

Symposium on Environmental Alternative Dispute Resolution

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PROBLEMS WITH USING COLLABORATION TO SHAPE ENVIRONMENTAL PUBLIC POLICY

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Popular ideas may not always be as good as they seem. Currently, popular ideology suggests that public agencies should shape public policy by relying on collaboration among stakeholders. Collaboration allows parties to avoid conflict and settle issues amicably. This approach to resolving disputes relates to the general principles in the field of Alternative Dispute Resolution.

While collaboration has its appropriate uses, over-reliance on it can displace traditional sources of legitimacy. For example, agencies that have derived their legitimacy from the electoral processes of representative democracy would be forced to secure a direct sanction from parties affected by the use of the collaborative process.

The collaborative process requires stakeholders of a community to actively seek agreement on the resolution of their dispute. Some proponents of the collaborative process believe that it entails finding stakeholders who have the power to make commitments to support an agreed upon solution, as well as persuading any of their followers,¹ to do likewise. Generally, the government is expected to embrace the agreed upon policies.

This idea is being advanced particularly in the context of decisions that are made by land management agencies and land use planning agencies. In particular, it is often being applied in the case of watersheds. It may also be applied to decisions regarding the site selection and operation of industrial facilities. In addition, there are cases where it is being applied to policy decisions of national scope.

This lecture explores why moving away from the practice of representative democracy is a bad idea. Particularly troubling is the

* Chairman, Sierra Club.

¹ See, e.g., Steven W. Selin et al., *Has Collaborative Planning Taken Root in the National Forests*, J. FORESTRY, May 1997, at 27. A planner is quoted as saying that "when an agreement is reached, there can be no end runs." *Id.* See also *Basic Guidelines: Wyoming CRM*, in CHRONICLE OF COMMUNITY, Winter 1997, at 21 ("All agency and organizational representatives must have the **AUTHORITY** to speak and make decisions for their respective entities.").

casual, uncritical way in which steps are being taken in this direction through growing reliance on collaboration as the "new way of doing business."

I. BACKGROUND

Collaboration is being urged upon government in a variety of reports. In 1996, the President's Council on Sustainable Development declared that "collaborative decision making must be encouraged and must involve all levels of government . . ." ² The latest report from the Council notes that "community participation and multi-stakeholder collaboration processes at . . . all levels of government . . . can also help optimize the efficacy and efficiency of environmental management decisions." ³ In an interim report in 1997, the Council stated that "collaboration is a process that is helping us learn how to solve society's complex problems." ⁴ The Council went on to assert that collaboration "may result in equal or better environmental and social outcomes at lower costs than traditional, more adversarial approaches." ⁵

In its latest report, the Aspen Institute also commends "collaborative planning processes [that] allow a 'community' (defined broadly to include a city, township, watershed or other geographic or non-geographic unit with common interests) to avoid natural resource problems by addressing potential conflicts before they arise." ⁶ The Enterprise for the Environment Report ("E4E") issued last year also calls for "place-based environmental strategies that offer local organizations and citizens 'a constructive way to build consensus on environmental protection issues.'" ⁷ In reviewing that report, one analyst stated that

² See THE PRESIDENT'S COUNCIL ON SUSTAINABLE AMERICA, SUSTAINABLE AMERICA: A NEW CONSENSUS 29 (1996).

³ See THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, TOWARDS A SUSTAINABLE AMERICA 52 (1999).

⁴ See THE PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, BUILDING ON CONSENSUS: A PROGRESS REPORT ON SUSTAINABLE AMERICA 19 (1997) [hereinafter BUILDING ON CONSENSUS].

⁵ *Id.*

⁶ See THE ASPEN INSTITUTE, THE STEWARDSHIP PATH: TO SUSTAINABLE NATURAL SYSTEMS 17 (1999).

⁷ See Cary Coglianese, *The Limits of Consensus: The Environmental Protection System in Transition: Toward a More Desirable future*, ENV'T, April 1999, at 28, 31 (1999) [hereinafter Coglianese, *Limits of Consensus*].

