TULANE ENVIRONMENTAL LAW JOURNAL

VOLUME 17 WINTER 2003 ISSUE 1

The Movement for American Ecosystem Restoration and Interactive Environmental Decisionmaking: Quagmire, Diversion, or Our Last, Best Hope?

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I. "PROBLEMS, WHAT PROBLEMS? OH THOSE PROBLEMS . . . WELL, WE WERE TALKING ABOUT THEM JUST THE OTHER DAY": WHAT IS INTERACTIVE ENVIRONMENTAL DECISIONMAKING?

"In Arizona, old lawmen used to say you can get much further with a kind word and gun than you can with a kind word alone."[1]

Adherents of interactive decision-making processes might change Mo's wry comment to say that you can achieve more in environmental protection and restoration with a kind word and a gun than you can with a gun alone. Following thirty years of modern environmental law and policy in the United States, much ado is made in the popular press, academic literature, Congress, and the Executive Branch about "cooperative" and/or "locally based" environmental regulation and management efforts. Former Secretary of the Interior (and former Arizona Governor) Bruce Babbitt spent years championing the work of consensus based watershed councils throughout the West as the best hope to end the divisiveness accompanying historic levels of resource extraction and degradation of the environmental resources of the West.[2]

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1. The late, great conservationist, water developer, and humorist, U.S. Representative Mo Udall. MORRIS K. UDALL, TOO FUNNY TO BE PRESIDENT 219 (1988).

2. Cynics might note (and environmental cynics cheer) that Babbitt's cooperative conversion came only after being outgunned by conservative western senators in the Clinton Administration's first environmental battle over grazing reform on public lands, and their later

Babbitt's relentless advocacy for watershed councils and for cooperative environmental endeavors had at least one great effect: cooperative environmental decision-making processes are now endemic throughout the United States, and are receiving increasing attention from all sectors. From the Oregon Plan for Salmon Recovery,[3] to an extensive variety of community forestry efforts,[4] to New Hampshire's Tilton Diner Group,[5] cooperative environmental decision-making processes exist at all levels of government—irrespective of community and/or ecosystem size—and in various private and quasi-governmental organization guises. Some of these processes are largely defined by geographic setting, others by resource use and/or protection, and still others by statutory authorization or requirement. Natural groupings are easy in some cases, such as river watershed councils, and less so in others (the Tilton Diner Group, for instance).

Collaborative decision-making efforts involve varying degrees of decisionmaking by a variety of nongovernmental parties to an issue. Characterized as "collaborative" or "community" or "consensus" based, as distinguished from "leadership" or "command and control" processes, these efforts are attempting to find more effective ways of protecting and restoring environmental quality. For example, in these "newer," "cooperative" processes, elected and appointed government officials do not simply lead or command groups in reaching environmental protection and restoration decisions. Instead, officials try to facilitate (or sometimes just sit on the sidelines) decisions (which are usually intended to conform to the law and sound public policy) based on discussions which produce some kind of consensus among all parties.

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crushing defeat when attempting to amend the hopelessly outdated Mining Law of 1872. In the waning days of his second term at the Department of the Interior, Babbitt and his boss, President Clinton, seemed to rediscover their "gun" in the form of the Antiquities Act and their near weekly proclamations of National Monuments on disputed public lands throughout the West during the summer of 2000.

3. The Oregon Plan for Salmon and Watersheds, *Welcome to the Oregon Plan!*, *at* http://www.oregon-plan.org (last updated Oct. 4, 2001).

4. *See, e.g.*, UNDERSTANDING COMMUNITY BASED FOREST ECOSYSTEM MANAGEMENT (Gerald J. Gray et al. eds., 2001); FOREST COMMUNITIES, COMMUNITY FORESTS (Jonathan Kusel ed., 2003).

5. New Hampshire's Tilton Diner Group (so named because its first meeting was at the geographically convenient, but lousy tasting, Tilton Diner at exit 20 off Interstate 93 in central New Hampshire) is a group of industry associations (including Ski New Hampshire), environmental advocacy groups (including Audubon Society of New Hampshire, Conservation Law Foundation, The Wilderness Society, and the New Hampshire Charitable Foundation), and the State of New Hampshire Division of Forests and Lands. *See* Robert Braile, *Groups Take United Stand on Plans for the Whites*, BOSTON GLOBE, June 6, 2000, at NH Weekly section 1 (describing the group's Spring 2000 position papers).

The most popular terminology for these efforts seems to be "community-based collaboratives" (CBCs). The Consortium for Research and Assessment of Community-Based Collaboratives[6] (CRACBC) defines a CBC as

> [a] group that has been convened voluntarily from within the local community to focus on a resource management issue(s) or planning process involving public lands or publicly owned or regulated resources, whose management impacts the physical, environmental and/or economic health of the local community; a group membership that includes stakeholders from the local community and which may include traditional adversaries; a shared desire to influence the protection and use of natural resources through recommendations or direct actions that will impact the management of the resource; and a decision-making process that requires participation by local stakeholders.[7]

A bit convoluted, this definition and characterization of CBCs fails to capture the variety of interesting deviations from the "command and control" model of environmental regulation available through CBCs. CRACBC's exclusive focus on public land issues also ignores the long and vibrant history of thoughtful, conciliatory deliberative processes at work in much of the East, South and Midwest. In addition, though these processes are necessarily defined as community (read geographically) based, the restrictive definition of stakeholders as "local" excludes important community institutional players who may not be locally based. Examples include corporations and other businesses that are active (and indeed may be the primary economic player(s)) but are not controlled or even based in the community, the country, or the continent.

Scholars Julia Wondolleck and Steven Yaffee favor a definition of collaborative relationship that defines collaboration as "1) the pooling of appreciations and/or tangible resources, 2) by two or more stakeholders,

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6. The Consortium for Research and Assessment of Community-Based Collaboratives is a loosely structured national network of environmental researchers and practitioners organized by the Institute for Environmental Negotiation at the University of Virginia and the Morris K. Udall Center for Studies in Public Policy at the University of Arizona.

7. ANN MOOTE ET AL., ASSESSING RESEARCH NEEDS: A SUMMARY OF A WORKSHOP ON COMMUNITY-BASED COLLABORATIVES 2 (2000). This publication summarizes the first thoughts of a major research coordination effort underway through a partnership between the Udall Center for Studies in Public Policy (UC) of the University of Arizona and The Institute for Environmental Negotiation (IEN) of the University of Virginia. The Consortium, initiated by IEN in 1998, convened a gathering of over forty academic and NGO researchers, forest and community organizing practitioners, and a few designated "skeptics" (including this writer) representing environmental protection and other organizations in Tucson, Arizona, in October 1999.

3) to solve a set of problems which neither can solve individually."[8] Wondolleck and Yaffee also argue that "[c]ooperation involves individuals or groups moving in concert in a situation in which no party has the power to command the behavior of the others."[9] In their series of case studies, "these relationships had to cross boundaries defined by organizational affiliations, interests, perceptions, geography or jurisdiction."[10]

I prefer the simpler, more inclusive and less value-laden term "interactive decisionmaking" (IDM) to characterize this burgeoning area of environmental endeavors. Like "regulatory reform," collaborative decisionmaking seems too loaded a phrase,[11] especially when compared to "command and control." Broadly defined, IDM is first characterized by stakeholder participation in the decisions made. Stakeholders are defined as those parties, often self-defined, who have a "stake" or claim to the use, destruction, conservation, or preservation of the natural values in a given watershed, ecosystem or other defined geographic area. Stakeholders may include traditional adversaries in addition to government officials in participatory or advisory roles. Second, IDM processes involve some sort of public consensus or majority based stakeholder decision-making process that is presented as an alternative to a more traditional government leadership/majority rule process. Finally, IDM convenes in response to a perceived environmental and/or legal managerial crisis or problem.

II. IDM AND THE MOVEMENT FOR AMERICAN RESTORATION

"Balance should be the watchword of his stewardship."[12]

When Mo Udall was asked to participate in a political compromise by his opponents, he often retorted, "the lion and the lamb can lie down together but the lamb won't get much sleep."[13] Advocates for the use of IDM processes to address environmental problems often start with the premise voiced by rural sociologist Jonathan Kusel that "traditional

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8. JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT, at xiii (2000).

9. *Id.*

10. *Id.*

11. As one commentator has noted, the term "collaboration" does not play well in many parts of Europe where memories of France's Vichy regime's "collaboration" with the Nazis in World War II remain strong. Unidentified speaker, Remarks at Research Consortium Arizona Gathering (1999).

12. Edward Flattau, *Balance Not Possible in Saving Environment*, OREGONIAN, Jan. 29, 1993, at C7.

13. UDALL, *supra* note 1, at 206.

adversarial approaches aren't working so we need to try other options."[14] Kusel's perspective, like that of many others involved with IDM projects, is informed both by personal experience and careful examination of ecosystem and environmental trends over the last two decades.[15]

Indeed, over the last thirty years, the trends of important indicators of environmental health in the United States are alarming, and the unprecedented attention paid to environmental issues since the first Earth Day in 1970 has not reversed environmental degradation.[16] At best, the wall of environmental law enacted in the 1970s remains a finger in the dike—tremendously valuable at slowing disaster, but ultimately not enough without additional systemic changes. While there have been dramatic improvements in elimination of visible pollutants in the air and in many rivers since the original passage of the Clean Air and Clean Water Acts and their numerous amendments, endangered species listings continue to grow, more species go extinct every year,[17] views in Big Bend National Park have deteriorated,[18] and rivers systems throughout North America are still highly degraded.[19] River systems are deteriorating again because gains from the Clean Water Act are being overwhelmed by population growth, the negative effects of urban sprawl and associated increases in paved and other impervious surfaces, oil- and metal-filled stormwater runoff, and vast increases in legal discharges of industrial pollutants due to the vibrant economy of the 1990s.[20] For example,

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14. Communication with Jonathan Kusel, Ph.D., Founder and Director of Forest Community Research (May 2000); *see also* Forest Cmty. Research, *at* http://www.FCResearch.org (last visited Mar. 24, 2004) (providing information on the variety of activities undertaken by Forest Community Research).

15. *Id.*

16. Trends in many other parts of the world are even worse due to population density pressures and the resource extraction burden often undertaken to support the quality of life and standard of living enjoyed by residents of the United States and other highly consumptive societies. *See generally* BILL MCKIBBEN, MAYBE ONE: A PERSONAL AND ENVIRONMENTAL ARGUMENT FOR SINGLE CHILD FAMILIES 106-28 (1998); WORLDWATCH INSTITUTE, STATE OF THE WORLD (1995-2000).

17. DAVID S. WILCOVE, THE CONDOR'S SHADOW: THE LOSS AND RECOVERY OF WILDLIFE IN AMERICA 230-41 (1999).

18. *See* NAT'L PARK SERV., AIR QUALITY AND VISIBILITY IN BIG BEND NATIONAL PARK, *at* http://www.nps.gov/bibe/aqvis.htm (last updated July 10, 2003); Francis K. Sage, *Ongoing Air Pollution Issues in Big Bend, Texas*, 8 BORDERLINES 63 (America's Program of the Interhemispheric Resource Ctr., N.M., Jan. 2000), *available at* http://www.americaspolicy.org/borderlines/2000/b163/b163comp-body.html.

19. WILCOVE, *supra* note 17, ch. 4.

20. EPA, LIQUID ASSETS 2000: AMERICA'S WATER RESOURCES AT A TURNING POINT 4 (EPA-840-B-00-0012000) (2000), *available at* http://www.EPA.gov/ow/liquidassets/assets.pdf (last updated Oct. 18, 2002); OR. PROGRESS BD., THE OREGON STATE OF THE ENVIRONMENT REPORT (2000), *available at* http://www.econ.state.or.us/opb/soer2000/ (last updated Sept. 21, 2003); EPA, WATER QUALITY CONDITIONS IN THE UNITED STATES: A PROFILE FROM THE 1998

Oregon's Willamette Riverkeeper organization reported in April 2000 that permitted discharges of toxic chemicals into the Willamette River had nearly doubled since 1995, as had discharges of toxic chemicals from publicly owned sewage treatment plants.[21]

Moreover, according to the World Wildlife Fund:

> The cumulative impact of all forms of disturbance to [North American] aquatic systems is staggering. Within the United States alone, sixty-seven percent of freshwater mussels and sixty-five percent of crayfish species are rare or imperiled; thirty-seven percent of freshwater fish species are at risk of extinction; and thirty-five percent of amphibians that depend on aquatic habitats are rare or imperiled. These numbers do not include the twenty-seven species of freshwater fish and ten species of mussels that are known to have gone extinct in North America in the last 100 years.[22]

Given the grim environmental trends we face at the start of the new millennium, what could interactive environmental decisionmaking possibly offer to bolster our current systems of environmental law and policy? Secretary Babbitt, in a speech before the National Press Club in 1995, called the emerging efforts at community-based environmental protection the "third generation of environmental activism."[23] He expressed his hope in what he described as "hands-on work directed at their own communities, an activism focused at reclaiming their known heritage, their local landscapes, their sense of place which reminds them where they are and therefore, *who* they are."[24] Babbitt described this "third great environmental movement," the "voice of Americans rooted to their land," as the era of "American Restoration" and asserted that "we can do better. . . . We can use these laws. We can do more than just stop our waters and soils from declining."[25] Babbitt continued, "I [see] Americans crossing the threshold from Prevention into Watershed

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NATIONAL WATER QUALITY INVENTORY REPORT TO CONGRESS 305(B) (EPA-841-F-00-006) (2000), *available at* http://www.EPA.gov/305b/98report/ (last updated Aug. 15, 2003).

21. Joe Coffman & Elizabeth Grossman, *Under the Surface: Year 2000 State of the Willamette*, WILLAMETTE RIVERKEEPER, Apr. 2000, *at* http://www.willamette-riverkeeper.org (last visited Mar. 24, 2004).

22. ROBIN A. ABELL ET AL., FRESHWATER ECOREGIONS OF NORTH AMERICA: A CONSERVATION ASSESSMENT (2000); *see also* JOHN C. RYAN, STATE OF THE NORTHWEST (rev. 2000).

23. Secretary of Interior Bruce Babbitt, Remarks at National Press Club, Washington, D.C. (Dec. 13, 1995).

24. *Id.* (emphasis added). Babbitt describes the "first era of environmental activism" as Teddy Roosevelt's "conservation movement" that created the national parks, national forests, and wildlife refuges of the United States. *Id.* Babbitt described the "second generation of environmental activism" as the "Rachel Carson" era, which helped pass the current structure of environmental law passed in the 1970s. *Id.*

25. *Id.*

Restoration. They are building upon the current framework of laws, giving form and content to abstract, clumsily worded codes, getting results beyond the expectations of the legislators who wrote our laws back in the 1970s."[26]

Babbitt's ideal for community-based environmental protection involved gathering sometimes "tens of thousands of people, but the essential nature is all those people coming together, working in harmony, listening to one another, looking inward towards their community in search of a common solution, and getting to yes."[27] He singled out cooperative efforts in the Pacific Northwest, the Everglades, the San Francisco Bay Delta, the Blackstone River Valley in New England, and the Chesapeake Bay.[28] According to Babbitt, these efforts can be characterized as sharing the following working principles: (1) united by watersheds (a sense of place), (2) built through partnerships, (3) reinforced by federal laws, and (4) decisions reached through the consensus of everyone involved.[29]

Babbitt's travails aside (and there were many during his eight years as Secretary),[30] his vision of community-based environmental efforts is widely shared in the environmental community.[31] For example, the energetic Alaskan environmental scientist, organizer, and former gill-netter Dr. Riki Ott represented the sentiments of the IDM movement when she commented on her experiences with the Copper River Watershed Project:

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26. *Id.* Babbitt also elucidated five principles for government's role in the emerging interactive restoration processes. *Id.* First, he pledged government to be a "full partner in the process." *Id.* He also promised to "use laws creatively," and to "listen to local needs." *Id.* The outcome of these steps would be "empowering local communities" and finally, "sharing the costs of Restoration." *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Much of Babbitt's roller coaster tenure as Secretary of Interior revolved around the tension he evinced between wanting to restore and preserve the West of his youth and his eagerness to bring along the extractive industries which have dominated Western politics for nearly a century.

31. In my experience, it is far too easy to use a phrase like "environmental community" to summarize what is largely a poorly funded, mostly volunteer, disorganized, disparate, and formally unconnected "group" of organizations and individuals working on a variety of issues and in a variety of venues throughout North America. Further, while much industry angst is focused on "rich" organizations, such as the Nature Conservancy or the far poorer Sierra Club, the policy and technological resources of the environmental community pale in comparison with the resources of just one $3.5 billion insurance company called the American Farm Bureau. *See 60 Minutes* (CBS television broadcast, July 16, 2000) (presenting details about the Farm Bureau's resources).

