Collaborative Approaches:

A Handbook for
Public Policy Decision-Making
and Conflict Resolution

August 2000

Obtaining Assistance

Oregon's Public Policy Dispute Resolution Program (PPDRP) promotes the use of collaborative processes for reaching agreements and resolving public policy disputes involving state agencies. The PPDRP encourages the design, development, and implementation of appropriate processes that allow decision-makers and affected parties to collaboratively resolve public policy controversies. Leadership for the PPDRP is provided by a steering committee consisting of representatives from the Oregon Dispute Resolution Commission (ODRC), the Department of Justice, the Department of Administrative Services and the Governor's Office.

Four Public Policy Dispute Resolution Coordinators, each serving specific clusters of state agencies, are available to assist state agencies, local governments, and others in the effective use of collaborative processes. Their assistance may involve:

- Helping to determine the appropriate collaborative process for a specific issue or controversy.

- Working with agencies to review their decision-making processes and improve their dispute resolution systems.

- Assisting in procuring the services of an appropriate impartial facilitator or mediator.

- Training and educating government officials, interest groups, and the public on collaborative problem-solving skills.

- Providing information on dispute resolution processes to state agencies and the public through conferences and publications.

- Assisting with the design of dispute resolution training curricula and the procurement of qualified trainers.

- Evaluating completed dispute resolution processes.

- Providing grants and technical support for collaborative processes to resolve complex public policy disputes.

More information on the Public Policy Dispute Resolution Program is available on the World Wide Web at www.odrc.state.or.us/ppdrp.htm or by calling the Oregon Dispute Resolution Commission at 503-378-2877 or 877-205-4262 (toll free in Oregon).

In addition, the Department of Justice, in collaboration with ODRC, maintains the State Agency Mediator Roster and is responsible for publishing model rules on mediation confidentiality and collaborative dispute resolution, as well as ADR-related bulletins, forms and agreements for state agencies. Information on these resources is available on the World Wide Web at www.doj.state.or.us or by contacting the ADR Coordinator at the Department of Justice at (503) 378-4620.

Copies of this document may be obtained by contacting the Oregon Dispute Resolution Commission
at 503-378-2877 or toll free in-state at 877-205-4262.

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We have thought of peace as passive and war as the active way of living. The opposite is true. War is not the most strenuous life. It is a kind of rest cure compared to the task of reconciling our differences. From war to peace is… from the futile to the effective, from the strategic to the active, from the destructive to the creative way of life…. The world will be regenerated by the people who rise above these passive ways and heroically seek, by whatever hardship, by whatever toil, the methods by which people can agree.

-Mary Parker Follett

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As a society – a community of Oregonians – the problems we face are becoming increasingly complex. The pressures of population growth, the conflicting interests and values of our citizenry, the tough choices about how to manage our scarce public resources… there are no obvious solutions to these complex problems.

Over my tenure in political office, I have come to believe that we can make better decisions if we make them together. I believe that by working together to create mutually agreeable solutions to problems, we are more likely to avoid overlooking important issues, alienating certain stakeholders, or endlessly defending our decisions against legal challenges.

In Oregon, we have experienced numerous successes by tackling the tough issues through collaborative efforts. And I believe that, in the 21st Century, Oregonians will experience many more successes in the same manner. These efforts will help strengthen the vitality and character of Oregon that make it the place we want to live.

This handbook is for any agency, organization, or individual involved in the challenging work of making public policy decisions that will shape Oregon's future. The more that we can wisely employ the tools of consensus building and collaborative problem solving, the better able we will be to serve the public interest.

I hope you find the approaches and methods presented here to be as useful in resolving problems as I have. I am convinced that collaborative efforts will pave the path to Oregon's promising future, or, in Wallace Stegner's words, will provide us with the opportunity "to create a society to match its scenery."

> *"…one cannot be pessimistic about the West. This is the native home of hope. When it fully learns that cooperation, not rugged individualism, is the quality that most characterizes and preserves it, then it will have achieved itself and outlived its origins. Then it has a chance to create a society to match its scenery."*

Wallace Stegner, from The Sound of Mountain Water

John A. Kitzhaber, M.D.

Foreword

Oregon is a nationally recognized leader in using collaborative processes to shape public policy and resolve controversies. Several things contribute to making this possible.

■ The Oregon State Legislature has demonstrated bipartisan support for alternative dispute resolution (ADR) through the enactment of enabling statutes and funding mechanisms for the Public Policy Dispute Resolution Program (PPDRP). The PPDRP supports agencies and stakeholders interested in using collaborative processes to resolve public policy controversies.[1]

■ Natural resource agencies have had assistance from the PPDRP since 1991. Their experience with collaborative processes established negotiated rule making and mediation as valuable tools for public policy decision-making and led to the expansion of the PPDRP in 1998 to serve all state agencies.

■ The Governor's Office has played a hands-on role in promoting collaborative approaches to public policy decision-making both by example and through its policy directives. The Governor's Dispute Resolution Steering Committee, which includes members representing the Governor's Office, Department of Justice, Oregon Dispute Resolution Commission and state agencies, meets regularly to provide guidance and support for the PPDRP.

■ The Department of Justice is committed to the appropriate use of collaborative conflict resolution processes. The Department's dispute resolution initiatives and customized staff trainings have resulted in an expanded use of ADR by staff attorneys. Additionally, the Department supports the use of ADR by state agencies by publishing model rules on confidentiality and collaborative decision-making, by maintaining the State Agency Mediator Roster, and by developing and distributing various bulletins, forms and other ADR-related resources.

■ The Oregon Dispute Resolution Commission (ODRC) and its Executive Director provide leadership and administrative support for the PPDRP. Because the structure of the PPDRP is not centralized within a single agency, the Commission and its staff play a key role in coordination and program development.

This broad-based support is the foundation of Oregon's successful public policy dispute resolution efforts. To sustain the success of these efforts, several things are critical. First, collaborative processes should be used only when appropriate. To this end, thorough assessments are necessary prior to initiating a collaborative process. Second, participants should understand and have skills in collaborative (interest-based) negotiation. And third, neutral facilitators and mediators should be used to assist in the negotiation and resolution of public policy controversies.

This handbook aims to serve all of those objectives by providing thoughtful guidance and useful information for sponsors and participants of collaborative public policy processes.

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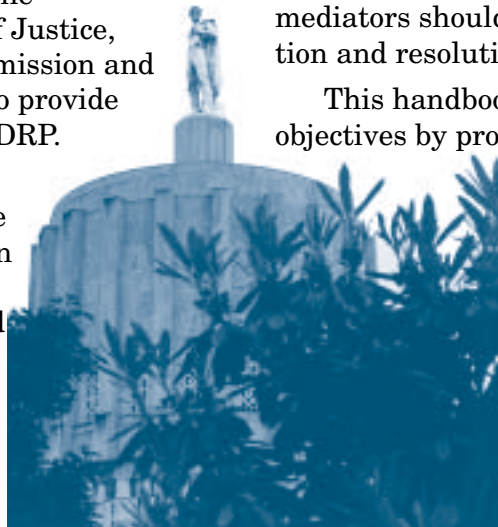
[1] In 1993, the Legislature enacted ORS 183.502 which authorizes and encourages all agencies to use alternative means of dispute resolution in any decision-making process in which conflicts may arise unless it would be otherwise prohibited by law. For official government decisions, it is wise to consult legal counsel to ensure that no violations of administrative or public records law occur.

Chapter One: Effective Governance

The Move to Collaboration

Governance, in a literal sense, is about one group of individuals or an institution exercising authority, rule, control, or management over others. For all practical purposes, however, effective governance–at least in this country–more and more is about collaboration. Contrary to most accounts, citizens want and, many would argue, need to participate in their governance structures. (Lee, 1995, p. 1)

Governments are changing the way they do business. The traditional approach of "decide, announce and defend" is becoming less common while collaborative approaches are taking center stage. These consensus-based efforts – including policy dialogues, collaborative rulemaking, and public policy mediations – bring government agencies together with affected and interested citizens to develop agreements on policies and actions to address public problems. Several factors are contributing to this change:

Changing Models of Leadership

A key component of "effective governance" is leadership. In a complex environment, leadership involves more than taking control and making decisions. Effective leaders recognize the importance of building support for decisions by engaging the public and affected interests in the policy development process. Collaborative agreement seeking processes are changing the way government develops and carries out policy initiatives.

Increasing Complexity of Problems

The growing complexity of social, economic and environmental issues fuels conflict in the public policy arena. More complex conflicts can involve several government bodies, multiple private and public interest groups, and a myriad of intertwined interests. Without great care, there's a risk that today's solutions will become tomorrow's problems. Involving affected parties in problem solving efforts can minimize this risk. In many instances, consensus-based processes can be the most effective approach to resolving these conflicts.

Scarce Public Resources

With public resources dwindling, government needs to "work smart." In shaping public policy, working smart means ensuring broad-based support so that government agencies don't spend limited resources defending unsupported initiatives or forcing unwanted programs on resistant constituents. This can be avoided by working collaboratively with stakeholders when addressing contentious public policy issues. Collaborative processes can secure the support of stakeholders and help ensure the development of creative and durable policies, programs and rules.

Public Frustration with Traditional Decision-Making

The public's resistance to and frustration with top-down decisions are commonly demonstrated through lawsuits, legislative end-runs, and other citizen-imposed barriers to implementation. These actions increase government costs by delaying or preventing the implementation of needed services and worsening the relations between government and its public. Collaborative processes can be used to avoid these adversarial actions and foster public confidence in government.

Successful Experiences with Collaborative Processes

Nationwide, collaborative processes have been used successfully on issues as diverse as allocating Medicaid beds, dispensing federal dollars for HIV protection, developing policy recommendations on affordable housing, negotiating workplace safety rules, and mediating multi-party water rights disputes. As word of the successes spread, more and more public managers and community leaders are turning to collaborative approaches to address today's complex and often contentious public policy issues.

The primary objective in producing this handbook is to help expand the use of collaborative processes to reach agreements that effectively resolve public policy conflicts. Collaborative approaches allow parties with a stake in an issue to create solutions that are agreeable to all. The act of creating mutually satisfying solutions establishes a sense of ownership. Because of this, the stakeholders are more likely to support and implement the solutions.

Using this Handbook

This handbook is designed to serve as a resource for those who might sponsor or participate in a collaborative process to address public policy issues. Chapter Two provides a basic understanding about how conflicts arise and how it may be possible to avert unnecessary conflict through skillful communication. Chapter Three describes various conflict resolution systems and provides guidance on when to use a collaborative approach. Chapter Four outlines the specific steps involved in designing and implementing a collaborative agreement-seeking process and the roles of mediators and facilitators.

The Appendices identify a number of additional resources, including a reference list of related literature and professional organizations, guidelines for using collaborative approaches, information about confidentiality, and a glossary of dispute resolution terms.

The world we have created today as a result of our thinking thus far has created problems that cannot be solved by thinking the way we thought when we created them.

-Albert Einstein

Chapter Two: Anatomy of a Conflict

Conflict is a fact of life. Actual or perceived limitations in resources, divergent or competing goals, ineffective communication, missing or erroneous information and differences in personal style are potent seeds of conflict. Although conflict is most often considered as something negative or destructive, it can have a positive side – one that promotes communication, problem solving, and positive changes for the parties involved. To be able to create positive outcomes from conflict, it is necessary to understand conflict. By understanding and addressing the causes and components of conflict, many conflicts can be prevented or successfully resolved.

Types and Causes of Conflict

Types and causes of conflict generally fall into one or more of five categories–data, structural, relationships, behavioral, and value conflicts.

Data conflicts may be caused by lack of information, misinformation, or disagreement over what data is relevant; disagreement on interpretation of data; or different data assessment procedures.

Structural conflicts are caused by disagreements over the assigned or implied patterns of human relationship. This may involve issues of authority, accountability, distribution of resources, decision-making procedures, boundaries, role definition, etc.

Relationship conflicts indicate dissatisfaction with the nature of a relationship. Issues may include lack of trust, divergent priorities and expectations, incompatibility, power imbalance, and other causes leading to relationship "dysfunction."

Behavioral conflicts are caused by strong emotions, misperceptions, poor communication, or offensive behaviors.

Value conflicts arise when people attempt to force one set of values on others. Values are beliefs that give meaning to people's lives or provide the basis for judging what is right or wrong.

Identifying and categorizing the causes of conflict and the various issues involved is only a starting point in the process of conflict resolution. Successful resolution requires that the needs or interests underlying the issues be revealed and addressed. This can be the most challenging aspect of a conflict resolution process.

Getting to the Core of Conflict: From Issues and Positions to Interests

Three elements are present in every conflict: issues, positions, and interests. Often, the interests are hidden behind the issues and positions.

Issues tend to attract the majority of the attention in a dispute. Issues are the "what" of a dispute. Disputants can argue interminably over an issue (e.g., the impacts of a proposed development) without talking about why they are concerned about the issue or how the issue should be resolved.

Positions are specific proposals disputants put forth that suggest how the conflict should be resolved. Statements such as "this development cannot be allowed" are positions.

