U.S. ARMY CORPS
OF ENGINEERS

Working Paper #3

ALTERNATIVE DISPUTE
RESOLUTION SERIES

GETTING TO THE TABLE

October 1990

IWR Working Paper-90-ADR-WP-3

The Corps Commitment to Alternative Dispute Resolution (ADR):

This working paper is one in a series of working papers describing applications of Alternative Dispute Resolution (ADR). The working paper 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. ADR is a new field, and additional techniques are being developed all the time. These working papers are a means of providing Corps managers with examples of how other managers have employed ADR techniques. The information in this working paper is designed to stimulate innovation by Corps managers in the use of ADR techniques.

These working papers are produced under the proponency of the U.S. Army Corps of Engineers, Office of Chief Counsel, Lester Edelman, Chief Counsel, and the guidance of the U.S. Army Corps of Engineers Institute for Water Resources, Fort Belvoir, VA, Dr. Jerome Delli Priscoli, Program Manager.

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GETTING TO THE TABLE

A Guide for Senior Managers

Alternative Dispute Resoulutions

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October 1990 IWR Working Paper 90-ADR-WP-3

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I. ON THE WAY TO THE FORUM

Ancient Romans created fenced areas near their marketplaces as a place for lively political discussions and public judicial activities. These areas became known as forums. People today continue to take their disputes to special arenas for solutions. The number and variety of forums in today's society for the host of judicial, legislative, and administrative decisions is continually increasing.

Rather than riding our chariot to the forum, we now use a broad range of sophisticated tools to select, develop, and use a forum. In conflicts, the choice of forum is often the most significant strategic decision. Each party is seeking to ensure that the forum is suitable for the pursuit of their interests. Forums, however, are easily slanted toward the interests of their creator. In public disputes, public agencies, like the U.S. Army Corps of Engineers, are often primarily responsible for legitimating forums. In private disputes, each party usually has the right to veto forums outside of the judicial arena.

* * *

Let's examine a brief case study. In Texas, highway officials sought to expand the number of lanes of an Interstate highway that forms the southern border of downtown Fort Worth. After the requisite public hearings, a citizens' group filed suit because it opposed the option selected -- expanding an elevated freeway. Ten years of litigation led to a ruling that the highway department had not met citizen participation obligations because one of the first public hearings was advertised as focusing on an intersecting Interstate highway.

In 10 years the traffic problem had dramatically worsened, downtown businesses felt choked by the congestion, and relationships between the principal players were badly fractured. The Court had finally made a definitive ruling, but was the problem solved? Clearly not.

After six months of forum-creating work by a mediator, representative parties jointly convened a 14-member working group representing all interests and took almost three years to consensually select an alternative routing[1]. In this instance, the facilitated **joint decision-making process**[2] was superior to both the forums created by individual citizen action which, escalated the conflict and to the court which ruled on procedural issues tangential to the question of how to respond to increased traffic.

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1 See "Multi-Year Mediation Breaks Fort Worth Interstate Deadlock, Participants Say", ADR Report, vol. 2, Oct. 27, 1988, pp. 381-383.

2 While we are writing about what is commonly called Alternative Dispute Resolution or ADR, we use the phrase "joint decision-making processes" to distinguish between adjudicative processes where a third party decides and those which we are writing about -- negotiated processes.

Joint decision making, which includes negotiated, mediated, and facilitated processes, comes without the rules and established practice that guide many other forums. This flexibility creates both opportunity and obstacle. The opportunity arises from the ability to create a joint decision-making forum that directly responds to the nature of the issue, the needs of the parties, and the external constraints. The obstacle emerges as you explore the other parties' desires and test the willingness of people to work together. They may want a much different forum than you, they may not trust you to create a fair forum, they may be trying to create their own forum, or they may be reluctant to try something new.

The process of overcoming the obstacles and building an acceptable forum has been dubbed "getting to the table"[3]. The best-seller on negotiation, Getting to Yes[4], starts with the parties at the table. In multi-party, high-stakes disputes, the most difficult part of the process may be gaining agreement on what is the **design** "of the table," **who** should be "at the table," and **which issues** should be "on the table". Indeed, parties in complex disputes often must deal with competing forums and forum shopping. Yet, getting to the table, often called "negotiating about negotiating", is possible. It is the phase during which the parties design a forum. Indeed, most executives and managers do it all the time, intuitively moving through the steps.

The purpose of this guide is to offer a four-step process for designing a forum to help you get to the table. Mini-case studies which represent composites of actual conflicts involving the Corps are presented throughout. A variety of approaches are suggested for overcoming the obstacles you are likely to encounter.

While this guide focuses on both public disputes and contractual disputes that occur in construction projects, the emphasis is on public disputes. If you face a contract dispute, we also encourage you to read the Corps publication, Using ADR in the U.S. Army Corps of Engineers: A Framework for Managerial Decision Making[5].

But, before we go step-by-step through the process, it will be helpful to have in mind the various kinds of forums you might use.

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3 Laue, James H., et al, "Getting to the Table: Three Paths", Mediation Quarterly, 20, Summer 1988.

4 Fisher, Roger and William Ury, Getting to Yes: How to Negotiate Agreements Without Giving In, New York: Penguin, 1981.

5 Susskind, Lawrence, Susan L. Podziba, and Eileen Babbitt, Using ADR in the U.S. Army Corps of Engineers: A Framework for Managerial Decision-Making, IWR Case Study 89-ADR-R-1, Fort Belvoir: Institute for Water Resources, USCOE, 1989.

II. JOINT DECISION-MAKING FORUMS: HOW THEY DIFFER

Imagine a City Hall meeting room with 30 people, seated in a semi-circle, being led by a professional facilitator who covers the walls with poster paper. The press is rapidly making notes while an environmentalist offers alternatives to channelizing a stream. Corps officials are both observing and participating as members of the group.

Across town in a small hotel conference room, a Corps senior executive is meeting with his counterpart from a large construction concern over the company's claims for further payment due to allegedly inadequate soil tests. The neutral advisor for this mini-trial is about to introduce key staff who will be making presentations to support their organization's perspective. The press has not been informed of the meeting and all have agreed that information presented here cannot be used in court.

Public or private; large or small; facilitated, refereed, or not -- these are but a few of the many characteristics that shape the nature of a forum. The significant contrasts between the above meetings is obvious, but what about the nuances? Which 30 people? Did the Corps select them, or were they self-invited? Is the facilitator from the Corps or not? How will you decide?

Will the executive who has managed the construction project for the Corps represent the Corps? Or should it be his superior? Or someone completely disassociated from the project? Making wise judgments about joint decision-making processes requires a set of criteria that differs from the typically adversarial legal gamesmanship or applying professional technical judgment.

A partial list of the characteristics of a forum is shown in Table I. These are the variables you must keep in mind as you move through the steps of designing a forum. Ultimately, the Corps must be able to live with each of the decisions made about a forum -- and, of course, with the outcome reached.

TABLE I: CHARACTERISTICS OF A FORUM

What issues are on the table?
Who are the parties?
How are they represented?
The setting -- public or private?
What are the decision-making rules?
What are groundrules?
Is there a third party?

Characteristics of Joint-Decision-Making Forums

What are the issues on the table? Occasionally the issues are well-defined and straightforward, but in most cases the situation is murky and full of uncharted waters. Should the implementation ability of a potential permittee be on the table with the permit? Should local land use issues be addressed with the potential channelization of a stream?

If the issues are narrowly defined and primarily serve the Corps' interests, there may not be enough "solution space" for the parties to find an acceptable outcome. If the issues are too broad, too many stakeholders may need to be at the table and the resulting negotiation can become unworkable. Finding the middle way usually means addressing the other parties' most important issues directly related to the primary issue (for example the permit, the financial claim, the viability of a construction project, etc.) and ensuring that the appropriate stakeholders are at the table for the issues discussed.

Having the appropriate issues on the table increases the likelihood that a solution can be reached which satisfies all the parties.

Who are the parties? When the dispute is between two organizations, as in the typical construction dispute, identifying the parties is straightforward. But what about a hazardous waste site? To identify the parties, you need to conduct a stakeholder assessment, that is, an assessment of all those who have a stake in the issue[6]. Stakeholders include:

- those with formal responsibility for the decision,
- those affected or potentially affected by the outcome, and
- those with the power to block or obstruct an agreement.

For example, consider the clean-up of a typical hazardous waste site and the parties. Those with formal responsibility might include the Corps, Department of Defense, Environmental Protection Agency, the State Department of Natural Resources, and a Federal District Court. Parties affected include the public directly affected by the site, taxpayers might have to incur a portion of the clean-up costs, a probable potpourri of potentially responsible parties -- the alleged polluters -- and a range of additional federal, state, and local agencies. Finally, those able to block or obstruct a potential outcome might include national environmental or chemical industry groups watchdogging the process, various senior executives not directly involved in the process, or elected officials who can influence some of the parties.

How are the parties represented? If these are the stakeholders, is there a table large enough to seat them all? Of course not. The difficult question is how to best represent these stakeholders to ensure that the collection of representatives covers the diversity of

6 See Appendix A, "A Guide to Situation Assessment" for additional questions to guide a stakeholder assessment.

interests, functional differences (for example regulators, alleged polluters, affected publics, etc.), and knowledge sources necessary for a wise decision to be reached and for all parties to feel that their interests helped shape the outcome.

Several different levels of authority need to be considered as well. One needs to contemplate only how to best represent a local government (consider elected officials, the city manager, or a department head) to realize how rarely one person can bind an entire city. Levels of authority include:

- those with full ability to bind their organization,
- those with a limited ability to bind (e.g., those who can make binding decisions on procedural issues, but must consult on major substantive decisions),
- those who are trusted liaisons with the decision-makers, and
- those who represent the interests and concerns of an affected unorganized party.

At many tables, representatives with many different levels of authority will be involved. For example, the private corporation may be represented by a senior vice president who can bind the corporation. The local government may be represented by the city manager who needs an affirmative vote of city council to consummate an agreement. The local environmental group may need to call a meeting of its members before it allows a representative to bind the organization to a specific course of action. The differing levels of authority present often determine how decision-making rules are established, and how quickly progress can be made.

It also is important to consider how representatives are chosen. They can be:

- selected by you, the Corps representative,
- selected by a small representative group of primary stakeholders,
- selected or elected by each organized party,
- developed jointly by the parties through use of a single negotiating text, or
- some combination of the above.

If all of the parties are comfortable with the process of choosing representatives **and** how their interests are represented **and** how the group is balanced, they will most likely support the process.

Representatives may be slimmed by:

- grouping like stakeholders together with a single representative,
- differentiating primary stakeholders (i.e., those at the table) from secondary stakeholders (i.e., those who need only be kept informed),
- having a small primary working group that links to committees that have broader representation. In general, groups smaller than 15 persons are desirable in multi-party disputes, and even smaller groups are desirable in two-party disputes.

The setting -- public or private? In many situations, local, state, or federal sunshine laws may apply, and the question of whether the setting is public or private will not be a matter of choice. When the law does not apply, discussions can become heated on this point.

In general, when meetings are closed to the public and to reporters, meeting participants may be more open, more willing to explore new ideas, and less pressured to speak the way they do to their constituents. When positions are firm and the battle has been heated, private meetings often are thought to be necessary to break through the impasse. Private meetings, however, can engender distrust in the public's eye, with negotiation sessions viewed as the modern-day equivalent of a smoke-filled back room. Private sessions may also drive a wedge between party representatives and their constituents.

While public meetings can create more posturing and be less efficient, they can also serve to build a broader consensus. Observers and the media can help reach a much broader public, and conducting meetings in public can demonstrate the integrity of the process. But public meetings can be more difficult to manage, especially if large crowds or many reporters are present.

Knowing the law, developing a sense of whether the parties at the table will need privacy, and understanding how the public and constituent groups are likely to respond should frame your discussion with other parties.

What are the decision-making rules? Once a finely-crafted group of representatives has been developed, do you allow alternates? This is one of many questions that emerge around decision making.

Decision-making rules cover most of the "what if" questions and some of the "what is" questions that emerge during a group's life. What is consensus? What if we do not reach consensus? Do we need consensus within the group only or also within each of the parties? Is the decision binding or advisory? What is the role of the third party?

