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ALTERNATIVE ENVIRONMENTAL MEDIATION STRUCTURES WITHIN THE FEDERAL GOVERNMENT

FINAL REPORT

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by

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PREFACE

The Council on Environmental Quality continues to investigate avenues for improving federal agencies' ability for and committment to environmentally sound actions. This document represents the Council's willingness to explore if not endorse the use of mediation as one of the avenues.

The authors wish to thank Malcolm Baldwin, Senior Staff Member and Project Monitor, and Wendy Emrich, Staff Assistant, for their guidance. Other members of the CEQ Staff including Nicholas Yost, General Counsel and Edward Strohbehn, Executive Staff Director, were of particular assistance in keeping the relationship between CEQ and the National Environmental Policy in the forefront of our thinking.

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Chapter One

INTRODUCTION

Background

The importance of adversary processes in a highly diverse culture is discussed in a recent article by Peter Schuck entitled, "Litigation, Bargaining and Regulation". Professor Schuck suggests that in the United States:

> ". . .adversary processes enjoy considerable constitutional, statutory, and judicial protection; in a liberal society in which there is no received or even widely shared notion of truth, they are simply indispensable for resolving sharply conflicting interests. . ."*

The author describes a spectrum of adversary processes which range from pure adjudication by a formal and independent tribunal to pure bargaining between the interests directly involved. Somewhere along that spectrum he places mediation, calling it a "mixed form" because of its use of a combination of bargaining and independent third party participation in the process. This paper is about mediation as it might be organized for disputes in which federal agencies are involved.

Procedural innovations (or new applications of traditional methods) designed to produce decisions which are:

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*Peter Schuck, Regulation. AEI Journal on Government and Society, July/August 1979, Volume 3, No. 4, p. 26.

- more agreeable to the parties affected,
- beneficial to the public interest, and
- arrived at efficiently,

have recently occupied the attention of Congress, various public agencies, legal system analysts, organizational development specialists, and others. In particular, the National Environmental Policy Act (NEPA), a procedural springboard for public intervention into federal action, has helped increase the pressure on federal agencies involved in environmentally sensitive programs to develop new approaches to decision-making. A complicated balancing effort between competing demands has tipped one way and then another as interest groups have their day in Congress, federal court, adjudicatory hearings, and, now, NEPA scoping meetings.

As a result, disputes of substantial scale involving large amounts of money, land, and ultimately, values associated with environmental quality, often involve federal agencies. A few examples include:

Federal Action	Parties
Decision to issue §404/10 dredging and filling permits, removing last administrative barrier to the construction of the Hampton Roads Oil Refinery, Portsmouth, Va.	Department of Interior, Army Corps of Engineers, Department of Transportation, Department of Commerce, Environmental Protection Agency, local residents, Chesapeake Bay/ Elizabeth River fishing industry; Hampton Roads Energy Company and organized environmental groups;
Multiple use policy in the California Desert -- specifically ORV use.	Bureau of Land Management (DOI), ORV user groups, national conservation groups.

Federal Action	Parties
Construction of the Greyrocks Dam and Reservoir project in Wyoming.	Conservation organizations, Governors of Nebraska and Wyoming, the developer/power companies; the Fish and Wildlife Service (DOI), the Army Corps of Engineers, and the Rural Electification Administration.

The procedures for making decisions at the federal level need to keep abreast of the level of public interest and the magnitude of the potential controversy generated by a given project. One approach has been the proposal of various modifications to the judicial system to cope with these specialized disputes over environmental concerns. This and other major proposals are outlined in Table 1 below.

Table 1

FEDERAL POLICY OR ACTION	RESULT TO DATE
Science Court (proposed by White House Task Force on Anticipated Advances in Science and Technology, 1976).	Generally rejected on basis that scientific questions cannot be settled by persuasive argument. "The use of adversary legal process to control scientific research is likely to lead to serious scientific errors and to badly thought out policy." (William McGill*)
Environmental Court System (Feasibility study was directed by Federal Water Pollution Control Act, 1972: Title V, Section 9).	Tentatively rejected on the basis that fear that inclusion of environmental cases with tax and patent cases would create "the danger that environmental matters will not receive the attention intended by a specialized court . . . ." Also, CEQ claims that only approximately 7.5% of the total cases included in the new court's jurisdiction would be environmental, and that the number of such cases is decreasing each year as the law becomes firmly established.
New Appellate Court with exclusive jurisdiction over environmental cases (part of Department of Justice "Proposal to Improve Federal Appellate System", 1978).	More importantly, CEQ challenges the notion that an appellate court should attempt to gain any special expertise in the technical aspects of environmental issues. "(T)he function of the appellate courts on judicial review is not to acquire a specialized knowledge of a particular discipline, but rather to ensure that the administrative agencies have performed their functions properly." CEQ fears that the special court would become a "super-agency" that would be more likely to substitute its judgment for that of the agencies charged with administering environmental statutes. *Environmental Reporter*, 1169,1170 (October 20, 1978).
Administrative Court System specializing in environmental matters as a special master for regular federal courts.	Pending analysis.
Federal Court Improvement Act (1979) (S-1477) -- Senate has approved Amendment 636 which would demand Section 706 of the Administrative Procedure Act -- and would eliminate the presumption in judicial review of administrative agency rule making that rule or regulation at issue is valid.	Pending House action.

In addition to these proposals, there have been efforts to expand the use of non-judicial forms of dispute resolution, such as mediation. Federal agencies in Washington have been a particular target for organizations and individuals seeking to have the process of third party intervention tested. A willingness to experiment has been found in the following examples:

Table 2

Resource and Land Investigations Program USGS (DOI) and Council on Environmental Quality: Contract to explore conflict resolution approaches to identification, management and resolution of environmental/energy disputes (1977-1979).	Exploratory efforts to mediate generally frustrated with a few exceptions; project has developed greater emphasis on workshops, conferences and information sharing.
U.S. Forest Service's Roadless Area Review and Evaluation (RARE II) in Denver: Attempt to reach consensus on designation of Colorado's 234 roadless areas.	Not strictly speaking a mediation effort, generally not considered a successful effort due to unrealistic time pressures.
Federal Regional Council (Northwest): Contract to explore mediation in decision making in permitting process for five participating agencies.	Outcome pending. Workshops and information-sharing also a feature.

Purpose and Organization

Federal policy toward mediation has not been explicit nor organized. In fact, to date, there has been none. However, during the decade, the intersection of attempts at (1) judicial reform (2) reappraisal of administrative procedures, and (3) regulatory reform may have contributed to the potential emergence of a federal policy for mediation.

The most important link between the proposals in Table 1 and the experiments in Table 2 is the effort to devise a resolution process that fits the characteristics of the dispute. The underlying premise is that the currently available mechanisms are not adequate to address the "new disputes." In fact, this paper looks toward creating the framework within which an acceptable and by definition, flexible, process might occur. Although most attempts to narrow or limit the scope of the dispute in which mediation would be applied have been unsatisfactory, the Council on Environmental Quality has sought to answer some of the practical questions which revolve around how federal agencies might respond when approached regarding the use of this process.

The purpose of this paper is:

- to summarize federal actions and policies related to environmental mediation over the decade,
- to summarize a few agencies' attitudes towards the idea,
- to describe some possible alternative frameworks for its use,

- to explore some of the legal concerns affecting the use of mediation,
- to review mediation in the context of the National Environmental Policy Act, and finally,
- to make recommendations to the Council regarding future steps.

This document does not review the extensive and growing body of material available on mediation. However, readers are referred to the attached bibliography which covers much, if not all of the literature relevant to the general topic of this document.

Chapter Two describes some hypothetical options available for structuring an institutional approach to the organized application of mediation to environmental disputes. The third chapter is a review of federal agency attitude toward the use of mediation and the fourth chapter is a summary of the legal implications affecting the use of mediation. Chapters Five and Six cover mediation and NEPA and some recommendations for the Council on what it might do to encourage or discourage the institutionalization of the process.

Comment on the Major Obstacles to Mediation

This investigation was initiated to assess the options available for designing an additional tool for federal agencies charged with missions which bring them into disputes with an environmental dimension. However, two obstacles of some importance have persisted throughout the study which

may have a significant impact on both the design and implementation of the tool. These barriers are discussed in other chapters, but should be recalled when considering the alternative configurations:

1. The reluctance of most federal agency officials to interpret their authority as sufficiently flexible to include mediation as a method to resolve disputes with environmental dimensions.

2. The need to preserve the legal rights and status of the non-federal parties to a mediation.

These two themes seem at times to conspire to undermine the vitality represented by the many experiments which are referred to in Table 2.

The issue of interpreting agency authority stems in part from the uncertainties involved in entering into a negotiated agreement with parties over which one agency has no direct control. However, establishing an official sanction may require guidelines which may be sufficient to stifle the very purpose of entering into a voluntary set of negotiations managed by a neutral party.

The legal rights issue has focused on the environmental advocacy segment of the stakeholders in mediation of environmental disputes, rather than on those of permit applicants, and other commercial or industrial parties. The impetus for the use of environmental mediation arose in part from the perception on the part of some observers that the burgeoning volume of environmental litigation was not a satisfactory way to make complex decisions about resource allocation and environmental

protection.* (This perception also stimulated the judicial reforms described in Table 1.)

Much of the litigation arose out of a heightened environmental consciousness and new developments in the law which permitted advocates for environmental protection and preservation to challenge public and private decisions about the environment in new and more effective ways. Thus, litigation became a major empowering tool for individuals or groups to enter the decision-making process on behalf of environmental values. There is, therefore, an understandable suspicion on the part of environmentalists toward those whose primary concern is reducing the volume of litigation. To date, litigation has been the most effective tool environmentalists possess in attempting to shape decisions. In order for mediation to be effective, it should not undercut the legal rights that parties would have if they chose to litigate. Otherwise, there would be little incentive to enter the mediation process. At the same time, a counter-balancing consideration may be developing: the value of effective case-by-case resolution of disputes weighed against the effect of an anti-regulation sentiment threatening to undermine the legislative, legal and political victories of the environmental community.

Chapter Four poses the issue as a conflict between an efficiency model and a legal model. These two points have

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*Some of the litigation, of course is NEPA-related, but also relates to enforcement proceedings, permits, presence of endangered species, land management, etc.

been raised at the outset because, regardless of available organizational alternatives, mediation will not have a life of its own within the federal governments unless answers can be found to these questions. The answers must come from those who will use mediaton.

Chapter Two

ALTERNATIVE STRUCTURES

Introduction

During the course of the study it became clear that establishing mediation practices could mean either (1) creating a separate organization to make mediation available as a service to federal agencies or (2) establishing an agency or federal government policy to use mediation to resolve certain kinds of disputes. These two approaches are interdependent. Mediation could be encouraged without any explicit policy that directs agencies to use it. In practice, however, it is probable that both institutionalizing efforts are needed in some form to insure use of the process.

This chapter considers ways to organize mediation services. Acceptance of an organizational structure would, for purposes of this paper, depend upon a policy encouraging its use where appropriate. Two primary distinguishing features have been selected to characterize the organizational alternatives: administrative control and geographic location. Each aspect can be highly centralized or highly decentralized and the centralizing emphasis can be different for administration and geographic location (see Figure A).

ALTERNATIVE STRUCTURES	GEOGRAPHIC EMPHASIS	ADMINISTRATIVE EMPHASIS
ALTERNATIVE I Staff and decision making and operations centralized in D.C. No field offices	CENTRALIZED	CENTRALIZED
ALTERNATIVE II Small decision making and management staff in D.C. with field offices	DE-CENTRALIZED	CENTRALIZED
ALTERNATIVE III Divisions of existing agencies located in D.C.	CENTRALIZED	DE-CENTRALIZED
ALTERNATIVE IV Located solely within local area, No national office; each state, local or regional entity manages its own operation	DE-CENTRALIZED	DE-CENTRALIZED

Figure A

Policy of Use

There are several alternative ways to establish a policy for the use of mediation. The selection of the most appropriate one may depend upon the organizational decisions above. They include: an Executive Order; legislative amendments -- either to legislation or regulations oriented to a specific agency; an internal (agency) policy directive; or a Secretarial Order.

Table 3 includes a comprehensive list of the existing environmental statutes and orders which, in conjunction with other non-environmental laws and policies, could each give rise to disputes -- some of which could be resolved by mediation. However, one major task of the administrative dimension of each alternative is to understand these orders and statutes in enough depth to develop a program for mediation which is acceptable within the bounds of existing legislative restrictions.

A policy which reinforces the use of mediation, whether in Washington or in the field or both will almost certainly be necessary. This is generally true because of an initial reluctance among federal representatives to go beyond the familiar boundaries of established procedures (see discussion in Chapter Three). The willingness to consider mediation becomes further inhibited by the specific characteristics of both the disputes and the agencies faced with them. Therefore, an important administrative incentive to using an experimental approach would be the existence of an agency policy to support it.