"E4E joins a growing chorus of support for collaborative approaches to environmental policymaking."⁸

In a paper prepared for the World Conservation Union ("IUCN") on collaborative management of protected areas such as parks, the author urges "effective sharing of management responsibilities among all the parties involved in the agreement thus lessening the burden of the agency in charge."⁹ However, the author does recognize the "potential opposition by agencies or individuals unwilling to share authority with other stakeholders."¹⁰ In evaluating the stakeholder processes used in the pilot phase of Environmental Protection Agency's ("EPA") XL project, a consultant recommended that the agency "use consensus-decision-making processes when serious objections to the final outcome might succeed in blocking implementation . . ."¹¹ This approach is contrasted with occasions when "public-consultation and information-sharing processes" might be used instead.¹²

In a monograph reporting on use of these approaches in the Pacific Northwest, a practitioner observes that consensus decision-making, "unlike government-driven processes, . . . empowers the community [to decide] where it wants to be in the future."¹³ Some proponents of the collaborative process call for "transference of power directly to citizens."¹⁴

In some reports that commend collaboration, it is not always clear whether this process is being urged simply to make input to government or whether something more is intended. But the passages just quoted suffer from no such imprecision. These passages clearly indicate that government is being targeted at all levels, that decision-making that affects outcomes is the object, and that power-sharing is sought.

⁸ *Id.*

⁹ Grazia Borrini-Feyerabend, *Collaborative Management of Protected Areas: Tailoring the Approach to the Context* 26 (IUCN, Gland, Switzerland 1996) (on file with author).

¹⁰ *Id.* at 27.

¹¹ ENVIRONMENTAL PROTECTION AGENCY, *EVALUATION OF PROJECT XL STAKEHOLDER PROCESSES: FINAL REPORT 2* (1998).

¹² *Id.*

¹³ See Jeff Goebel, *Founders of a New Northwest*, in *SUSTAINABLE NORTHWEST* 36 (1997).

¹⁴ See JOINT PUBLIC ADVISORY COMMITTEE, *REPORT TO THE NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION* 5 (Oct. 1, 1996).

II. AN INQUIRY

The implications of these ideas are profound. They suggest that government is simply another stakeholder, not the body that represents all stakeholders. Additionally, they suggest an absence of distinctive expertise in both agencies and government and that more expertise resides in casually assembled groups of stakeholders. Furthermore, they suggest that, while the government may still have power to enforce a decision, it lacks any special legitimacy to make decisions. Apparently, government is no longer viewed as having any right to exercise authority by virtue of the democratic process that chooses the office holders who direct government.

One can only wonder from where such revolutionary ideas came. They may reflect the ascendancy of the "boomer" generation and its life-long antipathy to authority, especially government. Low voter turnout may also undermine the legitimacy of governmental institutions. To some extent, the diminished reputation of government may reflect a sentiment that agencies have over-reached their competencies. Moreover, a better-educated public may also bring more expertise to the table than was once the case.

It must be acknowledged, however, that these ideas are attractive to politicians. The ideas absolve the politicians from having to solve intractable problems by simply retorting that "it is up to the citizens themselves to solve the problems." They really provide "an easy way out." In turn, this mindset actually allows politicians and government to abdicate whenever they choose.

One must also note for the record that there are those in the American business community who advocate using the collaborative method. In fact, some public relations firms have identified collaboration as a key strategy to enable the business community to realize its goals. Collaboration is being sold as a device to avoid disputes, "to get on with your plans."¹⁵ Public relations firms emphasize to clients that it "is not about relinquishing business decisions to external stakeholders, nor is it about losing control."¹⁶

¹⁵ See generally Kenneth D. Kearns & Anna L. West, *Innovations in Public Affairs Programming: Collaborative Planning and Beyond*, in PRACTICAL PUBLIC AFFAIRS IN AN ERA OF CHANGE (Lloyd B. Dennis et al. eds., 1996).

¹⁶ *Id.*

At a 1995 conference on this subject in Blairsden, California, the viewpoint of the timber industry was described as follows: "They supported the local partnership activities [i.e., collaboration] on philosophical grounds that forest management decision-making should be driven more from the local level. And, they perceived local partnership group processes as a means of breaking the existing policy gridlock and achieving some management activity on the ground."¹⁷ The industry's enthusiasm for the process was also evident at the American Forest Congress, which took place in 1996.¹⁸

Reasoning along this line became embodied in the output of a collaborative process that took place in Quincy, California, in the mid-1990s.¹⁹ That collaboration pertained mainly to the management of a nearby national forest, the Plumas National Forest north of Lake Tahoe. The group meeting in the local library (known accordingly as the "Quincy Library Group") recommended both increases in logging and reserves for conservation. When the local Forest Service failed to embrace their ideas, the ideas were taken to the local member of Congress who succeeded in adding them as a rider to an appropriations bill, whereby they became law. This case demonstrates most clearly that these consensus processes are designed to be implemented; they are not mere input. Furthermore, they are intended to shape policy.

