a senior attorney in the Office of General Counsel, U.S. EPA, Washington D.C. He has successfully defended EPA in numerous cases involving the Federal Advisory Committee Act and provides counsel on a wide range of FACA matters to his agency. Hale participated as part of the core interagency team developing the GSA FACA regulations. In 2001, he was asked to work in the White House Counsel’s Office as an ethics advisor during the transition of the new administration. Mr. Hawbecker is a 1989 graduate of Brigham Young Law School.

**Christopher Helms** is Executive Director of the Morris K. Udall Foundation and was appointed the Udall Foundation’s first Executive Director in May 1995. A graduate of The University of Arizona, Chris began his professional career at Tucson’s NBC television affiliate where he became News Director. He left the news media to become Public Relations Director for the Tucson Chamber of Commerce. He joined Congressman Udall’s district staff for one term and then went to the Arizona-Sonora Desert Museum for 14 years as public affairs/development officer. Before coming to the Udall Foundation, Chris served three and a half years as Public Affairs Director at Biosphere 2.

**Maralise Hood**, CRI’s Program Manager, has been a conflict resolution professional for over 19 years in the U.S. and Latin America. She was the coordinator of the Conflict Resolution Program at the UN University for Peace in Costa Rica and a private consultant in mediation, reconciliation, facilitation, strategic planning, and other conflict resolution skills throughout Central America and other third world countries. With CRI, she has trained a variety of groups in negotiation and mediation, including the Human Rights Ombudsman Offices in Guatemala, the parties involved in the Guatemalan Peace Process, the political opposition and the Sandinista government in Nicaragua, as well as mediating a workplace conflict at the Federal Highways Administration and designing the manual and training mediators for property rights in Nicaragua.

**Robert Horwitz** currently serves as the Chief Financial Officer of the New Mexico Environment Department, the state’s environmental regulatory agency. He is also one of the principal architects of the agency’s strategic planning and collaborative decision-making processes and was instrumental in developing the New Mexico Public Servant Leadership Program, a first-of-its-kind in the country series of courses that teach facilitative leadership to state government managers. He also chairs the governor’s ADR Advisory Council. In addition to his 15 years experience in senior government management, Bob is

an experienced mediator, facilitator, and trainer, having worked with federal, state, and local agencies as well as private organizations as they manage conflict and facilitate change. He holds a bachelor's degree in psychology and a master's degree in public administration.

**Charles ("Chuck") Howton** is a senior analyst with the Office of Government-wide Policy, General Services Administration, Washington, D.C., and serves as the Deputy Director of the Committee Management Secretariat. The secretariat monitors executive agency implementation of the Federal Advisory Committee Act (FACA) of 1972, as amended. Chuck is responsible primarily for regulatory and compliance matters, including tracking legislation and executive orders establishing advisory committees. He provides guidance and assistance to congressional staffs, OMB, and agency committee managers and counsel on advisory committee issues and operations involving more than 60 federal agencies. He also supervises the secretariat's FACA training, outreach, and public information programs. Chuck attended American University in Washington, D.C. (B.A., M.P.A. 1978).

**R. Craig Hupp** is a partner with Bodman, Longley and Dahling LLP, in Detroit, Michigan. Mr. Hupp has degrees in engineering, law, and dispute resolution. He is a Michigan Registered Professional Engineer. Mr. Hupp served as common counsel for the Verona Well Field PRP Group in the negotiations discussed in the panel presentation. He represents clients in a wide variety of environmental matters and environmental, commercial, and local government litigation, and specializes in complex, multiparty litigation and PRP allocation plans. Mr. Hupp is an active member of the environmental law and dispute resolution sections of the State Bar of Michigan and the American Bar Association.

**Cynthia Irmer** is the Attorney Advisor in the U.S. EPA's Alternative Dispute Resolution Law Office and a Conflict Specialist in EPA's Conflict Prevention and Resolution Center (CPRC). She serves as the national expert on legal matters arising under the Administrative Dispute Resolution Act of 1996 and acts as legal counsel on ADR for other EPA offices. She is responsible for evaluating the legal implications of agency-wide policies on binding arbitration and confidentiality in ADR processes where the federal government is involved as party or neutral. For more than 20 years, she has represented the U.S. and multinational corporations as chief trial attorney and lead negotiator in environmental cases. She has also served as adjunct professor in George Washington University's Environmental Manager's Program and is currently adjunct professor at George Mason University's Institute for Conflict Analysis and Resolution (ICAR) where she teaches the graduate level introductory course on conflict theory. She is a Ph.D. candidate at ICAR and has studied international conflict resolution at Oxford University, England.

**Cheryl Johnson** is a 41-year-old single parent with two teenaged kids. Ms. Johnson lives in Altgeld Gardens, a public housing development located on the South Side of Chicago and is the executive director of People Community Recovery (PCR), a community-based environmental social justice organization. Ms. Johnson was promoted to this position last year and has been an employee of PCR for 17 years. Ms. Johnson has developed many programs that address health and economic disparities in this poverty stricken community. The most publicized effort of the organization was to prove to public officials that her community has extensive soil contamination.

**Robert M. Jones** is a Director at the Florida Conflict Resolution Consortium. His areas of expertise/ accomplishments in this field include works with representatives from state and local government to design and implement collaborative approaches to planning and dispute resolution. He has served as a mediator in land-use and environmental disputes, as a facilitator in policy forums, and as a trainer in negotiation and mediation skills. Some of Robert's publications in this field include: coauthoring with Bruce Stifte and Thomas A. Taylor, "Statewide Offices of Dispute Resolution: The Florida Experience," *Espaces et Société*, April 1999; and authoring "Building an Intergovernmental Coordination Model in the Everglades Ecosystem," *NIDR News*, November/December 1997 and January 1998. Robert is a graduate of the University of California, Davis School of Law and of the University of California, Berkeley.