TABLE 3

Statutory Sources of Environmental Disputes

General

*The National Environmental Policy Act
Executive Order 11514, Environmental Quality
Executive Order 11523, National Industrial Pollution Control Council
Environmental Quality Improvement Act of 1970
Executive Order 12088, Federal Compliance
Executive Order 11564, Transfer of Oceanographic Programs
Executive Order 11821 - Inflation Impact Statements
Executive Order 11987, Exotic Organisms
Executive Order 11988, Floodplain Management
Executive Order 11989, Off-Road Vehicles on Public Lands
Executive Order 11990, Protection of Wetlands
Executive Order 12113, Independent Water Project Review
Executive Order 12114, Environmental Effect Abroad of Major Federal Actions

Air

*Clean Air Act
Excerpt Relating to Clean Air Act From National Energy Conservation Policy Act
Energy Supply and Environmental Coordination Act of 1974

Solids

Resource Conservation and Recovery Act of 1976

Water

*Federal Water Pollution Control Act as amended
Executive Order 11735, Delegating Functions of the President Under Section 311 of the Federal Water Pollution Control Act, as Amended
The Rivers and Harbors Act of 1899 (The Refuse Act)
Executive Order 11574, Refuse Act Permits
General Instructions, Short Forms, Standards Forms, and a Discharge Monitoring Report for Applications for Permit Discharges Under the National Pollutant Discharge Elimination System
Water Resources Research Act of 1964
Water Resources Planning Act
Water Resources Council Principles and Standards for Planning Water and Related Land Resources

Table 3 (Cont'd)

Fish and Wildlife Coordination Act
Ports and Waterways Safety Act of 1972
Safe Drinking Water Act
Deepwater Port Act of 1974
National Ocean Pollution Research and Development and Monitoring and Planning Act of 1978

Noise

An Act to Require Aircraft Noise Abatement Regulation
*Noise Control Act of 1972

Pesticides

*Federal Insecticide, Fungicide and Rodenticide Act

Land Use

Surface Mining Control and Reclamation Act of 1977
Coastal Zone Management Act of 1972

Conservation

Marine Mammal Protection Act
Endangered Species Act of 1973
Executive Order 11870 on Animal Damage Control
Wild and Scenic Rivers Act
Soil and Water Resources Conservation Act of 1977

Chemicals

Toxic Substances Control Act

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*The proposed federal appellate court with exclusive jurisdiction over "environmental cases" was to include cases arising under these statutes (as defined by the Administrative Office of the U.S. Courts).

Organizational Features

The details of an organizational structure are numerous, this discussion emphasizes certain basic components. Not only are these components basic, but they require an explicit, clear-cut decision at the outset. Modifications could be made later on; the important point is initial decisiveness, clarity and specificity.

The issues of geographic and administrative emphasis have already been introduced. Once the general decisions on administrative and geographic centrality have been made there are six additional basic demands that must be satisfied:

- size and responsibilities of the fulltime staff
- source of and policy for
  - on-going operating funds (to cover costs not specifically related to disputes, such as administration, research, staff development)
  - dispute settlement funds (to cover costs related to dispute settlement)
- source of and certification for mediators (whether or not on full time staff)
- physical location
- type and scope of disputes to be handled
- clear definition of demonstration/experiment scope and criteria for success.

This chapter outlines these prominent aspects for each of the four alternatives. The administrative and geographic emphases have been used in order to provide a framework for

evaluation and comparison. Such a framework also permits some decisions to be made with regard to:

- federal support
- realistic goals
- operational definitions

Alternative I: Administratively and Geographically Centralized

Referring back to Figure A, the first option is perhaps the most familiar to federal agencies because of its emphasis on an organization headquartered in Washington, D.C. Its offices would be located in Washington; the staff and all decision-making and most mediation sessions would be there. Only in isolated circumstances would the mediation take place in the field.

Some of the options for institutional locations which have been suggested include:

1. an independent commission,
2. a congressional staff office,
3. a division within the Department of the Interior, another natural resources agency,
4. a special autonomous agency like the Federal Mediation and Conciliation Service (FMCS),
5. a branch of FMCS which confines its operations to FMCS' Washington Headquarters.

The primary purpose and singular advantage of such a configuration is its manageability. That is, it is the simplest approach from an administrative point-of-view. It

focuses all the energies in one place rather than diffusing them through more fragmented undertakings. All data on case experience would be available for ongoing analysis; quick changes and rapid response to changing circumstances would be possible because of proximity to agency decision-makers. These advantages all have an underlying bias: tight management, carefully selected disputes, controlled matching of mediator to dispute, and explicit screening of all aspects of the process would be beneficial to the professionalism of the discipline and to the long-term security of those represented at the mediation table.

The disadvantages mostly fall in the category of lack of local control and sense of proximity to the issues being mediated. Given the concerted effort of the last decade to return the power of making decisions to those whose lives the decisions affect, this Washington-focused alternative may be summarily rejected. In rebuttal, of course, there is the possibility that a mediation service should begin under a highly controlled situation and, if successful, branch out at a later date.

Funding

In this alternative it is proposed that a special appropriation would be made from existing budgets of the Department of Justice, for example, which could cover the basic operating costs for the service. Alternatively, funding could be structured similarly to the appropriations

made for the Federal Mediation and Conciliation Service. In any case, the experience of the experiments mentioned in Chapter One suggests that day to day operating costs should be accounted for and perhaps funded separately from the costs associated with mediating specific disputes.* The reason is that various administrative functions, general research and staff development are necessary above and beyond the staff/mediator/back-up requirements for specific disputes. Further, individual disputes will make varying demands on resources depending upon their scope, visibility, available information, and so on. The separate accounting will assist in the development of cost effectiveness comparisons with approaches to dispute resolution.

Possible Institutional Locations

The locations listed on page II-5 indicate the centralized activity which this alternative represents. With the exception of #3 (division of DOI) these options have the advantage of being relatively free of any specific bias (perceived or actual) of a substantive nature. The most important characteristic in this alternative is that the institutional location should represent as much independence from specific agency mandates or spheres of influence which could constrain or impede the dispute settlement process.

*Thus, funding might come from separate sources; one source for operating costs, another for dispute settlement.

Alternative II: Administratively Centralized and Geographically De-Centralized

In the second alternative the administrative focus remains in Washington but the operations are regionally dispersed. The administrative function would include overall policy development, screening of disputes to be handled, long-term data collection and analysis, fiscal control and general coordination. The regional centers would be primarily responsible for conducting conflict assessments, mediation sessions, development of local mediator capabilities, compiling data required for central office analysis.

Possible Institutional Locations

Among the possible institutional locations are:

Administrative	Regional
• Branch of D.C. FMCS	Regional FMCS Offices
• Executive Office of the President	Existing regional centers*
• Independent Commission	Existing regional centers
• Justice Department Land and Resources Division	Existing regional centers

In this alternative essential criteria for an institutional identity are those which (1) effectively reinforce the goal of having the federal government involved in supporting or providing a mediation capability at all and (2) support an approach acceptable to non-federal parties. All of the above options could provide either a strong or limited administrative role depending upon the degree of emphasis on the regional centers.

*See Appendix B.

The essential advantage of this particular structure is that it can build upon existing regional experience and capabilities for actual mediation, while simultaneously developing a more consistent style of management, fee structure, data analysis, screening and verifying credentials of mediators. The importance of the centralized administrative function is initially critical for developing a strong and recognized credibility for the mediation service as a whole. It also can provide support and credibility for any new regional centers which did not have a previously existing base. The central office can provide access, if necessary, to the Washington office of any federal agencies involved in regional disputes.

Additional advantages of the geographic dispersal of centers is the flexibility of resource commitments responsive to the activity level in any region, flexibility of staffing, an opportunity to develop positive federal-regional ties.

The disadvantages -- at least relative to Alternative I -- stem from the inevitable difficulties of maintaining policy and management control. This would be a disadvantage primarily at the outset when the policy objective would be to establish credibility, consistency and expertise. Additionally, during the sensitive early period, much of the mediation will be tested/measured against other forms of dispute resolution. Precedent setting procedures and guidelines will be established. This critical period could have a profound influence on the likelihood of overall success.

Therefore, strict control and evaluative capabilities are particularly important at that time.

Another version of this alternative is a loosely organized administrative link between all existing regional centers (see Appendix B for a list of these centers). The centralized administrative function could be primarily of an umbrella nature: a channel for funds, a recognized federal designation (Commission, Service, etc.) and perhaps a public relations or clearinghouse responsibility.

This approach would probably receive the support of existing centers which have dealt with disputes in which a federal agency was a significant party. The obstacles which have made federal participation in mediation difficult would be removed with the federal imprimatur of the service, and funding support could be more reliable. Further, if only a loose relationship exists between the regional centers and the central administration office, existing centers could maintain much of their current autonomy. There is, however, a distinct problem with depending too heavily on the tractability of existing centers. They have not indicated any willingness to share a common bond, nor even to be linked to the federal government -- except as a funding source.

Funding

The approach to funding would be similar to Alternative I in that the mediation service would receive a specific budgetary appropriation either from Congress or through an existing agency (e.g., Department of Justice). One significant variation would be that in addition to basic appropriations, each regional center could be eligible for special grants, and local support (if desirable). Such additional funds would not be allocated to particular disputes under mediation. Rather they would be designated as contributions to the development of the regional centers' resources and capabilities -- perhaps for specializing in certain of reoccuring, regionally - specific categories of environmental disputes.

Alternative III: Administratively De-Centralized/ Geographically Centralized

The third alternative has a different emphasis than the first two. They had an essentially independent existence from any particular agency.* This third alternative could be viewed in substance as more directly related to NEPA processes, and organizationally as an entity located within appropriate agencies in Washington, D.C. such as EPA, DOT, Department of Agriculture, DOI, DOD.

*Except where the Justice Department relationship was suggested.

Possible Locations Within the Agencies

- A newly established office or division
- Part of the agency's General Counsel's office
- Part of an Assistant Secretary's Office: Policy or Administration or Public Affairs

The link to NEPA is a fairly natural one in terms of limiting the scope of the disputes. That is, the disputes would be those which surfaced during the course of an agency's environmental impact evaluation of projects or programs. Some sporadic consideration has also been given, for example, to using a form of mediation during the "scoping" phase prior to the development of EIS's.

In this third option the use of a mediation office within an agency would be triggered by the agency's involvement (as lead agency or otherwise) in the EIS. The emphasis would be on substantive orchestration of the resolution of disputes which arise during the EIS process. Objectivity, if not neutrality, could be maintained if the mediator function was filled by a representative from the agency who had the least direct interest in the outcome. A dispute which involved DOT as the lead agency, EPA in an important review capacity, DOI in a tangential review role, as well as several non-agency interested parties --could, for example, be mediated by a staff mediator from the mediation section at DOI.

An underlying premise of this option is that independent mediators, even if organized under a federal umbrella, would not be sufficiently knowledgable about either the substance nor the complex insitutional or practical details of the dispute to provide cost saving or efficient help. Just as the various "Offices of Environmental Affairs" in most agencies have become an integral part of agency planning and decision making,* the mediation office would be called upon, through formal request, to give explicit organization and attention to disputes which have surfaced.

The advantages of this option are related to its close agency relationship. The mediation function can be tailored to each agency's needs, and in particular to each agency's NEPA process. The agency has control over its own experimentation with the use of mediation.

The disadvantages are the limitations associated with the lack of centralized control and perceptions of bias. There may be excessive overlap with the activities of other agencies, an inevitable bias toward the home agency's mission.**

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*To a greater or lesser degree, depending on the agency.

**See Chapter Five for a summary of CEQ's current views regarding mediation and NEPA.

Funding

Funding for day-to-day maintenance of the operation would come from the agency's budget. Contributions or transfers to cover additional expenses related to dispute settlement (although not to any particular dispute) could be developed through experience with the type, number and source of requests for settlement. For example, DOI may be frequently asked to intervene in disputes involving EPA and others such as a dispute in which FAA (DOT) and EPA are in conflict with state and local economic interests as well as national conservation interests over issues related to an airport runway expansion. Mediation of such disputes could involve a substantial commitment of resources. Thus, some formula for contributions from parties involved to cover the extraordinary expenses could be devised. The contributions would be funneled into a pool to help defray future expenses of the agency which sponsored the mediation effort.

Alternative IV: Administrative De-Centralization/ Geographic De-Centralization

The final variation proposed is one which places all of the emphasis on regional activities. A simple example might be mediation offices established in those regions where the Federal Regional Councils wish to sponsor such a service.*

*In order to retain its primarily regional character, it is presumed that the Under Secretaries for Regional Operations which sets policy for FRC's would not play a very active role in this approach. However, if Alternative II were adopted, it is conceivable that the Under Secretaries Group could provide an institutional home for the central, coordination and analysis.

The regionalized service could be made available to any federal agency involved in an environmental dispute within the region. It should be recalled that this report is focused on the use of mediation in disputes where federal agencies are important parties. State and local public agencies may face some of the same confusion and obstacles regarding the use of mediation, although at least one significant quandry, that of representing the interests of a national constituency, is removed.

From the geographic perspective (and thus, the scope of the disputes to be handled in this alternative) this alternative is similar to Alternative II. That is, it can draw upon existing regional entities already engaged in mediation such as the University of Washington, the Wisconsin Center for Public Policy, the New Jersey Dispute Center, RESOLVE, ROMCOE, American Arbitration Association and others. The important addition which would be required in building on existing centers is the appreciation for the federal role in the dipsutes to be handled. Therefore, a significant obstacle to implementing this final configuration is the lack of any central organizing or coordinating entity.*

The regional focus and the operational/administrative flexibility would create an opportunity for cooperation between regional organizations and federal agencies with programs and/or projects within the region. Since there

*There is the same issue regarding the willingness of existing centers to cooperate.

would be operational and administrative flexibility region-to-region, successful approaches could be encouraged and unsuccessful ones would eventually cease to function. The flexibility of this option and the difference in the scope, intensity and frequency of disputes region-to-region could generate experimentally creative results.

If one takes the view, however, that experiments have been underway for five years; that even though many federal agencies are attempting to streamline decision making and the implementation of their programs, and have been exposed to mediation, the process in this connection has not been adopted as an acceptable approach in very many cases. One reaction to that failure has been to propose more directed, controlled and professional mediation centers specifically organized to address the questions which federal agencies feel they must consider. If this totally decentralized approach were to be adopted many of the same questions would be asked again and again with no central unit able to provide an overview of conclusions on aggregate experience, precedents, or guidelines. Thus, if a primary purpose of institutionalizing mediation is to give the tool a recognized place in the process of making decisions and taking actions which affect the environment, the totally de-centralized approach may not be the best way to accomplish that goal.

If, however, no formal action is to be taken by Congress or the Administration, a hybrid of this de-centralization

approach and the continued efforts of foundations and other profit and non-profit mediation centers will probably continue to promote and/or use mediation.