> Community based conservation projects are providing the driving energy in conservation now. Energy from thousands of communities has infused conservation with an emphasis on sustainability, or the integration of environmental, economic and social capital to provide long-term wealth, health and prosperity. . . . As external conditions continue to change and worsen socially, environmentally and politically, organizations working towards sustainability increase. . . . We are witnessing the emergence of a new form of global leadership from below, grounded in a love of life, and a capacity for deep compassion.[32]

III. "FOR EVERY COMPLICATED PROBLEM THERE IS A SIMPLE SOLUTION . . . AS LONG AS IT'S NOT TOO COMPLICATED": DEFINING ENVIRONMENTAL INTERACTIVE DECISION-MAKING PROCESSES IN THE UNITED STATES

> *They say Republican and Democrat. I say the people of rain. They say city folk and redneck (my neighbors Alonzo and Sunny). I say hospitable tribe of the rain. I say rain today in the gray of Portland and the dusty green of high desert walking rain. They say for and against. I say friend and friend, friend and friend in midsummer Oregon rain.*[33]

As Dr. Ott says, there are literally hundreds of IDM efforts underway throughout the United States. Most of these projects are under five years old, though a select few stretch as far back as thirty to fifty years (including the Plum Valley Watershed Association in Wisconsin, founded in 1946,[34] Maine's Saco River Corridor Commission, founded in the 1960s,[35] and various efforts undertaken by the National Park Service's Rivers, Trails and Conservation Assistance Program,[36] which was authorized in the National Wild and Scenic Rivers Act in 1968.[37] A handful of other projects range from fifteen to twenty years old, including parts of the massive federally funded Chesapeake Bay

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32. Riki Ott, Ph.D., Cultivating Conservation in our Conscious and our Communities: Reflections from the Field, Plenary Address Before Building on Leopold's Legacy: A New Century for Conservation Conference in Madison, Wisconsin (Oct. 5, 1999) (text available from the Wisconsin Academy for Sciences, Arts and Letters).

33. Kim Stafford, *A Thousand Friends of Rain*, *in* NEW AND SELECTED POEMS 1976-1998, at 24-25 (1999).

34. *See generally History of Plum Valley* (Historical Committee, Plum Valley Watershed Ass'n, Wonewoc, Wis., 1948) (available at the Wonewoc, Wisconsin, Public Library).

35. ROLF J. DIAMANT ET AL., A CITIZEN'S GUIDE TO RIVER CONSERVATION 46 (1984).

36. *Id.* at 63-65. The original name was the Rivers and Conservation Technical Assistance Program.

37. Rivers, Trails & Conservation Assistance Program, Nat'l Park Serv., *Rivers & Trails*, *at* http://www.nps.gov/pwro/rtca.htm (last visited Mar. 14, 2004).

Program[38] and aspects of the Great Lakes Program.[39] Given the depth or lack thereof and variety of efforts to change the way we approach environmental protection and restoration activities, it is useful to categorize and analyze these efforts in a general way.

A. Geographically Defining and Classifying Watershed Councils

While "watershed protection and restoration" was the environmental buzz phrase of the 1990s, watershed ecosystem restoration will continue to be a focus far into the future. In response to this emphasis on watershed approaches to ecosystem restoration and protection, "watershed councils," "alliances," and "associations" in various forms and with various purposes have emerged all over the United States as "new institutions" facilitating local place-based ecosystem conservation. The term "watershed council," however, has important regional differences.

In the East, watershed councils are most often private, nonprofit river watershed protection associations, with paid memberships and staff. Staffers and volunteers work to educate and advocate for broadly based river protection and restoration as independent, 501(c)(3) environmental groups that are granted nonprofit charity status by the Internal Revenue Service. Funding for these groups begins with their members and individual donors, grants from private foundations, business contributions, and occasional government grant programs.

Watersheds and watershed advocacy and management vary tremendously in size and organization in the East and Midwest. River basins with watershed councils range from tiny, one hundred square mile coastal watersheds like the Westport River, to twelve thousand square mile watersheds like the Connecticut River. Eastern watershed councils often have a twenty to fifty year history as independent advocacy organizations preaching watershed management and ecosystem protection for multistate watersheds. For example, the Connecticut River Watershed Council was founded in the 1950s,[40] the Merrimack River Watershed Council was founded in the 1970s,[41] the Nashua River

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38. *See* Robert W. Adler, *Addressing Barriers to Watershed Protection*, 25 ENVTL. LAW 973, 1071-72 n.608 (1995) (discussing the Chesapeake Bay Program).

39. *Id.* at 1073-75.

40. Connecticut River Watershed Council, *at* www.ctriver.org/index.html (last visited Mar. 6, 2004).

41. The Merrimack River Forum began in 1988 as a project of the Society for the Protection of New Hampshire's Forests (SPNHF) and the Merrimack River Watershed Council (MRWC). Because of travel policies in the environmental agencies of Massachusetts and New Hampshire that forbade the expenditure of state funds for out-of-state travel, it was difficult, and

Watershed Association was founded in 1969,[42] and the Housatonic Valley Association was founded in 1941.[43] In addition, community-based efforts were even founded to protect the tiny Massachusetts and Rhode Island watershed of the beautiful ecological treasure, the Westport River.[44]

Watershed protection and restoration efforts in the East, South, and Midwest often also include statewide umbrella groups like the Massachusetts Watershed Coalition, the River Alliance of Connecticut, New York Rivers United, the River Alliance of Wisconsin, the Minnesota Rivers Council, and the Alabama Rivers Coalition, and the twenty-three-state Mississippi River Basin Alliance. These organizations often provide policy coordination and other services to local groups in their regions, in addition to pursuing their own policy, advocacy, and education agendas. Many of the eastern watershed advocacy organizations also sponsor or participate in CBC or IDM processes as well.

In the West, the term "watershed council" usually means a quite different kind of organization (though some groups based on the eastern model exist in the West as well and vice versa). The Rocky Mountain and Pacific Coast states now have over four hundred watershed councils at various stages of maturity.[45] Some are staffed; most are not. Western watershed councils vary widely in composition, level of technical expertise, and experience in collaborative decisionmaking. Western watershed councils also usually have several differentiating characteristics from their eastern counterparts. First, western councils are usually "multi-stakeholder" organizations; their governing boards are often informally organized without incorporation as nonprofits or any other kind of recognized legal entity. They include not only self-identified environmental activists, but also (depending on the primary

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often impossible, to arrange meetings of officials from the two states to discuss issues of the interstate Merrimack River Watershed. The MRWC and SPNHF began hosting occasional meetings to which approximately sixty groups, agencies, and individuals were invited to give updates of their enforcement, protection, and/or restoration activities throughout the watershed. These formal networking sessions soon led to changes in travel policies between the two states and, eventually, to formal partnerships under the EPA-sponsored Merrimack River Watershed Initiative. The Merrimack River Forum meetings died out after several sessions as activities under the Initiative and other efforts replaced the need for formal networking sessions.

42. Nashua River Watershed Ass'n, *at* http://www.nashuariverwatershed.org (last visited Mar. 6, 2004).

43. The Housatoric Valley Ass'n, *at* http://www.hvathewatershedgroup.org (last visited Mar. 6, 2004).

44. The Westport River Watershed Alliance was founded in the late 1970s as the Westport River Defense Fund.

45. River Network & Nat'l Park Serv., River and Watershed Conservation Directory, *at* http://www.rivernetwork.org/library/libnetdirsearch.cfm (1998-99) (last visited Mar. 24, 2004).

local constituencies of the watersheds) ranchers, farmers, other business people, federal, state and local agencies like USDA or the Forest Service, county commissioners, local agricultural districts and others with direct economic interests in the watershed.

Second, western watershed councils generally run on some sort of consensus based decision-making model. Pure consensus-based decisionmaking means that no decisions are made or positions taken by the council unless all members agree. Often, these groups have an "open membership" policy, meaning that anyone or any interest group can attend or join a watershed council meeting and/or decision-making process at any time. Some variations of the pure consensus model allow for some version of a super-majority vote in situations where consensus is not reached, and/or membership is limited to previously identified interests or associations in the watershed.

Third, western watershed councils are often highly dependent on government funding or "certification" for funding, and/or staff assistance. Hence, in the West, watershed councils will often be mentioned under the "government statutory" or "government outlaw" categories, while in the Midwest and East, watershed councils, associations, or alliances will most often fit into the "grassroots NGO" category, occasionally into the "institutional NGO" process, and only rarely into either of the government categories.[46]

B. Categories of Interactive Decision-Making Organizations

Analysis of the IDM landscape shows at least four different categories of collaborative conservation projects emerging or in process throughout the different regions of the United States. I classify IDM projects as:

1. Government Statutory
2. Government "Outlaw"
3. Grassroots NGO and
4. Institutional NGO processes.

However, strict categorization is difficult at times because some efforts may start in one category, such as Grassroots NGO, and evolve into another category, like Government "outlaw." For example, the Merrimack River Watershed Council's Merrimack River Forum changed quickly into the EPA-funded Merrimack Watershed Initiative meetings,[47]

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46. *See infra* Part III.B (discussing these categories).

47. Barbara J. Rich, *Solutions for the Future . . . Actions for the Present: Proceedings from the 1993 Merrimack River Watershed Management Conference* (June 7-8, 1993).

which were modeled in part on the efforts of the National Estuaries Program (NEP).[48]

1. Government Statutory IDMs

Government Statutory IDMs are easily defined: they require, at base, a statutory authorization (or requirement) for an inclusive, cooperative process to achieve a specific environmental protection and/or restoration goal.

This type of IDM model begins with a statutory framework or other governmental imprimatur that defines the multi-stakeholder organization or advisory process.

The NEP is a particularly good and well-known example of a Government Statutory IDM. Congress established the NEP in 1987 as part of the Clean Water Act's[49] reauthorization and expansion. The Program started in 1988 with six estuaries, and grew to seventeen by 1992.[50] Of the first six estuary projects designated under the NEP, the Buzzards Bay Project (BBP) in particular reflects a number of procedures that bore imitation and spin-offs. Initiated under the joint management of the EPA and the Massachusetts Executive Office of Environmental Affairs in 1985, the BBP was designated as an NEP "estuary of national significance" in January 1988, after nomination by Massachusetts Governor Michael Dukakis.[51] The Citizens Advisory Committee (CAC) to the BBP, consisting of over thirty concerned citizen representatives of various interest groups (including industry, marinas, agriculture and conservation organizations, and government officials) regularly met to direct and advise the Buzzards Bay Project Management Committee (BBMC).[52] The BBMC included a couple members of the

48. EPA, THE NATIONAL ESTUARY PROGRAM AFTER FOUR YEARS: A REPORT TO CONGRESS (EPA-504-99-207) (1992) [hereinafter NEP REPORT].

49. Clean Water Act, 33 U.S.C § 1342 (2000).

50. The estuaries were Albemarle-Pamlico Sounds, North Carolina; Buzzards Bay, Massachusetts; Long Island Sound, New York and Connecticut; Narragansett Bay, Rhode Island; Puget Sound, Washington; and San Francisco Estuary, California. NEP REPORT, *supra* note 48, at 39.

51. *Id.*

52. The CAC in turn spawned a private environmental coalition, the Coalition for Buzzards Bay (the Coalition), which was initially funded by a BBP grant. The Coalition's membership included the Bay's major environmental advocacy organization (the Westport River Watershed Alliance), a private education and research facility (the Lloyd Center for Environmental Studies), fishermen's associations, marina representatives, and other organizations and individuals. Among other activities, it conducted citizen involvement efforts including annual "Buzzard's Bay Day" with activities throughout the Bay's communities. I served as a member of the BBP CAC, and a cofounder and First Vice President of the Coalition for Buzzards Bay, while also working as Executive Director of the Westport River Watershed Alliance.

CAC, along with the federal scientists administering the Project's studies and funds.[53] The CAC adopted an informal consensus procedure, but was operated under the benign dictatorship of its chair, Town of Marion Selectman[54] and local philanthropist Ted Pratt. After the CAC, and BBMC adopted, the Project's first management plan,[55] the CAC grew concerned about the possibilities for endless scientific studies without corresponding actions to remedy the Bay's environmental problems.[56] Mindful of the power of labels, the CAC changed its name to the Buzzard's Bay Action Committee (BBAC) with a mission of overseeing implementation of Bay cleanup and remediation actions.[57]

Another example of a government statutory IDM is the lesser-known and elaborate process set up by the Oregon legislature to codify "watershed councils" and make them eligible for state funding.[58] This restrictive system began in 1987 with the enactment of Senate Bill 23 which established the Governor's Watershed Enhancement Board (GWEB).[59] GWEB was created to combine the fish, river, lake, and estuary restoration efforts of government agencies with those of private citizens, watershed councils, soil and water conservation districts, youth, and volunteers.[60]

The legislature passed HB 2215, creating Oregon's Watershed Council program requirements in 1993. In 1995, HB 1331 directed GWEB to provide support to the statutory watershed councils.[61] Watershed Councils are defined under the statute as "a voluntary local organization, designated by a local government group convened by a county governing body, to address the goal of sustaining natural resource and watershed protection, restoration, and enhancement within a watershed."[62] Membership of a watershed council is defined by statute to consist of "a majority of local residents, including local officials," and

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53. *See supra* note 52 and accompanying text.

54. In New England, town "selectmen" are the elected executives, analogous to city councilors, who administer town business.

55. The Comprehensive Conservation and Management Plans were known as CCMPs. NEP REPORT, *supra* note 48, at 2.

56. *Id.*

57. *Id.* at 26-27.

58. *See generally* OR. REV. STAT. §§ 541.345-541.413 (1987).

59. *Id.* § 541.350, *repealed by* § 541.351.

60. *The Governor's Watershed Enhancement Board*, *amended by id.* § 541.360 (2001) (Oct. 1997); Ken Bierley, OWEB Program Manager, presentation at Portland State University (Jan. 1999); Interview with a state representative who wishes to remain anonymous (Jan. 2000) [hereinafter Anonymous State Representative]; Interview with Geoffrey Huntington, Executive Director, OWEB (Apr. 10, 2000).

61. OR. REV. STAT. § 536.009 (1993), *amended by* ch. 594 (2003).

62. *Id.* § 541.388 (2000).

seven additional categories that may be included are listed as well.[63] GWEB, renamed and restructured by the legislature in 1999 as the Oregon Watershed Enhancement Board (OWEB),[64] distributes about ten million dollars in annual funding to watershed councils which have been certified by county commissioners as eligible for the funds for habitat restoration projects.[65] Oregon now has over ninety officially recognized watershed councils eligible to receive OWEB funding.[66]

2. Government "Outlaw" IDMs

Government "Outlaw" IDM processes are those without specific statutory authorization or requirement that are government initiated and/or funded. These IDMs are designed to bring together a variety of stakeholders with disparate and often conflicting viewpoints to work on specified environmental protection or restoration goals. Examples of Government "Outlaw" IDMs include the Quincy Library Group,[67] Project XL,[68] the Oregon Plan for Salmon and Watersheds[69] and its outgrowth the Kitzhaber/ Leavitt Enlibra,[70] EPA Merrimack Watershed Initiative,[71] Portland Oregon's Willamette River CSO Task Force,[72] and

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63. *Id.*

64. According to one source, the name change came as a rebuff to a popular and environmentally active Democratic Governor and former Senate president by a right wing, antienvironmental Republican majority legislature. Anonymous State Representative, *supra* note 60.

65. OR. REV. STAT. § 541.350(7), *repealed by* ch. 1026 § 1 (1999), OR. REV. STAT. § 541.351.

66. Some local critics refer to this structure as a "co-optation web."

67. Lisa Jones, *Howdy Neighbor!: As a Last Resort, Westerners Start Talking to Each Other*, HIGH COUNTRY NEWS, May 13, 1996, *available at* http://www.hcn.org/servlets/hcn.issue1828; *see also* Ed Marston, The Timber Wars Evolve into a Divisive Attempt at Peace, HIGH COUNTRY NEWS, May 13, 1996, *available at* http://www.hcn.org/servlets/hcn.Article2.article_id=3650.

68. *See* Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103 (1998) (presenting an analysis of Project XL).

69. The Oregon Plan for Salmon and Watersheds, *supra* note 3; Carlotta Collette, *The Oregon Way*, HIGH COUNTRY NEWS, Oct. 26, 1998, *available at* http://www.hcn.org/servlets/hcn/issue4548.

70. *See, e.g.*, Judy Fahys, *Leavitt Gets Backing for "Enlibra*," SALT LAKE TRIB., Aug. 9, 1999, at A4; Eric Bergman, *Enlibra Principles' Gain Following Among Western Politicians*, CHRON. COMMUNITY (1999); Western Governors' Ass'n, http://www.westgov.org (last visited Mar. 24, 2004).

71. EPA, MERRIMACK RIVER WATERSHED PROTECTION INITIATIVE: PAST, PRESENT, AND FUTURE (1987).

72. Peter M. Lavigne et al., *Willamette River Stakeholders Task Force, Recommendations to the Portland City Council: Portland's Predesign Project to Reduce Combined Sewer Overflows* (Sept. 1999), *available at* http://www.cleanrivers-pdx.org/tech_resources/cso_stakeholders_report.htm (last visited Feb. 12, 2004) [hereinafter *Willamette River Stakeholders Task Force*].