**Kristin Kelling** is Program Manager of the education programs of the Morris K. Udall Foundation. Ms. Kelling, a 1997 Udall Scholar, manages a national undergraduate scholarship program, a Ph.D. disserta-

tion fellowship program, the Parks in Focus program, and recruits for the Native American Congressional Internship Program. She received her B.A. in 1999 from Ohio Wesleyan University where she majored in environmental studies, sociology, and anthropology. Ms. Kelling plans to pursue her master's degree in international public health. She is currently taking graduate courses at The University of Arizona. Ms. Kelling has spent much of the past eight years living and working in Latin America.

**Claudia L. S. Kerbawy** is Superfund Section Chief, Environmental Response Division, Michigan Department of Natural Resources. Ms. Kerbawy has worked in Michigan's environmental programs since 1977. As Superfund Section Chief since 1997, she is responsible for implementation of enforcement and response actions at Michigan's 69 NPL sites. She also is responsible for administration of Michigan's Pollution Emergency Response System and implementation of the Pre-Remedial and Brownfield Assessment Programs. Ms. Kerbawy has been a Michigan representative to the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) for 10 years.

**Dale Keyes** is a Senior Program Manager at the U.S. Institute for Environmental Conflict Resolution. Dale's work focuses on multistakeholder collaborative problem solving and dispute resolution processes involving air and water quality, hazardous and radioactive materials, energy development, urban planning, and transportation. Two of his current projects are conflict management and environmental streamlining for the Federal Highway Administration and best practices for public involvement in restricted-use decommissioning for the Nuclear Regulatory Commission. Dale's previous professional experience includes positions in academia and with research organizations and environmental consulting firms. Dale holds B.S. and M.S. degrees in chemistry and biochemistry, an M.S. in urban planning, and a Ph.D. in geography. He is a Certified Mediator for the Arizona Agriculture Mediation Program and a member of the Environmental and Public Policy Section of the Association for Conflict Resolution.

**Melody Kreimes**, Director, Kreimes Associates, Inc., has worked as an environmental mediator and facilitator for the past eight years, with her private practice currently located in San Luis Obispo, California. Recent casework includes facilitating public involvement on contentious NEPA/CEQA processes, facilitating scientific and multi-agency workgroups, and mediating technical disputes involving multiple parties (including federal, state, and local agencies). Ms. Kreimes also provides various trainings to EDR practitioners, agencies and nongovernment organizations on public participation, collaborative decision making, and dispute resolution. She has B.S. and M.S. degrees in natural resource sciences, with extensive training and graduate research in consensus building and dispute resolution.

**Phil Lemanski** is Chief Financial Officer of the Morris K. Udall Foundation. Prior to joining the Morris K. Udall Foundation as Chief Financial Officer in 1998, Mr. Lemanski was the Vice President for Business Affairs and Enrollment Management at Columbia University's Biosphere 2 Center in Oracle, Arizona. During the center's startup period, he oversaw finance, administration, and systems. While based at Columbia University's main campus in New York City, Mr. Lemanski was the Director of Finance, Administration, and Systems for the Office of the Executive Vice Provost, the office responsible for university-wide research policy. In addition to assisting in the design and implementation of the research enterprise, he established the financial structures/processes for the four research offices.

**Diane LeResche**, Ph.D., specializes in the design, implementation, and evaluation of systems for preventing and resolving interethnic conflicts. She teaches, trains, coaches, and facilitates groups in collaborative planning, problem-solving, and decision-making efforts. She focuses on the commonalities and distinct variations in how conflicts are perceived and handled in diverse ethnic groups. Diane has a background in administration and management in local, state, and national government education and other human service agencies. She has special experience with Native American and Alaskan Native populations. Currently, Diane is an independent contractor providing Native American tribes with assistance in developing their comprehensive tribal justice systems, training adult and youth peacemakers, and conducting conflict resolution skill workshops for tribal members and employees.

**Leslie Liberti** is a Ph.D. candidate in the School of Renewable Natural Resources at The University of Arizona. Her research focuses on the usefulness of decision models and their ability to facilitate sound decision making and consensus in an environmental context. Leslie is currently employed by the town of Marana as the public involvement coordinator for the Tres Rios del Norte and Santa Cruz River Corridor planning processes. In addition, she is developing a decision model to help prioritize Santa Cruz projects for implementation and a second model to rank regional transportation improvement projects for funding.

**William F. Lincoln**, Executive Director, CRI, is an internationally acknowledged teacher, trainer, and practitioner of negotiations and mediated negotiations. His impartial intervention activities include prison uprisings, Native American affairs, environmental issues, court diversion/restitution cases, desegregation of schools, community development projects, labor management issues, public policy disputes, and considerable work in the private sector. Through CRI, Bill has worked in England, Pakistan, Poland, Hungary, Latvia, the former Soviet Union, Russia, Ecuador, Guatemala, El Salvador, Nicaragua, Honduras, Costa Rica, Mexico, Haiti, and Cuba. Bill also is co-director of the St. Petersburg based Russian-American Program on Conflictology.