Funding

If the FRC's were used as the existing institutional base and as the funding vehicle, the problem of funding source still remains. The regional offices of each of the agencies represented on the Council could transfer an amount arrived at through an equitable formula.

The level of funding may well be less critical than its reliability.

Conclusion

The alternatives have been somewhat arbitrarily drawn in order to provide a specific context for considering the next step. These alternatives focus on what appears to be most pressing at the moment: a need for guidance and administrative control.

If it proves desireable to create new structures or procedures for environmental mediation, beyond simply approving the process on a case by case basis then the following recommendations may be pertinent, in view of the alternatives proposed.

1. An environmental mediation fund be established by to give state and regional governmental entities grants to conduct mediation experiments.

2. The same office that administers these funds should also provide guidance and assistance to grantees in their use of the funds. An amount should be reserved to this central coordinating office to permit it to conduct its own environmental mediation experiments.

3. The environmental mediation office should be located either in the executive office of the President or in the Federal Mediation and Conciliation Service. If in the latter, it should be made clear that persons with background in environmental affairs and administrative procedure should be in charge. The latter course would also involve statutory changes in the FMCS enabling legislation. Therefore, if an appropriate place in the executive office of the President could be found, it would be preferable. It could have an advisory board composed of designees of the heads of FMCS, DOI, CEQ, DOE, DOC, HUD, EPA, etc.

4. The environmental mediation central office should also investigate the institutional and legal obstacles to further successful use of mediation and report to Congress and the President accordingly.

5. Mediators may be retained inhouse in some of the experiments, but in most cases they should be selected with the guidance of the central and regional offices as independent contractors with knowledge of relevant issues, process expertise, and trust of the participants to the dispute as key criteria. Technical assistance in the form of conflict resolution expertise, technical expertise, and legal expertise should be made available to such mediators by the center.

6. Services of a mediator should be available upon the request of any person or agency who has some interest in the dispute. Mediators could also be made available to hearing officers, administrative law judges, and state or federal court judges in connection with formal proceedings.

7. The emphasis of the experiments should be on small portions of larger disputes in which specific, negotiable components can be identified.

Chapter Three

FEDERAL AGENCY ATTITUDE TOWARD THE USE OF MEDIATION IN ENVIRONMENTAL DISPUTES

Introduction

An important aspect of the original design of the study was to approach representatives from several federal agencies to solicit their response to the use of mediation. It quickly became clear that radical differences existed in the level of understanding and sense of relevance which were perceived by those with whom the matter was discussed. CEQ's objective was to gather from informal interviews with agency people generally concerned with decision-making processes and practices, their general reactions to the idea of mediation.* The obstacles to gaining useful or consistent information were related to the chicken-egg problem of the inability to get responses on possible alternative structures which would be viable without proposing some hypotheticals, and not being able to propose realistic hypotheticals without previous input.

Summary of Interview Results

The list of federal agencies which are potentially affected by a national policy to use mediation appears in

*See Table 5 at end of Chapter for list of interviews.

Table 4. Not all of these agencies would be affected to the same degree, but certainly all should be made aware of any movement to officially endorse or reject the use of mediation in disputes wherein the federal government is a party.

As a general pattern, the representatives of federal agencies that were interviewed fell into three groups:

1) Those who had never considered mediation as a formal tool but who initially reacted positively to its potential as a planning tool.

2) Those who were thoughtfully skeptical because of their awareness of the difficulty of implementing any process which did or was perceived to infringe on the automony of a federal agency. A frequent comment, "It sounds like a good idea, but I'm not sure I see a role in this agency."

3) Those who did not understand or those who did not feel very comfortable even considering the idea without a more elaborate framework.

The groups were concerned about practical difficulties arising if mediation were specifically encouraged within the federal government. For example:

- Will mediation create more rather than fewer problems for the agency?
- If the conflict is important enough, won't it end up on the Secretary's desk anyway?
- What if the agreement reached interferes with other agency commitments and functions?

It was difficult to elicit useful and specific examples of where and/or how mediation could be useful. This was partly due to a lack of a prototype, or at least a prototype which was close enough in its primary characteristics to be analogous to a circumstance which the interviewee could understand.

TABLE 4

FEDERAL AGENCIES LIKELY TO BENEFIT
FROM A MEDIATION POLICY

AGRICULTURE (DEPT. OF)
- Agricultural Stabilization & Conservation Service
- Forest Service
- Office of General Counsel

APPALACHIAN TRAIL COMMISSION

NUCLEAR REGULATORY COMMISSION

COMMERCE (DEPT. OF)
- National Oceanic and Atmospheric Administration
- Regional Commissions
  - Coastal Plains
  - Four Corners
  - NERCOM
  - Pacific N.W.
  - Ozarks
  - Old West
  - Upper Great Lakes
  - Southwest Border Reg'l.

COUNCIL ON ENVIRONMENTAL QUALITY

DEFENSE (DEPT. OF)
- Army Corps of Engineers (Divisions & Districts)

ENERGY (DEPT. OF)
- Asst. Secretary for Environment
- State Energy Offices

ENVIRONMENTAL PROTECTION AGENCY (ALL)

HEALTH EDUCATION & WELFARE (DEPT. OF)

HOUSING & URBAN AFFAIRS (DEPT. OF)
- Asst. Secretary for Comm. Planning & Development

INTERIOR (DEPT. OF)
- Office of Env. Project Review
- FWS
- USGS
- BLM
- NPS
- HCRS
- Bu.Rec.& Reg.Off.
- Bu.Mines
- OSM

INTERNATIONAL BOUNDARY & WATER COMMISSION
(U.S./Mexico)

INTERNATIONAL JOINT COMMISSION
(U.S./Canada)

TABLE 4 (Cont'd)

DEPARTMENT OF JUSTICE
Land and Natural Resources Division

Pollution Control Section

NATIONAL ACADEMY OF SCIENCES
Commission on Natural Resources of National Research Council

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (?)

NATIONAL COMMISSION ON AIR QUALITY
(Advisory)

NATIONAL SCIENCE FOUNDATION

SMITHSONIAN INSTITUTION
Oceanography

Chesapeake Bay Center for Environmental Studies

STATE (DEPT. OF)
Bureau of Oceans and Intl.Environmental and Scientific Affairs

(Several)

TENNESSEE VALLEY AUTHORITY

TRANSPORTATION (DEPT. OF)
U.S. Coast Guard

Federal Aviation Administration

Federal Highway Administration

Urban Mass Transit Administration

WATER RESOURCES COUNCIL
River Basin Commissions (8)

A description of the interview at EPA may be an indication of the thinking which characterizes other federal agencies. Excerpts are included below, as are brief summaries on DOT, DOI, and Department of Agriculture.

Environmental Protection Agency

Awareness

The staff persons interviewed at EPA seemed well informed about the process of mediation and had already considered its applicability to EPA's disputes. Apparently several organizations and/or individuals have approached EPA with various suggestions for the application of the process.

In terms of specific experience with mediation none of the individuals present had participated in such an effort. However, Region X was mentioned as having explored the idea with the Office of Environmental Mediation at the University of Washington.

Applicability to EPA

The general observations about mediation included:

(1) (It) is a process which should be used selectively in special circumstances: (e.g., for projects where litigation is imminent.) (It) is a resource-intensive process in that it requires the presence -- over some period of time -- of a consistent group of representatives who can make decisions on the spot. In fact, the consistency of representation is one of the problems. A federal agency can commit the time of the public servant. But private groups, especially citizen or certain environmental groups, often cannot provide either consistent representation or a representative who can control or in any way commit the other members of the organization (if any.)

(2) Mediation lacks a certain dimension of reality. Decisions made over controversial issues are often determined by the political considerations of the situation and not necessarily likely to be submitted to a process which may require relinquishing actual or perceived authority.

(3) Solutions arrived at through negotiation and/or consensus may be ones that the agency lacks the authority to implement. Therefore, if a dispute is submitted to mediation the parties must look to the authorities available to implement the decision

(4) The use of mediation would have to be evaluated carefully because the potential for abuse is very high. Mediation represents an opportunity to delay agency decisions, and delay might be blamed on the possibility of submitting the dispute to mediation. An agency's "trump card" is elevating a problem to the Secretarial level; mediation might fall into that same category.

More specifically, some comments were made on where mediation would/would not be useful:

(1) Mediation would not be appropriate for interagency disputes; it might be more useful in public agency v. private interest settings. (This point came up in the context of EPA's reviewing capacity of other agencies' projects and also in the context of number four above -- once a dispute has been elevated to the Secretarial level, mediation would be an unlikely approach to use at that especially political stage.)

(2) In the private interest public agency setting, one needs to consider carefully the nature of the "Federal handle" in a dispute. In certain cases federal involvement may be strictly limited to evaluation of a specific proposal, such as the one in the issuance of permits. Depending upon the role of NEPA in a particular circumstance, the federal government may or may not be in a position to urge the consideration of alternative sites not proposed by the applicant. (Reference was made to Hampton Roads Oil Refinery and the various roles of the Corps, Secretary of Interior, Secretary of the Army, EPA, local interests, etc.)

The point seemed to be that the issuance or non-issuance of a permit might not be the proper basis for instigating a mediated solution to a dispute which probably has more fundamental problems.

(3) The examples which came up as possible areas suitable for mediation tended to emphasize situations in which EPA was in the background, i.e., had no major stake in the outcome, or where the problem was primarily a local one. The examples included:

(a) Construction grants program for waste water treatment plants. In these cases, the problem is often around local disputes over capacity requirements, type of facility, desired location, etc. EPA has "control of the purse strings" and is under pressure to distribute the grants and see that water quality goals are met. However, it is often the persistence of local disagreements which have delayed planning and construction of waste water treatment plants. An uninvolved party might help to resolve some of the local issues without significant participation by EPA.

(b) Circumstances in which EPA or another federal agency has a permitting function but the dispute is basically between the interest applying for the permit and other local interests -- again EPA is in the background.

(c) Use of mediation as part of the A-95 Review process. In locations where the concept of "local clearing house" is more than a paper processing activity, mediation could be instituted as a tool for resolving disputes.

(d) Other local trade-off decisions. Comments were made that mediation might be a suitable mechanism for helping local areas make planning decisions for such issues over which EPA has oversight responsibility such as: sludge disposal sites, decisions on configuration of sewer/water/highway infrastructure to support location/growth, growth of subdivisions, etc.

Institutionalization

The EPA staff interviewed was unable to comment on the process of institutionalizing - either in terms of policy for the agency or an administrative process physically located either inside or independent of the EPA.

Department of Agriculture and Department of Interior

There are vast tracts of land managed by these two agencies. It may be that they should be the most frequent users of mediation. The National Park Service Workshop on mediation* has suggested that land use/management may be the most comprehensible area for the mediation approach to be tried because the resource is one for which a number of alternatives are possible. However, during two years of exposure to the concept it has been tried only three times: twice by the National Park Service (DOI), and once by the Bureau of Land Management (DOI). A resolution procedure was

* Sponsored by the Resource and Land Investigations Program, U.S.G.S. Department of the Interior and the Council on Environmental Quality.

also tried by the Forest Service (Department of Agriculture) in conjunction with its RARE II evaluation, but while it used third parties to orchestrate the meetings of the parties at interest, the process was more in the nature of support-generation.

In these two agencies the concept of mediation may have become more difficult to react to explicitly, because through the AAA project, mediation has been only one of a number of conflict resolution processes to which the various bureaus, services and offices have been exposed. Before it was clarified that mediation was one specific, relatively formal approach, various attempts at conflict resolution were referred to as "mediation." Thus, the Department of Interior, which has devoted the most time and energy to the exploration of mediation (among other techniques), is probably more confused and continues to be quite hesitant (with the exception of the Park Service) to try the approach, even at an experimental level.

Department of Transportation

Recently FHWA contracted with the Federal Mediation and Conciliation Service for a series of workshops on mediation. The workshop was oriented to providing mediation training for state FHWA staff who are confronted with frequent challenges to FHWS transportation initiatives.

In spite of this isolated effort on the part of FHWA, however, DOT staff in the Environmental Review Office fell into the "thoughtfully skeptical" category with regard to federal involvement in formal mediation ventures. They have not specifically commented on the "institutionalization" of the process. The applicability of mediation to DOT's environmental disputes, even if sanctioned within the federal government, would appear to be most promising in two areas: (1) at the local level represented by I-90 dispute in Washington State (mediated by Gerald Cormick*) where a complete stalemate had been reached over a portion of the highway, and (2) at the intra-agency level as a result of an inconclusive EIS process. The latter circumstances are subject to conditions similar to EPA's "trump card" of elevating a difficult, often highly politicized decision to the Secretarial level.

If past experience is any indication, DOT could develop detailed procedures for entering into mediated settlements, but would avail itself of the process only in rare circumstances, if ever.

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* Office of Environmental Mediation -- University of Washington Seattle. The disputed portion of the highway ran between I-405 and I-5. The parties involved included cities of Seattle, Mercer Island, Bellevue; King County; and Washington State Highway Commission. See further discussion of legal challenge in Chapter Five, Page V-18.

These excerpts provide an indication of attitudinal levels at different agencies. If the final version of this document can be circulated then responses solicited will be premised on a common base of information and more consistently useful.

The interviews represented here (see Table 5) and many other discussions with individuals in and out of the federal government consistently raise the issue of "legal issues." This next chapter goes into a discussion of that particular perspective. Its purpose is to stimulate further discussion and also to help rationalize concerns and remove misconceptions that have become associated with mediation discussions.