Interests are the expression of needs or what is important. Interests drive a person's behavior and provide the motivation to seek a solution to a problem. In a conflict, interests can often be difficult to identify because the disputants are focused on the issues and their proposals for resolving the issues.

Interests are the "why" of a dispute – the reasons the dispute exists. They can be uncovered by asking open-ended questions, such as "What bothers you about this situation?" or "Why is that important to you?" or "If that happened, what would that accomplish for you?"

Separating the interests from the rest of the "debris" in a conflict is the most critical step in its resolution. Only by identifying the interests underlying the issues and positions and recognizing the different levels of importance each party gives to these interests can the disputing parties create mutually satisfying, durable solutions to conflicts. Consider the following example:

> Two men were quarreling in a library. One wanted the window open; the other wanted it closed. They bickered back and forth over how much to leave it open: just a crack, halfway, three-quarters. They were arguing so loudly that the librarian came over to find out what was the matter. She asked one man why he wanted the window open. He replied, "To get some fresh air." She asked the other why he wanted it closed. He said, "To avoid a draft." After thinking a moment, the librarian left, went into the next room, and threw open the window, bringing in fresh air without a draft.

> The two men viewed their problem as a conflict over positions and limited their discussions to those positions. If the librarian also had focused only on the two men's stated positions of wanting the window open or closed, the dispute could not have been resolved with both men satisfying their needs. By looking instead at the men's underlying interests of fresh air and no draft, the librarian invented a mutually acceptable solution.

> *(Drawn from original material by Mary Parker Follett and adapted by Fisher and Ury, 1981)*

Achieving Full and Lasting Solutions

The interests underlying issues and positions in a conflict consist of three types of interdependent needs: procedural, psychological, and substantive.

Procedural: People need to feel that they are being treated fairly. Although fairness is a highly subjective measure, it is a critical one. Even if the parties have their substantive interests met, if they do not feel that they were treated fairly in the way the conflict was resolved, they may refuse to enter into an agreement or they may attempt to block implementation.

Psychological: Everyone needs to feel that they were listened to and their ideas were respected in a negotiation. Without these qualities, mistrust can build up and overshadow otherwise acceptable solutions.

Substantive: Every party to a conflict wants to get something (e.g., money, physical resources, fair treatment, etc.). The definition of what "something" is may change over the course of a negotiation, but the outcome must ultimately satisfy each person's principal substantive needs. Often times, what may be perceived to be substantive needs are met through procedural or psychological satisfaction.

To achieve full and lasting resolution to a conflict, it is necessary for each party to feel that her/his needs in each of these categories are "satisfied."

Preventing "Unnecessary" Conflict

It is possible to prevent "unnecessary" conflicts, for example, the sorts of conflicts that arise from poor communication, lack of information, and interpersonal friction. The keys to preventing unnecessary conflict are found in self-awareness of one's attitude and communication style.

Attitude

The most critical factor determining whether a relationship will flourish or go sour is attitude. Since one's attitude is communicated through verbal, visual, and energetic channels, there is no

hiding how one really feels. Having a poor attitude will inevitably create more friction in a relationship, regardless of how much effort is put into masking it.

An attitude that is conducive to establishing productive relationships or resolving friction has the following qualities:

1. Willingness: Be willing to put forth the effort. It takes work to communicate effectively, listen earnestly, and decipher misunderstandings.

2. Openness: Be open to others' points of view. Be willing to accept that another's experience is just as valid for them as your experience is for you.

3. Respect: Respect their experience, emotions, and needs.

4. Humility: You do not know everything. Suspend your assumptions and judgments, and anticipate that you have much to learn from others.

5. Mutuality: You cannot do this by yourself. Treat the others as colleagues or allies working together to gain insight and solve problems.

Without these qualities, parties may find it difficult to resolve a dispute. In some cases, a neutral facilitator can assist parties to reach agreement despite the absence of one or more of these qualities.

One final consideration that is often overlooked, and is frequently a prime catalyst of conflict escalation, is timing. Rather than walk up to a person and unload your complaints on them, consider informing them that you would like to talk about a problem you are having and ask them if they would be willing to set up a time to do so. This simple consideration can sometimes make a significant difference.

Communication Skills

Communication involves both receiving and sending messages. For the purposes of preventing or resolving conflict, it is important to give thoughtful consideration to how to accomplish each task most effectively.

Sending Messages

How many times have you found yourself wishing you had never opened your mouth; feeling certain that had you not said anything everyone would be better off? Well, the truth is, it is generally necessary to open your mouth to communicate. Yet it is wise to do so with prudence, to ensure that the words that are spoken do not unnecessarily contribute to conflict escalation.

When trying to promote understanding and avert conflict, there are two primary reasons to speak: (1) to gain a clearer understanding
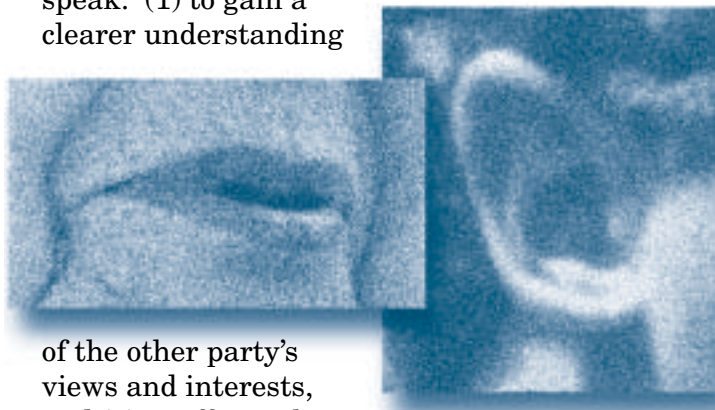
of the other party's views and interests, and (2) to effectively communicate your views and interests. A certain amount of skill is involved in doing each of these things effectively.

It is best to keep these two tasks separate. First listen to her/his story, asking questions only as necessary to get a more complete understanding of it. Wait until s/he is completely finished telling the story before offering your perspective. When listening to the story, use the following techniques to help ensure that the other party will feel s/he is being heard.

Ask Questions That Encourage Others to Talk. Good questions can be powerful listening tools. Good listening questions are those that reduce threat, build trust, and open dialogue. These questions are open-ended, and offer people a choice in how to answer instead of boxing them in, cross-examining them, or manipulating them toward your "correct" answer. Open-ended questions begin with words like what, how, describe, could you tell me more about, etc.

Show Empathy for Another's Feelings. This skill has two parts. First is the ability to sense the other person's feelings. Second is the

ability to label and acknowledge the feeling. Do this in a tentative, questioning way, allowing for the possibility that you may be reading the person incorrectly. This will encourage her/him to get more specific about what is really going on rather than get defensive. For example: "It sounds like you are...(angry, frustrated, discouraged, etc.)."

Summarize and Paraphrase Accurately.
Summarizing and paraphrasing are ways of informing the speaker what you heard her/him say. These are offered in a way that allows the speaker to correct you or clarify what s/he said if necessary. Because you do not question, judge or argue over what s/he has said, this can help reduce defensiveness and build trust. (Confluence Northwest, 1993)

Use "I" statements.
When it comes time to share your views and interests, remember to use "I" statements. Keep your comments centered on what your experience has been and what your interests are. Explain how a given situation has affected (or will affect) you, without asserting blame or responsibility for how the situation arose.

The following general guidelines will help keep your comments from offending the other party and keep the process headed in the direction of resolution, rather than escalation.

- Focus on your interests and avoid establishing a position.

- Indicate when you are making assumptions and the basis for them.

- Allow the other party their experience and perspective. When your perspective differs from theirs, refrain from implying that they are wrong. Simply state your experience and leave it at that.

- Maintain credibility. Do not say anything you know is not true; do not make promises you cannot keep. Make an effort to avoid speculation.

- Enhance legitimacy. Do not act in ways you would not want others to act toward you.

Receiving Messages

Listening is the most critical communication skill. Effective listening ensures that the message being received is the message that was intended to be sent. Done correctly, listening is anything but a passive process; it requires focused attention and a discerning mind. Listening even involves speaking; restating to the speaker what you heard and asking questions to get issues clarified. To be effective, listening skills must be actively cultivated.

Listening Techniques:

- Stop talking. You cannot listen while you are talking.

- Empathize. Try to put yourself in the other person's place so you can understand what s/he is trying to communicate and why it matters.

- Ask questions. When you do not understand, when you need more explanation, or when you want to show that you are listening, ask. But do not ask questions to embarrass, challenge, or show up the speaker.

- Be patient. Do not rush people; give them time to say what they have to say.

- Look at the other person. Faces, eyes, posture, and gestures are important communication clues. Let the other person see that you are listening.

- Get rid of distractions. Put down papers or pencils. Do not jingle change in your pocket, rap on the desk, or stare at the ceiling.

- Share responsibility for communication. Only part of the responsibility rests with the speaker. The listener also has an important part. Try to understand; if you do not, ask for clarification.

- Do not argue mentally. When you are trying to understand the other person, don't argue mentally while s/he is speaking. Internal arguing sets up a barrier between you and the speaker and keeps you from really listening.

- Listen to how something is said. We often concentrate so hard on what is said that we miss the importance of understanding emotional reactions and attitudes. Attitudes and emotions may be more important than words.

- Do not antagonize the speaker. Be aware of the effect you are having on the other person and adapt. Arguing, criticizing, taking notes, not taking notes, asking questions, and not asking questions may disrupt the speaker. You may cause the other person to hide her/his ideas, emotions, and attitudes if you are antagonistic.

- Avoid assumptions. Do not assume others use words the same as you do. Do not decide that although they did not say what they meant, you understood it anyway. Do not imagine they avoid looking you in the eye because they are lying; that they are trying to embarrass you by looking you in the eye; or that they are distorting the truth be cause they do not agree with you. Do not decide they are unethical because they are trying to persuade you or that they are angry because they are enthusiastic.

- Do not classify the speaker. Too often we classify people as certain types and then try to fit every thing they say into pigeonholes. Knowing the politics, religious beliefs, or jobs of speakers may be useful, but people are unpredictable and do not always fit into the assumed slot.

- React to ideas, not to the person. Do not let your reactions to the person influence your interpretation of what s/he says. The ideas may be good, even if you don't like the person, the way s/he communicates, or the way s/he looks.

- Avoid hasty judgment. Wait until all the facts are known before you make decisions.

- Recognize your own prejudices. Be aware for your own feelings toward the speaker, the subject, or the occasion, and allow for these biases.

(Adapted from Community Boards Program, 1984)

Creating a Supportive Environment

Other important considerations include creating an atmosphere and environment that is conducive to productive communication. The atmosphere should not be charged with emotional energy. If a heated argument has just taken place, it is probably wise to do nothing more than agree to meet at a later time when the discussion can continue. Continuing the interaction and pretending that effective communication is happening will only serve to frustrate all involved in the conversation and may have an impact on further conversations.

Body language has a powerful impact on atmosphere. Stop for a moment and imagine talking to someone who is standing in front of you with their arms crossed, with a clenched jaw, tight lips, and stern look on their face. Notice how you begin to tense up, and how the conversation becomes more competitive; your statements become more defensive and you become more wary. Now imagine that person softening, sitting down, and acknowledging your statements with nods and utterances. They are not interrupting, nor are they counteracting each point you make with an explanation or challenge. You become more able to tell your story rather than defend it. You feel more hopeful rather than pessimistic that they will really hear what you have to say.

Elements of body language that help maintain an atmosphere conducive to productive interactions include:

Posture. Maintain an open and relaxed posture. Do not lean back and appear to "recoil" from them (unless they have assumed that posture; see "Tracking and Leading" below). Instead, stay in a neutral position or lean toward them, indicating an interest in being engaged in the conversation.

Eye Contact. Maintain eye contact, but be careful not to intimidate the speaker. Keep your focus soft.

Acknowledgment. Give them the sense that you are listening and understanding them by nodding or giving verbal acknowledgments.

Tracking and Leading. To "track" someone means to notice and respond to their posture, tone, and other signs of their state of being. By tracking, you can subtly mimic these elements and, in so doing, subconsciously communicate a sense of connection. To "lead" them means to "invite" them to shift their attitude by first mimicking their posture and then assuming a different, more congenial position. For example, if both of you had your arms crossed, and you uncrossed your arms and relaxed your upper body, the other person might do the same. Tracking and leading occur all of the time, although generally at an unconscious level. To use these skills consciously and effectively, though, requires a concerted effort.

Creating an environment that promotes productive interactions is not difficult, but involves some forethought. The environment should be free of distractions and physically comfortable (lighting, comfortable chairs, etc.). It may be important to select a neutral location, so that none of the parties is left feeling at a disadvantage or uncomfortable. If unsure, it cannot hurt to ask if someone is uncomfortable or would like to have the conversation in a different place, or at a different time. This sort of courtesy goes a long way toward setting a tone of mutual respect and understanding.

Dealing with Angry People

Typically, anger and opposition can be the result of a wide range of circumstances. For example, people may display anger when they:

- Believe they have been adversely affected by something you have done.
- Are grieving over some loss and express their grief through anger.
- Are fearful of being adversely affected by something you are proposing.
- Disagree in principle with something you stand for.

