

**CAPP<sup>1</sup> Stakeholder Meeting  
Tribal Trustee Representatives  
NOAA Offices, Seattle, WA  
December 6, 2001**

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<sup>1</sup> The program's name was changed from Green Coasts to Cooperative Assessment Pilot Project (CAPP) to reflect the support for the pilot from the Federal trustees.

## **I. Introduction**

This memorandum is prepared at the direction and request of NOAA counsel.

The National Oceanographic and Atmospheric Administration (NOAA) has conducted five facilitated sessions to garner stakeholder input regarding the development of the Cooperative Assessment Pilot Project (CAPP) concept. CAPP is a program initiative whereby potential responsible parties may be provided the opportunity to initiate and conduct cooperative natural resource damage assessments.

The five meetings included representatives from state trustee agencies, federal trustee agencies, potentially responsible parties (PRPs), environmental non-governmental organizations (NGOs), and representatives from tribal trustees. Summary notes from the first four meetings, which took place in summer, 2001, have been distributed to all participants. Because the tribal meeting occurred several months later these notes were compiled separately and cover only the tribal meeting. An attendance list is included in Attachment A. Valerie Lee of Environment International Ltd. (EI) facilitated the meetings, and Alisa Bieber of EI took notes.

Eli Reinharz of NOAA's Damage Assessment Center welcomed the participants to the stakeholder meeting for tribal trustees and thanked them for coming. He explained that this was the fifth in a series of five stakeholder meetings discussing the Cooperative Assessment Pilot Project (CAPP), formerly known as Green Coasts. He reviewed the day's agenda, explaining that the meeting would begin with a presentation by Linda Burlington outlining the natural resource damage assessment (NRDA) process. Eli would follow with a second presentation regarding the CAPP idea. The rest of the day would be devoted to discussing the concerns, incentives, challenges and ideas of the tribal trustees for the CAPP concept.

Eli Reinharz introduced Valerie Lee and Alisa Bieber from Environment International, who would facilitate the meeting and record notes. He asked the participants to introduce themselves and their organizations. A complete participant list with contact information is included as Attachment A.

## **II. Natural Resource Damage Assessment Presentation**

Linda Burlington presented a short slide show about the NRDA process. Linda began by reviewing the legislative framework for NRDA. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Oil Pollution Act (OPA) and the National Marine Sanctuaries Act (NMSA) all contain provisions for damage assessments. In general, after a release, there are two types of actions: first the response, which cleans up the affected area, and second the restoration, performed by the natural resource trustees, which attempts to restore injuries to the public's natural resources.

NOAA has several offices that work together on NRDAs: the Damage Assessment

Center (DAC) evaluates the injuries to natural resources and their services, the Restoration Center (RC) conducts restoration of the injured resources/services, and the Office of General Counsel for Natural Resources provides legal support to both DAC and RC. During a damage assessment, the trustees, or agencies that hold the land in the public trust, will first determine the injury. The pathways for injuries and the specific causation must also be proven. The second step is quantifying the injury, including its severity, extent and duration. Lastly, the appropriate restoration actions are planned and scaled commensurate with the natural resource injuries.

In a conventional NRDA process, the trustees do the work and ask the potentially responsible parties (PRPs) to pay for it. The costs include the amount necessary to restore the area to baseline conditions, the value of the interim loss of resources and the cost of the assessment. When determining natural resource damages, trustees can take a value-based or cost-based approach. If a value-based approach is used, the amount of damages is derived from natural resource economics and the money awarded goes toward restoration. In a cost- or restoration-based damage assessment, the amount of damages is determined by adding the cost of the primary restoration projects, which restore the affected area, and the cost of the compensatory restoration projects, which account for the interim loss of the resources.

Linda Burlington showed a map of the NRDA sites in which NOAA has been involved. Overall, NOAA has generated approximately \$300 million for coastal restoration. The Department of the Interior is a trustee for sites that are primarily land-based, while NOAA works primarily with coastal resources.

In a conventional NRDA, trustees will initiate the action, pay all costs up front, and seek reimbursement from the PRPs at a later time. Trustees will either perform or directly oversee the PRPs' work, with both the trustees and the PRPs spending time and money preparing for probable litigation.