Massachusetts's Watershed Initiative Steering Committee.[73] Many of these IDM processes are new or relatively recent and are experimental. They are often led by personality and are politically driven by high profile executive sponsors, such as Governors Kitzhaber and Leavitt's "Enlibra."[74] EPA's business reinvention effort "Project XL" also fits in this category.[75]

One particularly interesting Government 'Outlaw' IDM is For the Sake of the Salmon (FSOS).[76] FSOS was originally organized as an unincorporated, voluntary association with no statutory authority, acting in a quasi-governmental capacity on a regional basis.[77] Nisqually tribal elder Billy Frank, chair of the Northwest Indian Fisheries Commission, originally inspired FSOS.[78] Frank wanted to bring together traditional enemies including decision-makers from state government, timber, utility and sport fishing industry groups, conservation organizations, and others to work together to protect the Pacific salmon.[79]

Initially FSOS reflected each of the three characteristics of Western watershed councils discussed above, but on a region-wide basis. The

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73. PETER LAVIGNE, THE WATERSHED INNOVATORS WORKSHOP 28-36 (1995); *see also* STEPHEN M. BORN & KENNETH D. GENSKOW, EXPLORING THE WATERSHED APPROACH: CRITICAL DIMENSIONS OF STATE-LOCAL PARTNERSHIPS, THE FOUR CORNERS WATERSHED INITIATIVE FINAL REPORT (1999), *available at* http://www.rivernetwork.org/library/libriviss_4corners.pdf (last visited Sept. 21, 2003); Sari Sommarstrom, *The Four Corners Watershed Innovators Initiative—Its Origins*, WATERSHED MGMT. COUNCIL NEWSL. (Watershed Management Council, Mammoth Lake, Cal., Winter 2000), *available at* http://www.watershed.org/wmc/index.php (last visited Mar. 24, 2004); Sari Sommarstrom, *Comparing Watershed Management Across the Four Corners of the U.S.: The Four Corners Watershed Innovators Initiative*, J. WATERSHED MGMT. COUNCIL NEWSL. (Watershed Management Council, Mammoth Lake, Cal., Summer 1999), *available at* http://www.watershed.org/wmc/index.php (last visited Mar. 24, 2004).

74. Governor Leavitt was appointed Administrator of the EPA and confirmed by the Senate in late 2003 in part because of his advocacy of Enlibra. Some with differing perspectives refer to Enlibra as "Ebola."

75. Steinzor, *supra* note 68, at 104 n.6.

76. *See* For the Sake of the Salmon, *at* http://www.4sos.org/ (last visited Mar. 24, 2004).

77. In the interest of full disclosure, I served as Deputy Director of FSOS starting April 1, 1996, in its first full year of existence, before leaving on April Fools' Day, 1997. I was convinced several months earlier that the consensus process followed by the FSOS Board was used by industry representatives solely to protect their turf. Their veto power stopped any effective substantive policy advances which would have protected and or led to the restoration of endangered salmon stocks. This sadly predictable state of operations was soon reflected by the principals of many of the interest groups who began sending mostly junior employees, who did not have decisionmaking authority, to represent them at board meetings shortly after the first six months of meetings.

78. Interview with Jim Rapp, Executive Director, For the Sake of Salmon (Mar. 15, 2003).

79. *See supra* note 77 and accompanying text.

FSOS governing board, as a voluntary association, had no legal authority for management of the funds or staff of the organization.[80]

The governing board initially consisted of representatives of the Governors of California, Oregon, and Washington, the Northwest Indian Fisheries Commission, timber, agricultural, commercial and sport fishing industries, conservation groups, power companies, and various federal resource agencies, among others.[81] FSOS operated with funding from various federal agencies, and the states of Oregon, Washington, and California with the State of Oregon employing FSOS's executive director, and the federally created Pacific States Marine Fisheries Commission employing the rest of the staff.[82] This model proved unsuccessful and in 2002, FSOS incorporated as a 501(c)(3) nonprofit corporation.[83] Its programs are now limited to support of *noncontroversial* watershed council projects with technical information, agency coordination assistance, training programs, and fee-for-service programs in the three-state region to enhance and restore salmon streams.[84]

3. Grassroots NGO IDMs

The category of Grassroots NGOs is large and diffuse. This category includes such groups as Applegate Partnership,[85] Henry's Fork Watershed Council,[86] Yakima River Watershed Council,[87] Whiskey Creek Group,[88] Beartooth Front Community Forum,[89] and the Merrimack River Watershed Council's now defunct Merrimack River Forum. Grassroots NGOs cover everything from ad hoc associations working on protection or restoration of a specific place to incorporated public charities (mostly 501(c)(3) organizations) with varying geographic or topical missions.

In this IDM model, decision-making processes begin without explicit governmental authority or support. Local stakeholders often start

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80. *See supra* note 77 and accompanying text.
81. *See supra* note 77 and accompanying text.
82. *See supra* note 77 and accompanying text.
83. Interview with Jim Rapp, *supra* note 78.
84. *Id.*
85. *See, e.g.*, Jack Shipley, *The Applegate Partnership*, WATERSHED MGMT. COUNCIL NEWSL. (Watershed Mgmt. Council, Mammoth Lake, Cal., Summer 1995), *available at* http://watershed.org/news/sum_95/applegate.html (last visited Mar. 24, 2004).
86. *See, e.g.*, Kirk Johnson, *Henry's Fork Watershed Council, Community-Based Participation in Regional Environmental Management*, RIVER VOICES 10 (Fall/Winter 1995).
87. BORN & GENSKOW, *supra* note 73, at 21.
88. Jane Braxton Little, *The Whiskey Creek Group*, CHRON. COMMUNITY 5 (Spring 1999).
89. John Clayton, *Elk Viewing Illustrates Community Collaboration*, CHRON. COMMUNITY 24 (Spring 1999).

these groups, as do existing nonprofit organizations, who want to find a way out of the "box" of adversarial government hearings and other types of meetings. The membership of the Grassroots NGOs ranges from unlimited to relatively narrow—sometimes deliberately excluding stakeholders. Government agencies often participate in these efforts, either as members of the group or as informal advisors and technical assistants.

Grassroots NGOs by definition use an inclusive collaborative or consensus-based process to achieve a desired environmental result.[90] Results can be real or imagined, as they may sometimes create a shared "desired future condition" among opposing stakeholders which is used to choose among a variety of restoration and protection activities. Some organizations, which commonly belong to this category (watershed councils in Oregon, California and Washington, for instance), may also be entities certified by government agencies as meeting particular associative requirements.

The Applegate Partnership is one of the earliest examples of grassroots NGO efforts in the West, and is perhaps the premier poster child of community collaboration.[91] Formed in October 1992 in a southern Oregon valley noted for its extreme divisions regarding timber harvesting and associated ecosystem degradation, the Partnership has attracted a number of case studies, most of which report favorably on the participants' own evaluations.[92] To date, few published materials have looked in depth at the on-the-ground results of these efforts to achieve environmental restoration.[93] However, the Applegate River Watershed Council, a sub-group of the Applegate Partnership, published a Restoration Plan in 1999 documenting changes in riparian communities over time and which assessed restoration projects underway since 1994 and the plan also specifies monitoring and measurement plans for the future.[94]

4. Institutional NGO IDMs

Institutional NGO IDMs (for example, the Tilton Diner Group and the Northeast Business Environmental Network) fit into another broad

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90. Note that some grassroots NGO IDMs have limitations based on geography that may limit some "stakeholders" from participation in a specific process.

91. *See, e.g.*, Shipley, *supra* note 85.

92. *See, e.g.*, NATURAL RES. LAW CTR., THE WATERSHED SOURCE BOOK 2-51, 53 (1996).

93. *See* BARB CESTERO, BEYOND THE HUNDREDTH MEETING: A FIELD GUIDE TO COLLABORATIVE CONSERVATION ON THE WEST'S PUBLIC LANDS (Sonoran Inst., July 1999).

94. The Applegate River Watershed Council's Restoration Program (spiral bound report) available from the ARWC Office, Jacksonville, OR (1999).

category which nonetheless has some distinguishing characteristics. These IDMs are typically large-scale efforts aimed at reaching agreement on regional resource extraction and land use disputes. Though large scale, institutional NGO IDMs are usually not government funded or driven and are organized and facilitated by large and usually long-established organizations.

Institutional NGOs are sponsored by formal nonprofit environmental or other community-based organizations or for-profit business organizations. As in Grassroots NGO processes, the government may be represented in the Institutional NGO processes as members or informal advisors.

One recent example of an institutional NGO process is the Tilton Diner Group in New Hampshire.[95] This group of industry associations (Ski New Hampshire), environmental advocacy groups (Society for the Protection of New Hampshire Forests (SPNHF), Appalachian Mountain Club (AMC), Audubon Society of New Hampshire, Conservation Law Foundation, the Wilderness Society, and the New Hampshire Charitable Foundation), and the State of New Hampshire Division of Forests and Lands convened in the mid-1990s to try to create a consensus-based approach to the next White Mountain National Forest Plan.[96] Other examples of IDMs in this category include the Maine Forest Biodiversity Project,[97] the Rocky Mountain Institute's Economic Renewal (ER) program,[98] and the Northeast Business Environmental Network.[99]

Another important sub-category of the institutional NGO IDMs can be characterized as "business self-reinvention" (BSR) projects. These types of projects include efforts like those of Ray Anderson and InterFace,[100] Eric Bloomquist and Colonial Craft, Inc.,[101] and The Natural

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95. As reported by Steve Blackmer and Ted Smith in 1999, the Tilton Diner Group had met for three years. Ted in particular was disillusioned with the process' "probable minimal results." However, one year of additional work by the group brought three major new "consensus position" papers by the groups: (1) Effectively Providing and Managing Recreational Opportunity on the White Mountain National Forest, (2) Exemplary Forestry on the White Mountain National Forest, and (3) Conserving Biodiversity on the White Mountain National Forest.

96. *See* sources cited *supra* note 5.

97. Interview with Steve Blackmer, Northern Forest Center (June 1999).

98. *See* Michael Kinsley, *Citizens Kane: A Town Starts to Renew Itself*, XV(1) ROCKY MTN. INST. NEWSL. (Rocky Mtn. Inst., Snowmass, Colo., Spring 1999), *available at* http://www.rmi.org/sitepages/pid229.php (last visited Mar. 14, 2004).

99. Interview with Ralph Goodno, President, Merrimack River Watershed Council (June 2, 1999).

100. *See* Hunter L. Lovins, *United We Solve*, XV(1) ROCKY MTN. INST. NEWSL. (Rocky Mtn. Inst., Snowmass, Colo., Spring 1999), *available at* http://www.rmi.org/sitepages/pid229.php

Step.[102] These efforts are collaborative and community-minded, and sometimes are integrally linked with NGO initiatives, including "green certification" of business products (for example, Smartwood) and the Rocky Mountain Institute's Natural Capitalism consulting groups.[103]

BSR processes do not fit neatly into this collection of Institutional NGO IDM examples. Like most of the IDM processes, BSRs are highly dependent on individual leadership. It can be harder to enroll other stakeholders to participate in BSR efforts because of a perceived lack of a stake. However, these processes are critical (and very public-informed and involved) environmental protection drivers in some regions. For instance, Colonial Craft, a privately held custom molding business in Minnesota, Wisconsin and Alabama, is creating a market for Smartwood certified lumber and causing a regional revolution in public forestlands management in the process by involving county governments, private foundations, state agencies, and local businesses in an effort to convince public and private timberland owners to manage their forests with diverse ecosystem restoration and protection goals.[104] Many commentators see BSR processes as the most promising for actually causing significant improvements in environmental protection and restoration due to what they perceive as corporate dominance of world resource (mis)management.[105]

IV. "HOW ARE THOSE SOLUTIONS WORKING FOR YOU ANYWAY?": ARGUMENTS FOR IDM

> *I can't compare the river to a frail human being*
> *Because the river doesn't lie*
> *The river doesn't cheat*
> *The river doesn't steal*
> *The river also doesn't have a heart*
> *So it can't be broken. Lucky it.*
> *But if it did and it was, by some twist of fate,*
> *I'm sure it would just keep flowing 'till there wasn't a drop left to its name.*

(last visited Mar. 14, 2004); RAY C. ANDERSON, MID-COURSE CORRECTION: TOWARD A SUSTAINABLE ENTERPRISE: THE INTERFACE MODEL (1998).

101. *See* Peter M. Lavigne, *Revolutionizing County Forest Management in Minnesota: Aitkin County and SmartWood Certification*, *in* FOREST COMMUNITIES, COMMUNITY FORESTS (Jonathan Kusel ed., 2003).

102. *See* The Natural Step, *at* http://www.naturalstep.org (last visited Mar. 14, 2004).

103. Rocky Mountain Institute, *at* http://www.rmi.org (last visited Mar. 14, 2004).

104. *See* Colonial Craft, Inc., *at* http://www.colonialcraft.com (last visited Mar. 14, 2004).

105. *See, e.g.*, ANDERSON, *supra* note 100.

And never look back.[106]

Ott, Babbitt, Wondolleck and Yaffee,[107] Kenney,[108] the EPA,[109] Sommarstrom and Huntington,[110] and Paul de Jongh,[111] among others, see many reasons why the fundamental shift in the way groups, agencies and communities approach issues of environmental degradation is good for community, civic capacity, and ecosystem health. De Jongh, Director of Nature Protection in the Dutch Ministry of Agriculture, perhaps said it best:

> Business-as-usual is no longer an option for government or the private sector, or for the environment. Effective solutions to environmental problems will require some radical rethinking of technology and economics. This can only be achieved if government and business, as well as citizens and NGOs, join forces in a concerted effort rather than waste their energies and ingenuity in endless skirmishing.[112]

Arguments for the process of interactive decisionmaking can be summarized (in rough order or policy progression) as follows:

1. The status quo doesn't work and/or IDM is no worse than existing adversarial mechanisms;
2. IDM overcomes historic animosities and builds trust among and between participants;
3. IDM increases information gathering and exchange among traditional adversaries, thus ensuring everyone has a more complete view of the issues/problems;
4. IDM increases civic capacity—the ability of communities to build, maintain and tap into expertise in a variety of disciplines and communication skills;

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106. Corwin Bolt (grade 11), *The Consummate Role Model*, *in* HONORING OUR RIVER: A STUDENT ANTHOLOGY 35 (2000).

107. *See, e.g.*, WONDOLLECK & YAFFEE, *supra* note 8.

108. DOUGLAS S. KENNEY, ARGUING ABOUT CONSENSUS: EXAMINING THE CASE AGAINST WESTERN WATERSHED INITIATIVES AND OTHER COLLABORATIVE GROUPS ACTIVE IN NATURAL RESOURCES MANAGEMENT 11-15 (2000).

109. EPA, EPA'S FRAMEWORK FOR COMMUNITY-BASED ENVIRONMENTAL PROTECTION (DOC. 237-K-99-001) 5-6, 10-12 (Feb. 1, 1999), *available at* http://www.epa.gov/ecocommunity/frame40.pdf (last visited Mar. 24, 2004).

110. SARI SOMMARSTROM & CHUCK W. HUNTINGTON, AN EVALUATION OF SELECTED WATERSHED COUNCILS IN THE PACIFIC NORTHWEST AND NORTHERN CALIFORNIA 5-13 (Jan. 2000), *available at* http://www.pacrivers.org (last visited Mar. 24, 2004).

111. PAUL E. DE JONGH & SEAN CAPTAIN, OUR COMMON JOURNEY: A PIONEERING APPROACH TO COOPERATIVE ENVIRONMENTAL MANAGEMENT 1-14 (1999). De Jongh builds by far the best case for cooperative environmental management based upon sixteen years of a nationwide process that is resulting in significant reductions in pollutant discharge and, he believes, is entering the stage of significant structural changes for the long haul. *Id.* at 197.

112. *Id.* at 6.

5. The cooperative or interactive process changes public agency cultures for the better, making them less imperious and more inclusive, creative and responsive to local needs, problems and solutions.
6. IDM has greater problem solving potential than traditional adversarial situations—leading to more creative solutions and better environmental outcomes. These solutions include adaptive management; making changes in efforts towards solutions based on experience and collected data of environmental pollution (i.e., source reduction and/or treatment remedies) and restoration projects sometimes proscribed by regulatory efforts.
7. IDM's local focus better educates the "public," especially local residents, about complex environmental conflicts and issues and makes an ecosystem focus more likely.
8. Early and mid-time/effort agreements and solutions on "easy" issues enabled by IDM build the long-term ability to come to agreement on tougher decisions which often require systemic change that is unlikely to happen through adversarial processes.[113]

A. The Status Quo Doesn't Work, and/or IDM Is No Worse Than Existing Adversarial Mechanisms

On its face, the first argument of IDM proponents is simple: environmental problems are getting worse or at least not getting better, and the command and control process is part of the problem because it increases disagreement by presenting rigid, hard line decisions.[114] Rigid, inflexible command and control systems set in place on a national level also may not allow the best possible ecosystem outcomes without considering local (place-based) conditions. These gaps in the process lead to decreasing social trust and increasing conflict responses.[115] IDM proponents also argue that the lack of flexibility inherent in command and control systems unnecessarily alienates affected stakeholders, again leading to adverse responses from possible allies in ecosystem restoration.

