

## *The Virginia NEWS LETTER*

# *Solving Problems by Consensus: Water Planning for Virginia*

By Mark Rubin

### **Introduction**

Many elected officials and agency heads think of themselves as problem solvers. The fact is that being a problem solver of public policy issues is extremely difficult in a highly adversarial atmosphere such as the one that currently reigns in many government venues.

Candidates for office identify problems and propose solutions in campaigns. A proposed solution then becomes a legislative proposal at either the state or local level. Partisan values and electoral concerns often become the measuring rod for the validity of the proposed solution. Stakeholders play off these factors and make concerted efforts to protect their turf—believing that what is good for them is good for the Commonwealth. Unfortunately, legislative processes long ago ceased to be civil processes in which collaborative problem solving was valued. As one veteran legislator said as he surveyed the results of a session: “It’s a wonder it works as well as it does.”

Out of all of this, new laws and policies sometimes arise. When they do, the task of government agencies is to implement them through regulation. When a statute is born in an adversarial process, the process to adopt the regulations often continues in the same vein—with stakeholders seeking to protect their advantages or mitigate their legislative losses in the regulatory process.



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Beneath all of the partisanship and adversarial debate, state agencies are beginning to harness the power of alternative dispute resolution (ADR) processes to bring collaborative problem-solving techniques to bear on regulatory issues. One example is the recently concluded drafting of a water planning regulation in which a facilitated process was used.

### **Warring Interests and the Drought**

For many years, stakeholders in water policy issues battled to a draw in the Virginia General Assembly. Environmentalists, local governments, industry, agricultural interests and others neutralized each other's efforts to the point that the Commonwealth was in a state of near paralysis in attempts to address long-term water supply and resource problems.

As water levels fell during the state's 2001 drought, numerous public policy problems were revealed. The lack of planning and preparedness required the Governor, the Secretary of Natural Resources, the Department of Environmental Quality (DEQ), and the Department of Health to act through emergency orders to avert catastrophes until the rains returned.

The drought proved that a lack of knowledge, data and information about water resources left



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## *Years of distrust causes paralysis*

the Commonwealth powerless to plan and prepare not only for future droughts but also for inevitable increased demands on water for both instream and offstream uses. Consequently, future environmental, economic and health needs of the Commonwealth were all at risk of not being met.

To remedy this lack of knowledge, Gov. Mark Warner instructed DEQ to convene a technical advisory committee (TAC) of stakeholders to assist in drafting a water planning regulation.

The advisory committee was composed of representatives of stakeholder organizations, state and federal agencies, local governments, and other individuals with water expertise who had a stake in water policy issues. Not unexpectedly, the same problems that afflicted prior efforts made the initial technical advisory committee ineffective.

This paralysis was born of years of mistrust among the parties, conflicting values, and a combination of statutes and common law doctrines that provided a dizzying array of rights and entitlements to water. The law provided broad guidance but little specific assistance. Added to all of this was the painful experience all had suffered during the permitting process for the Lake Gaston and Newport News Reservoir projects.

What little agreement there was in the initial technical advisory committee was subsequently embodied in state Senate Bill 1221, introduced by chairman of the State Water Commission Sen. Marty Williams in the 2003 General Assembly session. The bill required the State Water Control Board, in consultation with other interested parties, to establish a comprehensive water supply planning process for the development of local, regional and state water supply plans.

The planning process was to (1) ensure availability of adequate and safe drinking water, (2) encourage and protect all beneficial uses and (3) encourage the development of incentives for alternate water sources—a most ambitious task.

Conscious of the barriers to agreement previously mentioned in the first technical advisory committee, DEQ retained the services of The McCammon Group (Barbara Hulburt, Bill Ellis and the author) to facilitate what was essentially a negotiation among the stakeholders. Neutral facilitators are trained to diagnose impediments to agreement and to create an atmosphere where constructive negotiations can take place.