Under CAPP, the PRPs volunteer to participate in the program, then pay the costs and conduct the work with trustee oversight. Any party may terminate the cooperation at any time. CAPP focuses on restoration and aims to be more open and more cooperative than current practice. CAPP attempts to continue these trends in order to complete more restoration projects.

One participant asked why PRPs would want to participate in a program such as CAPP. Linda Burlington responded that it represents good business practice because it increases the level of certainty; the PRPs do not like to have a potentially large yet indeterminate liability on the books. Additionally, participation in the program might offer the company positive public relations. Finally, Linda pointed out that not all PRPs would be eligible for this program.

### **III. CAPP Presentation**

Eli Reinharz presented an overview of the CAPP concept. To begin, he explained that this concept had been discussed extensively with other Federal agencies, and it was agreed that this idea is ripe for discussion. He stressed that CAPP is a road map rather than a cookbook approach. The purpose of the overview was to explain the CAPP concept in broad terms, to inspire constructive thought, to identify potential challenges and opportunities, to develop a potential framework and to determine how best to test out the idea.

Eli Reinharz explained that, rather than making large changes to the current process, CAPP creates another means to cooperate with willing PRPs and perform NRDA's without diminishing current authorities or standards. It attempts to extend, formalize and streamline the successful cooperative experiences that have worked and integrate the lessons learned from past experiences. It emerged from a desire to enhance NRDA practice and enable all parties to address a multitude of contaminated sites. It is expected that CAPP will cover a small portion of NRDA's and not replace the conventional process.

CAPP aims to provide trustees the opportunity to restore sites on an expedited basis. CAPP intends to expedite the NRDA process without compromising trustee standards or responsibilities. Some methods for expediting the process might be model agreements, stipulations or use of expedited assessments such as the reasonable worst case (RWC) approach, as was used in several southeast sites in the U.S. CAPP aims to encourage innovation and initiative by the PRP to address the restoration of injuries. CAPP will focus on areas of chronic contamination under CERCLA or OPA, where the trustees have the legal and practical ability to make decisions and where all stakeholders can commit to CAPP.

The legal authority for CAPP stems from the Clean Water Act (CWA), CERCLA, OPA, NMSA, their supporting regulations (CERCLA at 43 CFR 11.32, OPA at 15 CFR 990.14(c), NCP at 40 CFR 300.615(d)(2)), and related programs and policies. Additionally, the current regulatory regime encourages a cooperative working relationship between trustees and PRPs to restore injured resources and services. CAPP encourages cooperation by institutionalizing the experience on cooperative assessments, integrating lessons learned, and including a framework that ensures consistent and responsible application.

The model process for CAPP need not be drastically different from the current process. First, a site would be selected through a screening process. Second, a project initiation agreement (PIA), similar to a memorandum of understanding (MOU) or a memorandum of agreement (MOA), would include agreements on dispute resolution, termination of the agreement, defensibility of work and other issues. Third, the restoration planning phase would be expedited, possibly by the use of conservative assumptions such as the RWC approach. Fourth, restoration implementation would include effective monitoring and potential corrective actions. Lastly, the resolution of liability would occur.

Eli explained that NOAA works with both CERCLA and OPA cases across the U.S. and that NOAA is interested in streamlining the process and improving cooperation between PRPs, trustees, and the public. Additionally, NOAA is interested in improving the NRDA/cooperative process so that it can benefit from industry initiative. NOAA has been recognized as an innovator and seeks to maintain this reputation.

Future directions will be determined based on these five meetings with stakeholders, potential ongoing stakeholder meetings and on the lessons from pilot projects. Summary notes from all the meetings were provided to the participants. Summary notes from the tribal trustees' meeting will be provided to the participants in the series of workshops following this meeting. A framework needs to be developed and tested through pilot efforts. The foreseeable steps include continuing to develop a viable framework, identification of potential pilot sites, and ongoing dialogue with the stakeholder groups.

Eli stressed that NOAA was here to listen. He challenged the group to identify incentives for the stakeholders to participate in CAPP, to define and provide solutions for some potential difficulties and to indicate next steps for the CAPP development process.

The slides are included as Attachment B.

#### **IV. Challenges in the Role of Tribal Trustee**

After a short break, the facilitator began the discussion by asking the participants what is the role of tribes as trustees, and what challenges are inherent in the role.