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113. It is important to note that policy development and implementation is a long, continuous, and not necessarily linear process. *Id.* at 197-204. De Jongh notes that

> continuity is a crucial element in a long and complicated process. It requires negotiating new deals, monitoring feedback and maintaining dialogue among the parties. Environmental policy . . . must be judged by the conversion of skeptics into advocates and the continuity of efforts to translate general policy goals into specific real world changes.

Id. at 203-04.

114. Proponents also say that at least IDM is no worse than the existing systems of environmental regulation and environmental problem solving, so IDM should be tried because it does not increase the harm.

115. *See* WONDOLLECK & YAFFEE, *supra* note 8, at ch. 1.

However, critics of this reasoning might argue that command and control systems and representative democracy aren't always failing. Notable successes that included public input but that were ultimately resolved by governmental process include the wilderness designation system, federal wild and scenic river designation on private lands in the Northeast, and regulations under the Clean Air Act.[116] For example, the system of a "smile and a stick" under the Clean Air Act that increased emissions standards for automobiles while also increasing mileage requirements worked extremely well, when it was enforced. Nevertheless, IDM supporters might respond that the Clean Air Act requirements worked well—until the auto industry bought control of Congress again and undid the requirements. IDM supporters might also argue that negotiated regulations using a consensus process would make future requirements less vulnerable to reversal in the political process. Alternatively, it may mean that the antienvironmental political change in Congress in the mid-1990s was merely the last grasp of a pollution friendly worldview. That we have not cured all environmental ills may simply mean that we need to refine and strengthen the current system by modifying environmental regulation so that it better reflects ecosystem processes and deals with the cumulative effects of pollutants and the destruction of natural resources. Better public education regarding the cause and effect relationships of environmental problems and sensible and stronger enforcement of existing antidegradation laws will in turn build stronger support for environmental protection.

B. Building Trust—Overcoming Historic Animosities While Increasing Information Exchange

The cliché that women get to know each other face to face and men by working shoulder to shoulder underlies this argument for IDM processes. The repetitive nature of IDM meetings chipping away at issues provides the opportunity to get to know one's adversaries "as

116. Taking a longer view of the process of change, it is useful to compare how systems evolve in comparable amounts of time. Let us use Babbitt's characterization of the last forty years as the "Rachel Carson" command and control revolution in conservation. Taking into account the context of environmental trends discussed earlier, I wonder if, indeed, the current systems are failing or whether they are only in need of a "60,000 mile tune-up" and some maintenance. After all, thirty-six years after the Declaration of Independence and the founding of the republic, the United States was using its second major federal governing document, and it was involved in its second major war with Great Britain while the capitol was evacuated and the White House burned. Was representative democracy, therefore, a failure ready to be replaced by a completely new or old system of government? Viewed in that context, the relatively recent change of attitude in the American public—and in some of its formerly deliberately polluting industries, due in large part to the system of environmental law enforcement under use—is massive.

people." This knowledge of each other is supposed to build trust by taking away ignorance of opponents' human qualities and motives.[117] If we aren't ignorant about adversaries as humans, the theory goes, the need to demonize them over differences on environmental protection issues disappears making education (information exchange) and agreement easier.[118]

The development of the Copper River Watershed Project illustrates one example of the process. The Copper River Watershed Project's initial organizing efforts sprang from the aftermath of the Exxon oil tanker spill in Prince William Sound in 1989.[119] As Ott describes the situation in her adopted hometown of Cordova, Alaska (population 2600) in the early 1990s, thousands of people visited Prince William Sound for a year or two after the Exxon spill "to atone for the sacrificial death of the Sound, and many filled their pockets with Exxon's money. After a year or two, they all left, mostly believing or wanting to believe that the Sound was better. But something was still wrong, and only a handful of us knew."[120] Ott spent the first three winters after the oil spill working as a volunteer lobbyist for stronger oil spill prevention laws in Alaska's state capitol, Juneau.[121] As Ott recounts, she was "angry, resentful, self-righteous. Taking positions which of course created opposition."[122]

Ott later drew on that communication failure in her efforts to build a sustainable economy in Cordova, and simultaneously protect the ecology of the vast Copper River Delta and its famous "unoiled" sockeye salmon runs bordering the town to the south.[123] As pink salmon stocks collapsed in 1992, followed in 1993 by the collapses of the herring stocks and the odd year cycle of pink salmon, it was clear to all that "the Prince William Sound ecosystem—the economic lifeline for Cordova—was experiencing severe delayed effects from the oil spill."[124] Ott said the

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117. In a report written by Belden, Russonello, and Stewart, trust is described as "a quality that is earned through the collaborative process, by working to obtain the other ingredients. Trust may indeed be the product of collaboration." BELDEN ET AL., COLLABORATIVE PROCESS: BETTER OUTCOMES FOR ALL OF US 4 (2001).

118. *Id.*

119. *See* Ott, *supra* note 32; Riki Ott, *Building Sustainable Communities*, *at* http://www.copperriver.org (last visited Mar. 24, 2004).

120. Ott, *supra* note 32.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* Ott notes that at the time no one knew the mechanism causing the salmon and herring stock to collapse three and four years after the oil catastrophe. *Id.* Later, multigeneration studies with pink salmon showed that oil is toxic at levels 1000 times lower than previously thought and that low levels of oil impair reproduction in pink salmon. *Id.* The pink salmon

experience deeply frightened the people of Cordova, where over half of them are directly employed by the fishing industry.[125] In 1994, Ott and others organized a series of meetings to discuss ideas for rebuilding the town's economy.[126]

> Adding urgency to the meetings was the fact that residents were completely polarized on resource use. The state had plans to open the Copper River Delta for oil and gas lease sales and to build a road along the Copper River, with a deep-water port in town, for industrial-scale tourism and resource extraction. In addition, the largest private property owners in the region were actively clear-cutting great swaths of coastal temperate rainforest.[127]

Ott recounts that

> [a]bout 400 people agreed that efforts to diversify the economy should also protect our (former) quality of life and the unoiled Copper River salmon fishery which was the town's economic mainstay. Implicit in this decision was the need to sustain the ecosystem upon which the Copper River fisheries—and our subsistence resources—depended while also fostering our cultural heritage.[128]

The turning point for the community's ability to coalesce around this agreement came, Ott says, when two dozen individuals meeting as representatives of the diverse interests in the community learned that their greatest obstacle was one of their own making: a lack of mutual trust.[129] Ott reports that by continuing to meet and work together, trust grew.[130] "By sharing a framework for our goals, the dialogue became 'smarter', i.e., more positive, focused and creative, which stimulated problem-solving. 'I get it' said a 13-year-old student who attended one of our early meetings. 'This is like adult problem-solving!'"[131] Six years later, the trust built in those early meetings resulted in the incorporation of the Copper River Watershed Project, a grassroots NGO. The Project has since sponsored a variety of economic, artistic, cultural and environmental studies and restoration projects focusing not only on

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exposed to oil as one year old fry and eggs in 1989 returned as adults in 1990 and 1991 respectively, but were unable to reproduce, resulting in population crashes in 1992 and 1993. *Id.*

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

Cordova and the Copper River Delta, but also on the entire Copper River watershed.[132]

C. IDM Increases Civic Capacity

Civic capacity can be described as the ability of communities to build, maintain, and tap expertise in a variety of disciplines and to improve communication skills to raise the quality of life for its inhabitants. By engaging citizens in interactive decision-making processes, we both use and add to the citizens' expertise, and the increased depth in expertise of the individual and/or the group is presumed to be available for future community use.[133] This assumption is sometimes explicitly built into community processes and subsequent reports.[134] For example, in the Willamette River Stakeholders Task Force's September 1999 *Recommendations to the Portland City Council*, the fourth of six major recommendations called for investment in "civic infrastructure."[135] Defined as "a combination of civic, business, ratepayer, non-profits, neighborhoods, stream groups, Watershed Councils and 'Friends' organizations which collectively comprise avenues for citizen input and involvement in civic affairs," civic infrastructure "creates within the Portland community local water quality and watershed expertise and experience from which to draw as planning occurs for new development and redevelopment of the metropolitan area."[136]

D. IDM Changes Agency Culture for the Better

IDM processes can also change agency cultures for the better. Imperious agencies become more inclusive, creative, and responsive to local needs, problems, and solutions by working with their constituents. University of Michigan professors Julia Wondolleck and Steven Yaffee chronicle such positive responses by the United States Forest Service in their comprehensive book, *Making Collaboration Work*.[137] Wondolleck and Yaffee present an enthusiastic endorsement of the movement towards cooperative environmental management.[138] They state, "Many of these

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132. *Id.* The Copper River Watershed is roughly the size of Wisconsin, with only 5600 people in the fourteen larger communities of the watershed.

133. *Willamette River Stakeholders Task Force*, *supra* note 72, at 22.

134. *Id.*

135. *Id.*

136. *Id.*

137. WONDOLLECK & YAFFEE, *supra* note 8, at 9-11.

138. *Id.*

innovations have occurred because the participants simply had no other way to move forward and they felt a strong need to do so."[139] From the perspective of federal agency managers like Forest Service ranger George Weldon, "[g]oing it alone 'is not even an option. . . . We have to cooperate to do our jobs properly.'"[140]

Wondolleck and Yaffee note that cooperative efforts, like those trumpeted by Ranger Weldon, are "partly an outgrowth of a new style of resource management that is in evolution from the approach that dominated the first hundred years of conservation activities."[141] The Roosevelt era of conservation relied on the efficiency of technical experts (rangers), and the maxim of the greatest good for the greatest number.[142] Wondolleck and Yaffee note that management philosophy worked well in times of low demand on the system.[143] As extraction demands grew, along with recreational demands from a vastly increased and more mobile public, the "mechanistic, dominant purpose agencies that were effective at producing harvestable timber and shootable deer . . . were bound to run into problems as public values shifted."[144] As conflict, violence and gridlock grew in the early nineties, a shift to interactive forest planning processes came into being—producing agreement and restoration projects in Oregon's Applegate Valley and other areas around the country.[145]

Portland's Willamette River Stakeholder process also noted changes in the focus of both the Task Force and the city's Bureau of Environmental Services during the four years of their joint process evaluating the city's approach to river pollution issues.[146] From the passage of the Clean Water Act in 1972 to the early 1980s, the City of Portland, like many others across the country, ignored and avoided the problem that its combined stormwater and sanitary sewer system lacked storage and treatment capacity to absorb the massive amounts of

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139. *Id.* at 9.
140. *Id.*
141. *Id.* at 11.
142. *Id.*
143. *Id.*
144. *Id.* at 12.
145. *See id.* at 12-13.
146. *Willamette River Stakeholders Task Force*, *supra* note 72; PORTLAND BUREAU ENVTL. SERVS., PORTLAND'S CLEAN RIVER PLAN: TEN ACTIONS FOR SUCCESS (Mar. 2000), *available at* http://www.cleanrivers-pdx.org/clean_rivers/clean_river_plan.htm (last visited Mar. 1, 2004) [hereinafter PORTLAND'S CLEAN RIVER PLAN]. Narrative interpretation of events and the stakeholder process is solely that of the author who was an appointed member of Portland's Willamette River Task Force and coauthored the Task Force report.

rainwater running into the system in the winter.[147] The stormwater, when combined with the sewage flows in sanitary sewers, overfilled the system and resulted in combined sewer overflows (CSOs) into the Willamette River and the Columbia Slough.[148] For nearly half of each year, raw sewage flowed into these waterways at the estimated rate of up to ten billion gallons per year, instead of being treated at the municipal wastewater treatment facility.[149]

In the early 1990s, Northwest Environmental Advocates, a nonprofit environmental advocacy group, initiated a lawsuit against the City of Portland for failing to implement the Clean Water Act through application of Oregon's regulations requiring partial elimination and treatment of CSOs.[150] After a series of legal maneuvers, the City eventually capitulated to the legal and public pressure and signed a "Stipulation and Final Order" with the Oregon Department of Environmental Quality (DEQ) in August 1991.[151] This agreement included a "re-opener" clause intended to allow the parties to renegotiate the agreement's requirements if the discovery of additional water quality or cost information so required.[152] The city agreed to a 99% elimination of CSOs from the River and Slough in an estimated $1 billion dollar project.[153] Through initial engineering assessments between 1990 and 1993, the City estimated that 100% elimination of CSOs into the Columbia Slough was cost effective and feasible.[154] Analysts also concluded the cost differential between a 94% and 99% level of control on the Willamette through the middle of the City was approximately $300 million dollars—with little noticeable gain in water quality.[155] As a result, in 1994, the City and DEQ signed an amended order committing

147. *Willamette River Stakeholders Task Force*, *supra* note 72.

148. *Id.*

149. *Id.*

150. Northwest Environmental Advocates presented two alternative legal theories: (1) that Portland was unlawfully discharging pollution without a NPDES permit and (2) that Portland was discharging pollutants in violation of the sewage treatment plant's NPDES permit. *See* N.W. Envtl. Advocates v. City of Portland, 56 F.3d 979, 982 (9th Cir. 1995).

151. PORTLAND'S CLEAN RIVER PLAN, *supra* note 146, at 3. The city estimated that it was discharging six billion gallons of CSOs a year in 1990. By 2000, the city had reduced the annual overflow to less than three billion gallons through implementation of source reduction efforts, separation of some sewers, and completion of the Columbia Slough portion of the CSO project. *Id.*

152. *Id.* at 4.

153. *Id.* at 3. Federal CSO policy guidelines require only an eighty-five percent cleanup level.

154. PORTLAND'S CLEAN RIVER PLAN, *supra* note 146.

155. *Id.*

the City to a 99% level of control for the Slough by the year 2000 and a 94% level of control for the Willamette by the year 2011.[156]

In 1996, as engineering studies continued and work was underway on a variety of pilot projects, Portland's City Council decided to appoint a citizen task force to advise the Bureau of Environmental Services (BES) and the Council while the design and implementation of the CSO control plan progressed.[157] The Willamette River Stakeholders Task Force (WRTF), a government "outlaw" organization, included representatives from industry, neighborhood associations, the Public Utilities Review Board, Portland State University, several environmental organizations (NW Environmental Advocates declined to participate), business associations, and downtown law firms.[158] Various government representatives participated as nonvoting members, and BES provided some staff time dedicated to supporting the Task Force (particularly in the last year of the process).[159]

Emblematic of the Portland process was the change in the style and content of Task Force meetings about halfway through the process.[160] At the beginning, and for nearly twenty-four months thereafter, Task Force meetings consisted mostly of BES staff presenting lectures on the process of analyzing sewer construction needs and costs, treatment siting challenges, and other details throughout the project area.[161] Little give-and-take occurred, and information sharing was largely in one direction.[162] Task force members began to skip meetings, and some of those who attended regularly wondered if their investment of time was worthwhile.[163] As knowledge of the technical challenges increased, however, Task Force members began to direct the meeting agendas, and the agency and the Task Force began to raise questions about the overall direction of the CSO plan.[164] As meeting agendas changed and questions were raised about the direction of the efforts to eliminate sewage overflows from the Willamette, the agency's approach shifted from "reporter" to one of partnership with the Task Force in designing a more comprehensive approach to restoring ecosystem functions in the urban

156. *Id.* at 4.
157. *Willamette River Stakeholders Task Force*, *supra* note 72.
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

watershed.[165] The City also achieved a major change in the culture of BES: the agency shifted from a pure end-of-the-pipe engineering focus to one more disposed to address environmental problems on a comprehensive watershed basis.[166] BES now deals integrally with the effects of land use on water quality and quantity issues, while focusing on eliminating pollution at the source as much as treating pollution at the end-of-the-pipe.[167] The length and thoroughness of the process also contributed to the same major shift in perspective for many of the members of the Task Force.[168]

E. IDM Leads to Better, More Creative Problem-Solving, Including Techniques Like Adaptive Management

While Portland's efforts to eliminate and treat massive combined sewer overflows into the Willamette River and Columbia Slough represent a shift from an adversarial approach to an IDM strategy, Portland's efforts also demonstrate the ability of IDM processes to create better outcomes and encourage adaptive management to improve environmental outcomes. After nearly four years of public hearings and meetings with a panel of experts, the WRTF unanimously recommended[169] that the City stick to its legal agreement of ninety-four percent control of CSOs on the Willamette.[170]