**Gregg Macey**, a doctoral candidate at MIT, focuses on environmental justice, community health and risk assessment, and organizational change and development. As a senior associate at the Consensus Building Institute (CBI), he has led investigations of multiparty public disputes in a variety of settings, facilitated meetings, and drafted negotiation training materials and simulations. He has published over a dozen consulting reports and academic journal articles. He manages a program with the U.S. EPA's Office of Environmental Justice that offers negotiation skills training workshops for environmental justice organizations and is working to develop evaluation tools for collaborative planning in environmentally at-risk communities. This year, he serves as a Research Fellow at Harvard Law School's Program on Negotiation.

**Harry Manasewich** is a Government Programs Coordinator at the Commonwealth of Massachusetts Office of Dispute Resolution (MODR). His experience spans over 16 years in the private and public sectors as a mediator, facilitator, negotiator, and trainer; it ranges from two-party divorce cases to hazardous waste disputes involving over 20 parties. Previously, he held positions as a city planner, operations director of an international corporation based in Switzerland; director of an environmental consulting firm; and as an Affirmative Action Officer. He served on the Board of Directors of a family mental health corporation for five years and is currently a Director on the Boards of the MA Council on Family Mediation and the New England Chapter of the Association for Conflict Resolution. He holds a B.S. in education from Northeastern University and a certificate in environmental, health, and safety law from the Institute for Applied Management and Law in Washington, D.C.

**Anna Masayeva** works part-time at the U.S. Institute for Environmental Conflict Resolution. She provides research assistance and administrative support on various Institute projects and programs. Ms. Masayeva is completing her senior year as an environmental science major at The University of Arizona. After graduating, Ms. Masayeva plans on working with Native American tribes and other indigenous communities in the natural resources discipline. Ms. Masayeva is a member of the Hopi Tribe in northern Arizona.

**Lindell Marsh** has been a practicing attorney for 35 years, with a focus on land use, natural resources, and the environment, in most cases, matters involving complex issues and multiple interests in various parts of the nation (e.g., Southern California, his home, Florida—the Keys, Colorado, and the offshore). His interest has been on the development of collaborative efforts—processes leading to plans and strategies as a way to resolve differences. He was an originator of the “habitat conservation plan” process under the Endangered Species Act. More recently, in addition to lecturing as adjunct faculty at various law schools and planning schools (UCLA, Georgetown, USC, and University of California at Irvine), he has acted as a facilitator in various circumstances, including the Santa Ana River Valley Watershed in Southern California (addressing urban/agriculture issues—dairies, coastal water quality, smart growth, and the conjunctive use of groundwater basins). He has authored books on mitigation banking, development agreements, and wildlife conservation.

**Analee Mayes** is the President of Consensus Builders, Inc. Over the last two decades of change in Florida, her practice has evolved from land use and environmental planning to public outreach and facilitation. She co-founded the firm of Moore-Bowers Planning and Landscape Architecture in 1989 and served as its president for nine years. Then in 1998, she opened the firm of Consensus Builders. During 1996 and 1997, Ms. Moore facilitated a consensus-building process that resulted in the signing of an historic agreement to end Tampa Bay's "Water Wars." She was also the first planner to bring citizens' committees into the siting process for electric utilities in Florida. She received the 1997 "Excellence in Conflict Resolution" award from the Florida Conflict Resolution Consortium. She is a graduate of the University of North Carolina at Chapel Hill and the University of Florida. She is a member of the Association for Conflict Resolution, the International Association for Public Participation, the Environmental and Land Use Law Section of the Florida Bar (associate), the Executive Committee of the Council for Sustainable Florida, and Leadership Florida Class XVI.

**Scott T. McCreary**, Ph.D., Principal, CONCUR Inc., has been analyzing and resolving environmental disputes for 25 years. Scott received his doctorate from MIT in urban and regional planning with an emphasis in environmental policy and dispute resolution. While in Cambridge, he served as an Associate of the Program on Negotiation at Harvard Law School, and held a research position at the American Academy of Arts and Sciences. He earned his master's degree in landscape architecture and environmental planning at UC Berkeley. At CONCUR, Dr. McCreary serves as a senior mediator, policy analyst, and trainer. He has managed over 25 major multiparty projects of multiple-year duration involving such diverse topics as statewide water policy, flood control, comparative risk, ecosystem restoration, Superfund remediation, regional land use, and military base reuse. He serves on mediator rosters for the U.S. EPA and the U.S. Institute for Environmental Conflict Resolution.

**Bill McDonald** is fifth generation on his family's Sycamore Ranch in southeastern Arizona and a graduate of both Arizona State University and Arizona Center for Rural Leadership. Mr. McDonald is the past president of Cochise and Graham Counties' Cattle Growers' Association and supervisor of Whitewater Draw Natural Resource Conservation District. He is the co-founder, past president, and executive director of the Malpai Borderlands Group, a grassroots organization attempting a whole ecosystem approach to the management of one million acres of land under multiple ownerships on the Mexican border in Arizona and New Mexico. He was named Arizona Game and Fish Commission's Outstanding Wildlife Steward for 1995, is the recipient of a MacArthur Fellowship for work in Conservation (1998), and was chosen "Conservationist of the Year" by *Beef Today* Magazine (2000).

**Kemper McMaster** is a State Supervisor for the U.S. Fish and Wildlife Service's Oregon Fish and Wildlife Office. Kemper has served in his current position for two years and as the Field Supervisor of the service's Montana Field Office for twelve years. Prior experience with the service includes positions in Washington D.C., western Colorado, and northwestern Washington. The major aspect of these positions is field level implementation of the ESA, Fish and Wildlife Coordination Act, and Clean Water Act. His approach to meeting responsibilities is to focus on open communication and to seek common ground. Wherever possible his goal is to develop a shared vision and shared mission to meeting the mandates of environmental legislation and the needs of society.

