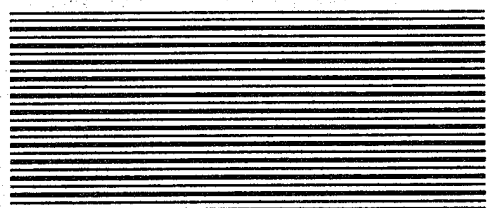




Case Study #13

ALTERNATIVE DISPUTE
RESOLUTION SERIES



USE OF A FACILITATED TASK FORCE TO DEVELOP A GENERAL PERMIT IN COLORADO

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AUGUST 1995

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*The Corps Commitment to
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This case study is one in a series of publications describing techniques for Alternative Dispute Resolution (ADR). This series is part of a Corps program to encourage its managers to develop and utilize new ways of resolving disputes. ADR techniques may be used to prevent disputes, resolve them at earlier stages, or settle them prior to formal litigation. These case studies are a means of providing Corps managers with up-to-date information on the latest ADR processes, and the information here is designed to encourage innovation by Corps managers in the use of ADR techniques.

The ADR Program is carried out under the auspices of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel, and Frank Carr, Chief Trial Attorney. The program is under the guidance of the U.S. Army Corps of Engineers' Institute for Water Resources (IWR), Alexandria VA. C. Mark Dunning, Ph.D., Chief, Program and Analysis Division of IWR supervised the ADR program during the development of this study, assisted by Trudie Wetherall, ADR Program Manager. Jerome Delli Priscoli, Ph.D., Senior Policy Analyst of IWR is currently supervising the program. James L. Creighton, Ph.D., Creighton & Creighton, Inc., serves as Principal Investigator of the contract under which this study has been produced.

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*USE OF A FACILITATED TASK FORCE TO
DEVELOP A GENERAL PERMIT IN COLORADO*

by
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ORIGINAL QUALITY INSPECTED 1

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INTRODUCTION

This case study reveals both the problems and the potential involved in working with stakeholders; in managing conflicts around diverse interests; in promoting collaboration informally as well as formally; in deciding if and when to use a neutral facilitator; and in building relationships with constituencies and adversaries. Although the relationship among parties may not progress as smoothly as desired, there are always useful lessons to glean. The process of gaining agreement affords powerful lessons about what works and what does not in consensus building. Success may well be incremental — a matter of degree — and, in fact, relative to one's perspective. It is defined as much by the education and expectation transformation that occurs as by the substantive, psychological, and procedural outcomes that result. This case embodies substantial insight gleaned from hindsight about the evaluation of relationship-building to attempt to gain consensus on whether or not to issue a General Permit.



SUMMARY

In this case, a facilitated task force was used to try to develop a consensus on the terms of a 404 General Permit covering stream modifications in El Paso and Teller Counties, Colorado. Participants in the task force included Federal, State, county and city agencies; developers; and local citizen representatives, including environmentalists. The author served as facilitator for the task force.

Although the task force met periodically for nearly a year and drafted permit language, the draft language was opposed by the City of Colorado Springs and developers. Nevertheless, the U.S. Army Corps of Engineers (COE) issued a General Permit using the language that had been developed. No lawsuits were filed against the permit. Subsequently, the City of Colorado Springs has proposed to revise its basin-wide planning process, using citizen input. Several members of the original task force are now serving as part of the City's Citizen Advisory Committee.



BACKGROUND

In recent years there has been dramatic regional growth and development throughout the Front Range of Colorado, including the City of Colorado Springs. Colorado Springs, like many communities in the Pikes Peak area, has been the scene of numerous disputes between development interests and groups promoting environmental values.

In the years immediately preceding the start of the Alternative Dispute Resolution (ADR) process described in this article, the city saw numerous environmental conflicts over drainage policies. Large developments -- in particular, "Corporate Center," "Park Vistas," and the "Stetson Hills" project -- involved major stream modifications, leading to numerous engineering studies and litigation. Many of the conflicts centered around the competing approaches of the City's Public Works Department and that of planners from El Paso and Teller Counties. Environmental groups also demanded recognition as stakeholders in these conflicts.

