# NEW APPROACHES TO MANAGING ENVIRONMENTAL CONFLICT: HOW CAN THE FEDERAL GOVERNMENT USE THEM?

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## I. THE ADVENT OF ENVIRONMENTAL MEDIATION AND OTHER APPROACHES TO ENVIRONMENTAL CONFLICT MANAGEMENT

The environmental disputes of the 1970's have been well-documented. Conservationists have pointed to continuing degradation of ecosystems and irresponsible actions on the part of industry and government. Industry representatives have criticized environmental goals as unrealistic and increased regulation as unmanageable, costly and delaying. Government, often the key decisionmaker, has struggled to resolve complex issues made more difficult because the competing interests have become increasingly vocal and effective.

The federal government is usually an important participant in most major environmental disputes; yet its ability to manage intense conflict often suffers. Ineffective federal procedures can easily contribute to a stalemate among contending groups. Even the best of the known planning procedures and public participation programs can result in an impasse. Government agencies are therefore becoming increasingly aware that it is often the process followed to resolve issues that creates a problem, not only the substantive difficulties posed by the issues themselves.

Existing conflict resolution mechanisms reflect a long history of adversarial institutions and approaches. Adjudication, arbitration, administrative hearings and public meetings

are founded on the principle of adversary proceedings. Opposing parties present their arguments in the most extreme terms in order to prove the "rightness" of their cases. Especially with complex environmental disputes, the final decision is not always perceived as a lasting or satisfactory solution. Further, the decision frequently stems from a procedural question and does not address the roots of the conflict. There are supposed "losers" and supposed "winners." Often the parties become more embittered and opposed to each other after the proceeding than before so that forces regroup and prepare for another battle.

Fortunately, people of all sides of environmental conflicts are realizing that there must be better ways to resolve differences. In many cases there is movement by all parties to "be reasonable," to admit that issues seen as black and white in the heat of the early 70's may now seem more "gray" and therefore open to collaboration and compromise. Many groups are aware that no one may really be winning these confrontations; in fact, everyone may be losing.

Of course, existing decisionmaking mechanisms can be adequate, and even when they are not, there may be other factors which still make them the only realistic choice. Adversary approaches are appropriate in a number of circumstances: one of the parties may want to set a legal precedent, another may simply think that its chances of winning every-

thing it wants is very high, and another may determine that whatever the risk of losing the battle, its position has to be non-negotiable.

But in those cases in which collaboration or compromise is preferable, some innovative techniques--such as mediation and facilitation--are available. These new approaches are not "the answer" to environmental disputes; they must be evaluated carefully for their applicability in each case and used selectively. They should, however, be routinely considered when a federal agency is faced with conflict management problems so that it need not rely wholly on administrative hearings, existing planning and regulatory procedures and litigation to anticipate, prevent and resolve disputes. Tables 1 and 2 show some of the potential advantages that tools such as facilitation and mediation can have over traditional adversarial approaches.

In the early to mid-1970's, with the support of the Ford and Rockefeller Foundations, Dr. Gerald Cormick and Jane McCarthy pioneered the "environmental mediation" movement. They defined mediation as a voluntary process in which a neutral third party assists stalemated opponents to reach their own negotiated settlement. Their Office of Environmental Mediation in Seattle, Washington achieved the first two successfully mediated disputes. One involved the impact of a proposed dam on the Snoqualmie-Snohomish River Basin, and the

Table 1. Public Planning: With and Without Facilitation

| Public Agency Planning Business as Usual | Public Agency Planning with Facilitation Added |
|---|---|
| IN-HOUSE PLANNING, ENVIRONMENTAL ASSESSMENTS, PUBLIC HEARINGS . . . | FACILITATION . . . |
| o sometimes postpone the most difficult issues | o identifies and resolves problems early to minimize later conflict |
| o limit public input to formal presentation of data and positions | o manages public participation through a collaborative process to reach agreement on data and alternative plans |
| o increase polarization among the parties | o builds a positive working relationship among the parties through joint problem-solving efforts |
| o can be more resource-consuming in the long run because the most difficult conflicts are faced later when parties are less flexible | o can save resources in the long run because the groundwork has been laid for a smoother final decisionmaking process with fewer disputes |

Source: Peter B. Clark and Wendy M. Emrich, "New Tools for Resolving Environmental Disputes," draft working paper prepared for the Council on Environmental Quality and the Resource and Land Investigations (RALI) Program, February 1980.

Table 2. Dispute Resolution: With and Without Mediation

| Traditional Adversarial Resolution Processes | Mediation as an Alternative |
|---|---|
| ADMINISTRATIVE HEARINGS, LITIGATION, APPEAL . . . | MEDIATION . . . |
| o can be time-consuming and expensive | o can save time and money |
| o polarize the parties in an adversarial process | o brings the parties together to bargain in good faith |
| o do not always resolve the real issues (decisions sometimes made on purely procedural grounds) | o attempts to resolve all the major issues |
| o put the solution in someone else's hands | o leaves the solution of substantive issues in the hands of the parties |
| o usually result in "win/lose" decisions where some parties win everything and some lose everything | o results in "compromise" agreements where all parties attain some of their essential objectives |

Source: Peter B. Clark and Wendy M. Emrich, "New Tools for Resolving Environmental Disputes," draft working paper prepared for the Council on Environmental Quality and the Resource and Land Investigations (RALI) Program, February 1980.

other concerned the consequences of widening Interstate 90 adjacent to Seattle.[1] In the last few years the Office has successfully mediated five more disputes.[2]

Other processes attempt to anticipate and prevent conflict, or resolve conflict, before a stalemate occurs. ROMCOE, the Center for Environmental Problem Solving in Boulder, for example, emphasizes the use of conflict anticipation and conflict assessment. Conflict anticipation is a systematic process for identifying potential areas of dispute before opposing views solidify. The multiple interests can then be organized to work together--possibly with the help of a third party--to consider ways of solving the potential problems.[3] Conflict assessment is simply an analysis--sometimes by a neutral party--of an actual conflict's dimensions, with recommendations for conflict management solutions. It is intended to provide a new perspective on the dispute from which the parties themselves can design a workable outcome.[4]

Facilitation, as practiced by the Center for Collaborative Problem Solving in San Francisco, uses a neutral facilitator in a group setting to help parties solve problems, collaborate and develop agreements related to issues that have not yet reached an impasse.

Although neutral third parties are helpful in all these approaches, they are not always essential. In certain circumstances federal agency personnel--when properly trained--may

be able to act as facilitators or mediators if they are not perceived as biased by the other parties. Again, in the case of conflict anticipation and conflict assessment, the outside neutral viewpoint may be beneficial but is not always crucial. Federal agency staff can learn how to conduct these activities as well.

In the last few years the field of innovative environmental conflict management has grown beyond the few organizations already mentioned. RESOLVE in California is serving an important role in disseminating information about ongoing projects and new conflict management experiences through a quarterly newsletter, periodic reports and an annotated bibliography of pertinent literature.[5] RESOLVE has also been involved in the actual mediation of disputes. Two organizations in the Midwest, the Wisconsin Center for Public Policy and and the Upper Midwest Council in Minnesota, are sponsoring environmental conflict resolution projects. Two independent mediators, David O'Connor in Boston and Jane McCarthy in New York, were funded by the Ford Foundation for one year to identify and mediate selected disputes.

Several universities are involved in research and/or training activities in environmental conflict resolution, primarily at MIT's Department of Urban Studies and Planning under Lawrence Susskind, at New York University's Graduate School of Business Administration under Thomas Gladwin and at

the University of Colorado under Paul Wehr.

Four state mediation projects are either underway or under consideration in Virginia, New Jersey, New York and Massachusetts. Virginia's is funded by the Virginia Environmental Endowment and is based at Old Dominion University and the University of Virginia. New Jersey's is in the state government in the Office of Dispute Settlement and handles environmental as well as other types of disputes. New York is currently developing legislation to begin a state-funded environmental mediation service, also to be university-based.[6] The Massachusetts legislature is considering a bill which would establish a voluntary mediation service.*

California is also experimenting with environmental mediation. Its Office of Permit Assistance, situated within the Governor's Office of Planning and Research, has been authorized to mediate disputes arising from permit applications (under Assembly Bill 884, California's "fast track" or permit streamlining act). To date the Office of Permit Assistance has officially mediated only one such conflict between developers and permitting agencies, but mediation is routinely considered an available option.[7]

* In March 1980, the Ways and Means Committee of the Massachusetts Senate submitted Bill No. 1948 to establish such a service in the Commonwealth.

## II. EXPERIENCE IN THE FEDERAL GOVERNMENT

Although federal agencies have had useful and important experiences with environmental mediation (which are summarized in Appendix A), the federal government has no effort underway which approximates the state-wide programs described above. There are no government-wide, or individual agency, policies on the use of environmental mediation and related techniques. (The Department of Energy, however, may have taken the first step in considering the broader use of mediation inhouse). There are also no legislated programs at the federal level to promote their use. One independent federal agency, the Federal Mediation and Conciliation Service, has begun to expand its traditional work in labor mediation to include some environmental issues. So although Appendix A indicates increased activity, environmental agencies and bureaus have seen limited participation in mediation-related efforts overall. And only a small number of these efforts have been initiated by the federal government.