**Timothy J. Mealey** is a founder and Senior Partner of the Meridian Institute. For the past 20 years he has served as a professional convener, facilitator, and mediator of multiparty dialogues, negotiations, and collaborative problem-solving processes on a variety of local, state, national, and international environmental and sustainable development issues pertaining to sustainable forest management and planning, solid, hazardous, and nuclear waste management and cleanup, food security and agricultural policy, chemicals /pesticides regulation, climate change, and air and water quality. Mr. Mealey holds a Master of Planning from the University of Virginia and a Bachelor of Arts in environmental studies and economics from the University of California Santa Cruz.

**Valentina Durán Medina** is a lawyer from the University of Chile, and a DEA (master) in Environmental Law from the University of Paris/Panthéon-Sorbonne, France. Her thesis subject was "Voluntary agree-

ments as a policy and legal tools in environmental matters.” From 2000, Mrs. Durán has been a researcher at the new Environmental Law Center, University of Chile. Her main activities are researching various environmental law topics, advising, and post-graduate teaching. Since late 2001, she has been working on the creation of the new Environmental Mediation Center, in partnership with Casa de la Paz Foundation. She is also a part-time private consultant on environmental law issues for public and private entities at GESCAM.

**Robert Merideth** is Assistant Director and Editor-in-Chief at the Udall Center for Studies in Public Policy at The University of Arizona. In addition to general administrative responsibilities, he coordinates and supervises activities related to the development, use, and promotion of the Udall Center’s publications, listservs, Web sites, and other educational events and programs. He is also an assistant research social scientist at the center with interests in U.S.-Mexico border environmental issues, climatic change, and other environmental issues in the Southwest, and the role and use of information and information-dissemination mechanisms to facilitate public policy making, environmental conflict resolution, and public participation in decision making. He is editor of *AuroraNet News*, a weekly, electronic newsletter focused on the use of geographic information systems and other spatial decision support tools for environmental and natural resources management. Merideth has a B.A. in geography from the University of Oklahoma and an M.S. in water resources management from the University of Wisconsin-Madison. Merideth is author of *The Environmentalist’s Bookshelf: A Guide to the Best Books* (G.K. Hall, 1993). He coauthored “Trouble in Tortuga!” and “Conflict on the Culebra!”—role-playing simulation games for teaching environmental conflict resolution.

**Mandy Roberts Metzger**, Director, Diablo Trust, an Arizona community-based, collaborative land management team and National Reinventing Government Laboratory. Established in 1993, the Diablo Trust has received national recognition for its goal-directed efforts. A former senior natural resource legislative aide in Washington, D.C., Mandy has 25 years’ experience in public relations, public policy, legislation, and collaboration. Working as a consultant for a western land group, she helps to build coalitions and facilitate complex land-related public/private agreements. Mandy is active in Arizona growth issues and chairs the Arizona Growing Smarter Oversight Council’s legislative subcommittee. Executive board participation includes: Coconino County Comprehensive Plan, Flagstaff Leadership Program, Arizona Centennial Forest, and Arizona Town Hall.

**Gillian Mittelstaedt** is a policy analyst and sustainable development advocate who works to connect communities with innovative environmental protection and land-use strategies. Her current work involves the development of a sustainable development training curriculum for tribal and local governments. In previous and ongoing work, Gillian develops environmental policies and programs for American Indian tribes, including the Tulalip Tribes in Washington State. In 1999, she coauthored a national report on the use of environmental impact assessment by American Indians and Alaska Natives. Since 1994, Gillian has served as a planning commissioner and is current board president for the Pomegranate Center for Community Innovation. Gillian holds a B.A. from the University of Puget Sound and an M.P.A. from Syracuse University.

**Lucy Moore**, mediating since childhood, now practices in Santa Fe, New Mexico, where she focuses on natural resource conflicts, often involving forest management, water rights, endangered species, air quality, land use, mine closures, and facilities siting. Also a facilitator and trainer, she offers a course, “Handling Hostile Meetings,” which is especially popular with federal agencies. A believer in mentoring as a way of both repaying and vitalizing the field, she regularly mentors those who might not otherwise have access to the ADR field. Her education includes eight years on the Navajo Indian Reservation, raising two sons, and lessons learned from many challenging cases.

**Bridget S. Morello**, P.E., is a principal of Progressive Engineering & Construction, Inc., in Tampa, Florida, and is a Florida Registered Professional Engineer. Ms. Morello served as the PRP Group’s Project Manager in the negotiations of the Verona Well Field Superfund case and has been the lead engineer for remedial activities at the site since 1992. Ms. Morello has designed more than 150 remediation systems

and several waste minimization systems, and specializes in remedial strategy development, benefit analyses, and regulatory negotiations.

**Bryan D. Olson** is currently U.S. EPA's Team Leader for the General Electric/Housatonic River Project. Bryan has worked on the GE project for 9 of his 12 years at EPA. His responsibilities on the project have included oversight of all technical aspects of the project, negotiation of the comprehensive site Consent Decree and integration of EPA's work with the needs of public stakeholders. Bryan graduated from the University of New Hampshire with a Bachelor of Science degree in civil engineering.

