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ENVIRONMENTAL MEDIATION AND THE ACCOUNTABILITY PROBLEM

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INTRODUCTION

Environmental mediation is being practiced in many parts of the United States.¹ Although still sparse, mediation experience is accumulating rapidly.² Strong professional and interpersonal net-

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1. Organizations involved include the Center for Environmental Conflict Resolution (Minneapolis, Minn.); the Conservation Foundation (Washington, D.C.); Environmental Mediation International (Washington, D.C.); The Environmental Mediation Service (Norfolk, Va.); Forum on the Community and the Environment (Palo Alto, Cal.); Keystone Center for Continuing Education (Keystone, Colo.); The Office of Environmental Mediation (Seattle, Wash.); The Center for Environmental Conflict Resolution (RESOLVE) (now affiliated with the Conservation Foundation in Washington, D.C.); The Environmental Mediation Project of the Wisconsin Center for Public Policy (Madison, Wis.); The Rocky Mountain Center on Environment (ROMCOE) (Denver, Colo.); New England Environmental Mediation Center (Boston, Mass.); and Clark-McGlennon Associates (Boston, Mass.). Other organizations involved in environmental mediation include the Federal Mediation and Conciliation Service, the American Arbitration Association, and the New Jersey Office of Dispute Resolution. For a full description of the activities of these organizations and the work of individual practitioners, see RESOLVE, *Environmental Conflict Resolution Organizations, Practitioners, and Researchers*, (1980) (1717 Massachusetts Avenue, N.W., Washington, D.C. 20036).

2. See, e.g., O'Connor, *Environmental Mediation: The State-of-the-Art*, 2 ENV'T'L IMPACT ASSESSMENT REV. 9 (Oct. 1978) (published by the Laboratory of Architecture and Planning, MIT); ENV'T'L COMMENT, May 1977 (devoted to articles on environmental conflict resolution); *Environmental Mediation: An Effective Alternative?* (1978) (a report of a conference held in Reston, Virginia, Jan. 11-13, 1978, sponsored by RESOLVE, The Aspen Institute for Humanistic Studies, and the Sierra Club Foundation). These and other de-

works are aiding the rapid development of the field.³ Consensus building⁴ and conflict management⁵ techniques dominate the environmental dispute resolution field, but formal mediation is employed in a growing number of instances.⁶ If the current trend con-

scriptions of recent mediation practice are discussed in G. BINGHAM, *ENVIRONMENTAL CONFLICT RESOLUTION: ANNOTATED BIBLIOGRAPHY* (1981) (RESOLVE, Washington, D.C.).

3. In June 1980 the Ford Foundation assembled in Mt. Kisco, New York representatives of the majority of groups in the United States involved in efforts to mediate environmental disputes. This meeting was the third in a series of such gatherings. Each of the organizations represented at the meeting presented a description of its activities. More than fifty dispute resolution efforts were described in some detail, including 1) nonadversarial consensus-building workshops seeking solutions to aspects of the radioactive waste management problem, 2) short-term interventions designed to help ease conflicts among the National Park Service, the Nature Conservancy, and the citizens of the Hawaiian town of Hana (Maui) concerning proposed changes in the boundaries of Halekala National Park, and 3) the actual mediation of a fishing rights dispute between the Red Cliff Band of the Chipewas on Lake Superior and the Wisconsin Department of Natural Resources. Minutes of this Mt. Kisco, New York, meeting are contained in two memoranda—Task Force on External Relations (June 24, 1980) (unpublished; available from the author); Notes of Internal Subcommittee Meeting (June 24, 1980) (unpublished; available from the author). Following the meeting six practitioners were asked to summarize conflict resolution strategies currently in use. They prepared an article for RESOLVE's newsletter, Bellman, Bingham, Brooks, Carpenter, Clark & Craig, *Environmental Conflict Resolution: Practitioners' Perspective of an Emerging Field*, *ENVT'L CONSENSUS* (winter 1981).

4. For an overview of terminology and concepts in the dispute resolution field, see Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79 (1976). For a discussion of consensus building, see Clark, *Consensus Building: Mediating Energy, Environmental, and Economic Conflict*, *ENVT'L COMMENT*, May 1977, at 9-12; Susskind, *Citizen Participation and Consensus Building in Land Use Planning: A Case Study*, *THE NATIONAL LAND USE DEBATE* (J. deNeufville ed., to be published in 1981).

5. For a discussion of conflict management, see Carpenter & Kennedy, *Information Sharing and Conciliation: Tools for Environmental Conflict Management*, *ENVT'L COMMENT*, May 1977, at 21-23; Carpenter & Kennedy, *Environmental Conflict Management*, 2 *ENVT'L PROFESSIONAL* 67-74 (undated).

6. All practitioners are not in agreement as to the criteria to be used in determining whether a given dispute is suitable for mediation. A recent report prepared for the United States Department of Energy by American Management Systems, Inc. culled three commonly mentioned criteria from the environmental mediation efforts completed to date: (1) there must be room for compromise; (2) the parties must enter into mediation voluntarily with good faith efforts to resolve the conflict without stalling; and (3) the mediating parties must have the backing and the resources to ensure that any final solution is politically, technically, and financially feasible. AMERICAN MANAGEMENT SYSTEMS, INC., *THE POTENTIAL OF MEDIATION FOR RESOLVING ENVIRONMENTAL DISPUTES RELATED TO ENERGY FACILITIES* 19-20 (Dec. 1979) (available from the United States Dep't of Energy).

A recent survey of twenty individuals involved in the use of mediation to resolve environmental disputes offers several interesting insights into the state-of-the-art. First, most

tinues, many of the important resource allocation decisions made

environmental mediation efforts have occurred in the context of major conflicts where the public interest appeared to be in serious jeopardy if a stalemate persisted. In most instances in which environmental mediation has been attempted, a long and costly court battle, carried through numerous appeals, was the likely alternative. Second, although there are certain important ingredients common to successful environmental mediation, there are no rules or standard formulas that guarantee success. Third, most environmental mediation efforts initiated thus far have been proposed by persuasive individuals who hoped to serve as mediators. O'Connor, *supra* note 2, at 15.

Several successful environmental mediation efforts have been documented in some detail. The Snoqualmie River Dispute and the Interstate 90 Dispute in Seattle, Washington, successfully mediated by the Office of Environmental Mediation, have been described in several papers prepared by the mediators involved. See Cormick & Patton, *Environmental Mediation: Potentials and Limitations*, ENV'T'L COMMENT, May 1977, at 13; Cormick, *Mediating Environmental Controversies: Perspectives and First Experiences*, 2 EARTH L.J. 215 (1976); McCarthy, *Resolving Environmental Conflicts*, 10 ENV'T'L SCI. & TECH. 40 (Jan. 1976); McCarthy & Shorett, *Mediation to Resolve Environmental Conflict: The Snohomish Experiment*, 31 J. SOIL & WATER CONSERVATION 212 (1976). The White Flint Shopping Mall Case, a mediation effort handled by an independent mediator, is the subject of a report by the Conservation Foundation. See M. RIVKIN, AN ISSUE REPORT: NEGOTIATED DEVELOPMENT, A BREAKTHROUGH IN ENVIRONMENTAL CONTROVERSIES (1977) (The Conservation Foundation). Another independent mediator successfully resolved the controversy surrounding the switch from oil to coal at the Brayton Point electrical generating facility in Somerset, Massachusetts. See AMERICAN MANAGEMENT SYSTEMS, INC., CONVERSION TO COAL AT BRAYTON POINT: FINAL REPORT TO THE NEW ENGLAND ENERGY TASK FORCE 28-31 (Oct. 1978). The National Coal Policy Project, an eighteen month effort to mediate differences between environmentalists and the coal industry concerning the development of coal reserves in the United States, has received a great deal of media attention. See DETAILED REPORTS OF THE TASK FORCES: TWO VOLUMES AND A SUMMARY (F. Murray ed., April 1978) (published by the National Coal Policy Project, CSIS, Georgetown University, 1800 K Street NW, Washington, D.C. 20006) [hereinafter cited as Murray]. See also Alexander, *A Promising Try at Environmental Détente for Coal*, FORTUNE, Feb. 13, 1978. Mediation was also crucial to the resolution of the following disputes: 1) the Bachman Warbler Dispute in which environmentalists believed that uncontrolled deforestation threatened to eliminate an endangered species of bird. See *Resolving the Bachman's Warbler Controversy*, 1 CONSERVATION NEWS No. 13, at 10-12 (Aug. 1977); NATIONAL WILDLIFE FEDERATION, MEDIATION: A LESS COSTLY ALTERNATIVE TO LITIGATION (Jan. 12, 1978); O'Connor, *supra* note 2, at 9; 2) the General Electric PCB case in which the General Electric Company agreed to phase out its use of PCB's and to spend three million dollars on treatment facilities. See A. Weinstein, *Application of Environmental Mediation to Energy Facility Siting Disputes: Prospects and Problems* (May 1979) (unpublished Master's thesis submitted to the Dep't of Urban Studies and Planning, Massachusetts Institute of Technology); *Pounds of Cure: General Electric Agrees to PCB Abatement, Cleanup and Research*, 6 ENV'T'L L. REP. 10225, 10226 (1976); *General Electric Co.*, 6 ENV'T'L L. REP. 30007, 30013-16 (N.Y. Dep't of Environmental Conservation, Feb. 9, 1976); 3) the Grayrocks Dam controversy in which the whooping crane habitat along the Platte River was protected in spite of the construction of a major dam and reservoir. J. Wondollock, *Bargaining for the Environment: Compensation and Negotiation in the Energy*

each year could depend on the success of independent mediators. Under the circumstances, scholars and public interest groups ought to be questioning the emerging theory and practice of environmental mediation.⁷

One of the questions raised is to whom and how will environmental mediators be held accountable: More specifically, how can those affected by the actions of mediators effectively chastise, sue, or fire them?⁸ Labor mediators must abide by the rules established by the Federal Mediation and Conciliation Service or the American Arbitration Association.⁹ Mediators' efforts are policed by

Facility Siting Process at 19-48 (Sept. 1979) (unpublished Master's thesis submitted to the Dept of Urban Studies and Planning, Massachusetts Institute of Technology). See also Cahn, *Perspectives—The God Committee*, AUDOBON MAGAZINE, May 1979, at 10; Hamilton, *The Whooping Crane: A Success Story*, 64 SIERRA CLUB BULL., May/June 1979, at 56; 4) the Foothills Case in which mediation produced a compromise among the Environmental Protection Agency (EPA), the Denver Water Board, and a number of other interest groups regarding dam construction and water policy in the Denver area. See H. Burgess, *The Foothills Water Project: A Case Study of Environmental Mediation* (Sept. 1980) (unpublished report prepared for the Environmental Negotiations Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under a grant from the Environmental Protection Agency).

7. For an overview of the questions raised to date about environmental mediation, see Susskind & Weinstein, *Towards a Theory of Environmental Dispute Resolution* (accepted for publication in ENV'TL AFF.).

8. I am indebted to Professor Michael Wheeler of the New England Law School for what I hope is a clear definition of accountability.