Several participants commented that the diversity of tribes involved in NRDA makes any attempt at a "one size fits all" approach to tribal trustees very difficult. Different tribes have different treaties, resources and experience. For example, many of the tribes in Washington State have fishing rights and can be co-managers of fisheries. Usual and accustomed (U&A) areas vary, and may overlap between tribes.

Tribes also enter the NRDA process with a different status than other trustees, because they are separate sovereigns. They do not have the funding base that states or Federal government agencies do. Tribes, however, do have the most to lose, because they cannot change the reservation boundaries or their U&As and go somewhere else. Sometimes, their traditional way of life is also at risk. One tribal representative commented that the cultural and spiritual resources important to tribes were often the first traded away at the negotiating table.

Many felt that the subsistence issues applicable primarily to tribes were rarely adequately addressed in the course of a NRDA. Tribes are sometimes asked to put a value on their ability to continue the lifestyle of their ancestors by valuing the natural resources, such as reeds or fish, necessary for such a lifestyle. Several participants felt that this was both practically impossible and a poor political move; once valued, the resources can be more easily removed and the tribes compensated for the loss. However, without articulating a

value for a resource, a NRDA claim is difficult to establish. It is equally difficult to value the loss incurred by native peoples when they change their traditional behavior out of fear that certain natural resources that are central to their traditions are contaminated. For example, if a river is contaminated, the tribes living along the river may not feel safe eating fish from the river, thus altering many traditional practices.

The process of risk assessment was viewed particularly poorly by some tribal representatives because they believed that the scenarios in a risk assessment are often not suited to tribes. For example, a tribe might eat more than ten times the fish estimated in the risk assessment, exposing them to many times the risk of injury. One representative believed the process was insidious because it ignores both subsistence issues and increased genetic sensitivity to certain risks. Some representatives saw risk assessment as an explanation for not completely cleaning up environmental problems.

Another difficulty unique to the tribes derives from their trustee relationship with the U.S. government. One participant commented that the agency responsible for overseeing the best interest of the tribes, the Bureau of Indian Affairs, is the PRP in some cases on the reservation. How, the participant asked, can one agency be a trustee for the tribes, a trustee in the NRDA, and a PRP at the same time?

The interaction of tribal law and Federal law presents additional challenges. Often, a question of whose resource quality standards to use arises. This question is further complicated because many cases where tribes are involved are not physically on the reservation, but pertain to natural resources that are covered under treaty rights. The legal question of tribal authority over non-tribally owned lands in the reservation continues to be unclear.

## **V. Incentives for CAPP**

The facilitator pointed out that other NRDA stakeholders perceived that the tribes had significant power throughout the process. The facilitator asked the tribal representatives what they would like to see included in this emerging CAPP framework.

One participant spoke about his experience working with the PRPs in the response phase of a potential Superfund site. Instead of listing the site, the interested parties agreed that the tribe and the state agency would work with the PRP to clean up the site. The PRP reimburses the agency and the tribe for their work as they collaboratively manage the site and provide oversight for PRP clean-up actions. All parties have the right to terminate the arrangement and agreed to use tribal scenarios in the risk assessment for the site. Currently, the representative felt that the process is helpful and productive.

In order for tribes to be respected as co-trustees, many participants felt that there must be an education effort; other trustees need to understand what tribal sovereignty means and what the tribal decision-making process is. One person felt that part of his job when he travels is to be an ambassador and explain tribal practice to others, especially other trustees. Some pointed out that official timelines do not always take into account the

time it takes to go through a tribal council and a full tribal decision-making process. Others, however, acknowledged that the tribal process still might be faster than some Federal processes.

Many of the participants felt that up-front and consistent funding would be important for full tribal participation. Year-to-year funding is too unreliable to be able to hire new staff and begin large projects.

Several participants expressed confusion about what CAPP would be and specifically how it would be different than what is currently in place. NOAA staff explained that CAPP could be viewed as a road map, or an institutionalization of practices. Instead of reinventing the wheel every time PRPs and trustees were interested in cooperating, CAPP can provide a framework for cooperation that streamlines the process. Further, CAPP would allow for contemporaneous agreements along the cooperative process; avoiding the need to negotiate among parties down the line as is currently done.