Answers to these questions and others are usually included in a document that is discussed as the first item of business of a new group. The document may be labeled as protocols, groundrules, policies and procedures, or memorandum of understanding. This document

usually includes a statement of purpose or mission statement, a discussion of necessary logistical issues (such as who keeps the minutes), and behavioral groundrules. For purposes of this document, we will continue to refer to the decision-making rules as **protocols**. Sample protocols are enclosed in Appendix C.

What are groundrules? Groundrules are the set of guidelines that define constructive interaction for the group's work. They also may sanction destructive interaction. They focus on behaviors, not attitudes. They are commonly a part of the protocols and may be posted on the wall at the beginning of each meeting. If the group is being assisted by a mediator or facilitator, that person may propose draft groundrules that the group then amends, or adds to, and then adopts.

Is there a third party? Mediators, facilitators, referees, and moderators are some of the roles played by a third party. The term "third party" comes from social science literature and refers to a group or person who helps manage the **process** in a conflict situation, but is impartial about and does not have a specific stake in the **substance** of the outcome. The use of a third party is often a difficult issue for some parties to work through because of the lack of shared concept of the third-party role.

If the situation is highly contentious, involves many complex issues, has a large number of parties, or has high stakes, a third party may be of considerable assistance to the parties. Commonly, the parties to a dispute will negotiate with the third party over the third party's role. The third party can draft protocols, offer groundrules, help the parties clarify representation, run meetings, help the parties communicate clearly between meetings, and help the parties develop a final agreement.

* * *

These are the most significant characteristics that define a forum. Each one should be explicitly discussed among the parties in the process of jointly designing the forum. You will need to answer the above questions for every joint decision-making process. Let's move to the four-step method to examine how consensus on these issues might be developed.

III. GETTING TO THE TABLE: A FOUR-STEP METHOD

The Four-Step Method is a straightforward approach an executive can use to initiate a joint decision-making process with the other stakeholders. It is heavily dependent on analysis and your ability to select a strategic course of action.

The Four Step Method is:

- Assessing the Situation

- Developing Agency Strategy
- Designing and Building the Forum
- Getting Parties to the Table

These steps -- or stages -- often occur sequentially. However, they are not always either successive or discrete stages; they can occur out of sequence or simultaneously. And assessment, the first step, continues throughout the entire process.

In **Assessing the Situation**, the goal is to develop a strategic perspective on the situation drawing on the basic facts, each major party's perspective, an assessment of power issues, and an understanding of the operating environment. In **Developing the Agency Strategy**, the Corps executive reviews the assessment in light of agency policy and needs, and makes specific choices about how to proceed in attempting to resolve the problem.

Designing and Building the Forum is the step where you and other parties make key decisions about the characteristics of the table -- who sits at the table, what issues are on the table, how decisions get made, and others. Finally, **Getting Parties to the Table**, while frequently taken for granted, includes important decisions regarding timing, the order of invitation, relationships with other agency activities, and the like. Each step creates choices and decisions for you and the other parties about the worth of joint processes in comparison to the alternatives.

Joint decision-making processes -- negotiation, mediation, collaborative problem solving, mini-trials, and others -- are not a panacea for all situations. By following the stages, you not only will be preparing to initiate joint decision-making processes, you will be better able to determine the appropriateness of these processes for your situation. Litigation, administrative and legislative processes, public relations campaigns, and other forums may be better matched to the situation you face. The Four-Step Method helps you make the right choice.

STEP 1. ASSESSING THE SITUATION

Developing a working understanding of the situation, as you **and** others see it, is an essential step for determining how to proceed. A preliminary assessment covers the topics shown in Table II.

TABLE II: QUESTIONS FOR THE PRELIMINARY ASSESSMENT

Who are the parties?

What are the stakes for you?

Do some represent essential agency objectives?

What is the power of the agency relative to that of other parties?

How will the power balance affect this situation?

What are the current relationships among the parties?

What are your goals for future relationships?

What is the level of interdependence and compatibility among the parties?

What is the context and background? How does that influence your choices?

A successful assessment allows you to develop a workable strategy to determine how the situation can be resolved, to clarify your interests and goals for a satisfactory outcome, and to thoughtfully design a forum that responds to your needs and those of the other parties. Conducting the assessment of an actual or potential conflict helps you think beyond the natural first response -- how to fix it quickly -- and move to longer-range issues of agency objectives, relationships, power, and procedure.

A. Data to be Gathered in the Assessment

In this stage, you are primarily interested in information essential to the development of a strategy for the agency. A Guide to Situation Assessment, included in Appendix A, contains a model comprehensive assessment guide.

Your ability to gather the information shown in Table II may depend on what stage the decision-making process has reached. If you are in the midst of a full-blown conflict, this information may be readily available through newspapers, internal documents, correspondence, and other written material. You will be better able to understand and predict the responses of other parties from the existing pattern of interaction.

It may be wise to start discussions with potential parties much earlier in the assessment step if other sources of information are not available. Agency preventive action in response to likely or imminent conflicts can occur as agencies better understand some of the destructive consequences of ongoing conflict.

Key Characteristics of the Situation. Understanding the broad outlines of the situation will provide you with a context for synthesizing specific information. The key characteristics

include the parties and their basic interests, the issues, and the potential forums for decision making.

Parties or stakeholders, as we discussed earlier, are persons or groups who:

- have decision-making authority,
- may be affected by the decision, or
- can block or delay a decision.

In assessing the parties, it is important to understand how they cluster (for example, anti-development, pro-environment, pro-development, etc.), their organizational size and structure (for example, hierarchical, democratically elected leadership, etc.), their general interests, and their central issues.

Interests are those underlying concerns or principles that must be satisfied for the development of an equitable and durable agreement. **Interests are why** a party is involved, and **issues are what** they are concerned about. Interests and issues are the tangible items that need to be addressed for resolution to be reached. They need to be distinguished from positions. **Positions are specific answers, demands, or proposals** that a party believes will satisfy its interests in this issue.

Knowing the potential **forums** where parties might seek to resolve the dispute can help a manager compare joint decision making to other approaches. While we focus on joint decision-making forums here, courts, private hearings, administrative procedures, and public hearings are also forums. Each party may engage in **forum-shopping**, trying to find the setting it believes will be most advantageous in protecting its interests. Occasionally, there may be several forums used simultaneously. For example, negotiations and court processes are often pursued at the same time.

Knowing these key characteristics will allow you to build a comprehensive picture of the situation. Each of the next questions provides information used in building a strategy for agency action to respond to that situation.

Stakes in the Situation. Stakes are what each party believes it has at risk in the situation. Criteria for judging stakes are:

- the importance of the issue to each party.
- the relationship of the issue to the strongly held values or essential interests of each party.
- the strategic nature of the issue for the agency -- the importance of its resolution to the future ability of the agency to meet its mission.

- the degree to which the resolution of the issue may set a precedent which will constrain agency action on similar issues in the future.

Knowing the stakes of each party is an important predictor for party behavior. When the stakes are high, a party will be highly assertive or aggressive in working toward a resolution that protects its interests. If the stakes are high for your agency, you should seek a strategy that protects your bottom line interests -- even in the worst case. If the stakes are not that significant, parties are likely to be more flexible in their response, and the agency is no exception.

Relative Power of the Agency. Power can be defined as the ability to control and influence others or a situation in a way that furthers your interests or thwarts those of others. Three characteristics are important when considering power.

First, power is relational. Having a power resource, such as status, legitimacy, money, time, knowledge, or organization, is significant only if that resource is recognized by other parties. You may have the authority or power to convene a meeting, but what if nobody comes?

Second, the existence of power sources and uses is independent of the motivation for that use. Groups occasionally choose to exercise their power simply to demonstrate to others their strength, or to attract attention, or to play out an internal political battle.

Third, certain power resources are more effective in some forums than others. A community organization with many active members may be highly effective in a lobbying or electoral process, but might need more technical staff resources to participate effectively in an administrative process. Environmental organizations with staff attorneys often function better in litigation processes.

For this analysis, we distinguish between power based on a **legal right** and the **informal power resources** a person or institution may have by virtue of position, personality, or network. Parties to a dispute can have **a legal right** to participate in any dispute resolution process, or they may be able legally to enforce certain procedural requirements.

If parties have a legal right to participate, the forum design must reflect their rights. And indeed, you may not have a choice of forum, especially if Congress or the courts are involved. But do not overcompensate because someone has legal rights. Remember that other parties may be just as dissatisfied with the formal process, and may seek to move you toward **their** alternate forum of choice or may pursue simultaneous forums.

Those with **informal power** often can be extremely influential, even without the legal right. The chair of a key congressional committee may have considerable influence, if he or she chooses to use it, over which water projects are destined for his or her state. Neighborhood, environmental, and NIMBY (not in my back yard) groups have been able to

delay indefinitely or at least dramatically influence major decisions through a combination of symbolic, moral, and people resources.

There are many sources of informal power. A partial catalog is given in Table III. The source of informal power needs to be assessed on a forum-by-forum basis to understand the preferred forums of a particular stakeholder and its power relative to your own.

TABLE III: SOURCES OF POTENTIAL POWER

Physical Resources

money

property

control over institutions with property or money

Information Resources

factual information

expertise to obtain and interpret information

access to the media or ability to disseminate information

Symbolic Resources

reputation and prestige

appeal to fundamental values (e.g., fairness)

legitimacy of an established authority role

dependable allies or coalitions

People Resources

skilled and committed leadership

member numbers, skills, and commitment

effective organizational systems

Bidol, Patricia, *et al*, eds., Alternative Environmental Conflict Management Approaches: A Citizens' Manual, Ann Arbor, MI: School of Natural Resources, 1986, pp. 96.

In many cases, organized groups can use legal processes to obstruct decisions they see as detrimental to their interests. If you seek to avoid court, the operative question becomes: Which forum can be used to develop an agreement that will be accepted by the parties who have the legal right to raise the issue in court? In situations where there are power

disparities, the use of coercive processes against low-power parties usually creates fractured relationships and an image that the high-power party is a bully. Because joint decision making works toward establishing an atmosphere of respect and collaboration among all parties, it may produce better outcomes, and certainly better relationships, even when not required by the law.

Relationships Between the Parties. Strong and constructive working relationships between parties often lead to open and collaborative processes for decision making. Pervasive distrust and lack of prior experience working together characterizes conflicts that frequently end in unsatisfactory and usually adversarial processes.

When analyzing relationships, attention must be paid not only to the current status of the relationship, but also the past history and goals for the future. Regarding the **history** of the relationship:

- How have the parties communicated?
- Has there been a consistent pattern of communication?
- Have there been emotional arguments or disputes?
- Have the parties had some level of trust between them?
- Have any of the parties used their power to coerce another party? With what frequency?

If the relationship historically has been strong and healthy, it provides a basis for a good future working relationship. Destructive past relationships are obstacles to establishing a constructive joint decision-making process.

To inquire about the **current status** of the relationship:

- Do the parties still communicate with each other regularly? If not, has that pattern been a decision of one or both of the parties?
- Does one party feel "left out" or not listened to?
- Would any party suggest that a problem exists in the relationships?

Most relationships are affected by each party's **goals for the future** of the relationship. If both parties desire a strong working relationship, developing one now is much easier, regardless of their past history and current status. The primary need is to set behavior patterns that support reliable communication and mutual acceptance, while avoiding behavior that might disrupt a good relationship. But if the parties do not desire future contact, a good working relationship may be more difficult to establish. Each party may play to win at the expense of the other. Even with a good history and present status, parties

with no interest in working with each other in the future may use their current trust to cut unfair deals. **The primary effort is to try to build common interest in a good future relationship, while maintaining a close watch on how parties are currently working together.**

The level of interdependence between parties can help determine the quality of relationships among the parties. Multiple parties are interdependent when no single party can achieve its objectives without action by others. When there is a high level of interdependence, joint decision-making processes often are inevitable.

B. How to Gather Data for the Assessment

In the information-gathering process, you want to develop an accurate representation of the situation from both your perspective and that of the other parties. Your first step is to use secondary sources, including newspaper articles, official documents, organizational newsletters, transcripts and tapes from talk shows, periodicals, and sources that do not involve direct contact with others.