Two years ago the Council on Environmental Quality (CEQ) and the Resource and Land Investigations (RALI) Program in the Department of the Interior's U.S. Geological Survey undertook a project to explore the potential for using innovative conflict management techniques in energy-environmental disputes involving the federal government. In Phase I of the CEQ/RALI project, the contractors (the American Arbitration Association,

or AAA, of New York and Clark-McGlennon Associates of Boston as subcontractors) analyzed some 40 disputes for their appropriateness for mediation.[8] During Phase II, to end in the summer of 1980, the AAA project team is serving as mediators or facilitators in two or three actual disputes; offering training in facilitation, negotiation and mediation to federal agency personnel; preparing conflict assessment reports; recommending ways of incorporating innovative conflict prevention and management procedures into existing regulations; and producing handbook materials on topics related to the use of environmental conflict management by the federal government. (See Appendix C for titles of the handbook materials.)

The Council on Environmental Quality also funded a research project to examine the pros and cons of institutionalizing environmental mediation in the federal government and the possible forms a new institution might take.[9] (The project's report will be referred to in this paper as the Carnduff-Russell report.)

Federal Experience to Date

To determine whether the federal government is likely to increase significantly its use of innovative environmental conflict management, it is helpful to consider the kind of experience, or exposure, agencies have had to date. In addition to the knowledge this author has gained as project

monitor of the two CEQ projects, further information was gained from questionnaires and telephone interviews with environmental conflict resolution practitioners and federal agency officials. (See Appendix B for the questions asked.) Appendix A describes in substantial detail each federal agency's experience with new environmental conflict management approaches. The description is broken out by bureau when appropriate; it also includes training activities. The following comments are based on what is known of that experience.

At the outset, it is clearly too early to conclude very much. Almost everyone practicing in this new field is quick to emphasize the limited federal case experience and the experimental nature of the undertakings. Although one can point to increased federal agency interest and involvement in the last few years, the total experience is still too small, too sporadic and too diverse to lead to many generalizations about its possible implications. However, the following conclusions appear reasonable (see Appendix A for specifics):

1. Various bureaus and offices in a growing number of federal agencies know more about new approaches than they did five years ago (or even one year ago); they are showing more interest; and they are participating more.
2. Several agencies are taking steps to increase their

participation by identifying specific situations in which new approaches might be tried.

3. The relationship of new techniques to types of federal actions has been varied, involving enforcement of standards, the development of plans and the granting of licenses and permits. Permitting and standards review have been the most prevalent basis for federal involvement.

4. Agencies have largely participated as passive observers and/or advisors in third party conflict management efforts (remaining on the sidelines) rather than as active participants. "Active" implies participating as an actual negotiator or even as an involved advisor attending the joint sessions and actively offering information. The choice of role reflects the nature of the dispute and the federal action, the preferences of the agency, the other participants and the third party. The agency's preference, in turn, relates to a range of factors discussed in part in Section III, "Barriers," below.

5. Very little federal funds have supported third party efforts. Most mediation cases, for example, have been funded by foundations. When federal agency funds were forthcoming, they were usually funneled

through multi-agency commissions. Only in a few instances has an agency funded a third party effort directly.

6. In almost all cases it has been a party other than the federal government that has initiated the idea for third party assistance. Although the instances of a federal agency refusing to participate once contacted are minimal, by the same token the times an agency has instigated the effort are also minimal. The agencies that have recently taken the lead had prior experience in a successful third party effort, previous training programs in conflict management, substantial knowledge of the field through sustained contact with an ongoing organization or project (e.g., the CEQ/RALI project) or self-proclaimed "risk takers" as leaders.

The hypotheses that begin to emerge from federal experience thus far pertain to the very general situations in which agencies might consider using third party neutrals to help manage actual or potential conflict. Presented below are several such hypotheses from internal CEQ/RALI project reports,[10] the Carnduff-Russell study,[11] the confidential questionnaire responses[12] and the author's own observations.

1. Agencies bearing primary responsibility for resource planning and management--and therefore having a real

stake in disputes--prefer retaining direct control of their decisionmaking processes and are leery of bringing in third parties. They may, however, be very interested in learning better conflict anticipation and prevention skills that they can apply themselves.

2. These same agencies will be most open to using third parties when existing procedures actually break down and all other avenues seem too risky. However, as agencies learn more about innovative conflict management approaches, an early assessment by agency personnel may reveal serious conflicts that its own procedures will be unable to handle. In these situations a third party facilitator (and later a mediator) might be called in--especially if:
   a. there are no agency staff trained as facilitators
   b. there are not enough staff resources available, trained or not, to undertake a facilitating effort
   c. there <u>are</u> available and trained staff, but the other parties see them as biased (a likely occurrence when the agency has primary planning and management responsibility).
3. If these resource planning agencies do enlist the

help of a third party, they will probably want to participate actively as a "stakeholder" (that is, to participate at the table as a problem solver or negotiator with the other parties) so they do not appear to lose control or surrender their primary responsibility and authority.*

4. Regulatory agencies serving as policemen and adjudicators have different types of responsibilities (rulemaking, licensing, enforcing) which may make them more amenable to third party assistance. The activities that have the greatest potential for such help are those that the agency believes are most "negotiable." So far, permit granting and standard setting seem to be one type of candidate, and local regulatory program approval and oversight another. In the first case a collaborative or mediated approach to setting down the initial rules (among the regulators, those to be regulated, and other affected publics) would presumably cut down on later challenges or infractions. In the second, the agency usually does not care what programs or

* It should be noted that there is disagreement among third party practitioners whether agencies with a stake in a dispute should participate actively. For example, Peter Clark of Clark-McGlennon Associates in Boston and Michael Doyle of the Center for Collaborative Problem Solving in San Francisco say yes, Gerald Cormick of the Office of Mediation in Seattle says no.

solutions local communities come up with, so long as they meet federal standards. In these instances, using mediation to resolve disputes among localities may be particularly useful.

5. Regulatory agencies are less likely to view enforcement actions as negotiable, although some conflict management practitioners think there is more room for flexibility there than most agencies are willing to consider.

6. There are two possible routes for regulatory agencies to follow in negotiable cases, depending on the individual situation:

   a. have trained conflict managers on staff who could facilitate or mediate disputes when the parties view the agency as neutral and/or

   b. employ an outside third party when the agency is not considered neutral or when it prefers to demonstrate its ultimate decisionmaking power (or "indifference" to the final solution) by separating itself from the negotiating process.

7. One of the best opportunities for mediation with federal agencies participating as negotiators is in inter-agency disputes, which at lower levels of government often delay decisions as much as or more

than disputes involving outside groups. (Inter-agency disputes that have been elevated to the Secretarial level may be too politically charged for mediation to be successful.)

8. For third party efforts to work when the agency is an active participant, the agency representative who sits at the table as a collaborator or negotiator must:
   a. have the backing and approval of the policy-makers at the top
   b. have the delegated power to make decisions and strike bargains on behalf of the agency.

## III. BARRIERS TO INCREASED FEDERAL USE OF THIRD PARTY NEUTRALS

There are at least seven apparent difficulties that are now discouraging federal agencies from using third party neutrals to help manage environmental conflict (see Table 3). They are discussed below.

### Informational

At the most basic level, many federal officials involved in environmental decisions still have never heard about environmental mediation and related techniques. These officials do not use the techniques simply because they know nothing about them.

Those officials who are aware of these techniques may be misinformed about them and therefore have a negative attitude toward their use.

### Attitudinal

A bias against third party use is probably the single most important barrier. Federal agencies are naturally hesitant about trying new procedures that would alter their usual decisionmaking processes. Fear of losing authority, a tendency to see a request for outside assistance as a "failure" in existing procedures, and skepticism about early public participation are only a few of the contributing worries. Simply put, many federal officials are not risk takers or innovative thinkers; they receive little encouragement to be so. Techniques such as mediation are easily misunderstood and

Table 3. Barriers

| Type of Barrier | Illustrations of Problems |
|---|---|
| Informational | o I don't know what environmental conflict management is, especially what people are calling "environmental mediation."<br>o I've heard about environmental mediation, and it sounds like loss of agency authority to me--I'm not interested in getting into that. |
| Attitudinal | o New conflict management techniques mean more work.<br>o New techniques mean loss of control.<br>o New techniques mean more legal challenges.<br>o It's less risky to do what I've been doing. |
| Political | o No one has told me it's okay to try these new approaches.<br>o The President or Congress hasn't taken a position.<br>o My agency hasn't either. |
| Analytical | o I look at conflicts the way I always have. I wouldn't even know how to analyze them in "conflict management" terms.<br>o How do I assess when an innovative approach might be the way to go? |
| Administrative | o Even if I'd like to try a new approach on a specific dispute, who would take me seriously? |

| | |
|---|---|
| | o My agency doesn't have a way of considering alternative conflict management strategies; they do everything the usual way. |
| Legal | o My agency's statute doesn't say anything about mediation.<br><br>o Mediation sounds too informal and secretive; we're bound to run into challenges under the Administrative Procedure Act.<br><br>o Some things we can't negotiate.<br><br>o Who's to say a mediated settlement won't be challenged? |
| Financial | o The other parties are going to be suspicious if we're the ones to put up money to support a new approach.<br><br>o My agency can't afford to fund months of mediation. |

appear risky. Rowdy public meetings, a drain on staff time, giving up power to other parties and making commitments to unknown outcomes are all easy to conjure up. With these perceptions, an agency official may decide that in a difficult situation it is better to do nothing at all and to chance a court challenge than to risk a new approach.