The participants agreed that a memorandum of understanding (MOU) should be created between the trustees including any affected tribes prior to working with the PRPs and establishing a Project Initiation Agreement (PIA). The PIA should include a clear scope, quality control mechanisms, and some method of dispute resolution in case of a dispute. The roles and responsibilities of each party should be clearly defined in the PIA. For example, it should be clear who is going to enforce Federal laws protecting cultural resources. Finally, as an incentive for the PRP to stay in the process, the PIA could provide for a sum of money to be paid by the PRPs if CAPP is terminated.

Participants generally felt comfortable with the idea of working with mutually agreed-upon contractors performing much of the work, with appropriate oversight and worked out in advance. However, culturally sensitive issues and some fisheries issues should be dealt with by the tribe with funding from the PRP.

Overall, the tribal representatives created the following list of what they would like to see in CAPP:

- ◆ The right to terminate the agreement;
- ◆ Use of a tribal scenario for a risk assessment, if any must be used;
- ◆ Education on tribal issues for other trustees;
- ◆ Up-front, long-term funding;
- ◆ An MOU with other trustees prior to PIA;
- ◆ Dispute resolution;
- ◆ Clear roles with respect to enforcing federal laws; and
- ◆ A clear understanding of which standards (e.g., for water quality) to use.

## **VI. Pilot Site Characteristics**

The participants briefly discussed the characteristics that they believed would be important for a CAPP pilot site. In general, they believed that a simpler site, both in

terms of the legal and scientific aspects, would create a more auspicious beginning. Specifically, they listed the following:

- ◆ PRPs that are financially solid;
- ◆ No entity that is both a trustee and a PRP at the site;
- ◆ All parties should be sophisticated in NRDA and must recognize tribes as nations;
- ◆ PRPs must have motive to follow the process (such as an upcoming Superfund listing);
- ◆ Site with public interest/a “poster child” site;
- ◆ Clear and lethal, not chronic and sub-lethal, injury;
- ◆ There should be protections when steps are “skipped,” e.g., if studies are not done, there should be a stipulation regarding injury; and
- ◆ NOAA should be one of the trustees.

## **VII. Concerns with CAPP**

It needs to be clear that CAPP will not compromise the current process by implying that cooperative assessments can only be performed under the CAPP rubric.

Confidentiality is an important issue with the tribes. Recently, a Supreme Court decision involving the Klamath tribe made documents by a tribe that had been shared with Federal agencies subject to FOIA requests. This will make tribes unwilling to share information with other trustee agencies.

In response to questions about the openness of the process, NOAA staff clarified that, in their view of what CAPP could become, the administrative record with data and agreements would be made public, while negotiating positions and interpretations of data would remain confidential. The tribal trustees agreed with this, but cautioned that too much information should not be made public, including such information as location of culturally important sites. Additionally, if negotiated positions are made public, it reduces the possibility that the next time the tribes would be able to get a better deal. Another risk of a overly public process is delay; the more people involved, the longer it might take.

## **VIII. Next Steps**

The facilitator explained that at previous meetings, there had been discussions about a work group to continue discussing these ideas. The facilitator asked the group of tribal trustees whether they had interest in tribal representatives on the cross-stakeholder committee, and how those representatives should be chosen.

One participant suggested that a tribal work group should be formed. The participants agreed on the creation of this working group that would address NRDA issues of concern and interest to tribes.



For the larger, cross-stakeholder working group, participants cautioned that it would be very difficult for one or two people to represent the spectrum of tribes. Despite this difficulty, participants agreed that they did want representation in the cross-stakeholder working group that will be helping to work out the details for CAPP.

The discussion moved to deciding who would participate and how would other tribes would be included and informed. One participant suggested that the National Tribal Environmental Council had a Superfund Working Group that already had ties to many tribes and could serve as a focal point for this cross-stakeholder working group. Another participant mentioned that on the west coast, and particularly the northwest, many tribes had organized into fish commissions. These commissions already included several different tribes, and they could provide an opportunity to disseminate information effectively. Patti Howard of the Columbia River Inter-Tribal Fish Commission agreed to discuss the idea with her organization, and then contact Fran Wilshusen at Northwest Indian Fisheries Commission and Merv George at the Klamath River Intertribal Fish and Water Commission to evaluate the idea. The participants suggested that geographic areas other than the northwest should be represented as well. Eli Reinharz agreed to contact tribes he knew in the Great Lakes region who may be interested in participating in the cross-stakeholder working group.

