RESOLVED, That the public participation provisions of local, state, territorial and federal environmental laws and international environmental agreements and treaties should recognize and express the principle that the public and all affected interests should be provided meaningful and effective involvement and should be expected to participate in consensus building efforts to ensure that government decision-making regarding the administration, regulation, and enforcement of environmental laws is open, fair, efficient and credible.

FURTHER RESOLVED, That the public participation provisions of local, state, territorial and federal environmental laws should include express authority allowing government agencies to choose innovative public participation, stakeholder-involvement and shared decision-making models, including site-specific, negotiated consensus-building processes and negotiated rulemaking, which involve all affected stakeholders, such as citizens, potentially responsible parties, and affected federal, tribal, state, territorial and local governments.
FURTHER RESOLVED, That federal agencies should use more fully the
Administrative Dispute Resolution Act and the Negotiated Rulemaking Act for making
environmental decisions, and state agencies should follow similar procedures permitted
under generally applicable provisions of administrative law.

FURTHER RESOLVED, That Congress should reauthorize the Administrative
Dispute Resolution Act and the Negotiated Rulemaking Act on a permanent basis, and, in
doing so, Congress should revise provisions that inhibit their wider use to resolve
environmental matters by clarifying:

1) that the Administrative Dispute Resolution Act authorizes the use of the full range
of dispute resolution processes for making administrative decisions, including
general consensus building and the resolution of issues between private parties that
otherwise would be decided by the environmental agency;

2) that the decision of an arbitrator, where applicable, should be final when issued,
without the authority of an agency to unilaterally override such decision;

3) that communications between a party and the neutral should be protected from
disclosure except for the circumstances defined in the Administrative Dispute
Resolution Act; to that extent the Administrative Dispute Resolution Act should
be regarded as a Section (b)(3) exemption under the Freedom of Information Act; and

4) that a federal agency should not be required to secure the permission of the Office
of Management and Budget or the General Services Administration before it
impanels a committee under the Negotiated Rulemaking Act or the Administrative
Dispute Resolution Act, and that such agencies must continue to comply with the
substantive requirements of the Federal Advisory Committee Act, including
openness and balance on committees.

FURTHER RESOLVED, That the procedures described in the Negotiated
Rulemaking Act should be used for making policy decisions under environmental statutes.

FINALLY RESOLVED, That the framework established under the Negotiated
Rulemaking Act and the Administrative Dispute Resolution Act provide the means by
which the U.S. Environmental Protection Agency ("EPA"), community and business
interests, tribal, state, territorial and local governments, and environmental and other non-
governmental organizations can reach agreement on the appropriate issues.
REPORT

I. INTRODUCTION

The United States is distinguished from other countries by its extensive legislative commitment to public participation. Legislatively mandated public participation in natural resource development and environmental protection has increased dramatically. Over the past thirty years, environmental statutes have bolstered the involvement of public and other affected interests in government decision-making.

More recently, and not necessarily in response to specific legislative mandates, agencies have made an effort to consult with organized constituencies prior to formulating policy or implementing projects in which those constituencies have a stake. Indeed, a few governmental agencies even have experimented with the use of mediation and consensus building involving professional neutrals from outside of government.

Despite these efforts, public participation requirements in federal and state legislation have not engendered a cooperative, problem solving relationship among government, industry, and the public in the United States. Government agencies often have been eager to retain full decision-making authority and have fought efforts to extend the boundaries of public consultation. As a result, most mandated participatory processes have cast the public and industry in a reactive role. While individual citizens and regulated industries routinely are consulted about their reactions to proposed projects and their impacts, most have not had an opportunity to work collaboratively with government agencies from beginning to end in the crafting of environmental policies or enforcement of government regulations.

Public participation requirements have generated resistance and obstruction, heightening contentiousness and clogging the courts with complex and costly civil litigation. Opportunities to educate the public about the technical underpinnings of environmental problems have not been explored fully. It is not clear that public participation has enhanced government responsiveness to the needs of communities or ensured the wise and equitable use of natural resources.

Consensus building and environmental mediation hold out a promise of improvement. While they are not mandated by law, and many public officials are not familiar with their advantages, their use is on the rise throughout the country. Together they represent one new approach to stakeholder participation: they aim to make agencies far more responsive to the concerns of all stakeholders affected by government projects and policies. These techniques can help resolve the array of conflicting interests that so often block any
forward motion on environmental policy, while improving the relationship between government and the public it serves.