By pursuing secondary sources of information first, you will gain a sense of the politics of the situation, determine an appropriate order of contact, and develop a clearer picture of your data needs. Your next step is to bridge the gap between the impersonal secondary sources and the primary sources by talking to individuals who are familiar with the situation but not directly involved. Reporters, professors, researchers, and others can give you important background information. The best sources of information, however, are likely to be the persons directly involved in the situation.

If you do not have healthy working relationships with other parties, and your interests seem to be opposing, cold contacts with them might be unproductive or, at worst, damaging. In those circumstances, contact should be delayed until you have clearly identified your interests and have a sense of how the contact might be perceived by the other party. In situations where you have good relationships with some parties and not others, you may generate distrust by talking with those you already know, while ignoring or avoiding the others. Designing a way to talk to all parties fairly and in rapid sequence often is an important step toward success.

* * *

A preliminary assessment may be your first chance to immerse yourself in the politics of the situation. A good assessment is ongoing, because most situations are constantly changing. As your strategy develops, specific data needs will emerge. Pursuing them quickly and in depth can help you develop wise strategic choices for the agency.

STEP 2. DEVELOPING AGENCY STRATEGY

As a Corps manager, you are frequently able to choose, within the constraints of statute, regulations, and internal policy, the **forum** for the Corps' purposes -- the place and manner in which you would like to resolve a dispute. Possible forums include the court system, negotiating table with or without a mediator, problem-solving workshop with or without a facilitator, legislative body, mini-trial, public opinion, and public hearing process.

If you have few legal constraints on your choice, this section will help you identify and examine your alternatives and develop your preference. If your choice of forum is constrained by law or the Constitution, you will be able to skip over many of the elements that follow. At times, the decisions of other parties may constrain your alternatives, but despite attempts by others to dictate, you should review all of your alternatives in order to develop the best forum choice.

Three key questions shape the approach to choosing a forum -- who makes the decisions, how do parties engage each other, and what is your role in the process.

A. Who Makes the Decisions?

If the Corps has formal authority for making a decision, it can often choose how much it wishes to share responsibility for the decision-making process with other stakeholders. The Corps, like most public agencies, must involve many people and organizations in public decisions. The operative question is whether the other parties should be involved only in providing advice to, or as a full partner in, the decision-making process. There are three basic types of decision-making processes: unilateral action (no sharing), consultative decisions (soliciting advice), and joint decisions (shared authority).

Unilateral Action. The Corps can, within legal constraints, take unilateral action on substantive matters. A decision can be made, announced, and implemented by Corps managers, in many cases without serious problems. The danger of unilateral decisions is that the announcement, when controversial, can create opposition forces whose goal may be to delay the decision by exercise of legal rights or to obstruct its implementation through any means available.

A unilateral decision can also be made on process, for example, to initiate litigation. Selecting the judicial process normally takes the issue out of unilateral control of the Corps,

jury) that would not normally be considered part of the controversy. Litigation often guarantees that, if pursued aggressively, settlement will be a multi-year process.

Unilateral actions are least destructive when the relative power of the agency is high, the stakes are low for other stakeholders, and relationships will not be jeopardized. A decision to litigate may be almost mandatory if the stakes are high, the resolution of the issues is likely to be precedential, or the context forces the choice.

Consultative Processes. Consultative processes include a wide range of public involvement approaches where the Corps retains all decision-making authority but consults through public hearings, written comments with all who are interested, or informal contacts with key stakeholders prior to a final decision[7]. Consultative processes may be mandated by law.

Joint Decision-Making Processes. Joint processes are those where the Corps, by choice or necessity, seeks to make a decision **with** other parties. In a joint decision-making process, decisions are made by consensus, so each party at the table has the right to veto a potential agreement. This feature minimizes the power disparity between parties and builds joint ownership of the outcome so that all parties will help implement agreements reached at the table.

Joint decision-making often is selected when the parties are interdependent, when participating does not jeopardize the protection of organizational interests, when good working relationships have been established or are being sought, or when the context or power issues force the choice. Rather than further describe the virtues of joint decision making, we encourage you to explore through books[8], federal regulations[9], and training programs how these processes work.

If efforts at joint decision making are not successful, the process reverts to other levels. For example, unsuccessful negotiations can provide the basis for the Corps to make a decision in a consultative mode, using the information gathered in discussion. If the dispute is contractual, unsuccessful negotiations may lead the parties to court.

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7 See Public Involvement Techniques: A Reader of Ten Years of Experience at the Institute for Water Resources, Institute for Water Resources, 1983, for a wide ranging discussion of these techniques.

8 For a descriptive view, see Breaking the Impasse: Consensual Approaches to Resolving Public Disputes by Lawrence Susskind and Jeffrey Cruikshank. For a skeptic's perspective, see Douglas Amy's The Politics of Environmental Mediation. Additional resources are listed in the bibliography.

9 See the recommendations of the Administrative Conference of the United States, 1 CFR 305.82-4 and 1 CFR 305-85-5. Both are reprinted in the Negotiated Rulemaking Sourcebook, ACUS, 1990.

Multiple Forums. Occasionally, multiple forums will be pursued simultaneously or in a series. For example, a manager may want to use a consultative process along with a negotiation process. A small representative working group can jointly develop a draft agreement and then consult with all affected parties before finalizing the agreement.

Sometimes individual forums are played off against each other. For example, as mediators and process advisors, the Conflict Clinic assisted the Missouri Basin States Association in attempting to resolve several water disputes. In one water contracting dispute, the member states could not agree whether one state could act unilaterally or whether all states needed to act jointly, and whether the Interior Department, the Bureau of Reclamation, or the state had jurisdiction over the stored water. Forum shopping in Congress, the federal court system, and at various negotiating tables was initiated at various times by parties to the dispute. Negotiations were often most productive when it appeared progress in court was not likely, or when that progress was seen as not providing the answers to important issues[10].

B. How Do Parties Engage Each Other?

When most people think of negotiation, their first question is, "Should I take a hard line?" And then, "If I choose not to, will others think that I am willing to compromise?" The approach a party might bring to any forum can range from highly competitive to fully collaborative, and your assessment should drive your choice. You should remember, however, that the styles and strategies chosen by others need not determine your approach. You can model for others the kind of strategies you prefer and attract their acceptance. Recognize always the impact the choice of others has on you and vice versa.

A collaborative strategy is best when there is a flexible and creative attempt to identify alternatives which might meet the interests of all parties, when information is to be shared openly, and when sufficient meeting time is available to find joint agreement. This approach is commonly taken when substantial interdependence exists among the parties, good relationships are already present or are possible, the agency's stakes are high, and the agency's power is such that it can protect its interests. Typical collaborative processes are problem-solving approaches, principled negotiation, and mediation.

Competitive strategies usually occur when a relatively quick resolution of the dispute is preferred to prolonged interaction, desire to maintain a relationship exists, and the parties doubt the existence of a win/win outcome. This approach often is chosen when the stakes are high, power relatively equal, the parties find the situation confusing, and the relationships are unknown or one-time. Mini-trials, mediation, or positional negotiation are often used when competitive strategies dominate.

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10 See Miranda Salkoff and Frank Blechman's "Mediation Among the States in the Missouri River Basis 1984 - 1987", Working Paper Series, Conflict Clinic, Inc., 1988.

C. What is Your Role in the Process?

As a public agency, Corps personnel play many roles in the eyes of the public: administrators, regulators, technical experts, decision-makers, facilitators, convenors, and liaisons. Managers must be especially clear about the roles they are playing, and careful not to combine competing roles in one meeting.

For example, within the same meeting a staff member may try to elicit participation from a diverse group and, at the same time, close out unacceptable options under Corps regulations, comment on options that are technically deficient, and throughout be especially nice to the powerful person in the back of the room. Rarely will you find a clearer prescription for disaster. The group in this example will likely be confused, inclined not to participate, and possibly quite distrustful because of their perception of the Corps' motivations.

Potential roles for a public agency official in a joint decision-making setting are:

- Negotiator. Represents the Corps' interests at the table in working directly with other parties on issues of substance and procedure. A negotiator usually has some authority and may be able to bind the agency to a decision.

- Technical Expert. Has significant knowledge about the issues in question, but usually little decision-making authority.

- Facilitator. Is neutral to the substantive issues and helps the group stay focused on a problem-solving agenda. A facilitator usually guides, through education and negotiation, the development of an acceptable process.

- Mediator. While both facilitators and mediators help run meetings, the mediator is generally more proactive and may call caucuses, meet with parties between sessions, and draft potential agreements.

- Convenor. Has sufficient credibility or appropriate authority to bring all the parties together to focus on issues of mutual concern.

The negotiator is almost always someone directly affiliated with the agency. Each of the other roles can easily be filled by someone outside the agency depending on the politics of the situation, the interests of the agency on the issue, and the availability of skilled third parties.

Some roles can be combined and others cannot. Generally, the negotiator and technical expert roles should be kept completely separate from the third-party roles. A negotiator can -- and in some cases must -- have expertise in the substance, and may in some instances be able to shift to a technical expert role without any loss in credibility of the data or expert opinion. But a negotiator should not attempt to facilitate or mediate. Clearly developing

your role and the roles of others, and honoring those self-imposed limitations, are essential elements of building successful working relationships.

Corps as Convenor. The Corps is in an unusually strong position to use its authority as an incentive for drawing parties to the table[11]. The Corps' offer to establish a consensual process can provide parties with a forum to agree to procedural rules and create an agreement that meets their interests without circumventing other strategic options.

In situations where the conflict is especially contentious and the Corps is perceived as a direct party to the conflict, the Corps' attempt to serve as a convenor may be challenged. If that role is challenged successfully, it can be fatal to all future attempts to bring this particular set of parties to the table. As a Corps manager, you may choose a strategy of acting as a convenor prior to creating the *ad hoc* initiating committee described below, then test the concept with the committee once it is formed.

D. Completing the Strategy

To be successful, joint processes must not only use an **approach** that is acceptable to the parties, but must also produce an **outcome** that is acceptable as well. Parties must be comfortable with the process in order to accept the outcome. If the process is viewed as biased, too narrow, not grounded in sufficient analysis, or in other ways deficient, the agreement will be suspect as well.

You should develop strategy with the understanding that the process will need to be supported by all the parties at the table. To develop this support will inevitably require negotiation about the characteristics of the forum outlined earlier in Table II.

This step is similar to preparing for negotiations on the substance of the dispute, but is focused on procedural issues and forum development. It merges with the next step, Designing and Building the Forum.

11 See Jerome Delli Priscoli's article, "Conflict Resolution in Water Resources: Two 404 General Permits" for further exploration of this issue.

CASE STUDY:

NEGOTIATE IT NOW?

Assessing the Situation and Developing Strategy

The phone call is for you. The president of a major development firm, Build It Now, Inc., is calling to tell you that his company is seeking a permit to build on non-tidal wetlands and he would appreciate your assistance in processing the permit on a timely basis. Years ago, your staff granted a permit for a similar project and after five years of litigation by environmentalists, the decision was overturned.

Ever since the issue of wetlands became politicized by the President's pledge of "no net loss," the Corps has been especially cautious in issuing permits. Non-tidal wetlands have been especially difficult to regulate because they are not clearly understood. It is clear that you will make sure the Corps' efforts are well documented because of the possible court action. What else should you do?

The first step is to determine what you need to know to inform your choice of strategy. Let's begin by examining the parties and their interests. Build It Now's interest seems clearest. They want to build the development and make a profit. Their position is that the Corps should grant the permit on a timely basis. You discover that one of your staff lived in the neighborhood next to the proposed development and you ask him what he knew. You discover that this neighborhood is very concerned about the traffic this project would generate and that the vacant lots have long been used as playgrounds for the kids. The position of the neighborhood association is likely to be, "no permit and no development."

You have been on the opposite side of the fence with the local environmental organization, but you have been able to forge a working relationship with the director. Calling the director reveals that the environmental community is likely to be focused on the potential wetlands loss and the wildlife that resides in the area. They, too, are likely to oppose issuing the permit.

If past behavior is an indicator, Build It Now will not only use the administrative procedure of the permitting process, but may resort to the courts if the permit is not initially granted. The environmentalists may follow a similar strategy. Other groups may choose to force the issue into community forums -- the planning commission, the city council, or local newspapers -- perhaps staging media events and using lobbying and electoral pressure to win in these forums, hoping to make the permit unnecessary and the administrative procedure moot.