The ways in which innovative conflict management techniques can be used to safeguard agency authority rather than threaten or weaken it, and how public participation can be managed by channeling it into constructive joint problem-solving activities, are poorly understood.*

Political

Few federal agency personnel have been told that it is permissible, let alone desirable, to try new environmental conflict management approaches. Nothing official, government-wide, has been said on the matter. Nor have the Congress, the Department Secretaries or bureau heads stated that these new techniques should, as a matter of policy, receive routine and serious consideration when selecting a conflict management strategy.

In a few isolated cases, a bureau head, regional administrator or office director has asked staff to begin identify-

* For further discussion of these issues, see the CEQ/RALI handbook materials listed in Appendix C. They include an introductory piece, "New Tools for Resolving Environmental Disputes: Introducing Federal Agencies to Environmental Mediation and Related Techniques" and six other working papers.

ing possible opportunities for using the new approaches (see Appendix A for specifics). This type of action could be a first step toward an unofficial, or even official, policy favoring experiments with innovative methods. In one case, an executive department (the Department of Energy) actually did contract for an issue paper on the potential use of mediation in the Department, and it is being reviewed by the Secretary for possible action (see Appendix A for further information). The CEQ/RALI project team has made itself available for consultation with the Department of the Interior over development of a possible department policy on the subject as well. Certain DOI spokesmen have expressed their willingness to consider such a policy, especially at the conclusion of the CEQ/RALI project when there is more experience.[13]

Federal interest in nontraditional conflict management approaches has nevertheless persisted in recent years. Proposals for a science court and an environmental court (among others),[14] the passage of the Dispute Resolution Act in 1979[15] and the creation by Congress in 1978 of the Commission on Proposals for the National Peace Academy[16] are important examples. The very existence of a federal mediation service (Federal Mediation and Conciliation Service), which has enjoyed a solid reputation since 1913, in addition to occasional White House drafts of regulatory experiment legislation which have included the use of mediation[17] are other encouraging signs.

The Region V Federal Regional Council has also lent its support to a foundation-funded "Negotiated Investment Strategy" project which is trying mediation to unify urban planning efforts in three midwestern cities.[18] (See Appendix A for a more detailed description.)

In addition, individual legislators have demonstrated their support for environmental mediation, in particular. Senator Frank Church of Idaho acted in a mediating role in the Gospel Hump Management Plan dispute. He supports negotiated settlements at the grass roots and sees the Gospel Hump settlement process as a precedent for replacing polarization and litigation over management of natural resources with rational discussion and compromise.[19]

Congressman Tim Wirth of Colorado helped the Denver Water Board, the Environmental Protection Agency and environmental groups agree on the siting of the Foothills Water Treatment Plant.[20] Senator Warren Magnuson of Washington has been a staunch supporter of the Office of Environmental Mediation in Seattle and is developing draft legislation which, among other things, would support experienced organizations like the OEM.[21]

Analytical

Another barrier to use of innovative techniques is inability to analyze conflict situations. A government official faces a host of uncertainties. How does one analyze

a given environmental dispute or a potential dispute? What questions should be looked at; what factors should be considered? When might one want to use some of these approaches? Identifying all the parties, evaluating their relative power, their attitudes and their willingness to compromise, and analyzing the characteristics and the stage of the conflict as well as the role of government agencies and their relationships with each other are only some of the confounding factors in any environmental conflict equation. What is required is "conflict assessment" know-how.* This skill is being developed and practiced by individuals who currently offer services in environmental conflict management, but it is also a skill which can be transmitted to federal personnel through training sessions and workshops.

Administrative

A further dimension of using innovative conflict management approaches and assessing conflict situations is internal agency decisionmaking procedures. Most agencies do not have in place an internal mechanism which routinely and explicitly considers alternative strategies for conflict management. In other words, even if a government official has completed a

* Because environmental conflict usually involves (1) multiple parties of different types who may or may not be acquainted with each other, (2) complex environmental, economic and social impacts and (3) a wide range of issues under contention, it is very different from the traditional labor-management dispute. Accurate evaluation of an environmental conflict situation is especially complex.

conflict assessment and thinks that third party assistance might be useful, there is no regular forum to present the idea--a forum where agency decisionmakers discuss all the available conflict management choices. Agency personnel are expected to follow normal agency procedures for handling different regulatory and planning situations. Tough disputes often land in administrative hearings, on the Secretary's desk or in court. New approaches are rarely considered.

In selecting a conflict management strategy, ideally an agency should look at all factors pertaining to both the dispute itself and the internal agency position.[22] To assess these factors accurately an agency needs a systematic way of reviewing them when the conflict presents itself.

Legal*

A growing number of papers and reports are becoming available on the legal aspects of the more informal dispute resolution mechanisms which involve confidential bargaining. This author is personally aware of four, all written by law students or lawyers, three of which principally address environmental mediation.[23] The major points are summarized below.

The federal agency needs to look at two sets of issues: general legal concerns that all "parties"--mediator and negotiators--should consider when using mediation, and special

* The discussion in this section pertains to mediation only, not to some of the other techniques mentioned earlier.

statutory concerns of federal participants (in particular, the Administrative Procedure Act).

In the former "general" category are (1) "due process,"[24] (2) lack of legal precedent,[25] (3) identifying parties-in-interest,[26] (4) enforcement of, and challenges to, mediated agreements[27] and (5) questions of evidence and privilege (the "confidentiality" issue).[28] The first four do not appear to pose major problems.[29] The fifth, however, raises thorny problems and has been subject to the most legal analysis.

The root of the problem is simply this: absent a privilege of confidentiality to protect environmental mediators and the negotiating parties, many of the oral as well as written proceedings in a mediation would be admissible as evidence in subsequent court proceedings. This possibility not only deters parties from participating at all, but it may stifle actual environmental mediation proceedings once they are underway.[30] The three authors[31] that look at this question most carefully (Weinstein, Getman and Stockholm) all agree that--given the impressive range of legislative and statutory history, the substantial judicial case history and the almost uniform opinion of respected scholars--a very strong argument can be made for asserting a privilege of confidentiality for environmental mediators and participants.[32]

The legal issues of special concern to federal agencies involve their own operating statutes and the Administrative

Procedure Act, specifically, the amendments governing open meetings and freedom of information.[33]

In the case of operating agency statutes, the question has been raised whether these statutes permit use of public funds for outside mediation services to help resolve environmental disputes. Because the practice of environmental mediation has existed for only five or six years and many statutes have existed for decades, it is not surprising that no federal statutes (except those in the labor disputes area) specifically authorize the use of agency funds for external mediation.

In a brief review of the matter by the Congressional Research Service,[34] it was pointed out that some statutes might be broadly interpreted to permit such use of funds, e.g., the Administrator of the Environmental Protection Agency is required to "conduct investigations" concerning water and air pollution problems and in doing so may "contract with organizations and with individuals" (33 U.S.C. 1254 and 42 U.S.C. 7403(a)(3)). The Congressional Research Service review also said that the National Environmental Policy Act (NEPA) may be interpreted as authorizing agencies to hire mediators when the agency is itself a party to the dispute. NEPA requires agencies to "develop methods ... which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along

with economic and technical considerations" (42 U.S.C. 4333(a)(B)).

So far the statutory question has not loomed large as a barrier. Most agency statutes provide for doing feasibility studies, conducting investigations, contracting for technical assistance, assuring public participation in decisionmaking in appropriate public participation programs and a number of similar activities which might be interpreted as including mediation services.

Most of the agencies interviewed (see Appendix B) which have used mediation have taken the position that because their statutes do not explicitly prohibit it, it is therefore permissible. These federal officials all agreed that most legal counsels are conservative and are trained to give the reasons why agencies should not try something new. It was these same officials' opinion that some risks had to be taken to keep any federal agency up to date with new techniques in a complex decisionmaking environment. Some suggested that in some circumstances the lawyers should either not be consulted, or consulted on how a new approach could be tried, not whether it could be tried at all.

It is important here to distinguish mediation from arbitration. Unlike arbitration, mediation is a voluntary process in which an agency is not obliged to participate nor

is it legally obliged to abide by any settlement.*

There is also a time element to the statutory issue. As long as federal involvement in mediation activities continues sporadically at the experimental or demonstration stage, few people seem to think that the question of statutory authorization is a very important one. If the use of mediation picks up substantially and the activity becomes highly visible and possibly more controversial, then it might be advisable (although perhaps not legally necessary) to make its use explicitly permissible through statutory revisions. Specific authorization would remove the doubts on the part of the more hesitant or conservative agencies and eliminate any general fuzziness still surrounding the issue. (This type of reasoning was probably partially behind the drafting of proposed regulatory experiment legislation that encouraged experimentation with mediation by explicitly authorizing its use.)