In the 1990's, the federal government has adopted both a Negotiated Rulemaking Act and an Administrative Dispute Resolution Act, encouraging federal agencies to explore the use of mediation and consensus building to reduce costs and increase responsiveness to public concerns. A number of states have begun to explore the possibility of enacting parallel dispute resolution statutes.¹

Federal, state and local legislative bodies should be encouraged to give express authority to environmental agencies to use innovative public participation, consensus-building and shared decision-making models in all environmental laws.

In addition, the American Bar Association is engaged actively in helping other countries to develop and implement effective legal systems. These activities include the Central and Eastern European Law Institute (CEELI) and nascent programs in Africa and Southeast Asia. Techniques of consensus building and other forms of public participation can be an important component of those activities, keeping in mind that the relevance of the U.S. experience will vary with conditions in the foreign country in question.

II. BACKGROUND

Environmental legislation enacted during the 1970s was at the forefront of increased participation by the public in government decision-making. Congress inserted explicit public participation requirements into many of the new environmental protection laws.²


² The Toxic Substances Control Act of 1976 required the Environmental Protection Agency to issue public notice when a chemical manufacturer intended to produce a potentially toxic substance. The Resource Conservation and Recovery Act of 1976 contained a broad mandate for citizen participation in its regulatory programs. In 1980, the Comprehensive Environmental Response, Compensation and Liability Act encouraged federal and state agencies to initiate "community relations programs" to ensure that citizens were informed about and allowed input into the direction of remedial work on sites where toxic chemicals were found.
At least three key factors contributed to the increased demand for public participation by American citizens and other stakeholders affected by government environmental decisions during the 1970s: (a) the rapid pace of technological change in American society had increased uncertainty, heightened perceptions of risk regarding health and safety, and sharpened social tensions. This was particularly evident in situations involving hazardous waste disposal and the siting of hazardous waste treatment facilities; (b) the discretionary power delegated to government administrators by legislative bodies lessened the accountability and direct involvement of elected officials. In reaction, citizens and stakeholders demanded more direct control over key decisions; and (c) strong environmental and citizens lobbying organizations emerged out of the antiwar era and the civil rights protests of the late 1960s and early 1970s. This altered the way in which government policy was formulated and created a climate of uncertainty for businesses regulated by government environmental agencies.

By the early 1980s, over a decade of experience had left citizens disappointed and frustrated. Public hearings were formalized procedures that appeared often to appease rather than to address stakeholders' desire for input. In addition, regulated industries' efforts to achieve certainty in government environmental decision-making often were delayed by expensive and time-consuming public interest lawsuits.

In the late 1980s, at least two factors contributed to the public's renewed interest in participation in decisions by the public and affected interests. First, attempts to resolve environmental problems through litigation had grown increasingly expensive and time-consuming. Excessive litigation costs even may have put U.S. businesses at a competitive disadvantage with other nations. Both the public and industry were demanding

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7 James L. Creighton, "The Continuing Evolution of Public Involvement and Conflict Management." Public Involvement and Dispute Resolution, James L. Creighton, C. Mark
alternatives, including less expensive means of participation that did not involve litigation. Second, visible accidents such as those in Bhopal, India, Institute, West Virginia in 1984, Chernobyl (former U.S.S.R.) in 1986, and the Exxon Valdez oil spill in 1989, again elevated environmental issues to the national political agenda. The Chemical Manufacturers Association responded by initiating the industry's "Responsible Care" program, an attempt to inform citizens about, and include them in, its attempts to responsibly manage toxic chemicals.¹

In the late 1980s and early 1990s, citizens, public officials, industry leaders and professionals in local, state and federal agencies began using innovative forms of joint problem-solving including environmental mediation, consensus-building, and negotiated rulemaking.

The common thread of these processes is that the representatives of the interests that will be substantially affected by the action, including the public, directly participate in determining the outcome rather than being relegated to reacting to decisions made by others. These new forms of public participation are best characterized as "consensus seeking."² In large measure the experience has been very positive. The resulting decisions tend to be more stringent—environmentally protective—yet cheaper to implement precisely because people with a practical insight are able to work with other technical experts in designing a result that works. Moreover, when consensus is reached and implemented, litigation is rare. Thus, when viewed in the long run, consensus decisions are made more rapidly and with fewer overall resources than by following a more traditional, judicial-like hearing process.