The Task Force also recommended spending an additional $100 million to complete and implement an "integrated watershed plan."[171] Portland's integrated watershed plan would use adaptive management of more environmentally productive, "green" solutions in addition to the standard engineered pipes and "end-of-the-process" sewage and stormwater treatment technologies for the Willamette and its tributary streams within the city boundaries to *achieve the ninety-four percent level of control or better*.[172] The Task Force strongly recommended the

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165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. There was unanimous agreement on nearly all aspects of the Clean River Plan except for a sharply divided debate about an extension on the time frame to complete the Plan. No minority reports were written. There was, however, much public debate about the extended time frame and vociferous opposition from NW Environmental Advocates.
170. It was clear, by 1998, that the City would reach its goal of one hundred percent control on the Columbia Slough by 2000 (and it has—on time and under budget), so the recommendations of the WRTF focused on numerous aspects of the effort on the Willamette.
171. PORTLAND'S CLEAN RIVER PLAN, *supra* note 146.
172. Copies of the Clean River Plan on CD-ROM are available from the Bureau of Environmental Services and on the City's Web site at http://www.enviro.ci.portland

integrated watershed approach as providing significantly better ecosystem results than just using the traditional end-of-the-pipe sewage treatment process.[173] This plan, however, would delay final control of the CSOs on the Willamette from 2011 until 2020, while creating much more extensive water quality and other environmental benefits.[174]

The recommended actions focused on source reduction efforts for stormwater control, including the installation of innovative features like rooftop gardens, downspout disconnection programs, restoration of wetlands, specified reductions in impervious areas in parking lots and driveways, and extensive tree plantings throughout the city.[175] The plan also recommended substantial city investment in adult and school education programs regarding environmental solutions within the urban area, investment in training programs for agencies and businesses, and other activities which would greatly increase the "civic infrastructure" of the city.[176] The data from these stormwater source reduction efforts would then be used to "downsize" the large tunnel and pipe taking the bulk of the CSOs from the riverfront in downtown Portland to an expanded Wastewater Treatment facility, which discharges treated wastewater into the Columbia River.[177] Building a smaller "big pipe," based on measured reduced flows (adaptive management), would result in substantial cost savings—allowing more money to be spent on habitat restoration and other environmental restoration efforts in parts of the city which have stormwater runoff problems but that do not have combined sewers.[178] After some debate, the five-member Portland City Council unanimously supported the integrated watershed approach and its use of adaptive management, and reaffirmed the City's commitment to the ninety-four percent (or better) control of CSOs.[179] The Council directed Dan Saltzman (who has oversight of BES and the Clean River Plan in Portland's commission form of government) to negotiate with the state DEQ to see if it would accept an amendment to the 1994 agreement allowing for an extension in time to complete this broader and more comprehensive solution to CSO control on the Willamette.[180]

.or.us/crp.htm (last visited Mar. 24, 2004). Part of the context for the Task Force recommendation included Endangered Species Act listings for salmon in the urban area and a pending decision to declare part of Portland's riverfront harbor a federal Superfund site.

173. *Willamette River Stakeholders Task Force*, *supra* note 72.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *See infra* Part VI.A.4 for more on this story.

Thus, by moving the debate from the litigation of the 1980s to the interactive process of the Task Force, the City of Portland generated a comprehensive response to water quality and other problems of the urban environment. The Clean River Plan features solutions that will not only improve water quality, but also air quality, wildlife habitat, and recreational space for people.[181]

F. IDM's Local Focus Better Educates the Public About Complex Environmental Issues, Making an Ecosystem Focus More Likely

Portland's Clean River Plan effort also illustrates a public shift toward supporting ecosystem-wide efforts to address environmental pollution and endangered species problems. In extensive newsletter surveys and public involvement meetings, when participants were educated about the ecosystem options laid out by the Bureau of Environmental Services, public support shifted dramatically from the big pipe status quo plan by 2011 to the integrated watershed approach.[182] The public clearly supported providing more environmental benefits, even when it would take longer to produce results and cost more. Similar results were reported from four focus groups studies conducted by Campbell DeLong Resources Inc.[183] DeLong concluded:

> Once educated about water quality problems and shown the three possible approaches to improving water quality in the city's rivers and streams, Portland residents prefer the heavy emphasis on [improving] stream corridor conditions and [reducing] stormwater runoff. . . . They believe that improving water quality is important to future quality of life and the livability of the city of Portland. . . . They want the City to take an ecosystem approach to the problems in the Willamette and other local

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181. While the IDM approach has led to numerous innovative and comprehensive solutions for the CSOs in Portland, the origins of the CSO battle in litigation and name-calling came back to kill parts of the city's integrated watershed Clean River Plan. As of January 2004, the plan's ultimate fate was still uncertain. While the City Council, in 2001, abandoned the recommendation to extend the time allowed to finish construction of the "big pipes" on the city's East Side, many of the integrated aspects of the plan live on in the city's interagency "River Renaissance" program coordinated by the Bureau of Planning. It is clear, however, that much of the habitat work implicit in the Clean River Plan will be delayed until long after the "big pipe" part of the project is finished. Without the delay in construction, most of the habitat restoration aspects of the plan were left unfunded and the ability to plan pipe size around the source reduction efforts (adaptive management) was eliminated. *See* PORTLAND'S CLEAN RIVER PLAN, *supra* note 146, at 1-10.

182. *See Willamette River Stakeholders Task Force*, *supra* note 72, at app. J (Public Involvement Report).

183. *See* CAMPBELL DELONG RES., INC., WILLAMETTE RIVER TASK FORCE FOCUS GROUP RESEARCH REPORT (August 1999).

> rivers and streams. Healthy fish and wildlife, not just swimming in the river are very important to participants.[184]

The changes in perspective and restoration efforts in Portland typify results of some IDM processes throughout the country.[185] As EPA's *Atlas of America's Polluted Waters* illustrates, however, it will take years before the results of Portland's and other similar efforts can be measured in watershed health and ecosystem restoration.[186]

G. Early and Mid-Time/Effort Agreements and Solutions on "Easy" Issues Enabled by IDM Processes Build the Long-Term Ability to Agree on Tougher Decisions—Which Often Requires Systemic Change Unlikely to Happen Through Adversarial Processes

Paul de Jongh's fascinating book, *Our Common Journey: A Pioneering Approach to Cooperative Environmental Management*, details his thoughts and experiences regarding the development of a cooperative national environmental plan in the Netherlands in the late 1980s.[187] He analyzes the progression and results of that initial process nearly fifteen years and three plans later.[188] While the Netherlands may seem an odd example for the United States, the process in this small, intensively developed, resource-poor country has many similarities to issues confronting the United States. These similarities include a citizenry that was highly polarized over environmental issues in the 1980s, and a fairly sophisticated structure of environmental regulation and conflicting government agencies.[189] In addition, the Netherlands might strike the reader as the perfection of Twiss's Planning Rule – namely that "no serious planning will ever be done until every available capacity is already overallocated."[190] As de Jongh says:

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184. *Id.* at 33.

185. *See* DOUGLAS S. KENNEY ET AL., THE NEW WATERSHED SOURCEBOOK: A DIRECTORY AND REVIEW OF WATERSHED INITIATIVES IN THE WESTERN UNITED STATES (April 2000); KENNEY, *supra* note 108; WONDOLLECK & YAFFEE, *supra* note 8.

186. EPA, OFFICE OF WATER, ATLAS OF AMERICA'S POLLUTED WATERS (EPA 840-B-00-002) (May 2000).

187. DE JONGH & CAPTAIN, *supra* note 111, at 1-14.

188 *Id.*

189. In the Netherlands, these agencies included the Environmental Ministry and the Ministries of Agriculture, Economic Affairs, and Transport and Waterworks.

190. Former Vermont Law School Professor Richard Cowart taught Twiss's Planning Rule to me in the early 1980s. Cowart in turn was taught the rule by Professor Robert Twiss at the University of California-Berkeley. Cowart reported in August 2000 that Twiss's original version of the rule was expressed:

> [T]he public will not respond with meaningful action to the erosion of a critical natural resource until at least 90% of the original natural endowment of that resource has been

> I learned to appreciate nature when I was very young; I also learned it was in danger. Each stroll on the beach, for example, ended with cleaning oil off my shoes. And the sky was often clouded by heavy smog from industries at the port of Rotterdam, twenty kilometres to the south. I speak of "nature," but that is a curious topic in the Netherlands, where so little is still natural. About half the country . . . is one to three metres below sea level. Originally, this was a vast region of wetlands, something like the Florida Everglades . . . . The Netherlands has the second highest population density in the world, trailing only Bangladesh. The 15.3 million people now squeezed into our small country have no choice but to find ways of working together amicably.[191]

De Jongh describes sixteen years of a nationwide process that is resulting in significant reductions in pollutant discharge and, he believes, is entering the stage of significant structural changes for the long haul.[192] De Jongh also uses metaphors to describe the Dutch process:

> If the adversarial approach resembles a very disorderly hike, the cooperative approach may resemble a more successful outing . . . . Everyone will not have the same reason for hiking . . . . Others may not be so sure they want to go hiking at all . . . . The trick is to help everyone find a reason to participate and objectives they can agree on.[193]

The heart of the Dutch process is a reorganization of a traditional policy development model—what de Jongh calls the boxing match version of policy development.[194] As de Jongh describes the process, you can picture the "boxing match as consisting of two concentric rings: the inner ring for the actual match and the outer ring for the audience, media and sponsor."[195]

In the Dutch model, the new policy process still has an outer ring of sponsor, audience and media, but the center ring has changed completely from a battle to a process among three sectors: the driving force, the stakeholders and the informer.[196]

> depleted. This seems often to be the case with species depletion, and with wetlands. However, there are counter-examples, as [Twiss] also pointed out. The Bay Conservation and Development Commission, set up to protect San Francisco Bay from further filling and diking, was set up after the Bay had been fifty percent filled. Perhaps this ranks as a great environmental victory.

Communication by Richard Cowart to Peter Lavigne (Aug. 22, 2000).

191. DE JONGH & CAPTAIN, *supra* note 111, at 15.
192. *Id.* at 6.
193. *Id.*
194. *Id.*
195. *Id.* at 111.
196. *Id.* at 111-15.

In the new model, the driving force tries to initiate change.[197] In the Dutch case it is the government, but de Jongh says it can also be an NGO or the private sector.[198] Using de Jongh's explanation:

> Responding to outside pressure (from the sponsor, audience and media) the government may initiate, for example, a policy to ban a certain harmful pesticide X. Rather than imposing regulations unilaterally, however, it now seeks a dialogue with potential stakeholders. In the case of a pesticide, the stakeholders may include chemical companies that manufacture the product, farmers who use it, and the communities downstream. The informer plays a neutral, intermediary role in the process—providing objective scientific information . . . as well as economic information about the impacts of a possible ban. There may still be "confrontation" in this model . . . . The difference here is that the participants try to resolve the confrontation in a more productive way than under the old approach.[199]

Critical to this approach is splitting the "we" role of government in the old model into two new roles: the *driving force*, which pushes for a certain outcome, and the *informer*, which provides objective information.[200] In many ways de Jongh's example parallels some methods of policy development in the United States, including EPA's negotiated regulations processes. While cooperative in nature, the process recognizes the role of government in providing a bottom line of enforcement. De Jongh uses his experience as project leader of the first National Environmental Policy Plan (NEPP) to note that "[p]olicy is a long, continuous process."[201] He explains that the first NEPP was first conceived in 1984.[202] Work on the plan began in 1986, and "finally, over a decade after the NEPP process began, the last two ministers have been able to announce some results, but also the need for additional measures."[203] He notes that the Netherlands is now implementing NEPP 3, which "recognizes that the original policy measures from 1989 are not sufficient for achieving sustainable development and proposes a greater role for fiscal and economic measures. These new issues were not covered in the original plan . . . and their subsequent inclusion provides a critical lesson about continuity."[204]

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197. *Id.*
198. *Id.*
199. *Id.* at 115.
200. *See id.*
201. *Id.* at 197.
202. *Id.*
203. *Id.*
204. *Id.*

Thus, the ability of the cooperative planning and implementation model to identify, sustain, and build upon significant policy goals and pollution elimination targets is one of its strongest points. As Wondolleck and Yaffee note about the federal agency process in the United States, cooperative community level involvement can provide the "institutional memory" of people, projects and local knowledge that is lost when agency employees make frequent location transfers.[205]

V. "IT SOUNDS TOO WEAK FOR ME": GROUNDS FOR SKEPTICISM ABOUT IDM

> *"[Please] avoid the word 'balance', because it suggests that we're doing too much to protect the environment when such is not the case."*[206]

Columnist Edward Flattau once wrote, "Now consensus building is fine as far as it goes, but it can only go so far. If you single-mindedly pursue the goal of trying to make everyone happy, you are going to end up with a policy so tepid that it accomplishes little and pleases no one."[207] While there is much to recommend IDM processes for difficult environmental problems, there is also much to be concerned with practically, legally, and philosophically.

Arguments for skepticism about IDM abound. In rough progression they are:

1. Consensus Processes lead to useless lowest common denominator decisions
2. Problems of Stakeholder Representation: Time, Expertise and Money
3. Actual Accomplishments Are Unknown or Unknowable
4. Adaptive Management is an excuse for lack of accountability
5. Legality is Questionable
6. Federalism and the Public Trust
7. Limitations of Sector Specific Laws.

A. Consensus = Lowest Common Denominator

Let's start with the whole idea of consensus. Many watershed councils and other IDM groups operate with a rule of strict consensus, that is, no action can be taken unless and until all members of the group

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205. WONDOLLECK & YAFFEE, *supra* note 8, at 37.

206. Edward Flattau, *"Balance" Not Possible in Saving Environment*, OREGONIAN, Jan. 29, 1993, at C7.

207. *Id.*

agree. Marc Reisner, the well-known author of *Cadillac Desert*[208] and prophet of negotiation with California rice farmers for a win-win situation in California's Central Valley, was severely critical of consensus-based ecosystem restoration efforts.[209] In a keynote speech delivered at the Fourth Annual Symposium of the Wallace Stegner Center for Land, Resources and the Environment in April 1999, Reisner called consensus "less a set of laws or rules than an idea, a concept that, in my view, has been taken to an almost ludicrous extreme."[210] He argues that consensus is rarely achievable in the case of an issue as volatile as water in the West, and that it often results in lowest common denominator solutions that don't really work to restore environmental health.[211]

Reisner gave the example of a small salmon-blocking waterfall on a Central California stream that was not allowed to be modified to give salmon passage to miles of spawning habitat upstream.[212] "[T]hough we altered nature tremendously to the detriment of fisheries, now consensus policies won't allow us to alter nature minimally for the *benefit* of fisheries."[213] He also gave a personal example of an aquifer recharge project he wanted to pursue where surplus floodwaters would be used to recharge a depleted aquifer beneath his own ranch, but because the project would need to be funded under a federal process operated by consensus, it was unable to proceed due to objections by some participants in the funding process.[214] Reisner's central point is that consensus seeking

> has devolved into a hopeless obsession that thwarts most any effort to move beyond yesterday . . . . What I fail to see is real *boldness* in meeting our challenges, the type of boldness that created this desert empire and gave us the [environmental] challenges we face today. We tear down antiquated or inefficient buildings, public and private ones, all the time. We demolish mammoth public works like San Francisco's Embarcadero Freeway. Our Dams, public and private, no matter how troublesome, no matter how marginally beneficial or small, enjoy a status akin to shrines, or

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208. MARC REISNER, CADILLAC DESERT (1986). *Cadillac Desert* was listed by the Modern Library as one of the top 100 nonfiction books of the twentieth century. Regrettably, Marc Reisner died at age 51 in July 2000.

209. *See* Marc Reisner, *Western Water and the Limits to Consensus*, CHRON. COMMUNITY (Spring 1999).

210. Marc Reisner, Keynote Speech at the Fourth Annual Symposium of the Wallace Stegner Center for Land, Resources and the Environment (Apr. 1999) (on file with author).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* Reisner concedes that consensus is appropriate in some situations "here and there." *Id.*

> cathedrals—they are not to be touched. . . . [W]e've become mesmerized by the quixotic notion that, after decades of fighting ferocious water wars, we can leave our disagreements behind, amble into the Quaker meeting-house, and seek and magically *find* consensus.[215]

In short, Reisner argues that consensus processes make bold projects impossible to try and test and calls for a resurgence of "Dominy-like leadership" on the restoration side.[216] Reisner is not alone. The consensus-based For the Sake of the Salmon (FSOS) group eventually gave up all attempts to formulate and adopt a substantive policy position regarding salmon restoration because no matter what the topic, one or two representatives from affected industries would block adoption. The objections nearly always came from different ends of the spectrum, depending on whose ox was being gored.[217] The gridlock at FSOS became so bad that the group eventually even gave up trying to agree upon scientific parameters by which to grade the health of salmon stocks and restoration efforts on the Pacific Coast.[218] FSOS programs are now limited to providing technical support and funding to consensus based watershed councils in the states of California, Oregon and Washington, though new Executive Director Jim Rapp reports that four years later they are making "another run at some policy issues."[219]

Even Matt McKinney, the Executive Director of the Montana Consensus Council, a state funded organization based in the Governor's office, cautions that consensus is only useful in certain situations:

> A consensus process is appropriate when all of the stakeholders believe that they are likely to get something through consensus that they are not likely to obtain from any other arena. Without this conviction, efforts to create consensus are likely to fail, and those who might toy with the idea of

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215. *Id.* (emphasis added).