It should be noted here that although agency statutes may not explicitly prohibit mediation, they may do so indirectly by prohibiting confidential off-the-record commun-

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* As a result of an inquiry by the General Accounting Office all of the CEQ/RALI project's publications contain a disclaimer which states that "the conflict management techniques presented herein do not in any way involve the use of 'binding arbitration' ... and, in the absence of a statutory authorization to the contrary, the United States is not legally bound to accept the recommendations of mediating committees and the like."[35]

ications with respect to certain agency proceedings.[36] Which agency actions constitute formal rulemaking on the record are defined by the agency's operating statute, according to the Administrative Procedure Act. But this category of action is a small one; most actions are more informal and permit substantial discretion and flexibility on the part of the agency. Many of the informal actions, however, are still governed by two key APA amendments: the Open Meetings Act and the Freedom of Information Act.[37]

Weinstein, alone of the four authors, had completed an analysis of these two acts in time for this report.* Confidentiality is again the primary issue. The Open Meetings ("Sunshine") Act applies only to collegial bodies (e.g., the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission and most other federal regulatory agencies) and not to single-headed agencies such as the Departments of Agriculture, Interior, Transportation and the Environmental Protection Agency. Weinstein bases his case for protecting

* Nan Stockholm was still writing her chapter on "Legal and Statutory Conflits;" it will certainly be available by the time this paper is distributed. However, some of her introductory comments seem to support Weinstein's basic conclusions; see p. 7 of her section on "Evidentiary Issues." Although the chapter in the Carnduff-Russell report does discuss the APA, it does so in very general terms with no analysis of the sections of the Act itself or review of the case history. The chapter is much more skeptical about confidential mediation holding up under APA; yet because its conclusions are not backed up by specifics, this author was hesitant to refer to them.

confidential mediation sessions under the Open Meetings Act on the opinions of respected scholars and on the precedents (in statutes and cases) of excluding collective bargaining from state "Sunshine" provisions.[38] Providing even more support for this point of view is his analysis of the Freedom of Information Act and its exemptions, which are similar to those in the Open Meetings Act. (Although the Freedom of Information Act applies to all agencies.) Weinstein reviews three of the Act's exemptions to show that a federal agency can build a strong argument for non-disclosure of mediation documents.[39]

In sum, the main body of evidence in these particular papers presents an optimistic legal picture for federal agencies wanting to participate in environmental conflict management activities--e.g., mediation--that involve confidential bargaining. Although decisive court decisions, legal opinions or legislation specifically addressing environmental mediation would help combat any hesitancy now existing, it seems safe to say that in the meantime federal agencies should consider the overall legal risk of participation a small one.*

* This conclusion is obviously assuming thoughtful analysis on the part of the agency before it enters a mediation setting. As discussed in this section, there could be several legal issues for the agency to check on.

Financial

Another barrier relates to funding third party efforts. First, full agency funding of a mediation effort will usually cause the parties to view the mediator as biased--as a hired gun of the agency. Even if this were not true, few agencies will want, or be able to finance completely mediations that go on for many months.

Generally speaking, most mediators agree that even a partial contribution from a particular federal agency can sometimes create hesitancy and suspicion on the part of the parties, especially if that agency is perceived as having a real stake in the outcome of the dispute. In these cases it will be useful to have (1) a vehicle for pooling federal agency funds and channeling them to mediators through neutral auspices or (2) a wholly new federal funding source independent of existing agencies.

There has been some question whether the funds authorized under the 1979 Dispute Resolution Act could be used for mediation of environmental disputes. It is clear from reading the Act, however, that the funds are meant primarily for "minor," "community based" disputes primarily of the "neighborhood" or "consumer" variety; examples given in the legislation are two party disputes between neighbors, consumer and seller, and landlord and tenant.[40] Environmental disputes that might qualify would involve, for example, an individual versus a

utility company or a neighborhood group versus a housing developer. Even if the interpretation of the legislation could be stretched to cover these disputes, the total amount of money available for them would be minimal. Most environmental disputes which concern federal agencies involve multiple parties, are greater than local in scale and would be too expensive and too complex to qualify for DRA funding.

Another vehicle for supporting mediation with federal funds--using the "pooling" approach--is the Federal Regional Council, located in each of the ten federal regions. The Region X FRC is currently financing by contract 30 percent of the Office of Environmental Mediation's activities in the Northwest. The FRC is in turn funded by six federal agencies: the Departments of Transportation, Energy, Interior, Agriculture and Health, Education, and Welfare and the Environmental Protection Agency. During the first year's contract the FRC funds were used only for conflict assessment activities, with actual mediation financed by nonfederal sources. This precaution was added in the first year to prevent any possible perception of even general "federal" bias. The 1980 contract, however, does allow FRC money to be used for all phases of conflict management. It was concluded that use of the FRC mechanism permitted the spread of federal funding and perceived influence over a sufficiently broad base through a nonoperating entity to avoid problems of bias.

The Office of Environmental Mediation is also receiving federal funds from the Department of Commerce, but it is being disbursed indirectly through the Pacific Northwest Regional Commission under the direction of the governors of Idaho, Oregon and Washington.

## IV. OVERCOMING THE BARRIERS

To overcome the barriers discussed above a number of new actions are possible. These are summarized briefly in Table 4.

Informational and attitudinal obstacles are best countered through new information, education and training for federal agencies. These activities are being undertaken now by a variety of organizations and projects (as discussed earlier and in Appendix A) but are now uncoordinated and are conducted on a relatively small scale. What is needed is a well-planned direct approach to reach key federal agency environmental officials in Washington, D.C. It would be useful for some federal agency--CEQ or the Department of the Interior, for example--to distribute the CEQ/RALI project papers and reports on the subject and to sponsor a series of meetings and presentations for federal agency leaders to (1) acquaint them with experience in the field in general (2) share the results of the CEQ/RALI project and (3) enlist agency support for any future actions to increase federal exposure to, and use of, these new techniques. These presentations should include complete information on existing organizations available to train agencies in alternative conflict management approaches. Further, if federal money becomes available (see the section below on financial barriers), a coordinated education and training effort to reach federal personnel could be initiated under newly created centralized auspices.

Training and educational sessions have led directly to the use of third party assistance in several instances.[41] Sessions that combine agency personnel with outside groups have special value in establishing better communications between the various disputing parties and in encouraging openmindedness and flexibility in positions.[42]

With few exceptions, both the federal officials and conflict management practitioners responding to this author's questionnaires agreed that new approaches needed explicit mention at the national policy level before they would ever be seriously and routinely considered by all federal agencies with environmental decisionmaking responsibilities. A Presidential directive or order is perhaps the best vehicle to overcome this political or bureaucratic barrier on a government-wide basis. Because each agency would have to do its own analysis of how new approaches could be incorporated for consideration into agency business, a Presidential statement need only recognize the need for additional environmental dispute settlement approaches, emphasize the usefulness of new techniques as demonstrated to date and request the agencies to develop their own policies on the matter.

To comply with the President's request each department secretary and agency head would then issue policy directives (e.g., Secretarial orders) to develop new approaches, identify general criteria for considering nontraditional techniques and

Table 4. Overcoming Barriers to Using Environmental Mediation *et al*.

| Category of Barrier | Ways to Overcome Barriers |
|---|---|
| Informational<br><br>and<br><br>Attitudinal | o Information and education: reports, high-level meetings, series of presentations<br><br>o Education and training about: conflict assessment, facilitation, negotiation, mediation |
| Political | o Directive or order--Presidential/ Executive<br><br>o Orders and policies--Secretarial; agency<br><br>o Legislation--Congressional |
| Analytical | o Conflict assessment--training or third party services |
| Administrative | o Agency decisionmaking apparatus for making conflict management choices |
| Legal | o Policy guidance and/or legal opinion from Justice Department and agency legal counsels<br><br>o Modifications in statutes if needed<br><br>o Clear legislative initiative |
| Financial | o Congressional legislation providing support for new federal program and for existing local services |

ensure that bureau/office heads develop their own guidelines for use in particular cases.

Another obvious way to help surmount the political barrier is through legislation which officially recognizes and promotes these new concepts at the national level. (For further discussion see the sections on legal and financial barriers below).

The analytical and administrative obstacles might be overcome to some degree by the Presidential and agency policy directives; each agency would develop criteria for assessing when alternative conflict management strategies might be used and in so doing would have to set up an internal administrative mechanism for making conflict management choices. The analytical problems would be further, and more directly, addressed by agency training in environmental conflict assessment and/or by the use of third party assistance in assessing specific conflicts.

The unknowns surrounding the Administrative Procedure Act and agency statutory limitations could constitute the key legal barriers to using innovative environmental conflict management approaches. (As mentioned earlier, these are not now formidable problems but could become so if use of new techniques substantially increased.) In the first instance, the Justice Department could be requested to develop policy guidance on the APA matter.

To resolve the second legal concern the Justice Department could also be asked to issue a legal opinion on the statutory difficulties faced by individual agencies if that were deemed necessary. Further legal interpretations from each agency's counsel would be an essential supplement to both Justice Department actions. In some cases modifications in the statutes themselves might be necessary.

Clear legislative initiatives at the Congressional level to promote the use of innovative approaches would help overcome the current legal fuzziness by clarifying the national intent on the subject in general. These initiatives are discussed below.