III. CLAIMED ADVANTAGES

Proponents of the collaborative approach claim that the collaborative approach consists of four basic types of advantages: better outcomes, improved processes, greater acceptance, and desirable aftermaths.²⁰

A. Better Outcomes

Through collaboration, the participants are thought to move beyond posturing, stereotypes and narrow, traditional views of issues. Thus, they gain a better understanding of the nature of problems. As they seek common ground, it is believed they have a better chance of finding

¹⁷ See Jonathan Kusel et al., Report on the Lead Partnership Group Roundtable on Communities of Place, Partnerships, and Forest Health 7 (Oct. 6-7, 1995, Blairsden, CA.) (on file with the author).

¹⁸ See Report on the Seventh American Forest Congress Section on Communities (Feb. 20-24, 1996, Washington, D.C.) (on file with author).

¹⁹ For a discussion of this case, see Michael McCloskey, *Local Communities and the Management of Public Forests*, 25 *ECOLOGY L.Q.* 624, 625-26 (1999).

²⁰ See, e.g., BUILDING ON CONSENSUS, *supra* note 4, at 19.

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solutions that are fresh, new and creative. Some think more comprehensive solutions may also be found. Better outcomes might stem from the fact that the stakeholders are drawn into a process where they all share responsibility for finding a solution with which others can live. Thus, they are supposed to become more constructive.

B. Improved Processes

The iterative nature of collaboration, with “give and take” dialogue and the need to respond to others’ concerns, is supposed to be the mechanism that greatly improves the process. Through it, many believe decisions will be produced at a lesser expense in terms of time and money. They also think that the process will cover more ground and probe into the issues at greater depth. Agency decision-makers, however, are thought to be hobbled by their own biases and, thereby, are limited in doing this.

C. Greater Acceptance

Many believe that the stakeholders involved in a collaboration will have a greater sense of satisfaction with the outcome. Essentially, the stakeholders will have invented it and will have come to learn first hand why other alternatives could not be pursued. They will have seen which options were not viable. As a consequence, the outcome is apt to be one that they and their constituents will be able to accept.

D. Desirable Aftermaths

Finally, the process may leave a number of valued results in its aftermath. Discord in affected communities may be reduced as stakeholders gain experience by working together. The hope is that communities can come together around these consensual outcomes. Observing this success would prompt agencies themselves to learn how to become more responsive to the public. Consequently, confidence in public institutions would grow.

E. Drawbacks

However, not all share these high hopes.²¹ In fact, critics of collaboration find problems with these suppositions, both in theory and practice. In looking at empirical research and the E4E process, a high

²¹ See Coglianese, *Limits of Consensus*, *supra* note 7, at 30-32.

profile collaborative policy dialogue, Cary Coglianese concludes that "consensus-building processes are not well suited to meeting at least three of their major objectives."²²

He asserts that "consensus-building shifts the ultimate goal away from reaching a quality decision and moves it toward reaching a merely agreeable one."²³ He believes that "[t]hey can lead to policies that are based on cumbersome compromises of principles, the lowest common denominator, and on the most tractable but least important issues."²⁴ He also finds that they "may actually inhibit genuine innovation."²⁵ Thus, he doubts whether they necessarily produce better decisions.

Moreover, he is not convinced that time and money are saved. Collaborative processes are time intensive; typically, many of the parties complain about the time that must be committed, causing some to refuse to participate. The process itself can often be wearing and exacts a toll. Coglianese finds that regulations developed through negotiated rulemaking take as long, if not longer, to develop as do other rules.²⁶ Parties involved in some of EPA's XL projects found that the transaction costs were very high,²⁷ particularly the XL project involving Intel at Chandler, Arizona.

Coglianese also doubts that collaboration builds trust and acceptance among the parties. He points to the example of what happened with EPA's rule on reformulated gasoline, which was the product of a stakeholder negotiation (i.e., a "reg neg").²⁸ The negotiation was subjected to extensive court challenges. Additionally, it encountered political resistance as well. Consequently, the collaborative process did not resolve the dispute. In fact, Coglianese finds that affected parties overall file court challenges to EPA's negotiated rules more frequently than they do to rules formulated using more conventional procedures.²⁹ The Quincy Library Group's recommendations proved to be intensely

²² *Id.* at 31.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Coglianese, *Limits of Consensus*, *supra* note 7, at 31. See also Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1309-10 (1997) [hereinafter Coglianese, *Assessing Consensus*].

²⁷ See ENVIRONMENTAL PROTECTION AGENCY, CONSTRUCTIVE ENGAGEMENT RESOURCE GUIDE: DRAFT 3, 26 (Nov. 16, 1998)

²⁸ See Coglianese, *Assessing Consensus*, *supra* note 26, at 1290-94.