The traditional way of responding to angry people is to try to convince them that they are

wrong, that they have not been hurt by something you have done, that what you are trying to do is not risky or harmful, or that the problem is under control.

The problem is that this traditional approach does not work very well when people perceive unacceptable risks and impacts or are unable to empathize or trust.

Too often public and private organizations under attack fail to build the kind of relationships that will enable them to be heard and trusted. They do not take the steps necessary to convert potential disasters into opportunities to build understanding, to enlist the support of would-be detractors, and to substantively enhance their organization's image.

The Mutual Gains Approach

- The mutual gains approach to dealing with angry people is based on the notion of "side-by-side" problem solving rather than "across-the-table" confrontation and has six key ideas at its core.

- Acknowledge the concerns of the other side. The other party believes just as strongly as you do that s/he is right.

- Encourage joint fact finding. The battle of the experts tends to convince the public that the facts do not matter and someone with credentials can be found to support almost any view.

- Offer contingent commitments along the lines of "if...then..." to minimize any impacts. Promise to compensate unintended effects - if you really think you're right, then you should be prepared to "hold people harmless."

- Act in a trustworthy fashion at all times. This is the only way to build and maintain trust. Once trust is lost, it is very difficult to regain.

- Accept responsibility, admit mistakes, and share power.

- Focus on maintaining long-term relationships. Do not lose sight of the long-term need for support to ensure implementation. Short-term victories are not enough.

(Adapted from Susskind and Alterman, 1991)

Chapter Three: Why and When to Use a Collaborative Approach

Why Collaborate?

To understand how collaborative approaches can be useful, it is necessary to distinguish them from the more "traditional" approaches to conflict resolution.

Conflict Resolution Systems

There are three types of "systems" for resolving conflicts. One of these systems is based on power, one on rights, and another on interests. Each has its own methods and characteristics, as outlined in Figure 1.

Figure 1: Conflict Resolution Systems

Basis for Resolution:	Power	Rights	Interests
Methods	War	Litigation	Mediation
	Protests and Strikes	Arbitration	Negotiation
	Legislative Decisions	Quasi-Judicial Decisions	Consensus Building
	Elections	Administrative Decisions	
Characteristics	Majority Decides Forced Changes	3rd Party Decides Competitive	Parties Decide Collaborative
Outcomes	Win/Lose or Lose/Lose	Win/Lose	Win/Win

Power-based decisions include decisions where authority, hierarchy and force prevail, such as in war. There is usually a winner and a loser in power-based systems, or in some cases significant losses for all. Rights-based decisions include litigation and administrative types of decisions. These decisions typically involve a third party decision-maker and a competitive process. Again, there is usually a winner and a loser.

Interest-based decisions include some forms of mediation and collaborative agreement-seeking processes. In these cases, the parties work together to develop mutually agreeable solutions. Because they maintain control over the outcome and focus on interests, it is more likely that all parties will come out of the process as "winners."

> *People are generally better persuaded by the reasons which they have themselves discovered than by those which have come into the minds of others. Blaise Pascale*

Labeling the power-based and rights-based methods as conflict resolution systems is somewhat misleading. In actuality, these methods are designed for making decisions, not for helping parties resolve their differences. They may be useful for settling disputed issues by deciding which side wins, but not for resolving the underlying conflicts or seeking agreement.

The traditional approaches for making public policy decisions, including administrative procedures and legislative activity, may allow for public comment but do not typically allow affected parties to be directly involved in decision-making. These methods often produce outcomes that are unsatisfactory to the affected parties and do not fully respond to their underlying interests.

Policy conflicts are the business of political life. Governors, legislators, and others are used to negotiating and mediating the resolution of conflicts. But over the past 25 years, policy conflicts have become more complex and the public more frustrated and angry over the growing list of seemingly intractable problems. While officials are working very hard to listen and be responsive to citizens, they recognize that they need more than typical public involvement techniques. They are struggling to find effective

ways to give citizens a more active role in making choices and setting priorities. (PCI p.2)

Public Involvement vs. Collaboration

Many government decision-making processes include a public involvement stage. In this stage, government officials disseminate information and request the public's feedback and input. This may be accomplished through hearings, the submittal of written comment, or various sorts of forums and other public outreach activities. Following this stage, the government officials consider the public input and weave the pertinent information into their decisions. While this approach assures an opportunity for public review and comment, there is little opportunity for true communication or a stakeholder's ability to effectively influence decision-makers.

A collaborative process is not the same as a public involvement process. In a collaborative process, stakeholders work directly with government officials to develop agreements or recommendations on public policy issues. Although both activities share the goals of informing the public, seeking meaningful input and building a basis for a decision, there are significant differences. The summary on page 12 outlines key differences between public involvement and a collaborative process.

Comparison of Public Involvement and Collaborative Processes

	Public Involvement	Collaborative Process
Participants:	Act as Advocates (Independent)	Are Decision-Makers (Interactive)
Objectives:	Hear From All Parties	Search for a Single Voice
Approach:	Parties Take Positions	Parties Focus on Interests
Activity:	Make Representations	Find Common Ground
Interaction:	Parties Act Alone	Parties Interact with Each Other
Negotiation:	Usually Behind Scenes (Not Required)	Usually in Open Sessions (Standard Practice)
Outcome:	Many Inputs/ Single Decision	One Decision or Recommendation
Timing:	Usually Prescribed	Participants Decide

(Adapted from Cormick et. al., 1996.)

Limitations of Traditional Approaches

The limitations of traditional decision-making approaches to resolve underlying conflicts among the affected parties can be attributed to certain common characteristics, including:

■ Power Imbalances: Individuals or groups may find themselves unable to compete with their opponents who may have more money, expertise, or connections. This may cause affected individuals or parties to abstain from a process because they perceive themselves as powerless and unable to hold their ground against their opposition.

■ Third Party Decisions: Traditional approaches give the decision-making authority to a third party. Some of the affected parties may have an opportunity to state their positions (e.g., testifying in public hearings, judicial proceedings or before the legislature), but they play no direct role in making the decision.

■ Limited Options: Because the parties are not directly involved in decision-making, it is unlikely that the more creative types of solutions that can arise from face-to-face negotiations will develop. Consequently, decision-makers cannot fully understand the parties' needs and interests and the trade-offs they might be willing to make. Instead, the third party decision-makers respond to the evidence presented and base their decisions on specific rules and criteria. Options that may provide better solutions by being more responsive to all parties' interests are missed.

Collaborative Approaches to Managing Conflict

A collaborative agreement-seeking process provides the opportunity to accommodate the underlying interests and needs of each party and can overcome the failings of traditional approaches. Collaborative processes involve all parties with a stake in an issue. These stakeholders (i.e., those who will be affected by the outcome and those in a position to help implement or block implementation of the outcome) come together to talk about their interests, jointly consider a wide range of options for satisfying their interests, and develop mutually acceptable outcomes. Perhaps the most important distinction between collaborative processes and traditional approaches is that the former enables persons involved to remain in control of the resolution of the conflict.

Common Features

Collaborative approaches have several common features:

Participation is inclusive and voluntary. All major interests that will be affected by the outcome and those in a position to hinder or facilitate the implementation of the decisions are identified and representatives of those interests participate in the process.

Participants have ownership of the process. There are no externally imposed procedural rules. Participants accept the responsibility for

O ften, government agencies or officials with the authority to "decide" simply exercise that authority: they act by fiat, imposing a solution that often fails to satisfy some of the disputing parties. Some decision-makers will temper their rulings by seeking "public input": they hold public hearings or convene public advisory boards. But rarely do they engage in face-to-face discussions with citizens, and rarely do they agree to share decision-making authority with these citizens.... In short, traditional means for resolving disputes at the local level often fail to reach solutions that are fair or efficient. Solutions generated by these traditional means may leave in their wake disgruntled, unhappy parties whose new goals may include delaying tactics, protests or other activities aimed at undermining the implementation of policy decisions they have "lost."

(Madigan et. al., 1990)

making the process effective and the outcome a success.

People are kept informed. Participants ensure that their constituent groups are kept up to date on the group's activities and progress to avoid surprises at the end.

A common definition of the problem is used. Participants agree on a clear description of the problem or the objective they want to address before beginning to develop proposals for solving the problem or achieving the objective.

Participants help educate each other. Participants share their interests and concerns regarding the issues and their ideas for dealing with the issues. They work together to gather and develop factual information that will help them formulate proposals.

Multiple options are developed. Participants create a range of options that could satisfy their respective needs and concerns. They focus on addressing each other's interests, not on asserting one solution to the problem.

Decisions are made by consensus. Participants work to modify proposals until all can support the decision to some degree, and, at a minimum, all "can live with the decision." No party feels that it must act to block the decision. The group recognizes that the decision is the best for everyone involved.

Participants oversee implementation. Participants identify methods to implement their recommendations and they establish a way to work together to monitor implementation.

The process supplements existing legal procedures. Collaborative processes do not replace current laws and procedures for making decisions. They are supplementary procedures that may result in an outcome that is more agreeable to all involved parties.

Common Features of Collaborative Agreement–Seeking Processes

■ Participation is inclusive and voluntary

■ Participants have ownership of the process

■ People are kept informed

■ A common definition of the problem is used

■ Participants help educate each other

■ Multiple options are developed

■ Decisions are made by consensus

■ Participants oversee implementation

■ The process supplements existing legal procedures

Advantages of Collaborative Agreement-Seeking Processes

Collaborative processes can be valuable tools for decision-making. These approaches have a number of advantages, including:

Agreements are more likely to be successfully implemented. Parties are more likely to support implementation if they understand that a plan or policy reflects their input and has been crafted to meet their basic interests. Rather than standing in the way of implementation, parties involved in the process often make commitments to participate in the implementation.

Creating new resources. Fewer federal, state, and local dollars are available to deal with critical issues facing our society. Collaborative processes can engage a range of public, private, and community institutions and in doing so bring a wider array of resources to bear on the problem.

Participants make the decision. Rather than relying on a third party, such as a judge, or representatives, such as an attorney, the participants create the process and make the decisions. This control over the process eliminates some uncertainty over outcomes and creates unique opportunities for exploring creative solutions to the problem.

Managing diversity and building common ground. Collaborative processes can help increasingly diverse communities improve inter-group relations, build trust, and find common ground.

I**ntergovernmental cooperation.** Collaborative processes can effectively involve different governmental units and non-governmental parties in building agreements on issues that cut across jurisdictional lines.

Educating constituencies. Collaborative processes can inform constituents on the complex nature of the problems and issues and the range of concerns that will need to be addressed in solutions.

Improving relationships. Many of the parties in a collaborative process will have working relationships that extend long beyond the conclusion of the process. The understanding and camaraderie they forge through the collaborative process can result in a stronger foundation for cooperation in the future.

(Jones, 1995)

When communities have a controversial issue that needs to be resolved, such as a highway siting, decisions concerning resource allocation, or policy formulation and implementation, they have many options for addressing the problem. Parties can go to court and have the issue formally adjudicated, hoping the judge decides in their favor. They can bargain with each other, never being sure if they are really getting the best deal. They can use pro forma citizen participation processes, hoping everything will move without too much unproductive conflict.

Or, parties can find a forum where they can try and build a shared agreement. When the parties work together to ensure that everyone's needs are taken into account, that information is communicated freely, that all views are respected, and that everyone supports the agreement, implementation

usually proceeds more quickly and efficiently. Parties emerge from such a process knowing that the best possible outcome was reached. These joint decision-making strategies are known as collaboration.

(Potapchuk and Polk, 1994)

Why Use a Collaborative Approach?

Collaborative approaches to decision-making and conflict resolution can:

- Help clarify the problem and the underlying issues and interests

- Help build respect for and a better understanding of different viewpoints

- Encourage greater creativity and a broader range of options for mutual exploration

- Lead to more creative, balanced and enduring decisions

- Increase commitment by sharing responsibility for the process and outcomes

- Improve chances of implementing a permanent solution

- Improve the relationships between the parties in the process

When to Use A Collaborative Approach

Opportunities

Opportunities to use collaborative approaches arise at many stages of the public policy decision-making process. When policy development will address issues that are known to be complex and/or contentious, using a collaborative process to involve all stakeholders and build consensus on ways to address the issues can help avoid or minimize the potential for conflict when the policy is applied. When a dispute develops over the application of a policy, decision-makers can pursue resolution through a collaborative process before resorting to litigation. The following table illustrates the range of opportunities.

Opportunities for Collaboration

Decision-Making Stage: **Example:**

Decision-Making Stage	Example
Framing Issues	Consulting with affected parties to identify all the issues that need to be addressed in an upcoming rule revision process.
Developing Policy	Working collaboratively with state, local and federal governments, service providers, interest groups and other stakeholders to reach agreement on how to distribute federal block grant funds.
Implementing Policy	Including stakeholders in the process of developing an agency's procedures for granting and reviewing permits.
	Carrying out a legislative mandate by convening a collaborative process to agree on how legislation should be implemented.
Interpreting Policy	Resolving disputes arising over the application of rules.
Negotiating Enforcement Agreements	Negotiating creative enforcement agreements to address the root causes of non-compliance, rather than simply penalizing the offending parties for their errant actions.