**Suzanne Orenstein** is an environmental and public policy mediator and conflict resolution trainer with over 20 years of dispute resolution experience. She has mediated cases at the national, state, local, and regional levels, conducted more than 50 training courses, and managed rosters of neutrals. Her mediation cases have included negotiations over land use and unwanted facilities, global warming policies, pesticide impacts, transportation improvements, and hazardous waste cleanup and regulation. She has facilitated meetings for strategic planning, visioning, partnering, and agenda-setting purposes, as well as to foster dialogue on controversial issues like dioxin policy, fishing regulations, endangered species, water quality issues, and forest management planning. She is the former Vice President of RESOLVE, in Washington, D.C., and worked as ADR Coordinator for the Attorney General of Massachusetts. She has also served on the faculty of the Graduate Program in Dispute Resolution at the University of Massachusetts-Boston.

**Barron Orr** is Assistant Professor and Geospatial Extension Specialist at The University of Arizona. His task is to join the missions of the NASA Office of Earth Science and Space Grant with the experience and infrastructure of the Cooperative Extension in order to bridge the gap between geospatial technology and its potential users in the state of Arizona. Dr. Orr received his Ph.D. in arid lands resources sciences in December 2000, with a dissertation entitled, "More Users and More Uses: Choosing between Land and Forest In Malawi's Protected Areas." He earned a master's degree in international affairs from Columbia University and a bachelor of arts in French and political science with a certificate in African studies from Indiana University. He also studied at the Université de Strasbourg in France and served in the U.S. Peace Corps in Morocco.

**Sarah Palmer** is a Program Manager at the U.S. Institute for Environmental Conflict Resolution. Sarah's work at the Institute focuses on multistakeholder conflict assessments and dispute resolution processes involving natural resources and public lands management issues, with particular emphasis on issues involving Native American tribes. Sarah's work also focuses on the analysis of processes and the implementation of agreements. Her current Institute projects include: assessment and program design assistance for the National Environmental Policy Act (NEPA) Pilot Projects Initiative; management and oversight of the Navajo-Hopi Peacekeepers Program, including research of potential institutional designs for long-term implementation of a mediated agreement. Sarah holds a B.S. in biochemistry from the University of Wyoming, an M.S. in biology from Virginia Tech, and an M.P.A. in public policy and natural resources from The University of Arizona.

**Jeffrey D. Paquin** is a partner with Paquin Victor LLP, a specialty law firm based in Atlanta that provides ADR and conflict management services to corporate and government clients. Mr. Paquin previously served as the National Practice Leader for Ernst & Young's Legal Management Services group. Prior to that position, Mr. Paquin was chief litigation counsel for United Parcel Service and a litigation attorney and ADR Section Chair with Powell, Goldstein, Frazer & Murphy in Atlanta. Mr. Paquin is a member of the State Bar of Georgia and the District of Columbia Bar. He has extensive experience in designing and implementing ADR and conflict management programs, and he regularly provides legal advice, consulting, and training services in the areas of conflict prevention and management, early neutral evaluation, mediation, arbitration, and other ADR processes. He also serves as an arbitrator and mediator for the American Arbitration Association, for several court-annexed ADR programs, and privately, is a registered neutral in the State of Georgia. Mr. Paquin received a B.A. in both communications and psychology with high honors from the University of Wisconsin-Milwaukee and a J.D. from the University of Kentucky College of Law.

**Richard A. Pettigrew**, attorney, is a retired partner and headed the Environmental Practice Group of the Miami Office of Morgan, Lewis and Bockius in 1998. He was Chairman of the Governor's Commission for a Sustainable South Florida, 1994–1999. The commission made recommendations for regional sustainability and developed the Conceptual Plan for Everglades Restoration. The commission also made a series of additional recommendations that the U.S. Army Corps of Engineers incorporated into the final plan submitted to Congress. All the commission reports on Everglades restoration were approved unanimously by the 49-member commission. Mr. Pettigrew also served as assistant to President Carter for reorganization, 1977–1979, was a member of the Florida Senate, 1972–1974, was a member of the Florida House of Representatives, 1963–1972, and Speaker of the House of Representatives, 1970–1972. Since 2000, he has been the Chairman of the Board for Audubon of Florida.

**Pablo Pisani** has been the Coordinator on Citizen Participation and ECR at Casa de la Paz Foundation, Santiago, Chile, since 1997. He holds a masters in urban and regional planning, University of Pennsylvania, a masters in human settlements and the environment, Catholic University of Chile, and a B.A. in urban studies, University of Maryland. His main area of expertise is in the design and management of participatory and ECR processes for transportation, urban solid waste, and industrial projects. He has carried out applied research on citizen participation and ECR in Chile and other Latin American countries, tending toward the optimization of participatory spaces and their agreements. Mr. Pisani has been involved in undergraduate, post-graduate, and professional training programs at Catholic University of Chile, University Diego Portales, University Alberto Hurtado, and University of Chile. Today, he is participating in the creation of the National Environmental Mediation Center, together with University of Chile and other institutions.

**Jennifer Pratt Miles** is a mediator with the Meridian Institute. She provides neutral, third-party facilitation for community-based, regional, and national processes addressing public policy issues. Her work has addressed a range of issues, including: agriculture, citizen involvement in decision making, forestry, growth and development, land-use planning, watershed protection and restoration, telecommunications, and indicators for measuring community health. Participants in these projects have included representatives from business, government, and nonprofit organizations. Prior to joining Meridian, Ms. Pratt Miles served as director of the nonprofit initiative, Shaping Our Summit. Ms. Pratt Miles holds a Bachelor of Arts in Government from Bowdoin College.