²⁹ *Id.* at 1307-09.

controversial. The E4E participants have continued to differ on issues; in fact, a number of them refused to sign the final project report.

Clearly, collaborative processes have, on occasion, produced some of the claimed benefits. But the sweeping nature of the claims made for the technique and the impulse to always rely on it are puzzling. A few decades ago, mediation was suggested for environmental disputes in special circumstances.³⁰ These included the notion of "ripeness." At that time, theorists felt a dispute was only ripe for mediation when the dispute had been deadlocked for long periods and none of the parties were sure of prevailing. Few disputes would meet such criteria and, thus, they would not be considered ripe for mediation.

Today, issues have been propelled into policy dialogues that are not ripe. For example, the "Car Talks" between auto-makers and environmentalists on the question of climate change occurred when the issue in dispute did not satisfy the ripeness requirements. This initiative of the Clinton Administration in the mid-1990s broke up without any consensus. The auto-makers were not ready to concede the problem was real. Nonetheless, the Clinton Administration took the position that it was up to these parties to agree on what should be done, with the implication that little could be done otherwise.

IV. FUNDAMENTAL PROBLEMS

The expectation that collaboration will operate under consensus rules would not be a problem if these processes were purely advisory in nature. Now that many seek to engraft them onto public policy, however, major problems appear. Most fundamentally the consensus rule serves to overthrow the basic suppositions of representative democracy. Instead of the directions of public policy being set by those garnering the greatest support among the electorate, those directions would be set by collaborations in which those with little support can thwart the will of the majority. This turns democracy on its head. Ironically, the consensus rule allows minorities to veto progress along certain lines.

While minorities under consensus rules cannot force their preferences on the majority, the majority cannot force its preferences on minorities. A standoff results. Thus, consensus rules embody a built-in

³⁰ See, e.g., the work of Gerald Cormick, at the University of Washington with reference to environmental mediation.

bias towards the status quo; neither side has the power to move forward. Whether that bias is desirable or not will depend on how one views the status quo. The consensus rules, however, certainly are a bias against change.

Moreover, trying to achieve representation through service on a negotiating group, rather than through the electorate and representative institutions, also poses problems. Most theorists agree that all stakeholders with a real interest in the outcome ought to be members of the group.³¹ But institutions of representative democracy provide many more nuanced opportunities for various interests to be heard and exert influence, particularly through opportunities to form alliances in the electoral and lobbying processes. It is simply not mechanically feasible to bring that many voices to the table in a collaborative exercise. These exercises need to be of a workable size. Thus, in practice, fewer voices can be heard.

In addition, another problem presents itself where national interests would be addressed by community collaboratives. This arises in cases similar to that of the Quincy Library Group, which did address certain issues of national interest (e.g., issues of wilderness and endangered species). In such cases, who is to represent these national interests? Spokespersons for the relevant national groups might be appointed, but it would not be convenient or economically feasible for them to attend frequent meetings in far-off places. Surrogates might also be chosen from among local sympathizers, but how can they be legitimated as representatives in fact? The national groups might not agree that they will faithfully represent their interests. In many cases, only a limited portion of the interested parties will reside in the locality involved.

The collaborative process derives its putative legitimacy from purporting to represent all of the affected and interested stakeholders. Without purporting to represent all claims, any legitimacy the collaborative process might claim is lost. Some are seeking to resolve this dilemma by engineering a conscious transfer of power. Instead of conceptualizing communities of interest (meaning the totality of all of those with interests in a given question), they seek to shift the emphasis to communities of place. They want to shift the focus from national

³¹ See, e.g., Linda R. Singer, *SETTLING DISPUTES: CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM* 137 (2d ed. 1994). See also TELLUS INSTITUTE, *When Does Consensus-Building Yield More Effective Environmental Policy?*, in *ENVIRONMENTAL PERSPECTIVES*, December 1997, at 1.

policy making to one focused on rural regions and to citizens close to the sites affected.³² With regard to federal land management, they want to reverse the trend toward national control and re-vest control in local hands.³³ Sometimes the concept of “place-based management” is also intended to legitimate this change of focus; some want to change the name of this to Community-Based Environmental Protection.³⁴ The net effect is to dispense with communities of interest and to put the focus instead on communities of place. In that event, stakeholders solely from that locality might suffice.

In placing the focus on communities of place, a massive change is made in the decision-making process. Instead of issues being decided by majorities or pluralities in a nationwide constituency, decisions would be made in the context of small, dispersed constituencies through consensus processes where minorities can veto outcomes. The power of such constituencies would not be limited to local issues. Issues of broader import would be subject to the local communities’ decisions.