9. The Federal Mediation and Conciliation Service (FMCS) is an independent executive agency of the federal government created in 1947 to facilitate the resolution of labor-management conflicts. Its primary duty is to promote labor-management peace. This responsibility is fulfilled by providing mediation assistance in preventing and resolving collective bargaining disputes. For this purpose, approximately 300 federal mediators, known as commissioners, are stationed strategically throughout the country. The Service enters a labor-management dispute only at the request of the parties involved. The parties are, however, obligated to notify if an agreement has been reached 30 days in advance of a contract termination or reopening date. If the case falls within the jurisdiction of the Service, the regional office then assigns a mediator to ask the employer and the union involved if assistance is required. In about 95% of the cases in which requests for assistance are filed, the employers and the unions reach agreement on their own. Service mediators are carefully selected and trained. Most mediators have backgrounds in management or labor, and many have some experience in both. Mediators are selected for the job because of their demonstrated skills in collective bargaining.

The American Arbitration Association (AAA) is a public-service, nonprofit organization with headquarters in New York City. Its main goal is the resolution of disputes of all kinds through use of arbitration, mediation, democratic action, and other methods. Founded in

these associations to ensure conformance to their codes. Failure to comply can lead to disaccreditation. Labor mediators can be sued if they violate statutes or judicial decisions regarding proper mediation procedure.¹⁰ They can also be discharged by the parties to a dispute, thereby making it harder for incompetent mediators to find work in the future.

There are no comparable statutes or judicial decisions that currently apply to environmental mediators.¹¹ Most environmental mediation efforts have been undertaken by *ad hoc* mediation centers that are not bound by the codes of existing professional associations. Now, many environmental mediation efforts are undertaken by "one-time only" intervenors, so that attempts to discharge them will have little effect on their future mediation careers.¹² In short, the moral, legal, and economic pressures that ensure the accountability of mediators in other fields do not apply to

1926, the AAA has more than 50,000 persons currently serving on all of its impartial panels. Only about 300 are experienced in environmental matters. Most of the disputes resolved by the AAA have involved a limited number of parties and easily identifiable issues (*i.e.*, wages, working conditions, and benefits). See AMERICAN MANAGEMENT SYSTEMS, INC., CONVERSION TO COAL AT BRAYTON POINT: FINAL REPORT TO THE NEW ENGLAND ENERGY TASK FORCE 68-78 (Oct. 1978) (citing the American Arbitration Association Code of Ethics for Arbitrators in Commercial Disputes).

10. John Dunlop writes:

The labor organization is certified by law as the exclusive representative of the employees in a precisely defined job territory. The management is clearly identified by law. The subjects the parties are required to bargain over or are not required to negotiate over are also defined by law. The obligation to bargain in good faith has been defined by statute and case law probably in too much detail. The union has the obligation to represent all employees in the bargaining unit, fairly, without hostile discrimination, including any minority group of employees confronting a majority of employees. Negotiations are to begin by a specified number of days before the expiration of the old agreement. Some methods of conflict in negotiation, for example, relating to the boycott, are permissible by law and others are prohibited.

J. Dunlop, *The Negotiations Alternative to Markets and Regulation* (Aug. 29, 1979) (unpublished draft distributed to the Negotiations Seminar, Harvard Law School, Feb. 1980).

11. At the Ford Foundation Mt. Kisco conference, discussed at note 3 *supra*, the environmental mediators present attempted to draft a provisional Code of Ethics. See Notes of Internal Sub-Committee, *supra* note 3.

12. See L. Susskind, *The Political Realities of Environmental Dispute Resolution* (May 18, 1978) (unpublished paper presented at Arbitration Day, American Arbitration Association, New York City).

environmental mediators.¹³ This gap is cause for some concern.

Even if it were clear how environmental mediators could be held accountable, debate about what their responsibilities ought to be would continue. The success of most mediation efforts tends to be measured in rather narrow terms.¹⁴ If the parties to a labor dispute are pleased with the agreement they have reached voluntarily, and the bargain holds, the mediator is presumed to have done a good job. In the environmental field, there are reasons that a

13. Simkin describes three functions of the mediator: procedural, communicative, and those that are more affirmative and substantive. W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 77-106 (1971). Procedural functions include scheduling and recessing meetings, arranging joint and separate meetings, choosing the location of meetings, chairing meetings and maintaining order, proposing the agenda and the sequence of items for discussion, and keeping records. Communicative functions can include facilitating communication between meetings, trying to determine the areas of agreement through confidential talks with each side, and pointing out to each side the rigidity of its demands. Mediators may attempt to deflate extreme negotiating positions. In addition, a mediator's experience may enable him or her to offer creative suggestions regarding the resolution of specific issues, remind the parties about the costs of failing to reach agreement, and even recommend the terms of settlement.

Mediators attempting to intervene substantively must be careful to justify their actions in terms of the objectives of the parties and in terms of the original goal of facilitating the process of compromise. The classic model of labor-management mediation makes certain assumptions about the role and responsibilities of the mediator. The classic model assumes that the mediator ought not attempt to guide the negotiations toward a particular outcome. Indeed, any effort to steer the process may impeach a mediator's neutrality and undo the bonds of trust that sustain the mediator's credibility and effectiveness as a go-between. In sum, the classic model assumes that good mediation is a process that helps the parties involved reach a compromise on their own, a compromise that they believe to be workable. *Id.*

14. There are several reasons why the labor-management analogy is inappropriate:

- (a) Labor-management disputes are bilateral; environmental disputes are usually multilateral.
- (b) In a labor-management negotiation, it is usually clear who the parties and their representatives are. It is less clear who should be a party to an environmental mediation effort.
- (c) In a labor-management dispute, both sides have a strong incentive to bargain—neither side really wants a strike. In many environmental disputes, those who want to stop a project may have no motive to bargain.
- (d) In labor-management disputes, it is not difficult to identify the terms of the bargaining although it may be hard to define the final compromise level of those terms. In environmental disputes, it is unclear what the actual terms of the bargaining ought to be. Issues are usually framed in an all-or-nothing way. Fair trade-offs or compensation in environmental disputes, for example, are not easily negotiable.

broader definition of success is needed—one that is more attentive to the interests of all segments of society.¹⁵

If the parties involved in environmental mediation reach an agreement, but fail to maximize the joint gains possible, environmental quality and natural resources will actually be lost.¹⁶ If the key parties involved in an environmental dispute reach an agreement with which they are pleased, but fail to take account of all

The following is an excellent summary comparison of these differences:

Comparison of Labor-Management Conflicts and Environmental Disputes

	<i>Labor-Management Conflicts</i>	<i>Environmental Disputes</i>
<i>Conflicting Actors</i>	Unions & Management	Developer & Opposition Groups
<i>Membership</i>	Often Mandatory. Union represents all workers in a bargaining unit	Voluntary
<i>Leadership</i>	Representative	Often Charismatic
<i>Recognition</i>	Law sets rules	No rules for negotiation
<i>Ability to make contracts</i>	Clear validity of labor contracts	Contracts have an uncertain legal status
<i>Negotiation Structures</i>	Stable & Known	Emerging
<i>Incentives to negotiate</i>	Law requires bargaining. Goals of each side are tied to negotiation.	No legal incentives to negotiate. Negotiations may threaten the organization.
<i>Common Interests</i>	Common work environment. Both sides fear striking. Both sides seek a healthy firm.	Not Clear
<i>Repetition of Negotiations</i>	Cyclic negotiations	One time only
<i>Number of Bargaining Participants</i>	Limited	Many
<i>Agenda of Issues</i>	Many	Few
<i>Deadlines</i>	Almost always	Seldom

T. Sullivan, *Negotiation-Based Review Processes for Facility Siting 135* (Dec. 1979) (Ph.D. dissertation, Kennedy School of Government, Harvard University).

15. Dunlop, *supra* note 10.

16. The concept of joint net gains is explained by H. Raiffa, *Analyses for Conflict Resolution* (Nov. 1980) (a monograph based on the Gaither Lecture Series in Systems Science, Center for Research in Management, University of California at Berkeley).

impacts on those interests not represented directly in the negotiations, the public health and safety could be seriously jeopardized.¹⁷ If the key parties to a dispute reach an agreement, but selfishly ignore the interests of future generations, short term agreements could set off environmental time bombs that cannot be defused.¹⁸ Although the key stakeholders in an environmental dispute may pay only a small price for failing to reach an agreement, their failure could impose substantial costs on many groups, who may be affected indefinitely. Finally, the parties to environmental disputes must be sensitive to the ways in which their agreements set precedents; even informal settlements have a way of becoming binding on others who find themselves in similar situations.

This article will examine the recent experience with environmental mediation in the United States, focusing especially on three illustrative case studies that suggest a need for a broader definition of the mediator's responsibilities. The article begins with a review of the causes of environmental disputes and their susceptibility to mediation. Then, various criteria by which the success of environmental mediation efforts should be evaluated and explored are presented. The article concludes with a discussion of mechanisms by which environmental mediators could be held accountable.

I. ENVIRONMENTAL DISPUTES AND THEIR CAUSES

Environmental disputes occur because various publics find their self-interests in conflict. For example, environmental and pro-development groups espouse contrary philosophies which often result in direct conflicts.¹⁹ Nationally-organized environmental interest groups, such as the Sierra Club, the Audubon Society, the Environmental Defense Fund, and the Isaak Walton League are especially concerned about the long-term health of the natural en-

17. See R. CAHN, *FOOTPRINTS ON THE PLANET* (1978).

18. See 1 G. SCHRAMM, *THE VALUE OF TIME IN ENVIRONMENTAL DECISION PROCESSES: CONCEPTS AND ISSUES* (1979) [hereinafter cited as G. SCHRAMM].

19. For a discussion of the causes of conflict, see K. BOULDING, *CONFLICT AND DEFENSE* (1962). For an analysis of environmental-developmental value conflicts, see *WHEN VALUES CONFLICT: ESSAYS ON ENVIRONMENTAL ANALYSIS, DISCOURSE, AND DECISION* (L. Tribe, C. Schelling & J. Voss eds. 1976).

vironment.²⁰ They stress the *cumulative impact* of human activity on the viability of terrestrial and aquatic life. They are risk averse—they would rather not take an action that introduces even the slightest chance that an environmental catastrophe will occur. If the environmental risks of a project are high, and the probability of a calamity is low, many environmentalists would rather forego any benefits in light of the risks involved. Finally, environmental interests are not “homo-centric”—they consider the needs of mankind to be only one of many factors to be considered in making resource allocations and public policy decisions.

Business interests and pro-development groups tend to operate within a shorter time horizon than do environmentalists.²¹ They tend to be much more opportunistic and less risk averse. Development interests tend to favor public efforts to exploit natural resources, arguing that the short-term gains (*i.e.*, jobs created, increased energy supplies, or return on capital) are likely to outweigh the long-term environmental impacts. Often this position is based on the belief that subsequent repairs can recreate what existed before or even provide something better.²²

Developmentalists often seek to break problems or opportunities into separable parts. Nuclear power advocates, for instance, argue that the United States ought to build additional reactors now because the electricity is needed. They are not opposed to storing the radioactive wastes although we currently have no effective means of disposal. They are prepared to separate facility siting and construction from the question of how to dispose of wastes. This proposition runs counter to the holistic view of environmentalists who are concerned about the infinite chain of events triggered by

20. The discussion of contrary philosophies that follows is based on L. SUSSKIND, J. RICHARDSON & K. HILDEBRAND, *RESOLVING ENVIRONMENTAL DISPUTES: GUIDELINES FOR INTERVENTION, NEGOTIATION, AND CONFLICT RESOLUTION* (1978) (Laboratory of Architecture and Planning, Massachusetts Institute of Technology) [hereinafter cited as L. SUSSKIND]. See also F. Buttel & D. Morrison, *The Environmental Movement: A Research Bibliography with Some State-of-the-Art Comments* (July 1977) (Exchange Bibliography No. 1308, Council of Planning Librarians).