## **Seeking Consensus Through a Facilitated Negotiation**

At the outset, all of the parties agreed that planning, in and of itself, was important. Secondly, all agreed that the goal was to reach consensus on a planning regulation to implement the statutory requirement of a local and regional planning process. Consensus was defined to mean that “everyone could live with” the final product. This meant that the regulation could proceed through the normal Administrative Process Act procedures to become a regulation without opposition from the participating stakeholders. No votes were to be taken. It was further understood that in the event consensus was not reached, the State Water Control Board would draft its own regulation and all would be free to oppose it. Although the advisory committee's major role was to work on local and regional plans, the stakeholders were also asked to assist DEQ in creating a state plan.

## **Forms of Negotiations**

As noted previously, this process was in essence a facilitated negotiation. Critical to arriving at a consensus public policy decision is selecting the appropriate style of negotiation.

One form is adversarial or competitive negotiation. A competitive negotiator struggles to have his position on a given matter prevail. The end result is either no agreement or a compromise. This usually means there is general unhappiness with the result but joy that the confrontation is over. The old saw that “if everyone is a little unhappy with the result, it must be good” may be a valid standard when negotiating the purchase price of a car but it is not the most acceptable result in a public policy discussion.

A second form of negotiation is known as collaborative bargaining or collaborative problem solving. The goal is to first assist each party in achieving clarity about his interests. Interests are the reasons underlying the assertion of a particular position. Positions are what a stakeholder thinks he wants and interests are why that position is important to him. After identifying interests, the facilitators and the process help negotiators solve the problem presented by meeting as many of the stakeholders' interests as possible. Adversarial negotiation assumes a finite pie while collaborative problem solving seeks to expand the pie.

The process established in the technical advisory committee was one of collaborative

problem solving. While all agreed in theory to participate in this form of negotiation, implementing the theory was difficult. One reason was that many of the members of the committee were veterans of legislative wars. In this arena, agreements were the result of adversarial negotiation tactics which only began when it became clear that one side or the other did not have the necessary votes to win outright. Switching negotiation gears is hard work and takes time.

A second reason for the difficulty in moving to collaborative bargaining was that many issues surrounding water were made into disputes over conflicting values and world views. It is axiomatic that values cannot be negotiated. Consequently, once a dispute is framed in terms of conflicting values, the negotiation ends. During technical advisory committee meetings, it eventually became clear to all that each group sought a balance between beneficial instream uses such as “water for the fish” and offstream uses such as “water for people.” The question was not whether each party’s values were valid but, rather, where the balance would be struck between them.

### Clarifying Stakeholder Interests

The first job of the facilitators was to elicit from the various parties what their interests were in a planning process. Interests are both positive and negative: What a stakeholder sees as a value in planning and what he seeks to avoid. As usual, fear, uncertainty and mistrust fueled the list of things to avoid. To further understand the workings of the advisory committee, it is useful to summarize (even at the risk of oversimplifying) the various interests at the negotiation table.

- DEQ first had to clarify its own interests as a stakeholder. As a state agency, DEQ saw itself as responsible for fulfilling duties imposed on the Commonwealth by the state constitution and statutes. Its duty is to manage the state’s water resources for the benefit of all citizens and this is accomplished through use of the police powers to regulate and protect water within the Commonwealth. The goal is to establish and preserve a balance between instream beneficial uses (protection of fish and wildlife as well as recreational uses) and offstream uses (drinking water and industrial uses).

From DEQ’s perspective, the agency and the public needed to be able to gather available information on water resources and needs that would be like pieces placed in the frame of a large puzzle (the state plan) so that there would

be a big picture of water resources in Virginia. This big picture would be the basis for planning and for identifying potential conflicts and stresses on the resource. Local governments had the information or the ability to get the information that would compose the puzzle pieces and DEQ sought a way to facilitate the gathering of that information.