As alluded to several times above, national legislation could help overcome the political and legal as well as financial barriers. Two types of initiatives might be useful: incorporating new conflict management approaches into specific environmental program legislation as it comes up for new consideration or reauthorization, and creating a new general federal program to fund these approaches government-wide.

In the first case authorized use of mediation and related techniques could be written into new and existing legislation--for example, the Coastal Zone Management Act, the Water and Air Pollution Control Acts, the Housing and Community Development Act and various public land management and energy development acts. The legislation would recognize the inevitability of

conflicts in implementing environmental programs, document the usefulness of new conflict management techniques as demonstrated to date, encourage/require routine consideration of these techniques by the grant recipients and authorize use of program funds for conflict assessments, third party assistance, conflict management training for program personnel, etc.

The implementing regulations would then ask the grant recipients to develop guidelines and criteria for using the new approaches. For the regulations to give sufficient guidance to the grantees for developing these criteria, the federal grant agency would first have to draw up its own guidelines and suggestions. The regulations should also require the grantees to keep records and conduct brief evaluations of any conflict management efforts undertaken.

As mentioned throughout this paper, the question of federal bias inevitably arises. To avoid suspicion of a "loaded deck" on the part of other disputants due to federal agency funding, the legislation might limit federal support of third party work to some percentage (e.g., one-third) of the total conflict management activity.

In response to the questionnaires, practitioners and agency officials alike agreed that to surmount the financial barrier, a source of unbiased federal money (not limited to specific programs or agencies) is needed to carry out a significant number of environmental conflict management experiments

with federal government participation. They also strongly concurred that it was too early to set up a new "federal intervention service" as such; rather, the emphasis should be on building a greater track record of cases by funding existing organizations.

The reason is two-fold. First, these organizations have already earned respect and credibility in their own regions, and federal funds could profitably build on what exists rather than create a new entity. Second, these organizations have not had an easy time financially. Federal agency money has been scarce and is sometimes perceived suspiciously even when available. There may certainly be some cases where the nature of the dispute itself, the role of the federal agency in the dispute and the relationship of the agency with the other parties are such that agency funding will not be perceived as unduly biasing the conflict resolution effort. But this will be the exception rather than the rule.

To date, most mediation activities have had to rely on foundation support. Many foundations do not see themselves as permanent sources of funding, but as providers of "seed" money to get experiments going. Further, they may not be able to provide enough of the total budget needed to sustain lengthy--and sometimes expensive--mediation efforts. Although some foundations have expressed an interest in continuing to support environmental conflict management projects, they see

two needs: (1) for a central clearinghouse to coordinate the channeling of foundation money and other nongovernment funds (e.g., corporate contributions) and (2) for greater federal support from an unbiased source, especially when federal agencies are dispute participants.[43]

In response to the first concern, the Ford Foundation is considering the organization of a nonprofit national center on conflict resolution which, among several missions, would promote environmental mediation and related activities by serving as a repository for corporate and foundation contributions and possibly government grants.[44] As a trusted vehicle for pooling and distributing funds, the center could finance existing and new environmental conflict management organizations, function as an informational clearinghouse and perhaps stimulate research in the field.[45]

With respect to the second need--a larger source of unbiased federal money--a recurring theme in the questionnaire responses was fear of premature and potentially harmful influx of new funds. Innovation could be stifled by a monolithic approach and by red tape before enough was known about new methods and before the demand for them was clearly demonstrated. Moreover, too much official government presence by "the Feds" would inevitably discourage participation by other groups. The challenge is to provide federal money for innovative environmental conflict management activities without over-

institutionalizing these activities inside the federal government.

## V. CONCLUSIONS AND RECOMMENDATIONS

Based on personal exposure to the field over the past two years and on the research conducted for this report, several conclusions can be drawn about the actions needed to increase federal involvement in environmental conflict management efforts.

First, whatever actions are taken, federal agencies should support both the continuation of outside mediation organizations and the development of internal agency capabilities in conflict assessment, in conflict management strategy selection and in facilitation, negotiation and mediation. In addition, the outside organizations receiving assistance should be those that offer early involvement before impasses develop (e.g., though conflict anticipation) as well as those specializing in mediation per se. Although third party environmental mediation has received the most publicity, many of the federal officials interviewed for this paper emphasized the importance of training for their own personnel and the need for preventive third party assistance to avert crises.[46] (The CEQ/RALI project initially was directed toward third party intervention, but training proved to be an increasingly important need as the project developed.)

Second, a national policy directive by the President or by the Congress is needed before there will be significant initiative in this field by a number of federal agencies.

Voluntary policy directives on the part of individual agencies would certainly be welcome--and might be encouraged by the CEQ/RALI project team, for example--but they would not achieve an across-the-board increase in federal involvement. Aside from the agencies affected by conflict management requirements that might be added to specific program legislation, few agencies with environmental responsibilities are likely to act on their own. Congressional legislation creating a new source of unbiased money would add important impetus to a general directive.

Third, a multi-faceted policy is needed to see that a variety of conflict management tools are developed and used. Although a national policy is important, it will mean little without education and training to change agency attitudes, development of legal opinions to overcome fear of courtsuits and unbiased federal money to make increased agency participation financially feasible.

Fourth, two types of new legislation should be considered: legislation which incorporates innovative conflict management techniques into new and existing federal environmental programs (discussed in the section on overcoming barriers, above) and legislation which creates a federal entity that primarily funds existing environmental conflict management organizations in their work with federal agencies.

In consideration of new legislation for any new federal

entity, the objectives to address are the needs to:

1. support all types of environmental conflict management organizations and activities, including education and training for federal agency personnel
2. fund existing third party organizations and individuals rather than set up a new federal intervention service putting mediators, etc. on the federal payroll
3. minimize bureaucratic red tape in any new support entity that is created
4. keep the new funding entity as independent of the federal government as possible.

The third and fourth points raise the issues of control, coordination, evaluation and accountability. The Carnduff-Russell report states that among many of those interested in promoting mediation, "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.[47] Nontraditional environmental conflict management techniques are still being tested, and to earn credibility the experience must be recorded and evaluated far more systematically than it has been to date. This systematic record and analysis is particularly important if federal money is allocated by Congress to support innovative activities. Some central management will be necessary to

assure accountability for the use of funds, and to provide for the requisite federal agency involvement in the ultimate decisions that resolve conflicts.

In assessing possible institutional arrangements at the federal level for mediation services only, the Carnduff-Russell report notes the problems with a totally decentralized approach--e.g., channeling federal money to local mediation organizations through various regional Federal Regional Councils with no national administrative body:

> 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 of 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 decentralized approach may not be the best way to accomplish that goal.[48]

A central entity located in Washington, D.C. would be of inestimable value by providing direct access to top level agency policymakers. A new federal entity, therefore, could:

1. help the agencies develop their operating guidelines for evaluating nontraditional conflict management strategies (in response to the Presidential directive discussed earlier)
2. spread information about the new approaches through written materials and presentations to agency officials
3. arrange for agency training sessions in various

aspects of conflict management

4. match federal agencies requesting assistance with outside environmental conflict management organizations which it (the entity itself) is helping to fund
5. conduct the necessary research to record and evaluate the conflict management activities listed above.

A private nonprofit national center of the kind proposed by the Ford Foundation would be an important supplement to the federal entity, but it could not be a complete substitute. A private entity could certainly accept and pool grants for environmental conflict resolution activities from individual government agencies who voluntarily chose to give. It is uncertain, however, whether corporate and foundation funds would suffice even with some federal support, to fund a significant number of major projects involving federal agencies. Also, federal entity would receive more automatic credibility in the eyes of other federal agencies, resulting in better access to government officials--a crucial factor in increasing agency understanding and participation in this field.

However, an independent center could work in close partnership with any new federal entity in many respects. For example, a private national center within reasonable distance of Washington, D.C. would be a logical recipient of grants

from the new federal body to run education and training programs for agency personnel in Washington. Such a center would also be an invaluable source of matching funds for environmental conflict management projects that any new federal entity was helping to fund.

What seems to be needed, then, is a government program which is primarily an unbiased federal funding source for outside environmental conflict management services undertaking third party projects with federal agencies. Its other two functions would include: (1) information, education and training and (2) research and evaluation. For the last two functions the federal "bureaucracy" could be minimized by limiting the central staff and contracting for these services. The small central staff would provide overall guidance and direction to the program, by developing guidelines and plans of action for: funding organizations and projects, educating and training federal officials, and collecting data to evaluate the activities.

One Legislation Option: A Federally Funded Private Nonprofit Corporation

Among the possible institutional arrangements which might achieve these objectives, the Legal Services Corporation appears to be the most useful model.[49] It is a private nonmembership nonprofit corporation, set up by Congress for the primary purpose of funding legal service programs for individuals unable to afford such services.[50] To do so it

makes grants to and contracts with individuals, firms, corporations, nonprofit organizations and state and local governments. It is also authorized to conduct training, research and information clearinghouse activities, either directly or by grant or contract. It is governed by a board of directors appointed by the President, with the advice and consent of the Senate, with representation as outlined in the statute.