21. See, *e.g.*, I. KRISTOL, *TWO CHEERS FOR CAPITALISM* (1978).

22. For an analysis of the reasons that repairs are not always possible, see *AMERICA'S CHANGING ENVIRONMENT* (R. Revelle & H. Lansberg eds. 1970).

almost every action, especially actions that alter ecological balance. It is not surprising that groups with such different time horizons, risk orientations, and ways of viewing problems find themselves in conflict.

There are, of course, factions within each of these interests groups. Among the environmentalists there are subgroups that are quite pragmatic.²³ They are willing to negotiate changes in the design of proposed facilities or to discuss steps that might be taken to mitigate adverse environmental impacts. Other environmentalists are hardliners. They usually remain aloof from negotiations in the hope of blocking any and all action, typically through extended litigation or administrative appeals.²⁴ There are similar factions within the development community. Some subgroups are totally insensitive to the seriousness of substantial incursions into fragile habitats. Other development interests are prepared to accept responsibility for such impacts, even to the point of absorbing the additional costs associated with less efficient but less environmentally-damaging designs.²⁵

Disagreements between environmental interests and development interests typically revolve around the allocation of fixed resources, the hierarchy of public policy priorities, and the setting and enforcement of environmental quality standards.

A. *Disagreements Over the Allocation of Fixed Resources*

Although areas of land and water can be used simultaneously to achieve environmental and developmental goals, compromises are often difficult to achieve. All too often, competing uses are viewed as mutually exclusive. Private development of coastal properties, for example, is usually presumed to preclude public ac-

23. M. McCluskey, *Environmental Conflicts: Why Aren't More Negotiated?* (July 18, 1977) (unpublished paper prepared for Aspen Institute Meeting in Aspen, Colo., available from the Sierra Club, 530 Bush Street, San Francisco, Cal.).

24. G. SCHRAMM, *supra* note 18.

25. Rivkin, *Negotiated Development: A Breakthrough in Environmental Controversies*, ENV'T'L COMMENT, May 1970, at 3-6. The above article is based on M. RIVKIN, AN ISSUE REPORT: NEGOTIATED DEVELOPMENT: A BREAKTHROUGH IN ENVIRONMENTAL CONTROVERSIES (1977).

cess to the shore. Industrial development, contingent on the filling of wetlands and marshes, is usually presumed to eliminate the environmentally productive uses of such areas. Mining for minerals on public lands is typically viewed as precluding cattle grazing, if only because mining may leave too little water for ranching.

When the "highest and best use" of land was assumed to be equivalent to the most economically productive use, the market functioned adequately as a means of allocating such fixed resources.²⁶ In the wake of the environmental movement, this definition of highest and best use has been deemed unacceptable. A new definition that takes account of the need to balance economic return with the achievement of aesthetic and ecological goals has replaced it. Market allocation mechanisms cannot distribute resources in a way that responds to this new definition of highest and best use.

When the hidden hand of the free market fails to allocate fixed resources in a satisfactory fashion, other mechanisms, typically the administrative strategies employed by government, must be used. Ostensibly, government regulators seek to ensure a balance of all costs and benefits, including those that the market undervalues. It is not obvious, however, that administrative strategies are a great improvement. Indeed, environmentalists and developers agree that government regulatory agencies figure costs and benefits incorrectly. Environmentalists argue that environmental protection is still being undervalued. Developers contend that arbitrary and time consuming regulatory requirements add unnecessarily to the cost of doing business. Any effort to mediate disputes over the allocation of fixed resources must provide a forum in which environmental and development interests can reconcile their different calculations of costs and benefits.

B. *Disagreements Over Public Policy Priorities*

Development interests would like government to use the taxes it collects to encourage continued economic growth. This encour-

26. Slitor, *Taxation and Land Use*, in *THE GOOD EARTH OF AMERICA* (L. Harris ed. 1974).

agement can be done by subsidizing housing, and commercial and industrial development; or by building roads, sewers, schools, or other facilities that stimulate private investment. Environmental interests would rather see public revenues used to enhance environmental quality and to protect fragile areas and endangered species.

Such public policy conflicts tend to fester. Our system of representative government is insufficient to resolve these differences.²⁷ Representative democracy often fails to ensure that the interests of all contending groups are adopted by elected officials at each level of government. Elected officials remain unresponsive to the concerns of a large number of their constituents. Our system of representative democracy needs to be bolstered by "extra-representational" means to ensure that all interests can participate directly in policy choices of greatest concern to them.²⁸ Both environmental and developmental interests complain that existing "participatory" mechanisms are inadequate. Efforts to mediate disputes over the setting of public policy priorities, particularly disputes involving the allocation of public funds, must provide a means of involving environmental and developmental interests directly in the policy decisions that affect them.

C. *Disagreements Over Environmental Quality Standards*

Groups with different risk orientations, time horizons, and assumptions about the "repairability" of the environment are bound to clash when it is time to set environmental quality and development standards. For example, even when development and environmental interests agree on a general plan for accommodating new growth, they tend to disagree on the specifics. The environmentalists argue that the natural "carrying capacity" of the land and resiliency of the particular environment ought to dictate the

27. For a discussion of these insufficiencies, see O'Hare, *Not on My Block You Don't: Facility Siting and the Strategic Importance of Compensation*, 25 PUB. POL'Y 407-58 (1977).

28. For a discussion of extra-representational possibilities, see Susskind, *Resolving Environmental Disputes Through Ad Hococracy*, ENV'T'L CONSENSUS (Summer 1980).

limits of allowable development.²⁹ This approach, of course, would indirectly set the price of the units or structures to be built. Developers prefer to work backwards from a desired sale price appropriate to the market area. This approach would implicitly limit the "environmental repairs" they could afford.

Disputes over standard-setting arise in large part because traditional approaches to regulation, and the administration of regulations, do not work as intended. In theory, experts or specialists are supposed to set guidelines based on objective scrutiny of the best scientific information available to them. Yet, every standard also involves an assessment of risks and a decision about the distribution of costs and benefits.³⁰ Although the process of setting environmental quality standards involves technical analysis, it also involves subjective or political judgments.³¹ Furthermore, when standards are set on the basis of analyses prepared by the staffs of regulatory agencies that are suspected of not being neutral, but are sympathetic to the interests they are supposed to be regulating the prospect of conflict increases.³² Both development and environmental interests have come to suspect that regulatory agencies are more sympathetic to the other side. Efforts to mediate regulatory disputes must, therefore, provide a means of enabling environmental and development interests to develop technical analyses in which they can both have confidence.

II. CRITERIA FOR EVALUATING THE SUCCESS OF ENVIRONMENTAL MEDIATION EFFORTS

Most environmental disputes involving the allocation of fixed resources, the specification of public policy priorities, or the setting of environmental quality standards are susceptible to mediation. Successful mediation, however, requires reconciling the differences between development interests and environmentalists in the ways in which they figure costs and benefits. It also requires providing a

29. D. GODSCHALK, F. PARKER & T. KNOCKE, *CARRYING CAPACITY* (1974).

30. E. ASHBY, *RECONCILING MAN WITH THE ENVIRONMENT* (1978).

31. *Id.* at 59-90.

32. Sabatier, *Social Movements and Regulatory Agencies: Toward A More Adequate View of Clientele Capture*, 6 *POL'Y SCI.* 301 (Fall 1975).

means for involving representatives of both groups directly in public policy debates. Finally, success will require establishing shared credibility for the scientific and technical evidence upon which both groups base their positions.

One analysis of environmental mediation suggests nine steps that must be completed for mediation to be successful: (1) all the parties that have a stake in the outcome of a dispute must be identified; (2) the relevant interest groups must be appropriately represented; (3) fundamentally different values and assumptions must be confronted; (4) a sufficient number of possible solutions or options must be developed;³³ (5) the boundaries and time horizon for analyzing impacts must be agreed upon; (6) the weighting, scaling, and amalgamation of judgments about costs and benefits must be undertaken jointly; (7) fair compensation and mitigatory actions must be negotiated; (8) the legality and financial feasibility of bargains that are made must be ensured, and (9) all parties must be held to their commitments.³⁴ Although these steps will ensure a fair and efficient process, the success of a mediation effort must also be judged in terms of the fairness and stability of agreements that are reached.³⁵ From this standpoint, a mediator should probably refuse to enter a dispute in which the power relationships among the parties are so unequal that a mutually acceptable agreement is unlikely to emerge.³⁶ In addition, environmental mediators should probably withdraw from negotiations in which any of the parties seek an agreement that would not be just from the standpoint of another participant or from the standpoint of a party not at the bargaining table.³⁷

To achieve just and stable agreements, mediators may have to find ways of enhancing the relationships among the parties so they

33. At least at the outset, every group or faction must be able to find a "favorite" option or solution among those being considered, or it will have no incentive to join the negotiations.

34. These nine steps were first described in L. SUSSKIND, *supra* note 20, at 24-39.

35. G. Cormick, *The Ethics of Mediation: Some Unexplored Territory* 12 (Oct. 24, 1977) (unpublished paper prepared for The Society of Professionals in Dispute Resolution, Fifth Annual Meeting).

36. *Id.* at 12-13.

37. *Id.*

will be better able to reconcile future differences (that threaten implementation) on their own. Mediators may also have to build the basic negotiating capabilities of one or more of the parties to ensure more equal bargaining relationships.

Agreements are sometimes reached because one party with substantial power holds out for what it wants while other parties, with less leverage, realize that they can either accept a small gain or wind up with nothing at all. Under these circumstances, all sides may sign such agreements but with unequal degrees of enthusiasm. This result sends a message to the community-at-large that it is acceptable for the most powerful interests to pressure opponents into accepting less than completely fair outcomes. Mediators should avoid setting such precedents, if only because they undermine the chances of attracting less powerful but obstructionist parties to the bargaining table in the future.³⁸

It is also quite possible that short-term solutions with which the parties to an environmental dispute are quite pleased can generate new and different problems for other groups outside the bargaining process. It would be irresponsible to ignore these problems if they are indeed foreseeable; if only because implementation may be obstructed by those outside groups later on.

