

Ratification of Informal Agreements and Their Linkage to Formal Binding Agreements

CONCUR Working Paper 92-03

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I. Introduction

An important motivation for organizing collaborative dialogues is to produce outcomes that are more likely to be implemented and less likely to be challenged in court, in the legislature, or at the polls. The rationale is that if affected stakeholders are recruited to participate, are given the chance to jointly explore relevant information, and can contribute to inventing a solution to a problem, they are much more likely to support the result. Yet, in many informal dialogues no mechanism is used to bind the parties to their agreements. This imposes two burdens on the negotiation: it makes it difficult to determine the extent of the consensus that really existed, and it undermines the translation of a formal agreement into a binding, formal agreement. In fact, we suspect that these oversights account for many of the criticisms to the effect "that those conflict resolution techniques don't really work."

This working paper discusses how to secure the commitments needed to produce formal agreements. The balance of this working paper is organized into three sections. Section II discusses the need for a ratification step in a mediated negotiation. In Section III, we give two detailed examples of translation of informal agreements into formal agreements, based upon our professional practice and research. The Working Paper concludes in Section IV with advice for facilitators and mediators.

II. The Need for a Ratification Step in Mediated Dialogues

In our professional work, we consistently try to include a ratification step which involves circulation of a draft agreement among the representatives of each stakeholding group, asking for any final revisions, and then securing the signature of the participants. Usually we place the "ratification page" near the front of the results of a negotiated agreement. Figure 1 displays an example of such a ratification page from the final report of the Louisiana Comparative Risk project, also known as the Louisiana Environmental Action Plan (LEAP to 2000). That project, described in detail in another CONCUR Working Paper, yielded a statewide consensus on a ranking of environmental issues and a set of environmental policies.

Over 50 organizations signed the final document, including 12 state agencies and 35 interest groups. Business and industry signatories included groups such as the Louisiana Chemical Association, Dow Chemical, Co Polymer, Waste Management Inc., and Louisiana Land and Exploration, the state's largest land owner.

¹Scott McCreary and John Gamman are CONCUR Principals; Cornelia Tietke is a Research Assistant.

Figure 1: An Excerpt from the Signatures Ratifying the Final
Project Report for the Louisiana Comparative Risk
Project

We, the undersigned have worked together during the past year and a half to prepare this Report. We present our vision of the state of Louisiana, and our ranking of the environmental issues which Louisiana faces. We believe that addressing these issues will help us to achieve this vision. We include a discussion of obstacles perceived by Louisiana citizens which we must overcome in order to resolve these environmental issues. We have also developed guiding themes for consideration as all Louisiana citizens work to resolve our most pressing environmental problems.

Christine E. Baldridge

Christine E. Baldridge
Senior Environmental Specialist
Dow Chemical, Plaquemine

Phillip E. Boydston

Phillip E. Boydston
Manager of Government Affairs
The Louisiana Land & Exploration
Company, New Orleans

Steve Cochran

Steve Cochran, Director
Lake Pontchartrain Basin Foundation
Metairie

Nancy Jo Craig

Nancy Jo Craig, Director
Louisiana Nature Conservancy
Baton Rouge

Roland E. Daigre, Jr.

Roland E. Daigre, Jr.
Community Relations Manager
Copolymer Rubber and Chemical
Baton Rouge

Edward S. Flynn

Edward Flynn, Director
Health Affairs
Louisiana Chemical Association
Baton Rouge

Peggy Frankland

Peggy Frankland
Calcasieu League for Environmental
Action Now
Sulphur

Paul Kemp

Paul Kemp
Science and Technology Director
Coalition to Restore Coastal Louisiana
Baton Rouge

Marianne Kormann

Marianne Kormann, Manager
Technical Services and Environmental
James River Corporation
St. Francisville

Robert R. Kuehn

Robert R. Kuehn, Director
Tulane Environmental Law Clinic
New Orleans

Randy Lanctot

Randy Lanctot, Executive Director
Louisiana Wildlife Federation
Baton Rouge

Judy Mier

Judy Mier, Community Relations Manager
Lake Charles Treatment Center
Chemical Waste Management, Inc.
Sulphur

Environmental representatives included the Sierra Club, the Nature Conservancy, Shreveport Green, and the Audubon Society. Also represented were the North Baton Rouge Environmental Association and the Oil, Chemical and Atomic Workers.