**Jonathan Raab** is President of Raab Associates, Ltd., in Boston. He is an experienced mediator, facilitator, consultant, and trainer. Dr. Raab is also a national leader in applying consensus-building processes to energy, environmental, and regulatory issues. He authored *Using Consensus Building to Improve Utility Regulation* (ACEEE, 1994) and is on the dispute resolution rosters of the PJM Power Pool, the U.S. EPA, and the U.S. Institute for Environmental Conflict Resolution. Prior to starting Raab Associates, Dr. Raab was Assistant Director of the Electric Power Division at the Massachusetts Department of Public Utilities. He has a Ph.D. from MIT and M.S. and A.B. from Stanford.

**Howard Raiffa** is the Frank P. Ramsey Professor (Emeritus) of Managerial Economics, a joint chair held by the Business School and the Kennedy School of Government at Harvard University. He held professorial positions in the Department of Economics and in the Department of Statistics. He chaired the inter-university doctoral program in decision sciences. He was the co-founder with Roger Fisher of the intra-university Program on Negotiations located at the Harvard Law School. As a scientific advisor to McGeorge Bundy and later to Philip Handler, President of the U.S. National Academy of Sciences, Raiffa helped in the negotiations ('67–'72) leading to the creation of the International Institute for Applied Systems Analysis (IIASA). The Institute, supported by 16 Academies of Sciences from the East (led by the Soviet Union) and the West (led by the U.S.), was designed as a confidence-building measure during the cold war. Raiffa was the first director of the Institute ('72–'75). He has worked in operations research, game theory, statistical decision theory, decision analysis, risk analysis, behavioral decision theory, and in conflict resolution and mediation, and in each of these fields he has received lifetime achievement awards from societies representing those fields. He holds four honorary doctorates and in year 2000 he received the Dickson Prize for Science (conferred annually by the University Professors of Carnegie Mellon University) for his contributions to the decision sciences.

**Robin Roberts** is a mediator with nine years of full-time experience as an environmental professional at RESOLVE and Clean Sites, Inc. He has responsibility for convening, facilitating, and mediating a range of projects, including multiparty policy dialogues and community-level collaborative processes. Currently, Mr. Roberts is working with the U.S. EPA's Office of Children's Health Protection as a facilitator and mediator of plenary and work group meetings. Additionally, Mr. Roberts is the lead facilitator for EPA's Cross-Media Electronic Reporting and Record-Keeping Rule public meetings, which have been held in Dallas, Chicago, and Washington, D.C. Recently, Mr. Roberts cofacilitated the listening sessions around the country on EPA's proposed Total Daily Maximum Load. He has co-led seminars at the Georgetown University Law School and has been a panelist at the Society of Professionals in Dispute Resolution (Public Policy and Environmental Section) meeting.

**Rosemary Romero**, for the past 16 years, has designed and facilitated numerous public involvement projects, assessed the potential for neutral conflict resolution services in diverse cases, and consulted with public and private organizations on the use of alternative dispute resolution techniques. She has trained hundreds of persons in negotiation and mediation and public involvement skills and promoted the use of mediation and facilitation in the environmental field. She has facilitated controversial issues with various federal, state, and local governments. As a native New Mexican, she brings a heightened awareness of cross-cultural issues in the resolution of disputes particularly in the natural resources arena. Ms. Romero is currently the Director of the Leadership Institute at Santa Fe Community College. The Institute is committed to personal and group effectiveness for conscious leadership in an intercultural community through experiential learning and training.

**Andy Rowe** is based in the U.S. and works with GHKI business units in North America, Europe, and South East Asia. He is an internationally recognized evaluator, a former President of the Canadian Evaluation Society, active in the American Evaluation Association and has a Ph.D. from the London School of Economics. Dr. Rowe is currently working with three clients to develop and implement evaluation systems for their dispute resolution programs: the U.S. Institute for Environmental Conflict Resolution, the Oregon Dispute Resolution Commission, and the Florida Conflict Resolution Consortium. He has extensive experience in working with organizations to evaluate programs in most health and human service areas, environmental and resource programs, community and regional development, cultural industries, housing programs, and industry development.

**Colin Rule** is a Senior Associate at Raab Associates and Director of its new Online Public Disputes project. He is the co-chair of the Online Section of ACR. He co-founded *Online Resolution* (an ODR provider) in 1999 and served as its CEO and president. Previously, Colin worked with Mediate.com, the National Institute for Dispute Resolution in Washington, D.C., and the Consensus Building Institute in Cambridge, Massachusetts. Colin is the author of *Online Dispute Resolution for Business*, due for publication by Jossey-Bass in 2002. He holds a master's degree from Harvard University's Kennedy School of Government in conflict resolution and technology.

**Vincente Sánchez** was born in Chile in 1933. He has held academic positions at universities in Chile, Texas, Harvard, and El Colegio de Mexico. Mr. Sánchez has served in a number of executive positions in the United Nations Environment Program (UNEP), director and assistant director for Latin America, and chairman of the negotiations for the biodiversity convention. He is a consultant on environmental affairs for public and private sectors in Latin America, the Middle East, and Africa, and has authored over 40 publications and four books on environmental policies. Mr. Sánchez is currently a visiting professor on trade and environment at the United Nations University and special advisor on the environment to the National Chamber of Commerce of Chile.

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# **ADDENDUM TO PANEL SESSION I**

# AMERICAN CONFLICT RESOLUTION ADOPTING NATIVE HAWAIIAN PARADIGMS

BY BEADIE KANAHELE DAWSON, ESQ.