The classic model of labor mediation places little emphasis on the mediator's role as a representative of diffuse, inarticulate, or hard-to-organize interests. All the appropriate parties to a labor-management dispute are presumed to be present at the bargaining table. Thus, the problems of protecting unrepresented segments of the society or reducing impacts on the community-at-large receive little, if any, attention. Joint net gains are presumed to be maximized through the interaction of the parties and their ability to know for themselves how best to achieve their objectives. No effort is made to bolster the claims or abilities of the weaker stakeholders. Precedent is not a concern; indeed, one of the presumed

38. The importance of precedent in the world of politics and the weight it carries in political debate are too often ignored. Even if decisions or agreements and the principles upon which they are based are not recorded, they remain in the collective memory of the public and will be recalled at key moments during subsequent decision making situations.

strengths of labor mediation is that parties are free to devise agreements of their own design. Finally, spillovers, externalities, and long-term impacts are, for the most part, ignored since the time frame for implementing most labor-management agreements is relatively short. The parties will usually face the same adversaries again in a few years which makes it easier for them to hold each other to their agreements.³⁹

Although procedural fairness and ethical behavior on the part of labor mediators and self-interest maximizing behavior on the part of the participants in labor-management negotiations are presumed to be sufficient to ensure just and stable agreements, these assumptions are inappropriate in the environmental field. Just and stable agreements in the environmental field require much closer attention to the interests of those unable to represent themselves. Joint net gains can be achieved only if the parties attempt to understand the complex ecological systems involved and to generate appropriate compromises that go beyond their self-interests. In short, self-interested negotiation must be replaced by "principled negotiation."⁴⁰

Principled negotiation rests on the assumption "that the proper standards for judging a process of conflict resolution are *not* those that may produce a particular result in a particular case, but rather those standards that will tend to produce desired results in an indefinite series of cases."⁴¹ From this assumption seven criteria can be derived by which the success of environmental mediation efforts ought to be judged.⁴² These criteria, formulated to apply to the decisions of judges, provide a framework within which environmental mediators can be held accountable for the fairness of the processes in which they engage as well as the quality of the agreements they help to reach.

39. Dunlop, *supra* note 10.

40. R. Fisher & W. Ury, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (in press, Houghton-Mifflin Publishing Company, Boston, Mass.).

41. R. Fisher, *Some Notes on Criteria for Judging the Negotiations Process 1* (Nov. 1979) (unpublished paper distributed at the Negotiations Seminar of the Harvard Negotiations Project, Harvard Law School).

42. *Id.* The order and content of Fisher's criteria have been slightly revised.

The first criterion is that the results of a dispute resolution effort must appear fair to the community; that is, "the outcome is better if it is consistent with shared notions of equity and justice."⁴³ The emphasis should be on the results of the dispute resolution effort and not just on the fairness of the negotiations process.

The second criterion is that the results of a dispute resolution effort must "well reconcile the interests of the parties."⁴⁴ This criterion is an appeal for what the economists call "Pareto optimality." The parties to a dispute cannot, by themselves, assess the extent to which their interests have been well reconciled; a neutral observer must be convinced that joint net gains have been maximized. At the very least, the parties ought to think that their interests have been well served *after* they have heard what others in the community have said about the agreements.

The third criterion is that the results of a dispute resolution effort should be "consistent with principles reflecting pre-existing practice."⁴⁵ This proposition does not mean, of course, that there is no room for new or creative solutions to difficult disputes. What appear at first glance to be similar situations might be redefined by looking at them in a fresh light or by recasting the questions at hand. Thus, the argument that dispute resolution efforts must be consistent with past principles is not an argument for mechanical justice. It is, however, a plea for attention to past precedent.

The fourth criterion is that an agreement should set "a good precedent for the parties involved as well as for other parties."⁴⁶ It may well be that the way to ascertain whether this criterion has been met is to see whether a precedent has been set that helps to achieve the first three criteria over time.

The fifth criterion is agreement should be "reached quickly and at low cost."⁴⁷ The obvious question is: As compared to what?

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 2.

It is not hard to agree with the claim that more efficient dispute resolution processes are better than less efficient processes. When costs and benefits to the community-at-large are weighed, however, it is often difficult to prove that a particular outcome is efficient. Nevertheless, the cost of reaching agreement should be minimized when opportunities to do so are apparent.

The sixth criterion is a bit easier to measure: "The process of decision should be one that tends to improve rather than exacerbate the relationships among the parties."⁴⁸ The more closely they can work together in the future, the better. It may seem that the sixth criterion must by definition be met, if the first five criteria are met. There may be instances, however, in which the parties feel that their interests have been well reconciled by a settlement, but the experience of reaching the agreement embittered them to such an extent that future negotiations will be impossible.

Finally, the seventh criterion is that the results of the negotiation process ought to be readily acceptable to the parties; "the more willingly they accept and comply with the terms of agreement, the better."⁴⁹

Working back from these measures of success, it is clear that environmental mediators ought to accept responsibility for ensuring (1) that the interests of parties not directly involved in negotiations, but with a stake in the outcome, are adequately represented and protected; (2) that agreements are as fair and stable as possible, and (3) that agreements reached are interpreted as intended by the community-at-large and set constructive precedents.

III. THREE CASE STUDIES OF ENVIRONMENTAL MEDIATION

There are more than a dozen well documented cases of environmental dispute resolution.⁵⁰ Most involve the allocation of fixed

48. *Id.*

49. *Id.*

50. *See, e.g.*, (1) Interstate 90: L. Patton & G. Cormick, *Mediation and the NEPA Process: The Interstate 90 Experience* (May 1977) (unpublished paper prepared for a conference on Environmental Impact Analysis, University of Illinois); (2) Snoqualmie-Snohomish Dam: G. Cormick & J. McCarthy, *Environmental Mediation, A First Dispute: Flood Con-*

resources.⁵¹ A few center on disputes surrounding the specification of environmental quality standards.⁵² Thus far, there are only a few that concern the setting of public policy priorities.⁵³ The majority illustrate the application of conflict avoidance and conflict management techniques. Many involve facilitators (*i.e.*, group process managers), who are not mediators in the traditional sense.⁵⁴

trol, Recreation, and Development in the Snoqualmie River Valley (Nov. 1974) (unpublished paper prepared for Washington University Social Science Institute, St. Louis, Mo.); (3) Brayton Point: O'Connor, *EPA Announces Approval of Mediated Conversions of Power Plant to Coal*, ENV'T'L CONSENSUS (July 1979); D. Smith, A Case Study of Environmental Mediation: The Brayton Point Coal Conversion (Aug. 1980) (report prepared for the Environmental Protection Agency Laboratory of Architecture and Planning, Environmental Negotiations Project, Massachusetts Institute of Technology); (4) Foothills Water Project: H. Burgess, *supra* note 6; (5) White Flint Shopping Mall: M. RIVKIN, *supra* note 6; (6) Port of Everett: Shorett, *Environmental Mediation at the Port of Everett*, ENV'T'L CONSENSUS (Dec. 1978); (7) Alewife: Susskind, *supra* note 4; (8) Eau Claire: Bellman, *Siting for a Sanitary Landfill for Eau Claire, Wisconsin*, 2 ENV'T'L PROFESSIONAL No. 1, 56-57 (undated); (9) General Electric: A. Weinstein, *supra* note 6; (10) Grayrocks Dam: Wondolleck, *supra* note 6; (11) Backman Warbler: *Conservation News*, *supra* note 6; (12) Metal Recycling Plant: S. Carpenter & W. Kennedy, Third Party Participation in Environmental Disputes (Jan. 12, 1978) (unpublished paper presented in the RESOLVE Conference, Reston, Va.); (13) Coastal Development Review in New Jersey: Kiney, *The Coastal Development Review Process in New Jersey: Avoiding Disputes and Resolving Conflicts*, ENV'T'L COMMENT 19-20 (May 1977); M. RIVKIN, *supra* note 6; (14) Jackson Water Treatment Plan: S. Hill, 201 Grants for Municipal Waste Water Treatment: Negotiating an Inter-governmental Dispute in Jackson, Wyoming (July 1980) (unpublished report prepared for the Environmental Protection Agency through the Laboratory of Architecture and Planning, Environmental Negotiations Project, Massachusetts Institute of Technology); (15) National Coal Policy Project: Murray, *supra* note 6; (16) Swan Lake Hydro: D. O'Connor, The Use of Mediation to Resolve the Dispute Over Low-Head Hydroelectric Development of Swan Lake (undated) (unpublished report of the mediator to the Maine Office of Energy Resources); (17) Columbus Negotiated Investment Strategy: L. Susskind & F. Keefe, A Negotiated Investment Strategy for Columbus, Ohio, Vol. I: The Mediation Process, Vol. II: The Agreement (undated) (unpublished report prepared by the mediators for the Federal Regional Council V).

51. See, *e.g.*, Case 2, Snoqualmie-Snohomish Dam; Case 4, Foothills Water Project; Case 5, White Flint Shopping Mall; Case 6, Port of Everett; Case 10, Grayrock Dam; Case 11, Bachman Warbler; Case 13, Coastal Development Review in New Jersey; Case 14, Jackson Water Treatment Plan; Case 15, National Coal Policy Project, *supra* note 50.

52. See, *e.g.*, Case 2, Snoqualmie-Snohomish Dam; Case 3, Brayton Point; Case 4, Foothills Water Project; Case 9, General Electric; Case 12, Metal Recycling Plant; Case 13, Coastal Development Review in New Jersey; Case 14, Jackson Water Treatment Plan; Case 15, National Coal Policy Project, *supra* note 50.

53. See, *e.g.*, Case 1, Interstate 90; Case 4, Foothills Water Project; Case 14, Jackson Water Treatment Plant; Case 15, National Coal Policy Project; Case 17, Columbus Negotiated Investment Strategy, *supra* note 50.

54. See, *e.g.*, Case 5, White Flint Shopping Mall; Case 9, General Electric; Case 13,

The three cases summarized below typify the practice of actual environmental mediation.

The first is the Snoqualmie-Snohomish Dam dispute.⁵⁵ This case involved two mediators from the Office of Environmental Mediation at the University of Washington in Seattle. In 1974, they were invited by the Governor of the State of Washington to help break a deadlock. Interest groups dedicated to blocking construction of a dam managed to tie the project up in court. The mediators brought together a group of farmers, sportsmen, government agency representatives, developers, environmentalists, and other citizens to negotiate an agreement providing for flood and growth control in conjunction with the building of a dam on the Snohomish River.

The second is the Brayton Point case.⁵⁶ This case began when the Department of Energy (DOE) pressed the New England Power Company to burn coal instead of oil in its electric generating plant in Somerset, Massachusetts. An independent mediator, David O'Connor, helped DOE, the power company, and other regulatory agencies and interested citizens reach an agreement concerning ways of ensuring that coal conversion would not aggravate air pollution in the area.

The third is the Foothills case.⁵⁷ This case concerns a dispute surrounding the proposed construction of a dam and reservoir on the South Platte River near Denver, Colorado. This case is especially interesting because it was mediated by a member of Congress. The Corps of Engineers, EPA, the Bureau of Land Management, the Denver Water Board, and numerous environmental action groups negotiated a very complicated agreement.

The outcomes and processes portrayed in these three cases reveal a great deal about the emerging practice of environmental mediation. In all three cases, the stakeholders directly involved were

Coastal Development Review in New Jersey; Case 14, Jackson Water Treatment Plant, *supra* note 50.

55. G. Cormick & J. McCarthy, *supra* note 50.

56. D. Smith, *supra* note 50.

57. H. Burgess, *supra* note 6.

satisfied with the agreements that were reached. The mediators played an active role in formulating and negotiating settlements. They were much more active than their counterparts in the labor-management field.⁵⁸ A partial, but not especially successful, effort was made in each case to involve representatives of interests that did not come forward to request a place at the bargaining table.⁵⁹ All three negotiations involved at least some consideration of the impacts that proposed agreements might have on parties that were not present, including future generations. The mediators pushed the key stakeholders to continue bargaining even when agreement seemed out of reach. Finally, the mediators urged the participants to be sensitive to the precedent-setting nature of the agreements under consideration.