We find that this ratification step has several benefits. Rather than leaving participants with a vague sense of the consensus they did or did not reach, a ratified document brings the negotiation to closure. Asking for ratification gets the attention of the senior decision makers in participating organizations. The joint effort of signing a document--perhaps in a "ratification ceremony"--helps sustain the esprit de corps that builds in a successful negotiation and can be a real source of pride for the participants. Moreover, when stakeholding groups that often compete sign a negotiated agreement, we find that this sends a powerful message that can get the attention of both elected officials and the media.

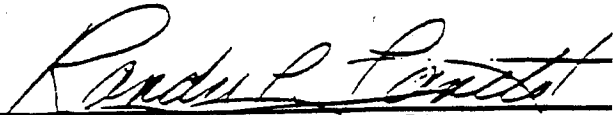
Earlier in the LEAP project, we found that the public release of a ratified version of a draft agreement help catalyze public discussion. The circumstances were these: the Public Advisory and Steering Committee (PASC) had reached an interim agreement on a ranking of environmental quality issues in the state, and had concluded negotiations to craft a statement of environment quality goals. Upon the successful conclusion of a "Ranking Retreat," we suggested that a ratification step would be an excellent way to build on the momentum they had generated.


PASC members agreed that they would complete the ratification in two weeks--in time to incorporate the signature page in the document to be distributed at a statewide environmental summit on Earth Day. However, at this early stage of the project there were still four recalcitrant parties: the Louisiana Chemical Association (representing 65 diverse companies), Dow Chemical and Co Polymer, and the State Department of Natural Resources (DNR). Each group had different reasons for not signing: LCA claimed that it could not check with its members quickly enough, Dow was reluctant to go ahead, since it chaired LCA that month, and Co Polymer's representative said he needed time to check with corporate management in Europe. DNR's reluctance stemmed mainly from inter-agency feuds with DEQ, and from an apparent desire to protect the oil and gas industry.

The Secretary of DEQ shrewdly decided to go ahead with printing the document, and under the signatures of the outstanding parties was printed "discussions continue" (Figure 2). The idea was to leave the door open for additional support.

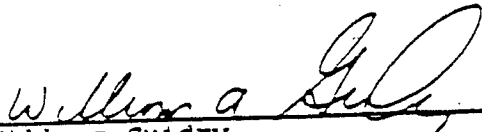
Figure 2: An Excerpt from the Interim LEAP Report:
Blank Signatures Lines for Recalcitrant Parties



Paul Davidson, Chair
Sierra Club, Delta Chapter
Baton Rouge

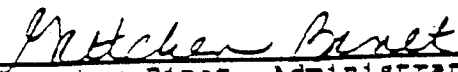

Randy Lanctot, Executive Director
Louisiana Wildlife Federation
Baton Rouge

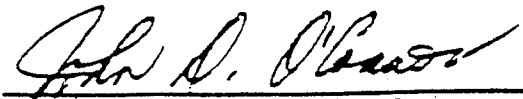

Mary Dishaw, Advisor
Sabine Parish Environmental Commission
and Sabine Parish Resource Conservation
& Development Commission
Many

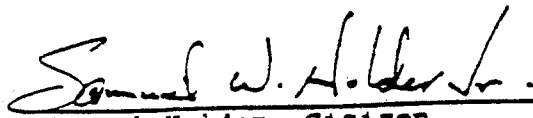

Sara Seals
Louisiana Cooperative Extension Service



William Guildry
Evangeline Parish Recycling Committee
Ville Platte


Linda Castano
U.S. Minerals Management Service
Gulf of Mexico Region
New Orleans


Gretchen Binet, Administrator
Coastal Zone Management
St. Charles Parish Planning
Department
Hahnville


John O'Connor, Deputy Conservationist
U.S. Soil Conservation Service
Alexandria


Samuel Holder, Citizen
Metairie


Eldridge Hickerson, Citizen
Ville Platte

Chris Baldrige *
Dow Chemical

Roland Daigre *
Copolymer Rubber and Chemical

Edward Flynn *
Louisiana Chemical Association

Discussions continue.
Decision on
ratification expected
before May 7, 1991.