However, simply having the opportunity to use a collaborative agreement-seeking process does not mean it is appropriate for the situation. Careful consideration should be applied in each situation to determine whether and how to proceed. In other words, do existing conditions and the desired outcome suggest that reaching a joint agreement with affected stakeholders is necessary? For example:

- Is broad-based support critical to successful implementation?

- Do other stakeholders have information that is critical to finding the best solution?

- Can more be achieved through collaboration than can be achieved independently?

- Does the community require more substantial opportunities for involvement in decision-making than simply providing input?

- Does the history of conflict among stakeholders suggest that the only way to achieve a well-supported outcome is to involve them in making the decision?

If the answer to any of these questions is "yes," it is worthwhile to consider using a collaborative agreement-seeking process. Other questions also need to be answered, such as:

- Is it possible to address the issues of concern through a collaborative process?

- Are the stakeholders willing and able to participate?

- Is there enough time to conduct a meaningful and well-designed process?

- Are there adequate resources to support a collaborative process to a successful conclusion?

These and other considerations are key to the appropriate application, and ultimately the likelihood of success, of collaborative agreement-seeking processes. The process of "conflict assessment" is described in detail in Chapter 4.

Proactive vs. Reactive

In the past, mediation and collaborative agreement-seeking processes have been used largely in reaction to disputes, e.g., in response to a lawsuit or because a decision-making process was derailed due to impasse. These days, it is more common to see collaborative processes proactively applied during the development of public policy. When the issues are known to be contentious, a collaborative process offers the opportunity for diverse stakeholders to understand each other's differences and work together to seek a solution they can all support. In addition, some government agencies are looking at their existing decision-making framework in an attempt to identify possible problem areas and opportunities to integrate dispute resolution into their procedures.

> Successful use of collaborative processes requires a change in ethic that looks for long-term solutions that are carefully arrived at after consultation with stakeholders, not quick, top-down answers. With the proper investment of time and resources, collaboration becomes both a problem solving process and a learning process. Perhaps the greatest payoff that comes from successful use of collaborative processes is the groundwork they lay for future cooperation in the community.
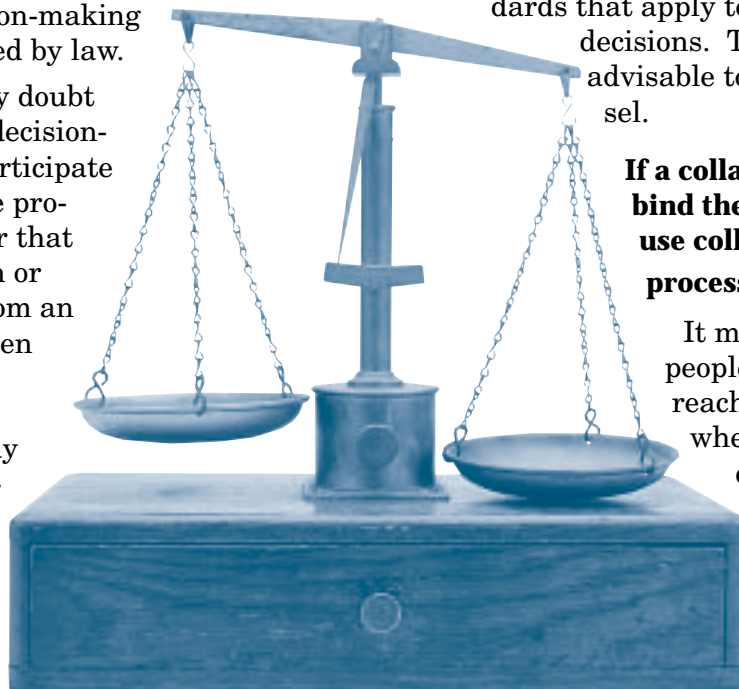>
> (p. vi, Potapchuk and Polk, 1994)

Common Questions about the Use of Collaborative Agreement–Seeking Processes

Can decision-makers participate in collaborative processes without compromising their decision-making responsibilities?

If the law requires an administrative decision (e.g., quasi-judicial or contested case), the decision-maker should be conscious of ex parte contacts that may bias her/his decision or give the appearance of impropriety. Because of this possibility, a decision-maker in such a case may choose not to participate directly in negotiations. He or she could delegate the responsibility of negotiating to someone else or stay out of the negotiations completely.

In legislative decisions where ex parte contact is not an issue, members of the decision-making body can participate in a collaborative process with less potential risk. However, it should be clarified ahead of time that the agreement cannot bind the decision-makers. If parties sign a written agreement at the conclusion of the negotiations, decision-makers should consider including a written statement that the agreement does not bind them to any particular decision on the matter and that the agreement is subject to all remaining decision-making processes required by law.

If there is any doubt as to whether a decision-maker should participate in a collaborative process, it is wise for that official to abstain or receive advice from an attorney. And even when there is no overt reason for abstaining, it may be prudent none-the-less to maintain the appearance of fairness. If the participation of such an official could be construed as illegal or illegitimate, the success of the entire process, and of future collaborative efforts, could be jeopardized.

Do open meeting laws affect the use of collaborative processes?

Open meetings laws will affect collaborative processes when a quorum of public decision-makers are participating in the process or when the collaborative group has been charged with advisory or decision-making responsibilities by a public body. In these cases, the collaborative group will be subject to the meeting notice and accessibility provisions of open meetings law. It is highly advisable to consult with legal advisors if there is any uncertainty regarding this issue. A helpful discussion of Public Meetings Law can be found in the Attorney General's Public Records and Meeting Manual, available through the Oregon Department of Justice.

Does a collaborative agreement between the parties commit decision-makers to a certain course of action?

No. Even when a collaborative process is used, Oregon law mandates that the responsibility for making a final decision rests with the appropriate decision-making body following required procedures. There are different standards that apply to legislative and quasi-judicial decisions. To avoid legal issues, it is advisable to check with your legal counsel.

If a collaborative agreement does not bind the official decision-makers, why use collaborative dispute resolution processes?

It may seem pointless to some people to spend time and effort reaching a collaborative agreement when there is no guarantee that a decision-making body will support it. Why not just go directly to the decision-makers and get a decision? The answer to this is most

easily seen through the eyes of a decision-maker. When a decision-making body is presented with a proposal that represents a consensus of all affected parties, most decision-makers will be inclined to support it.

Of course, the proposal must fall within the bounds of the decision-making body's authority. It must also be in compliance with all applicable policies, plans and rules. These critical elements can be most effectively addressed by having staff from the governing body or regulatory agency advise the collaborative workgroup. These people will instruct the workgroup on what can and cannot be included in the final proposal.

Another strategy for ensuring decision-makers' support for the collaborative proposal is to let them know it is coming. They should be informed as soon as a collaborative dispute resolution process is being considered. As the negotiation plays out, the decision-makers should be kept apprised of the group's progress. To avoid the appearance of influencing the decision-makers' ultimate decision, it is best not to brief them on the substance of the negotiation. Instead, the decision-makers should simply be made aware of how the group is progressing toward developing a collaborative solution.

Concerns about Using Collaborative Approaches

■ **Abdication of power?**

Public leaders retain their legal responsibility and final decision-making authority.

■ **Does it undermine representative government?**

Collaborative processes supplement democratic processes.

■ **What about accountability?**

Decision-making authority is retained and implementation is controlled by elected or appointed leaders.

■ **Will it take too much time?**

Difficult public issues require patience, time, and participation to develop a plan of action that is broadly supported and can be implemented.

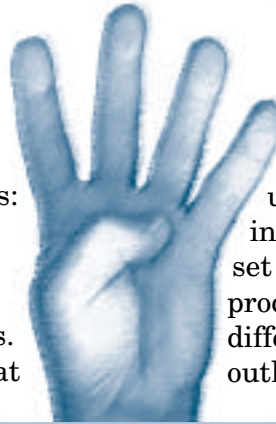■ **Do these processes thwart the will of the majority?**

Collaborative processes contribute to identifying the agreement of the majority after all views are shared and fairly heard.

(Jones 1995)

The Four Phases

Collaborative agreement-seeking processes generally involve four phases: assessment, convening, negotiation, and implementation. Within each phase, the participants normally work through several steps to accomplish specific objectives. These steps are described in the pages that follow. However, it is important to keep in mind that each process must be custom-designed to match the unique needs of a particular case. The information in this chapter is, at best, a set of principled guidelines; each and every process that is designed may necessarily differ in one or more ways from the steps outlined here.

The Four Phases of a Collaborative Agreement–Seeking Process

1. Assessment Phase: A Critical First Step

- ◾ Charting the Course
- ◾ Interviews
- ◾ Analysis
- ◾ Reporting

2. Convening Phase: Creating a Collaborative Environment

- ◾ Agreeing on the Statement of Purpose
- ◾ Agreeing on Ground Rules
- ◾ Gathering Information

3. Negotiation Phase: Exploring Interests and Options

- ◾ Inventing Options for Mutual Gain
- ◾ Packaging Agreements
- ◾ Testing and Refining Draft Agreements
- ◾ Binding Parties to their Commitments
- ◾ Producing a Written Agreement
- ◾ Ratifying the Agreement

4. Implementation Phase

- ◾ Linking Agreements to Formal Decision-Making
- ◾ Monitoring and Evaluating
- ◾ Refining the Agreement

(Adapted from Susskind and Cruikshank, 1987)

Assessment Phase: A Critical First Step

The assessment phase is a critical first step in determining whether a collaborative agreement-seeking process should be convened. The objectives of an assessment are to identify key issues and stakeholders; to assess the feasibility of proceeding with a collaborative process; and, if convening is warranted, to determine how to proceed. Conducting a conflict assessment provides valuable information and assists a potential sponsor to determine whether a collaborative agreement-seeking process is appropriate for the issues at hand.

The assessment phase consists of four steps – charting the course, interviews, analysis and reporting.

Using a Neutral Assessor

It is helpful to use a professional neutral (i.e., a mediator or facilitator experienced with complex public policy disputes) to conduct assessments. The use of a neutral assessor distances the assessment process from the sponsoring entity, and lessens the chance that "baggage" will interfere with each stakeholder's objective consideration of the proposed process. Also, when conducted by a skilled neutral, the assessment can serve as a valuable educational tool to help prepare stakeholders to effectively participate in the process.*

The assessor should be charged with preparing an assessment report that includes findings and a recommendation on whether to proceed with a collaborative process. The sponsor and other stakeholders use this report to determine whether the effort should be undertaken.

In many instances, the person conducting the assessment will be the same person that facilitates the resulting collaborative process. The familiarity they gain with the issues during the assessment phase and relationships they form with the stakeholders can be quite helpful. However, since it is always prudent to involve stakeholders in the selection of the facilitator, it is best to await the completion of the assessment before the facilitator decision is made. At that time, parties can jointly decide whether they would like to proceed with the same person or select someone else.

* For less complex or contentious disputes, it is sometimes possible for the assessment to be conducted by someone within the sponsoring agency.

Charting the Course

The assessment begins when a sponsor first wonders whether a collaborative process might be a useful approach. Together the sponsor and assessor examine the issues, review background information, and identify an initial list of stakeholders. One technique for identifying potential stakeholders is to determine who:

- Is affected by the issues at stake
- Is likely to be involved in implementing any decisions made about how to address the issues
- Could claim legal standing
- Would have the political clout to draw elected and appointed officials into the dispute
  - Could challenge the results of the process or block implementation of an agreement
  - Would have sufficient moral claims to gain the sympathy of the public

Most importantly, the assessor and sponsor look closely at the sponsor's organization to discover any internal barriers to successful use of a collaborative process, such as agency culture or conflicts over relevant policy.

Before proceeding, each of the following characteristics should be determined to exist.

- The issues are of high priority and a decision or guidance is needed.
- The issues are suitable for negotiation.
- Successful resolution of the issues requires stakeholder involvement.
- It is possible to find representation for affected interests (stakeholders).
- There is adequate time for a meaningful and well-designed process.
- There are adequate resources to support the process.
- The sponsor itself is willing to use the process and share control.

(Adapted from SPIDR 1997)

Once this hurdle is passed, the assessor must prepare to make contact with other stakeholders. The sponsor and assessor work closely to determine the sponsor's interests and the desired outcome of a collaborative process – recognizing that this is only a starting point for the purpose of discussion, and is likely to change as the assessment proceeds. In some cases, the sponsor may want to prepare a written interest statement. Putting such a statement down on paper may not always be necessary, however it is a useful exercise. First, putting words on paper pushes the sponsor to be very clear about its intent to proceed with a collaborative process if the assessment indicates a chance for success. Secondly, the gesture of putting the proposal on paper communicates an earnestness about being collaborative that may influence some of the more skeptical parties to give it a try.