The corporation establishes rules, regulations and guidelines necessary to assure that program objectives are met and may require its grant recipients to establish operating guidelines consistent with corporation regulations. It also must monitor and evaluate program activities and provide for independent evaluations and in so doing can require its grant recipients to keep appropriate records and submit necessary reports. Each year it publishes an annual report to the President and Congress.

This type of federally funded entity--e.g., an "Environmental Dispute Services Corporation"--appears to answer the worries of the questionnaire respondents discussed earlier in the paper while fulfilling the three overall service functions noted above. It would also provide flexibility over time. During the experimental period it might have a skeletal central coordinating staff and obtain most of its services by contract. More staff and expanded functions could be added

if warranted. The board of directors could include federal agency members and therefore could easily gain immediate support of, and access to, the key agencies.

It should be noted here that the Federal Mediation and Conciliation Service has been considered as another institutional option. Adding an "environmental arm" to FMCS would certainly have the advantage of using an existing well-regarded and independent federal agency without having to create a "new layer of federal bureaucracy." FMCS also has begun to broaden its experience into the environmental field. FMCS appears both willing and able to continue branching out in this direction.[51] The Office of Mediation Services continues to be approached by federal agencies in a variety of areas, and it tries to respond to as many requests as possible; funding of any mediation services is worked out between FMCS and the individual agency.[52] If future environmental mediation were institutionalized at the federal level and FMCS were given leadership responsibilities in that area, the Service would willingly subcontract with some of the existing organizations as well as use its own mediators.[53]

There are a few complications to this option. One is that, based on the discussion in this paper, the main initial function of a new federal program should be channeling funds to existing nongovernmental environmental conflict management organizations. The primary purpose of using FMCS would

presumably be to draw upon its long-standing conflict management expertise, not necessarily that of others. Contracting with outside organizations would logically be a supplemental or secondary objective in this case. Moreover, the Service's environmental experience is limited at this point. It would be preferable at the beginning to rely primarily on organizations and individuals with this specialized expertise and credibility already established. However, an umbrella "Environmental Dispute Services Corporation" would obviously work closely with FMCS and draw upon its experience in a range of areas.

The last complication is statutory. If Congress asked FMCS to establish a permanent environmental mediation service for federal agencies, its enabling statute would almost certainly require revision to broaden Service functional areas beyond that of labor-management. The mediation service FMCS is now providing to the Department of Health, Education and Welfare for age discrimination disputes is a temporary two and one-half year experiment and has been permitted by the Office of Management and Budget provided that HEW finance the FMCS activities and FMCS's labor-management services are not diminished in the process. Although the Service sees this as a liberating precedent which now allows it to assist agencies in a variety of areas (e.g., in the environmental field), broader Congressional authorization appears necessary

to support a major institutional reorganization inside FMCS involving a permanent environmental service.[54] However, should a private nonprofit corporation prove untenable, the FMCS option ought to be seriously considered. FMCS is an experienced, respected and autonomous agency that would be preferable to a new office within the Justice Department or within the Executive Office of the President. These latter actions would overinstitutionalize an environmental dispute resolution process by prematurely placing it at the heart of the federal government.

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25. Id., "Potential Disadvantages of Mediation," p. 1.

26. Ibid.

27. Carnduff-Russell, supra note 23, pp. IV-12, 13, and Stockholm, supra note 23, "Potential Disadvantages of Mediation," pp. 2-5.

28. Getman, supra note 23, pp. 1-12; Carnduff-Russell, supra note 23, pp. IV-6-12; Stockholm, supra note 23, "Evidentiary Issues" and "The Case for a Mediator's Privilege;" Weinstein, supra note 23.

29. See Carnduff-Russell and Stockholm, supra notes 24-27.

30. Stockholm, supra note 23, "Case for a Mediator's Privilege," pp. 1, 6, and Weinstein, supra note 23, pp. 75-78, 92-93.

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32. Getman, supra note 23, pp. 3-5; Stockholm, supra note 23, of section entitled, "Case for a Mediator's Privilege," pp. 4-24; and Weinstein, supra note 23, in relation to federal agency statutes only. Of particular importance is Stockholm's review of the specifics of the one environmental mediation case thus far on record: Alder v. Adams, involving Dr. Cormick's I-90 mediation.

33. For "open meetings" provisions, see the Government in the Sunshine Act, Public Law 94-409, 90 Stat. 1241 (1976), 5 U.S.C. Sec. 552b (1976). See also the Freedom

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36. Conversations with Robert Nicholas, legal staff, Council on Environmental Quality, Washington, D.C., January 2 and November 28, 1979.

37. See note 33.

38. Weinstein, supra note 23, pp. 81-87.

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40. Dispute Resolution Act, supra note 15, Secs. 2(a)(3), 2(a)(4), 2(a)(6), 3(4)(B), and 3(4)(C).

41. Questionnaire responses from the Office of Environmental Mediation and Clark-McGlennon Associates, supra notes

2 and 12, gave specific case examples of this phenomenon.

42. Questionnaire response from the Office of Environmental Mediation, supra note 2, highlighted this result.

43. Telephone conversations with William C. Pendleton, Program Officer at the Ford Foundation, November 1979 and March 1980.

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46. Telephone interviews with three federal officials were representative of this viewpoint: Peter Ruane, Department of Defense Office of Economic Adjustment, November 20, 1979; Richard Azzaro, Federal Energy Regulatory Commission Hydroelectric Division, November 19, 1979; and Craig Rupp, Department of Agriculture Forest Service Region VIII, November 19, 1979.

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50. 42 U.S. Code, Sec. 2996, "Subchapter X--Legal Services Corporation, " Public Law 88-452, Title X, Sec. 1001, as amended by Public Law 93-355, Sec. 2, 88 Stat. 378 (1974), and Public Law 95-222, Sec. 2, 91 Stat. 1619 (1977).

51. Interview with Jerome Barrett and Edward Hartfield, Federal Mediation and Conciliation Service, November 29, 1979.

52. Ibid.

53. Ibid.

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## APPENDIX A

## Compendium of Federal Experience

What follows is a brief accounting of federal exposure to and experience in third party environmental conflict management activities. While it hopefully reflects the best information available, it is not meant to be exhaustive. The material here is up-to-date as of March, 1980. Clearly, the status of ongoing projects will probably change by the time of this report's release.

Departments and agencies are organized alphabetically. Individual offices and bureaus are not, but they are underlined for easy location.

The main source of information for this Appendix was the confidential questionnaire and interview responses and these are not footnoted; for further information see Appendix B. Other sources are footnoted and included in a separate reference section at the end of this Appendix.

### Department of Agriculture

DOA's Forest Service got involved in a 1976 dispute with environmentalists in South Carolina over the effect of lumbering and deforestation on the survival of the Bachman's Warbler, an endangered species. Robert Golten, an attorney for the National Wildlife Federation, suggested the parties try mediation. During an agreed-to moratorium on both

litigation and timbering, a mediation panel met with the parties and developed a recommendation that logging be permitted in those areas that were not nesting places for the Warbler. The recommendation was adopted by both the Forest Service and the environmentalists.[1]

More recently, in response to a contact made by RESOLVE, the Forest Service directly funded that organization to facilitate meetings among opposing groups in Colorado to reach consensus on wilderness designations under the RARE II (Roadless Area Review and Evaluation) Program. The Service attended the meetings as an informed observer, a role chosen for it by the other participants. Consensus was reached on just a few of the areas.

RESOLVE also led two meetings to explore conflicts over future projects planned for the American River (see the Federal Energy Regulatory Commission for further description). The Forest Service, which has jurisdiction over certain lands adjacent to the River, will participate as one of the principal parties when the meetings resume.

In another case involving the Service, Robert Golten again took the initiative and acted as go-between among disputing parties to help resolve a conflict over Forest Service timbering and protection of the chinook slamon in Idaho's Salmon River. As a result of these private caucuses, a tentative solution was reached: to establish a panel of

of experts to monitor conditions and make recommendations on logging activities. While the local Forest Supervisor agreed to this arrangement, the Regional Forester vetoed it. This case was appealed to the Chief Forester in Washington, D.C. who decided on a compromise involving a monitoring panel with environmentalist representation.[2]

In a foundation-funded project, the American Arbitration Association was able to get the Forest Service, the Natural Resources Defense Council and the National Forest Products Association to work with them to design a series of conflict resolution meetings concerning the long standing dispute over general pricing and management of timber resources. If agreement can be reached on meeting design, a site-specific case study will probably be used to help address the basic issues in dispute.

Finally, the Forest Service agreed to participate as an active member in a mediation by ROMCOE involving water diversion and wilderness designation issues in the Williams Fork Management Area in Colorado. Another party broke off the mediation but the Forest Service remains strongly supportive.

Department of Defense

The Army Corps of Engineers, Region X, acted as key advisors to two mediations by the Office of Environmental Mediation: the Snoqualmie-Snohomish case and the Port of

Everett. (See case descriptions earlier in the main text and under Department of the Interior, Fish and Wildlife Service.) The Snoqualmie-Snohomish case involved a Corps proposal for a major flood control facility. The Corps did not attend the joint meetings but through the mediator provided important technical assistance in developing solutions and had a major responsibility in implementing the settlement. The Port of Everett involved required Corps permits for dredging, and Corps representatives did attend most of the meetings in this case. Neither case involved direct funding or official initiation by the Corps.