Then, he convened a press conference and released the interim report. Print reporters and television cameras zoomed in on the blank signature lines. Along with the headlines about a statewide consensus on environmental issues were stern questions. The Dow representative told of having people say, "Chris, I saw your name on TV last night. What did you want them to take out of the document?" While this could be viewed as a high risk strategy, it seemed to motivate additional discussion. And as described above, all the active parties, eventually signed the document.

Ratification Should Be Anticipated by Groundrules and Linked to a Negotiated Text

Ratification, though it comes near the end of the process of mediated negotiation, is closely related to two other stages of the negotiation. The first is the **adoption of groundrules**, which occurs early in the negotiation sequence. As discussed in the Teaching Note on this subject, the groundrules typically address expectations that parties would reach full consensus, and would indicate their assent to the agreement with their signatures.

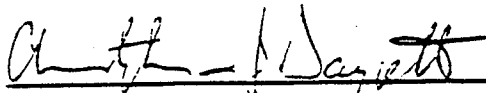
Ratification of an agreement also usually hinges on the use of a **negotiated single text**. The single text is used as the vehicle to draft and refine the relevant findings and solutions. In working through such draft texts, we like to ask participants to write comments directly on the document, rather than submitting separate reports or memos.

In one of our first efforts to secure ratification from the parties in a dialogue, ratification was discussed, but was never the subject of any adopted groundrules. The project, known as the New York Bight Initiative, was a mediated negotiation convened under the auspices of the New York Academy of Sciences. The focus was on *Managing PCBs in the Hudson Raritan Estuary and the New York Bight*. After five successive versions of a negotiated text the final version was distributed to the twenty-two negotiating parties.

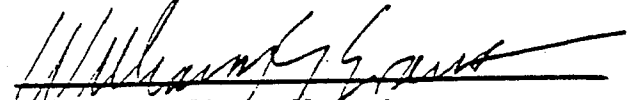
Despite valiant efforts on the part of the mediation team, ratification was a difficult and protracted process. Figure 3 displays the list of ratifying organizations. As shown in Table 1, 18 of 22 parties ultimately ratified the document, although it took almost six months to collect all the signatures. There were two major sources of difficulty. One was the 11th hour intervention by the Chemical Manufacturers' Association (CMA) and their coalition partners that tried to interject still more changes after the final draft had been distributed. CMA's major concern was that the health effects of PCBs were overstated. The second, and perhaps more fundamental problem was the failure to adopt clear groundrules calling for ratification early in the process, and a lack of agreed-upon deadlines for circulation and ratification of the final document.

Figure 3: Organizations Ratifying the New York Bight Initiative

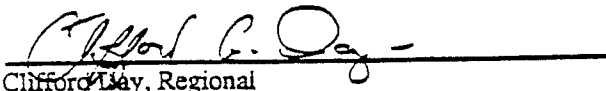
LIST OF RATIFYING ORGANIZATIONS



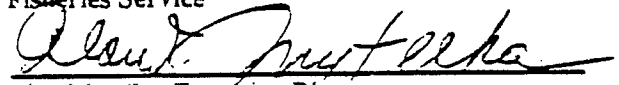
Chris Daggett, Regional
Administrator, U.S.
Environmental Protection Agency



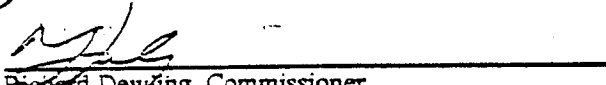
William Evans, Director, National
Oceanic and Atmospheric
Administration/National Marine
Fisheries Service