But their strategy will partially depend upon how important the issues are to them. If the project proposed by Build It Now is the smallest of a half-dozen similar projects, they may not pursue this project with as much vigor as if it

were the only major current activity. So, you make several calls and what you discover is that Build It Now has several other projects in the works and that this is among the largest.

The community groups whose sole reason for existence is to defeat the project will certainly see this as a high stakes situation. Community groups which are not directly affected may believe that if this project goes forward, it will set a bad precedent and open the gates for other large projects. They will see their stakes in this situation as of medium importance. The environmental group will likely see this as a less important issue because its members are engaged in a community-wide battle over an unrelated issue.

What about the Corps' stakes? This situation might be one of several hundred similar situations around the country. Or, if the project is in the district of a member of Congress who oversees the Corps' activities, the issue may be of strategic importance for the Corps and receive special attention. If the Corps is acting on newly-promulgated regulations where the decision is likely to be precedential, the Corps also may choose to be especially cautious. You learn fairly quickly that this matter is fairly routine for the Corps but that in similar instances the Corps has become a lightning rod for community activism against the project.

What can you conclude from this analysis? Obviously, you would gather much more detailed information from a real situation. Here, though, it would be fair to conclude that Build It Now and the Corps would both be drawn to a negotiated process, the environmental group would seem to lean toward participating, while the community group next to the proposed development might be fairly resistant to coming to the table because that act alone would signify it might be prepared to back down -- and it isn't.

STEP 3. DESIGNING AND BUILDING THE FORUM

After completing your preliminary analysis, you have decided to explore a joint decision-making process and are now ready to move ahead. But how? Should you contact the parties you know first, or circulate a memorandum with a proposed format, or publish the details of a well-thought-out process in the Federal Register? Before making that decision, you have several additional steps to take.

A. Designing an Acceptable Forum

Forums do not just happen. They are designed and built by those who use them. The manager who plans and acts purposefully in these tasks is in a position to achieve the best outcome in the end.

There are many feasible approaches to achieving this goal. Each has merits. Some rely on you, the executive; others must be managed by a mediator or facilitator because of the need for impartiality or special expertise.

Interactive approaches provide a vehicle for discussion and decision among the parties on important procedural issues. They are really a negotiation within a negotiation. A joint decision on procedure may be the first agreement parties have ever reached. To the maximum extent possible, steps you take to design the forum jointly with others should model the behavior you hope the parties will exhibit as they address the substantive issues.

In this phase, the use of an interactive approach to develop a joint decision-making process will do much to model what you hope to have happen at the table. Modelling the process in the early stages of designing the forum will also help reveal your intent. A collaboratively developed forum will generally be more stable and widely supported during difficult negotiations than one imposed by a powerful party.

We recommend the use of an *ad hoc* initiating committee to develop a forum as an approach that will work in many situations and can be implemented by you. Its use in typical situations is described below. We offer strategies for dealing with specific obstacles in the next section. In Section V we offer some thoughts on the role of the third party -- the outside mediator or facilitator -- and guides for determining when to use and how to procure a third party.

B. The *Ad Hoc* Initiating Committee

The best way to move forward is **with** other parties. Very early in the process, your views should be tempered, analyzed, and refined by other parties. Not only will the process design be improved by the participation of other parties, but other parties will "own" the resulting design as well. If stakeholders participate in developing an acceptable forum, they certainly will be inclined to join it. Each step in building the table -- critical procedural decisions, developing a representative group, agenda decisions, and others -- will be better made if a small group representing the diversity of the stakeholders makes the decisions instead of just one party.

If there are only a small number of stakeholders, you could probably work easily with every stakeholder. However, in many situations there may be dozens of groups and hundreds of individuals with a stake in either the process or the outcome. In these situations, you should form a small working group or committee to make procedural decisions and propose forums to the broader set of stakeholders.

For the purposes of this booklet, we call this group the initiating committee. In real life, it may not have a formal name, or it could be called a working group, steering committee, process design team, negotiation exploration team, or any other name that is acceptable to the stakeholders. The task of the committee may be variously called building the table,

designing the table, designing the process, building the forum, exploring the feasibility of negotiations, developing procedures, or again almost any similar phrase that the stakeholders will find comfortable.

During the assessment process, one question that can be asked in every conversation is, "If we were to get together a group of four or five people to explore how we might really solve this problem, who should be there?" Those persons named frequently, if they represent the diversity of interests, can become the core of the initiating committee. The membership of the initiating committee should be acceptable to the larger body of stakeholders.

C. Tasks of the *Ad Hoc* Initiating Committee

The initiating committee usually is responsible for developing an acceptable forum, in concert with other key stakeholders. The work of the initiating committee continues from its creation to the first meeting of the group developed to address substantive issues -- often called the working group.

The initiating committee will continue the assessment process you began. Again, the process is interactive, modeling the behavior you want to set as standard for the group, and it is a powerful technique for building a shared view of the situation. Joint analysis gives the initiating committee and the larger body of potential stakeholders an opportunity to work together to look at the issues, the parties, their interests, the data available, the data and analysis needed, and other questions crucial to designing an effective forum. The shared perspective allows each party to judge whether it is in its interest to continue to move toward the table.

The initiating committee operates both as a working group and as a catalyst for actively engaging other stakeholders in the analysis process. Through its diversity, the initiating committee builds bridges into broader professional, political, and social networks.

For example, between meetings the environmentalist can talk to other environmentalists about important procedural issues, the state DNR representative can talk to other state officers, the planner can talk to other planners, and Corps officials can cement relationships with other federal agency representatives who could be helpful. This communication will focus stakeholders on common goals, such as developing an effective forum and completing the assessment process.

As committee members work toward a joint understanding of the situation, they also are moving toward completing the tasks that lay the groundwork for a successful first meeting. The major tasks include:

Invitation List for the First Meeting. The answer to who gets invited should flow directly from the situation assessment. In building a successful working group, the operative questions are:

- Who needs to be at the table?
- Are all the stakeholders represented?
- Does each party have sufficient authority and stature to represent its constituency?
- Can decisions be made efficiently?
- Can agreements be implemented fairly and fully?

The maximum size for a self-facilitated working group is typically 10-12 persons. If there are more than 10 persons who need to be at the table, or if the group includes certain stakeholder interests that are without clear representation and is awkwardly large, specific procedural tools for large groups are available. Procedural advice should be sought from a third party or someone familiar with these mechanisms.

Identifying and Developing an Approach to the Issues. As we discussed earlier, different parties often identify different issues as central to the situation. If each party brings its full "laundry list" of issues to the table, the collection of issues can be too long, unwieldy, and confusing. It also encourages parties to "own" certain issues and stick with them in an adversarial way. The initiating committee should develop a preliminary set of issues based on discussions with the stakeholders and circulate that set for input from stakeholders at the first meeting. Even if the issues are thought to be well-defined and straightforward, they should be identified and circulated. The issues must be defined and listed in a way that permits the parties at the table to address them constructively as a common enterprise.

Once the issues are clear, the next step is to plan how the group will address the issues. Will the whole group work on every issue, or will there be committees? Do some issues need to be decided first? The approach developed must work logically and politically.

Facilitator, Moderator, or Chair? A well-run first meeting is critical to establishing a sense that progress is possible. Choosing a person who can run an effective meeting and manage the process is an important element of success. The initiating committee will need to decide who should do it. A representative of the convenor, if there is one, or of the initiating committee as a convening group, may start the first meeting. Determining who should run the meeting after the initial welcome, and who can continue in that role throughout the life of the working committee, often raises challenging questions. If a staff person from the Corps or one of the other stakeholders is chosen by the committee, that person may not be perceived as fair because of his or her employer, or may not have the requisite skills to run a focused, productive session with a large group. A facilitator or mediator can be helpful when many parties are involved, the issues are contentious, the emotions are strong, no one else has skills in running meetings, the group does not have established working relationships, or poor working relationships exist. If use of a facilitator

is contemplated, the selection of the facilitator and who pays the cost will be serious issues for the initiating committee to work through.

Protocols. Protocols are the explicit procedures for conducting the process, and they are usually agreed to by the stakeholders. Sample protocols are in Appendix C. The initiating committee should propose groundrules to the working group, and leave time for members to suggest changes or additions at the outset of the first meeting. Protocols may include guidelines for behavior (such as one person speaks at a time), for responsibility (such as the staff of the Corps will develop meeting summaries), for group procedure (such as all decisions are tentative until they are affirmed as a whole at the end), for communication with others outside the group (such as the only person who can speak to the media on behalf of the group is the facilitator, or representatives should check in with their constituent groups between every meeting), and for other issues deemed important by the group (such as smoking, food, breaks, meeting norms, etc.).

Time and Location. The initiating committee should select the time and place of the first meeting. Location is especially important; a neutral site usually is preferred, but the main criterion is that all participants feel comfortable with it. In selecting a venue, you also will want to consider whether isolation is best, or whether you will need ready access to telephones, computers, technical data, or staff resources.

Agenda Development. Agenda items for the first meeting always include ample time at the beginning for introductions and an agenda review. Other common items are review and agreement on groundrules, discussion of purpose, review and development of the big picture (such as how many meetings and the purpose for each), and a schedule and approach for working on the issues.

Other tasks that may need initiating committee action include:

- developing systems for data collection and data exchange,
- addressing matters of confidentiality,
- affirming or developing timelines and deadlines, and
- deciding on dates and locations of subsequent meetings.

D. Managing Incentives

Throughout this convening process, the initiating committee must analyze with stakeholders and others the incentives and disincentives acting on each party for coming to the table. If the parties are not naturally inclined to come to a negotiating table, the initiating committee should explore the creation of incentives that will make this option more attractive.

An incentive makes the likely progress in the joint decision-making process more attractive to a party than what that party can expect outside the process. Many situation-specific incentives can be developed through this kind of analysis. Incentives could include: expanding the issues on the table, linking the expenditure of funds to joint decisions, providing funds to enable full participation by weaker parties, and taking unacceptable options off the table.

The timing or "ripeness" of a situation can be a significant element in each party's view of incentives. Rarely will parties think of changing process in midstream. If a party is in court, in the midst of a significant lobbying or electoral campaign, or pursuing technical studies, it will generally want to follow that path to its natural conclusion. Still, the advantages of joint decision-making, even as complementary to a more formal forum, are significant. Knowing the path that each party is pursuing can inform the timing of the getting-to-the-table effort.

E. Process of the Initiating Committee

The initiating committee, like the working group that follows, should guide its internal actions by principles of joint decision making. Decisions should be consensual, the orientation should be toward problem solving, and the communication with constituent groups should be open. Again, modeling the behavior you expect in this working group is the best way to begin.

Relationships among members are therefore crucial to an effective committee. Each member should gain concurrence of his or her colleagues on the committee before taking major steps. The interaction and constant checking will create a common sense of purpose that will serve well as decisions are made.

In some situations, committee members are separated by hundreds of miles. In developing an initiating committee, it is important to select members who know each other personally, or have the ability to meet face-to-face several times, and are able to communicate regularly via telephone, fax, mail, or private meetings.

F. Summary

Designing the table is a creative task that allows stakeholders to shape a forum to reflect their needs. An initiating committee serves as a bridge between the Corps and other parties and helps build a table that is acceptable to all stakeholders. A well-designed table creates incentives for all parties to pursue their interests through joint work.

CASE STUDY:

DESIGNING THE TABLE FOR GP NEGOTIATIONS

A general permit (GP) granted under Section 404 was up for renewal. Its current stipulations were widely viewed as outdated and therefore unacceptable. The permit holder, Acme Drilling sought to renew its general permit to facilitate hydrocarbon exploration drilling activities in the states of Bethesda, Howoming, and Youdaho. The Pro-Earth Society, a major environmental group, was on record as opposing renewal of the general permit for Acme and had threatened a lawsuit.

The Corps had little interest in processing each of the permits needed if the General Permit was not approved or in spending the next decade in court on this issue. After further study, the Corps determined that it would clearly prefer not to litigate and would seek to develop a negotiation process for the development of the conditions of issuance of the GP.