Table 5

LIST OF INTERVIEWS

FEDERAL AGENCIES	INDIVIDUALS
Council on Environmental Quality	Nicholas Yost, General Counsel Foster Knight, General Counsel's Office
Department of Agriculture U.S. Forest Service	Barry Flamm, Coordinator, Office of Environmental Quality Activities
Department of Interior National Park Service	David Watts, Assistant Solicitor for NPS
Fish and Wildlife Service	Joel Pickelner, Office of the Director, Legislative Division
	Raphael Semmes, Assistant to Director, Office of Policy Analys
Department of Transportation FHWA	Michael Lash, Director of Environmental Planning
Environmental Protection Agency Office of Environmental Review	William Hederman Peter Cook Joseph McCabe
Federal Mediation and Conciliation Service	Jerome Barrett, Director of Professional Development Hal Davis Ed Hartfield
Federal Trade Commission	Lemuel Dowdy, Director of Minor Dispute Resolution Section
Health, Education and Welfare (Mediation provisions for implementing Age Discrimination Act)	Bayla White, Director, Age Discrimination Task Force, HEW

NON-FEDERAL AGENCIES	INDIVIDUALS
Home-Owners Warranty Program (HOW) (Magnuson-Moss Act)	Benjamin Herbert, Assistant Director of HOW
U.S. District Court, Southern District of New York	Judge Abraham Sofaer, (formerly Columbia Law School)
U.S. Senate	Ed Sheets, Special Assistant to Sen. Warren G. Magnuson
Yale University School of Forestry	Charles Foster, Dean (formerly Secretary of Environmental Affairs: Massachusetts)

Chapter Four

GENERAL LEGAL CONCERNS AFFECTING THE USE OF ENVIRONMENTAL MEDIATION

Introduction

The institutionalization of environmental mediation in the federal government poses a basic legal and public policy problem. The problem is that of reconciling the need for efficient, inventive, and creative governmental problem-solving with the need for legally adequate agency decision processes. Although this issue has not been clearly articulated in the literature on environmental mediation, it will be the central concern of this chapter.

Five Major Legal Issues

(1) Procedural Fairness

One of the central precepts of Anglo-American legal thinking is the notion of due process of law, i.e. that certain principles of fundamental procedural fairness are inviolable. These principles involve the opportunity to be heard in decisions that affect a party's rights. Increasingly, procedural fairness has come to include the right to a formal, trial-type hearing involving the right to cross-examine opponents. This is felt to be the best way to arrive at the "truth". Adversarial confrontation is the basic legal model for discovering facts which must be known for an intelligent

decision to be made or for a dispute to be resolved fairly.*

In 1946, the Administrative Procedure Act (APA) established the current framework for administrative decision-making. It outlined highly formal procedures for "adjudicatory" types of proceedings, less formal procedures for "rulemaking" proceedings, and remained silent on the issue of appropriate procedures for other types of agency action. In recent years the APA has been embellished by a series of court decisions which prescribe increasing degrees of procedural rigor in the administrative process. These court-made rules were created largely to correct abuses in the ways that agencies have handled their public responsibilities by favoring private interests. Paralleling and influencing these court decisions have been a series of amendments to the APA that increase the amount of openness and public accountability required of agencies, e.g. the Freedom of Information Act, Government in the Sunshine Act, Advisory Committee Act, etc.

As Congress and the courts have tried to correct the abuses of agency discretion by imposing more procedural requirements, agency flexibility and efficiency have suffered. There are increasing numbers of "hoops" to jum through before an agency can take action. If it fails to complete some of the formalities in particular cases, it risks the

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* Note that the "confrontation" model of truth discovery is at variance with modern scientific notions of knowledge, which are also supposed to be the basis for rational agency decisions.

possibility of reversal by a court. Agencies are therefore understandably reluctant to engage in processes that are not explicitly authorized or prescribed by existing law.

Mediation, generally characterized by informality and ad hoc problem-solving, is a process that can easily run afoul of administrative procedure requirements. There are therefore two alternatives: (1) to liberalize the procedural requirements in the context of mediation ("closed mediation"), or (2) to design a mediation process in such a way that it remains in compliance with the requirements of procedural regularity ("open mediation"). It should be noted that achieving changes in the procedural requirements would involve considerably more difficulty than trying to operate within the existing procedural framework. Perhaps some type of middle ground between these alternatives could be devised. The important procedural principles of providing an adequate opportunity to be heard and accountability for decisions must be preserved in any such compromise solution.

A general principle guiding administrative procedure is that the more that is at stake, the greater the formality of the proceedings ought to be. This suggests that more closed forms of mediation are best practiced in small-scale "low stakes" disputes where parties can be brought together informally to settle their differences. As controversies increase in scale, more is at stake, and typically there are more formal procedures that must be followed. Attempts

to mediate these kinds of controversies will always be more difficult, but the potential benefits may also be much greater.*

A federally sponsored mediation service should be sensitive to the issues of procedural fairness and should provide guidance to mediators. It could select mediators with a view toward matching the scale of the dispute with the necessary degree of concern for and understanding of administrative procedure by the mediator. Smaller scale disputes are likely to produce the best track record for mediation success stories, in part because they are least likely to conflict with the requirements of administrative procedure.**

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* It is fairly clear that open and formalized forms of mediation must be used in such cases if the rights of the parties are to be adequately protected and intervenors are to be heard. In many of these cases decisions must be made by public officials in compliance with specified legal standards. The standards range from the vague "substantial evidence" rule of administrative law to certain pollution controls standards developed on the premise that the protection of health and welfare should take precedence over economic considerations, to specific numercial standards for emissions limitation.

** Since mediation has almost always been presented as an alternative to litigation, the possibilities of a creative interplay have often been overlooked. There is no reason why, in a dispute with high stakes, formal administrative proceedings or litigation could not be coupled with an open mediation process designed to resolve those aspects of a conflict that are mediable, possibly leading to a compromise solution that a judge would approve in a consent decree or permit as an out-of-court settlement. In litigation, out-of-court settlement is frequently as important as what occurs in the courtroom. Many judges often will attempt to encourage parties to settle out-of-court, sometimes referring a case to a master or a magistrate for a type of mediation process.

(2) Protection of Substantive Rights and Standards

An important difference between environmental mediation and the resolution of disputes between private parties is that frequently environmental cases involve an underlying public interest which cannot be negotiated and compromised in the same way as private rights. Government officials and public interest groups frequently act on behalf of interests which either cannot legally be compromised, or are so diffuse that there is no way for those protected to indicate what is an acceptable compromise.

Thus the large amount of private bargaining characteristic of small-scale disputes, private conflicts, and labor-management disputes may not necessarily be an appropriate way to deal with public interest concerns.* In

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** (Cont'd)

A federal mediation service could become involved in cases that are in formal proceedings or litigation, where the efficient dispute resolution services of the mediator can be overseen by a judicial officer capable of assuring the procedural fairness of the process. Such an interplay between mediation and litigation could represent an important step forward in the institutional reconciliation of the ideals of efficiency and legality.

* Even in labor-management cases, there is now a new issue which gives them more of the complexion of environmental mediation, i.e. the President's anti-inflation guidelines. Matters which were strictly between the company and the union have taken on a public-interest dimension, such that a negotiated settlement which vilates the substantive standards of the wage-price guidelines may not be legally permissible. This public-interest dimension is new in the labor mediation field, but it has been an important feature of environmental disputes from the beginning.

environmental cases, there are frequently one or more types of specified standards that must be met by government decision makers, e.g. substantial evidence, health and welfare, and numerical emission limits. These kinds of standards are negotiable only to a certain degree. Environmental mediators and the participants in the process must be aware of when such standards come into play and must respect their non-negotiability. Thus, if the "substantial evidence" rule requires that confidential communications by and agency official are impermissible, that principle should be borne in mind in conducting the mediation.

It seems inescapable that the compliance with both procedural and substantive standards of fairness and maintenance of environmental quality requires access to legal advice for a mediator. The legal constraints on the environmental mediation process are such that legal advice will be necessary to tailor the mediation process to the scale and type of dispute in question, in order to permit the mediator maximum flexibility within the constraints prescribed by law.

(3) Potential Prejudice to the Rights of Parties

One of the legal drawbacks to bargaining in good faith is that positions advanced as possible compromises, or admissions made about factual circumstances, could be used against a party in subsequent administratvie proceedings

or litigation. This is true of any negotiating situation, not just mediation. The only circumstance in which this type of problem is less severe is when settlement processes are occurring in anticipation of or in the context of litigation. Under such circumstances, offers of settlement or compromise are usually inadmissible as evidence. Thus, ironically perhaps, in some situations litigation provides the safest context for parties to engage in bargaining.

Mediators prefer, if possible, to have the parties agree that statements made in the process of mediation will not be used in subsequent litigation. However, such agreements are probably not enforceable, particularly if another person who did not participate in such an agreement seeks to compel the testimony of the mediator or of a party to the mediation.

Since statements made in the course of mediation may be used later in some circumstances, parties will feel less free about bargaining in good faith. They will advance strategic bargaining positions and will play "close to the vest" rather than laying their cards on the table. Here again, environmental mediation differs from labor or community mediation because in those cases litigation is typically not a readily available alternative form of conflict resolution. Therefore, with no threat of subsequent litigation, parties have more incentive to be open in their discussions.

(4) Mediator Confidentiality

Central to any closed form of mediation is the protection of the mediator from attempts to compel him to testify about what he has learned about a dispute from the parties. He has usually assured them that he will keep their statements confidential, and they have relied on such assurances in admitting items that could be prejudicial. These admissions, however, may be very useful in facilitating the resolution of the conflict. Under present law in most states, there is no guarantee that a mediator's assurances of confidentiality would be honored by a court. In fact, if a mediator gave those assurances and a party relied on them to its detriment, the mediator could conceivably be held liable for the harm incurred by the confiding party. Thus, a mediator should at least protect himself by limiting his assurance of confidentiality to that permitted by law, rather than giving an unqualified assurance.

One of the few court cases to arise on this issue occurred recently in the state of Washington where Gerald Cormick, a well-known environmental mediator, was asked to give a deposition concerning the mediation of a highway dispute in which he was the mediator. He resisted the attempt to compel him to reveal information given in confidence. He was upheld by the federal court. However, this case must be viewed as a limited precedent, particularly since the court relied on a local rule of court that requires mediation

in civil litigation and affords some protection to a mediator who obtains information in confidence in particular instances.* The adoption of such rules around the country or the passage of statutes assuring mediator confidentiality would solve the problem of the current legal uncertainty over mediator confidentiality.

Before such protections to mediators are afforded on a wide basis, the question of their justifiability should be faced squarely. The challenge to Cormick's claim of "mediator privilege" was based on the public interest in knowing how a government decision is made, to assure that all important public interests are taken into account. In the Washington highway case, low-income citizens were challenging the settlement reached by a mediation group comprised largely of state officials and representatives of suburban communities affected by the highway alignment. The low-income persons claimed that inadequate consideration was given to their needs. They wanted to know what was said in confidence tc the mediator because it might bear on their concern that

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* An earlier example:

> A Florida Small Claims Court held that "No employee of the Citizens Dispute Settlement Program shall be compelled to appear in Small Claims Court to testify as to matters learned through his or her employment at the Citizens Dispute Settlement Program." The decision of Judge Howard H. Whittington was in response to a motion to Quash Subpoenas filed by Lynn H. Ball, program director in Francis v. Abben, County Court of the Sixth Judicial Circuit of the State of Florida in and for Pinellas County, Civil Division 78-0008-46, decided March 6th, 1978.

their interests were left out of the decision process. Whether or not they are right in their legal claim, the possibility exists that some significant portion of the process might have occurred outside of public view, where they had no opportunity to challenge the decision. This example points to the need for open mediation processes when substantial and divergent public interests are at stake. Here, the proceedings were quite open, even televised, yet the attempt to assert a confidentiality privilege served to arouse suspicion, and was held to be legal largely because of an unusual court rule in the locality.

As suggested earlier in this chapter, the typical multi-party, multi-issue dispute found in environmental mediation lends itself to an open process in which the mediator does not offer any guarantees of confidentiality. Even if they are not challenged legally, such guarantees may engender suspicion. On the other hand, in a smaller scale dispute with clearly defined boundaries and few parties, a mediator who can win the mutual trust of all parties could use a limited assurance of confidentiality to advantage in facilitating a settlement.

In order to create any kind of broader statutory or regulatory protection for a mediator, standards must be established to make clear when a person qualifies as a bone fide mediator, and what, if any, types of communications would be exempt from protections from disclosure. For example, it would probably be unconstitutional for a mediator ever to withhold information which could have a direct effect on a defendant in a criminal case. That is an extreme example

of a situation in which a public interest in justice far transcends the interest in efficient dispute resolution represented by mediation. There are other, less clear-cut situations--they all must be considered in the formulation of any rule protecting mediators from having to reveal information.

Distinctions must also be made concerning the disclosure of information in the course of trial, pre-trial discovery, and administrative proceedings. It is much easier to keep evidence out of a trial than it is to prevent discovery of evidence at the pre-trial stage, since the standards for discovery (depositions, interrogatories, requests to produce documents and notes, etc.) permit a court to order the disclosure of information that might tend to lead to evidence which would be admissible at trial. This more liberal standard makes resistance to attempts at discovery more difficult than at trial. The Cormick case mentioned above occurred in the context of pre-trial discovery. The standards in administrative proceedings are even looser, since they do not follow the traditional exclusionary rules of evidence. They also vary widely according to agency practice.

The issue of mediator confidentiality leaves many unanswered questions, both about whether it is a legally enforceable concept and whether or not is a categorically good thing. Here again, legal advice may be necessary for a mediator to carry out his responsibilities appropriately and to protect the rights of parties and the public interest.

(5) Legal Challenges to Mediated Settlements

Mediated settlements of environmental disputes will always be subject to challenge by parties who have not bound themselves to the settlement. Typically, many such parties will exist. Where a dispute is very small, it is possible that all significantly affected parties will agree to the settlement. Where it is large, a good settlement will tend to discourage potential litigants from challenging it, since they may not have a great deal to gain. However, if their objective is to win at all costs, then challenge will be likely.