Aloha Kakou, Aloha Kakahiaka. Greetings and good morning to all of you.

1. My Topic: An ancient NH conflict resolution practice—Ho’oponopono.
2. It appears to have been developed in Hawaii following the migration of Polynesians to Hawaii in 1100 AD. In the 1800s, it became a practice suppressed for many generations by American missionaries who feared the practice and condemned it as pagan.

Ho’oponopono

Ho’o = causative verb: “to make something happen”

Pono = “right”

Ponopono = reduplication: “completely right”

3. Today, Ho’oponopono is alive and well. It is a practice actively understood/used in NH community by NH organizations (and some non-native organizations and corporations) and NH and non-NH families.

Ho’oponopono is not reserved for exclusive use only by NH for only NH issues.

Hawaiian culture is very inclusive, and native Hawaiians proudly share the practices of their culture with all ethnicities.

4. Perhaps most remarkable is the interest and desire of the Hawaii State Courts to utilize some of the elements of Ho’oponopono in the courts to augment their alternate dispute resolution efforts. And this is precisely what many state judges are doing. They are actively assessing cases and offering Ho’oponopono, or certain principles of Ho’oponopono, to parties where this unique problem-solving process appears to be appropriate to the particular circumstances.
5. I will later discuss the reasons why Ho’oponopono is such an attractive alternative for the courts.

First, I need to introduce you to Ho’oponopono.

True Ho’oponopono is a method by which disputes and problems can be resolved primarily by alienated family members but also by community parties. Ho’oponopono is setting matters right. It is correcting and restoring relationships. This is accomplished through prayer, discussion, confession, apology, forgiveness, and perhaps most importantly, release.

Historically, in the Kingdom of ancient Hawaii, Ho’oponopono was a dispute-solving mechanism used by the Chiefs and the maka’ainana (common people). Family disputes were resolved, societal problems were cleared, and in a number of instances, imminent and threatening wars were averted.

Currently, Ho’oponopono is used principally for resolution of family problems and in some cases, illnesses. However, key Ho’oponopono elements can be successfully used for community and environmental disputes as well.

It is interesting to note that certain elements of Ho'oponopono are being taught as "new" concepts in the Stanford University Center on Conflict and Negotiation. Last year, Professor Dana L. Curtis, an attorney and professional mediator and professor of law at Stanford Law School, conducted a workshop in Honolulu on "Apology and Forgiveness in Mediation"—two concepts that are totally foreign to western mediation but are absolutely essential in Ho'oponopono. My workshop was on "Ho'oponopono: A Different Approach." We were fascinated by the similarity of each other's presentations.

This brief discussion of Ho'oponopono will distill some relevant Ho'oponopono elements that may have application here in the environmental field. First, we need to know what Ho'oponopono is and what it is not.

Ho'oponopono is often perceived by Hawaiians and non-Hawaiians to be what it is not. Ho'oponopono is:

- Not mediation; it is
- Not talking out a problem; it is
- Not "settlement" of a problem; it is
- Not prayer; above all, Ho'oponopono is
- Not the panacea to all problem solving.

Ho'oponopono seems miraculous to some parties who observe the outcome, because properly conducted, the results are often spectacular: parties are often rendered better off than they were preceding the dispute.

**However, Ho'oponopono does bear some similarity to mediation:**

Ho'oponopono and mediation are methods of problem solving. Both require voluntary commitment by the parties to the process. Both require the acceptance of the Haku or Mediator.

But there the similarity ends.

Ho'oponopono is distinguishable from mediation. Ho'oponopono requires:

1. A belief in God or a Higher Power.  
Pure Ho'oponopono requires a spiritual commitment and foundation by all parties.
2. Commitment must be by all parties to the Ho'oponopono process. Moreover, it requires commitment to the result before the result is attained or conceived.
3. Confidentiality—total confidentiality. No consent can be given to waive that confidentiality.  
Ho'oponopono is not a media event. Even for Haku training, student practitioners are not permitted to "sit in on" or witness actual Ho'oponopono sessions being conducted.
4. Self-scrutiny  
Ho'oponopono begins and ends with introspection, examination of self. It is not a presentation of facts or "evidence." It is not inspection of others.  
Ho'oponopono is not finger pointing.

5. Absolute Truth  
Ho'oponopono requires, "the truth, the whole truth and nothing but the truth," given freely and sincerely.
6. Aloha/Respect for each other.  
Ho'oponopono begins with some measure of mutual Aloha and Respect. By its ending, these attributes will have grown immeasurably.
7. Respect for the Haku (leader/facilitator/coach/arbitrator).  
Ho'oponopono requires the Haku to conduct thorough and often multiple interviews with all of the parties before Ho'oponopono begins. This "due diligence" by the Haku guides the questions used by the Haku to ferret out the truth from each individual who may not speak to each other but must **ONLY** speak to the Haku unless otherwise given permission by the Haku.
8. Acceptance of the result from the start.  
If Ho'oponopono is properly conducted, the parties will need no urging to feel at peace with the outcome of the Ho'oponopono sessions. The results are binding. There is no appeal.
9. Absence of attorneys.  
Ho'oponopono requires all the parties to speak for themselves. No representatives are permitted.

In Ho'oponopono, the above nine concepts and requirements are never optional. As part of the preparation for Ho'oponopono, the Haku must first train all participants in the art and elements of Ho'oponopono. The Haku must ascertain that each and every one of the parties understands and commits to and abides by the Ho'oponopono "rules."