In order to design the forum, an initiating committee was formed. It consisted of a representative of the Corps, Pro-Earth, the Youdaho Department of Natural Resources, and Acme Drilling. At first, Acme lobbied the Corps to have Pro-Earth excluded, but the Corps wanted to make sure the environmental group was included since they were a significant stakeholder. Eventually, Acme acquiesced realizing that otherwise Pro-Earth would probably litigate any agreement they did not help create, which would delay Acme's ability to move forward.

After meeting several times, the initiating committee invited 15 people to join a working group. The committee had fought hard over the balance of interests on the working group, but the result was ultimately thought to be fair. The key was inviting J. Harmony, the former head of both an environmental group and the Howoming DNR office. Harmony was well respected and his presence was appreciated by everyone.

The other difficult issue was the environmental group's interest in protecting its right to sue if a complete consensus was not reached. Everyone finally recognized that Pro-Earth would always have an ability to sue. It was understood, however, that if an agreement were reached that was acceptable to Pro-Earth, they would not sue.

In addition to its own discussions, the working group convened several public hearings to include those who wanted an opportunity to make their concerns known to its members. After several sessions, progress was clearly being made, but there were several difficult issues remaining. The working group scheduled a session for Saturday and Sunday to work out the remaining issues. On Sunday afternoon, complete agreement was reached. The GP was issued and no one litigated.

This fictional scenario is inspired by the negotiated development of a General Permit for hydrocarbon exploration drilling in Louisiana and Mississippi. See "Conflict Resolution in Water Resources: Two 404 General Permits" by Jerome Delli Priscoli (Journal of Water Resources Planning and Management, Vol. 114, No. 1, January 1988) for a description of that situation.

STEP 4. GETTING PARTIES TO THE TABLE

The Invitation. If the forum has been constructed through a process that has involved the parties, getting them to the table may be as easy as issuing the invitation. Each will want to attend a meeting that he or she helped design. If problems, obstacles, and disincentives abound, getting parties to the table becomes a more difficult task. Certain considerations are essential to success. The kind and timing of the invitation they receive is important. A senior corporate official, the leader of a recently-organized NIMBY group, state and local officials, or other civic leaders must each recognize the invitation as a positive step toward meeting their respective interests.

Recipients of the invitation should not be surprised when it arrives. All invitees should be contacted in person or by telephone by an initiating committee member before they receive the written invitation. A personal contact can be used to discuss the situation, describe the joint decision-making process, answer questions, and determine interest and availability. The invitation then becomes a means to follow-up a successful personal contact.

Keeping Parties at the Table. Even if a person is persuaded to come to one meeting, most people must be convinced that future meetings will be worthwhile for them to continue to commit time in a busy schedule. Before moving toward a discussion of problem solving or negotiation, one of the primary goals of the first meeting is to have the parties understand and be comfortable with how the table has been built. Parties should have an opportunity to review who is at the table, groundrules, issues, decision-making procedures, and any other issue of concern. This discussion usually leads to the timing and agenda of future meetings. Each person should be comfortable with the design of the table and how procedural concerns are being addressed by the conclusion of the first meeting.

Creating a Process Management Team. Once the parties have come to the first meeting, the work of the initiating committee is complete. This step should be made clear to the full working group. Process decisions go on, however. Decisions about procedure, agenda, and perhaps some substantive issues must often be made prior to each meeting. Many larger, ongoing working groups construct a small process management team to coordinate the joint decision-making process. For continuity purposes, this team may draw heavily on the initiating committee for its core members, but it can have different membership. The process management team should have the same characteristics as the initiating committee

with process issues. The process management team almost always is called something else: steering committee, agenda planning team, executive committee, and management team. Its name, like the name of every other committee, should be broadly acceptable to the group.

* * *

Building a forum acceptable to parties to a dispute and getting each to come to the first meeting can occur as smoothly as described above. A systematic process that participants and observers see as fair and open can transform the perception of conflict from a belief that it will be impossible to find common ground, to solid optimism about the problem-solving process. Some situations, however, will prove more vexing and difficult to unravel. The next section focuses on specific barriers you may encounter and potential responses to them.

CASE STUDY:

GETTING CASHDOLLAR TO THE TABLE

You are in the midst of a large construction project that has become your biggest headache. The general contractor, Cashdollar and Associates, has dramatically exceeded cost estimates and not met deadlines. You expect Cashdollar to sue at the end of the project to recover some or all of its cost overruns. You, though, are under heavy pressure to get this project completed on time.

With the downturn in the construction business, Cashdollar has reduced the size of the team working on your project and work is moving more slowly. Cashdollar claims that they cannot move forward more quickly because of the amount of money they are owed by the Corps. You know some portion of responsibility for the cost overrun lies with the Corps, but you are tempted to terminate the contract and take Cashdollar to court for breech of contract.

If you terminate the contract, getting a new contractor will significantly delay the project. While you are completely frustrated with Cashdollar, you realize that your ability to get the project finished in reasonable time may depend on whether the project becomes as high a priority for them as it is for you.

You sit down with S. Phixit, project manager for Cashdollar, to discuss some of these issues. Phixit tells you right up front that his supervisors feel that the Corps deceived the contractor, the project will cost significantly more than bid, and that they are going to take their time -- fitting the project around the ebbs and flows of their other projects. You are furious!

You realize it is necessary to reach someone in the leadership of Cashdollar, and you need to plan the strategy carefully. After discussing the problem with several of your colleagues, you decide that the best approach would be for the call to come from the General Counsel's office of the Corps to the General Counsel for Cashdollar.

The Corps' General Counsel is an advocate for negotiated approaches and talks knowledgeably about these processes. The lawyers can focus on the costs of litigation, the advantages of negotiation before more serious problems arise, and each side's interests in having a successfully completed project. The call was made, Cashdollar's attorney came to the table, and successful negotiations ensued.

IV. OVERCOMING BARRIERS TO JOINT DECISION MAKING

When a party uses fear and distrust to win others to its cause, a variety of forces are created which can push other parties away from the table. These forces can be identified during the getting-to-the-table phase just discussed in the last section.

Many parties are reluctant to come to the table because of fear -- fear of losing, of cooptation, of something new, of unpredictability, of other parties, of losing constituents, or of being vulnerable. Parties may be forced to come to the table with a show of power, but it is unlikely they will be ready to participate with a cooperative frame of mind. Fear is not overcome by a show of power, coercion, or heavy-handed persuasion. Parties coerced to the table often participate only to sabotage the process later.

In the academic literature, getting to the table is often linked with conciliation, which is defined as the conversion from a state of hostility or distrust, or the promotion of good will by kind and considerate measures. Conciliation overcomes forces that drive parties away from the table by opening up communication channels, initiating trust-building activities, and clearing up misperceptions.

Bringing parties to the table also implicitly legitimates the concerns of everyone at the table. Yet, one need only look at the deep-rooted conflicts in the Middle East or Northern Ireland to recognize that there are times when one group is unwilling to recognize the legitimacy of another group. Conciliation activities will be slow and difficult, at best, when some parties do not accept the legitimacy of others as a matter of principle. Deep-seated mistrust may not be as visible, but it can be an equally effective block to collaborative efforts.

As you design and develop the forum, you need to identify all barriers and consider them real and legitimate. If parties are going to participate effectively in a conflict resolution process, they must be able to work jointly through their concerns about the process. Working jointly through process issues may be a good start at lowering the barriers of fear and mistrust.

Power Issues. Some say that all conflicts are over power and resources, and that all conflicts over resources are over power. Power disparities among the parties -- especially when low-power parties believe they will be unable to successfully protect their interests at the table -- can pose significant barriers.

Low-power parties are typically skeptical of consensus decision making and believe that, somehow, high-power parties will use their power to push through an agreement against the principles and better judgment of low-power parties. Joint analysis of the concerns of low-power parties can lead toward development of a process that directly responds to those concerns, thereby helping create a fair process -- the so-called level playing field -- for all participating groups.

Low-power parties usually have highly refined skills in obstructing proposals that other parties put forward, but they may not feel comfortable at the negotiating table. Joint or separate training in negotiation skills can be provided prior to actual negotiations, or funds can be raised to allow low-power groups to hire technical assistance, negotiation assistance, or attorneys, as well as pay for travel, lodging, and other expenses of the negotiation team. These responses can help a low-power party be an effective participant.

Some low-power groups maintain an organizational culture that nurtures trust and openness, and therefore avoid situations where only a small group may participate. Faced with this situation, you may want to explore the use of meetings where observers are allowed, public meetings, or a mixture of public and private meetings as function dictates.

Creating a process that allows for representatives of low-power groups to communicate with their constituencies and that reflects the inability of a representative to bind the group without consultation also may respond to the concerns of low-power groups.

High power groups generally are accustomed to getting what they want. Their attempt to use power may scuttle the process. Special groundrules or pre-negotiation agreements may be needed for working with high power groups who commonly control processes to suit their own interests.

Joint Decision Making as Unwelcome Change. Many parties have never participated in a formal joint decision making process and therefore may resist participation because of its unfamiliarity. Training can help familiarize potential representatives with the process prior to negotiations. Another way to help educate those unfamiliar with joint decision-making is to encourage contact with a peer who is knowledgeable about its use. Peers can best interpret the relative advantages and disadvantages of participation because they usually are trusted more than another party or an outside facilitator or mediator.

Others may resist joint decision making because the process seems to contradict their cultural norms. Many Asian peoples, for example, avoid face-to-face negotiations and prefer to conduct discussions through an elder[12]. Hispanics often are sensitive to the location of discussions and are distrustful of bureaucratic environments[13]. When working in a situation that involves persons from other cultures, it is essential to understand and respect differences in cultural norms. Negotiation processes are present in every culture, but they vary widely. Finding a forum and process that responds to cultural concerns will create an effective work environment.

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12 Pye, Lucian, Chinese Commercial Negotiating Style, Cambridge, MA: Oelgeschlager, Gunn, and Hain, 1982.

13 Lederach, John Paul, "Mediation in North America: An Examination of the Profession's Cultural Premises", Akron, PA: Mennonite Conciliation Service, 1986.

Joint decision-making may be resisted because of its unpredictability and lack of formal rules. Unpredictability is inherent in joint processes, but the uncertainty is perhaps no higher than in other forums, even the court. Joint analysis will go a long way toward reducing the negative feeling caused by unpredictability. Moreover, the flexibility of joint decision making often leads to new and creative solutions. Rules can constrain as well as empower, so the lack of formal rules by itself should not be a substantial barrier. Development of very specific protocols, including the order in which issues will be addressed and the steps of the process, can help allay these fears.

Relationship Issues. Hostility, distrust, and a lack of respect often permeate relationships in contentious disputes[14]. As mentioned in the first section, relationships need to be assessed from three perspectives: past, present, and goals for the future. While present relationships may not be characterized as healthy, the parties in a dispute may have a healthy past relationship that can serve as a positive referent point, or a desire for a good future relationship which can provide motivation for change.

The level of interdependence between the parties also affects the relationship. If some parties realize they need others if they are to accomplish their goals, they are likely to try harder to find ways to work together. After a lengthy period of non-decision, as proposal after proposal is blocked by the other side, parties may recognize that at a minimum they need the concurrence of the others in order to proceed. Interdependence is a strong incentive for parties to come to the table, and anything that increases that sense of interdependence will help overcome barriers to joint decision making.

The level of trust is the key to bringing parties to the table. If you strongly believe another person's word cannot be trusted, it is unlikely that you will think negotiation is a viable option. There are several ways to move from mistrust to trust; the thrust of each is that consistent communication and interaction between the parties can build a common perspective and, from that, small agreements, which foster a sense of acceptance and reliability. The work of the initiating committee can serve as a bridge between parties who distrust each other, and trusted go-betweens can also help.

Mistrust is frequently based on conflicting perceptions of the same events. Establishing regular communication focused on a joint analysis of the situation can be a vehicle for working through perceptual disagreements. Keeping the relationship focused on the specific issues at hand can help build agreements on those issues even when the parties will agree to disagree on other issues.

Truly fractured relationships may require team-building activities, or the actions of a third party to conciliate. The roles of third parties will be discussed more fully in the next section.

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14 Useful guidelines for building relationships can be found in Roger Fisher and Scott Brown's Getting Together: Building A Relationship that Gets to Yes, Boston: Houghton-Mifflin, 1988.