A simple statement may be appropriate to share with potential stakeholders as a demonstration of the commitment of the sponsoring agency. A more detailed statement, including principles, positions and detailed information about the agency interests may be useful for the

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The following is a sample framework for a simple interest statement:

The [agency or commission] takes its duties and responsibilities related to [subject area] seriously. It seeks to ensure that it can achieve its program objectives and mission.

To effectively achieve these objectives, it is important to work with stakeholders to resolve the conflict over [clarify nature of dispute].

The [agency or commission] would like to address these questions and concerns in a collaborative manner. Stakeholders who have an interest in the issues include [list state agencies and other stakeholders].

The [agency or commission] hopes that a collaborative process will provide a forum for constructive resolution of these important issues. We would like to see the process result in [nature of the agreement, principles, memorandum of understanding, rules, etc.]

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agency during the proceedings, but may not be appropriate to share with others.

Interviews

To conduct the assessment, the assessor prepares an interview protocol and list of questions to take to each of the identified stakeholders. The questions will differ for each situation, but typically address many of the following topics:

- The history of the conflict and relationships among the stakeholders

- Substantive issues important to the stakeholder

- The stakeholder's underlying interests

- Timing limitations or constraints affecting participation in the process

- The stakeholder's preliminary prognosis about reaching agreement

- Perceptions about any barriers to agreement

- The stakeholder's available alternatives to a collaborative process

- The stakeholder's level of commitment to a collaborative approach and willingness to remain at the table until the process is complete

- The need for information or data to reach agreement

- The stakeholder's need for training on interest-based negotiation to be an effective participant

- The need for assistance in identifying and selecting an appropriate representative of the stakeholder's interests to participate in the process (more important for loosely organized groups or groups that represent a broad range of interests)

In addition, each interviewee is asked about other parties that might need to be contacted as part of the assessment process. Through this process, the list of contacts often expands to include additional parties.

Each person contacted during the interview process needs to understand that it is an exploratory exercise, i.e., that participation in the

interview does not commit one to participation in the process. Their comments help create the complete body of knowledge that will be used to determine whether a collaborative process will ensue and who will be involved in that process.

Confidentiality

Questions may arise about the confidentiality of communications that take place as part of a collaborative process to address public policy controversies. In some cases, confidentiality provisions are included in an "Agreement to Collaborate," "Agreement to Mediate" or in "Ground Rules." In Oregon, there are specific statutes and rules governing confidentiality in mediations involving public bodies. Before agreeing to confidentiality provisions, it is important to check with your legal counsel or the Department of Justice. Further information on confidentiality is contained in Appendix D of this Handbook.

Analysis

The assessor's task is to assimilate the findings from the interviews and recommend whether or not to proceed with a collaborative agreement-seeking process. There is no precise formula for determining when a collaborative effort is likely to succeed. However, there are a number of key indicators that contribute to the assessor's decision, including:

Do key stakeholders agree that the issue is one that warrants attention? Without this, it may be impossible to engage key participants or keep them engaged once a process gets underway.

Do the interests and concerns of stakeholders provide fertile ground for collaborative negotiations? Some issues are negotiable and others aren't. Typically, value differences allow little room for negotiation, and disputes arising over constitutional rights or requiring a legal precedent for settlement are other unlikely candidates for negotiation. Additionally, strictly competitive or distributive interests (i.e., if you get more then I get less) provide for little more than a tug-of-war. However, the more varied the interests

of the stakeholders, the more likely there will be room for bargaining and trade-offs that may provide some or all parties with more of what they want in exchange for things that aren't as important to them.

Is a collaborative process an attractive option for the stakeholders? If any of the stakeholders believe they can get more of what they want by some other means, they will not want to participate in a collaborative process. Part of the assessor's job is to help each stakeholder decide which option best serves their interests. The term used to describe and analyze a potential party's options is "BATNA." This stands for Best Alternative to a Negotiated Agreement. If a party has a better alternative, it is usually not advisable to enter into a collaborative process. For example, if an agency is in a superior legal position, there may be limited value in negotiating. This is particularly true if the agency's interests are a point of law or legal principle.

There are other factors that could influence this judgement. If the agency has an ongoing relationship with stakeholders or where a victory in the litigated environment may simply result in shifting a disagreement into a legislative arena, it may still be valuable to attempt to negotiate an agreement. The main point to remember is that a collaborative process is more likely to be successful where each participant has something to gain and when the alternatives present some level of risk.

Is the timing good for an agreement-seeking process? All parties need to find that it is in their interest to pursue a collaborative agreement at a given time. This decision can be influenced by a wide variety of factors. Sometimes the timing is not good because one or more parties have not yet exhausted their alternatives. For example, they may want to see whether the legislature or the courts are sympathetic to their cause. Other times, a party might find non-participation to be its best option because they believe that their interests are best met by the

status quo and they don't want to risk a different outcome. For decisions that will require ratification by a public body, it is important to consider whether the political support exists for a collaborative process, and whether anything can be foreseen that could cause that climate to change (e.g., an election). And finally, it is important to have some sort of deadline that sets a target for completing a process. Without a deadline, the absence of an incentive to reach an agreement may derail the process.

Is a collaborative process possible while litigation or other "rights based" processes continue? There are times where parties want to enter into a collaborative agreement-seeking process while continuing to pursue litigation, legislation or other alternatives. While it is theoretically possible to proceed on two or more paths simultaneously, it is important to recognize that there may be some negative impacts as a result. It is usually advisable to stay a "rights based" process pending the outcome of the collaborative process. Pursuing two processes can generate hostility and distrust among stakeholders. Information may be used in the two forums and even if there is a limit on admissibility, participants may be reluctant to act in good faith where the possibility exists for information to be helpful in the other forum. Finally, one of the considerations for stakeholders is the viability of alternatives. In general, a degree of uncertainty helps parties work towards a collaborative agreement. A party may cease to work towards a collaborative agreement in a situation where a "rights based" process continues and as a result, reduces that party's risks.

Will each stakeholder group be able to participate effectively? One of the most difficult issues in a public policy process is determining whether all stakeholders can be identified and represented. Each representative needs to have the authority and skills to effectively represent their group and participate in the collaborative negotiations. For some interest groups, it may be unclear how they should be represented. For example, a neighborhood group may contain multiple interests and an unclear set of principles or desired outcomes. A mediator/facilitator may need to work with such groups to develop consensus within the group about appropriate strategies and bargaining positions. Another issue is whether a representative has the time and resources to participate. These concerns need to be carefully addressed upfront to ensure that each representative can participate effectively for the entire life span of the process.

Reporting

Once the assessment is complete, the assessor usually summarizes the key findings in a written report, protecting all confidences. The assessment report typically includes a background section describing why the assessment got underway, a summary of findings from the interviews, and a recommendation on whether to convene a process. In addition, if the recommendation is to proceed, the assessor will offer suggestions on how that might occur (e.g., who should be involved, timing and structure of meetings, proposed ground rules, rough estimates of costs, etc.). This report is often shared with all parties.

Depending upon the circumstances, the report can serve a variety of purposes. First and foremost, the report provides the parties with the same amount of objective information. This information may be useful regardless of whether a process is convened. If the assessor recommends that a process be convened, the report may assist undecided parties make the decision about whether or not they are willing to participate.

Sometimes the assessment report can cause new issues or concerns to surface. For example, one party may change their mind about participation after getting a more complete sense of the issues. Or, the assessment report may identify potential barriers to reaching agreement that the stakeholders have to grapple with – such as missing technical information or the inability of one key interest group to afford to send someone to the meetings. It is often useful at this juncture to convene the stakeholders and assist them to jointly address the remaining questions or issues.

Convening Phase: Creating a Collaborative Environment

It is important to convene the process in a way that clarifies for participants that each interest at the table has legitimacy and that the participants control the process. A first step in this process is to involve the stakeholders in the selection of a neutral facilitator. Whether they choose to continue working with the person who conducted the assessment or select someone else, it is important that all participants support the decision. Selection of the neutral is the first agreement of the group. This step can be significant in demonstrating the ability to work together and reach an agreement.

The first meeting should provide the opportunity for participants to plan and organize the process. It also is the time to reaffirm the decision to participate in a collaborative process, share information about the issues, and generally set the stage for negotiations.

In some cases it will be necessary to train the participants in interest-based negotiation so they can participate effectively and equally in the negotiations. The training may also provide a way for the stakeholders to start to form relationships before the more challenging negotiations get underway.

Agreeing on the Statement of Purpose

Although the assessment report will normally include a statement of purpose, such a statement may not be fully supported by the group. Reaching agreement on the purpose of the process will help ensure that each party fully understands their charge. Absence of agreement on the purpose for convening the process may result in confusion about the scope of work for the group. Varying interests at the table may have very different understandings about the nature of the collaborative efforts. Stakeholders must be comfortable that the process will address their interests and needs.
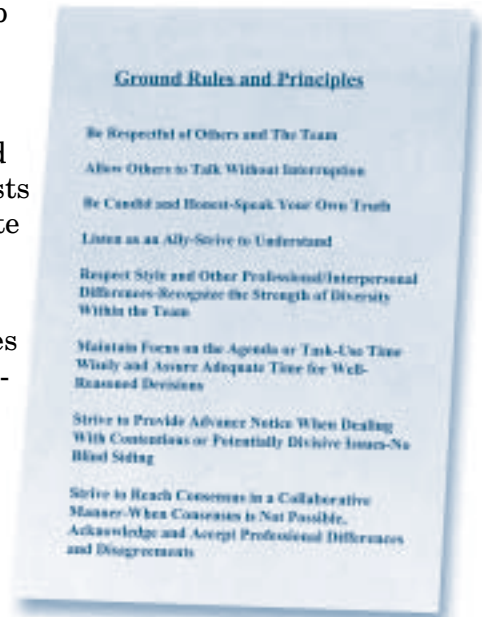
Agreeing on Ground Rules

Agreement on ground rules may take time and should not be overlooked or simply assigned to the facilitator/mediator. It may be necessary for the facilitator to provide a framework or a rough draft for consideration, but it is important that the participants understand and agree to ground rules. This step will affirm the ability of the group to work together toward common interests and demonstrate the validity of collaboration.

Ground rules should be established before beginning even the simplest of negotiations. There is no "correct" set of ground rules; each group of stakeholders should adopt rules that they feel will work best.

During abbreviated negotiations, such as those lasting only one or two sessions, ground rules may focus primarily on standards of conduct. These standards might include the following:

- Be respectful of one another;
- Take turns speaking and do not interrupt each other;
- Be candid and honest, but do not blame, attack or put-down other people;
- Ask questions for clarification or to get information, but not to challenge or intimidate others;
- Retain flexibility, do not establish irrevocable non-negotiable positions;
- Focus on the future that you would like to create rather than past problems;
- Work toward an agreement that is fair and constructive for everyone;
- Share all information that may affect the final agreement; and
- Support the facilitator and take responsibility for observing ground rules.

Ground Rules and Principles

Be Respectful of Others and The Team

Allow Others to Talk Without Interruption

Be Candid and Honest-Speak Your Own Truth

Listen as an Ally-Strive to Understand

Respect Style and Other Professional/Interpersonal Differences-Recognize the Strength of Diversity Within the Team

Maintain Focus on the Agenda or Task-Use Time Wisely and Assure Adequate Time for Well-Reasoned Decisions

Strive to Provide Advance Notice When Dealing With Contentious or Potentially Divisive Issues-No Blind Siding

Strive to Reach Consensus in a Collaborative Manner-When Consensus is Not Possible, Acknowledge and Accept Professional Differences and Disagreements

For complex negotiations, more detailed ground rules may be necessary. These will assure stakeholders of clear procedures and rules of conduct as well as a framework for dealing with various potential potholes on the road to reaching agreement. Careful attention to ground rules can avoid unnecessary conflict at later stages of the agreement-seeking process. Ground rules usually contain basic behavioral components such as the simple rules outlined above. However complex cases may include rules that address the following:

- Background on the dispute and purpose of the ground rules;

- Enforcement of ground rules and consequences for violations;

- Time frame for the process;

- Participation and representation, including attendance at meetings, how to add parties and how to proceed if parties leave the table;

- Role of participants in the process, including attendance at meetings and designation of alternates, including special responsibility for alternates to be knowledgeable;

- Responsibilities of participants to the process and one another, including rules of behavior and respect of other participants;

- Confidentiality, admissibility and disclosure provisions;

- Communication with the press and other media;

- How meetings will be run, including agendas, preparation of materials and attendance by the public;

- Caucuses and provisions to recess meetings for discussion purposes;

- Decision-making process (usually by consensus, including a definition); and

- Role of facilitator/mediator, including provisions for removal.

Gathering Information

One of the group's first tasks is to identify the information it will need to address the issues and how this information will be obtained. Sometimes this simply involves educating each other about information that each member brings to the discussion. Other times new information may need to be collected. By agreeing up-front on how information will be gathered and/or assessed – a process that is sometimes called "joint fact finding" – it is possible to avert "dueling data" debates later in the process.

The group should move carefully and deliberately through this phase as it will provide the basis for its work on negotiation. As it proceeds, agreements about data gathering and interpretation should be documented and recorded.