The framework for consensus building already is in place. The Administrative Dispute Resolution Act authorizes agencies to use a full suite of alternative dispute resolution processes if the parties agree to do so. These include settlement negotiations, conciliation, facilitation, mediation, fact finding, mini-trials, and arbitration as well as any combination of these. The Act requires each agency to establish a policy with respect to the use of these procedures, to appoint a dispute resolution specialist who will be a resident expert


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in their use, and to provide training for agency employees. The Act further provides for a confidentiality that is necessary at times for the effective use of direct negotiations—a process that strikes a careful balance between the openness that is critical for the legitimacy of the agreements reached and the confidentiality that is critical if agreements are to be reached. It also provides the structure for the administrative use of arbitration. The Negotiated Rulemaking Act provides a framework for negotiating rules among representatives of the affected interests. It explicitly does not limit agencies from experimenting with other rulemaking processes, but it does provide a Congressional imprimatur for this particular consensus process.

To encourage agencies in these processes, in a Memorandum of September 30, 1993, the President directed agencies to use negotiated rulemaking, and his Executive Order 12866, which provides White House direction to the agencies on how rules are to be written, weaves public participation throughout its requirements. For example, "[e]ach agency . . . is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking." (§ 6(a).) The Vice-President's Reinventing Government recommended that agencies make more use of dispute resolution processes. In response to its awesome task of implementing the Clean Air Act, the U.S. EPA published a very helpful Primer on Consensus Building, which provides extremely useful analysis of what type of public participation process to use for what type of problem. The Administrative Conference of the United States has issued a series of recommendations and has conducted seminars for agencies on the use of consensual processes. Similar efforts are occurring at the state level.

Thus, the framework for the use of consensus building is well established. However, consensus building has not been used as often or as effectively for resolving environmental disputes.

III. CONSENSUS-BUILDING TECHNIQUES AND INNOVATIONS

Consensus-building, environmental mediation, and regulatory negotiation draw from a general notion that all representatives of the affected interests (including citizens and industry) included in a fair, dialogue-promoting process can help government to make decisions that will be viewed as legitimate, innovative, and stable over time. Indeed, this report assumes that good faith participation on the part of representatives of the affected interests is necessary to promote dialogue and that the representatives will use consensus building as a means to reach mutually agreeable solutions.

This Section first outlines and assesses the strengths and weaknesses of "traditional" public participation techniques—public hearings—followed by a similar discussion of more recent, innovative stakeholder participation models. This is not an all-inclusive list of
public participation techniques. Workshops, seminars, public opinion polls, information centers, video, and data bases such as the Toxics Release Inventory also can be used effectively to involve the public in government decision-making. In addition, the four techniques listed below are not necessarily mutually exclusive. During a long-term planning process, some or all of the methods might be used. Finally, this Section discusses improvements that need to be made in the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act to facilitate the use of consensus-building techniques.

A. Public Hearings.

(a) Description. Public hearings are open meetings between government officials and the general public. They serve at least five distinct functions: (i) to provide an opportunity for members of the public to orally provide information they believe the agency should consider when making its decision; (ii) to provide information to citizens and other stakeholders; (iii) to relieve public frustration so that government decisions can be made; (iv) to provide a ritual carried out by government which is expected both by law and by citizens, regardless of the influence this ritual affords the public; and (v) to serve as a means for government and citizens to interact and for government to respond to citizens' needs. This form of participation has existed for many decades, but it gained increasing currency in the 1970s and 1980s when numerous legislative acts began to include a formal public hearing requirement prior to implementation of proposed projects or policies. The public hearing presents a highly structured and formal forum for public participation.

(b) Assessment. While public hearings give the public a forum for speaking to government decision-makers, they have been faulted for several reasons, including these: (i) hearings do not require effective responses from decision-makers; (ii) they take place too late in the planning process; and (iii) they can become a forum for "grandstanding" rather than problem-solving.

While public hearings can air public concerns, they do not require careful listening or effective and genuine responses from government decision-makers. Frequently, public officials do not take hearings seriously, discounting them because they believe they do not draw citizens representative of the larger community. On the other hand, officials may instead mistake hearings as representative of the interests of constituencies at large, thus giving undue favor to vocal but not necessarily representative interests.