One of the most controversial issues was the City's practice of "hard lining" streams (essentially, paving the stream beds) to control erosion resulting from the impact of developments. Channelization (containing the flow within concrete walls) was also a normal practice. These approaches had major advantages for developers, who could build right up to the edge of the concrete channels rather than leave undeveloped land in a floodplain. However, many environmental groups were upset by the aesthetics of "concrete streams," and argued for more natural regimes to deal with flooding and stream control.

In an effort to address these issues, the City developed a new drainage criteria manual. Citizen interest groups were not included in negotiations about the manual's language, so when it was presented to the City Council for approval, a number of citizens criticized it as being an engineering, rather than a policy, document. It was clear that the real conflicts were not resolved by the publication of the document. The City was also involved in controversies with Federal agencies with responsibilities for regulating streambeds and wetlands, because the City's criteria differed from Federal guidelines. In fact, during the period of this case study, the U.S. Environmental Protection Agency (EPA) was in litigation against the City of Colorado Springs.

The Federal agencies were also in growing conflict with one another. The Corps of Engineers had granted a number of 404 permits for hard lining streams. EPA, concerned with the loss of wetlands and diminished aesthetic values, threatened to shut down the permitting process. EPA argued that the Corps was not fulfilling its responsibility to consider the cumulative impacts of the permits it had granted.

In response to these concerns, the Corps initiated a General Permit Process. When Congress gave the Corps the mission of regulating the nation's wetlands, it gave the Corps the option of issuing permits that cover a single project in a specific wetland, or issuing General Permits. As a general rule, a General Permit defines permit criteria for some particular type of activity within an entire geographic area. Any action that conforms with the criteria in the General Permit can be permitted quickly, without public meetings and with few administrative requirements. However, the Corps must consult with other agencies and hold public meetings as part of the process of issuing the General Permit itself.

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This case study describes the process used by the Corps and its outcome.

It should be noted that while the issues of drainage policies, erosion control, stream modification and flooding were the subject of immediate discussion, these issues also symbolized a much broader debate about environmental quality in the Pikes Peak area. As a result, the General Permit also became the battleground for various interests vying for control of policy regarding future development in the area.



CHRONOLOGY OF THE PROCESS

Early Events

The Corps' Albuquerque District, which has responsibility for parts of Colorado, initiated development of a General Permit in 1986. Anticipating conflict, the Corps planned a series of public meetings to surface concerns, after which it would convene a task force, representing all stakeholders on the issues, who would be asked to develop draft language for the General Permit.

In November 1986, the Corps' local office, an area office in Pueblo, Colorado, held several public meetings which produced a long list of concerns. A task force was then established by the Corps to consider these concerns. The Pueblo office determined the membership of the task force based on its knowledge of the key stakeholders. Members of the task force included the Corps, EPA, environmentalists (including Federal and State wildlife representatives and citizen groups), developers, local and county planners and engineers, and the City of Colorado Springs Public Works Department. The task force's assignment was to negotiate conditions for a regional permit for stream modification, based on consideration of the citizen concerns listed at the public meetings.

The first two task force meetings were difficult and conflicts surfaced quickly. The task force members had little experience working collaboratively; most prior interactions had been confrontational. The meetings degenerated to the point that a third meeting of the task force seemed unlikely.

In analyzing what to do next, it became apparent to the Corps that one of the problems was that the

Corps' regulatory staff, who were facilitating the meetings, were caught in the bind of trying to be neutral facilitators while at the same time representing the Corps' interests and advocating for a General Permit. This was proving to be untenable.

A professional, neutral facilitator was hired at that point to attempt to get the task force on track. Selection was based on a recommendation from the Institute for Water Resources, a field operating agency of the Corps.

During the first meeting among the facilitator and the District Engineer and his staff, the key issue was to clarify the Corps' role in the process. Based on the first two unproductive meetings, the District Engineer had become frustrated and had drawn up a list of the Corps' "demands." At first he insisted that the next meeting of the task force start with that list. After discussion with the facilitator, an agreement was reached that the Corps' role as convener of the process was to participate and listen, not to make demands. The Corps agreed to abandon the list of demands and to accept the consensus of the task force on the permit conditions (as long as they did not violate Federal law).