- While the environmental community is not monolithic, the various organizations active in public policy formulation had sufficient commonality of purpose to be able to present a unified front in this environmental negotiation. The existing federal and state laws governing the issuance of permits for water withdrawals require a close analysis of the effects of a planned water withdrawal on instream uses. Therefore, a significant fear among the environmental community was that the creation of state and local plans would impinge on the scrutiny required under existing law for new water withdrawal projects. At the same time, well-documented local plans that included information on existing instream beneficial uses would push localities into recognizing potential problems and stresses on the water resource when considering alternatives to increase water supply. Consequently, the environmental representatives approached the negotiation with both fears and hopes, but they also had a healthy skepticism about the chances for success in light of past planning efforts.

- Local governments come in all sizes: some have ready access to water and others do not, and some do extensive water planning while others do virtually none. Notwithstanding this array of interests among local governments, there were certain common interests.

First and foremost, local governments were adamantly opposed to another unfunded mandate. They did not want to be required to do planning by the state and not be provided the resources to accomplish it. While this is primarily a financial concern, the extent of a required plan clearly influenced the monetary concern. The more extensive the plan, the more it would cost.

Secondly, local governments were acutely aware of the difficulty of obtaining permits for new water withdrawals. The lengthy and contentious permitting process for both the Lake Gaston project and the Newport News Reservoir raised a desire to streamline the permitting process. If a local government had to formulate a plan that was reviewed and approved by DEQ, then it wanted to be able to use it to shortcut the permitting process. In addition, localities believed that a plan approved by DEQ should

*Localities: No new unfunded mandates*

## *A fear of state planning*

result in the willingness of the Commonwealth to be an advocate for water withdrawal projects contained in the plan.

On the other hand, local governments believed strongly that water planning is a local government function and not one which should be taken over by the state. This belief was derived partly from a desire to retain existing powers but also from a fear that state planning could result in state allocations of water. Finally, the drought had also shown local governments that many of them were unprepared for the problems inherent in such a crisis and better planning could help avert some of these concerns.

- Manufacturing and utility interests generally obtain water through grandfathered water-withdrawal projects. Changes in the regulatory status quo tend to create fears and mistrust. Strong economic growth, however, can only be sustained by having access to water resources for offstream uses. Creating a big picture of available water resources around the state could be seen as an asset in economic and business planning. The countervailing fear was the same as that of local government: A state plan could be a short step away from a state allocation system.

- Agricultural interests were in a situation similar to manufacturers and utilities in that they enjoyed the status quo. The existing law provided them with ready access to groundwater and streams on their land and rivers running adjacent to their land. Regulatory reform that might change the status quo caused great mistrust and fear. In fact, the less regulation of water the better it was for these interests.

- Home builders and developers had a strong stake in the ability of communities to grow. Growth of residential communities and commercial development is very dependent on the existence of adequate water supplies. Any use of water planning to curtail growth was a matter of significant concern.

### **The Consensus Product**

The collaborative problem-solving method of negotiation was sorely tested by the task. DEQ had to allay a number of fears that local plans would be used as an allocation tool. It became apparent that the earlier potential conflicts over the same resource could be identified, the more likely regional solutions could be found to avert such conflicts. DEQ defined its role as a facilitator of discussions between potentially conflicting parties instead of as an arbiter of such disputes.

The group decided early in the process that

all decisions would be made in the context of existing law and that no effort would be made to propose changes to such laws. This further allayed a number of fears discussed above.

While acknowledging the issues about the length and contentiousness of the permitting process, the group agreed that the planning process was distinctly different than the permitting process. After a thorough exchange of ideas, the group agreed that streamlining and advocacy issues should not be addressed in a planning regulation.

Local government interests were also met when the focus shifted from requiring a comprehensive and expensive plan to something more akin to an inventory. The local government would be required to provide DEQ with information about how much water it currently utilized, where it came from, and current environmental conditions pertaining to those sources. It then was asked to show how much water it thought it would need over the next 30 years, and if there was an increased demand, ideas about alternative sources for such water. The analysis was to use readily available information wherever possible, and DEQ agreed to help provide all of the information it already had to the locality and to assist the locality in working with other state agencies.