Several Corps regional offices have had workshops on environmental mediation techniques, one in Jackson, Mississippi by Lawrence Susskind of MIT and the others in Kansas City and San Francisco by Alice Shorette from the Office of Environmental Mediation. In the last two instances, the OEM did a session on mediation per se within a larger workshop for permit and regulatory personnel on conciliation and consensus-building techniques.

In Wisconsin, the Corps participated in a foundation-funded mediation of a wetland dispute, undertaken by the Environmental Mediation Project of the Wisconsin Center for Public Policy at the request of the developer. With the concurrence of EPA and the Fish and Wildlife Service, the Corps had ordered a developer to restore a wetland he had

filled without a Corps permit. The Corps served as an advisor during the initial stages, and then with the two other federal agencies attended the final session where alternatives were discussed and a settlement was reached. The three agencies oversaw the restoration of the wetland as part of the settlement.

While the Corps did not initiate the activity, it has been an active participant in a series of collaborative problem-solving sessions on dam permitting, the changing nature of licensing, and the jurisdictional issues of water policy. The meetings have been facilitated by Interaction Associates/Center for Collaborative Problem Solving in San Francisco. They have resulted in the Corps initiating a pre-dispute facilitation/settlement process, to be applied to two dam sites coming up for relicensing.

The Department of Defense was an active party in the mediated disposition of choice surplus navy lands in Rhode Island.[3] After an independent conflict assessment by Ecofunding, a nonprofit environmental problem-solving organization in New York, DOD made a grant through the New England Regional Commission to the State of Rhode Island to allow Ecofunding to hold a series of conflict resolution workshops. Selected mediators Jane McCarthy and Debra Mellinkoff conducted the meetings and kept DOD informed of progress made inbetween the joint sessions where DOD attended as observer. The

Department officially accepted the final agreements reached in late 1978. Currently the Office of Economic Adjustment at DOD is eager to identify more mediation candidates involving base closures and surplus land dispositions. The OEA is particularly interested in building conflict management in at the beginning of the planning process as "preventive medicine," using third parties as advisors/consultants before crises have a chance to develop.

Department of Energy

DOE has gotten involved in innovative conflict management on several fronts. Region I in Boston was an active party in two coal conversion cases at Brayton Point in Massachusetts and Norwalk Harbor in Connecticut. Independent mediator David O'Connor worked on both; he mediated the Brayton Point case and set up the negotiating process for Norwalk Harbor (which was able to continue on its own without his presence).

The Brayton Point coal conversion involved an impasse among regulatory agencies, and between those agencies and the New England Power Company (NEPCO). The conciliation-mediation approach was initiated by the Center for Energy Policy in Boston and was funded by three federal agencies--DOE, EPA and DOI--through the Federal Regional Commission.

Region I DOE also was a willing participant in O'Connor's conflict assessment of the Sears Island power plant proposal (see description under Department of the Interior, National

Park Service). The Region I office initiated O'Connor's involvement in both Sears Island and Norwalk Harbor.

DOE Region X is working with the Office of Environmental Mediation in Seattle (under the OEM contract with the Federal Regional Council) to develop criteria for evaluating appropriateness of DOE-related disputes for mediation--especially those involving energy facility siting.

DOE Washington engaged RESOLVE in California as a neutral organizer and facilitator of a process policy meeting on nuclear waste management problems in the United States. It was held in San Francisco for two days in December, 1979. Thirty people from government, industry, academia, and civic and environmental groups reached consensus on (a) an overall objective for nuclear waste management, (b) three main problem areas, and (c) a set of criteria to evaluate alternatives for meeting those problems. In February 1980 a task force met to generate alternatives for addressing the problems, and in April 1980 the larger plenary group meets again to review the task force recommendations.

Different offices within DOE Washington have studied the potential application of mediation and related techniques to their work. Under the CEQ/RALI project, the AAA research team completed studies for DOE's Economic Regulatory Administration (ERA) and the Office of Environmental Compliance and Overview. The ERA is responsible for implementing the Fuel

Utilization Act (FUA) and is concerned with getting power plants to use alternative fuels to oil. AAA explored ways for ERA to incorporate innovative consensus-building and conflict management techniques into their FUA regulations.[4] For CEQ and DOE's Office of Environmental Compliance and Overview, AAA analyzed how agencies might adapt their NEPA policies and regulations and even their NEPA staff organization to emphasize better conflict prevention and management approaches.[5]

Lawrence Susskind at MIT has done research for DOE on energy facility siting issues, including how new conflict management tehcniques might be used to resolve disputes that arise.

Most recently, the Office of the Assistant Secretary for the Environment has sponsored an outside study on environmental mediation and its potential uses for energy facility disputes.[6] This "issue paper" has gone to the Secretary and to offices throughout DOE for review and possible further action. To this author's knowledge, the Department of Energy is the only federal department which is explicitly considering mediation as a policy issue on an agency-wide level.

Department of the Interior

The Department of the Interior has at least nine bureaus or services which have participated in conflict assessment

or mediation efforts. The Bureau of Land Management (BLM) took part as an observer in ROMCOE's project in Delta County, Colorado, to anticipate future conflicts over energy development. Over a number of months, the various interest groups in the area examined the range of growth impacts that could result from future coal development and began to develop alternative responses that would reduce tensions and creatively shape the future of the county.

After continued contact with the CEQ/PALI project, BLM decided to fund the AAA project team under the auspices of the Southwest Border Regional Commission (directed by the four Governors of Texas, New Mexico, Arizona and California) to facilitate and mediate controversies over the multiple-use of the Southern California desert under the upcoming Desert Management Plan. The use of off-road vehicles (ORVs) has been the primary issue thus far, and BLM has participated at the table as an active participant/negotiator with the other interested parties. The AAA team recently completed an assessment of potential conflicts likely to arise from the Draft Desert Management Plan and Draft EIS, recommending facilitated workshops for the major disputants to address the key points of conflict (to supplement the normal public hearing process).

The National Park Service has been one of the most enthusiastic supporters of mediation. It was an early

pioneer of sorts when it agreed to use a mediation panel in Vermont to settle land acquisition disputes in the development of the Appalachian Trail. In 1978 it requested workshops in negotiation and mediation for its personnel, conducted under the CEQ/RALI project by the AAA project team. This led directly to active consideration of disputes for mediation, ending with the choice of the long standing Acadia National Park dispute in Maine. Jane McCarthy, an independent mediator supported by the Ford Foundation, was asked by the National Park Service to intervene. An agreement was reached in just five months, but implementation requires Congressional legislation which is currently in doubt.

Clark-McGlennon Associates in Boston is being funded by NPS to facilitate the resolution of problems over alternative energy systems for Lowell, Massachusetts. The effort will include facilitated meetings with state, local and federal agencies, and private hydro-energy developers.

In Alexandria, Virginia, the Park Service has remained positively open to the idea of mediation over the redevelopment of the town's waterfront. The dispute is over the ownership of the waterfront and the land use plans being developed for it by NPS and the Alexandria Planning Commission. The Virginia Endowment's Environmental Conflict Resolution project has conducted a conflict assessment and offered its third party services as a resource for any negotiating

process.

A similar situation existed in the case of a proposed coal-fired power plant on Sears Island in Maine. Mediator David O'Connor, also supported by the Ford Foundation, completed a conflict assessment, interviewing NPS, the Department of Energy and the Environmental Protection Agency. This case became moot, however, when the plant proposal was finally turned down.

The Heritage Conservation and Recreation Service (HCRS) and Bureau of Indian Affairs (BIA) served as advisors to the primary parties (Indian tribe and the local county) in a mediation over the problems of county parkland on Portage Island in Washington coming in conflict with tribal fishing grounds. The mediation was initiated at the request of the Department of the Interior through the Region X Federal Regional Council contract with the Office of Environmental Mediation. As mediator, the Office of Environmental Mediation worked with the federal bureaus solely in private caucus to assure that the group agreement abided by relevant laws and regulations. Both bureaus agreed to coordinate and initiate several implementation steps contained in the final settlement.

In addition, HCRS asked the help of the AAA team under the CEQ/RALI project to mediate local disputes involving conversion of abandoned railroad rights-of-way to recreational

use. Such a dispute in Columbia, Missouri was successfully resolved with the help of an AAA third party. Following that, HCRS requested AAA to organize a 1980 conference in dispute resolution techniques for its regional personnel who confront similar types of issues and need ideas for new conflict management tools. In this way, HCRS is hoping to make innovative environmental conflict management techniques applicable to agency activities at all levels.

The Fish and Wildlife Service (FWS) has been working with Clark-McGlennon Associates in Boston on two projects. Following an introductory workshop on environmental conflict management, FWS hired Clark-McGlennon to facilitate/mediate a dispute with environmentalists over road paving and construction of a headquarters building on Plum Island, Massachusetts as part of the Parker River Wildlife Refuge management plan. Although no agreement could be reached on the site and size of the headquarters, the parties did agree on some of the smaller issues. Also, the process itself created a more positive approach on the part of the environmental groups re the offering of alternative proposals and better understanding of government constraints.