Interests And Positions Of Key Actors

The description below of the interests and positions of the parties is the facilitator's own understanding as a result of the process. No additional research or interviews were conducted to verify whether the parties accept this interpretation of their interests, or believed themselves to have interests that are not shown.

U.S. Army Corps of Engineers

The Corps was neutral in terms of the permit conditions as long as the conditions

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conformed with Federal law. The Corps, however, took a position in favor of issuing a General Permit. The Corps' interests in having a General Permit in place were to streamline the permit process and to ease administration. The Corps also had several interests related to its relationship with other Federal agencies. The Corps hoped to forestall EPA's threat to halt the permit process over the question of cumulative impact. It also hoped to avoid having either EPA or the U.S. Fish & Wildlife Service insist that the permit be elevated for discussion by higher level managers in those organizations. The Corps also genuinely desired the public's assistance in identifying the issues and getting some sense of what constituted a balanced public interest in this situation.

Environmental Protection Agency (EPA)

Initially EPA was somewhat mistrustful of the Corps' motives in proposing a General Permit, and entered the process reluctant to support the concept of a regional permit. But as the dialogue progressed and trust in the process itself began to take hold, the EPA played an active role in the negotiations, advocating strict environmental controls. Water quality and water supply issues and issues of biological character and change were paramount for EPA. EPA strongly opposed the common, past practice of using refuse, old tires, construction debris, etc., as protection against erosion. As expected, EPA was also greatly concerned about the question of cumulative impact. At the time of the process, EPA was also in litigation against the City of Colorado Springs and was interested in "sending a message" to the City that it needed to be more sensitive to environmental concerns.

Environmentalists (Including Federal and State Wildlife Agencies and Citizen Groups)

The three "citizen representatives" selected by the Corps to be on the task force were strong advocates for environmental quality. The representatives of the Colorado Division of Wildlife and the U.S. Fish & Wildlife Service also joined the "environmental side" at different points in the process.

The environmental representatives strongly distrusted local jurisdiction over stream modifications and drainage. One of their positions was that Federal control or oversight was needed over any local administration. They also distrusted local decision making processes due to the perceived absence of citizen participation in land use decisions. Environmentalists strongly favored more natural stream regimes, in order to preserve habitat and mitigate the effects of development.

Environmentalists supported the General Permit concept only for minor projects, and wanted some mechanism by which major projects could be subjected to additional review.

Beyond specific proposals for permit language, though, the underlying interest of the environmentalists was a desire -- as stated by one of the environmentalists in response to the facilitator's request for written goals -- to "create an attitude change that indicates that aesthetics and environmental preservation are important." This often translated into a desire to "send a message" to governmental entities that more attention should be paid to environmental concerns. This message was



strong enough that it was captured in the Permit Evaluation and Decision Document that stated:

"Many of the task force members were intensely dissatisfied with the way the COE and various local governments were handling drainage issues. About half ... of the task force members felt that sending a message to the entities who governed drainages was a valid purpose of the regional permit and was still needed." (p. 26, CESWA-CO-R, CO-OYT-0423.)

Developers

The developers had one major concern, which was to reconcile the conflict between the local jurisdictions' philosophy, policies and criteria with the goals, policies and regulations of State and Federal environmental agencies who have jurisdiction over the 404 permitting process. The fundamental interest of the business and development community was a timely, predictable and less-expensive permit process. They were getting trapped by the differing demands of the agencies, and the conflicts were causing them intolerable delays. Another important issue for the developers was that the permits allow large as well as small projects. Without this assurance, there was concern that a General Permit would not be useful.

County Planners

County planners (though not monolithic in their thinking) wanted to meet local concerns for more aesthetic stream channels, while providing adequate flood control and erosion control without increased engineering costs. Their issues were quality of life, safety, and

keeping costs down. They were very concerned that the permit would be too stringent, fearing this might slow down development or cost local jurisdictions more money. Their most fundamental interest appeared to lie in finding a way to respond to a growing environmental constituency in suburban areas under heavy pressure from growth and development.