216. Reisner refers to the ever-humble Floyd Dominy, famed dam builder and former Commissioner of the federal Bureau of Reclamation, who once said "I was the Messiah" of water in the West. *Id.*

217. For instance, the utility company representative did not object to decommissioning logging roads on federal lands, but the timber representatives surely did—though they did not necessarily object to decommissioning old power dams while the utility companies surely did.

218. It is interesting to note that a subcommittee of scientists from the timber, utility, environmental, tribal, and sportfishing industries quickly came to agreement on a wide variety of parameters and data by which to grade the health of salmon streams and the efficacy of state, local, and community efforts to restore those streams. These parameters were quickly tossed by the Board of Directors of FSOS when one of the three states involved (California) objected to the whole process because they were not collecting some of the agreed upon data—notably escapement of juvenile salmon from the streams to the ocean.

219. Jim Rapp, Executive Director, FSOS, Presentation at Portland State University (Oct. 19, 2000).

> entering discussions aimed at building agreements would probably be better off relying on the more adversarial venues.[220]

In addition, Michael McCloskey, chair of the Sierra Club, has written a series of articles critical of using consensus based collaborative efforts to set environmental policy.[221] McCloskey objects to the result of tyranny by the minority in consensus efforts: "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 . . . those directions would be set by collaborations in which those with little support can thwart the will of the majority."[222] McCloskey goes on to posit that the ability to thwart majority positions embodies a "built-in bias" toward the status quo.[223] He also argues that the shift to consensus is irrevocably linked to the concept of place-based management and that the "net effect is to dispense with communities of interest."[224] This power shift, McCloskey says, would have the net effect of disenfranchising urban citizens who "use and appreciate resources on public lands. . . . This is a prescription for frustrating the national will of the majority. It subverts basic tenets of democracy and nationhood."[225]

Similarly, Cary Coglianese, Associate Professor at the JFK School of Government, writes that consensus processes often avoid specifics in their recommendations and leave audiences with nothing more than a glossed over series of generalities.[226] In *The Limits of Consensus*, Coglianese analyzes the national Enterprise for the Environment (E4E) process chaired by former EPA Administrator William Ruckelshaus from

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220. Matthew J. McKinney, *What Do We Mean by Consensus? Some Defining Principles*, CHRON. COMMUNITY (Spring 1997).

221. *See, e.g.*, Michael McCloskey, *Problems with Using Collaboration to Shape Environmental Policy*, 34 VAL. U. L. REV. 423 (2000) [hereinafter *Problems with Using Collaboration to Shape Environmental Policy*]; Michael McCloskey, *Local Communities and the Management of Public Forests*, 25 ECOLOGY L.Q. 624 (1999) [hereinafter *Local Communities and the Management of Public Forests*]; Michael McCloskey, *The Skeptic: Collaboration Has Its Limits*, HIGH COUNTRY NEWS, May 13, 1996, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=1839 (last visited Mar. 8, 2004); *see also* Ed Marston, *Squishy-Soft Processes—Hard Results*, HIGH COUNTRY NEWS, Aug. 28, 2000, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=5981 (last visited Mar. 8, 2004) (replying to McCloskey's articles).

222. *Problems with Using Collaboration to Shape Environmental Policy*, *supra* note 221, at 430.

223. *Id.* at 430-31.

224. *Id.* at 432.

225. *Id.*

226. Gary Coglianese, *The Limits of Consensus: The Environmental Protection System in Transition: Toward a More Desirable Future*, 41 ENV'T 28, 31 (Apr. 1999).

1996 to 1998.[227] He notes that after three years of consensus process with "leaders of extraordinary experience and know-how," the group failed to achieve consensus and the report itself failed to present any innovative, specific, or analytical recommendations to support its goal of improving the system of environmental protection and regulation in the United States.[228] Coglianese calls for a leadership model of environmental management, saying that public managers "should decide when and how to engage in public dialogue based foremost on what will serve the overall public interest, not on what will lead to a consensus among those inside the policy loop."[229]

In addition, Riki Ott makes a critical distinction when she says "[w]ork by consensus, but understand that 'consensus' doesn't have to mean 100% agreement. Decide as a group if you want to work by majority consensus or unanimous consensus."[230] Ott distinguishes majority consensus as a situation where just one or two people in a group are "disrespectful" of the majority's opinion.[231] She goes on to say "majority consensus allows everyone's views to be heard, but decisions are based on the majority and the group can move on."[232]

B. The Problems of Stakeholder Representation: Time, Expertise, and Money

Matt McKinney has noted that the problem with the out-of-control rhetoric of consensus is two-fold.[233] First, consensus often fails to distinguish between process and outcomes.[234] Second, there is the question of who sits at the table and who determines who sits at the table.[235] Many IDM processes are not representative of all stakeholders.[236] Many federal advisory processes, and in particular those of the United States Forest Service, are famous for deliberately choosing participants who appear to be "moderates" on the conflicts involved and for

227. *Id.* at 28-33.
228. *Id.*
229. *Id.*
230. Ott, *supra* note 32, at 5.
231. *Id.*
232. *Id.*
233. Communication with Matt McKinney, Executive Director, Montana Consensus Council (Aug. 1, 2000).
234. *Id.*
235. *Id.*
236. WONDOLLECK & YAFFEE, *supra* note 8, at 107.

deliberately excluding people who might take hard-line positions on the issues.[237]

The experience of the Big Hole Watershed Committee (BHWC) in southwest Montana provides one good example of a consensus process that excluded important stakeholders.[238] The BHWC was formed by ranchers in the Big Hole River valley in 1995, in response to a 1994 drought which resulted in the river running dry due to irrigation withdrawals and harm to the endangered arctic grayling fish and other river resources.[239] The ranchers in the valley then requested help from the state to develop a coordinated, voluntary approach to management of the water in the river.[240] In addition to the irrigation and endangered species concerns, ranchers were also upset with increasing conflicts over recreational access to the river by fishers and boaters.[241]

The BHWC was officially formed in 1995.[242] The present structure of the Committee is formal, with detailed ground rules outlining procedure and committee participation.[243] Meetings are held every third Wednesday of the month and are open to the public.[244] Agency personnel act as technical advisors to the group.[245] Decisions are made through a consensus process and meetings are formally facilitated.[246] BHWC includes a variety of organizational and individual affiliations on its twenty-three member steering committee.[247] As BHWC coordinator

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237. Jane Braxton Little, *Quincy Library Group Bars Outsiders*, HIGH COUNTRY NEWS, Apr. 26, 1999, *available at* http://www.hcn.org/servlets/hcn.Article?article_icl=4957 (last visited Mar. 24, 2004).

238. Jennifer Dwyer, Coordinator, Big Hole Watershed Committee (BHWC), Presentation at the Rocky Mountain Watershed Roundtable, Chico Hot Springs, Montana (May 15-17, 2000); Big Hole Watershed Committee, *at* http://water.montana.edu/watersheds/groups/details.asp?grapID=34; Communications with Jennifer Dwyer, Coordinator, Big Hole Watershed Committee (BHWC) [hereinafter Communications with Jennifer Dwyer]; Communication with Matt McKinney, Executive Director of the Montana Consensus Council; Communication with Rich Day, National Wildlife Federation regional office, Missoula, Montana (July-Aug. 2000) [hereinafter Communications with Rich Day].

239. Big Hole Watershed Committee, *supra* note 238.

240. *Id.*

241. *Id.*

242. *Id.*

243. Communications with Jennifer Dwyer, *supra* note 238.

244. *Id.*

245. *Id.*

246. *Id.*

247. The Committee includes the following members: Agriculture/Ranching (10); Beaverhead Conservation District; Beaverhead County Board of Commissioners; Big Hole River Outfitters; Big Hole River Foundation; Big Hole Tourism Committee; Local Government (3); Montana Water Resources Ass'n; Rocky Mountain Elk Foundation; Skyline Sportsmen Utilities (2); Trout Unlimited Technical Advisors; Bureau of Land Management (BLM); Common Ground; Helena Montana Bureau of Mines & Geology; Montana Department of Natural

Jennifer Dwyer tactfully described the Committee, "Our group continues to struggle with issues of representation, control of research efforts and building cooperative relationships with some organizations. The recreation management project has added additional internal conflicts."[248] The BHWC describes itself as a "consensus driven, multi-stakeholder entity" and one of its functions as "an open forum for watershed issue discussions."[249] The Committee's self-description leaves out its decision to exclude a middle-of-the-road environmental group, the Montana Wildlife Federation (MWF).[250] Matt McKinney notes that the BHWC is unusual in that the local ranchers determined who was going to sit at the table.[251] According to McKinney, "if that happened today, I'd say fine, hire somebody else to do your facilitation because the Consensus Council is committed to all stakeholders being represented."[252]

Thus, the stated mission of the BHWC, to seek understanding of the river and agreement among individuals and groups with diverse viewpoints on water use and management in the Big Hole watershed, is at odds with its record of exclusion and its conflicting goals. Nevertheless, it is worth noting the significant accomplishments of BHWC, particularly its development and implementation of a plan to return water to the river in times of drought.[253] The cumulative effect of their efforts resulted in the lifting of the Big Hole River classification as "chronically dewatered."[254]

Lack of balance in collaborative processes comes into play in other ways as well. John Echeverria, Director of the Georgetown

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Resources & Conservation (DNRC); Montana Department of Fish, Wildlife & Parks; Montana Land Reliance; Montana Water Course; MSU; Montana Wilderness Association; Natural Resources Conservation Service (NRCS); and U.S. Forest Service.

248. Communications with Jennifer Dwyer, *supra* note 238.

249. Agenda and supplementary materials compilation of the Rocky Mountain Watershed Roundtable, at 2 (on file with author).

250. The Montana Wildlife Federation is the state affiliate of the National Wildlife Federation (NWF) but is a distinctly separate and independent organization with an extensive membership in Montana. The roots of the exclusion of the Montana Wildlife Federation date back to a 1993 lawsuit filed by MWF and NWF regarding a large number of out-of-compliance grazing allotments by Big Hole Ranchers in the Beaverhead National Forest. Reaction by the ranchers to the MWF lawsuit, which forced changes in grazing allotment management, was fierce, including the posting of signs during hunting season that said, "All Hunters Welcome—Except Members of MWF and NWF." Communication with Rich Day, *supra* note 238.

251. McKinney, *supra* note 220.

252. *Id.*

253. Press Release, Big Hole Watershed Committee, Increased Flows on Big Hole River Result in Lifting of Fishing Restrictions (Sept 24, 1999); Press Release, Big Hole Watershed Committee, Voluntary Conservation Efforts in the Big Hole Successful (Nov. 1, 1999); Press Release, Big Hole Watershed Committee, Critical Flows Hit the Big Hole (June 26, 2000).

254. *See* Communications with Jennifer Dwyer, *supra* note 238.

Environmental Law and Policy Institute notes that the Platte River watershed planning program suffers from "a tilt in favor of development interests and against conservation interests."[255] Echeverria noted that the composition of the Governance Committee was seriously unbalanced with direct representatives of water interests outnumbering direct representatives of environmental interests by three to two and "the three state representatives expand the support for water development interests on the Committee."[256] Echeverria predicts the process "will almost certainly be a failure" because of its heavy weight in favor of economic interests "both in absolute terms and relative to what could reasonably be achieved through traditional regulation or other, more innovative approaches."[257]

IDM processes can also be very difficult for volunteer members who have families and full-time jobs. As Attorney Bill Hutchison, chair of the Willamette River Stakeholders Task Force once put it, "We need more staff support to do our job effectively."[258] Hutchison gave well over one thousand hours of volunteer time to the Task Force, at great cost to his law firm, as did several other members who were self-employed.[259] The Willamette Task Force process also illustrates the common example of volunteer representatives of public interest organizations in processes where everyone else is being paid by private industry or are public agency employees. In addition, IDM processes are often too time and resource intensive for public interest organizations to be effectively represented: most environmental NGOs do not have the resources to match business interests in expertise, training, or staff time.[260] There are no easy political solutions to these problems in an era of declining agency budgets and increasingly wealthy and powerful corporate conglomerations.

C. Actual Accomplishments Are Unknown

Another criticism of consensus processes is that the accomplishments of the processes are largely unknown. In most of the IDM studies and projects reviewed to date, there is little measurable analysis of the

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255. John D. Echeverria, *No Success Like Failure: The Platte River Collaborative Watershed Planning Process*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 559, 583-84 (2001).

256. *Id.*

257. *Id.* at 560.

258. Communication with Bill Hutchison, Chair, Willamette River Stakeholders Task Force (Aug. 1999).

259. *Id.*

260. Michael Axline, *Federal Lands and Invisible Hands*, 25 ECOLOGY L.Q. 611, 620-21 (1999).

environmental protection and restoration effects of these processes, or of possible changes in community attitudes, knowledge, or behaviors.[261] In addition, most of the IDM processes reported on to date have set no internal benchmarks for specific results, nor have they defined specific ecosystem goals.[262] However, Geoffrey Huntington, who was appointed executive director of the Oregon Watershed Enhancement Board (OWEB) by then-Oregon Governor Kitzhaber in 1999, stressed that OWEB was moving toward emphasizing the need for grant recipients to have both a "desired future condition" articulated for their watershed, and for projects to be "outcome based" with monitoring and measurements specified for each project.[263]

Most of the analyses of IDM processes have lacked at least three things critical to testing theory against reality. First, analyses often lack a clear statement of the desired future condition of the resources that are the target of each process. The desired future condition must have a specific timeline to be useful and many of the timelines would be long-term due to the ecological and political processes involved. Second, specific measurable benchmarks of progress along the time frame of the desired future condition are often missing. Finally, many analyses of IDM processes lack built-in data gathering measurement and calibration processes. In short, there is a severe lack of data, or even a conceptualized framework for that data, in most of the research to date.[264] In addition, Wondolleck and Yaffee noted that they had difficulty in determining what defined success.[265] Ultimately, they chose a highly subjective model, explaining that they "defined success largely in terms

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261. Surveys, focus groups, etc. in watersheds which have used intensive IDM processes would provide useful data for comparison to the national survey data assembled annually by the National Environmental Education and Training Foundation (NEETF). *See, e.g.*, NAT'L ENVTL. EDUC. & TRAINING FOUND. 1999 REPORT CARD: ENVIRONMENTAL READINESS FOR THE 21ST CENTURY, THE EIGHTH ANNUAL NATIONAL REPORT CARD ON ENVIRONMENTAL ATTITUDES, KNOWLEDGE, AND BEHAVIOR (Dec. 1999), *available at* http://www.neetf.org (last visited Mar. 24, 2004). This NEETF survey gave American adults an A+ for support of the environment and an F for "understanding of causes of basic environmental problems in the 21st century." *Id.* at 3.

262. One notable exception to the lack of benchmark data and specific measurables in watershed restoration plans is the plan assembled by the Applegate River Watershed Council (ARWC) in 1999. The ARWC is a subcommittee of the Applegate Partnership that was certified by the state of Oregon as a funding eligible watershed council in 1994. *See Applegate River Watershed Council's Restoration Program*, (Applegate River Watershed Council, Jacksonville, OR 97530). ARWC's Restoration Program includes detailed sub-watershed assessment components as well as essential target figures for restoration in a number of categories including road improvements, floodplain restoration, and fish passage projects. *Id.*

263. Interview with Geoffrey Huntington, Executive Director, Oregon Watershed Enhancement Board (Apr. 10, 2000).

264. *See, e.g.*, MOOTE ET. AL, *supra* note 7.

265. WONDOLLECK & YAFFEE, *supra* note 8, at xiii.

of the perceptions of the people involved in these efforts. If an effort was viewed as successful by participants from across the spectrum of involved interests, we took their word for it and worked to understand why they perceived it as a success."[266] Wondolleck and Yaffee went on to state that early evidence from their studies suggested some improvements in ecological and social outcomes.[267] However, whatever evidence they saw for ecological outcomes was not presented in their book, and that glossing over of ecological outcomes is all too typical of the existing literature.

D. The Issue of Adaptive Management

Finally, environmental activists often distrust "adaptive management." Defined as the ability to adapt a program to better address program goals,[268] adaptive management is sometimes viewed as an excuse for never defining ultimate goals, or as a method to relax standards in the name of flexibility. Like any tool or technique, adaptive management can be misused. Used properly, adaptive management is a tool to improve ecological results from restoration and clean-up processes.