Economic Issues. Joint decision making can be expensive. The significant commitment of staff time, costs of travel, costs of third parties, and the costs of lost opportunity due to long negotiations are only a part of the actual cost. But litigation and non-action can also be expensive. Complex litigations start with six-figure cost estimates which do not even include the expense of lost opportunities or the adversarial and unhealthy relationships caused by the litigation process.

The dispute over the expansion of the highway in Fort Worth took 15 years to resolve -- 12 in the litigation process system and the court of public opinion, and then three in negotiation[15]. It is impossible to estimate the costs of lost downtown development, the federal/state/local staff effort in responding to litigation, and of polarization and its effect on other projects.

When economic issues are raised, you should calculate the range of potential costs in several competing processes. These costs include the transaction costs of joint decision making and its alternatives, the costs of inaction, the costs in constituent and public relations, and the costs of potential litigation. You can then compare the potential costs in light of the size and stakes of the project and the potential benefits rising from the use of each process. In that context, financial issues can be more fairly evaluated.

Joint decision making may prove to be a wise financial investment, but that feature does not increase the capacity of the parties to pay for it. Some parties may be unable to share in the expenses and may even have difficulty in paying for the costs of their own participation.

If the effort is worthwhile to others, there may be many ways to compensate for these inequalities. However, if the costs are not to be shared equally, control of the process must be consciously separated from who pays for it. Otherwise, those who did not contribute to the budget will perceive that the process is biased in favor of those who paid, or those who paid may act as though they own or control the process.

Structural Issues. Structural issues are the legal, institutional, or political characteristics of the situation that can constrain the initiation of a process. Some officials from public agencies turn down opportunities to participate in joint decision-making processes because they are charged with making the decision. This reasoning, however, confuses formal authority to make the decision with the process of generating the best options. Joint decision making is a voluntary process, and therefore participation does not abdicate the responsibility to decide. The agency will only choose to support a joint agreement if that agreement is a responsible solution in the agency's judgment. If the parties are not able to develop an agreement that is also acceptable to the agency, the agency can always move forward with a unilateral decision.

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15 See "Multi-Year Mediation Breaks Fort Worth Interstate Deadlock, Participants Say", ADR Report, vol. 2, Oct. 27, 1988, pp. 381-383.

Conflicts are common on issues where statutes or regulations clearly define procedures. Environmental Impact Assessments and other requirements of the National Environmental Policy Act, federal highway planning, and the Community Development Block Grant program are just a few of the many frameworks that prescribe procedures. Many successful joint decision- making efforts have taken place as parallel processes linked to the formal process by having informal agreements precede the formal decision. In the Fort Worth highway dispute, the informal I-30 Working Group, after approving the scope-of-work statement and helping select the engineering consultants, helped develop the potential routes and options for an expanded highway and the criteria for assessing the options, and then helped weight and apply the criteria to the options. The formal decisions, however, remained with the Texas Highway Department and the Fort Worth City Council.

Political constraints also occur. The most predictable are the regular elections at all levels and their effect on particular disputes. In Missouri, the proposed damming of the Meramec River was put on hold during several elections in localities where the dam had become a major issue, and again when an advisory referendum was placed on a special regional ballot. Parties trying to work jointly have difficulty arriving at a final agreement if the issue in contention is also an election campaign issue. They also may not be able to act if the incumbent officials have chosen not to run again. Often public agencies or private interests cannot affect a political constraint, but must be satisfied with scheduling their efforts to miss or take advantage of political constraints.

Organizational constraints, especially in citizen groups, can be serious impediments to effective joint work. As discussed earlier, citizen groups often do not have the leadership patterns to ensure prompt and timely decision making -- or indeed the capacity to implement agreements made with agencies or other organizations. The timing of meetings, the participants at each meeting, and the separation of the various phases of the process should be adjusted to respond to such organizational limitations.

* * *

Each barrier issue can be addressed in a getting-to-the-table process, but barriers sometimes present themselves in droves. Serious conflicts exist because many relationship, power, and structural issues have combined to drive the parties apart. In these circumstances, the services of a third party may help the parties achieve the best possible outcome. The next section discusses the third-party role and provides some tips on how and when to call a third party.

V. THE THIRD PARTY

A. Structure of the Third-Party Role

The third party is the impartial person or team in a conflict situation who has no direct stake in the outcome and no direct link to the parties but rather is charged with helping the process of disputing. The third party thus is positioned to assist the conflicting parties in resolving their dispute. Even though conflicts may have dozens of parties, the "third party" still refers to the intervenor who does not have a substantive stake in the conflict.

Third parties come in many forms; some common examples are judges, arbitrators, law enforcement officials, mediators, and facilitators. We are specifically focusing on mediators and facilitators -- third parties who do not have adjudicative or enforcement powers, but whose primary objective is to help the parties find ways to resolve their differences. Much energy is spent in the conflict resolution field in attempting to distinguish between facilitators and mediators. In practice, the two descriptors are used interchangeably. For the purposes of this section, we will refer to mediators -- and intend both.

Mediators[16] have an independent base and are unaffiliated with the parties. They bring specific tools and broad knowledge of conflict and how it is resolved. The adversarial, even violent acts of persons in conflict rarely faze a mediator, whose critical skills include the ability to be sharply analytical in difficult situations.

Unlike other advocates, a mediator does not promote a particular outcome or a particular party. A mediator is an advocate for process -- for a specific way of approaching and resolving conflicts. In advocating for a process, the mediator usually helps each party understand the process choices in a situation and the strategic advantage of each.

When an impasse has been reached because of relative parity in power between the parties and high level of interdependence, joint decision-making approaches may be the only constructive means to break it. As each party is assisted in a new strategic analysis, the mediator can help all of them understand the perspective of other parties. The broadening of each party's perspective of the conflict often contributes to an enlarged view of how the conflict might be resolved.

In settings where parties are unwilling to talk to each other, mediators can start the process of communication through shuttle diplomacy. As this process moves forward, a mediator often becomes the trusted link for passing messages between the parties. The regular contact, the protection of confidential information, and the broad knowledge of the situation from each party's perspective helps strengthen the mediator's relationship with all of them.

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16 See Christopher W. Moore's The Mediation Process, and Nancy Roger's and Craig McEwen's Mediation: Law, Policy, and Practice, for more information.

As a person new to the situation, a mediator often is able to develop relationships with each of the parties as a trusted outside process advisor.

In the Fort Worth highway dispute, the mediators spent four months interviewing some 25 parties individually, carrying messages, identifying key stakeholders, and building relationships in order to identify co-convenors and a list of parties to invite to the first meeting. The intervention occurred after the parties opposing the highway succeeded in stopping the highway department's plan for expansion and before any alternative proposals could be developed. The timing provided a clear window of opportunity for the mediator. The mediator helped develop co-convenors to invite parties to the table. The co-convenors were the Mayor and a Texas Highway Commissioner; together they represented much of the formal authority in the conflict, and as a team were extremely persuasive.

B. How to Identify and Select a Mediator

Selecting a mediator should be done in much the same way as you might select a consultant. Determine whether the persons, team, or firm:

- Can do the work.
- Has done this kind of work before.
- Has appropriate knowledge of your situation.
- Charges acceptable fees.
- Can start work on a timely basis.
- Can provide references familiar with the mediator's work and your needs.
- Is likely to be acceptable to the parties and potential parties.

If possible, the initiating committee or similar combination of parties should take part in the hiring process.

If parties are not talking to each other, the intervention is commonly divided into two phases. In the first phase the mediator is invited by a small number of parties. The mediator's task is to expand participation, help build the forum, and bring the parties together. At the first meeting, the parties can determine if they wish to continue with the mediator who helped them to the table or whether they want to look elsewhere. Once this decision is made, the second phase begins.

Finding mediators is much less challenging than it was a decade ago. The field of conflict resolution has grown rapidly and with it, the number of experienced mediators. The Institute

for Water Resources has, as of this writing, highly qualified mediators under an omnibus contract to provide assistance to the Corps.

For further assistance on this program contact:

Institute for Water Resources **202/355-3090**
U.S. Army Corps of Engineers
Casey Building
Fort Belvoir, VA 22060

There are four additional organizations that can help you identify qualified mediators:

Administrative Conference of the United States **202/254-7020**
2120 L Street, NW, Suite 500
Washington, D.C. 20037

ACUS is an independent federal agency providing administrative support and advice for other Federal Organizations. The Conference recently developed a comprehensive roster of persons and organizations offering third party services to the Federal Government.

Federal Mediation and Conciliation Service **202/653-5256**
2100 K Street, NW
Washington, D.C. 20427

FMCS is an independent agency providing assistance in resolving disputes. Formerly a part of the U.S. Department of Labor, the agency focuses on labor-management issues, but its experienced mediators and conciliators can assist in a wide range of other matters.

National Institute for Dispute Resolution **202/466-4764**
1901 L Street, Suite 600
Washington, D.C. 20036

NIDR is a foundation and clearinghouse for information on conflict resolution. Staff members can help you identify qualified intervenors.

Society of Professionals in Dispute Resolution **202/833-2188**
1730 Rhode Island Avenue, NW, Suite 909
Washington, D.C. 20036

SPIDR is a professional association of mediators and arbitrators which maintains directories and can help you identify members who may assist you.

VI. SUMMARY

Bringing stakeholders together to design a forum for joint decision making can be a productive experience that builds a shared perspective of the situation and leads to a process that everyone supports. The obstacles to getting parties to the table are numerous, but most can be overcome in a non-coercive manner that is consistent with the principles of joint decision making. Several principles undergird the recommended activities.

Assessing the range of available forums for processing disputes that come to your desk is the first and most critical skill you have in dealing with conflict. Don't be dragged into a conflict in any other role than the one you choose. Construct the table carefully. Prepare for future sound management through building collaborative processes. And always remember that getting to the right table is the essential first step in getting to the right decision -- for you, for the agency, for contending outside parties, and for the broader public interest.

APPENDIX A

A GUIDE TO SITUATION ASSESSMENT*

When you are involved in a difficult situation, ongoing assessment of the actors, issues, and other dynamics is essential to developing effective strategy and making wise choices. Broad participation in an analysis and assessment process by all the parties will help build a shared perspective on the problem and the steps necessary to move forward. Indeed, joint analysis is often a key step in bringing parties to the table.

The following guide offers a series of questions to help you identify useful information. The commentary is specifically focused on data from the analysis that will impact the building of a forum and the getting-to-the-table stage of disputes.

Assessment also is useful for developing and clarifying your interests in preparation for negotiations. While this task is not emphasized here, we encourage you to be well prepared as you enter negotiations.

For further information on how to conduct an assessment, we especially recommend the Carpenter and Kennedy book cited below.

I. THE PARTIES, THEIR RELATIONSHIPS, AND THEIR NEEDS

A. Who are the parties?

- Who is responsible for making the decision?
- Who may be affected by potential solutions?
- Who may be able to block or ensure a particular decision?

Understanding the broad set of stakeholders can help you begin to assess how many persons or organizations will need to be involved -- and how much narrowing can be accomplished.

B. How is each party organized?

- Are the parties primarily organizational entities?
- What is their structure -- hierarchical? collective?
- Does each organization have identified leadership?

- What is the relationship between the leadership and others?

If each party is well organized and will vest responsibility in its leadership, ascertaining representatives will be easier.

C. What is the power base of each of the parties?

Of the parties who do not have formal authority for the decision, but seek to influence the decision:

- Does any party have the capacity to block decisions they do not approve?
- Does any party have an incentive to escalate the conflict?
- What is the capacity of each party to sustain its involvement over time?
- Does any party need another party in order to accomplish its goals? Does interdependence exist between these parties and the decision makers?
- Does any party have past experience with joint decision-making processes?
- Would any party need specific assistance to effectively participate in a joint decision-making process?

If some parties have the capacity to block decisions, they will certainly need to be involved in the process. If parties have the capacity to sustain activities, they may be able to effectively participate in a joint decision-making process and stalling by decision makers will not be effective. If the parties need each other to accomplish their objectives, joint decision making may be appropriate.