The facilitator and the NOAA staff thanked the group for a fascinating and productive meeting.

**ATTACHMENT A**  
**Attendance List Indian Tribe Trustee Stakeholder Meeting –December 6, 2001**

<b>Trustee Name</b>	<b>Participant Name</b>	<b>Address</b>	<b>Contact Numbers/ E-mail</b>
Colville Confederated Tribes	Maureen L. Mitchell	Short Cressman & Burgess PLLC 999 Third Avenue, Suite 3000 Seattle, Washington 98104	Ph: 206-682-3333 Fax: 206-340-8856 E-mail: <a href="mailto:mmitchell@scblaw.com">mmitchell@scblaw.com</a>
Columbia River Inter-Tribal Fish Commission (CRITFC)	Patti Howard	729 NE Oregon St., Suite 200 Portland, Oregon 97232	Ph: 503-736-1395, ext. 1395 Fax: 503-235-4228 E-mail: <a href="mailto:howp@critfc.org">howp@critfc.org</a>
Klamath River Intertribal Fish and Water Commission	Merv George Jr	P.O. Box 1149 Hoopa, California 95546	Ph: 530-625-1646 Fax: 530-625-1646 E-mail: <a href="mailto:klamathfish@hotmail.com">klamathfish@hotmail.com</a>
Lower Elwha Kalallam Tribe	Bill Gardiner	2851 Lower Elwha Rd. Port Angeles, Washington 98363	Ph: 360-452-8471, ext. 129 Fax: 360-452-3428 E-mail: <a href="mailto:wgardiner@elwha.nsn.us">wgardiner@elwha.nsn.us</a>
Makah Tribe	Vincent Cooke	Makah Tribal Council P.O. Box 115 Neah Bay, Washington 98357	Ph: 360-645-3263 Fax: 360-645-2585 E-mail: <a href="mailto:mtcehvc@olypen.com">mtcehvc@olypen.com</a>
Muckleshoot Indian Tribe	Glen St. Amant	Fisheries Department 39015 172 <sup>nd</sup> Ave., SE Auburn, Washington 98092	Ph: 253-939-3311, ext. 130 Fax: 253-931-0752 E-mail: <a href="mailto:gstamant@muckleshoot.nsn.us">gstamant@muckleshoot.nsn.us</a>
Puyallup Tribe of Indians	Bill Sullivan	Environmental Programs 2002 E. 28 <sup>th</sup> Street Tacoma, Washington 98404-4996	Ph: 253-573-7850 Fax: 253-573-7928 E-mail: <a href="mailto:billsu@puyalluptribe.com">billsu@puyalluptribe.com</a>
Swinomish Tribe	Scott Andrews	Swinomish Planning Department P.O. Box 817 La Conner, Washington 98257	Ph: 360-466-7299 Fax: 360-466-1615 E-mail: <a href="mailto:sandrews@swinomish.nsn.us">sandrews@swinomish.nsn.us</a>
Tulalip Tribe	Daryl Williams	7615 Totem Beach Dr. Marysville, Washington 98271	Ph: 360-651-4480 Fax: 360-651-4490 E-mail: <a href="mailto:dwilliams@tulalip.nsn.us">dwilliams@tulalip.nsn.us</a>
Yakama Indian Nation	Paul Ward	Resource Management Program P.O. Box 151 Toppenish, Washington 98948	Ph: 509-865-6262, ext. 6673 Fax: 509-865-6293 E-mail: <a href="mailto:ward@yakama.com">ward@yakama.com</a>