One way to insulate settlements from challenge is to institutionalize them in such a way that they become official agency decisions that are binding on the public as long as appropriate fair and open procedures have been followed. This is the objective of the new NEPA regulations. Many other agencies involved in disputes have established procedures giving parties substantial opportunities to participate in formulating the resolution. The resolution is ultimately decided, or approved, by the "responsible" government official, and will stick as long as correct procedures have been followed. There is no reason why mediation should not be used frequently in formulating these institutional agency decisions, since the decisions will tend to enjoy more credibility and consensus among the contending parties due to a sense of meaningful participation.

In the context of litigation, settlements reached and approved by a judge after an appropriate opportunity for all affected persons to comment can also be immune from legal challenge. Here again, an official legal procedure, conducted in the open with procedural safeguards, helps guarantee the legal viability of the settlement.

Mediated settlements which do not enjoy the benefit of either an official agency decision or a court approval, will be much more susceptible to legal challenge. Whatever else a settlement may be, legally it is a contract, and subject to all of the rules of contract law. The principal problem is that a contract generally cannot bind parties who have not assented to it. Further, a contract which conflicts with some provision of statutory, regulatory, or constitutional law is usually legally invalid, at least with respect to the provision with which it conflicts. Thus all parties may agree that if a power plant stack emits x ppm of NO_2 it is acceptable because the utility is providing some important other benefits. However, if the regulatory standard for NO_2 is x minus 1, the agreement is probably not valid. Of course, if the regulatory agency were brought into the mediation and went through a formal legal process of granting an exception to its emissions limit, then the institutional decision of the agency would make the settlement valid and binding on everyone, not just the parties to the mediated settlement.

Attitudes of Practicing Lawyers Towards Mediation

Public Interest and Private Sector Lawyers

Generally, as the direct antagonists in environmental conflicts, private lawyers like to think that they can win their cases. Even if they cannot, they want to use the leverage of adversarial proceedings in order to extract the best bargain for their clients that they can. While there is no reason, in theory, why some types of mediation could not facilitate the bargaining process, the notion of mediation appears to trouble many private lawyers. This is partly because mediation is not well understood, and is frequently confused with arbitration. Also, mediation as practiced in labor disputes is a closed form of dispute resolution which may appear inappropriate for complex environmental disputes. There are, however, other important legal reasons why private attorneys may be leery of entering into a mediation process.

Frequently, cases are won or lost primarily on procedural grounds, in which lawyers have a monopoly on training and understanding. Mediation is an attempt to get parties to negotiate over the merits of the dispute, freed from the constraints which a confusing procedural system often imposes. While this may be salutary from the point of view of societal problem solving, it may be threatening to the power of lawyers in influencing social decisions. It is also very difficult for a layman to know when an attorney is belaboring a legal

technicality and when he is asserting what may be an important legal right or an essential aspect of due process of law.

Other more specific objections private lawyers might have to environmental mediation involve the concerns expressed elsewhere that disclosures made in the course of mediation could be used against a party, a fear that the mediation process will simply further lengthen already drawn out proceedings, and fears that mediation might involve informal "deals" that could compromise important legal standards or be overturned because they lack the formal processes which the legal system equates with fairness and due process.

An Agency's General Counsel

The general counsel of an agency is primarily concerned with protecting the legitimacy of his agency's action. This results in a natural procedural conservatism. If a particular procedure has worked in the past and has not been overturned, the general counsel's office will tend to favor it over any novel kind of procedure. This conservatism will increase if more agency decisions are overturned for procedural inadequacy. The general trend in administrative law is to require increasingly formal agency processes and to minimize the use of informal agency action. Therefore, unless statutory protection were created for closed mediation processes, it is likely that they would be resisted by the general counsels of the various agencies.

However, open mediation processes would be acceptable from a legal point of view, although practically they might delay agency decisions. A well designed open mediation process which permits the participation of all parties and requires a written justification for a particular mediated settlement could protect procedural and substantive rights of all parties and also insure reasoned agency decision making.

There is widespread dissatisfaction with the increasing layers of formality which courts have imposed upon agency action. Amid the cries for regulatory reform and streamlining of agency procedures, it would seem that mediation would be a sensible way to achieve certain important goals without sacrificing rational agency process. Therefore, the reluctance likely to be shown by the general counsel of an agency might be overcome by a clear legislative initiative which makes mediation an important part of a streamlined regulatory process, and which guarantees as much procedural due process as is legally appropriate for resolving specific environmental conflicts. This approach reflects half of the "institutionalizing" requirement by giving official sanction to the process.

Attitude of the Justice Department

The Justice Department has, as its primary responsibility, acting as counsel to the federal government, and defending lawsuits against the government. The Justice Department,

like the agency general counsels, is therefore concerned with procedural regularity. Like the private bar, it is also concerned with winning its case. Many of the same resistances discussed above are likely to exist within the Justice Department. Nevertheless, if specific agencies can find applications for mediation, the Justice Department could be most helpful in designing the parameters for its use.

Conclusion

There are many legal constraints on the practice of environmental mediation. If the art of mediating environmental conflicts is to flourish, these legal constraints must either be carefully observed or changed through legislation. The ideals of efficiency and legality must be carefully weighed and balanced if an institutional structure for environmental mediation is to emerge successfully.

Any significant deviations from standard agency practice will be difficult to implement unless explicit authorization for mediation is created, such as that embodied in the National Labor Relations Act for labor disputes. Attempts by mediators to "get around" the legal constraints on mediation are doomed to fail since there are many lawyers who can successfully challenge an inadequate mediation process.

This chapter has highlighted some of the most important legal problems posed by mediation of environmental disputes in which federal agencies are significant parties. More

open forms of mediation can be tried now, since they involve little or no change in the law. The can use the existing framework for decision making more creatively than has been done in the past. Forms of mediation that are based more nearly on the closed forms of bargaining characteristic of labor mediation are much less practicable under existing law and may or may not be desirable. However, there is room to work toward a middle ground that permits more flexibility in conflict resolution than currently exists, while protecting significant public interests in fair process, open government, private property, environmental protection, and social justice. Where the balance should ultimately be struck will have to emerge from a debate which squarely addresses the conflict between the ideals of legality and efficiency.

Chapter Five

REVIEW OF MEDIATION AND NEPA

Introduction

Since NEPA-related litigation is in part credited with stimulating the interest in mediation, the two are often discussed in tandem. Although mediation of environmental disputes is not necessarily limited to use within the NEPA context, some consider the procedural nature of the Act and its regulations a natural partner to mediation. This potential partnership has been questioned as will be discussed below.

NEPA Regulations

At various times during the study suggestions were made regarding the use of mediation and the implementation of the NEPA regulations issued in the fall of 1978.* These included:

- Adding a provision for the resolution of disputes prior to any judicial review essentially an effort to bolster Section 1500.4.
- In lead agency circumstances: assist the lead agency in sorting out issues among the cooperating agencies (1501.5, 1501.6).
- Incorporation of a mediation initiative in agencies' own regulations regarding the management of the scoping phase of an environmental impact statement (1501.7).

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*Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act: 43 FR 55 978 - 56007, November 29, 1978, 40CFR Parts 1500-1508.

These suggestions regarding points of application for mediation within the NEPA regulations have been considered sporadically by Council staff over the last twelve months. For the present, all three have been abandoned because of the prevailing view that many of the basic principles of mediation are already embodied in the NEPA regulations. These principles include the involvement of all parties with a legitimate and specific interest in the outcome of a decision on actions/projects requiring EIS's, giving such parties leverage to make meaningful contributions at a critical point in the decision-making process. The view is premised on the assumption that if federal officials were to employ and support the use of mediation principles as a matter of course, there would be no need for outside third party neutrals to guide any particular aspect of the NEPA regulations.

Scoping

The most persistently discussed of the three applications noted above has been the use of mediation in the scoping process.* This suggestion has finally, however, evolved into the consideration of a much broader set of conflict resolution approaches which fall into a more general planning context (meeting facilitation, conflict "anticipation" and others).

*The Massachusetts Environmental Policy Act - G.L. Chapter 30 §61-62 which patterned after NEPA, contains a reference to the use of mediation in its scoping provisions.

The broader view has come from CEQ's efforts to develop ideas for advising agencies on methods of structuring each agency's approach to the scoping process. At one time, the use of mediation was viewed as having considerable potential in that context. More recently, CEQ staff and others have recommended that since scoping is to be implemented as soon as the decision is made to develop an EIS, it appears more appropriate to employ meeting facilitation and consensus building approaches which are less directed at resolving a head-on impasse. Further, since the regulations have been in effect for less than six months, the body of experience in the practical application of the scoping phase is still limited.

Conclusion

Mediation has not been eliminated as a process to be institutionalized under NEPA. (Alternative Three in Chapter Two and the discussion in Chapter Four still treat it as a possibility.) However, more experience under the new scoping process will provide a better basis for noting the type of disputes which will persist under NEPA and then become candidates for mediated solutions.

In the meantime, if any of the approaches in Chapter Two are considered viable, agencies will undoubtedly confront situations in which the dispute to be mediated has been generated during the NEPA process. Mediation should not

automatically be eliminated because of the relationship. This chapter simply reflects the view at CEQ that NEPA should not be the driving force behind the institutionalizing of mediation.

Chapter Six

CONCLUSIONS AND RECOMMENDATIONS

Introduction

In view of the rapid growth over the last year of existing centers for mediation and proposals for establishing others, the following recommendations are put forth in order that federal agencies may be in a position to respond to or initiate mediation themselves.

1. The Council on Environmental Quality or another appropriate agency should draft at a minimum general guidelines for federal agency participation in mediation.

2. Each agency listed on Table 4 should develop its own policy toward mediation and should do so in line with those initiated in #1 above.

3. These agencies should review this report (in some form) and respond as to their preference regarding federally funded and administered service (Alternatives #1 - #4).

4. The Council on Environmental Quality or some other appropriate agency should obtain a statement from existing and proposed mediation centers regarding their policies, guidelines, expectations and interests toward federal agency participation in disputes which they mediate.

5. Following the execution of the above, a decision should be made through an interagency Task Force organized by CEQ regarding what, if any, experimental alternative should be undertaken.

It is the conclusion of this document that the first and second recommendations are essential in order to apply mediation concepts to practical problems and to avoid confusion over what mediation can and cannot do. From information gathered in the first three steps the Executive Branch or the Congress could seek to develop specific frameworks for applying mediation in general or in experimental ways. If CEQ selects to go forward with #5, then it probably would not do so before a set of criteria for success has been developed. This paper does not purport to evaluate the long range success of mediating numerous environmental disputes; it does however, maintain that (1) a conscious distinction be made between sound planning practices (where conflicts are dealt with throughout the process) and the dynamic and high pressure setting of mediation (which is applicable is the former has failed), and (2) a clear decision to enter mediation should be made on an informed basis to avoid misunderstandings and substantial confusion.

Development of General Guidelines

The disputes which could be submitted to mediation as far as this paper is concerned are those in which federal agencies are one of the parties (in their capacities as regulators, funders, reviewers, managers, guardians, initiators or policy developers). Thus, the guidelines should focus on the implications of that characteristic. The very participation of a federal agency gives rise to a problem of decision

making authority. That is, who in the final analysis is legally responsible for the solution to the dispute. Because of the federal role, there is often a statutory responsibility to be fulfilled that gives the federal agency represented at the problem solving table the authority to make the decision. The agency is accountable and therefore vulnerable to any further challenges to the solution that is reached.

Federal agencies also have difficulties which stem from the case by case characteristic of mediation. The consequence of mediated solutions is that the federal agency involved is potentially subject to charges of inconsistency in, for example, its enforcement of air quality standards, or its implementation of different policies toward visitor use in National Parks, or mineral development on some Forest Service lands and not on others.

Thus, the development of the guidelines depends upon a willingness to accept the hypothesis that solutions to disputes will be different. Further, there must be the conviction that the differences are in the spirit of the current emphasis on broad public participation in decision making regarding environmental controversies.

The guidelines should be drafted in such a way as to encourage the consideration of mediation as a tool to resolve specific, well defined controversies where prolonged administrative or legal proceedings have been or are likely to be inconclusive. Agencies should be given some guidelines as to the type of authority vested in the individual appointed

to represent the agency and that agencies need to specifically acknowledge the flexibility which many of them do have in carrying out their own mandates.

The guidelines would exist to provide all agencies with a basic guide but to leave specific policy development and implementation to each agency.

Agency-Specific Policies Toward Use of Mediation

The purpose for the umbrella guidelines is to develop a consistent starting point. In the long run, however, it will be most important for each agency to have its own version. The "mediation" efforts which have already been attempted did not involve an agency-wide policy. Since the Fish and Wildlife Service, the National Park Service, and the Bureau of Land Management (all at DOI) are experimenting with their own variations of mediation, some clarifying information may be helpful for future efforts. (See Appendix B for descriptions of the specific efforts.) For example, sample written agreements and descriptions of the skills and position of the agency's negotiator could be circulated.*

Agency Review of Reports

If CEQ or some other federal agency decides to go further than recommendations (1) and (2), then all

*In the Acadia National Park mediation, the NPS negotiator was from the Park Service's Director's Legislative Office. He had the approval to commit the Park Service to an agreement partially because he was aware of most of Park Policy and knew the boundaries within which he had to work.

appropriate agencies can be provided with copies of this report. They can comment systematically on their own views regarding the alternatives suggested and simultaneously become more informed about the interest in the subject.

Survey

Appendix B includes the addresses of the centers which may be contacted if the survey suggested is pursued. The appendix is also a source for potential mediators. It should be noted, however, that this list includes individuals and organizations involved in conflict resolution approaches which are much broader than mediation, the subject of this paper.