Hearings often are held after an agency has designed and announced its proposed action, expending significant time and effort in preparing detailed plans, with an expectation or hope that they will be approved by the public. Two problems then arise: (i) the public is led to believe that their input comes too late, is not of use, and therefore, is not important; and (ii) government officials are led to anticipate an exhaustive series of draft plans, rejections, revisions and new draft plans that will waste limited financial and staff resources.

Hearings often become a forum for "grandstanding," not problem-solving. They can be dominated by groups prepared to deliver an aggressive challenge to the legitimacy of the governmental definition of the problem or to the government's power to supersede local or private jurisdiction. Participants often stake out extreme positions rather than explore underlying interests that might be resolved.

By their very design, however, public hearings are not conducive to reaching consensus. Indeed, the parties' major incentive at a hearing is to maintain an aggressive, adversarial posture since their purpose is to sway the decision. Consequently, they do not help the agency or the parties determine what is really at stake or what result might best satisfy all the interests.

When the government's public hearing model fails, aggrieved interests often move into confrontational modes of participation such as organization against the government's decision, mobilization of public opinion and -- the extreme form of public participation -- litigation. This is expensive, inefficient and often leads to unfair results. While public participation and public hearing requirements are part of all environmental laws, they have not "produced results that are sufficiently fair, efficient, stable and wise" for all affected stakeholders.¹²

B. Consensus Building.

(a) Description. In the last decade, an innovative model of stakeholder involvement known as consensus building has gained increasing usage in policy making efforts. Consensus building is centered around the creation of a collaborative problem-solving group comprised of representatives of affected interests who share concerns about a proposed project or policy. This group is convened to evaluate the problem and to consider collectively various possible solutions. Typically, the stakeholders represented


¹² Ibid.
at the table may include representatives of the government agency charged with implementing the policy, representatives of the governmental or non-governmental proponents of the policy, representatives of the regulated industry, and representatives of opposing groups with viewpoints to express.

A consensus-building process is typified by some if not all of the following phases: "convening"—analyzing the nature of the issues, determining whether a consensus-based process is likely to lead to a mutually acceptable resolution, preliminarily designing a process that might be used to reach consensus, assessing what interests would be affected by the decision and whether those interests are sufficiently organized to participate in a representative consensus process, and having each interest appoint its representatives and structure its own internal procedures for developing consensus within the interests as well as across the table; drafting ground rules and setting agendas; carrying out joint fact finding; inventing options; packaging those options; developing a written agreement; binding the parties to that agreement; ratifying the final agreement, and monitoring and enforcing the ratified agreement.

The group's first task is to select a neutral facilitator or mediator who is acceptable to all of the stakeholders. The facilitator manages meetings and assists the group in reaching an agreement about the best course of action. Meetings are characterized by informal dialogue, as members jointly develop and review information, determining how and what they need to make a responsible decision and discuss the practicality and desirability of various options. In some cases, independent technical experts are brought in to inform the discussion. Collectively, the group evaluates possible solutions in light of the technical information available and the concerns of a broad array of stakeholding interests represented at the table.

Under a consensus-building process, the involved agency still must agree to the outcome—the agency does not delegate its decision-making authority to a private committee, nor can the agency be "outvoted." Thus, the agency retains its authority to make the final decision, except that, in a consensus process, affected interests agree with the decision. While the agency in a consensus process cannot be "outvoted," neither can the participants. Consensus is defined in the Negotiated Rule Making Act as "unanimous concurrence among the interests represented on the . . . committee . . . unless such committee agrees to define such term as general but not unanimous concurrence or agrees on some other specified definition." Unanimity is the default definition in consensus processes.

Interestingly, the amount often is substantially less than that provided in an adjudicatory, adversarial process, since there the facts are used to influence and confine the decision-maker, whereas in a consensus process the parties themselves can make the relevant decision.
Consensus building has been used at the local level to guide municipal budgets (Kent, Ohio), site a new professional sports stadium (Denver, Colorado), and assess disaster relief and planning after a major hurricane (Kauai, Hawaii) and at the state level to develop a cooperative water resources plan (Washington state), prepare a blueprint for energy conservation (California), and develop a waste management plan (Georgia).^{14}

(b) Assessment. Consensus building developed in response to the deficiencies of other forms of stakeholder involvement mandated by federal and state legislation. While earlier forms, such as public notification and public hearings, varied in the degree and timing of public involvement, typically they did not vest in stakeholders control over final decisions. Consensus building represents a new opportunity to engage large numbers of people and stakeholders concerned about government policy in making decisions on matters that affect them.