Nesting Birds:

An Example of Joint Fact Finding

A local environmental group is opposing a proposed development on the grounds that it would eliminate a nesting area for a bird species. The parties agree that they need to determine the nesting population of that species on the property, whether there are other nesting areas in the vicinity, and how much habitat area is required by the species to nest successfully. Rather than having individual parties search for information that might promote their position on the issue, they agree to commission a noted ornithologist from the state university to provide them with the specific information they require. Regardless of the data produced, the parties have agreed to accept it and negotiate an agreement based on that information.

Negotiation Phase:
Inventing Options for Mutual Gain

Exploring Interests and Options

At this step, it is very important for the parties to approach the negotiations not as a contest to be won but as a problem to be solved. Therefore, to begin the negotiation phase, the group should review its understanding and agreement on the purpose statement. The next step is to identify the interests (i.e. the underlying needs and desires) of each stakeholder. In many instances stakeholders will express positions on the issues that are in dispute. It is important to keep asking "why?" when a position is expressed. Often, asking why in response to position statements leads to a more complete understanding of interests. The differences between "positions" and "interests" are often difficult to identify, particularly for the stakeholders that see a dispute from a single perspective.

The two approaches to negotiation are distributive bargaining ("zero-sum") and integrative bargaining ("positive-sum"). The zero-sum, distributive approach assumes that there are only limited gains available; whatever one party gains, the other party loses. It is much like two children arguing over who gets more pie; no matter how the pie is cut, whatever one child gets, the other does not. The pluses to one side are balanced by the minuses to the other side, yielding a total gain to the two parties of zero—a "zero-sum." (Susskind and Cruikshank, 1987)

In the positive-sum, integrative approach, the parties work cooperatively to find an acceptable solution to their common problem in which they all gain what they need most. They focus on each other's interests to determine if there are items that they value differently and can trade with mutual benefits. For example, if the two children who want the pie were to take this approach, they might find that one of them likes the pie filling best, while the other prefers the crust. Note that this is not the same as compromising. By cooperating, they both can receive actual benefits, not just concessions. Both sides receive pluses from the negotiation, yielding a positive sum to the two parties rather than a zero sum.

To invent options for mutual gains, the parties must first clearly state their interests to each other. This should not be difficult if all parties participated in creating the agenda as part of the development of the problem statement, because they should have made sure that their interests and concerns were included at that time. Since the parties previously decided that negotiating is in their best interest, there is incentive for them to be honest and thorough in communicating their interests. Not doing so would short-circuit the negotiating process and be a disadvantage to that party. The facilitator should be keenly aware of the linkage between stakeholder interests and negotiated agreements from work during the assessment phase. This awareness can be used to maintain stakeholder focus on interests, where a departure jeopardizes the long term success of the group.

After all the parties' interests have been stated and the necessary information (facts) obtained and accepted, the parties can agree to a period of "inventing without deciding." This is basically a brainstorming session where the parties think creatively about how the problem statement can be addressed in a way that meets their interests. It is important to be able to put these ideas on the table without challenge or debate, thus the phrase "inventing without deciding." The parties agree that all ideas presented do not commit the presenting party to anything and will not be criticized or evaluated during the brainstorming process. The purpose is to produce as many ideas as possible for solving the problem. The key to wise decision-making is to select from the greatest possible number and variety of options. (Fisher and Ury, 1981)

It is important in this process for the parties to broaden their thinking. They should not try to find the single best solution, but many options that may be acceptable. It may be helpful to invent some options that change the scope of the negotiations. Adding options to some proposals can enlarge the scope of negotiations and increase possible trade-offs. Alternatively, the parties might want to break the problem down into smaller pieces by inventing options that cover only some of the issues, include fewer parties, apply only to certain geographic areas, or remain in effect during a limited time period.

Some parties may be reluctant to participate in such a brainstorming session because they fear that suggesting options that are favorable to another party may be seen as a sign that they are willing to make concessions. It may be necessary to obtain outside help or technical expertise at this point to help the parties identify a full range of options. For the process to work well, it is necessary to set the tone for the brainstorming session as a time when all ideas should be offered.

Packaging Agreements

Once the parties feel they have invented enough options, they must decide which ones to include in a proposed agreement. The parties should remain mindful of each other's interests while working through this step. Each stakeholder should look for solutions that will maximize the benefits for all parties.

One strategy that may help in reaching agreement is for one participant to propose several agreements, all of which are equally acceptable. The participant can submit this package of alternative agreements to the other stakeholders and ask which one or combination they prefer. They can work together to develop several variations and present them to other stakeholders in an attempt to develop a preferred alternative. In this way, an agreement can be packaged without anyone having to make concessions. Throughout the process, each participant should be looking for items that are of low cost to their interest, but of high benefit to the others. Differences in priorities make it possible to discover these trade-off interests.

Even where no agreement is reached, a collaborative process can provide other benefits to the stakeholders. The issues and facts of the dispute are typically defined more clearly, the stakeholders gain a better understanding of each others' concerns, and relations between the stakeholder groups may be improved (Buckle and Thomas-Buckle, 1986). The three primary components of a successful dispute resolution process are outcome satisfaction, process satisfaction and psychological satisfaction. Stakeholders who do not reach agreement may feel good that the process was fair and impartial or that they can now trust other stakeholders because of improved relationships and understanding. Each of these three components represents one element of success.

Testing and Refining Draft Agreements

After the negotiating group completes development of a package of draft agreements, the participants should check-in with their constituent groups to carefully consider the package. This

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Nesting Birds (Continued): Inventing Options

The negotiating parties were told that there are three nests on the site proposed for development and two more nests on an adjacent parcel of undeveloped property. They also learned that the birds need a 50-foot radius of woods around their nest. After hearing this, the parties began to brainstorm about possible solutions. Suggestions include going forth with the proposed plan and letting the court decide if the impact is too great, imposing a construction ban during the nesting season, redesigning the site plan to minimize the impact on existing nests, purchasing and putting conservation easements on the adjacent undeveloped property, erecting bird houses, and other ideas. The parties decided that they would identify their top four options and submit them to the ornithologist for evaluation.

priate governing body through the required public review process. The collaborative agreement-seeking process can be viewed as a parallel track for reaching agreement, but not as a substitute for the formal public review process. In many cases this is a benefit, because it assures that the collaborative process is not a vehicle to abridge due process or for government to make decisions that are contrary to the public's interest.

If the agreement is one that does not carry the force of law, then it is important to build "self enforcing" provisions in the agreement. This generally requires careful sequencing of required actions and performance measures. In addition, it may be helpful to include contingencies in the agreement to cover unforeseen circumstances or failure by one party to uphold their end of the agreement. These can be worded as "if-then" statements. For example: "If the agency budget does not contain funding to continue the program, and the agreement can no longer be implemented, stakeholders will reconvene to make adjustments to the agreement related to the program that is not fully funded."

testing of the draft agreements helps ensure communication and involvement of the larger constituent group. Depending upon their feedback, the negotiating group may need to work on further refinements to their draft.

Binding the Parties to their Commitments

An important part of creating an agreement to resolve a dispute is including provisions to ensure the parties will honor the terms of that agreement. In most disputes involving governmental programs, official adoption or approval of all or part of an agreement is done by the appro-

Producing a Written Agreement

This step is critical, for it ensures that the parties will not leave the negotiations with different interpretations of the agreement. Negotiators for each party should have an identical copy of the agreement to take to their constituents for ratification.

In some instances, a portion of an agreement will be the ending of a legal proceeding pending before a court or other governmental body. If the agreement is to drop such an appeal, one party typically files the necessary paperwork with the court or body. Where some action precedes such a stipulated dismissal, the filing is delayed pending required action.

Some agreements may require financial or other arrangements between parties but are not directly tied in to the governmental action. For example an appeal of a city decision to issue a license for operation of a business could be resolved by the imposition of covenants restricting the size or architectural character of buildings on the property. These factors may not be a part of the regulatory framework for business licenses, but are the underlying interests of the parties to the dispute. An agreement to drop the appeal of the business license would require the filing of the covenant by one of the parties.

Ratifying the Agreement

When a negotiator represents a group of constituents, the negotiator is responsible for informing the constituents about the nature and text of the agreement to gain their endorsement. The process for ratification will vary from one party to the next. In some organizations, there is sufficient hierarchy for the leader or board of directors to commit the support of the entire organization. In many other groups, however, it is necessary to put the decision to a vote of the full membership. The negotiating group should agree on the form of ratification that is necessary from each party.

This step reveals how well the parties performed the role of a representative during the process. The parties must continually assess the legitimacy and authority of each stakeholder at the table. It is in the best interest of all the participants to make sure that everyone at the table is capable of accurately portraying their constituent's interests and the likelihood that they will approve an agreement.

There is always the possibility that a division will occur within one stakeholder group over whether to ratify the agreement. If this happens, an opposition splinter group could develop. All the parties must then decide if the splinter group poses enough of a threat to implementation of the agreement to reopen negotiations and include it as a separate party. Since most agreements involving governmental entities require the approval of a governing body, the parties should assess whether the splinter group has the ability to influence those decision-makers to reject or significantly modify the negotiated agreement. There is also a possibility that the facilitator can play a role in explaining the agreement to the stakeholder group and to revisit the agreement based on their interests. A complete discussion of reasoning behind an agreement and close evaluation of a stakeholder groups alternative to the agreement may be enough to gain their support.

Implementation Phase

Once an agreement is ratified and signed, the work of implementation and monitoring begins. Although the consensus process often creates a great deal of good will, the progress can be erased by a lack of attention to following the agreement.

Linking Agreements to Formal Decision-Making

A ratified agreement must be linked to the decision-making procedures mandated by the underlying statutory or other authority for the applicable governmental entity. How this takes place depends on the substance of the agreement and at

what point in the required decision-making process negotiation occurred. If, for example, an agreement is negotiated prior to a formal decision-making process, it's possible that the ultimate decision can include relevant portions of the agreement and any conditions that are negotiated can become a part of the decision. If the agreement is negotiated while an appeal is pending, the appeal may be dropped or the provisions of the agreement may be entered into the record of the decision by the appellate body, if appropriate. In some cases the agreement will include provisions that are outside the authority of the applicable decision-maker or appellate body. In these instances separate enforceability provisions are necessary.
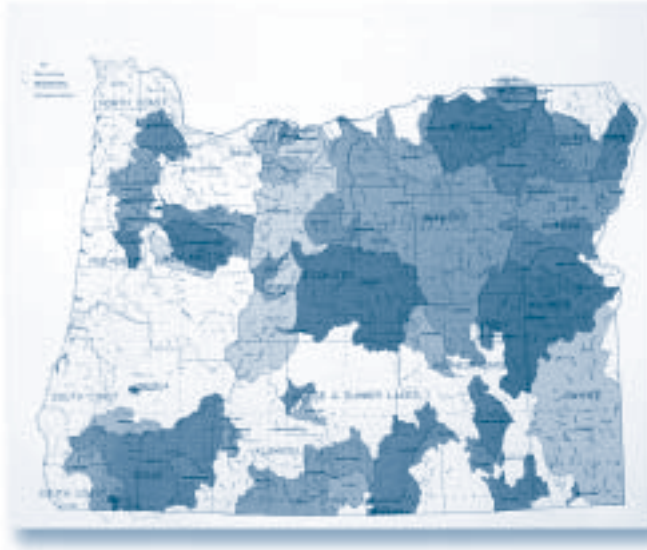
Obviously, there is no way to guarantee that the official decision will be completely consistent with the agreement. That fact should be acknowledged in the written agreement. However, the following measures can be taken during the process to improve the chances that decision-makers' actions are consistent with the agreement:

- Keep the decision-makers informed about the process (where such information is allowed by the rules governing the conduct of the decision-making body);

- Have staff advise stakeholders on whether the conditions of the agreement are within the scope of applicable regulations and are likely to be acceptable to decision-makers; and

- Make every effort to assure that the negotiating group is inclusive of interests that are likely to be affected and are likely to participate in the applicable decision-making process.

If a decision-maker is assured that all parties affected by an issue have agreed to a solution, and that solution is in accordance with the applicable law, the decision-maker will often be inclined to support the agreement.

Monitoring and Evaluating

In some cases, it may be necessary for the stakeholders to establish a mutually acceptable monitoring system to ensure long-term compliance with the agreement. If all or part of the agreement is adopted by a government agency, that organization may be responsible for monitoring and enforcement. However, if the agreement does not require such adoption, or if the parties are not confident that the agency has the means to constantly monitor the situation, then they may agree to a separate monitoring strategy.

This process is similar to the joint fact-finding process described earlier. The parties must agree to an objective (if possible) set of standards for measuring compliance and a schedule for carrying out the monitoring process. Be as clear as possible in the agreement, recognizing that vague standards or criteria may lead to future conflict.

It is also important to define a way to reconvene the parties if the agreement does not work as intended. A provision that spells out the terms under which the parties will meet to renegotiate can be included in the agreement. A provision to renegotiate should indicate the specific procedures for reconvening and should recognize that some stakeholders may change over time. Some original stakeholders may no longer represent the same groups at the time it becomes necessary to reconvene the process.