Of the parties who do have formal authority for the decision:

- Can the parties make and implement any decision they please?
- Can the parties protect their essential interests in the decision no matter how the decision is made? How?
- Are the parties constrained by previous decisions or decisions made by others (e.g., legislative bodies, precedent)
- Can the parties sustain their involvement over time in any kind of process (e.g., legal, negotiated)
- Do the parties need other parties to accomplish their goals?
- Do the parties have any experience with joint decision-making processes?

If the parties can make and implement any decision they please, reasons for entering joint decision making will be for other than their substantive interests. If they cannot, they may seek a process where they can protect their essential interests and sustain their involvement over time.

D. How has power been used in the situation?

- Have any of the parties used their power such that other parties have felt it has been to prevent them from reaching their goals?
- Have any of the parties used their power to help other parties?

If one of the parties has systematically used its power in a direct attempt to injure other parties, those parties will be distrustful and be very wary of joint decision-making processes.

E. What do each of the parties want?

- What are the stated positions of each party?
- What are the stated goals of each party?
- What are the underlying interests of each party?
- What are the dominant values that appear to guide the actions of each party? Are they mutually exclusive?
- Do any of the positions, goals, interests, values, or issues of any party challenge the identity of other parties?
- Does this situation represent high stakes for any party?
- Are there common interests which might provide the basis for an agreement?

Knowing what motivates each of the parties and whether there are overlapping interests can help predict whether the parties will see any value in coming to the table. Parties involved in identity or high stakes conflicts will need a table where each party believes their essential interests are protected.

F. Past Relationships

- Do any of the parties have a history of relationships with other parties?
- Has that history been productive or conflictual?
- Were the relationships characterized by trust and respect?
- Have any of the parties avoided other parties because they believed working relationships would be difficult?

Past relationships that worked well can be the basis for developing joint decision-making efforts. Difficult relationships, especially those characterized by distrust, may need to be addressed directly for joint decision making to be productive.

G. Current Status of Relationships

- Has the nature of the relationships between the parties changed over time?
- Are there existing working relationships?
- How are the parties communicating with each other?
- If they are not communicating directly, are there any trusted intermediaries?
- Do the parties accept each other's role in developing a joint agreement?

If the current relationships are healthy, joint decision making will help maintain strong relationships. If current relationships are contentious or characterized by lack of trust, a strong past relationship, a desire for a future relationship, or high levels of interdependence can mitigate current difficulties.

H. Desire for Future Relationships

- Do any of the parties desire a future working relationship with other parties?
- Will the parties need to work together on implementing an agreement?
- Are the parties forced to interact regularly because of the nature of their work or networks?

A desire for a future working relationship can be a strong impetus for using joint decision-making processes.

I. Who are the primary stakeholders?

- Who are the primary stakeholders? Why?
- Who are the secondary stakeholders?

Primary stakeholders will probably need to be directly involved in joint decision making. Secondary stakeholders may need to be kept informed or participate only at key points in the process.

II. THE SUBSTANCE

A. What are the issues?

- How does each party describe its own central issues?
- Do the issues differ between those who have authority for the decision and those who seek to influence the decision?
- Can all the issues be addressed in a joint decision-making process?

- Is resolution of the issues likely to be precedential?
- Are there secondary issues that may have an impact on the process or the outcome?
- Is there a framing of the issues that will address the concerns of all the parties?

Once the issues are clear, some determination can be made about how they can be approached. Some issues may be addressed only through one approach. Others may be addressed through a range of approaches. Putting some issues on the table or taking others off may be a pre-requisite for some parties agreeing to come to the table.

B. Are the issues framed as integrative, distributive, or redistributive?

- Are the issues either-or?
- Can distribution or redistributive issues be reframed as integrative?
- Can the resources be increased?

Integrative issues -- which by definition are those that can be resolved by meeting everyone's needs -- are the easiest to negotiate and promote cooperative approaches. Distributive issues -- such as how shall this new money be allocated -- often produce competitive orientations. Redistributive issues -- such as how shall the city's agencies respond to a 10 percent budget cut -- promote adversarial approaches. Either-or issues -- such do we build the highway or not? -- also promote adversarial approaches. Reframing the issues or increasing the resources available can help promote cooperative approaches.

C. How does each party see the available options for each issue?

- Have options been developed for each central issue? For secondary issues?
- Are the options well defined?
- Have all the potential options been explored by all the parties?
- Do any of the options seem to meet the needs of all the parties?
- Does any party feel that none of the options meets its needs?
- If new options are generated, will extensive or expensive further study be required?

If all the potential options have been generated and none seems to meet the needs of the parties, joint decision making may be difficult. If new options can be created that better meet the needs of the parties, joint decision-making processes may be appropriate. If new options require extensive or expensive study, pre-negotiation protocols should address the group's ability to generate new options.

C. What are the data and information needs?

- Do each of the parties believe sufficient data is available?
- Are the data and their analysis considered trustworthy by the parties?

- Will each party feel comfortable working with a common body of data?

Developing a common understanding of the problem may require further data collection or additional analysis. Each party must feel comfortable with the data.

III. BACKGROUND, CONTEXT, AND FORMAL PROCESS

A. What is the history of the situation?

- Have there been several stages (e.g., latent, emerging, litigation)?
- Have external events influenced the situation? How? Will they affect a decision-making process or the outcomes?

The history of the situation may be a guide to future action for disputants and the third party.

B. Are there any parameters set externally that must be followed?

- Are there any statutes or regulations that govern action in this situation? Is there any flexibility?
- Have there been any similar situations whose outcome will influence what happens here?

The external context may limit what is possible or what the parties believe is possible.

C. Is there a formal process typically used for resolving these issues?

- Can all the stakeholders use the formal process?
- Is the formal process adjudicative, administrative, consensual or legislative in nature?

The formal process often helps define the informal process. Joint decision-making processes may only be able to produce advisory outcomes if formal legislative or judicial action is needed. If all of the primary stakeholders cannot participate in the formal process, they may seek to sabotage the formal process or engage in alternatives.

IV. STRATEGIC ISSUES

A. Are there any likely existing forums for resolving the issues?

- Are there any forums which have been used to resolve similar situations in the past? Have they been perceived as productive?
- Do some of the issues require a certain kind of forum (i.e., constitutional issues may require court involvement)?

The existence of several forums may allow some parties to go forum shopping. Sometimes the choice of forum is limited by the issues.

B. How does each party see its alternatives?

- How does each party see its best alternative to a negotiated agreement? Its worst alternative? Its most likely alternative?

- Do any of the forums lack credibility from the perspective of any party?

If the parties have superior strategic alternatives to a joint process, they may pursue those alternatives. Some forums may be particularly difficult to "sell" to some of the parties.

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* Development of this assessment guide has been assisted by others who have attempted similar tasks.

For additional materials on assessment and analysis, see:

Carpenter, Susan and W.J.D. Kennedy, Managing Public Disputes, San Francisco: Jossey Bass, 1988, pp. 71-91.

Lincoln, William F., *et al*, The Course in Collaborative Negotiations, Tacoma, WA: National Center Associates, 1986, pp. 64-75.

Marcus, Philip A., "A Procedure for Assessing Environmental Disputes" in Philip A. Marcus and Wendy M. Emrich, eds., Environmental Conflict Management: Working Paper Series, Council on Environmental Quality, 1981.

Potapchuk, William and Chris Carlson, "Using Conflict Analysis to Determine Intervention Techniques", Mediation Quarterly, No. 16, Summer 1987, pp. 31-43.

APPENDIX B

JOINT DECISION-MAKING AND PUBLIC DISPUTES: AN ANNOTATED BIBLIOGRAPHY

I. OVERVIEWS OF JOINT DECISION-MAKING PROCESSES

Administrative Conference of the United States, Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution, Washington D.C.: Administrative Conference of the United States, 1987.

This mammoth federal publication provides a comprehensive overview of various conflict resolution techniques and their use in federal agencies.

Amy, Douglas, The Politics of Environmental Mediation, New York: Columbia University Press, 1988.

The first half of the book presents an excellent overview of environmental dispute resolution and the second part analyzes the impact of dispute resolution on the overall interests of the public, private, and citizens' sectors.

Bingham, Gail, Resolving Environmental Disputes, Washington, D.C.: Conservation Foundation, 1986.

This overview of the history of environmental dispute resolution discusses the development of the field of environmental mediation and analyzes the characteristics of 169 mediated environmental disputes.

Carpenter, Susan L. and W.J.D. Kennedy, Managing Public Disputes. San Francisco: Jossey Bass, 1988.

This 300-page book provides managers with step-by-step guidelines for designing workable conflict management strategies for public disputes. Case examples illustrate the procedures.

Laue, James H., ed. "Using Mediation to Shape Public Policy", Mediation Quarterly (Summer 1988).

This collection of articles by leaders in the field focuses on applications of conflict resolution in the policy-making process.

Susskind, Lawrence E. and Jeffrey Cruikshank, Breaking the Impasse: Consensual Approaches to Resolving Public Disputes, New York: Basic Books, 1987.

This book presents practical recommendations for improving the decision-making process in public disputes through assisted and unassisted negotiation and reviews important history and concepts of conflict resolution techniques used in such disputes.

II. OVERVIEWS OF SPECIFIC TECHNIQUES

Administrative Conference of the United States, Negotiated Rulemaking Sourcebook, Washington, D.C.: Administrative Conference of the United States, 1990.

This comprehensive guide to negotiated rulemaking focuses on federal agency applications. Each step of the process is covered and includes case studies.

Fisher, Roger and William Ury, Getting to Yes: Negotiating Agreement Without Giving In. New York: Penguin Books, 1981.

This well-written primer on "principled negotiation" that should be on everyone's bookshelf.

Moore, Christopher W., The Mediation Process: Practical Strategies for Resolving Conflict. San Francisco: Jossey-Bass, 1986.

This is an excellent and practical book on how to mediate. A series of examples helps illustrate the methods at each stage of the mediation process.

Rogers, Nancy H. and Craig E. McEwen, Mediation: Law, Policy, Practice, Rochester, NY: Lawyers Cooperative Publishing, 1990.

This comprehensive sourcebook on mediation is designed for attorneys who "need quick, reliable assistance for protecting your client's interest." Purchasers of the book receive regular updates.

Straus, David and Michael Doyle, Making Meetings Work, New York: Berkeley Publishing Group, 1982.

This is a straightforward introduction to facilitated problem solving and principles for successful meetings.

III. STRATEGIC APPROACHES TO PROCEDURAL DECISIONS

Bidol, Patricia, *et al*, Alternative Environmental Conflict Management Approaches: A Citizens' Manual, Ann Arbor: University of Michigan, Environmental Conflict Project, 1986.

This spiral-bound, 250-page manual helps citizen-based environmental groups develop a strategic understanding of the uses of negotiation, mediation, and collaborative problem solving.

Clark, Peter B. and Francis H. Cummings, Jr., "Selecting an Environmental Conflict Management Strategy", in Philip A. Marcus and Wendy M. Emrich, eds., Environmental Conflict Management: Working Paper Series, Washington, D.C.: Council on Environmental Quality, 1981, pp. 11-33.

The authors have written an early and still valuable article on how federal agency managers can develop an environmental conflict management strategy.

Freeman, R. Edward, Strategic Management: A Stakeholder Approach. Boston: Pitman Publishing, 1984.

This is written for corporate managers, but it is helpful for those in the public arena for thinking through the stakeholder question, the reasons one should work with stakeholders, and the strategic approaches a manager can use to work with stakeholders.

IV. APPLICATIONS OF JOINT DECISION MAKING TO SPECIFIC ENVIRONMENTAL ISSUES

Bacow, Lawrence and Michael Wheeler, Environmental Dispute Resolution, New York: Plenum Publishing Company, 1984.

Analyzes 12 environmental disputes and their negotiated resolution in the light of current dispute resolution theory.

Keystone Siting Process Group, "The Keystone Siting Process Handbook: A New Approach to Siting Hazardous Waste Management Facilities". Austin, TX: Texas Department of Water Resources, 1984.

This practical manual discusses how to develop a collaborative process for siting hazardous waste management facilities.

Delli Priscoli, Jerome , "Conflict Resolution for Water Resource Projects: Using Facilitation and Mediation to Write Section 404 General Permits", Environmental Impact Assessment Review 7 (1987), pp. 313-326.

The author analyzes two cases where alternative dispute resolution techniques were applied, and evaluates them in light of current negotiation theory.