Consensus building (i) is voluntary and face-to-face; parties directly address one another around a negotiating table; (ii) is ad hoc—representation, ground rules, and procedures are newly designed for each case; (iii) reaches agreement through consensus of participants rather than by imposition of a judgment by a residing authority; and (iv) addresses and attempts to improve the relationships between parties.

As the role of participants shifts from discussion of what a technical analysis seems to say to conduct of that analysis, the burden of responsibility on the public dramatically increases. The stakeholder's role is transformed from one of simply articulating interests with respect to a proposed policy, to working collaboratively with others in evaluating technical information and shaping the substance of solutions.

While consensus building offers direct stakeholders involvement in decision-making, it has been criticized for several reasons, including the following: (i) it forces government decision-makers to abdicate their unilateral decision-making responsibility; (ii) it reinforces existing power imbalances by asking parties with unequal resources, skills and expertise to negotiate directly with one another without the fair arbitration provided by

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^{14} Supra note 4.
a more formal, legalistic proceeding; and (iii) it requires high inputs of money and time from multiple participants without certainty that the process will avoid existing statutorily mandated procedures.

C. Environmental Adjudication.

(a) Description. A similar process has been used successfully to resolve specific conflicts. These disputes usually involve two or more parties who believe they have been unjustly and adversely affected by the action of another party. In many cases, these disputes pit citizens against government agencies that have undertaken or announced their intention to undertake a project or policy.

Mediation attempts to solve disputes by bringing parties face to face in a problem-solving dialogue. A neutral mediator is brought in to help the parties identify a settlement that takes seriously the concerns of all those involved. The dialogue may result in alteration of a proposed project or policy to minimize adverse impacts on the other parties or creation of a compensation scheme designed to offset negative impacts with financial or other forms of compensation.

Environmental mediation has been used in a variety of settings. At the local level, mediation has helped site a ferry terminal (Port Townsend, Washington), helped negotiate a shopping center development (Blacksburg, Virginia), and resolved a town annexation dispute (Leesburg, Virginia). At the state level, mediation has been used to resolve an appeal of a development order for a large, multi-use development (Florida), to end a dispute over planning for and development of an ecologically-sensitive Pine Barrens area (New York), and to resolve hazardous waste site clean-up disputes in Massachusetts. At the federal level, mediation has been used to streamline the CERCLA settlement process, to allow a public utility to convert to coal while maintaining air quality standards, and to resolve permitting disputes over water supply planning with federal, state, and local agencies and citizens.

(b) Assessment. During the 1970s and early 1980s, environmental disputes produced lengthy and costly court battles that dragged on, sometimes for decades. Settlements forged in the courtroom often were unsatisfactory in the long term because they did nothing to restore relationships and often left one or more parties feeling inadequately

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13 Supra note 4.
compensated. Mediation emerged as an alternative method for resolving disputes without resorting to the adversarial forum provided by the formal U.S. court system.

Mediation has been employed extensively in the United States during the last twenty years, effectively bringing together large numbers of people to resolve the disagreements that polarize them. Unlike many courtroom settlements, mediated solutions tend to (i) leave both sides feeling that they have received fair treatment and that their interests have been fully considered; (ii) enable the parties to pursue solutions that are not available in the context of litigation, such as redesigning government initiatives or securing non-financial compensatory measures; (iii) allow the parties to engage in collaborative joint-fact finding in areas of technical complexity rather than participate in advocacy science where experts battle over scientific uncertainties; and (iv) enhance long-term working relationships rather than encourage adversarial, contentious and uncooperative behavior.

Mediation promotes public and stakeholder participation. The informal nature of the proceedings allows diverse publics to grapple with the complex technical issues that often arise in the course of a dispute. Mediation is particularly well suited to environmental disputes, where there are seldom any clear-cut answers. By treating each party as an equal problem-solver, mediation allows individuals to explore creative options that meet the interests of all sides. Furthermore, parties in a mediated dispute will be more willing and able to work cooperatively towards implementation and to resolve future conflicts if they have developed a satisfactory working relationship.