In all three cases, subsequent enforcement of the agreement reached was difficult. The Snoqualmie agreement was thwarted by the election of a new governor. The Brayton Point agreement had to be re-ratified through parallel regulatory and permitting procedures that could not be suspended in deference to informal mediation.⁶⁰ The Foothills agreement was subsequently challenged by environmental splinter groups which felt that their views were not adequately represented during the negotiations.⁶¹ Moreover, portions of the Foothills agreement had to undergo subsequent court scrutiny since the parties-at-issue did not relinquish their legal rights when they agreed to participate in mediation.⁶² The role of the mediator in each case is described below.

A. *The Snoqualmie-Snohomish Dam*⁶³

Spring flooding of the Snoqualmie River Valley, Washington,

58. See G. Cormick & J. McCarthy, *supra* note 50; O'Connor, *supra* note 50; D. Smith, *supra* note 50; H. Burgess, *supra* note 6; M. RIVKIN, *supra* note 6.

59. See L. SUSSKIND, *supra* note 20, at 77-83, for a review of the techniques for identifying such interests.

60. D. Smith, *supra* note 50.

61. See H. Burgess, *supra* note 6.

62. *Id.*

63. The following account is based primarily on Baur, *Mediating Environmental Disputes*, 8 W. Soc. REV. 16-24 (1977); Cormick, *supra* note 6; G. Cormick & J. McCarthy, *supra* note 50; Lake, *Mediating Environmental Disputes*, 262 EKISTICS 164-70 (Sept. 1977).

was unusually destructive in 1959, washing away crops and topsoil from lower valley farms, and destroying many homes and businesses in the middle valley town of North Bend (population 12,000). Although the farms and towns had withstood floods about every five years, the devastation of 1959 was so severe that it prompted the county to request the U.S. Army Corps of Engineers construct a flood control dam on the Middle Fork of the Snoqualmie River. For the previous 15 years the Corps' plan for a dam had been resisted by environmentalists who prized the pristine wilderness of the Snoqualmie River, only 30 miles east of Seattle. The dispute appeared to be insolvable, and was destined for the courts.⁶⁴

As of 1973, the governor of Washington, Dan Evans, had twice vetoed the dam on environmental grounds, although he agreed "that there was a legitimate need for some form of flood protection."⁶⁵

The first task the mediators undertook was to identify the parties that had a stake in the outcome. The mediators selected ten individuals to participate in the negotiation by using public records to identify spokesmen for the different interests involved and also by discussing the controversy and mediation process with them and with others. The mediators searched for representatives with sufficient influence and stature to ensure support of any anticipated solution.⁶⁶ Although no organizations were formally represented, the individuals who participated in the negotiation were responsible for expressing their own concerns as well as those of others sharing their views. The mediators were responsible for staying in contact with others outside the core group, including the governor, county and state officials, and the Corps of Engineers. Eventually, the group formulated a problem statement which summarized their mutual concerns: "How do we provide some level of flood control, ensure the continued economic viability of the farmers and the townspeople and build the kind of land-use plans and controls that maintain the valley as a greenbelt with broad recrea-

64. Lake, *supra* note 63, at 166.

65. *Id.*

66. Cormick, *supra* note 6, at 220.

tion value?"⁶⁷

By carefully reviewing past plans and proposals, the negotiating group was able to develop an alternative dam proposal and growth control strategy that was acceptable to, and supported by, all the parties concerned. This achievement was possible only after many rounds of discussion had helped the participants understand their opponents' views. The environmentalists found room for compromise on what originally was a point of impasse—their feeling that building a dam for flood control would spur development in scenic wildlife areas.

The environmentalists realized that the farmers wanted to keep their land (and not sell to developers), and the land owners agreed that uncontrolled development would make the basin less desirable. The farmers convinced the environmentalists that increasing land values would make farming unprofitable.⁶⁸ A review of a series of nonstructural solutions showed that some kind of flood control structure was indeed necessary.

As the farmers began to acquiesce to land use controls which restricted use to agriculture and prohibited development in exchange for flood protection, the environmentalists agreed to consider a flood control structure as long as land use controls prevented urbanization.⁶⁹ In December 1974, the participants agreed to a package of measures designed to provide both flood protection and land use restrictions. The commitment to a total package was essential to the bargain. The participants agreed that the bargain would be void unless all parts of it were kept. The plan agreed to by all ten mediation participants required concessions from all sides:

1. The environmentalists agreed to a dam on the North Fork of the Snoqualmie River (instead of the Middle Fork) for flood control, hydroelectric generation and recreation. This was a major concession from groups which considered any

67. Lake, *supra* note 63, at 167 (quoting Joseph Fisher, foreward to F. ANDERSON & R. DANIELS, *NEPA IN THE COURTS* v-vi (1973)).

68. Cormick, *supra* note 6, at 220-21.

69. *Id.*

dam an anathema.

2. The townspeople and farmers agreed to leave a major portion of the middle valley undeveloped for natural flood storage and recreation, and called for the use of set-back levees in the Middle Valley. This plan would provide only 100-year flood protection for a small area of the middle valley. The residents would continue to live with a measure of danger, and forfeit the prospects of development. In return, they would preserve the rural amenities they prized. The plan also called for the purchase of development rights and floodway easements. . . .

3. A minimum lot size of ten acres was required for the North Fork Valley. In addition, the spillway of Seattle's Tolt Reservoir was to be raised to provide additional protection (the Tolt runs into the Snoqualmie River); dumping was to be ended in the Snoqualmie River "delta"; and the confluence of Snoqualmie and Snohomish rivers was to remain an agricultural area.⁷⁰

The mediation group's plan was unanimously endorsed by environmental coalitions, the farmers' organization, and county officials and accepted by Governor Evans on December 17, 1974.

B. *Brayton Point*⁷¹

Brayton Point Station is the largest fossil fuel-powered electric generating plant in New England. The plant is located in Somerset, Massachusetts; nearby are the city of Fall River and Narraganset Bay. In June 1977, New England Power Company (NEPCO), which operates the plant, received notice from the U.S. Department of Energy (DOE) that it intended to prohibit the burning of oil in three of the units at Brayton Point and would require NEPCO to burn coal instead.⁷² DOE was acting under authority granted by the Energy Supply and Environmental Coordi-

70. Lake, *supra* note 63, at 167.

71. This account is based primarily on AMERICAN MANAGEMENT SYSTEMS, INC., CONVERSION TO COAL AT BRAYTON POINT: FINAL REPORT TO THE NEW ENGLAND ENERGY TASK FORCE (Oct. 1978); O'Connor, *supra* note 6; D. Smith, *supra* note 50. The author relies extensively on commentary in the report on Brayton Point by Douglas Smith, *supra* note 50.

72. AMERICAN MANAGEMENT SYSTEMS, INC., *supra* note 71, at 29.

nation Act of 1974 (ESECA)⁷³ which Congress had passed in response to the oil embargo of 1973-74.⁷⁴

DOE estimated that conversion of Brayton Point to coal would lead to an annual increase of more than six million dollars in NEPCO's net cost for producing electricity.⁷⁵ The additional cost would largely be due to the expense involved in meeting the necessary standards for compliance with air pollution controls. To comply with the emission limits of the State Implementation Plan (SIP) under the Clean Air Act,⁷⁶ NEPCO would have to burn expensive low sulfur coal and would likely have to install flue gas desulfurization equipment ("scrubbers").

NEPCO challenged the DOE estimates. It estimated that the cost of conversion would be much greater. NEPCO was particularly opposed to any conversion plan that would require the use of scrubbers⁷⁷ and announced that it was prepared to contest the DOE Prohibition Order in court. For NEPCO, the Prohibition Order created a serious problem. To comply, it would have to burn coal at the plant and ensure that emissions would not violate either state or federal air quality standards. It would also have to avoid a significant increase in the cost of electricity and thus, a reduction in efficiency.

The Prohibition Order process is quite complex. The Environmental Protection Agency (EPA) must certify that a converting plant can meet applicable emission limits and protect both primary and secondary air quality standards while burning coal. DOE must prepare a comprehensive Environmental Impact Statement (EIS) and also certify that conversion is economically practicable.

73. Energy Supply and Environmental Coordination Act of 1974 § 2, 15 U.S.C. 792 (1976 & Supp. III 1979).

74. The Act required the Federal Energy Administration (now DOE) to identify those power plants with the greatest potential for conversion to coal. *Id.* Brayton Point was one of the New England power plants identified by DOE, and was by far the largest—as much oil would be saved by conversion of Brayton Point as by the four other plants together.

75. D. Smith, *supra* note 50.

76. 42 U.S.C. § 1857c-5 (1976).

77. NEPCO estimated that installation of scrubbers would cost \$153.8 million (in 1975 dollars). D. O'Connor, *supra* note 50.

The governor of the state must give his prior written concurrence which is then included in the Notice of Effectiveness issued by DOE. Thus, the ESECA program divides regulatory responsibilities among a number of state and federal agencies and offers no mechanism for resolving whatever conflicts might exist among them.⁷⁸

At the outset, it appeared that the prospects for conversion of Brayton Point in a manner that would satisfy all concerned parties (i.e., NEPCO, the regulatory agencies, and energy consumers) were very poor. The ESECA program was new and unclear, and its relationship to other regulatory programs, particularly those concerned with air pollution, appeared contradictory. Further, the principal parties were uncertain of one another's motives for opposing or promoting conversion and were apparently so mired in the legal and technical complexities of the process that they were unable to consider the possibility of conversion in a manner that would encourage progress rather than stalemate.

At this point, the Center for Energy Policy, a nonprofit organization concerned with the resolution of energy and environmental disputes, suggested to the principal parties that they enlist the services of a mediator. In April 1977, the Center for Energy Policy organized a meeting attended by officials of NEPCO, DOE, EPA, and the Massachusetts Department of Environmental Quality Engineering (DEQE) to examine the prospects for conversion. The meeting was pivotal, producing a number of crucial agreements on how best to proceed. NEPCO agreed that the addition of some new equipment (electrostatic precipitators) to control particulate emissions might be required to make conversion environmentally practical.⁷⁹ Regulatory agency officials agreed that economic considera-

78. In this case, the situation was further complicated because of the contradictory nature of *Massachusetts Regulations* contained in the State Implementation Plan that permitted some large power plants to burn inexpensive, high sulfur content oil. See *Regulations for the Control of Air Pollution in the Southeastern Massachusetts Air Pollution District*, adopted pursuant to MASS. ANN. LAWS ch. 111, §§ 142B, 142D (Michie/Law Co-op 1975 & Supp. 1981) and 42 U.S.C. § 1857c-5 (1976).

79. D. Smith, *supra* note 50, at 20.

tions might preclude the use of scrubbers or low sulfur coal.⁸⁰

DOE agreed to participate in a mediation process, but also made clear that it would continue to pursue conversion through the ESECA process.⁸¹ While continuing with the formal conversion process—issuance of a Prohibition Order, preparation of an EIS, and cooperation with EPA in obtaining certification under the State Implementation Plan—DOE indicated that it would participate in and cooperate with a mediation effort that might achieve an agreement regarding voluntary conversion. Eleven months of long and arduous negotiation followed. By March 1978, an agreement had been reached on all issues. Under the terms of the settlement, NEPCO agreed to install additional pollution control equipment to reduce the emission of particulate matter.⁸² The Massachusetts DEQE agreed to promulgate a new regulation for the control of air pollution from Brayton Point that would set sulfur and particulate emission limits for at least ten years.⁸³ The essence of the plan was to achieve certainty regarding both the emissions from the plant and the economic effect of the regulations under which conversion would take place. The mediation process consisted of three phases.