Robinson, Susan G. and Joni L. Leithe, Building Together: Investing in Community Infrastructure, Washington, D.C.: National Association of Counties, National Association of Home Builders, Government Finance Officers Association, 1990.

This loose-leaf guide, available from all three associations, provides a valuable how-to guide for consensual approaches to infrastructure planning.

V. SPECIFIC FOCUS ON THE PRE-NEGOTIATION STAGE

Gusman, Sam, "Selecting Participants for a Regulatory Negotiation", Environmental Impact Assessment Review 4, 2 (Spring 1983), pp. 195-202.

The author discusses the importance of who is at the table and offers guidelines for selecting negotiators.

Laue, James H., *et al,* "Getting to the Table: Three Paths", Mediation Quarterly 22 (Winter 1988), pp. 7-21.

This article presents case studies of the getting-to-the-table phase in three complex disputes -- a highway dispute, a water allocation dispute, and a comprehensive plan dispute. Issues involved in building a forum are discussed.

Murray, John S., "Third Party Intervention: Successful Entry for the Uninvited", Albany Law Review 48, 3 (Spring 1984), pp. 573-615.

This article discusses the major factors that influence the likely success of the third party to bring disputants to the table for mediated negotiations.

Potapchuk, William and Chris Carlson, "Using Conflict Analysis to Determine Intervention Techniques", Mediation Quarterly, 16 (Summer 1987), pp. 31-43.

The authors develop a comprehensive framework for analyzing a conflict which can help ascertain the appropriate intervention technique.

APPENDIX C

SAMPLE PROTOCOLS

Organizational Protocols
Zoning Ordinance Working Group
Loudoun County

Approved January 15, 1990

I. Mission

The mission of the Zoning Ordinance Working Group (ZOWG) is to recommend a draft zoning ordinance, reflecting citizen involvement, to the Loudoun County Planning Commission.

II. Open and Interactive Process

a. Open Meetings. All meetings of the ZOWG are open to the public and the media. Meetings of the ZOWG are subject to openness in government laws established by the Commonwealth of Virginia. Three or more members of the ZOWG may not meet to discuss the ZOWG business unless the meeting date and time has been publicized.

b. Interaction with the Broader Public. The ZOWG shall hold a variety of community meetings to provide specific opportunities for other members of the public to participate in its activities. These meetings will include but not be limited to public briefing sessions where the ZOWG and the public will have an opportunity to learn about particular sections of the draft zoning ordinance, public input sessions where members of the public will have an opportunity to comment on the draft zoning text, and public comment sessions where members of the public will have an opportunity to comment on ZOWG's work.

III. Decision Making and Internal Organization

a. Use of Consensus. The ZOWG will operate by consensus. ZOWG decisions will be made only with concurrence of all members represented at that meeting. No member can be outvoted.

b. Failure to Reach Consensus. If the ZOWG fails to reach consensus on changes to any section of the draft zoning ordinance, the section shall be submitted as written without

recommendation for change and the ZOWG shall forward issues, alternatives, and supporting information to the Planning Commission.

c. Officers. The ZOWG shall select a chair and vice chair. These officers will serve on the Managing Committee. They also will serve as primary liaisons between the ZOWG, organizations throughout Loudoun County, and bodies of Loudoun County government. The officers will not have major role in running ZOWG meetings.

d. Managing Committee. The Managing Committee will be to review draft agendas, deal with coordination and logistical issues, and review and approve meeting plans for the community meetings. The Managing Committee will consist of the Chair and Vice Chair of the ZOWG, the Loudoun County staff coordinator, and the facilitator.

e. Committees. The ZOWG may choose to establish other committees to address specific issues. Committees will operate by consensus. Committees are not authorized to make decisions for the ZOWG unless the ZOWG explicitly grants its authorization.

f. Agendas. Draft meeting agendas will be developed by the facilitator, reviewed by the Managing Committee, as necessary, and approved by the ZOWG.

g. No Alternates. ZOWG members may not be represented by alternates.

h. Meeting Summaries. A draft summary of each meeting shall be prepared by a Recording Secretary from the County staff, which includes an attendance record, a summary of actions taken at the meeting, and other pertinent information. The Meeting Summary also shall note sections of the draft zoning text that the ZOWG has approved and include sections of the draft zoning text that have been modified.

IV. Groundrules for Interaction

a. Groundrules. Members of the ZOWG shall seek to participate constructively in meetings.

Groundrules for constructive interaction include:

- Each member is to be treated with courtesy and respect.
- Listen carefully.
- Focus on the problem to be solved, not the personalities.
- Be brief and clear in your comments.
- Focus on the current agenda item.
- Focus on problem-solving, not fault finding.
- No smoking.

These groundrules may be amended at any meeting.

b. Enforcement of the Groundrules. Groundrules shall be monitored and enforced by the facilitator and members of the ZOWG.

V. Responsibilities of Members of the ZOWG

a. Attendance. Members of the ZOWG shall attend all meetings of the ZOWG. Failure to attend two meetings in any four week period shall be sufficient cause for removal of the member by the Board of Supervisors.

b. Financial Disclosure. Members of the ZOWG shall file a financial disclosure form with the Clerk of the Board of Supervisors by January 15, 1990. Failure to file the form shall be sufficient cause for removal of the member by the Board of Supervisors.

c. Preparation for Meetings. Members of the ZOWG shall read appropriate materials and arrive prepared to work.

VI. Responsibilities of the Facilitator

a. Task. The primary task of the facilitator is to guide the meetings of the ZOWG within the Organizational Protocols. These responsibilities include managing the ZOWG's agenda, helping the ZOWG stay on task, and helping members of the ZOWG develop consensus. The facilitator shall not express his/her views on the zoning ordinance.

b. Oversight. Oversight of the facilitator is regulated by the contract between the facilitator and Loudoun County. Within the contract is a provision for the ZOWG to recommend to the County that the facilitator no longer be retained. The County will provide a written response to the recommendation.

VII. Changes to the Organizational Protocols

a. Consensual Changes. All changes to these Organizational Protocols can be made at any meeting of the ZOWG and shall be made by consensus.

b. Parameters. Changes to the Organizational Protocols shall reflect the "Recommendations For A Citizen Involvement Process For The Review Of Loudoun County Zoning Ordinances" adopted by the Board of Supervisors.

ENVIRONMENTAL PROTECTION AGENCY

AHERA NEGOTIATED RULEMAKING COMMITTEE
Organizational Protocols

The Committee will operate according to the following rules:

I. DECISION MAKING

A. The Committee will operate by consensus. Committee decision will be made only with the concurrence of all members represented at the meeting. No member can be outvoted.

B. Smaller working groups may be formed to address specific issues and make recommendations to the Committee. Work groups are open to any member or his or her designee. Work groups will operate by consensus. Working groups are not authorized to make decisions for the Committee as a whole. Working group meetings will be held between the full sessions and will be scheduled in the same location and time whenever possible. Each Committee member will be notified of all working group meetings.

C. Committee members may be represented by alternates.

D. Meeting agenda will be developed by consensus.

E. If a deadlock or impasse is declared by any member, the facilitator will work with the deadlocked members to resolve the impasse.

F. A caucus can be declared at any time.

II. AGREEMENT

The agreement reached will take the form of a written statement that will be signed by all the members. The goals of the Committee will be to produce a preamble and a rule ready for publication in the Federal Register. EPA will use the consensus reached in these negotiations as its notice of proposed rulemaking. To the extent the parties do not reach consensus on all issues, EPA will draft a notice of proposed rulemaking consistent with the agreement that is reached.

III. SAFEGUARDS FOR THE MEMBERS

A. All members must act in good faith in all aspects of these negotiations.

B. Specific offers and statements made during the negotiations will not be used by other members or the organizations which they represent in any other forum or in litigation.

C. Any member may withdraw from the negotiations at any time without prejudice.

D. Personal attacks and prejudiced statements will not be tolerated.

E. No discussions characterizing the position of any other member or the interest he or she represents will be held with the press during the negotiations even if the member withdraws, unless that position is a matter of public record.

F. All members agree not to divulge information shared by others in confidence even if they withdraw.

IV. COMMITTEE MEETINGS

A. The negotiations will be conducted under the Federal Advisory Committee Act (FACA). Each negotiating session will be announced in the Federal Register, prior to the meeting and will be open to the public. Minutes of Committee meetings and working group meetings will be kept and made available to the public upon request after review and approval by the Committee.

B. After negotiations have begun, additional members may join the Committee only with the concurrence of the Committee and only if within the confines of the FACA Character. Members may invite specialists to participate in full committee sessions subject to committee approval.

C. Committee members or an alternate commit to attend each full negotiating session.

D. The Committee may discontinue negotiations at any time if the discussions do not appear successful.

V. SCHEDULE

Unless otherwise agreed upon, the negotiations will be competed by April 3, 1987.

VI. FACILITATORS

Owen Olpin and Eileen Hoffman will serve as the neutral facilitators working with all the members to ensure that the process runs smoothly. The facilitators serve with the consensus of the committee. The Conservation Foundation will provide assistance and logistical support to the full Committee and the working groups.

REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188
Exp. Date: Jun 30, 1986

1a. REPORT SECURITY CLASSIFICATION Unclassified	1b. RESTRICTIVE MARKINGS
2a. SECURITY CLASSIFICATION AUTHORITY	3. DISTRIBUTION/AVAILABILITY OF REPORT Unlimited
2b. DECLASSIFICATION/DOWNGRADING SCHEDULE	
4. PERFORMING ORGANIZATION REPORT NUMBER(S)	5. MONITORING ORGANIZATION REPORT NUMBER(S) IWR Working Paper 90-ADR-WP-3
6a. NAME OF PERFORMING ORGANIZATION The Conflict Clinic, Inc. 6b. OFFICE SYMBOL (If applicable)	7a. NAME OF MONITORING ORGANIZATION USACE, Institute for Water Resources
6c. ADDRESS (City, State, and ZIP Code) George Mason University Fairfax, Virginia	7b. ADDRESS (City, State, and ZIP Code) Casey Building Ft. Belvoir, VA 22060-5586
8a. NAME OF FUNDING/SPONSORING ORGANIZATION USACE, Office of the Chief Counsel 8b. OFFICE SYMBOL (If applicable) CECC-ZA	9. PROCUREMENT INSTRUMENT IDENTIFICATION NUMBER
8c. ADDRESS (City, State, and ZIP Code) 20 Massachusette Avenue, NW Washington, DC 20314-1000	10. SOURCE OF FUNDING NUMBERS PROGRAM ELEMENT NO. / PROJECT NO. / TASK NO. / WORK UNIT ACCESSION NO.
11. TITLE (Include Security Classification) Getting to the Table - A Guide for Senior Managers	
12. PERSONAL AUTHOR(S) William R. Potapchuk, James H. Laue, and John S. Murray	
13a. TYPE OF REPORT Final 13b. TIME COVERED FROM _____ TO _____	14. DATE OF REPORT (Year, Month, Day) 90/10 15. PAGE COUNT 60
16. SUPPLEMENTARY NOTATION	

17. COSATI CODES			18. SUBJECT TERMS (Continue on reverse if necessary and identify by block number)
FIELD	GROUP	SUB-GROUP	Joint decision-making forums, four-step method, agency strategy, designing & building the forum, public disputes sample protocols.

19. ABSTRACT (Continue on reverse if necessary and identify by block number)

The purpose of this guide is to offer a four-step process for designing a forum to help you get to the table. Mini-case studies which represent composities of actual conflicts involving the Corps are presented throughout. A variety of approaches are suggested for overcoming the obstacles you are likely to encounter. This guide focuses on both public disputes and contractual disputes that occur in construction projects, the emphasis is on public disputes.

20. DISTRIBUTION/AVAILABILITY OF ABSTRACT ☐ UNCLASSIFIED/UNLIMITED ☒ SAME AS RPT. ☐ DTIC USERS	21. ABSTRACT SECURITY CLASSIFICATION Unclassified
22a. NAME OF RESPONSIBLE INDIVIDUAL Jerome Delli Priscoli, Ph.D.	22b. TELEPHONE (Include Area Code) (703) 355-2372 22c. OFFICE SYMBOL CEWRC-IWR-XO