Despite the promise and success of environmental mediation, several criticisms have been made, including the sense that, rather than promoting participation, environmental mediation limits the number of participants in order to reach a manageable group size. Questions of representation at the table and accountability to constituents away from the table have not been fully addressed. Further, mediation does not incorporate procedural safeguards that ensure due process and protect weaker parties. Its informality and lack of structure make it open to exploitation by more powerful or unethical parties.17

D. Negotiated Rulemaking.

(a) Description. Negotiated rulemaking emerged in the 1980s as an alternative to traditional procedures for developing regulations required by legislation. "Reg-neg," as it is sometimes known, brings together the responsible agency along with representatives of the significantly affected interests to negotiate the terms of a proposed rule or regulation.

In 1982, the Administrative Conference of the United States, a presidentially-appointed body responsible for improving the efficiency of federal government operations, adopted federal recommendations to encourage the use of regulatory negotiations. In 1983, the Federal Aviation Administration became the first federal agency to use negotiated rulemaking when stakeholders negotiated new flight and duty time regulations for pilots. Since then, federal agencies, including the Environmental Protection Agency and the Department of Transportation, as well as many state agencies, successfully have used negotiated rulemaking to develop proposed rules in a wide range of areas. These include rules establishing penalties for excessive vehicle emissions, governing emergency exemptions from pesticide regulations, and setting a standard exposure level for such toxic chemicals as benzene, coke oven emissions, emissions of toxic chemicals from equipment leaks at chemical plants, disinfection by-products from drinking water purification, and the reformulation of gasoline to meet the stringent standards of the Clean Air Act.

In 1991, the Congress enacted the Negotiated Rulemaking Act. The Act lays out the determination of need for a negotiated rulemaking committee, the duties of conveners in identifying persons significantly affected by a proposed rule, the application process for membership on such a committee, the conduct of committee activity, the duties of facilitators, and the payment of facilitators' and members' expenses.

In assessing whether to undertake a negotiated rulemaking, an agency administrator must consider whether (i) there are a limited number of identifiable interests; (ii) there is a reasonable likelihood that balanced representation can be achieved, that consensus can be reached in the allotted time, and that the process will not unduly delay the issuance of a final rule; (iii) the agency has the resources allocated to commit to such an undertaking; and (iv) committee members are willing to negotiate in good faith.

(b) Assessment. There is a growing acceptance of negotiated rulemaking as a means of addressing politicized standard-setting choices. It is a clear way of enabling interested parties to participate in the development of rules that affect them.

The benefits of negotiated rulemaking include these: (i) participants can focus on their respective interests rather than on extreme positions publicly endorsed in order to sway decision-makers; (ii) the process increases the perceived legitimacy of agency rulemaking, leading to easier implementation and high compliance rates; (iii) it reduces the time, money and effort expended on developing rules over the long-term; (iv) it creates more cooperative relationships between the agency and affected parties; and (v) it may avoid lengthy and costly legal challenges to proposed rules.\footnote{Indeed, there has not been a single judicial challenge when an agency has implemented a rule developed under the consensus process.}
Experience with negotiated rulemaking has shown that certain characteristics of a situation favor a negotiated approach to rulemaking. These characteristics include situations where (i) all parties have something to gain by participating; (ii) all parties possess moderate to strong negotiating skills; (iii) no single interest will dominate the negotiations; (iv) there is a measure of agreement on fundamental values; (v) appropriate interests and their representatives can be identified; and (vi) the outcome of the process can be incorporated within the parameters of the law under which the rule is being developed.

While negotiated rulemaking has been used successfully, critics have made at least three complaints about the "reg-neg" approach. First, it requires an intensive initial investment of resources. Although it may save money and time over the long term, in the short term the investment can appear daunting. Second, some groups may not have the resources to take part in such a process without financial support from government. Third, the judiciary is faced with the relatively new and difficult task of determining if all appropriate parties were included in the process when an outside party challenges the rule made under "reg-neg." 10

As set forth in Section III B at page 7, a rigorous convening is essential to ensure the success of any consensus process and indeed its very legitimacy. The convening determines whether the criteria indicative of success are met and who the interests are that will be significantly affected and hence must be represented at the table. If the convening is not done well, and if no opportunity is provided for those who think they would be affected but are not represented to present their case as to why they should participate, the resulting negotiations not only may be a waste of time but actually may increase bitterness and adversarial actions.