First, the parties agreed to an agenda which dictated the order of issues to be discussed and the groups to participate in each phase of the discussion. Second, for several months, the group focused on technical and quantitative analysis. EPA performed a study of violations of the air pollution standard for particulates in the Fall River area and found that most violations were attributable to wind-blown dust, rather than to power plant emissions. This finding led EPA and the DEQE to consider relaxing some emission limits for the plant.

The negotiation process culminated with bilateral negotiation between NEPCO and DEQE during early 1978 which established the form, level, and duration of new particulate and sulfur emis-

80. *Id.*

81. *Id.* at 24-25.

82. *Id.* at 33-37.

83. *Id.* at 38.

sions standards for the plant. These standards and their schedule of application, in turn, dictated the timing of the coal conversion process.⁸⁴

The final agreement indicated limits on the sulfur content of the coal to be burned and special particulate standards for the plant. Providing that EPA approval of the DEQE compromise was not delayed, NEPCO agreed to begin burning coal at unit one in 1981, unit two in 1982, and unit three of the plant in 1983. Unit four could continue to burn oil.⁸⁵

DOE, in addition to preparing an EIS which examined conversion under the plans generated by the formal process, prepared a second EIS that examined the probable impacts of conversion under the terms of the revised plan prepared through mediation.⁸⁶ DOE encouraged EPA to analyze the prospects for certification under each of the plans being considered. Thus, both agencies were able to fulfill their statutory responsibilities while still cooperating with and supporting a mediation effort seeking voluntary conversion.

DOE felt that there were clear advantages to be gained by a voluntary conversion and was eager to participate in a mediation process that could achieve them. At the same time, both DOE and EPA officials were concerned about fulfilling their regulatory responsibilities under the ESECA process. DOE decided that there was nothing inherently contradictory about pursuing both paths simultaneously. Both DOE and EPA took the necessary actions—preparation of an alternative EIS and SIP certification—to assure that they could promptly fulfill their regulatory responsibility if the mediation effort were not successful. This model for agency participation in environmental mediation insulated the public agencies from the charge that they were shirking their duty, yet permitted participation in less formal processes that produced a voluntary agreement.

84. AMERICAN MANAGEMENT SYSTEMS, INC., *supra* note 71, at 30-31.

85. *Id.* at 31-32.

86. D. Smith, *supra* note 50, at 41.

David O'Connor, the mediator from the Center for Energy Policy, performed several activities. At the outset, he operated primarily as a facilitator/organizer. His first task was to obtain group approval of a set of informal procedural groundrules for setting agenda, raising issues, making proposals, dealing with the press, documenting discussion, and formalizing agreements.⁸⁷ Responsibility for convening meetings, keeping written records of the meetings, and documenting areas of agreement was given to the mediator. He also moderated discussions, ensuring that each party had an opportunity to be heard. The mediator thoroughly explained all technical and legal matters to ensure the complete understanding of all parties. O'Connor regularly pointed out areas of group progress or agreement in an effort to prevent frustration and to keep the group moving toward a settlement. O'Connor spent a considerable amount of time meeting privately with individual parties. In these meetings, O'Connor sought to discover the most important concerns and to understand the technical details that influenced each party's position. He tried to help each party develop a clear understanding of its own position by diplomatically challenging positions and underlying assumptions. In these private meetings O'Connor served as a sounding board for new positions or proposals, allowing parties some feedback on ideas without the risks inherent in presenting them to the group as a whole. On occasion, he presented ideas and options of his own in an effort to broaden the spectrum of possibilities under consideration.

The working group that did the negotiating decided to involve only those parties most directly concerned with the conversion in the final negotiations.⁸⁸ This decision facilitated the drafting of an agreement, but required additional procedures (i.e., public hearings) for gaining the approval of interested but unrepresented parties. The ongoing formal regulatory reviews ensured that these opportunities would be available. Several features of this case have been singled out as the key factors accounting for successful mediation: (1) All the parties agreed on the basic policy issues when

87. *Id.* at 39.

88. *Id.* at 40.

mediation began. They all agreed that coal conversion was inevitable, that air pollution emissions must be controlled, and that expensive pollution control equipment could not be installed since such installation would have forced NEPCO to shut down the three older units at Brayton Point. (2) Mediation was begun when the parties were completely aware of the issues and of each other's basic objectives. (3) The mediator maintained his flexibility. Overall policy sessions were open to the entire group and smaller, bilateral sessions addressed more specific, technical issues. (4) Since the parties generally had agreed on basic policy issues at the outset of mediation and since the FEA Notice of Intent imposed some urgency none of the parties attempted delay tactics. (5) Parallel hearings and public meetings also were held to solidify public acceptance of the agreement.⁸⁹

C. *Foothills Water Treatment Project*⁹⁰

The Foothills project is a raw water treatment facility that will be owned and operated by the Denver Water Department, an independent government agency. In addition to the treatment plant itself, the project consists of a dam and reservoir on the South Platte River approximately twenty-five miles southwest of Denver, Colorado. The first phase of the project is designed to treat 125 millions gallons of water a day, although the dam, reservoir, and conduit system will allow ultimate expansion to a 500 million gallons per day capacity.⁹¹

The Foothills project is funded by the Denver Water Department which will finance construction with municipal bonds. No federal money is involved. The federal government became embroiled in the Foothills controversy, however, because the dam and reservoir were to be sited on sixty acres of national forest land and fifty-one acres of land administered by the Bureau of Land Man-

89. AMERICAN MANAGEMENT SYSTEMS, INC., *supra* note 71, at 32-33.

90. This account is based on and the author relies extensively on the commentary in H. Burgess, *supra* note 6.

91. At the 125 million gallons per day level, the system uses only existing water supplies. If the project is expanded to 500 million gallons per day, additional raw water supplies will have to be developed. H. Burgess, *supra* note 6, at 6.

agement (BLM). For this reason, the Denver Water Board was required to obtain right-of-way permits from these two agencies.

The Water Department also had to obtain a "404" dredge-and-fill permit from the Corps of Engineers since a dam is considered to be fill material. Since the construction process is expected to dump additional fill material into the South Platte River, a navigable stream, a 404 permit was a prerequisite to construction. Although the Corps of Engineers is the primary agency responsible for reviewing 404 permits, the Corps is required to consult with the EPA to assure that the project will not excessively damage the environment.⁹²

There were numerous reasons that a locally supported, and locally funded project could create a controversy. First, there was some question about the need for additional water treatment. The Denver Water Board, in its application and throughout the controversy, contended that the water treatment capacity of the Denver Water Department would be inadequate by 1980 because of increasing population growth and increasing per capita water use. To ensure a margin for error, the Water Board wanted to bring Foothills into the system by 1977, ensuring continued "unlimited" treated water supplies to the Denver metropolitan area.

The Denver Water Board's analysis was disputed by many environmentalists, the EPA, and, to a lesser extent, by the BLM and the Corps of Engineers. The environmentalists and the EPA made the strongest case, contending that the additional treatment capacity was needed only "to allow unlimited lawn watering through the year 1988."⁹³ According to the analyses of EPA and environmentalists the project could be made unnecessary by conservation or a water rationing program. The environmentalists contended that either of these alternatives would have significantly fewer harmful effects and would be substantially less expensive than the proposed Foothills project.⁹⁴

92. *Id.* at 51-54.

93. *Id.* at 14.

94. *Id.* at 15.

A second major facet in the fight over Foothills concerned the control of urban sprawl and air pollution. The pattern of growth in Denver has been characterized by low density urban sprawl. This sprawl necessitates high per capita use of the automobile—the source of most of Denver's air pollution.⁹⁵ Many observers have suggested that the best way to control air pollution in Denver is to control and direct growth—slowing the absolute rate of growth, if possible, and directing the growth that does occur into existing urban centers. Since there is a strong link between the availability of public services and the pattern of settlement in many cities, control over the distribution of water (i.e., preventing Foothills from being built) was seen by some as a means of controlling population growth and air pollution. Proponents of Foothills disagreed. They argued that growth would occur regardless of the construction of Foothills. Citing the experiences of several other rapidly growing cities in arid areas, proponents, including the BLM, contended that Foothills would neither suppress nor encourage migration into the Denver area. Whether or not the absolute rate of growth could be altered by the availability (or lack) of water, all parties agreed that the provision of water would influence the pattern of whatever development did occur. Since the Water Board was required by law to respond to all requests for service within the city limits, growth would be channeled into the city rather than into outlying areas if water taps were limited.⁹⁶

According to EPA, “construction of the Foothills project would make the attainment and maintenance of national ambient air quality standards in Denver more difficult and perhaps impossible.”⁹⁷ It was on this basis (as well as others) that EPA declared the project to be “unsatisfactory from the standpoint of public health, welfare and environmental quality.”⁹⁸

A third concern was that the Foothills project would probably have direct and detrimental impacts on Waterton Canyon, a

95. *Id.*

96. *Id.* at 16.

97. *Id.* at 17.

98. *Id.*

unique and valuable recreation and wildlife area. According to project opponents, the permanent loss of such a unique area clearly outweighed the temporary benefits that Foothills might bring.⁹⁹

A fourth issue concerned the future development of additional raw water supplies for the Denver area. If no new additional supplies are developed, Denver will probably face raw water shortages beginning in 1988, regardless of whether the Foothills project is built. One likely source of water is the construction of an additional large dam and reservoir upstream from the Foothills treatment plant on the South Platte River. This project, called Two Forks Dam and Reservoir, has been planned by the Water Board for many years. Two Forks is highly controversial because of its likely environmental impacts. Furthermore, Foothills was seen by many as the first step toward implementation of the Two Forks project.¹⁰⁰

When the idea of mediation was first suggested by Congressional Representative Pat Schroeder in May 1977, the Denver Water Board refused to participate. The Board had the same response to Schroeder's renewed efforts to bring in the University of Washington's Office of Environmental Mediation in the winter and spring of 1978. Even with costs increasing daily, the Board was absolutely steadfast in its insistence that the project had to be built as designed. Given EPA's opposition and the resistance of many local environmentalists to the proposed dam site, the Water Board saw no benefit to be gained from mediation. Only when another mediator, Congressman Tim Wirth, was suggested, did the prospect of mediation emerge.¹⁰¹

Contrary to theory—and contrary to reason—Tim Wirth's success was based largely on the fact that he was widely perceived to be in favor of the Foothills project. Indeed, Wirth had written to the BLM in 1977 supporting the construction of Foothills at the 125 million gallons per day level. When the notion of mediation was suggested by Wirth, the Water Board assumed it would work

99. *Id.* at 19, 21.

100. *Id.* at 21-22.