City of Colorado Springs Public Works Department

As the entity that authorized many of the past practices, the City was not willing to acknowledge that these past practices were detrimental. As a result, the City of Colorado Springs Public Works Department quickly positioned itself as the defender of past and present policies.

The Public Works Department's most important interest was retaining its historic control over drainage decisions. To quote from a letter to the Corps from the City Engineer:

"At best, the proposed regional permit is an exercise in paperwork and construction by committee which accomplishes nothing. At worst, it represents an unsuccessful and highly objectionable attempt to intrude on the domain of local land use authority." (Sept. 9, 1987.)

The Facilitated Process

The facilitator recommended the use of a "one-text process," an iterative procedure that allows a group to build consensus around a written document, beginning with a "straw man" draft prepared by the facilitator. This approach was useful in surfacing issues and underlying

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interests, and was comfortable for the technical people on the task force, since it allowed them to deal with the precise wording and detail they would need for permitting. This approach required considerable staff time, as the task of revising the text each time was quite arduous. However, the Corps was willing to provide the staff support to make the process work.

Meetings of the task force were held once a month. The time between meetings allowed the Corps to revise the text based on the discussion in each meeting and distribute it to task force members before the next meeting. More frequent meetings would probably have lost some task force members, who were donating their time. No time constraints were placed on the process until about the eighth meeting, when the process appeared to be nearing completion. While "public recording" (newsprint notes hung around the room for group reference) was used as a facilitation tool during the meetings, minutes based on the tear sheets were augmented by notes taken by a group secretary.

Based on discussions with the Corps, the facilitator concluded that one of the problems at the two meetings before the facilitator was involved was that many of the task force members had little experience working collaboratively in groups. So, at her first meeting with the task force, the facilitator conducted a brief training course on the difference between positional and interest-based bargaining. Participants were then asked to help the facilitator "catch up" with the issues by brainstorming a list of objectives for the permit.

Each task force member was also asked to prepare a list of individual goals for the process and to submit it before the next meeting along with their first mark-up of the straw man permit language. At the next meeting, these goals were

shared and discussed. Most task force members defined their goals in terms of what they hoped to accomplish through the permit, rather than goals for the process itself. But when the facilitator also shared her goals for the process, a considerable discussion of process issues ensued.

The process issue of greatest concern was the meaning of the word "consensus." Most feared that it meant "unanimity," and they worried whether that was achievable. After considerable discussion, the group agreed that the term "consensus" did not mean "unanimity"; rather, it meant that there was enough agreement that no major interest would oppose the draft language.

Through the discussion of goals for the process in this and successive meetings, the task force was able to agree to the following list of shared goals for the permit:

- To streamline the permitting process for non-controversial projects;
- To protect or enhance existing environmental values while providing for health, safety, and general welfare;
- To encourage cross-disciplinary, basin-wide planning and management of basins;
- To encourage permit consideration at an early stage of project planning;
- To encourage local participation and administration of the regional permit; and
- To have ongoing review and enforcement of authorized activities and the permitting process.



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Throughout these early meetings, and despite the successes described above, the discussion often became heated. The facilitator frequently intervened by asking participants to restate what they had just heard before making their own comments. This helped improve listening, as people realized they might be asked to restate the position of someone with whom they disagreed before they could make their own argument.

As the monthly meetings continued, the facilitator assigned specific tasks and "homework." Some task force members were asked to work together on items which needed new wording, and to bring these to the next meeting. The work was reported both orally to the full task force and in written form as "working papers" for everyone to have in hand during the task force meetings.

When the majority of the task force proceeded to draft a permit containing strict environmental protections, in direct conflict with the City's drainage ordinances, the City drafted an alternate permit and presented it to the Corps on its own, stating: "The City Engineer's version addresses the construction techniques in a manner which can be accepted in today's drainageway management procedures, while at the same time addressing the protection of [the environment]."

Some on the task force suggested to the City that an ultimate solution to the dispute was not a regional permit, but an "updating" of the City of Colorado Springs' basin plans. To be credible, such a revision would include public participation as well as environmental interests in forming a community consensus. The City appeared to adopt this idea, although other parties interpreted this support as an effort to slow down the consensus that was building on the language of the permit. The City also suggested some

"compromises" that, in the end, were not accepted by the remainder of the task force.