Clifford Day, Regional
Administrator, U.S. Fish
and Wildlife Service



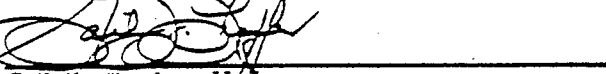
Alan Mytelka, Executive Director,
Interstate Sanitation Commission



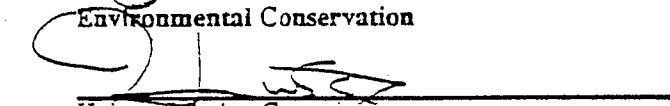
Richard Dewing, Commissioner,
New Jersey Department of
Environmental Protection



Langdon Marsh, Deputy Commissioner,
New York State Department of
Environmental Conservation



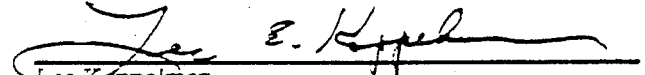
Gail Shaffer, New York
State Secretary of State/
New York State Coastal Program



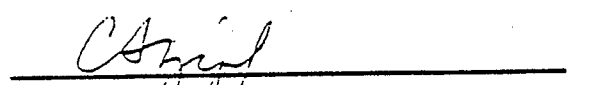
Harvey Schultz, Commissioner
New York City Department of
Environmental Protection



James Kirk, Director
Port Department, Port Authority
of New York and New Jersey



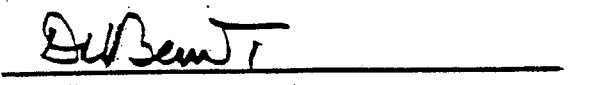
Lee Koppelman,
Executive Director,
Long Island Regional Planning Board



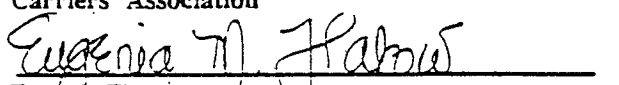
Cindy Zipf,
Coordinator,
Clean Ocean Action



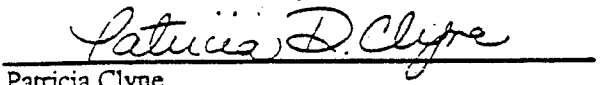
Linda O'Leary,
Executive Director,
Towboat and Harbor
Carriers' Association



Dery Bennett,
Executive Director,
American Littoral Society



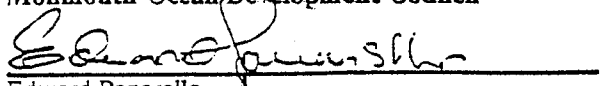
Eugenia Flatow
Coordinator,
Coalition for the Bight



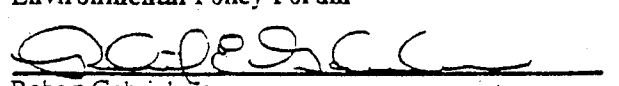
Patricia Clyne,
Executive Director,
Monmouth-Ocean Development Council



Robert Alpern,
New York City
Environmental Policy Forum



Edward Panarello,
Executive Director,
Maritime Port Council



Robert Gabrielson,
Executive Director,
New York State Commercial
Fishermen's Association

Table 1: Ratification Posture of Participants in the New York Bight Initiative Single Text Negotiation