Refining the Agreement

As implementation of the agreement proceeds, it may be necessary to revise or update it based on new information, changes in available resources, or unforeseen conflicts. Major changes should be considered by all participants and possibly reviewed with the public and constituency groups.

The Role of Facilitators/Mediators in a Collaborative Process

Facilitating or mediating a collaborative agreement-seeking process requires specialized skills and experience. Whether the person with those skills calls themselves a mediator or facilitator is unimportant. A guide to selecting a facilitator or mediator is included in Appendix B. Information on the State Agency Roster of Facilitators and Mediators is included in Appendix D.

In an agreement-seeking process, the facilitator manages the process in an orderly way and works with the participants on the substantive issues of the dispute. He or she may work individually with the participants to help them clarify their interests and options, and can help ensure that all parties in the negotiation are heard. Sometimes facilitators conduct shuttle negotiations between participants if levels of distrust or anger make it necessary to keep the parties separate.

Public policy facilitators are process experts and, if selected wisely, are neutral on the issues. In order for them to function most effectively, they should be brought in at the earliest stage in the conflict resolution process – i.e., the assessment and convening phases. A common mistake is to get the balling rolling long before bringing a facilitator on board. Don't do it! Why miss the opportunity to draw upon the facilitator's experience, skills and neutral perspective for the designing and launching the process? These early steps lay the foundation for success. Why undertake this step without the assistance of an expert?

During the assessment and convening phases of a collaborative process, a facilitator can help the parties establish a workable process by:

- Helping to define the problem to be solved and clarify the objectives of a collaborative process;

- Helping identify the parties that need to participate;

- Educating parties about collaborative processes, and helping them individually decide whether participating in such an effort would serve their interests;

- Proposing a process design suited to the unique factors of the given controversy;

- Making logistical arrangements;

- Working with the group to establish ground rules and procedures;

- Assisting participants in setting an agenda.

During the remainder of the negotiations, the facilitator ensures that the agreed-upon procedures are followed, enforces the ground rules, and fosters constructive communication between the parties. He or she always remains neutral. Using various techniques to facilitate communication, the facilitator strives to establish and maintain a process within which the parties can come to agreement on the issues in dispute. To increase levels of trust, the mediator/facilitator must create a safe, comfortable and constructive environment. The pace of negotiations is critical to the success of a collaborative process. The group must feel that it is progressing towards a settlement. Progress must be balanced in a way that assures adequate time to completely consider the implications of any interim or final agreements. Skilled public policy mediators know how to manage a process to achieve all of these goals.

The role of the facilitator involves numerous and complicated tasks throughout the life span of the process. Some examples of these tasks are summarized in the following chart. The phases described in the chart are described in more detail early in this chapter.
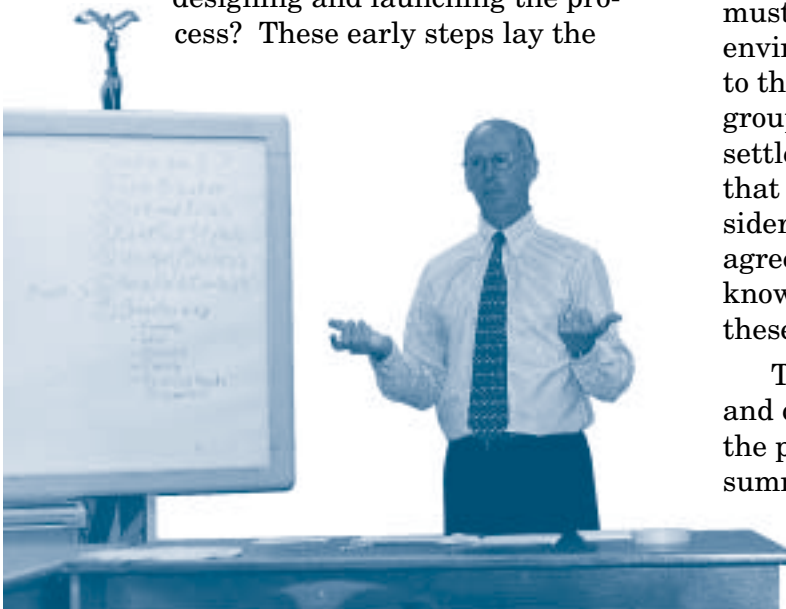
Tasks of a Facilitator in a Collaborative Agreement-Seeking Process

Assessment
- Helping agencies and stakeholders determine whether a collaborative approach is appropriate
- Meeting with potential stakeholders to assess their interests, describe the process, and determine willingness to participate in a collaborative process
- Working with initial stakeholders to identify missing parties
- Helping stakeholders choose spokespeople
- Handling logistics for initial meetings

Convening
- Guiding group through the process of adopting ground rules
- Managing the process of setting the agenda
- Helping parties define the issues or problems
- Helping parties recognize and communicate their interests
- Helping to identify technical consultants or advisors

Negotiation
- Managing the brainstorming process
- Suggesting potential options for the group to consider
- Coordinating subcommittees to draft options
- Caucusing privately with each party to identify and test possible trade-offs
- Ensuring that all participants have kept their constituents informed of the progress of the negotiations
- Preparing a preliminary draft of the written agreement or working with a subcommittee to produce a draft agreement
- Helping the participants "sell" the agreement to their constituents
- Approaching decision-makers on behalf of the group
- Helping identify the legal constraints on implementation

Implementation
- Helping identify a process for monitoring and evaluation
- Helping parties "link" the agreement to formal decisions
- Reassembling the parties if subsequent disagreements emerge

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APPENDIX A: Resources

Literature

General Theory and Practice

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Negotiated Rule-Making Sourcebook. David M. Pritzker and Deborah S. Dalton, U.S. Government Printing Office, 1995.

Organizations and Technical Assistance

In-State Organizations

Oregon Dispute Resolution Commission (ODRC)
1201 Court Street, NE Suite 305
Salem, OR 97310
(503) 378-2877 or (877) 205-4262 (toll free in-state)
www.odrc.state.or.us
     Established by the 1989 Legislature, the Commission provides a framework for developing a comprehensive collaborative dispute resolution system in Oregon. The Commission is charged with fostering the devel-

opment of community dispute resolution programs, establishing minimum qualifications and training for mediators in state funded programs, developing guidelines for court referrals to mediation, and encouraging the use of collaborative means to resolve public policy disputes.

Information on the following program areas can be found on the Commission's website.

Community Dispute Resolution Program   www.odrc.state.or.us/cdrp.htm
Court Referred Mediation Program   www.odrc.state.or.us/crmp.htm
Public Policy Dispute Resolution Program   www.odrc.state.or.us/ppdrp.htm

Oregon Mediation Association (OMA)

PO Box 2952
Portland, OR 97208-2952
(503) 872-9775

OMA was established in 1985 to promote and popularize mediation in Oregon. The Association provides training, support and continuing education to mediators and supporters of mediation. OMA maintains a directory of member mediators. All members must adhere to OMA's official standards for mediators.

Oregon State Bar Alternative Dispute Resolution Section

PO Box 1689
Lake Oswego, OR 97035-0889
(503) 620-0222 or 1-800-452-8260, Ext. 323

This section helps Oregon lawyers understand various dispute resolution processes. Additionally, the section has developed a directory of State Bar members who perform mediation and arbitration services as well as legal services.

National Organizations

Program for Community Problem Solving (PCPS)

915 15th Street, NW, Suite 601
Washington, D.C. 20005
(202) 783-2961
www.ncl.org/ncl/pcps.htm

PCPS, established in 1988, is a division of the National Civic League and is sponsored by five additional organizations. PCPS works to help communities build a civic culture that nurtures and supports inclusive and collaborative decision-making processes. They act as a clearinghouse for publications, consultants and other resources, and also conduct trainings and provide technical assistance in designing collaborative systems for decision-making.

Society for Professionals in Dispute Resolution (SPIDR)

1527 New Hampshire Avenue NW
Washington, D.C. 20036
(202) 667-9700
www.spidr.org

SPIDR's intention is to expand the utilization of alternative dispute resolution by private individuals, governmental agencies, and public and private organizations. As a professional membership organization, SPIDR actively promotes the professionalism of conflict resolvers at the local, regional, national and international levels, through its conferences, training institutes, chapters, and specialized sectors.

APPENDIX B: Guide to Selecting Mediators and Facilitators

Many people consider themselves to be mediators or facilitators, but not all have the appropriate skills, experience and training to manage public policy dispute resolution processes. Selecting the "right" mediator is important, as that decision can be closely tied to the ultimate likelihood of success. This task can be challenging because there are no definitive criteria for what qualifies a person to mediate public policy disputes, nor is there a formula for determining which one of the qualified mediators is best suited to a particular dispute. Because of this, users of a public policy mediator's services need to know how to make a good selection.

The following information lays out a procedure to help guide you through the selection process. At the end of this document are references to directories and rosters of mediators that may be useful when initiating your search.

Preliminary Screening

The first step is to develop a "short list" of candidates. Candidates that make the short list should be able to demonstrate that they have the skills and experience necessary to mediate or facilitate a public policy dispute. Additionally, depending upon the nature of a specific dispute, specialized knowledge or experience may be desirable. An initial screening can be accomplished by gathering the following information for each candidate:

1. **Experience** and demonstrated knowledge of the practices and range of procedures relevant to the service to be provided based on:

a. the amount and diversity of prior dispute resolution experience,

b. the characteristics (number of parties and/or issues) of previous cases handled, and

c. the amount of experience in similar cases.

2. **Training** and/or apprenticeship relevant to the service to be provided.

3. **Knowledge** of the institutional context in which the problem or dispute is being addressed. When the case involves government, experience in or demonstrated knowledge of governmental structures and processes is important.

4. **Professional affiliations** and adherence to standards of conduct. One of the most relevant affiliations for public policy mediators would be the Society for Professionals in Dispute Resolution (SPIDR) which maintains an active Public Policy Sector. For mediators in Oregon, many are members of the Oregon Mediation Association (OMA). Both OMA and SPIDR have established standards for the professional responsibilities of mediators.

5. **Formal education** relevant to the service to be provided.

Interviewing

It is always wise to talk with prospective mediators in person or by telephone. The following kinds of questions may be helpful in assessing your candidates:

Experience. What is your general experience as a mediator? What is your experience with issues or situations like this? With participants like ours? How long did those processes take? What kinds of results were achieved?

Process. Do you specialize in one approach? Describe what kind of process you usually use in these circumstances. What are some things that would not work here? Why? Do you generally conduct a case assessment[2] before convening a mediation? If so, describe the assessment process.

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[2] Case assessments are strongly recommended for many types of disputes. A case assessment is conducted before the final decision to convene a mediation/facilitation is made. The assessment typically involves interviews with key stakeholders and a determination of the "ripeness" of the case for mediation. If the assessment determines a case is not likely to succeed, the process can be shelved before stakeholders waste their time and money. Refer to Chapter 4 for more information on case assessments.

Roles. What role will you play and what impact do you want to have on the outcome? Do you think we have the necessary groups involved? If not, what do you suggest we do to involve others?

Substance. What kind of knowledge do you have about the issues to be discussed? If you do not have specific knowledge, do you think it will hinder your effectiveness? If so, how would you propose to address this?

Logistics. How can the parties get in touch with you? What kind of staff will be assisting you? What is your availability? Will you handle logistical arrangements for meetings? What kind of help from our staff will you need?

Costs. How do you charge for your services? How would you estimate the costs for this project? How could costs be kept to a minimum?

In evaluating the responses of potential mediators, consider some of the following issues:

- Did they describe how they would tailor their approaches to fit your circumstances? Could they discuss the advantages and disadvantages of different approaches? What knowledge did they seem to have of the context, the politics, and the relationships? Are there any conflicts of interest?

- How did they interact or, how do you think they will interact, with the different constituencies that are going to be part of the process? Will they be able to gain the confidence of the participants? What kind of listeners are they? Did they ask good questions? Did they seem able to grasp the situation?

- Will their style be compatible with yours and others in the dispute? How neutral do you think they will remain on the issues? Do you think they will be good at encouraging participants to come up with their own solutions? What kind of personality did they project? Did they have a sense of humor? Did they seem patient? Flexible? Were they well spoken?

Checking References

Whenever possible, check their references. References should be asked about the mediator's ability to:

a. listen actively;

b. analyze problems, help identify and frame issues;

c. deal with complex factual materials;

d. separate personal values from issues under consideration;

e. help parties assess alternatives, create options, identify criteria to guide decision-making, and make their own informed choices;

f. communicate clearly and effectively;

g. respect all parties and be sensitive to their values;

h. maintain control of a diverse group of participants;

i. effectively deal with power imbalances;

j. earn trust and maintain acceptability with parties;
k. adhere to ethical standards; and

l. maintain a sense of humor through tough sessions.