Late in the process, the representative from the City of Colorado Springs Public Works Department tried to seat the City Attorney at the table. The facilitator stated that it would violate the non-adversarial, consensus-building process that the task force was following to introduce attorneys as advocates for stakeholders, particularly late in the process. While the City's representative was not happy with this judgment, the City Attorney agreed to be seated away from the table and to take questions from the task force members as needed.

After nearly a year of meetings, the task force still remained divided. The City of Colorado Springs remained opposed to the draft permit, which was in conflict with their local basin plans. Developers also opposed it because it did not resolve the differences between local and Federal regulations, leaving the developers caught between the agencies and uncertain about the criteria that would apply on their projects.

A public hearing on the permit was requested by the City, at which the City pressed its argument that the General Permit violated local control. Following the hearing, the Corps nevertheless proceeded to issue the General Permit using the final language written by the task force. No law suits were filed. Neither the EPA nor the U.S. Fish & Wildlife Service requested that the permit be elevated to higher levels to resolve issues between the agencies.

Since the permit has been in place, the City of Colorado Springs has promised to revise its basin-wide planning process, using citizen input and looking at environmental criteria in a new way. The City has set up a Citizen Advisory Committee, and some members of this committee

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are people who were on the ADR task force. As stated in a letter (February 19, 1988) from Gary R. Haynes, City of Colorado Springs Engineer, to Lt. Col. Kent R. Gonser, of the Corps:

"The City intends to restudy the most urgent master drainage basins in 1988 and incorporate into the basin study environmental issues in an attempt to mitigate the environmental concerns of the 404 requirements....I wish to work with your staff in developing these master drainage basin restudies so that we can eliminate as many of these conflicts as possible. I also am intending to work with the local citizen groups through the planning study revisions so that I can assemble a good measure of input from these groups...."



EVALUATING THE SUCCESS OF THE PROCESS

The immediate outcome of the facilitated task force process was succinctly stated by the Corps in the Permit Evaluation and Decision Document:

"... (e) The comments received at the 14 December public hearing represent two views: that the proposed regional permit is valuable because of its environmental considerations and should be issued, and that the proposed regional permit is unworkable and conflicts with local Municipal Drainage Plans and should not be issued....The...process may have aided the general public in their formulation process of consensus, but it would not determine the final outcome...." (p. 48.)

One of the process problems throughout these discussions was that the participants from the Colorado Springs Public Works Department often felt that the other task force members were teaming up against them. In fact, participants representing environmental interests, including some local and state officials, did quickly coalesce as a sub-group within the committee, often forcing the Public Works representatives into a defensive posture. Also, EPA and the Corps, often in disagreement over the issuance of 404 General Permits, found themselves in more agreement over environmental criteria than they would have supposed, lending support to the environmental side of the table.

On the other hand, the League of Women Voters' representative assumed a cautious, mediating role within the group, assisting it in moderating the dialogue as the process progressed. The "business representatives," including the Home Builders Association, surprised their historic

environmental foes with both their willingness to listen and their artful presentation of the issues.

While the process did not result in a consensus, opinions about whether it was a success depend on which group was asked.

The success of a process such as this can be measured by some mix of procedural, substantive, or psychological satisfaction. The City of Colorado Public Works Department was not happy with the process using any of these criteria. They did not feel either procedural or substantive -- and certainly not psychological -- satisfaction. The City representatives disagreed with the language of the permit. They felt under attack throughout much of the process. They felt their attorney was unfairly denied a seat at the table. They thought the group had accepted a "compromise" which would allow the permit to go forward exempting the City of Colorado Springs. (No one else on the task force remembers agreeing to the "compromise" and there is no record of such in the minutes.) As a representative of the City stated in a letter:

"From my perspective, there were no compromises...only minor movement away from strict environmental issues. No consideration was given to the requirements of the local ordinances." (Feb. 11, 1988.)

The developers certainly felt no substantive satisfaction or ownership in a permit that substituted stricter, more expensive environmental criteria for a less restrictive nationwide permit, and which neither applied to larger projects nor streamlined the process. They still felt trapped between different Federal and local requirements.