Portland's Clean River Plan defined adaptive management as the "ongoing process of using measurements and direct experience to make wise management decisions. [The Plan] recognizes that scientific, economic and social information regarding water quality and watershed health actions will continue to grow."[269] According to the Plan, the City of Portland "will adjust programs and priorities when monitoring information indicates changes are needed to stay on course with *performance benchmarks, targets, and measures*."[270] In Portland's Plan, adaptive management is proposed as part of an enforcement mechanism (including monitoring and specific CSO control benchmarks along a specific timeline) to make sure that the court-mandated specific restoration results of the plan are achieved or exceeded in the most effective and efficient way.[271] This approach is the difference between building CSO interceptors based on data obtained in five to seven years of habitat restoration, monitoring, and measurement as opposed to

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266. *Id.*

267. *Id.*

268. John H. Davidson & Thomas Earl Geu, *The Missouri River and Adaptive Management: Protecting Ecological Function and Legal Process*, 80 NEB. L. REV. 816, 848 (2001).

269. PORTLAND'S CLEAN RIVER PLAN, *supra* note 146, at 6.

270. *Id.* (emphasis added).

271. *Id.*

building with no data on resource reduction or habitat improvement.[272] The City will assess differences in results in different areas and the similarity of benefits from similar restoration actions, and then make adjustments to ensure the best environmental result is achieved in a cost-effective manner.[273] In addition, an adaptive approach in Portland allows for the investigation and implementation of stormwater source reduction projects, which provide multiple measurable environmental benefits. The up-front source reduction/habitat restoration approach can result in smaller sewer tunnels and pipes (which cost less) and construction impacts that are less disruptive to neighborhoods and businesses. Under this model, the Clean River Plan is intended to adapt and change, while sticking to the result of achieving a ninety-four percent or better elimination of Portland's CSOs into the Willamette River.[274]

As University of Utah College of Law Professor Robert Adler said in his seminal article, *Barriers to Watershed Protection*, "[t]he process must be iterative rather than static. Watershed programs must be dynamic to account for changing environmental and artificial factors. . . . This process requires ongoing evaluation of program implementation and results, so that implementers can modify or retain programs and strategies when necessary."[275] In short, adaptive management rises or falls based on its implementation, and is equally suited for use within IDM processes or traditional command and control systems, such as the court-mandated aspects of the Portland example.

E. Legal and Philosophical Issues with IDM Processes

In addition to the practical and organizational issues, a series of articles critical of collaborative efforts raise and discuss several key legal and philosophical objections to IDM.[276] George Coggins, a law professor at the University of Kansas, takes the strongest position against devolution of power to collaboration processes on federal lands.[277] While conceding that confrontation, controversy and litigation are usually best avoided, he says that when the subject is federal lands, devolution "is simply abdication of responsibility" granted by the Constitution and Congress to four federal land management agencies and "as such is

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272. *Id.*

273. *Id.*

274. *Willamette River Stakeholders Task Force*, *supra* note 72, at 4-6.

275. Adler, *supra* note 38, at 1105-06.

276. *See Problems with Using Collaboration to Shape Environmental Policy*, *supra* note 221; Echeverria, *supra* note 255, at 579-85.

277. George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 ECOLOGY L.Q. 602, 603 (1999).

unlawful."[278] Citing cases from the 1970s-80s involving the Secretary of the Interior, the Fish and Wildlife Service, and the Forest Service, Coggins maintains there are clear lines beyond which agencies cannot go in abdicating administrative functions: "Devolved collaboration as currently advocated crosses the line at which judicial deference insulates agency irresponsibility from reversal. Every pertinent statute says that the Secretary or an agency, not local citizens, shall decide the allocation questions. No statute authorizes abdication of the authority. It is illegal. Period."[279]

F. Federalism and the Public Trust

Coggins also maintains that devolved collaboration "threatens to undo important elements of federal procedural law, federal substantive law, and emerging national priorities" involving regulation promulgation, public participation, environmental evaluation, and state and local cooperation among other areas.[280] He adds that while people may wish to cut red tape with local collaborative processes, in reality the local process adds another level of complication.[281] Coggins' point is reinforced by the experience of the ballyhooed Quincy Library Group, which required an act of Congress to put its plan into place.[282]

Echeverria states, "The procedural requirements of NEPA and the ESA cannot easily be adapted to a process that relies on informal negotiation."[283] More significantly, he notes that the Platte River Program Cooperative Agreement appears to concede vested property interest in water supplied under FERC licenses to public power and irrigation districts in Nebraska.[284] He explains the district's rights in the water projects are limited to a maximum fifty year term under the Federal Power Act, and are subject to comprehensive modification upon relicensing.[285] However, the Platte River Program stated at its start that "[a]lthough retirement or transfer of water rights for existing irrigated lands could be an option to help meet the water goals, water rights would

278. *Id.*
279. *Id.* at 606.
280. *Id.* at 608.
281. *Id.*
282. Jane Braxton Little, *A Quiet Victory in Quincy*, HIGH COUNTRY NEWS, Nov. 9, 1998, *available at* http://www.hcn.org/servlets/hcn.Article?article_id=4591 (last visited Mar. 22, 2004).
283. Echeverria, *supra* note 255, at 582.
284. *Id.* at 565, 588.
285. *Id.* at 565.

be retired or transferred only if the owner agreed and was compensated and other water rights are not adversely impacted."[286]

Michael Axline, a law professor at the University of Oregon, takes a more philosophical and practical approach with his arguments against devolving to more local influence on federal lands.[287] According to Axline, it is the excess influence of local governments and private industries that have already pushed federal lands to the brink of collapse.[288] Axline explains why public lands should remain federally owned: "While historically federal land managers have not protected adequately federal ecosystems, turning authority over to state or local control would only make things worse."[289]

Indeed, the concept that federal lands and the right to navigation and fishing in waterways, clean air, and clean water required to sustain life for all living beings are held by the government to be protected and managed wisely in the public trust, lies at the core of arguments over management of national or federal resources.[290] When authority is devolved to ever-smaller increments of private or local governmental interest, the public trust interest in national resources is diminished.[291] Axline uses the example of the vicious circle of Forest Service budgets dependent on producing timber cuts, which in turn provide revenue to local communities and create an expectation and dependence on ecosystem destruction to sustain local rural economies.[292] He maintains that one reason the timber industry is advocating more local control "is that historically receptive federal venues have become less hospitable. More recently, the national offices of land management agencies themselves have taken steps to restrict the discretion of local federal land managers in ways that will provide greater protection for ecosystems and remove temptations to appease local interests."[293]

Axline concludes that rather than join the rush to IDM processes on federal lands, we should instead "focus on insulating federal land managers from the economic and political influence of local industries and governments" while increasing the ability of citizens to enforce environmental laws governing federal lands.[294]

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286. *Id.* at 589 n.108.
287. *See* Axline, *supra* note 260, at 611, 620-21.
288. *Id.*
289. *Id.* at 615.
290. *Id.* at 612-15.
291. *Id.* at 619.
292. *Id.* at 617.
293. *Id.*
294. *Id.* at 623.

In addition, the definition of "community" in different regions can have important legal and resource implications for the areas over which the community professes to exert control.[295] Michael McCloskey, in one of several articles critical of collaborative processes, argues that the push to interactive and locally centered processes for the development of national forest plans "exalts the interests of given communities of place (those in and around the public forests) over more extended communities of interest."[296] Using the examples of San Francisco and Berkeley, cities which receive their drinking water from distant national parks and forests, McCloskey argues that local processes like the Quincy Library Group[297] effort give no voice to the interests of far away cities or to all the "national co-owners of these forests."[298] McCloskey argues further that because of the self-nominating nature of "outside" representation, "[t]he theory of national interest representation . . . is no more than an exercise in wishful thinking."[299] He adds that moving these mostly advisory processes to delegated decision-making bodies would ensure that national interests are "effectively disenfranchised, including the majority of users in the same state."[300] Effectively, majority rule is replaced by minority rule.

Aside from the evisceration of federalism that Axline and McCloskey both warn against, McCloskey also adds a significant practical objection. He states that local collaborative processes tend to put those without special expertise at a disadvantage and restrict significant participation to those with the financial and social ability to commit to considerable time investments.[301] Those who do not have the requisite financial and time resources, along with specific technical or institutional expertise, are marginalized.[302] That marginalization stifles public debate and "[i]ssues which prove too tough for negotiators to resolve are laid aside to languish without public attention. And public agencies, seeing the burden of making hard choices, may choose to

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295. *Local Communities and the Management of Public Forests*, *supra* note 221, at 627.

296. *Id.*

297. *See* Ed Marston, *The Timber Wars Evolve into a Divisive Attempt at Peace*, HIGH COUNTRY NEWS (Sept. 29, 1997), *available at* http://www.hcn.org/servlets/hcn.Article?seventy percent article.id=3656 (last visited Mar. 24, 2004) (discussing the Quincy Library Group).

298. *Local Communities and the Management of Public Forests*, *supra* note 221, at 627.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

follow in the wake of politicians" ultimately encouraging them "to pass the buck."[303]

G. The Limitations of Sector Specific Laws

As Adler, de Jongh, and Freeman note, sector-specific laws inherently inhibit integrative, flexible interactive approaches to environmental issues.[304] De Jongh notes that the framework of U.S. environmental law arose during an intense period of social and political conflict in the 1960s "in which every advance was won through hard political struggle."[305] De Jongh posits that the adversarial atmosphere of those intense cultural battles translated to "strict, punitive laws" with litigation "a primary policy tool."[306]

At the same time, a general lack of knowledge of the inter-connectedness of ecosystems led to a sector by sector approach in the Wild and Scenic Rivers Act, the Endangered Species Act, the Clean Water Act, the Clean Air Act and the various toxics laws, including the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act, as these laws were adopted in the seventies and eighties.[307] Though scientific and administrative understanding of ecosystem functions and the interrelationship of land use to air and water quality has increased substantially since the early seventies, it is worth noting that the public's understanding of these issues and the scientific principles underlying them is still abysmal.[308] For example, currently, few people know much about water. According to a recent survey by the National Environmental Education and Training Foundation (NEETF) and Roper Starch Worldwide, only twenty-three percent of American adults know that the leading cause of water pollution is surface water running off the land from farm fields to city streets.[309] The same research shows that nearly

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303. *Id.* at 628-29.

304. *See* Adler, *supra* note 38, at 1037-81; DE JONGH & CAPTAIN, *supra* note 111, at 229; Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 92-93 (1997).

305. DE JONGH & CAPTAIN, *supra* note 111, at 226.

306. *Id.*

307. In contrast, the Dutch took their cues from the strengths and weaknesses of EPA's role as administrator of these separate statutes which attempt to deal with interrelated issues and set up the Dutch Environment Department as a policy making (rather than mostly administrative) agency which works with the Prime Minister "to craft policies which are generally approved by the legislature." *Id.* at 227.

308. *See, e.g.*, NAT'L ENVTL. EDUC. & TRAINING FOUND., National Report Card on Environmental Knowledge (1997), *available at* http://www.neetf.org (last visited Mar. 24, 2004).

309. *Id.*

seventy percent of Americans believe (incorrectly) that industrial or municipal dumping is our main source of pollution.[310]

Adler notes the limitations of the myriad U.S. environmental statutes, while still finding hope that their "latent authority" for ecosystem approaches can be implemented usefully.[311] The question for Adler is whether the watershed movement of the 1990s can capture the attention of the "sultans of water" long enough to produce statutory and institutional changes that will ensure their longevity.[312] This is in fact the essential question for the Government Outlaw IDMs. To what extent should these processes become institutionalized or even codified and/or supplant or supplement existing regulatory processes and to what environmental result?

VI. ECOSYSTEM GOVERNANCE AND SOME THOUGHTS FOR THE FUTURE

The bottom line questions in this inquiry are: How do people ultimately effect real, positive change in environmental quality? Does land use change as a result of IDM efforts and are there measurable positive effects on biodiversity, water flow and quality? Are there measurable positive effects in institutional outcomes of consensus-based membership, funding, and reorganization?

A. "In Some Ways, for Some Things, Some of the Time"[313]

Many of the organizations working in the arena of interactive "change making" constantly struggle with these questions. Steve Blackmer, now president of the Northern Forest Center, an organization which he founded after many years working for or with a number of well-established conservation advocacy organizations,[314] says interactive processes are effective "in some ways, for some things, some of the time."[315] By implication, the challenge is to effectively identify the situations where IDM processes can be effective, and to recognize when other approaches are necessary.

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310. *Id.*
311. Adler, *supra* note 38, at 976.
312. *Id.* 976-77.
313. Interview with Steve Blackmer, President, Northern Forest Center (June, 1999).
314. *Id.* Blackmer served as Conservation Director for the Society For the Protection of New Hampshire's Forests and the Appalachian Mountain Club, served as a board member of the Northern Forest Alliance and the New Hampshire Rivers Campaign, and was an elected member of the Concord City Council, among other affiliations. *Id.*
315. *Id.*

In contrast to the slow and interesting results of the Tilton Diner Group, Blackmer praises the Maine Forest Biodiversity Project that brought together scientists, state government, conservation groups, and industry representatives in a facilitated process in Maine.[316] According to Blackmer, that effort wrapped up with a consensus that "dramatically improved the climate for discussion of tough conflicts."[317] Blackmer also noted the various negotiated FERC re-licensing agreements, which have been successful from a conservation standpoint, because "there was enough of a stick."[318] Ultimately, Blackmer's conclusion is that we can win little fights and skirmishes through command/control regulation but not the big one—a long-term movement to change the way people think.[319]

B. Multiple Approaches

Ralph Goodno, President of the Merrimack River Watershed Council (MRWC) attempted to further the Council's efforts to protect the Merrimack River by taking them from what might be characterized as a "government systems approach" to a "civic science and civic capacity approach." As Goodno stated in a newsletter column, over the past ten years the MRWC has spurred many changes in the state and federal agencies regulating and cleaning up the Merrimack—and in the process the MRWC has learned "several key lessons."[320] The lessons he enumerates are all related to building civic capacity in some form or another.[321] Goodno calls the MRWC approach "civic science."[322]

In contrast to formal consensus processes, the MRWC uses a variety of interactive and advocacy methods to build the policy results it desires.[323] First, Goodno states:

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316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. Ralph Goodno, *Rapid Watershed Assessment Program Under Development*, MID-STREAM NEWS, Apr./May 1999, at 2 [hereinafter *Rapid Watershed Assessment Program*]; Interview with Ralph Goodno, *supra* note 99. Goodno left the Council in 2002.

321. *Rapid Watershed Assessment Program*, *supra* note 320, at 2.

322. *Id.*

323. The MRWC has been mischaracterized as a formal collaborative partnership. *See* U. OF MICH., A SYSTEMATIC ASSESSMENT OF COLLABORATIVE RESOURCE MANAGEMENT PARTNERSHIPS 4-14 (August 1999), *available at* http://www.snre.umich.edu/emi/pubs/crmp.htm (last updated Nov. 28, 2001). Founded in 1976, the MRWC is a professionally staffed, middle-aged river advocacy organization—one that over the years has used lawsuits, lobbying, and issue campaigns in addition to many cooperative, educational, and interactive programs. MRWC's current self-description states that

> [S]tate and federal agencies have the regulatory [power] and other programs to guide many decisions, but the most critical impact lies in the hands of local community land use decision makers such as Boards of Health, Conservation Commissions, and Planning Boards. By listening to their needs and finding ways to provide for those needs, MRWC has the potential to empower each town to act in the best interest of the watershed.[324]

Second, Goodno identifies the need to build the capacity of MRWC, other organizations, and municipal decisionmakers to use science as a base for influencing the local and state decision-making process.[325]

> Being able to evaluate the impact of proposed land use changes and community-planning decisions is critical to the protection of our watersheds as land uses change. By providing better field information, good maps, and analysis of possible impacts, we can better support good decision-making at the community level.[326]

Goodno notes that this approach to community decisionmaking is critical for successful IDM efforts, and requires real technical expertise and sophisticated communication skills.[327] One might also include that these approaches also require a significant strategic vision for successful implementation.

Ted Smith, executive director of the Henry P. Kendall Foundation, has also thoughtfully addressed the challenges for IDM processes through the funding of projects including Watershed Innovators, The Four Corners Project, and a 1999 project with NEETF on developing visual tools for watershed education.[328] Ted's efforts in this arena also include innumerable discussions and site visits with environmental activists, government officials, environmental funders and others over the past ten years.[329] Ted identifies the "real action" in environmental

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> MRWC is a non-for-profit membership organization with a growing constituency of individuals, businesses, municipalities and community groups seeking to protect the natural resources of the watershed. Working in partnership with these diverse interests, MRWC acts as a catalyst to improve the watershed environment through planning, advocacy, education, science, and protection of watershed lands.

Merrimack River Watershed Council, *at* http://www.merrimack.org/aboutus/index.htm (last visited Mar. 24, 2004).