Making a Final Selection

Generally, all parties to a dispute should be involved in selecting a mediator. This maximizes the likelihood that all parties will endorse and support the mediator's leadership. Often, one party will take the lead in developing a list of 3-5 qualified and available mediators. This list is then shared with the other parties so each party can interview the mediators on their own. Each party may be given veto authority without being required to explain their reason for the veto. Then, a final selection is made from the candidates that have not been eliminated. In complex cases involving numerous parties, the parties may agree to have a selection committee make the choice.

Mediator Resources

There are several places to initiate your search for a mediator. Some Oregon-based sources that are most likely to include qualified public policy mediators include:

■ Oregon State Agency Roster of Mediators and Facilitators
Call (503) 378-4620

■ Oregon Mediation Association – Annual Resource Directory and Consumer Guide
Call (503) 872-9775

■ Oregon State Bar – Oregon Lawyers' ADR Resource Directory
Call (800) 452-8260

> Additional information on selecting and
> contracting with mediators is available at
> www.odrc.state.or.us/ppdrp.htm

APPENDIX C: Guidelines for Using Collaborative Agreement-Seeking Processes

These guidelines for best practice are proposed by the Society of Professionals in Dispute Resolution (SPIDR) for government-sponsored collaborative processes that seek agreement on issues of public policy.[3]

The processes these guidelines address have the following attributes:

- participants represent stakeholder groups or interests, and not simply themselves,
- all necessary interests are represented or at least supportive of the discussions,
- participants share responsibility for both process and outcome,
- an impartial facilitator, accountable to all participants, manages the process, and
- the intent is to make decisions through consensus rather than by voting.

The following guidelines for best practice include:

Recommendations for Best Practice:

1. An agency should first consider whether a collaborative agreement-seeking approach is appropriate.

Before a government agency, department, or official decides to sponsor an agreement-seeking process, it should consider its objectives and the suitability of the issues and circumstances for negotiation. In particular, before the sponsoring agency convenes a collaborative process, it is essential for the agency to determine internally its willingness to share control over the process and the resolution of the issue.

2. Stakeholders should be supportive of the process and willing and able to participate.

In order for an agreement-seeking process to be credible and legitimate, representatives of all necessary parties – those involved with or affected by the potential outcomes of the process – should agree to participate, or at least not object to the process going forward. If some interests are not sufficiently organized or lack resources and these problems cannot be overcome, the issue should not be addressed through collaborative decision-making.

3. Agency leaders should support the process and ensure sufficient resources to convene the process.

Agreement-seeking processes need endorsement and tangible support from actual decision-makers in the sponsoring agency or department with jurisdiction and, in some cases, from the administration or the legislature. The support and often the involvement of leadership is necessary to assure other participants of the commitment of authorized decision-makers who will be responsible for implementation. Their support helps sustain the process through difficult periods and enhances the probability of reaching agreements. Sponsoring agencies also need to ensure that there are sufficient resources to support the process from its initiation through the development of an agreement. As part of the pre-negotiation assessment, sponsors need to determine how they will meet evolving resource needs and provide funds and staff to accomplish the goals of the negotiation.

4. An assessment should proceed a collaborative agreement-seeking process.

Before an agency, department, or official initiates an agreement-seeking process, it should assess whether the necessary conditions are present for negotiations to take place. Presence of the factors in recommendations 1-3 are best ascertained as part of a deliberate assessment.

5. Ground rules should be mutually agreed upon by all participants, and not established solely by the sponsoring agency.

All participants should be involved in developing and agreeing to any protocols or ground rules for the process. Once ground rules have been mutually agreed upon, the facilitator should see that they are carried out, or point out when they are not being followed and seek to remedy the problems. Any modification to ground rules should be agreed upon by all participants.

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[3] This is an outline of information contained in a report published by the Society of Professionals in Dispute Resolution (SPIDR). For a copy of the full report, contact SPIDR at 202-667-9700.

6. The sponsoring agency should ensure the facilitator's neutrality and accountability to all participants.

It is preferable for all parties to share in the selection of the facilitator. When that is not possible, the agency or department has a responsibility to ensure that any facilitator it proposes to the participants is impartial and acceptable to all parties. The facilitator should not be asked by the sponsoring agency, or any other participant, to serve as their agent, or to act in any manner inconsistent with being accountable to all participants.

7. The agency and participants should plan for implementation of the agreement from the beginning of the process.

There are two aspects of implementation: formal enactment and actual implementation. This should be taken into account as part of the assessment and preparation phase. Implementation can be problematic if steps are not taken from the beginning to ensure linkages between the collaborative process and the mechanisms for formalizing an agreement, or if those responsible for implementing the agreement are not part of the process.

8. Policies governing these processes should not be overly prescriptive.

Policymakers should resist enacting overly prescriptive laws or rules to govern these processes. In contrast to traditional processes, consensus-based processes are effective because of their voluntary, informal and flexible nature.

Agency Checklist for Initial Screening to Determine Whether to Proceed

If the following factors are present, an agency can proceed toward the assessment phase:

- The issues are of high priority and a decision is needed.

- The issues are identifiable and negotiable. The issues have been sufficiently defined so that parties are reasonably informed and willing to negotiate.

- The outcome is genuinely in doubt. Conflicting interests make development or enforcement of the proposed policy difficult, if not impossible, without stakeholder involvement.

- There is enough time and resources. Time is needed for building consensus among conflicting interests, and resources are necessary to support the process.

- The political climate is favorable. Because these kinds of discussions occur in the political context, leadership support and issues of timing, e.g., elections, are critical to determining whether to go forward.

- The agency is willing to use the process.

- The interests are identifiable. It will be possible to find representatives from affected interests.

Guidelines for Conducting the Assessment and Preparation Phase of a Collaborative Agreement-Seeking Process

The sponsoring agency should seek the assistance of a facilitator experienced in public policy collaborative processes to conduct this phase of the process before initiating other activities. The following tasks should be accomplished:

1. The agency and facilitator should jointly evaluate whether the objectives of the sponsoring agency are compatible with and best addressed by a collaborative process.

2. Develop a statement outlining the purpose of the collaborative process, and its relationship to the sponsoring agency's decision-making process for communication to other potential parties.

3. Assess whether sufficient support for a collaborative process exists at the highest possible levels of leadership within the sponsoring agency.

4. Identify parties with an interest in the objectives and issues outlined by the sponsoring agency, and examine the relationships among the various interest groups and the agency.

5. Interview potentially affected interest groups and individuals to clarify the primary interests and concerns associated with the issues, and related informational needs.

6. Assess deadlines, resources available to support the process and the political environment associated with the issues and stakeholder groups.

7. Evaluate the influences of racial, cultural, ethnic and socio-economic diversity, particularly those that could affect the ability of interest groups to participate on equal footing.

8. Identify if assistance is needed by any interest group(s) to help prepare for or sustain involvement in the process.

9. Clarify potential obstacles to convening the process (e.g., non-negotiable differences in values, unwilling-ness of key stakeholders to participate, insufficient time or resources).

10. If no major obstacles are apparent, propose a design for the process including the proposed number of participants (based on the range and number of interest groups); the process for identifying and selecting stakeholder representatives; structure of the process (e.g., identify issues, clarify interests, joint fact-finding, brainstorm options); summary of resources anticipated and available to support the process; potential roles of the sponsoring agency, other participants and the facilitator; proposed meeting protocols; draft agenda for the first meeting; etc.

11. Prepare a report highlighting the results of the assessment as the basis for the sponsoring agency to decide whether of not to proceed. This may include actions by the sponsoring agency to respond explicitly to requests from other interest groups to include additional objectives or issues in the process. Under most conditions, the assessment report should be shared with the other process participants as well.

12. Pursue commitments of potential participants on the assessment, proposed agency objectives, preliminary process design and their willingness to participate in the collaborative process in good faith.

13. If a major stakeholder group chooses not to participate, evaluate the implications of their non-participation with the sponsoring agency and other participants, recognizing that the process may not be able to proceed.

14. Allow the participants an opportunity to concur with the sponsoring agency on the person(s) selected to facilitate the process.

15. Incorporate participant responses into the proposed process design, meeting protocols and meeting agenda for initiating the next phase of the process.

Steps 12-15 may occur as part of an organizational meeting of all parties during which the parties jointly decide to proceed and plan future phases together.

After completing the assessment and preparation phase, resolving any major obstacles and obtaining the commitment of the sponsoring agency and major stakeholders to proceed, conditions are appropriate for moving forward.

APPENDIX D: Confidentiality

For many public policy disputes, confidentiality is neither desirable nor permitted. There are, however, certain instances where confidentiality might be appropriate and permissible by law.

In determining whether a process, or a portion of a process, should be kept confidential, consider:

1) To what degree could confidentiality be helpful in this process?

   This question should be answered during the assessment of the case and with the involvement of stakeholders, and should also consider the interests of the "public" and non-participants, including whether:

   a) the public might perceive a confidential process as being a "secretive" or "back room" process.

   b) confidentiality might exclude the public from observing how the government is handling issues in which the public has an interest. How, for example, would the public know whether the government was being consistent in its policymaking if they are unable to determine how a decision was made?

   c) there are adverse impacts on parties who may have in interest in the outcome of the process, but who are not yet participating directly in the proceedings. Would confidentiality make it harder, for example, for all key stakeholders to be made aware of, and to have an opportunity to participate in, the process?

2) To what extent is "admissibility" a concern for any of the stakeholders (i.e., the concern that their statements might be used against them in a subsequent court proceeding)?

   It is often the case that a complex public policy controversy involving public bodies must proceed in an open and public manner, and that stakeholders neither need nor expect that a process involving public bodies will be completely confidential. It is important, however, to distinguish between a stakeholder's interest in confidentiality and their interest in inadmissibility. There may be different ways to address these concerns in the design of a collaborative process.

3) Having determined stakeholders' interest in confidentiality or inadmissibility, the process designers should then determine how these interests can be met, if at all. This analysis should be done with the assistance of the appropriate legal counsel.

   a) Who are the parties to the process? Knowing whether there are public bodies participating, and whether any of those bodies are state agencies, will make a difference in determining whether confidentiality is available under the law.

   b) Is any portion of this process a public meeting? Under Oregon's Public Records Law and Public Meetings Law any member of the public may inspect public records and attend public meetings in order to see and understand how government operates.

   c) Is the process a mediation and subject to ORS 36.220 to 36.238? Is there a state agency that is a party to the mediation, and has that agency adopted mediation confidentiality rules pursuant to ORS 36.224? Oregon Revised Statutes 36.220 to 36.238 authorizes state agencies to make mediation communications confidential. The statutes also allow agencies to limit the discovery and admissibility of mediation communications in subsequent proceedings. Except for certain mediations conducted by the Workers Compensation Board, the confidentiality and inadmissibility provisions of these statutes are available to state agencies only by adopting, with the approval of the Governor, mediation confidentiality rules developed by the Attorney General. A copy of these rules and a Bulletin explain mediation confidentiality for state agencies can be found at www.doj.state.or.us/ADR.

   d) Are there procedures or agreements that can be used to achieve the desired level of candor in the process? Consistent with applicable law, the participants may be able to design certain procedures or protocols into the process to achieve an appropriate balance between candor and openness in each stage of the process (e.g., an agreement to not subpoena the mediator or to not make a verbatim recording of the sessions). At a minimum an "agreement to collaborate" should be used to provide notice to the participants of the degree to which the process is confidential.

APPENDIX E: Glossary

Agreement to Collaborate/Mediate – an agreement that indicates the desire of the participants to resolve a controversy using a collaborative process. This agreement typically describes the type of process used, the nature of the controversy, the degree to which the process will be confidential, the procedures for conducting the process and any behavioral expectations (i.e. ground rules) or roles for the participants.

Arbitration – the intervention into a dispute by an impartial third party who is given the authority by the parties in a dispute to make a decision on how the conflict will be settled. Arbitration may be binding or non-binding.

Case Assessment – a process for determining if a particular controversy or matter is appropriate for a collaborative or alternative dispute resolution process. In the case of complex public policy controversies, an assessment is often conducted by a neutral party with skills in convening parties and designing dispute resolution processes. An assessment may also be used as an opportunity to clarify the issues in dispute, design a dispute resolution process, determine the costs of such a process, and determine who should participate in the process.

Collaborative Agreement-Seeking Process – a process in which a facilitator or mediator encourages and fosters discussions and negotiations among participants with the goal of finding a mutually acceptable resolution to a controversy.

Consensus – a decision developed through a collaborative process that each participant can accept.

Dispute System Design – a discipline in which an organization or agency considers conflict and conflict management systems in a systematic manner. This term may also be applied to the process of designing a comprehensive, step-by-step approach to a particular type of controversy. An agency may, for example, design a process in which staff provide information or negotiate directly with clients and later offer mediation, contested case hearings or more formal processes if a conflict escalates.

Mediation – a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy.

Negotiated Rulemaking (also called Collaborative Rulemaking) – a process in which a government agency works with persons or interest groups to develop and seek agreement on a proposed rulemaking action. This process is usually done with the assistance of neutral facilitator or mediator.

Public Involvement Process – a process designed to solicit information and input from the public on a proposed policy, rule or project. The primary purpose of a public involvement process is to assist decision-makers prior to taking action on a proposal.