This power shift would have a particularly acute affect on urban citizens who use and appreciate resources on public lands. They would be effectively disenfranchised. In the process, economic interests of citizens near to these lands would be given weight in preference to the non-economic interests of more distant, urban citizens.

This is a prescription for frustrating the national will of the majority. It subverts basic tenets of democracy and nationhood. But it is being advanced under the rubric of collaboration and place-based management.

V. AN ALTERNATIVE

The alternative to collaboration in this manner certainly is not to ignore the public. Many techniques have been developed to facilitate public participation in the process of developing public policy. Agencies

³² See, e.g., Louise Fortmann & Sally K. Fairfax, *Forest Resource Policy*, in *RURAL POLICY FOR THE 1990s*, 270-80 (J. Christensen & C. Flora eds., 1991) (arguing that forest policy should be “highly decentralized and localized”).

³³ For a discussion of this theme, see George Hoberg, *From Localism to Legalism: The Transformation of Federal Forest Policy*, in *WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS* 47, 63-65 (Charles David ed., 1997).

³⁴ EPA’s NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY AND TECHNOLOGY, EPA 100-R-96-003, *PROMOTING INNOVATIVE APPROACHES TO ENVIRONMENTAL PROTECTION* 4 (June 1996).

have gained experience not only with standard techniques, such as notice and comment and hearings, but also with newer tools such as workshops, workbooks, charettes, and other means of consultation (e.g., electronic mail and web sites).

Each of these tools has certain features of value, as well as shortcomings. It is usually wise to employ a number of them. They may offer advantages that collaboration alone cannot provide. For instance, hearings may provide an opportunity for many more people to participate. Written comments for the record may sample the largest segment of opinion. Predominant reliance on collaboration as "the way" to involve the public may discourage use of these varied techniques, which would be unfortunate. All of these techniques serve the essential purposes of learning of the public's particular concerns, finding out what the public wants, obtaining useful ideas from them, and testing the relative support for these ideas. When agencies listen well, their public relations improve.

Discussion among a group of stakeholders can be especially valuable because of its interactive and progressive nature. Ideas can be shaped in the "give and take" of discussion. All of the benefits of the group discussion process, however, can be realized without posing problems if three specific changes are made. First, the output of these discussions should simply be regarded as input, not as finished policy needing only official ratification. Public input may also come in other ways (e.g., through "notice and comment" and hearings). Second, the set of those brought to the table should be balanced to represent not only local interests but interests found at the state and national level too. To facilitate such a variety of stakeholders, the places where these groups meet should be moved around. Third, the discussion group should not be held to a consensus rule; it should be able to make recommendations based on voting, with decisions by majority rule. In that way, the group would not be held hostage by minorities, nor be limited to the lowest common denominator.

Getting rid of the consensus rule will make the composition of the group a critical concern. This, in turn, will put emphasis on how the group gets chosen and balanced. Some states have developed statutes to guide this process for various boards and commissions. They specify that various fields of expertise shall be represented, as well as various interests. Sometimes they also disperse the appointing power among different branches of state and local government. Through such dispersed sources of appointment, defenses can be built against exerting

control for any particular political agenda. Such boards have often performed creditably.

The same method might be applied to advisory committees that are expected to propose solutions to vexing problems. With such composition, the committees would not become a primary dumping ground for political appointees who need to be rewarded. Nor would such groups be easily captured by the agencies they advise (as too often happens at the federal level with FACA committees). They would not belong to any one agency, though there would need to be a convening power.

VI. CONCLUSION

Collaboration does not deserve to become the "new way" of doing business. It is a cumbersome process that is plagued by disadvantages that outweighs its perceived advantages. Its use should draw critical examination. It does not represent a "magic bullet" that solves all problems and restores confidence in governance. Turning over the power of government to collaboratives is misguided and a departure from democratic ideals. Most of the advantages of problem-solving through group discussion can be obtained without retreating from the norms of a representative democracy, without denying the claims of national majorities and disenfranchising urban populations. This approach should simply be added to the tool kit for public participation, without the counter-productive consensus rule.

The consensus rule is based on the supposition that civic conflict is the greatest problem of all, which simply is not the case. In many cases, other problems are more important. On them, we need to know both where everybody stands and what views command majority support. We do not need to know what represents the lowest common denominator.

Furthermore, conflict is inherent in exercising First Amendment rights and making democracy work. Full-throated debate develops and focuses issues, generates interest in them, educates the public, and creates the will to find solutions. Within limits, it should be seen as a positive factor. We do not need a tool to suppress such conflict.

On the issue of collaboration, the time has come to take a more balanced view. Collaboration is not "the answer."