324. Interview with Ralph Goodno, *supra* note 99.

325. *Id.*

326. *Id.*

327. *Id.*

328. NAT'L LEADERSHIP FORUM, VISUAL TOOLS FOR WATERSHED EDUCATION (Nov. 17, 1999).

329. Interview with Ted Smith, Executive Director, Henry P. Kendall Foundation (June 1999).

restoration "at the interface of citizen-based and state-led projects and groups," and identifies a corresponding lack of appreciation on both sides.[330] Like the efforts of the MRWC, the Kendall Foundation pursued a variety of approaches on watershed issues, including funds for public education, research, advocacy campaigns, symposia, and conferences.[331]

C. Enforcement Mechanisms Form the Table

Does IDM have any viability as a decision-making process other than in the shadow of a more traditional approach? This question is especially important here in the United States, with our traditions of independence, antigovernment rhetoric, and nearly mythical ideal of self-reliance. An underdeveloped, little noticed, but critically important point runs through the vast and growing literature on cooperative environmental decisionmaking.[332] Fundamentally, few of these collaborative or consensus based processes would happen or make much sense in the absence of bottom line performance standards and other enforcement requirements of environmental laws enacted over the past thirty years.

For instance, buried in the back of 252 pages of generally uncritical reviews of various collaborative decision-making processes, is the statement, "While some view (and others fear) collaborative decision making as a replacement for traditional standard setting, it is best used as a complement to traditional regulatory approaches."[333] This idea and its examples run through even the most cheerleading literature regarding cooperative environmental management.[334] In addition, de Jongh states that NGOs provide a needed enforcement role in the policy process "since their primary mission is to act as independent critics of business and government."[335] Saying that cooperative processes do not require a

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330. *Id.*

331. Henry P. Kendall Foundation, *at* www.kendall.org (last visited Mar. 14, 2004). Though formerly one of the more progressive environmental foundations which prided itself on its willingness "to accept a higher level of risk in order 'to hit a home run' rather than a more assured 'scratch single,'" (Kendall Foundation Grantmaking Guidelines for 2001) (on file with author) the Foundation in January 2002 adopted a "by invitation only" process and dropped its focus on watershed protection and broad ranging new initiatives. *Id.* at http://www.kendall.org/grants/proposing.htm (last accessed Mar. 19, 2004).

332. *See, e.g.*, WONDOLLECK & YAFFEE, *supra* note 8; DE JONGH & CAPTAIN, *supra* note 111; KENNEY, *supra* note 108; SOMMARSTROM & HUNTINGTON, *supra* note 110; EPA, *supra* note 109.

333. WONDOLLECK & YAFFEE, *supra* note 8, at 240.

334. As Doug Kenney says in the conclusion to *Arguing About Consensus*, "it is naïve to think that collaborative processes will emerge as a simple and effective solution to the full range of resource management and governance deficiencies. Similarly it is equally naïve to think that these processes are without merit and pragmatic application." KENNEY, *supra* note 108, at 60.

335. DE JONGH & CAPTAIN, *supra* note 111, at 11.

full buy-in by NGOs, he adds, "Perhaps it is best for them not to compromise, but to remain as strong critics, thus driving the public discussion of environmental issues and checking the integrity of other parties."[336] Also implicit in de Jongh's analysis of the policy making process is the underpinning of specific environmental quality targets and thresholds.[337] While the specific measurable implementation mechanisms in the Netherlands were negotiated through the cooperative policy process, they also have enforceable timelines and provisions.[338]

D. IDM and "Bad Actors"

While underlying statutes and regulatory requirements often form the "table" that players meet around, it is the problem of stakeholders acting in bad faith that perhaps offers the most difficult obstacle to successful cooperative decisionmaking. The Enlibra[339] process initiated by former Democratic Governor Kitzhaber of Oregon, in partnership with Republican Governor Leavitt of Utah, has been hailed as a promising approach to identification of solutions for difficult social and environmental issues in the West.[340] Essential to Enlibra is the notion of empowering local people and communities to design and implement solutions to difficult environmental problems.[341] As the Enlibra Web site states, "we need to empower people. This requires good information; inclusive processes that respect different values and provide individuals a role in designing and implementing solutions; and meaningful incentives to complement existing laws."[342]

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336. *Id.*

337. *Id.* at 12.

338. Even the Enlibra process principles discussed in Part VI.D explicitly states, "*National Standards, Neighborhood Solutions*," meaning that no federal environmental laws are rejected and that enforcement is key. Enlibra, *at* http://www.westgov.org/wga/press/enlib223.htm (last visited Jan. 3, 2004).

339. "Enlibra is a newly created word meaning balance and stewardship. The governors believe Enlibra will become a symbol for a balanced approach to successful environmental and natural resource management." Enlibra, Frequently Asked Questions, *available at* www.westgov.org/wga/initiatives/enlibra/enlibrafaq.htm (last visited Jan. 3, 2004).

340. Enlibra, Frequently Asked Questions, *available at* http://www.westgov.org/wga/initiatives/enlibra/enlibrafaq.htm (last modified Aug. 12, 2003). The stewardship and balance principles of Enlibra have been adopted as policy for the Western Governor's Association, and are meant to inform the Association's actions and provide a template for the discussion of difficult issues at all levels of community and government. *Id.*

341. *See* WGA Policy Resolution 02—07, *Principles for Environmental Management in the West* (June 25, 2002), *available at* www.westgov.org.wga/policy/02/enlibra_07.pdf (last modified Aug. 12, 2003).

342. *Enlibra*, Frequently Asked Questions, *available at* www.westgov.org/wga/initiatives/enlibra/enlibrafaq.htm (last visited Jan. 3, 2004).

Given Enlibra's lofty goals and seemingly widely shared principles, it is especially interesting to note the experience of the Lead Partnership Group (LPG) with the Enlibra Advisory committee of the Western Governor's Association (WGA). The LPG is a consortium of over fifteen community based groups from California and Oregon, including some of the marquee collaborative organizations in the region, such as the Applegate Partnership, the Quincy Library Group, and Willamette Valley Reforestation, Inc.[343] In an effort to further the Enlibra principles relating to collaboration, the use of science and process, and neighborhood solutions, the LPG raised $50,000 from the James Irvine Foundation[344] to work with the Enlibra Advisory Committee and the WGA to develop "listening sessions" around the region to form the basis for the design of the second Enlibra Summit,[345] a conference tentatively called "Communities Engaging Enlibra."[346]

However, after several months of work and facilitation of the first listening session in September 2000, the LPG stopped its involvement with the Enlibra effort and the WGA after a meeting with the WGA Enlibra Advisory Committee.[347] The LPG co-chairs said in their letter to the WGA that the Advisory Committee reflected resistance to "the idea of people and communities coming together in an open process to discuss barriers to advancing Enlibra principles," and "even the possibility of people and communities challenging established ideas and interests."[348] The LPG co-chairs went on to say:

> Given . . . specifically, the interest groups, agencies and governors' staffers rejecting the idea of communities and people actively engaged in shaping the next Enlibra conference we are left with little choice. We are separating from the Enlibra Summit II planning process because we believe that the next step for a genuine Enlibra process must be a mutual exploration and a multiple-voiced identification of what's needed for the West . . . . It will not be achieved through a conference directed by a few select voices and with its present direction.[349]

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343. *Communities Working with the Western Governor's Association*, THE LEAD PARTNERSHIP GROUP (Summer 2000).

344. Letter from the Lead Partnership Group to the Western Governors Association and the Enlibra Advisory Committee (Oct. 12, 2000) (on file with author) [hereinafter Letter from Lead Partnership Group].

345. The first Enlibra summit was the *Environmental Summit on the West* held in Phoenix, Arizona, December 4-5, 1998. Enlibra, *at* http://www.westgov.org/wga/press/enlib223.htm (last visited Jan. 3, 2004).

346. *Communities Working with the Western Governor's Association*, *supra* note 343.

347. Letter from Lead Partnership Group, *supra* note 344.

348. *Id.*

349. *Id.*

This provides a great example of the pitfall of key stakeholders coming to the table in bad faith and scuttling a process when it goes in an unanticipated direction. Ultimately the vulnerability of IDM processes to bad actors and the many resultant failures exposes a central weakness that must be addressed to avoid the win/lose litigation scenarios IDM is supposed to be superior to.[350] As Walla Walla Professor Philip Brick notes "[e]xercising power is not the same as generating consent, and . . . there is no such thing as a politically competent majority that does not at least take steps to protect the interests of the minority."[351]

E. Rules for Using IDM

With that and similar cautionary tales in mind, I propose seven "Rules For Using IDM" that must be applied to cooperative processes for future success of the "Movement for American Restoration." These "Rules for Using IDM," like the processes themselves, may be applied idiosyncratically. Resource conflicts and creative solutions, for better or worse, often emerge out of contradictions inherent in command and control (command and conform) statutes and processes like the Endangered Species Act. As McCloskey suggests, IDM processes should be added to the tool kit for public participation, but not as a prescriptive or exclusive panacea.[352] Processes that diminish vigorous public debate (and therefore deprive the public of sufficient information) and exclude viewpoints from the ends of the spectrum tend to serve up pablum that neither protects the environment nor provides for effective restoration and rarely do they provide visionary solutions.

Moreover, for all the hue and cry over the mythical "inflexibility" of the Endangered Species Act, its clear vision is leveraging enormous changes in management of the resources, land, water and air, which all humans, and indeed all life on the planet require first to survive. Whether we ultimately succeed in stopping and reversing the

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350. It is interesting to note that while failed collaborative processes are legion, little of the literature on collaboration closely examines failed processes—though it is from failure that we often learn our most valuable lessons. It is also worth noting that neither the WGA, the Enlibra Advisory Committee, nor Governors Kitzhaber and Leavitt responded to the LPG letter. One notable exception is John Echeverria's article on the Platte River Collaborative Planning Process, *supra* note 255.

351. Philip Brick, *Of Imposters, Optimists and Kings: Finding a Political Niche for Collaborative Conservation*, *in* ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST 177 (Philip Brick et al. eds., 2001).

352. *Problems with Using Collaboration to Shape Environmental Policy*, *supra* note 221, at 434.

accelerating loss of species on the planet will depend in part on creative and visionary solutions arising out of the current public debates.

1. Ripeness

As commentators have suggested, "issues have been propelled into policy dialogues that are not ripe."[353] Cooperative, interactive processes work best when there is a roughly equal power balance and where issues are deadlocked.[354] As a former clean air litigator for the Natural Resources Defense Council once posed, "[n]egotiations with the enemy work well to the extent everyone at the table has the ability to inflict pain on the rest."[355]

2. Inclusivity

Legitimization of IDM processes requires open processes. Processes like the Quincy Library Group, Enlibra, and the Big Hole Watershed Council have received their biggest criticisms (and ultimate loss of support from important sectors) precisely at the points where they restricted specific stakeholders from the table. All stakeholders—broadly defined to include the wide range of public and private interests in any given resource dispute—must not only be welcome, but there must also be conscious efforts to bring missing constituencies into the process and to provide the means to do so as necessary. This means also watching for "blind spots" (often people of color) and/or interests physically distant from the resource in question.[356]

3. Availability of Challenges to Group Process

In a dictatorship, the right of appeal is nonexistent. In a democracy, it is one of our most cherished principles. Informal and extralegal agreements (government outlaw processes and policies) must be subject to appeal through normal means of representative government. As McCloskey says, "Instead of the directions of public policy being set by those garnering the greatest support among the electorate, those directions should be set by collaboration in which those with little

353. *Id.* at 430.

354. Echeverria, *supra* note 255.

355. RIVER NETWORK, LESSONS FOR ENVIRONMENTAL ACTIVISTS (1993).

356. *See The Swift River Principles, Number 5*, *in* RIVER NETWORK, THE WATERSHED INNOVATORS WORKSHOP 21 (1995); Luther Propost & Susan Culp, *Imagining the Best Instead of Preventing the Worst: Toward a New Solidarity in Conservation Strategy*, *in* ACROSS THE GREAT DIVIDE, *supra* note 351, at 215.

support can thwart the will of the majority."[357] Explicit means to appeal decisions are an important safety check to the bad actor problem and to ensure the legitimacy of representative government.

4. Consensus Works Well in Limited and Carefully Proscribed Situations

Consensus processes work best in areas where the constituencies are relatively homogenous and the resource disputes are relatively simple. The Henry's Fork Watershed Council in Idaho is perhaps the best example of this rule. The Henry's Fork watershed is large (1.7 million acres), but has a small, homogenous population of roughly 40,000 people.[358] The resource conflicts focus on water quality (agricultural pollution) and water supply (irrigation withdrawals), and the consequent effects on recreational fishing.[359] The main parties and co-chairs to the open process are the local irrigation district and the local environmental advocacy group.[360]

Conversely, resource conflicts in similarly sized watersheds with large and diverse populations cannot be handled quite so neatly. The numerous mechanisms used in those watersheds to address resource conflicts reflect the difficulty and diversity of both the issues and the potential stakeholders.

5. Where the Conditions for Consensus Do Not Exist, Majority Rule or Some Sort of Super Majority Requirement Is Required

In areas where power among the stakeholders is not balanced, or where bad actors seek to destroy the process by routinely blocking any actions in a consensus process that possibly affect their interest (leading to a lowest common denominator action or often no result), a super-majority requirement for action can help lead to positive action. In well-working processes, the majority will often act to protect the viewpoint of a good-faith minority interest that may or may not be at the table at any given time.

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357. *See Problems with Using Collaboration to Shape Environmental Policy*, *supra* note 221, at 430.

358. Environmental Management Initiative, Henry's Fork Watershed Council, *at* http://www.snre.umich.edu/emi/cases/henrysfork/description.htm (last updated Mar. 12, 2004).

359. *Id.*

360. CESTERO, *supra* note 93, at 20-27.

6. If Advising or Intending to Supplement Representative Government, the IDM Process Must Develop Funding Mechanisms for "Volunteers" and Key Stakeholder Representation

IDM processes rise and fall on the breadth, strength, and staying power of the stakeholders. Funding this often-lengthy participation is a particular challenge for both small businesses and public interest group staff and volunteers. This is in stark contrast to government agency representatives and large corporate interests that have no problem funding salaries for staff representation. Where government agencies are putative sponsors of IDM processes, financial support (perhaps viewed as "scholarship assistance" for key stakeholders who otherwise could not participate) needs to be built into the process design.

7. IDMs Need Explicit and Careful Statutory Guidance and/or Authorization to Avoid Problems with Vague and Platitudinous Conclusions

In the Netherlands, the guidance for cooperative environmental standard setting in their National Policy Plan was both extensive and precise, and given by parliamentary act and extensive interdepartmental participation. In contrast, the results of the somewhat similar effort in the United States by the President's Council on Sustainable Development (PCSD) were vague, dismissed by most environmental organizations, and issued solely from the executive branch. The regulatory and environmental results of each process are dramatically different as well. Furthermore, the Dutch process, guided by statute, is ongoing, where the PCSD process was a one-time initiative of the Clinton administration in the face of a hostile legislature. One could argue that these differences are merely a reflection of the difficulty of coming to agreement on the breadth and depth of issues in the United States versus a very small and homogenous country like the Netherlands. It may, however, be more a question of a perceived lack of environmental crisis on the part of the voting public and a consequent lack of support in industry and in Congress for strong and definitive action.

8. The Serendipity Analysis and Synchronicity

Finally, there is the serendipity analysis: what results from the right staffer or volunteer being in the right place at the right time, and what are the dangers if that leadership is not available? Ponder the chances of Riki Ott deciding to live in Cordova, Alaska with a new career as a gill-netter (yet armed with Ph.D. in hydrocarbon sedimentology and a family

history of citizen environmental organizing) shortly before the Exxon oil spill disaster. Joseph Jaworski would call it synchronicity: going with the flow, an acausal connecting principle.[361] The serendipity of such occurrences is both a strength of IDM and a weakness in the process; its strengths are obvious and its weaknesses are a problem with process. Without legal and institutional standards to ensure fairness, utility of representation and legality of outcomes, a serendipitous lack of key people and expertise can lead to failure of results.

VII. CONCLUSION

Ultimately, the challenge of how we structure efforts to protect and restore ecosystems is the extent to which we change what the late David Brower posed as the accomplishments of people to date: "all we have been able to do is to slow down the rate at which things have been getting worse."[362] Carefully and skeptically used, cooperative processes hold promise as a tool to create innovative solutions over the certain continual loss of the "everybody wins and loses some of the time" current stalemate.

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361. See the fascinating book, JOSEPH JAWORSKI, SYNCHRONICITY: THE INNER PATH OF LEADERSHIP (1996). Jaworski, the son of Leon Jaworski, began his career as an attorney with the Houston firm, Bracewell & Patterson. In 1980, he founded the American Leadership Forum, and has since served as head of Global Scenario Planning for the Royal Dutch/Shell group of companies in London. In 1994 he joined the MIT Center for Organizational Learning and is also a founder of the Centre For Generative Leadership, now Generon.

362. DAVID BROWER & STEVE CHAPPLE, LET THE MOUNTAINS TALK, LET THE RIVERS RUN: A CALL TO THOSE WHO WOULD SAVE THE EARTH 19 (1995).