The citizen representatives were happier with the process, even though it did not result in a

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consensus. As one of the task force participants stated at the public hearing:

"We spent a lot of time (on the permit issues), but they are not the true issue. I think the true issue is the purpose statement...It took us months to come up with that purpose statement. I believe the citizens...involved in the task force thought that the purpose statement was a victory in itself because we felt that environmental concerns were not being addressed in the local community, and the purpose statement gave that to us...." (Proceedings, p. 19.)

In a letter to EPA, another task force participant stated:

"COE and its task force developed a...permit which...was not acceptable to the City....However, the task force did strike a bargain concerning all future basin plans including the three that will be re-studied beginning this year. Wildlife habitat, recreational potential and aesthetic considerations will become integral to the basin planning process. The goal is to secure a 404 permit for each of the 22 basins in the urban area and draft a General Permit covering small projects for the balance of the COE study area. In my view, the above agreement is a landmark event of lasting significance...." (Letter from John Covert to Gene Reetz, January 8, 1988.)



THE FACILITATOR'S EVALUATION OF THE PROCESS

From the perspective of the facilitator, one of the less desirable characteristics of the process was that the facilitator did not have the opportunity to design the process from the beginning. By the time the facilitator was brought in, the positions had already hardened and the process was already in motion.

As Carpenter and Kennedy have pointed out in their book *Managing Public Disputes*:

"In the complexity and uncertainty of public disputes, the more attention given at the beginning to preparing a conflict management program, the better the chances of a successful outcome. The preparation stage involves all the activities that occur prior to bringing parties together for face-to-face discussions."¹

Even though neutral third party assistance was late, the process that emerged resulted in a powerful and positive outcome for the future of the City and the way it plans for protection of its resources. The issues were ripe for discussion in a new forum; a broad range of detailed technical issues involving engineering criteria was available for tradeoffs; a manageable number of actors were involved in the process; and a consensus emerged that the status quo would have to change in light of new environmental realities. But the exact manner in which that challenge will be met was left for another time and process.

Although no agreement on substance was reached, there were a number of important process accomplishments.

- One of the most important outcomes, as expected in all similar processes, was the opportunity for mutual education.
- Power at the table was perhaps more equal than it had ever been in a public dialogue in Colorado Springs. Citizen representatives felt empowered by the process in a new way.
- New alliances and communication networks were formed at several levels. Participants learned much about the way human relationships mature in an atmosphere of candid discourse and mutual respect. Including citizen representatives from the General Permit task force on the City's advisory committee demonstrated the trust that had built up between the City representatives and these individuals.
- Finally, the City's commitment to revise its basin plans, addressing environmental issues and including public involvement, is a sign that, while the City could not agree to the language of the permit, it was educated to a degree on the need for greater environmental sensitivity and inclusion of the public in decision making. The City's new advisory committee is concrete (excuse the pun) evidence that the City has learned much.

¹ Susan Carpenter and W.J.D. Kennedy, *Managing Public Disputes*, San Francisco: Jossey-Bass, 1988, p. 68.

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| 13. ABSTRACT (Maximum 200 words) <p>In this case, a facilitated task force was used to try to develop a consensus on the terms of a 404 General Permit covering stream modifications in EL Paso and Teller Counties, Colorado. Participants in the task force included Federal, State, county and city agencies; developers; and local citizen representatives, including environmentalists. The author served as facilitator for the task force.</p> <p>Although the task force met periodically for nearly a year and drafted permit language, the draft language was opposed by the City of Colorado Springs and developers. Nevertheless, the U.S. Army Corps of Engineers (COE) issued a General Permit using the language that had been developed. No lawsuits were filed against the permit. Subsequently, the City of Colorado Springs has proposed to revise its basin-wide planning process, using citizen input. Several members of the original task force are now serving as part of the City's Citizen Advisory Committee.</p> | | | | |
| 14. SUBJECT TERMS General Permit, facilitation, environmental conflict, erosion control, city planning, interagency cooperation | | | 15. NUMBER OF PAGES 21 | |
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