**Indian Tribe Trustee Stakeholder Meeting – Set for December 6, 2001 (continued)**

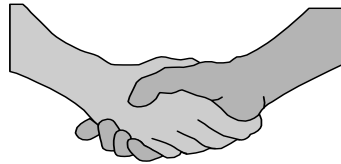
NOAA Damage Assessment Center	Bill Conner Eli Reinharz	1305 East-West Hgwy SSMC #4, N/ORR3 Silver Spring, Maryland 20910	Ph: 301-713-3038 Fax: 301-713-4387 E-mail: <a href="mailto:william.conner@noaa.gov">william.conner@noaa.gov</a> <a href="mailto:eli.reinharz@noaa.gov">eli.reinharz@noaa.gov</a>
NOAA Coastal Protection and Restoration Division	Mary Matta Alyce Fritz	7600 Sand Point Way, NE Seattle, Washington 98115	Ph: 206-526-6315 Fax: 206-526-6865 E-mail: <a href="mailto:mary.matta@noaa.gov">mary.matta@noaa.gov</a> <a href="mailto:alyce.fritz@noaa.gov">alyce.fritz@noaa.gov</a>
NOAA Office of General Counsel	Linda Burlington	1315 East-West Hgwy SSMC#3, Rm 15132 Silver Spring, Maryland 20910	Ph: 301-713-1332 Fax: 301-713-1229 E-mail: <a href="mailto:linda.b.burlington@noaa.gov">linda.b.burlington@noaa.gov</a>
Environment International Ltd.	Valerie Lee Alisa Bieber	5505 34 <sup>th</sup> Ave., NE Seattle, Washington 98105	Ph: 206-525-3362 Fax: 206-525-0869 E-mail: <a href="mailto:exec@envintl.com">exec@envintl.com</a>

ATTACHMENT B



# Cooperative Assessment Pilot Project (CAPP) formerly “Green Coasts”

A Government Partnership with  
PRPs to Restore Natural  
Resources



## What is CAPP?

- ◆ A means for PRPs to initiate damage assessment and restoration efforts
- ◆ Under trustee oversight
- ◆ Consistent with applicable NRDAR laws a



## **Goals of CAPP**

- ◆ Restore more sites on an expedited basis
- ◆ Streamline NRDA process w/out compromising standards
- ◆ Encourage initiative/innovation
- ◆ Strengthen partnerships



## **Scope of CAPP**

CAPP will focus on chronic contaminant sites (CERCLA/OPA) where:

- Trustees have jurisdiction
- Trustees can formulate restoration decisions
- Affected parties can commit to the CAPP process



## How is CAPP different?

- ◆ Extends/formalizes the NRDA cooperative experiences
- ◆ Expands site consideration by inviting PRPs to recommend projects
- ◆ Enhances the opportunities for PRPs to conduct NRDAs

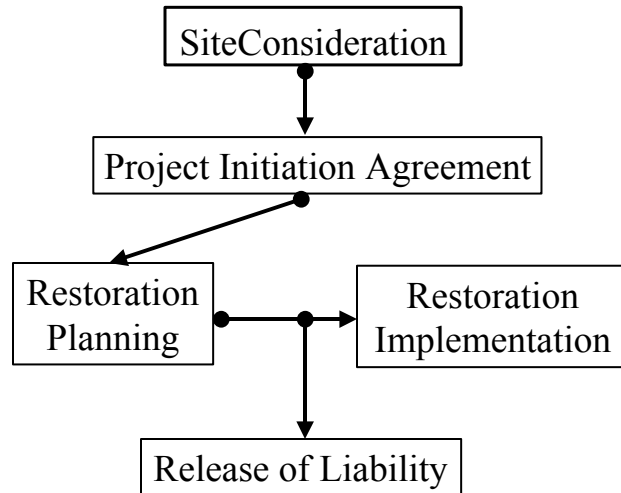


## Authority for CAPP

- ◆ Cooperation at the outset is explicitly encouraged by existing NRDA:
  - Laws (CWA, CERCLA, OPA, NMSA)
  - Regulations (CERCLA at 43 CFR 11.32, OPA at 15 CFR 990.14(c), NCP at 40 CFR 300.615(d)(2))
  - Programs and policies
- ◆ PRPs are invited to participate in development of the assessment and restoration process



## The Process - A Possible Model



## Why are we interested in exploring CAPP?

- ◆ Involved in OPA and CERCLA cases across the U.S.
- ◆ Interested in streamlining and consistency
- ◆ Interested in improving the NRDA/cooperative process to benefit from industry initiative



## **Future Directions**

- ◆ Develop a framework with stakeholder assistance
- ◆ CAPP needs to be road-tested through pilot efforts - Looking for a few good pilots
- ◆ On-going dialogue with stakeholder representatives



## **Challenge to the Stakeholders Participants**

- ◆ Identify incentives
- ◆ Define and articulate challenges/solutions
- ◆ Indicate next steps, e.g., How best to proceed?