Organization	Ratification Posture	Date
Environmental Management Agencies		
U.S. EPA	Ratified	March 7, 1988
New Jersey Dept. Environmental Protection	Ratified	April 4, 1988
Long Island Regional Planning Board	Ratified	Nov 12, 1987
New York State Department of Environmental Conservation	Ratified	July 26, 1988
New York State Coastal Program	Ratified	April 19, 1988
Wastewater Treatment/Management Agencies		
New York City Department of Environmental Protection	Ratified	Jan. 5, 1988
Interstate Sanitation Commission	Ratified	Jan. 22, 1988
Private Fisheries Interest/Fisheries Management Agencies		
National Marine Fish Service—NOAA	Ratified	Jan. 15, 1988
U.S. Fish and Wildlife Service	Ratified	Feb 16, 1988
New York State Commercial Fishermen's	Ratified	March 12, 1988
Environmental Organizations		
Clean Ocean Action	Ratified	April 1, 1988
American Littoral Society	Ratified	March 24, 1988
Environmental Defense Fund	Not Ratified	Feb. 16, 1988
Coalition for the Bight	Ratified	March 14, 1988
New York City Environmental Policy Forum	Ratified	March 14, 1988
Monmouth-Ocean Development Council	Ratified	April 29, 1988
Port Interests		
Port Authority of New York and New Jersey	Ratified	April 21, 1988
Towboat and Harbor Carriers Association	Ratified	Feb 15, 1988
Maritime Port Council	Ratified	March 1, 1988
Electrical Equipment/Chemical Manufacturers		
Chemical Manufacturers Association	Not Ratified	Feb. 16, 1988
Monsanto Corporation	Not Ratified	April 6, 1988
General Electric Company	Not Ratified	April 21, 1988
Total:	18 Ratifications	
	4 Decline to Ratify	

III. Two Examples: Translation of Informal Agreements to Formal Agreements

The Louisiana Comparative Risk Project

Our first example of translation of informal agreements into formal agreements is drawn from our work on the LEAP to 2000 Project. There, the challenge was to come up with a mechanism to help bridge what we anticipated would be a rough political transition.

We knew that the work of the Public Advisory and Steering Committee(PASC) was scheduled to be completed roughly at the same time as the primary election, and that PASC members had expressed a strong desire to continue their work after the election. That election would pit reform Governor Buddy Roemer against Klansman David Duke and former Governor Edwin Edwards. Working with DEQ staff, we scheduled the eighth and final meeting of the Public Advisory and Steering Committee (PASC) for October 17,1991--two days before the state's primary.

Then, working with DEQ staff and the Governor's staff, we identified the mechanism of an **Executive Order as a tool to promote implementation**. Executive Orders have several advantages: they can be put in place by the Governor, they have a fixed lifetime, and they can incorporate detailed information about both the rationale for the Order and the tasks to be accomplished. Concurrently with preparations for the final meeting, we began working with staff to draft the order, still unsure whether it would be signed.

We concluded work on the last section of the PASC's report, which addressed guiding themes for implementation. Consistent with the groundrules adopted for the LEAP project, all active PASC members agreed to ratify the document within four weeks.

After the state's open primary, in which David Duke and Edwin Edwards edged Governor Roemer, an ad hoc coalition of Louisiana environmental groups organized a questionnaire to rate the candidates. Among the 10 questions posed was this one:

Would you retain the multi-state agency LEAP to 2000 Committee, as well as its issues, rankings, and initiatives?

Edwards responded:

[T]he LEAP to 2000 participants have provided an important guideline for the state in establishing our environmental priorities and the allocation of resources for addressing those risks. I hope that the committee will continue their work, and provide recommendations so that we may better use our limited fiscal resources to protect and clean our precious natural resources.

Based on this preliminary show of support from Edwards, Buddy Roemer signed an Executive Order on January 3, 1992, his last day in office, to extend the life of the LEAP project through June 30, 1992.

After Edwards won the election, his transition team recommended continuation of the Louisiana Environmental Action Plan (LEAP) to 2000 and encouraged participation of interested citizens and groups in the policy development process.

The Order directed the PASC to work with DEQ staff to prepare an Action Strategies document. The findings were to be reviewed by state departments which are to respond within 90 days. Then, the PAC in conjunction with state departments, was to select specific policy options and present the results to Governor Edwards in a LEAP Implementation Report by June 30, 1992.

In practice, the Executive Order was undermined by the appointment of the new Secretary of DEQ, who signalled his low enthusiasm for the the LEAP project by assigning it to a junior staffer. The new head of the agency rebuffed an industry coalition of PASC members with the opinion that "citizens have no role to play in setting environmental policy." Now, former administration officials are working to revive the LEAP project.