101. *Id.* at 30, 32.

to their benefit. Naturally, they were more interested than they had been previously, and discussions went well.¹⁰²

Wirth started the process privately and carefully. He talked with the Regional Administrator of EPA, with whom he was friendly. Although the Regional Administrator had previously been under heavy political pressure and had dropped his opposition to the project as a whole, he still objected to the issuance of the 404 permit because he felt that alternatives to the proposed dam site had not been considered adequately. Since the proposed dam was likely to be damaging to the environment, he felt that the alternatives should be studied carefully. Wirth concluded that if he could arrange such a study of alternatives, the Regional Administrator would have to agree to the process. Since the Corps was already involved in the dispute, and had widely acknowledged expertise in dam design, a Corps' study of the alternatives seemed logical.¹⁰³

Negotiations among Wirth, the Corps, EPA and the Water Board continued in Washington, Omaha, and Denver until finally on June 16, 1978, the parties agreed to a procedure. The Denver Water Board, EPA, and the Corps reached agreement on a proposal for a "final, full and complete consideration of the most significant outstanding controversy still surrounding Foothills, the Strontia Springs Dam in Waterton Canyon."¹⁰⁴ The Corps agreed "to go beyond its normal review procedures to conduct a major study of the Strontia Springs Dam and alternatives to it."¹⁰⁵ "Both the Water Board and the EPA have agreed that they would have no problem with the Corps' decision—as long as the procedure established and carried out is fair and thorough."¹⁰⁶

Although the publicly released description of the proposed process was not referred to as mediation, some of the participants in fact hoped the review would result in a negotiated settlement.¹⁰⁷

102. *Id.* at 51.

103. *Id.* at 51-52.

104. *Id.* at 54 (quoting Wirth press release, Denver Post, June 16, 1978).

105. *Id.*

106. *Id.*

107. *Id.*

Although they did not agree in advance that the Corps' findings would be binding, Wirth's press release and the follow-up stories in the *Denver Post* gave strong indications that the parties had agreed to allow the Corps to act as data mediators and, if its study was fair and thorough, to abide by the results.¹⁰⁸

The Corps' study was eventually expanded beyond the simple review of alternatives proposed by the Water Board to encompass all the major outstanding issues. As listed in the first Foothills Newsletter (which became a forum for formal announcements concerning the progress of the Corps' study), three major topics were identified as key: the "need for additional water treatment; the existence of superior alternatives to either the project as a whole or just the Strontia Springs dam; and the severity of environmental, social, and economic impacts, whether direct or indirect."¹⁰⁹ The end result was a study which, although not perfect, was far more complete than the Corps had originally planned.

With the study in hand, the parties closed in on a final agreement. Wirth convened an evening meeting with the Corps, EPA, and the Water Board. The meeting was preceded by drinks and dinner which relaxed the participants and strengthened the growing mood of friendliness (and to some extent trust) that had developed. Negotiations began at 10:00 p.m. and continued—at Wirth's insistence—until agreement was reached. The strain increased the sense of common purpose. Though some of the participants disapproved of these tactics, all stayed until a settlement was reached.¹¹⁰

Wirth's political position gave him clout even when he chose not to use it. This clout was apparently respected by all the participants. Almost all the participants felt that Wirth's clout was a key ingredient in achieving the settlement that was obtained. Although a mediator without clout might have been able to succeed in a less polarized dispute, in this case political pressure was necessary to force concessions from parties who had insisted on winning it all.

108. *Id.*

109. *Id.* at 60 (quoting 1 Foothills Newsletter (July 31, 1978) (Corps of Engineers)).

110. *Id.* at 93, 94, 95.

Wirth negotiated the basic settlement among the Corps, EPA, and the Water Board before he brought in other parties. Although risky, this tactic was essential since negotiating with the first three parties was so difficult. Wirth and his assistants assumed that the most visible environmentalist, John Birmingham, could speak for all the members of the environmental coalition. When he could not, they had further problems. A sense of momentum, common purpose, and cooperation prevailed, however, and a settlement was indeed negotiated. Birmingham presented the agreement to other environmentalists who insisted on a few minor changes. The basic structure of the agreement was maintained, however. The final settlement contained some victories for all sides and some major concessions—even from the Water Board. More importantly, it gave all the parties a better result than they thought they were likely to get either in court or through a federally-imposed decision. The Water Board got its 404 permit for the plant and the dam at the site it wanted. Although the dam was a blow to EPA and the environmentalists, they did get promises of a stream improvement program and minimum streamflow guarantees that would actually increase the flow in the river beyond what it was prior to construction. In addition, EPA got a mandatory water conservation program stricter than the Water Board had planned. The environmentalists also got a citizen's advisory committee to watch over, if not to advise, the Water Board's planning process. Finally, the Water Board agreed to pay the attorneys' fees that the environmentalists had accumulated during years of litigation. Many charged that this award was extortion, but it was a small price to pay for obtaining a settlement. Further, according to most of the parties, the court costs were a key to obtaining the settlement.

The judge presiding over the various court suits that had been held in abeyance during the mediation effort refused to sign the consent decree.¹¹¹ He prepared a three page statement explaining the shortcomings of the agreement. He was extremely critical of the provision forcing the Water Board to pay the environmental attorneys' fees, citing "serious doubts as to both the legality and

111. *Id.* at 106-07.

ethical propriety" of such payments.¹¹² He also questioned the legal status of a mediated settlement and whether it was judicially enforceable.¹¹³ Although the judge did not try to block the agreement, the parties were all disturbed by his conclusions. Nonetheless, they expressed their continued support for the agreement. The attorneys' fees were paid, a conservation plan initiated, a citizen's advisory committee established, and law suits dismissed. A year later the agreement held; the threat of adverse publicity helped to keep it in place. Problems may arise in the next drought year when some fear the Water Board will violate the minimum streamflow requirements to meet peak summer demands. If that occurs, Wirth has threatened to denounce publicly the action as both illegal and unethical.

D. *Analysis of the Cases*

The Snoqualmie dispute¹¹⁴ concerned the use of fixed resources; it also involved a multi-party disagreement concerning the level at which environmental quality standards ought to be set. The Brayton Point case¹¹⁵ involved a conflict over the appropriate balance between the enforcement of environmental quality standards and the imposition of economic costs on private utilities. The Foothills case¹¹⁶ was, first and foremost, a dispute concerning the use of fixed resources. It, too, involved disagreements about the level at which environmental quality standards ought to be set as well as which public policies should be given priority.

In the Snoqualmie dispute, the mediators gained entry though the intervention of the governor and it appears that the mediators were primarily accountable to him.¹¹⁷ In the Brayton Point case,

112. *Id.* at 107 (quoting the Addendum to the Foothills Consent Decree).

113. *Id.* at 108.

114. See text accompanying notes 63-70 *supra*.

115. See text accompanying notes 71-90 *supra*.

116. See text accompanying notes 91-115 *supra*.

117. The Snoqualmie case has given rise to the concept of the "grey eminence"—a politically powerful figure, respected by all the parties to a dispute, with the power to bestow credibility on entering mediators and, perhaps, to ensure implementation of whatever agreements are reached. The number of cases in which such a person exists will be extremely small.

the mediator was already known by the parties and was selected on that basis. Here the mediator apparently wanted the negotiating parties themselves to be satisfied with his services. In the Foothills case, Congressman Wirth offered his services as a mediator when he saw that a project he considered important was hopelessly deadlocked. Wirth, as an elected official, was accountable primarily to the voters in his Congressional district.

None of the mediators appeared overly concerned about the effects that the respective agreements might have on groups not directly involved in the negotiation. The Office of Environmental Mediation sought the approval of credible representatives whose support for a negotiated settlement would indicate public acceptance. The public was not directly involved in the Brayton Point negotiations. In the Foothills case, local environmental interests were brought into the mediation effort, but only after the basic points of agreement had been reached by the major actors. There were obviously many groups, in all three cases, whose interests were likely to be affected by the agreements but who had no opportunity to participate directly in the negotiations. Although the parties in the negotiations might have indirectly considered the potential disruption these groups could have caused, the concerns of inarticulate or powerless groups went without either direct or indirect representation.

In the Snoqualmie dispute, the final agreements yielded gains for the farmers who needed more water and for the environmentalists who wanted to control growth. Abutters received what they felt was adequate compensation. It is not clear, however, that the concerns of other residents in the Seattle region were given due consideration. The level of development specified by the Snoqualmie agreement did not maximize job and tax benefits for the region. At Brayton Point, the agencies sought to ensure that environmental damage in converting from oil to coal would be minimized, but the option of continuing to burn oil was not given serious consideration. From that standpoint, then, it may be that joint net gains were not maximized. In the Foothills case, the final agreement may, in the future, mean severe water shortages for Denver area residents. Water users and ratepayers had no opportu-

nity to choose representatives to speak on their behalf in the negotiation.

All three agreements set precedents in their respective regions, if not for the country. The Corps of Engineers might be pressed to expand the scope of future engineering studies to include design and site options. The Department of Energy may be asked to mediate future efforts to encourage a switch from oil to coal in electric generating plants. Some environmentalists are already considering the desirability of asking for a guarantee that their legal fees will be paid before they agree to participate in mediation. Specific trade-offs between environmental protection and economic well-being were implicit in all three agreements. These compromises may now set a standard to which other projects in Washington, Colorado, and Massachusetts will be held.

In all three cases, spillover effects are likely. The land use controls included in the Snoqualmie settlement will force development into other areas of the Seattle region. The acid rain problem throughout the Northeast may worsen as a result of the Brayton Point agreement. The cost of housing may go up in the Denver area, as demand increases while the supply of housing is artificially restrained. Long chain reactions of impacts will, in all likelihood, result from each mediated agreement. Impacts on future generations, although hard to predict, are likely. Long term impacts and spillovers were not given much credence by the parties to these case study agreements.

The mediators in each case sought, above all else, to promote settlements that the parties to the negotiations would find acceptable. To that end, the mediators were willing to inject themselves into the substance of the disputes. They were not content merely to facilitate and encourage discussion among the parties. In that regard, they were activists. They had personal views about the appropriate scope and content of the agreements that were emerging. They did not take sides in a way that might have jeopardized their credibility with the parties, but they were not neutral in the usual sense. They worked behind the scenes, between meetings and during meetings, to find elements of agreement that could be treated

separately, items that could be traded, issues that could be packaged, and ways in which the momentum of the negotiations could be used to pressure holdouts.

From the documentation available, it is not possible to discern exactly what was on the mediators' minds at key moments. It is not possible to speculate whether they would have been willing to back out, in mid-stream, if it appeared that a segment of the community-at-large might have been severely disadvantaged. Nor is it possible to predict their behavior if a different solution, rejected by the parties, would clearly have done even more to maximize the gains to all the interests involved. It is not possible to tell whether they would have been willing to disrupt or halt the proceedings if they feared that an unjust precedent was being set.

The mediators were extremely active in promoting these agreements. They drew on a great deal of substantive knowledge about the environmental issues and regulatory processes involved. Their substantive knowledge allowed them to work with the stakeholders to develop creative solutions. All three cases involved multi-lateral (as opposed to traditional bi-lateral) negotiation. The participants were, in some cases, not the duly appointed representatives of the interests they ostensibly represented. The case studies presented describe the state-of-the-art in environmental mediation. They reveal reasons that the advocates of mediation are legitimately optimistic about the prospects for resolving environmental disputes. They also suggest that a broad, rather than the traditionally narrow, definition of the mediator's responsibilities is appropriate in the environmental dispute resolution field.