Interagency Task Force

Interagency coordination and participation would be useful though not necessarily essential to organized experimentation with mediation. Although such task forces may be relied on too heavily for efficient exchange of information between agencies, the existence of a knowledgeable and reliable core group of agency representatives, could be a key element in promoting and/or evaluating the use of mediation. If such a task force is created, its members (approximately 8 to 10) should come from agencies which have already had experience with decisions in which considerable public involvement has occurred but in which disputes still persisted. The reason is that a mediation experiment in the federal government

should not be considered a substitute for nor a precursor to an active public involvement program. Rather, mediation would most probably be used after enough public comment had been heard to permit the identification of the real issues, the appropriate parties, and some range of possible solutions.

Task force members should be provided with a thorough briefing on all aspects of mediation as it has been considered in the resolution of disputes with an environmental dimension. Participation should be premised on:

- a thorough knowledge of each member's agency's decision-making procedures,
- the current effectiveness of dealing with constituent groups who have taken an active interest in the agency's programs or function, and
- experience in agency programs and ability to contribute specifically to the experimental design of the preferred alternative from Chapter Three.

Conclusion

The authors have heard opinions from a wide range of interested parties -- some of whom recognized that federal agency involvement in mediation posed some peculiar problems. There was often a sentiment shared that to "bureaucratize" the process was to kill it. However, if mediation is to be encouraged or ever used some organization and regimentation will be necessary.

We are doubtful that a sufficient number of disputes will be submitted to mediation (even if recommendations (1) and (2) are implemented) to warrant a broad scale

experiment. But a limited one, patterned after Alternative Two (Administratively Centralized/Geographically Decentralized) would be worthwhile particularly for generating data on federal involvement expediting the process where necessary.

APPENDIX A

BIBLIOGRAPHY ON ENVIRONMENTAL MEDIATION AND RELATED TOPICS

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APPENDIX B

COMPILATION OF PROJECTS

AND REGIONAL CENTERS

FROM

RESOLVE CENTER FOR ENVIRONMENTAL CONFLICT RESOLUTION

PALO ALTO, CALIFORNIA

Update

American Arbitration Association (AAA)
140 West 51st Street
New York, N.Y. 10020
212/977-2084
Donald Straus, Peter B. Clark,
Project Co-Directors

The AAA Research Institute and Clark-McGlennon Associates are currently investigating active disputes involving off-road vehicles, water reclamation, and surface mine planning. This work is sponsored by the Council on Environmental Quality, and the Resource and Land Investigation Program to help federal agencies use mediation and other techniques to resolve disputes. Copies of the Phase 1 report are available from Dr. Ethan T. Smith, RALI, U.S. Geological Survey, National Center, Mail Stop 750, Reston, VA 22092.

FORUM on Community and the Environment
540 University Avenue
Palo Alto, CA 94301
415/321/7347
Marjorie Sutton, Director

FORUM's work in helping develop strategies for mitigating the noise and traffic impacts of the San Francisco International Airport on its neighbors received a substantial boost when the Chief Counsel for the C.A.B.—who spoke at a recent project meeting—encouraged the airport to use economic incentives to help bring about a more equitable distribution of air traffic (and its negative impacts) among the three major Bay Area airports.

James L. Creighton
15415 Pepper Lane
Saratoga, CA 95070
408/354-6070

Mr. Creighton, founder of SYNERGY Consultation Services, a training organization for public involvement, is now involved in preparing public involvement manuals and designing public involvement programs. The courses include basic communication skills, such as active listening and congruent sending, facilitation skills, and recently, mediation skills.

Environmental Mediation International
Suite 801, 2033 M Street, N.W.
Washington, D.C. 20036
202/457-0457
Robert E. Stein, President

EMI is undertaking a survey to ascertain whether present or future environmental problems between Mexico and the United States are amenable to mediation. The project will be conducted by Susan Carnduff, of Clark-McGlennon Associates, as a consultant to EMI. The survey will involve interviews with officials in both the United States government and Mexico, to explore receptivity to mediation as a way of resolving environmental disputes between the two countries. Additionally, specific environmental disputes will be identified which would have the potential for such resolution. As a result of the initial survey, some of the specific disputes will be further analyzed and parties contacted, with a view to bringing the disputes to mediation.

Jane McCarthy
29 East Ninth Street
New York, N.Y. 10002
212/673-8463 or 212/977-4674

Ms. McCarthy, working under a Ford Foundation Travel and Study Award, will be working with parties to a long-standing dispute over boundaries and other issues at Acadia National Park to develop a jointly acceptable agreement on a Master Plan for the park. Bill Whalen, the director of the National Park Service, asked the parties to initiate the negotiations which began in August. If an agreement is made, it will be a prelude to Congressional legislation for Acadia.

National Coal Policy Project (NCPP)
Center for Strategic & International Studies
1800 K Street, N.W.
Washington, D.C. 20006
202/833-1930
Francis X. Murray, Director

The NCPP is currently addressing topics which were not successfully resolved during its 1977 first phase. A Special Task Force has been created to search for mutually acceptable policies to encourage cogeneration which has the potential for greater electricity and steam production from given quantities of fuel. However, various institutional barriers have prevented its full utilization.

Project leaders Laurence Moss and Macauley Whiting presented NCPP recommendations to the President's Special 60-day Coal Study. One of the main points made before the commission was that environmentalists and industrialists can jointly resolve some of their differences in a constructive manner rather than automatically assuming the adversarial stance for which they are commonly known.

Office of Environmental Mediation
University of Washington, FM-12
Seattle, WA 98195
206/543-6713
Alice Shorett, Bill Reynolds, Mediators

An agreement was signed between the Seattle International Raceway Parks Inc., the National Hotrod Association, and four communities surrounding the track. The agreement includes a reduction in track use for racing and practice, muffling of motorcycles, assurance of one quiet weekend per month, and enforcement of an event curfew. As part of the overall settlement, enforcement and monitoring actions were taken by King County and the International Racing Car Drivers Club.

ROMCOE
5500 Central Avenue, Suite A
Boulder, Colorado 80301
308/444-5080
W. J. D. Kennedy, Director

At the request of Plateau Resources, a uranium mining company, ROMCOE organized a meeting for company executives and representatives from citizen groups to discuss plans for a proposed uranium project and new town in southern Utah. Citizens participated in determining areas of discussion for the meeting which provided a nonconfrontational forum to exchange viewpoints and discuss specific issues.

Wisconsin Center for Public Policy
Environmental Mediation Project
1605 Monroe Street
Madison, WI 53711
608/257-4414
Howard S. Bellman, Director

A recent settlement by a Center mediator concerned commercial use of a flood plain wetland. A landowner had filled land which the Army Corps of Engineers, EPA, and Fish and Wildlife Service regarded as wetland. Through mediation, the agency representatives reached consensus on the area of land where development would be permitted: the landowner agreed to remove fill from the remaining area and reclaim it.

Other Center involvements concern a solid waste landfill operation which is in violation of state codes; court orders to clean up objectionable odors from a meat packing plant; a city which is seeking a variance from state orders to install tertiary waste treatment; and a Wisconsin lake which is threatened by possible elimination of a dam, located on private property in Illinois, which maintains the water level.

Projects —

Executive Office of Environmental Affairs
The Commonwealth of Massachusetts
100 Cambridge Street
Boston, Massachusetts 02202
617/ 727-5830
Raymond E. Ghelardi, Associate Planner

Under the "scoping" provisions of the recently amended Massachusetts Environmental Policy Act, a "consultation session" was recently called by the Secretary of Environmental Affairs on a proposed hospital research center to be located in a dense urban setting within Boston. The proposed structure was to be 250 feet in height located in close proximity to a recently built 350 foot stack from a fossil fuel fired cogeneration facility. Community groups feared stack downwash due to aerodynamic features imposed by the new structure, but the hospital was loath to become embroiled in any study of the matter. Subsequent to the session and its suggested scoping requirements, a middle ground was negotiated which provided for study of the matter in an EIR, but not extensive wind-tunnel or modeling exercises. The community groups and the project proponent are satisfied with the EIR scope, and analysis is now underway.

FORUM on Community and the Environment
540 University Avenue
Palo Alto, California 94301
415/321-7347
Marjorie Sutton, President

Community Attitudes Toward Urban Development
Through interviews and a survey of government officials, environmentalists, community activists, and members of the construction industry, FORUM will gather data regarding attitudes toward urban development and identify barriers to cooperative action in meeting community needs for housing.

Park Lands Conflict Resolution
To reduce potential conflict between park users, neighboring homeowners, and park managers at Castle Rock State Park, FORUM will help develop an interview format, train interviewers, and analyze results to identify specific park use problems and a strategy for resolving them.

San Francisco International Airport (SFO) Joint Land Use Study
FORUM is continuing to help SFO and its neighbors develop a mutually acceptable set of land use plans for the airport and the surrounding communities. Loss of sleep has been identified as one of the most serious disruptions of peoples' lives, and thus participants in working groups and community workshops are now analyzing the potential of a special "night flow" for airport operations that would require higher altitudes, quieter aircraft, and fewer flights over residential neighborhoods.

Stanford University/Palo Alto— Jobs/Housing Imbalance Dialogues
Participants in sessions facilitated by FORUM have identified and evaluated a list of all remaining sites for housing in Stanford and Palo Alto. In the interest of more sensitive land use planning, Stanford has completed resource maps of its lands, showing viewsheds, trees, slopes, and other natural features. Stanford is working with participants in the workshops to devise ways to open up its planning process to greater public involvement.

New Jersey Department of Environmental Protection
Division of Marine Services
Office of Coastal Zone Management
P.O. Box 1889
Trenton, New Jersey 08625
609/ 292-8262
David N. Kinsey, Chief

Hotel-Casino — Design Project

In Atlantic City, a 75 acre development which includes hotels with casinos, a marina, a pedestrian system, an open space network, and a set of parking structures is being planned. To build the complex, construction permits and approvals are required from several federal, state, and city agencies particularly the Atlantic City Planning Board, the New Jersey Department of Environmental Protection, the New Jersey Casino Control Commission, and the U.S. Army Corps of Engineers. The project involves extensive pre-application conferences with individual developers and frequent joint informal city-state-federal meetings, as well as formal public hearings to identify issues, avoid disputes, reduce delays, achieve agreements, and shape an acceptable design for the area.

Wisconsin Center for Public Policy
Environmental Mediation Project
1605 Monroe Street
Madison, Wisconsin 53711
608/ 257-4414
Howard D. Bellman, Director

The Center is mediating a dispute over air emissions from a Wisconsin meat processing plant. At issue is the level of emission control to be required of the company by the Wisconsin Department of Natural Resources.

Other disputes currently being investigated for possible involvement by the Center concern restoration of dams in two locations to maintain lake water levels; expansion of a solid waste landfill; and wetland conversion for a commercial use.

Office of Environmental Mediation
University of Washington, FM-12
Seattle, WA 98195
(206) 543-6713
Alice Shorett, Mediator
Verne Huser, Mediator

A long-standing and frequently heated dispute over the future of Paine Field, a county- operated general aviation airport in Snohomish County, Washington, was mediated to a successful conclusion. The agreement, signed on January 23, 1979, by the 13 parties to the dispute, was adopted the same day in a unanimous vote by the Snohomish County Commissioners who had requested the assistance of OEM in resolving the dispute. Issues included noise abatement procedures, future activities and facilities, citizen involvement in airport decisions, and the location of a proposed new runway. Copies of the agreement may be obtained from OEM.

Planning and Research for Urban Development
Rivkin Associates Inc.
2900 M Street, N.W.
Washington, DC 20007
202 337-3100
Malcolm D. Rivkin, President

A large regional shopping complex is planned for location near an older, deteriorating suburban business center. With an objective to establish the two as mutually-supportive, the firm, working for a private client, has brought together local government agencies and citizen groups to work toward a negotiated development. Thus far, the firm has prepared a concept plan for restoration of the business center that helped change the local government's commitment to complete clearance and redevelopment.

A multi-use office, hotel, and residential complex has been suggested for a key station on the Washington Metrorail System. Rivkin Associates is coordinating the development plan and approval process with local government and citizens.

Environmental Protection Agency
Office of Solid Waste
Public Information Office, WH562
Washington, D.C. 20460
(202) 755-9161
Carol S. Lawson, Director

In February, the EPA awarded grants to the League of Women Voters Education Fund, the Environmental Action Foundation, the National Wildlife Federation, and the American Public Health Association to work together to put on a series of regional training workshops on the Resource Conservation and Recovery Act of 1976 (RCRA). Issues under RCRA to be covered in the workshops, the first of which is scheduled for May 31-June 2 in New Orleans, include resource recovery, solid waste facilities siting, and hazardous waste management. It is expected that these regional workshops will be followed by state conferences utilizing the trained cadre of citizen leaders. The goal of this cooperative program is to create a network of information and exchange among all the parties concerned with solid waste issues.

Canadian Arctic Resources Committee
46 Elgin Street, Room 11
Ottawa, Canada K1P 5K6
D.J. Gamble, Director
Policy Studies

CARC has just begun a two year study entitled "Arctic Seas: Marine Transportation and High Arctic Development." The first symposium, to be held March 21-23, 1979 in Montebello, Quebec, will provide an overview of the following issues: science policy, social and environmental factors, the regulatory dilemma, and international developments.

Center for Urban and Regional Research
Old Dominion University
Norfolk, VA 23508
(804) 489-6514
Roger Richman, Ph.D., Principal Investigator

Working under a grant from the Virginia Environmental Endowment, a team of researchers from the Center and the University of Virginia is conducting conflict assessments of three specific environmental disputes in Virginia to determine the feasibility of their resolution through mediation. If positive feasibility is established, then expert mediators will be selected to conduct each mediation. One of the purposes of the grant is to determine whether or not the process is feasible throughout the state, and if so, to recommend an appropriate institution for future environmental mediations.

One dispute being assessed involves a water supply problem in the heavily populated tidewater area. One suggested alternative to meet future requirements involves interbasin transfer. This highly controversial alternative involves a complex set of environmental, economic, and political issues.