**The elements that constitute Ho'oponopono also define the process of Ho'oponopono.**

1. Pule wehe (opening prayer)—E.g:

E ko makou, makua i; loko o ka lani;  
Ho'ohulu kakou na aina o lahui.  
E 'olu 'olu, kala mai ia makou.  
Kaumaha ia makou. Amene.

Our father who is in Heaven;  
We have offended the lands of our nation.  
Please, forgive all of us.  
We are sorry. Amen

1. Kukulu Kumuhana (a statement by the Haku of the problem or problems)
2. Self-scrutiny
3. Oia'i'o (absolute truth)
4. Mahiki (Each problem is resolved before going on to the next, much as one layer of an onion is removed before going on to the next.)

5. Ho'omalū (time out) (silence) (rest). Each Ho'omalū begins and ends with prayer.
6. Mihi (confession/apology/forgiveness)  
Mihi is an honest confession to God to self and most importantly, to the person wronged – (hala).  
Immediate restitution must be made or arrangements for restitution, if appropriate, ASAP.
7. Mutual forgiveness and releasing from guilt, grudges, tensions created by hala
8. Kala (release)
9. Pule ho'opau (concluding prayer)

**True Ho'oponopono is not any one or any few of the 10 elements. It is the sum of its parts that are: prayer, discussion with the Haku, confession, repentance, apology, forgiveness, and total release of the problem.**

Dr. E. W. Haertig, the eminent psychiatrist who guided counseling at the Queen Liliuokalani Children's Center for many years, has said: "Ho'oponopono may well be one of the soundest methods to restore and maintain good family relationships that any society has ever devised."

Note: Two practices that are always culturally correct and often surprising: First, there is usually a celebration with food for all in which there is no discussion—then or thereafter—of the dispute. Second, Ho'oponopono does not permit payment to the Haku. Sometimes parties may be inclined to make a donation to a cause or charitable organization.

I'd like to discuss several critical terms in Ho'oponopono

A. Oia'i'o: **Absolute Truth.**

**Oia:** truth **I'o:** substance, meat

Simple statement of deed, event. Oia'i'o is honest personal conclusion.

It is the plain truth, unvarnished truth, facts, or conclusions told without embellishment, without innuendo, and without emotional involvement.

\*Partial truths or slanted truths are the terms of art of law, politics, advertising, public relations, and irresponsible journalism. As attorneys, we are taught to present the "truth" in terms that sound good, or that advance and are in the best interests of our client's case. In Ho'oponopono, this doesn't fly. Truth is truth. Who is the judge of what is truth? It is God's truth. It is the truth as our internal personal Faith dictates.

B. Mihi (Forgiveness):

Obligation to forgive the penitent.

Aunty Mary Kawena Pukui, one of our greatest authorities on Hawaiian culture, said: "When someone came to you and asked for forgiveness, you could not **huli kua** (turn the back) on him. You had to forgive fully and completely. If you did not, then the **aumakua** (ancestor gods) would **huli kua**, turn their backs on you."

C. Kala (Release):

Hawaiian mores specified that both (if two) or all parties (if many) must forgive and go beyond forgiving. All must release (**kala**). Each must release himself and the other of the deed, and the recriminations, remorse, grudges, guilt, and embarrassments the deed caused. All must, "let go of the cord," freeing each other, mutually and permanently.

Further critical aspects of Ho'oponopono are the necessary words, "I'm sorry," "forgive me," "I forgive you." These are healing words, these are the words, which, said with honesty and sincerity, are not only healing to the anger, disappointment, and hurt of the parties, but they provide the fertile foundation upon which aggrieved parties can release the heavy burdens of guilt, anger, and resentment.

Stanford Professors Dana Curtis and Frederic Luskin have described the actions of forgiving in the context of concluding legal actions, whether by ruling of the court or by settlement. Their words are applicable to mediation as well as litigation:

American lawyers are blind to the possibility that their clients may have a need to forgive because...our adversarial legal system compels us to worship the god of blame....[These] conflicts rarely come free of anger, resentment, or guilt. For their problems truly to be solved, clients not only need a legal solution, they also often need an emotional one....Lawyers are rarely able to help their clients recognize or address [their emotional needs]. The adversarial system does not naturally accommodate the concept of forgiveness....Resolution in conflict resolution and litigation does permit the parties to put disputes behind them and move on, but [the parties] often carry forward the pain, resentment, or anger that brought them to a lawyer or mediator in the first place.

*California Lawyer*, December 2000, p. 23

Native Hawaiians discovered the great healing powers of confession apology, forgiveness, and release centuries ago. Now, non-Hawaiians in the Hawaii Courts, Stanford Law School, and in many other places and other situations are discovering those missing ingredients in American judicial and alternate dispute resolution practices.

Two major environmental disputes involving U.S. military actions and the people of Hawaii (NH and non-NH) are moving closer toward utilization of Ho'oponopono principles.

1. The army's training activities in Makua Valley, and
2. The long-term dumping of suspected hazardous material by the U.S. Air Force into the Bellows Airport Landfill.

In conclusion, just as there are many versions of conflict resolution of great value to our courts, to the parties and to the well being of our community, there are also significant concepts and benefits from Ho'oponopono that can be used to nurture more effective conflict resolution in our country.

With time and education, Ho'oponopono and elements of Ho'oponopono are on the threshold to become effectively used tools in dispute resolution for the courts and for U.S. Institute professionals like you.

Mahalo (thank you) and aloha kakou (my best regards to all of you).