IV. APPROACHES TO HOLDING ENVIRONMENTAL MEDIATORS ACCOUNTABLE

Whether environmental mediation becomes a matter of course in the United States, or occurs only rarely when an impasse has been reached, guidelines are needed to ensure that mediation efforts are structured properly.¹¹⁸ Enforcement of such guidelines

118. There is a continuing debate among environmental mediators as to whether or not mediation can be used effectively *before* an impasse has been reached. Cormick suggests

needs to be institutionalized, and there are at least three procedural approaches to holding environmental mediators accountable. The first involves licensing, certification, or registration. This procedure might be done at the state or federal level. Licensed mediators would be expected to subscribe to an explicit statement of their responsibilities.¹¹⁹ A second approach would involve creating environmental mediation offices attached to regulatory agencies or to the attorneys' general offices at the federal or state levels.¹²⁰ This second approach could be augmented by having administrative law judges require mediation before accepting challenges to the decisions or actions of regulatory agencies.¹²¹ A third approach would involve shaping the public's awareness of the risks and opportunities associated with environmental mediation—a well informed public can demand accountability.

If environmental mediation proceeds under the auspices of an accrediting organization such as the American Arbitration Association, their code of ethics could bind the mediators.¹²² For the foreseeable future, environmental mediation will probably not involve accredited mediators. Recent instances of environmental mediation have tended *not* to stress the formal credentials or the interventionist skills of the mediators involved.¹²³ Instead, mediators have

that mediation is "most appropriate at the point in a dispute when the issues have been defined, the parties are visible and highly involved, and there is some sense of urgency in resolving the conflict. Such circumstances typically occur near the point of impasse." Cormick & Patton, *supra* note 6, at 14. This view, of course, aggravates the problem of ensuring representation of all stakeholding interests and is quite consistent with the labor-management approach to dispute resolution. It also assumes that the terms of the disputes and the parties at issue are already at the bargaining table when the mediator arrives.

119. The mediators at the Mt. Kisco conference, discussed at note 3 *supra*, made an unsuccessful attempt to draft a provisional statement of responsibilities.

120. Such legislation has been proposed in New York State.

121. Judge Robert Keeton of the United States District Court, District of Massachusetts, has prepared a memorandum describing settlement procedures that he presents to lawyers before trial. The judge's aim is to encourage parties to settle before court costs are incurred. His Memorandum and Draft Settlement Procedures, dated Jan. 14, 1980, were distributed to members of the Harvard Negotiations Project, Harvard Law School, on Mar. 4, 1980.

122. See note 9 *supra*.

123. Of the documented environmental mediation cases, fewer than half were handled by individuals trained as mediators. See cases cited at note 50 *supra*.

had only to convince the parties involved that they might be able to provide assistance. Success to date has depended primarily on the mediators' capacity to maintain the trust of the participants. This capacity, and their ability to keep negotiations moving toward the preparation of written agreements, have been all that the participants have asked.

A. *Credentials*

The Office of Environmental Mediation in Seattle has suggested that the Code(s) of Behavior published by such agencies as the Federal Mediation and Conciliation Service and the Association of Labor-Management Agencies could provide a basis for establishing standards for environmental mediators.¹²⁴ Environmental mediators, however, require different standards which are tailored to their own situations. It is unlikely, therefore, that existing organizations which credential mediators would be helpful. Moreover, many environmental disputes are likely to be mediated by individuals called upon to intervene because of their positions and not their credentials as mediators. Their success may well depend on their capacity to operate free from the constraints that mediators typically feel. Congressman Wirth and others like him will not be successful if they are bound by procedures promulgated by associations responsible for credentialing professional mediators.

Environmental mediators, to the extent that they adopt the broader view of their responsibilities suggested in this article, will probably need to possess substantive knowledge about the environmental and regulatory issues at stake. Effective environmental mediation may require teams composed of some individuals with technical backgrounds, some specialized in problem-solving or group dynamics and some with political clout. It would be difficult and probably inappropriate to credential such teams.

124. See Cormick, *supra* note 35.

B. *Links to Regulatory Agencies and the Courts*

Credentialing or licensing would probably be unimportant if environmental mediation were undertaken by independent agencies of government or by court appointed mediators. This agency involvement would also solve the financial problems that continue to plague *ad hoc* environmental mediation centers.¹²⁵ Legislation could be enacted describing the circumstances and conditions under which mediation would take place. Those regulated and those doing the regulating would jointly select mediators. The mediators' responsibilities would be spelled out in the legislation. Potential and volunteer mediators could be required to disclose their views concerning the need to protect underrepresented groups, strategies for maximizing joint net gains, and the importance of considering the precedent-setting nature of mediated agreements. As mediation experience accumulates, mediation guidelines could be refined. Mediators could be paid as staff to the attorneys' general office.

Courts with responsibility for reviewing the administrative decisions of public agencies might rely more heavily on mediation. Indeed, judges could insist that mediation (or at least joint fact-finding) precede formal challenges to administrative actions. At the very least, this process would help narrow and clarify the issues requiring court review. Court appointed mediators would, of course, be accountable to the judges who appointed them as well as to the parties. The mediators would be paid in the same manner as judges.

125. Foundations and government agencies have provided substantial support for many of the environmental mediation efforts undertaken to date. The Ford, Rockefeller, and Hewlett Foundations have allocated almost \$1 million to support environmental mediation efforts. The Centers that have benefited from this funding are searching for ways to establish long-term financial stability. They cannot insist that parties to environmental disputes pay for their services, since many of the parties do not have resources. Mediators are very uncomfortable with the thought of collecting fees from only those parties that can afford to pay, thus jeopardizing their apparent neutrality. Even government grants are problematic since regulatory agencies are often among the parties at issue.

C. *Creating an Informed Public*

The most effective way to hold environmental mediators accountable would be to increase the public's capacity to demand fair and effective behavior on the part of mediators. This strategy is long-term and could begin with the provision of government funds to ensure the representation of disadvantaged groups with a stake in a mediated dispute.¹²⁶ To the extent that certain groups feel they are not competent to participate in technical aspects of negotiation, funds should be provided to appoint qualified agents to represent them. There are numerous public interest groups that could provide such assistance. Representatives of all stakeholding interests ought to be given funds to caucus with the people they represent. These are some of the costs associated with creating an informed public.

Several elected officials should probably participate in every environmental mediation effort. The larger the number of elected officials involved as interested parties or observers and not as mediators, the more likely that interests, indirectly or adversely affected can find someone to hold accountable.¹²⁷

The community-at-large must keep abreast of the negotiation's direction, or underrepresented groups will be unable to assert their concerns more forcefully. Although mediation efforts in the labor-management field are conducted in private, this practice should not be the case with environmental mediation. At least some scheduled sessions should be open to the public and to the news media.¹²⁸ Closed meetings are more acceptable if the agree-

126. Senator Edward Kennedy has, for several years, proposed legislation that would ensure compensation for representatives of all groups with a stake in the federal rule-making process.

127. A good example of the role that elected officials can play in a mediation effort is provided by Senator Frank Church's involvement in the Gospel-Hump Wilderness dispute. Church's staff helped to bring together preservationists and local timber and economic interests to reach a consensus on the appropriate designation of wilderness areas in the Gospel-Hump section of Idaho. Church did not actually mediate the dispute, but his "good offices" lent credibility and accountability to the mediation effort. *Gospel-Hump Wilderness Area Hearings Before the Subcommittee on Parks and Recreation, Senate Committee on Energy and Natural Resources*, 95th Cong., 1st Sess. (1977).

128. There is substantial disagreement among public sector mediators regarding the ad-

ments negotiated are subject to public scrutiny during parallel regulatory hearings, as in the Brayton Point case.

In summary, credentialing should not be insisted upon in the environmental mediation field. The institutionalization of environmental mediation through formal links to regulatory agencies or the courts is much more likely to produce situations within which the responsibilities of environmental mediators can be defined and monitored appropriately. The process of building an informed public should begin, but the task promises to be very long-term.

A note on the payment of environmental mediators is probably in order. The most desirable situation is one in which all parties contribute equally to the cost of compensating a mediator. In many environmental disputes, this cost-sharing will not be possible. Thus far, environmental mediators have volunteered their services, but this practice will continue only as long as foundation support holds out. Some observers have suggested the need for a superfund through which corporate and government contributions can be channeled to provide on-going support for environmental mediation centers throughout the country. The financing problem stems from the assumption that environmental mediation ought to be handled by *ad hoc* centers that do not need to bill their clients. It would not be impossible to have the federal or state governments (or the courts) contract with these private centers, but it would be easier to situate independent mediators in government itself. Given the relatively small number of cases likely to go to mediation and the special circumstances surrounding the selection of mediators appropriate to each case, it is unlikely that many individuals will be able to build an entire livelihood around environmental mediation cases.

Accountability requires that the parties to a dispute as well as

vantages of open versus closed meetings. The majority view is that all contact with the media should be avoided until after a settlement has been reached. This traditional view assumes that all the appropriate interests are adequately represented behind closed doors. The open process worked extremely well in the Columbus Negotiated Investment Strategy Project, *supra* note 50. With the help of mediators, teams representing the federal, state, and local governments negotiated a multi-year development strategy for the Columbus area. All negotiating sessions were open to the press.

the members of the community-at-large be able to hold environmental mediators to their responsibilities. Assuming that those responsibilities are clearly articulated and agreed upon in advance, accountability can only be achieved if the mediators can be effectively chastised, fired, or sued by the parties directly or indirectly involved. If a contract exists, accountability is easier to ensure. In the absence of a contract, the institutional framework within which the mediator is employed and rewarded is crucial. If mediators are licensed, accountability is presumably ensured by the licensing agency. If mediators were attached to courts or other government bodies that could effectively regulate their future employment, accountability would also be ensured. If most environmental disputes are mediated by individuals involved on a one-time basis, however, contracts detailing their responsibilities will be needed. Enforcement of such contracts would be much easier if mediators were bonded, but such insurance might be difficult to require. The means of institutionalizing the accountability of mediators will only be as effective as the parties to a dispute demand. If the parties fail to see the need for a broad definition of an environmental mediator's responsibilities, it will be difficult to ensure accountability on such a basis.

CONCLUSION

Environmental disputes will continue to erupt over the allocation of fixed resources, the setting of public policy priorities, and the setting and enforcement of environmental standards. All three types of dispute are susceptible to mediation although not in every case. Mediation will depend on the availability of a mediator or mediation team acceptable to all parties.

Environmental mediators ought to be concerned about 1) the impacts of negotiated agreements on underrepresented or unrepresentable groups in the community; 2) the possibility that joint net gains have not been maximized; 3) the long-term or spill-over effects of the settlements they help to reach, and 4) the precedents that they set and the precedents upon which agreements are based. To be effective an environmental mediator will need to be knowledgeable about the substance of disputes and the intricacies

of the regulatory context within which decisions are embedded. An environmental mediator should be committed to procedural fairness—all parties should have an opportunity to be represented by individuals with the technical sophistication to bargain effectively on their behalf. Environmental mediators should also be concerned that the agreements they help to reach are just and stable. To fulfill these responsibilities, environmental mediators will have to intervene more often and more forcefully than their counterparts in the labor-management field. Although such intervention may make it difficult to retain the appearance of neutrality and the trust of the active parties, environmental mediators cannot fulfill their responsibilities to the community-at-large if they remain passive.

The institutionalization of guidelines and procedures for holding environmental mediators accountable would best be handled by linking environmental mediation directly to the prosecutorial and judicial branches of federal and state governments. Efforts to license or credential environmental mediators are not likely to be effective. The long-term task of building the capacity of the public to participate in environmental mediation should begin in earnest.