E. Statutory Improvements.

Congress amended the Administrative Procedure Act (APA) with the Administrative Dispute Resolution Act (ADR Act) and the Negotiated Rulemaking Act to provide explicit authorization and encouragement to agencies to use consensus-based approaches to decision-making. These Acts provide the framework for using a consensus process to resolve the full range of environmental issues. Although not as explicitly, states generally provide similar authority under general principles of administrative law. The techniques have not been nearly as widely used as their success would indicate, however. Agencies therefore must be encouraged in this direction, both in terms of reaching better results and in not diminishing their authority. For example, in addition to existing alternative dispute

resolution provisions in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), potentially responsible parties are encouraged to use the Administrative Dispute Resolution Act to make allocation decisions, while environmental agencies are encouraged to use the Negotiated Rulemaking Act for making policy decisions. In doing so, EPA should appoint a single, relatively senior official to represent the agency and various components of its staff in such negotiations, and policy negotiations and allocation decisions should be coordinated to the extent appropriate.

Both statutes are due for reauthorization in 1995. To further encourage agencies to use these important procedures, Congress should reauthorize the statutes on a permanent basis. In doing so, Congress should clarify provisions that have generated confusion and hence limited their use.

For example, the ADR Act applies to all issues "in lieu of adjudication." Although under the APA this means any agency decision other than rulemaking, some people have read it too narrowly to exclude consensus building or other procedures to make decisions that otherwise would be made shy of formal hearings. The provision should be clarified. So too, the Act has been read as applying only when there is a disagreement between the agency and a private party, as opposed to a disagreement between two private parties which the agency is called upon to resolve. That, too, should be clarified. In addition, the ADR Act provides a structure for the administrative use of arbitration—which can be quite helpful in a variety of environmental matters that are distributive in nature. Although ABA policy supports the policy and legality of the finality of arbitration awards, Congress provided that an agency may override the decision of an arbitrator. That provision has significantly limited the utility of arbitration since private parties are reluctant to engage in the process when the agency can opt out. Congress should remove this override.

The Negotiated Rulemaking Act requires agencies to comply fully with the Federal Advisory Committee Act to empanel a negotiation. That, in turn, requires agencies to obtain the permission of the Office of Management and Budget (OMB) and the General Services Administration (GSA) before such a committee can be established. The bureaucratic nightmare can require significant amounts of time and red tape. Congress, therefore, should require agencies to comply with the substantive requirements of balance and openness on the committee but exempt them from approval by OMB and GSA. Further, there is confusion over the full reach of the confidentiality provision because the Act states that the Freedom of Information Act (FOIA) continues to apply: it is unclear whether confidential documents that are given to an agency official can or cannot be obtained through FOIA. A very limited, narrow exemption from FOIA for these purposes should be provided.
Respectfully submitted,

David S. Baker
Chair
Standing Committee on Environmental Law

Janet E. Belkin
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Section of Administrative Law
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R. Kinnan Golemon
Chair
Section of Natural Resources, Energy and
Environmental Law

February 1995
1. Summary of Recommendations:

- That the public participation provisions of environmental laws and international environmental agreements and treaties should recognize and express the principle that all affected stakeholders and interests should be provided meaningful and effective involvement and be expected to participate in consensus-building efforts to ensure that government decisionmaking regarding the administration, regulation and enforcement of environmental laws is open, fair, efficient and credible.
- That public participation provisions of environmental laws should include express authority allowing government agencies to choose innovative public participation, stakeholder-involvement and shared decision-making models which involve all affected stakeholders.
- That federal agencies should use more fully the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act in making environmental decisions, and state agencies should follow similar procedures permitted under generally applicable administrative law.
- That Congress should reauthorize the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act indefinitely, and revise provisions that inhibit their wider use by clarifying: the processes authorized, the finality to be accorded an arbitrator’s decision where applicable, the applicability and interrelationship of protected disclosures and the Freedom of Information Act, and the applicability of the Federal Advisory Committee Act.
- That the procedures described in the Negotiated Rulemaking Act should be used for making policy decisions under environmental statutes.
- That the U.S. EPA, community and business interests, state, tribal, and local governments, and environmental and other non-governmental organizations should use the framework established under the Negotiated Rulemaking Act to reach agreement on appropriate issues, provided that the U.S. EPA should appoint a relatively senior official to represent the agency and its staff in the negotiations, and policy negotiations and allocation decisions should be coordinated to the extent appropriate.