Another dispute involves a national forest in southwestern Virginia which has recently been designated as a national recreation area. Primarily wilderness up to this time, the forest and its proposed new use is the center of controversy among and between environmental groups, federal government agencies, and local citizens. Proposed developments include a scenic highway, a ski slope, a series of camping sites, and other facilities.

Environmental Mediation International
Suite 300
1717 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4333
Robert E. Stein, President

EMI was established in November 1978, and is now studying and analyzing the potential of mediation to resolve environmental and natural resource disputes between the U.S. and its neighbors (Canada and Mexico), western Europe, and the developing world. An international list of expert mediators is being compiled for use by potential parties to mediation efforts. Future plans include undertaking mediation of selected disputes and monitoring the results.

FORUM on Community and the Environment
540 University Avenue
Palo Alto, California 94301
(415) 321-7347
Marjorie Sutton, President

FORUM has completed a survey of Palo Alto and Stanford University leaders, who discussed their views on the jobs/housing imbalance in the area. A series of dialogues with representatives of the city, the university, and with community leaders is now being conducted. The purpose of the dialogues is to explore the possibilities for balancing jobs and housing, while preserving open space and enhancing the quality of life in Palo Alto and its environs.

FORUM received approval from the San Francisco Airports Commission in January 1979 to improve communication among all groups who are affected by the San Francisco International Airport. Included are 34 governmental agencies and many private and public interest organizations. FORUM has designed and is implementing a citizen involvement process for developing mutually acceptable plans for airport facilities, and an action plan for improving airport services while reducing negative impacts on people and the environment in surrounding communities.

Jane McCarthy
29 East Ninth Street
New York, NY 10003
(212) 673-8463 or (212) 977-4674

Ms. McCarthy, an experienced environmental mediator, has received a Travel and Study Award from Ford Foundation's Office of Resources and Environment to support her mediation services in the Northeast. A variety of disputes are being examined to assess their amenability to mediation.

Executive Office of Environmental Affairs
The Commonwealth of Massachusetts
100 Cambridge Street
Boston, MA 02202
(617) 727-5830
Raymond E. Ghelardi, Associate Planner

Approximately one year ago, the statutes governing the Massachusetts Environmental Policy Act were amended to require "scoping" of all projects to determine whether or not an environmental impact report (EIR) is required, and what impacts EIR's should address, if required. To implement this statute, the Secretary of Environmental Affairs in a consultation session, is to consider the points of all parties involved. These consultations have often proved to be informal mediation sessions, with project plans being modified during the meeting.

One project involved a proposed low income housing development in the suburbs of Boston. Local citizens were concerned that the project would cover up drainage swales and reduce wetlands storage areas. The developer agreed to re-site the structure and is now formulating an alternative design. It is expected that the new project will not require an EIR.

Wisconsin Center for Public Policy
Environmental Mediation Project
1605 Monroe Street
Madison, WI 53711
(608) 257-4414
Howard D. Bellman, Director

The Center's first case was a solid waste landfill siting dispute between a Wisconsin city and an adjacent town where the city planned to site the landfill. Disputants were three local governments, two State agencies, and three citizen groups. The agreement permitted the landfill, but with restrictions on mode of operation, provisions for town use, and a city commitment to compact waste within city boundaries.

Another completed case involved a sand and gravel operator, State Department of Natural Resources (DNR), Trout Unlimited, and a gas pipeline company in a dispute over the granting of a permit for a new pit and the degradation of abandoned sites. In the agreement, the permit was granted on the conditions that significant reclamation measures be taken and the public be granted access to a river.

Currently being mediated is a five year old dispute over the location of a new campus for Madison Area Technical College. Although the involved parties — the College Board, the State Technical Education Board, the City Council, and an environmental group — are in agreement over the need for quality education facilities, they are divided on the associated land use, transportation, and aesthetic issues.

ROMCOE
1115 Grant Street
Denver, CO 80203
(303) 861-1260
W. J. D. Kennedy, Executive Director

Gunnison County, Colorado citizens face potential boom town problems due to mining developments and associated impacts. ROMCOE assisted these citizens in organizing and managing a one week information sharing tour of rapid-growth communities in Colorado and Wyoming. Planning sessions were held to identify the 27 local participants, towns to be visited, and questions to be addressed. Follow-up activities are being planned. Donald Roe, Program Coordinator.

Western Energy and Land Use Team
Office of Biological Services
Fish and Wildlife Service
Washington, DC 20240
(202) 634-4900
Allan Hirsch, Chief

Using the Adaptive Environmental Assessment techniques developed at the University of British Columbia, the Team conducts workshops with policy makers, technicians, ecologists, and special interest groups, which serve to stimulate dialogue between the participants. With the input of these parties, the team constructs a dynamic computer model which identifies key resources, information gaps, and functional relationships. The model provides a useful tool for decisionmakers to evaluate scenarios and policy proposals. Recent workshops addressed issues involving the Truckee-Carson River Basin, the Arctic National Wildlife Refuge, and the Great Lakes.

KEYSTONE RADIOACTIVE WASTE MANAGEMENT GROUP
The Keystone Center for Continuing Education
Keystone, CO 80435
(303) 468-5822
Robert W. Craig, President, Keystone Center

The Radioactive Waste Management Discussion Group is composed of experts from industry, academia, environmental organizations, and other public interest groups. Its goal is to identify radioactive waste management policies that can be supported by advocates of differing concerns. The Group commented on the Interagency Review Group report on federal nuclear policy and most recently, recommended policy options for the near-term storage of spent fuel from U.S. and foreign nuclear power reactors. The Group is currently organizing an international forum of geologists which, in May, will scrutinize nuclear waste management alternatives and will offer their own recommendations.

NEW ENGLAND ENERGY CONGRESS
14 Whitfield Road
Somerville, MA 02144
(617) 625-6528
H. Bailey Spencer, Coordinator

Sponsored by the New England Congressional Caucus and Tufts University, the Energy Congress represents a concerted effort to address the critical energy problems of New England. The 120 delegates represent twelve constituencies (environmental, utilities, consumers, industry, etc.) and are proportionally balanced by state. Six 20 member committees have been working since May 1978 to frame and substantiate consensus-based energy action recommendations. A 300 page preliminary report was released in December. The final volume is due in March.

PROJECT ON ENVIRONMENTAL CONFLICT
Upper Midwest Council
Federal Reserve Bank Building
Minneapolis, MN 55480
(612) 373-3724

Ronnie Brooks, Director

The Project on Environmental Conflict is working with diverse elements in the Upper Midwest Community to establish an organization which can facilitate the resolution of disputes involving environmental and resource issues. The proposed Center for Environmental Conflict Resolution will encourage alternatives to litigation and the development and use of innovative methods of resolving disputes.

Environmental Consensus
March 1979

Project Report

This listing of ongoing or recently completed projects is intended to provide a forum for exchanging information on the application of environmental conflict resolution processes. RESOLVE invited practitioners and academicians across the country to contribute brief descriptions of their consensual dispute resolution projects. In future issues, we will continue this feature in order to provide up-to-date information on the activity in this field.

American Arbitration Association
140 West 51st Street
New York, NY 10020 (212) 977-2084
Donald Straus, Peter B. Clark,
Co-Project Directors.

Under a contract with the Council on Environmental Quality and the Department of Interior, the AAA Research Institute is testing the use of mediation in five disputes involving public agencies with responsibilities for such issues as herbicide spraying, land use planning, and endangered species protection.

Clark-McGlennon Associates, Inc. of Boston is associated with the AAA in this project.

Associates for Interactive Management
499 Hamilton Avenue
Palo Alto, CA 94301
(415) 321-7347
Marjorie Sutton, President.

AIM is conducting a leadership survey in the Palo Alto–Stanford University area to assess both the level of understanding and the diversity of attitudes about the jobs/housing imbalance in the area. It hopes to develop mutual agreement by the community on an action plan to address alternative solutions to the issue.

Business and Environment Program
The Conservation Foundation
1717 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4369
Sam Gusman, Senior Associate.

An ongoing Conservation Foundation program, underway for about two years, sponsors discussions between businessmen and environmentalists on specific issues, seeking to define areas of agreement and clarify disagreements. Work has been completed on two emerging Toxic Substances Control Act issues: testing of chemicals and training of toxicologists.

Canadian Arctic Resources Committee
46 Elgin Street, Room 11
Ottawa, Ontario, K1P 5K6
(613) 236-7379
Don Gamble, Director,
Policy Studies Programme.

CARC's Policy Studies Programme is currently involved in many projects that will culminate in public participation workshops, seminars, and conferences. A meeting on Water Resources Planning in the Yukon intended to engage the public early in the planning process will be held December 8–10, 1978 in Whitehorse, Yukon Territory.

Center for Community Organization and Area Development (CENCOAD)
2118 South Summit Avenue
Sioux Falls, SD 57105
(605) 336-5236
Nathan Koehler, Director,
CENCOAD Water Supply Management Project.

From its neutral stance, CENCOAD has organized a network of diverse leaders to determine existing consensus levels and develop long-term water management goals for eastern South Dakota. The project has assembled an interdisciplinary team of experts to explore public policy implications of alternative management plans to implement the goals, and has organized citizen education/involvement efforts.

Energy Impacts Project
Laboratory of Architecture and Planning, 4-209
Massachusetts Institute of Technology
Cambridge, MA 02139
(617) 253-1356
Debbie Sanderson, Research Director.

As one of its major tasks, the MIT Energy Impacts Project is analyzing local opposition to proposed large-scale facilities and developing siting procedures that use compensation and negotiation to minimize unnecessary conflict within the site selection process. The project welcomes invitations to apply these compensation and negotiation techniques in actual facility siting decisions.

Dr. Laura M. Lake
Department of Political Science,
Bunche Hall
UCLA
Los Angeles, CA 90024
(213) 825-6629 or 825-4331.

A one-year Department of Interior (Office of Water Research and Technology) project is now being completed on the institutional barriers to wastewater re-use in Southern California. The project utilized third party intervention to convene workshops to identify the problems of interagency policy implementation.

League of Women Voters Education Fund
Environmental Quality Department
1730 M Street, N.W.
Washington, D.C. 20036
(202) 659-2685
Scott Nessa, Solid Waste Project Manager.

Local and state leagues are conducting public education and consensus/building programs on solid waste issues such as landfiill siting, source separation, resource recovery, and hazardous waste disposal. One product of these discussions has been a paper published by the LWVEF examining the compatibility of alternative solid waste management strategies.

National Coal Policy Project
Center for Strategic and International Studies
Georgetown University
1800 K St., N.W.
Washington, D.C. 20006
(202) 833-1930
Francis X. Murray, Project Director.

Project Report (cont.)

The NCPP is a joint effort between leading environmentalists and industrialists to reach consensus on policy issues related to the economic and environmentally acceptable utilization of coal. A report entitled "Where We Agree" was recently published. Task Force deliberations will resume in late 1978 to address issues such as federal leasing policy, non-attainment area policies, and synthetic fuels.

Office of Coastal Zone Management
Department of Environmental Protection
P.O. Box 1889
Trenton, NJ 08625
(609) 292-8262
David Kinsey, Chief.

The Office has developed procedural and substantive rules for assessing impacts of new facilities in the coastal zone. By emphasizing pre-application discussions of proposed plans, the state has established a unique method of institutionalizing conflict avoidance. Presently, the Office's major activity is reviewing over 35 permit applications for casino and related development in the Atlantic City region.

Office of Dispute Settlement
Department of the Public Advocate
State of New Jersey
P.O. Box 141
Trenton, NJ 06601
(609) 292-0275
Edward F. Hartfield, Mediator.

Rollins Environmental Services. Following an explosion at the Rollins toxic waste disposal facility, O.D.S. began a seven-month mediation process to bring together the company, Logan Township, federal, state and local government agencies, and a citizen group. An agreement, reached in June 1978, enabled the company to reopen under improved safety and emergency procedures, and with greater cooperation between the parties.

U.S. Department of Interior. O.D.S. mediated a land use dispute between a shore community and the Department of Interior. Issues involved the acquisition of and restrictions placed upon uses of local land, and the lack of compensation to the town. The agreement reached specified a wildlife program, EIS requirements for new developments, and a joint approach to changing the compensation plan.

Office of Environmental Mediation
University of Washington
Engineering Annex, FM-12
Seattle, WA 98105
(206) 543-6713
Alice J. Shorett, Mediator.

Working with the District Court's technical advisor, the mediator worked with Indian tribes, the State of Washington, and steelhead sport fishing groups to develop a viable steelhead management plan for the 1977–78 season which was adopted as a Court Order by Judge H. Boldt. The mediator is presently involved in mediating disputes over an automobile racetrack and future airport development.

Rocky Mountain Center on Environment
1115 Grant Street
Denver, CO 80203
(303) 861-1260
W.J.D. Kennedy, Director.

ROMCOE is working with business, government and public interest groups to encourage cooperative efforts to reduce air pollution in the metropolitan Denver area. Activities include research, information sharing, and community action programs. Diane Marquardt, Program Coordinator.

ROMCOE is continuing to assist Delta County, Colorado residents in their efforts to minimize serious consequences of rapid population growth due to increased coal mining in the area. Don Roe, Program Coordinator.

Wisconsin Center for Public Policy
Environmental Mediation Project
315 West Gorham Street, Suite 110
Madison, WI 53703
(608) 257-4414
Howard S. Bellman, Director.

The Center is involved in a number of conflict management and site-specific mediation projects. A recently resolved case involved a landfill siting dispute in Eau Claire County. Current cases include water and air quality controversies at the University of Wisconsin in Madison and a dispute in the City of La Crosse over protection of wetlands. The Center also arranged a conference to provide public input to the State Department of Natural Resources on RARE II.