The net result is that over the next six years local governments and regional authorities will be providing the pieces of the water resource puzzle to DEQ and the State Water Control Board to assemble into the big puzzle frame that is the state plan. The Board will review the plans to assure they meet regulatory requirements. Once approved, the plans will be made part of the state plan.

The benefits of such a state plan are many. Potential conflicts over the same water source will be revealed earlier and efforts can be begun to resolve them. Potential stresses on a resource will be seen sooner so that alternative water sources can be evaluated more efficiently. The business community and state economic development agencies will also have a clearer sense of where water resources are available to support job creation.

Based on the consensus draft regulation, DEQ was able to obtain new money from the 2005 General Assembly for the planning process outlined in the regulation and to assist local governments in preparing their plans.

In the end, the advisory committee reached consensus on a draft regulation which was presented to the State Water Commission and subsequently approved by the State Water Control Board to be submitted to the Administrative

Process Act approval process. The fact that the draft regulation represented a consensus of previously warring and influential groups was a significant factor in the generally favorable comments made by the Commission and the Board. The draft regulation is now winding its way through the process, but the hard work has already been done.

## Implementing Dispute Resolution Act

The utilization of public policy facilitation by DEQ to assist in the process of drafting regulations is relatively new for Virginia but well established in other parts of the country. Based on models established in federal and other state governments, the General Assembly expressly authorized the use of alternative dispute resolution processes by state agencies and local governments in 2002.

Building on this statutory authorization, Governor Warner has made the use of such processes one of the top ten management objectives for his administration. Accordingly, Secretary of Administration Sandra D. Bowen has personally led the work of the Interagency Dispute Resolution Advisory Council to accomplish this objective.

As of last month, alternative dispute resolution pilot projects had been established in six different agencies. These projects range from complaint resolution processes in the Board of Accountancy to Department of Forestry efforts to streamline the enforcement of water quality laws. The projects also include the use of mediation to resolve procurement and contractual disputes with the Department of General Services and the Virginia Information and Technology Agency. The Department of Charitable Gaming and the Department of Mental Health are also incorporating these processes into aspects of their work. Other agencies are establishing ombudsmen programs while still others utilize partnering processes in contract administration.

All of this represents good news for Virginia. Alternative Dispute Resolution processes have generally proven to be quicker and cheaper than litigation and even the less formal Administrative Process Act procedures. In addition, the facilitation of the water planning regulation discussed above illustrates the many things that can be accomplished beyond the mere substance of the regulation.

Parties who had been unable to work together in the past found that they could engage each other in a constructive dialogue. As

previously noted, DEQ has begun another work group to draft amendments to the Virginia Water Protection Permit regulation. Many of the same interests are represented in this process. They are building on some of the work of the previous Technical Advisory Committee but also tackling new issues in a constructive manner.

When a consensus product is obtained, the stakeholders are invested in seeing it successfully navigate the remaining administrative processes and its ultimate implementation. Future efforts are not directed at derailing an unpopular regulation which was imposed by an agency—but rather at making it work.

Perhaps the most important benefit is that the product of consensus processes is often superior to that resulting from more traditional processes. When stakeholder talents and expertise are directed at problem solving as opposed to turf protection, the result is not a compromise which satisfies no party's interests well but the proverbial “win-win” in which as many interests of as many stakeholders as possible are met.

## Conclusion

The facilitation process invoked by DEQ and the other Alternative Dispute Resolution pilot projects look to a time in which civil discourse triumphs over partisan bickering as a problem-solving technique. The ADR processes allow executive branch administrators to clarify their agencies' institutional interests and to participate in discussions constructively as opposed to defensively. Many individuals enter public service because they want to be problem solvers. These processes allow them to engage the talent and expertise of stakeholders as well as their own in constructively and efficiently solving problems.

It takes a civil process to build a civil society. The Commonwealth is embarking on the path to utilizing civil processes to do just that.

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