Negotiating Energy Conservation Investments in California: The Demand Side Single Text

Our second example of effective ratification of an agreement and translation to a formal agreement comes from the work of the California Public Utilities Commission, catalyzed by the Natural Resources Defense Council. The result was a collaborative process that leveraged extensive new commitments for energy conservation and agreement to major regulatory reforms by the state's largest electric and natural gas utilities.²

In the late 1970s, the California Public Utilities Commission (PUC), under pressure from environmental groups (notably the Environmental Defense Fund) imposed strong requirements on the State's major energy producers that emphasized the use of conservation. Rules adopted by the PUC acted to remove financial disincentives for utilities to invest in conservation, but went no further in allowing utilities to factor conservation into their rate base.

However, with the advent of cheap oil in the 1980s, conservation investments slipped. NRDC staffers Ralph Cavanagh and Chris Calwell began to take a close look at trends in utility investments in conservation as the most cost-effective way to "find" new energy resources. NRDC published their findings in the report, "The Decline of Conservation at California Utilities: Causes, Costs, and Remedies" (1989).

After first rounding up support from major California utilities, Cavanagh went to the PUC in the summer of 1989, presented his findings, and proposed that the agency "convene structured, time-constrained negotiations to rebuild utilities conservation programs and develop performance-based incentives to operate them successfully." Also as Cavanagh had requested, the PUC gave negotiators a deadline: January 20, 1990.

² This account is based upon a more in depth case study completed by Scott McCreary for the report "An Assessment of Negotiation and Collaborative Problem Solving at the Environmental Defense Fund and the Natural Resources Defense Council."

The collaborative process involved fifteen parties and spanned about six months between the initial meeting and completion of a final report. Meetings were typically convened every two weeks, although weekly meetings were held during the last few weeks. Two senior PUC staffers (Gigi Coe and Terrie Wilsie) served as facilitators; a professional firm handled logistics and arranged for consultants who served as technical experts.

The final document, entitled *An Energy Efficiency Blueprint for California--Report of the Statewide Collaborative Process*, was completed on schedule in January, 1990. Two chapters comprise the heart of the 82-page document: 1) performance-based utility incentives; and 2) priorities for expanding and improving efficiency investment programs. Together, these elements of the report represented the new commitments that California's major utilities were willing to make to energy conservation.

According to John Fox, PG&E's representative, the process had three "end games" upon completion of the report: 1) ratification (including signatures of all representatives on the final report); 2) detailed negotiations about the content of utility plans--called "filings"; and 3) maneuvering the Commission to approve what was filed.

In the ratification step, copies of the draft went to organizations. According to Yole Whiting of San Diego Gas and Electric:

Here at SDGE, we let people know what was in it; we knew what we could agree to. There was a day when we all signed it. There was some running back and forth to the phone, but not really that much at the end.

Jean Solari recalled the review process at executive management level at Southern California Edison:

Meetings were held with increasing frequency as the process wound up. Ralph contributed significantly to speeding the ratification process; he reminded us of the early January deadline. He was very much a presence in making sure that we looked like we could make the March deadline for filing. We had absolute internal ratification.

Next came the filings. PG&E's Fox explained:

We had very detailed negotiations to produce the filings. Five or six parties took part: the utilities, NRDC, CPC, and TURN [Towards Utility Rates Normalization --a ratepayers' group]. Using the structure defined by collaborative documents, we negotiated the terms dollar by dollar and measure by measure. We produced a massive filing: which was stipulated by all parties. This took from the completion of the collaborative report in January to April 24.

When the Commission took up the filings they appointed an Administrative Law Judge. Fox noted that some parties felt the process was "greased," but the judge wanted to draft her own findings, revising some of the conclusions of the collaborative process. He explained that Cavanagh and other parties

lobbied for the Commission to uphold the sanctity of the process, and in a real act of moral courage, TURN joined them.