2. Approval by Submitting Entity.
Approval was given by the Standing Committee on Environmental Law in a conference call on November 14 and by the Section of Natural Resources, Energy & Environmental Law at an Executive Committee meeting on November 15, 1994.

3. Has this or a similar recommendation been submitted previously to the House or Board?
   No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?
   The Association has endorsed policy supporting the use of dispute resolution procedures and/or public involvement in governmental decisionmaking in a variety of narrower contexts (e.g., under GATT, 8/93; public participation in nonlegislative rulemaking, 8/93; public participation in amendments to CERCLA, 2/91; efficiency and public participation in rulemaking, 2/89) and has called for the use of alternative methods of dispute resolution by administrative agencies, including support for the policy and legality of finality of arbitration awards when issued (8/88). The present resolution more broadly calls for effective consensus-building as well as improvements in such current processes in agency environmental law decisionmaking. It also has the effect of reaffirming related prior ABA policy in a broader consensus-building context.

5. What urgency exists which requires action at this meeting of the House?
   Significant statutes relevant to this policy matter are due for reauthorization by Congress: the Negotiated Rulemaking Act, the Administrative Dispute Resolution Act, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund") and the Resource Conservation and Recovery Act (RCRA). The ABA's position is likely to affect consensus-building provisions in these statutes, particularly given the Association's already established visibility in narrower legislative discussions concerning CERCLA and consensus-building involving federal agencies. Further, environmental law/decision-making at the state and local levels is evolving separately from federal actions, creating an opportunity now for ABA impact on developing laws and processes around the country.

6. Status of Legislation (If applicable.)
   CERCLA, the Negotiated Rulemaking Act, the Administrative Dispute Resolution Act and RCRA are due for reauthorization.

7. Cost to the Association (Both direct and indirect costs.)
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There is no cost to the Association perceived to flow from adoption of this resolution.

8. **Disclosure of Interest**: (If applicable.)

There are no known conflicts of interest within the proponent entity of this resolution.

9. **Referrals**

Referred to the following entities in October and November, 1994:

- Section of Administrative Law & Regulatory Practice
- Section of Dispute Resolution
- Section of Natural Resources, Energy & Environmental Law (SONREEE)

Referred to all state and local bar associations represented in the ABA House of Delegates and to the following entities in November, 1994:

- Sections and Divisions
  - Antitrust Law
  - Business Law
  - Criminal Justice
  - General Practice
  - Government and Public Sector Lawyers
  - Individual Rights & Responsibilities
  - Intellectual Property Law
  - International Law & Practice
  - Judicial Administration
  - Labor and Employment Law
  - Law Student
  - Litigation
  - Public Contract Law
  - Public Utility, Communications and Transportation Law
  - Real Property, Probate & Trust Law
  - Science & Technology
  - Taxation
  - State & Local Government Law
  - Tort & Insurance Practice
  - Young Lawyers

- Committees and Commissions
  - Coordinating Group on Energy Law
  - Consortium on Legal Services and the Public
  - Homelessness and Poverty
  - Military Law
  - Opportunities for Minorities in the Profession

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Public Education
Public Understanding About the Law
Women in the Profession

Affiliated Organizations
Federal Bar Association
Federal Energy Bar Association
Hispanic National Bar Association
National Asian Pacific American Bar Association
National Association of Attorneys General
National Association of Bar Executives, Inc.
National Association of Women Judges
National Association of Women Lawyers
National Bar Association, Inc.
National Conference of Women's Bar Associations
National District Attorneys Association
National Legal Aid and Defender Association

10. Contact Person. (Prior to the meeting.)

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Tel. 303-297-2400
Fax 303-292-7799

11. Contact Person. (Who will present the report to the House.)

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Atlanta, GA 30303
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Tel. 404-572-6618
Tel. 303-297-2400
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12. Contact Person Regarding Amendments to This Recommendation. (Are there any known proposed amendments at this time? If so, please provide the name, address, telephone, fax ABA/net number of the person to contact below.)

No known amendments at this time.