APPENDIX C

SAMPLE LEGISLATION FOR STATE LEVEL MEDIATION DEPARTMENTS

MASSACHUSETTS

NEW YORK

MASSACHUSETTS

Excerpt from letter of April 14, 1975 from Charles H. W. Foster summarizing the draft enabling legislation for an environmental mediation center in Massachusetts:

> Massachusetts came close to filing enabling legislation in 1974. This would have authorized the cabinet Executive Office of Environmental Affairs to establish and operate an environmental mediation service. The service would have consisted of a roster of outside mediators, certified by the Office following evidence of proper training and experience; authority for the mediator to proceed once a request and assignment had been made; and authority for the Office to engage professional and technical services at the request of the mediator, or to assign agency services on behalf of his project.
>
> An interesting refinement was the requirement for an official report on the mediation proceedings and outcome which would then become a public document.
>
> The total expenses were estimated at $50,000; $25,000 for a staff director and overhead, and $25,000 for mediation expenses that could not be borne by the principals.
>
> The legislation failed to be submitted because of the pressures of an election year.*

*No action had been taken since the time of the original draft until March, 1980. At that time the Ways and Means Committee of the Massachusetts Senate submitted a new bill: Senate 1948. A bill Establishing a Voluntary Mediation Service in the Commonwealth.

DRAFT

Proposed legislation for an environmental mediation service in Massachussetts, May 22, 1974.

Whereas, the deferred operation of this act would tend to defeat its purpose which is to assist in the resolution of present and future environmental disputes of concern to all residents of the Commonwealth, therefore, it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Section 1. In order to encourage the order and efficient protection and management of the natural resources of the commonwealth, the secretary of the Executive Office of Environmental Affairs is hereby authorized and directed to establish a voluntary environmental mediation service for the purpose of expediting the resolution of environmental disputes. Environmental disputes shall include, but not be limited to, issues concerning air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other surface or subsurface water resources; destruction of seashores, dunes, marine resources, wetlands, open spaces, natural areas, parks, or historic districts or sites. The environmental mediation service shall be available to help resolve disputes between private parties, including private corporations, disputes involving private parties and public agencies, and disputes among public agencies. Neither the establishment of such a service nor the mediation of any individual shall dispute increase or diminish the powers and duties of the secretary or any agency involved in such dispute not shall participation in the mediation of any dispute relieve any agency of any existing but to permit or seek public comment or participation. No environmental mediator shall be empowered to settle disputes by arbitration unless the parties involved have executed written agreements to this end.

Section 2. In order to carry out the purposes of this act, the secretary of environmental affairs is hereby authorized to:

(a) appoint and remove environmental mediators without regard to the provisions of chapter thirty-one;

(b) accept or reject applications for mediation services;

(c) approve the assignment of personnel for periods of not more than thirty days from any agency within the executive office of environmental affairs to provide technical assistance, such assignments to be without prejudice to the employee's normal personnel or budgetary status;

(d) expend without prior appropriation any fees, charges, grants, or other funds received by the state treasurer from any public or private source for the purposes of this act;

(e) expend any state funds appropriated for the purposes of this act;

(f) enter into contracts with agencies or persons for technical or advisory services;

(g) develop and conduct training sessions and other appropriate information and education services relating to environmental mediation.

Section 3. Within sixty days of the effective date of the act, the secretary shall, without regard to the provisions of chapter thirty A of the general laws, establish rules and regulations governing the operation of the environmental mediation service which shall include specific guidelines describing the manner by which disputes may be accepted for mediation, the qualifications required of environmental mediators, the methods of conducting mediation sessions, the allocation of mediation costs and such other provisions as he may deem necessary.

Section 4. Within thirty days of the termination of any mediation case, the secretary shall cause to be published notice of the disposition of the dispute, and the written report of such disposition shall thereupon become a public document, provided, however, that the contents of such report shall be limited to a factual description of the dispute and an explanation of the method of termination of the mediation process. At least annually, the secretary shall file with theGovernor and the General Court a complete account of environmental mediation activities conducted during the previous year, and such report shall also be a public document.

NEW YORK

A PROPOSAL FOR NEW YORK STATE

New York is one of the nation's leading industrial states. It has a large and vital agricultural sector. It has a wide-ranging tourism and recreation business. And it has an abundance of natural resource areas - many of which continue to retain their wilderness characteristics.

New York State also has a structure of local government that may be the most complex in the nation. There are 8,591 local governmental units in the State - 57 counties (excluding New York City), 62 cities, 930 towns, 557 villages, 822 fire districts, 113 county or part-county districts and 5,502 improvement districts.

New York has an intricate system of environmental statutes and regulations, most of which were adopted in this decade. They relate to the protection of tidal and freshwater wetlands, environmental analyses of state and local government projects, control of the development of land in the Adirondack Preserve the protection of wild, scenic and recreational rivers and the classification and protection of most of the waters in the State.

New York's complex and diverse economy, geography, local governmental structure and state environmental laws present both an enhanced potential for environmental conflicts and a hindrance to their easy resolution.

Given the plethora of environmental disputes that do and will confront New York State, it seems clear that an environmental mediation option would serve the State well. Obviously, a mediation service would be of minimal use in such cases as toxic chemical deposits in the Love Canal or nuclear waste disposal at West Valley. These controversies involve certain nonnegotiable issues, but the resolution of other disputes could be aided by mediation. These cases might range from cases of statewide impact such as the Westway project in New York City to disputes of primarily local concern regarding zoning, pesticide use, or other various small-scale controversies.

In view of the suggested prerequisites for the success of any environmental mediation effort and given the setting of New York State, an environmental mediation apparatus might best be established within an academic setting. This approach would allow a state-supported mediation service to operate relatively free of the bureaucratic hindrances and rivalries that might arise if the service were to be established as another administrative unit of State government.

In addition, New York State is particularly blessed with superb public university resources suited to this task. One approach to the creation of an environmental mediation service in New York State could employ the collective expertise of:

- the College of Environmental Science and Forestry at Syracuse (for its expertise in natural resource and environmental policy),
- the College of Agricultural and Life Sciences at Cornell University (for its expertise in agriculture, natural resources and community relations),
- the College of Industrial and Labor Relations at Cornell University (for its expertise in economic development, mediation and negotiation), and
- various other academic units, including many of the excellent independent colleges and universities in the State, on a case-by-case basis.

The draft legislation in the Appendix of this report presents a detailed proposal for a New York State Environmental Mediation Center. The proposal suggests a center managed by a Board of Directors composed of the President of the College of Environmental Science and Forestry, the Dean of the College of Agriculture and Life Sciences, and the Dean of the College of Industrial and Labor Relations.

An Advisory Council, appointed by the Governor and the Legislature, would be established to insure input from the various interests involved in environmental issues.

Day-to-day operations would be the responsibility of the Executive Director who would be empowered to develop the Center's mediation capability, publicize its services, seek grants from various funding sources, investigate appropriate cases, establish personnel loan arrangements, and perform mediation services.

The Center would be located at the College of Environmental Sciences and Forestry in Syracuse, and could begin operations with an initial appropriation of $250,000.

APPENDIX I : DRAFT LEGISLATION

AN ACT to amend the _____law, in relation to establishing the New York environmental mediation center, providing for its functions powers and duties, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly do enact as follows:

Section 1. The _____law is hereby amended by adding thereto a new article, to be article _____, to read as follows:

Article _____

NEW YORK STATE ENVIRONMENTAL MEDIATION CENTER

Section _____. Legislative findings and declaration of policy
_____. Short title
_____. Definitions
_____. New York state environmental mediation center; establishment
_____. Function of center; specific duties
_____. Board of directors
_____. Functions and powers of board
_____. Executive director
_____. Advisory council

Section _____. Legislative findings and declaration of policy. The legislature hereby finds that it is essential to balance the need for economic growth and development with the need for environmental conservation and preservation. While many of the existing regulatory structures are capable of producing accommodation in areas of dispute between these two needs, it is clear that there are instances where such formal measures fail to function to produce the most desirable result.

The legislature further finds that the process of environmental mediation, where properly employed, can act to achieve amenable solutions to environmental disputes.

Therefore, the legislature hereby declares that it is the policy of this state to encourage and promote the use of environmental mediation through the establishment of a center to direct and coordinate environmental mediation efforts in an endeavor to remedy environmental disputes.

Section _____. Short title. This article shall be known, and may be cited, as the "New York State Environmental Mediation Center Act".

Section _____. Definitions. As used in this act, unless the context otherwise requires:

a. The term "center" shall mean the New York state environmental mediation center established by this article;

b. The term "board" shall mean the board of directors of the center;

c. The term "council" shall mean the advisory council appointed by the board, pursuant to sections of this article;

d. The term "environmental mediation" shall mean the process whereby those involved in an environmental dispute volunteer to jointly explore and reconcile their differences. The mediator shall have no authority to impose a settlement in such cases.

e. The term "environmental dispute" shall be broadly construed to mean any particular controversy or debate relating to the use or allocation of natural resources.

Section _____. Function of center; specific duties.

a. The New York state college of environmental sciences and forestry shall establish, provide and maintain such offices and facilities as may be necessary for the transaction of business of the center. Such offices shall serve as the primary center from which the activities of the board of directors of the center under this article and the specific functions and duties of the center under this article are conducted.

b. The center is hereby charged with the following specific functions and duties:

(1) To study the development, methodology and techniques of environmental mediation, determine its potential for application within the state, and disseminate the findings through appropriate publications, workshops, seminars, consultations or other methods where deemed appropriate.

(2) To foster and promote public awareness of environmental mediation.

(3) To monitor environmental disputes within the state and, as the board deems appropriate, determine those cases in which center involvement might be proper.

(4) To provide a mechanism whereby parties involved in environmental disputes might act together in pursuit of a resolution of such disputes.

(5) To advise the governor and the legislature and such other agencies of the state or political subdivisions thereof, as the board of directors deems appropriate, concerning recommended legislation or regulation necessary to foster and advance the use of environmental mediation, consistent with the public interest.

Section _____. Board of directors.

a. The center shall be managed by a board of directors which shall consist of the president of the New York state college of environmental sciences and forestry, the dean of the school of agriculture and life sciences at Cornell University, and the dean of the school of industrial and labor relations at Cornell University. Membership on the board shall not be deemed the holding of another public office.

b. Members of the board shall receive no compensation provided that they shall be entitled to receive compensation for the actual and necessary expenses incurred in the discharge of their official duties.

c. The board shall elect a chairman from among its members.

d. The board shall meet at the call of the chairman, and at least four times annually.

e. Each of the members of the board except the chairman may designate a representative to act in his stead. The presence of a majority of the members or their representatives shall constitute a quorum for the transaction of any business of the board.

Section _____. Functions and powers of the board. The board shall have overall responsibility for the management of the center and for the exercise and performance of the functions and duties of the center. In fulfilling these responsibilities, the board shall have the following functions and powers:

a. To adopt such rules and regulations as it deems advisable with respect to the conduct of its own affairs;

b. To appoint an executive director to the center;

c. To meet, as directed by the chairman, in order to implement the purposes of this article;

d. By itself, or through any member, employee or agent to whom authority is delegated, to do or perform any acts which may be necessary, desirable or proper to carry out the purpose of this article.

Section _____. Executive director.

a. The board shall appoint and at its pleasure remove an executive director who shall be the chief executive officer of the center.

b. The executive director shall exercise such functions, powers and duties necessary and appropriate to the effectuation of the purposes of this article not expressly reserved by the

board. Such functions, powers and duties shall include, but not be limited to the following:

(1) To appoint employees, agents, and consultants, prescribe their duties, and fix their compensation within the amounts made available therefor by appropriation;

(2) To formulate policies for approval by the board and implement procedures for the center and its personnel;

(3) To report annually, in consultation with the board, concerning the efforts of the center in effectuating the purpose of this article, on or before January fifteenth, to the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly;

(4) To request from any department, division, board, bureau, commission, statutory college, or other agency of the state such data and assistance, including the assignment of personnel on a temporary basis.

(5) To seek and accept gifts, donations, bequests, contracts or grants of funds from private and public agencies, including any federal funds granted, by act of congress or by executive order, appropriate to the functions of the center; and

(6) Within the authority delegated by the board to make and sign any agreements that may be necessary, desirable or proper to carry out the purposes of this article.

Section _____. Advisory council.

a. There shall be an advisory council to the center. It shall consist of eleven members of which five shall be appointed by the governor, two members shall be appointed by the temporary president of the senate, two members shall be appointed by the speaker of the assembly, one member shall be appointed by the minority leader of the senate and one member shall be appointed by the minority leader of the assembly. Such members shall be representatives of various interests concerned with economic development and environmental conservation.

b. One member of the council shall be designated as chairman of the council by the board and shall serve as such chairman at the pleasure of the board.

c. Any member of the board shall be entitled to attend and participate in meetings of the council but shall have no vote.

d. The council shall assist and advise the center and the board in the review and appraisal of programs and activities relating to the use of environmental mediation in the state.

e. The council shall meet as frequently as its business may require. The presence of a majority of the members shall constitute a quorum. The members shall receive no compensation for their services, but each shall be allowed the necessary and actual expenses which he shall incur in the performance of his duties under this section.

f. Members of the board and the council, and any officer or employee of the center, shall be deemed officers and employees of the state for the purposes of defense and indemnification provided for in section seventeen of the public officers law.

Section 2. The sum of two hundred and fifty thousand dollars ($250,000) or so much thereof, as may be necessary, is hereby appropriated to the New York state environmental mediation center established by this act out of any monies in the state treasury in the general fund to the credit of the state purposes fund, not otherwise appropriated, for the expenses of the center's board of directors, including personal service, staffing, maintenance and operation; in carrying out the provisions of this act. Such sum shall be payable to the New York state college of environmental sciences and forestry as agent for the state on the certification of the chairman of the board of directors and upon the audit and warrant of the comptroller.

Section 3. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law.