The substantive results of the collaborative process include faster-than-expected returns, avoidance of costs associated with the administrative process, and improved relations among some of the key parties in California energy policy. In Cavanagh's view, the two most important outcomes were: 1) utilities pledged to double their energy efficiency investment levels for 1988 by 1991 with programs yielding a projected net benefit/cost ratio of at least 2:1; and 2) for the first time, as a result of the agreement, all major California utilities' profits will be linked in part to their performance in delivering cost-effective energy savings.

Fox reported that PG&E got a ten to twelve week jump by committing to conservation programs at the time of filings. Similar results were posted in Southern California. Even though several months of additional "post negotiation" activity were needed to translate the product into formal agency action, the total elapsed time of about one year was about half of what would have happened through the normal procedural channels.

Legislative Mediation

In addition to these two examples, we have documented several other cases where legislators have served as mediators or promoted the use of outside neutral mediators to craft language for new legislation on natural resource issues. The obvious strength of this approach is that the tool for linking the informal agreement--legislation--is anticipated up front.

According to Gordon Weeks of the National Council of State Legislatures (NCSL), legislative mediation is fairly rare, yet there are an increasing number of examples. In Weeks' experience, the principal precondition is a political environment conducive to open discussion. Other preconditions include identification of reasonable, community-minded representatives ("fanatics are not necessarily the most dominant personalities in an interest group"), a legislator or legislative proponent with standing and leverage, a broad consensus that some new legislation is needed, and reasonable balance among interest groups. Of course, it is not clear that all of these preconditions are really essential for success, but this is a useful list of considerations.

In some cases **legislators themselves have played a quasi-mediator role**. This occurred in the development of groundwater legislation in Wisconsin and Arizona, where Representatives Lou Munz and Tom Hawke, respectively, helped bring disparate groups to consensus around a legislative package.

In other cases an **informal partnership between an elected official and an outside team of neutrals** was essential to create supplements to the traditional legislative process. One of the most successful examples was organized in Hawaii to assist the passage of a state water code that had been stalled for fourteen years (Unsoeld, 1988). Although a 1978 constitutional provision required the state legislature to protect, control, and manage the state's surface and groundwater, proposals to translate this goal into state law ran into opposition. Native Hawaiians, developers, farmers, and

county officials who disagreed with aspects of the draft legislation pressured their lawmakers into rejecting a series of proposals. In 1986, Kauai County councilwoman JoAnn Yukimura was instrumental in recruiting help from the state Judiciary's Program on Alternative Dispute Resolution.

ADR Program Director Peter Adler teamed with Leland Chang, executive director of Honolulu Neighborhood Justice Center, with the initial goal of creating an ad hoc forum. The neutral facilitator recruited key players in the water dispute to meet in informal dialogue. The group began with informal discussions and became known as the "Water Code Roundtable." The roundtable developed a series of substantive proposals and issued a 75-page water code proposal in February, 1987. Several key provisions have been adopted by the legislature. An independent state water agency was established, and a system of water use permits enacted.

IV. Advice for Facilitators and Mediators

In this section of the paper, we recap several important lessons based on the case studies and discussions presented above.

- o When organizing a facilitated dialogue, **seek the sponsorship of an agency, legislative body, or executive.** Without such sponsorship, it is very difficult to connect the results of an ad hoc negotiation to the formal policy making machinery.
- o Consider the advice of the National Council of State Legislators: **look for a political environment conducive to open discussion.** Other preconditions--as stated earlier-- include identification of reasonable, community-minded representatives, a legislator or legislative proponent with standing and leverage, a broad consensus that some new legislation is needed, and a reasonable balance among interest groups
- o **Build ratification into the groundrules** at the beginning of a dialogue.
- o **Set clear expectations for ratification,** including time needed for internal review, the due date for the final draft, responsibilities for internal consultation, and the requirement for a signature.
- o **Anticipate the need for a post-negotiation "end game."** Use the relationships developed in the main negotiation to sustain momentum and monitor implementation.
- o Look for **implementation tools** that can be put in place with a minimum of political friction, such as the Executive Order in the LEAP case.
- o **Engage the parties to the dialogue as advocates of the process and its outcome,** as was the case for both the LEAP and the Energy Conservation dialogues.

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