Clark-McGlennon and AAA are also working with an FWS research group, the National Powerplant Siting Team, in developing a data mediation (computer-assisted) approach to managing a multi-party consensus→ building and negotiating

process on long term power plant locations.

In their capacity of commenter on required Corps permits for dredging, the FWS offices in Olympia, Washington and Portland, Oregon participated as technical advisors at the group sessions of a citizen mediation panel in a dispute over future plans for the Port of Everett in Washington state. Handled under the auspices of the Office of Environmental Mediation in Seattle, which is partially funded by the Federal Regional Council, this mediation successfully resolved issues over: the areas, timing and nature of port development, public access to the waterfront, wetlands preservation and recreational development. FWS supported the settlement.

The Service was more peripherally involved as advisor in a Wisconsin wetland dispute (see description under Army Corps of Engineers). FWS staff attended the final mediation session and helped oversee a portion of the settlement.

The Bureau of Reclamation, after contact with CEQ/RALI project representatives, has agreed to explore appropriate opportunities for environmental conflict management assistance with the AAA project team. One possible opportunity has been identified in the Trinity River area in northern California. Conflicts already exist over the downstream effects of the diversion by a Bureau-constructed dam of approximately 90% of the river's streamflow. The AAA team

has conducted preliminary interviews with some of the parties should the Bureau want to proceed any further with a conflict management project.

The Department of the Interior's Office of Water Research and Technology contracted with mediation researcher Laura Lake at UCLA to complete three case studies of wastewater reuse to find out why, for example, reuse technology was not being used. Dr. Lake defined discrete issues that could be mediated, such as wastewater price setting and ownership, and identified one of the three cases as potentially mediable.

The Office of Surface Mining (OSM) is providing funds to the CEQ/RALI project to identify conflict management techniques that can be integrated into the federal coal lands mine plan review procedures and accompanying NEPA procedures. If implemented in its entirety, the effort could involve the AAA project team in three work phases: (1) background research and overall conflict assessment, (2) testing and evaluation of a proposed conflict management process, and (3) training program in conflict management for OSM staff.

The U.S. Geological Survey's Conservation Division and its Resource and Land Investigations Program (RALI) have contracted with the Four Corners Regional Commission (sponsored by the Department of Commerce, with state government membership) to offer four workshops for Division personnel

in introductory conflict management skills--including conflict assessment, conflict management strategy selection, meeting facilitation, negotiation and mediation.[7] Existing environmental conflict management organizations will be subcontracted to conduct the workshops themselves.

Department of Transportation

In the Office of Environmental Mediation's mediation of the Interstate 90 dispute, initiated by the Governor of Washington, the DOT area offices in Portland and Olympia approved of the mediation approach and were kept informed of all developments to be sure they adhered to federal standards. In the required federal approval for the widening of I-90, DOT cited the mediated memorandum of agreement and its requirements.

The Federal Highway Administration (FHWA) is continuing to show substantial interest in the potential for mediation in highway related disputes. It asked the Federal Mediation and Conciliation Service to conduct two workshops for its personnel in new conflict resolution approaches, using pertinent case studies. In Virginia, the FHWA office is using a NEPA scoping process that employs the FHWA official in a mediator-like role. The Washington office has put out a special report on this process to inform other FHWA offices of the opportunities for staff to help prevent or resolve disputes by assuring a more objective, neutral

stance during the problem-solving process.[8]

The Federal Aviation Administration (FAA) has had some limited exposure to new conflict resolution approaches in the state of Washington. In the Office of Environmental Mediation's intervention in the Paine Field dispute, the FAA Seattle staff attended most of the meetings as technical advisors on noise standards, legal options and air safety. Since the dispute involved the issues of airport growth, FAA's participation was important because any future airport expansion would require FAA certification.

Environmental Protection Agency

EPA has been involved in a number of workshop and training programs in conflict management, and has taken part in actual mediations on a select basis. The agency is interested in the idea, however, and is proceeding cautiously to define what types of issues under its jurisdiction could be negotiable and therefore mediable.

Lawrence Susskind of MIT, for example, has been engaged by EPA's enforcement division to research potential consensus-building approaches to standard setting and permit letting. In his research Susskind will develop case studies, produce reports and conduct training workshops for several of EPA's regional offices.

EPA Washington also helped fund RESOLVE's December meeting on nuclear waste management.

The Office of Environmental Mediation, Clark-McGlennon Associates and ROMCOE have conducted workshops for different EPA offices and regions on conflict resolution techniques in general, and on their specific application to 208 water quality issues, citizen involvement programs, management development problems and regional enforcement issues.

EPA Region I was an active participant in the Brayton Point coal conversion mediation (EPA was a negotiator and approved the change in emission limits in the final agreement) and willingly cooperated in the Sears Island conflict assessment (see earlier descriptions for both). Region X served as an advisor on air quality and noise measurement in two mediations conducted by the Office of Environmental Mediation in Seattle: the Interstate 90 case and the Seattle International Raceway case. (As advisor, in neither case did EPA actually attend the group mediation sessions.) In the Wisconsin wetland dispute described earlier, EPA again served as advisor, this time participating in the last mediation session and helping to oversee part of the settlement.

In still another mediation involving the New York Environmental Conservation Department and the General Electric Company in a dispute over the discharge of polychlorinated byphynels (PCBs) into the Hudson River, EPA participated actively as a technical advisor. While EPA did not assume a

negotiating role in the mediation sessions themselves, it was kept thoroughly informed since any final settlement required EPA approval before necessary federal permits could be issued.[9]

Most recently, EPA is considering the applicability of mediation and related techniques to other controversial issues, such as the disposal of hazardous wastes. Clark-McGlennon Associates of Boston helped an EPA contractor complete a study for EPA Washington of community disputes caused by siting of hazardous waste facilities.[10] Since then EPA has been evaluating how mediation might be used to resolve these types of disputes.[11]

Federal Energy Regulatory Commission

FERC has participated in two known disputes involving the assistance of neutral third parties. In the summer of 1979, David O'Connor (funded by the Ford Foundation) successfully mediated a dispute in Maine over the proposed renovation of a small mill dam into an hydroelectric one. FERC, the licensing agent, participated as observer and advisor (attending some of the mediation sessions) and intends to incorporate the mediated settlement into its license if feasible. The Commission has expressed interest in having similar future dam disputes resolved through mediation as well.

As a permit agent for allowing dam construction on

rivers, local FERC staff attended a first facilitation meeting in San Francisco conducted by RESOLVE involving the future disputed uses of the American River in Eldorado County, California. (The meeting was initiated by the County Irrigation District.) The local FERC staff then decided not to participate in an subsequent facilitation or mediation sessions since it might be viewed as agreeing to a settlement that the Commission could not uphold. (As it happened, the sessions were postponed indefinitely after two meetings since there were no immediate controversial actions that were causing specific conflicts.) Subsequently, however, FERC's Hydroelectric Division in Washington contacted RESOLVE to say that it was interested in third party approaches and would consider future FERC participation if the American River sessions resumed.

Also, the Hydroelectric Division is trying to identify other appropriate issues and cases for neutral third party intervention. The Division is most interested in early intervention, e.g. at the preliminary permit stage, and thinks that data mediation is an especially important concept.

Nuclear Regulatory Commission

NRC has had peripheral involvement in some innovative conflict management activities. First, it is partially funding RESOLVE's follow-up meeting in April 1980 on nuclear waste management policies. Second, it and the Energy Facility

Siting Council of Massachusetts contracted with Clark-McGlennon Associates of Boston to incorporate conflict prevention principles into new environmental impact assessment methods and regional planning processes so that controversy caused by NRC's licensing process could be minimized.

Regional Commissions with Federal Members

Several multi-agency regional commissions with federal membership have sponsored third party environmental facilitation and mediation activities. The Region X Federal Regional Council (FRC)--members including DOT, DOE, DOI, EPA, DOA and DHEW--has a contract with the Office of Environmental Mediation in Seattle to: identify federal/state/local conflicts appropriate for mediation, undertake actual mediation of the most suitable candidates, and conduct seminars on conflict resolution. The Wisconsin Center for Public Policy's Environmental Mediation Project has met with the Region V FRC and is pursuing discussions with some of the members concerning possible training or case projects on an individual agency basis.

As mentioned earlier in the main body of this paper, the Region V FRC is also supporting a mediation approach to unifying governmental planning efforts in three midwestern cities: St. Paul, Minnesota; Columbus, Ohio; and Gary, Indiana. This Negotiated Investment Strategy project was initiated by the Charles F. Kettering Foundation.[12]

The Region I FRC funded the Brayton Point coal conversion mediation (see earlier description).

The New England River Basins Commission (NERBC), made up partially of federal agencies (DOA, DOD, DOC, DOE, DHEW, DHUD, DOI, DOT and EPA) is using a third party facilitator from Interaction Associates in San Francisco to build consensus on land and water-related criteria for power plant siting.

## References for Appendix A


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2. Ibid., and telephone conversation with Robert Golten, National Wildlife Federation, December 12, 1979.
3. Final Report: Resolution of a Conflict Over Use Of Surplus Naval Lands In Rhode Island, a Report from the Governor of Rhode Island to the Secretary of Defense, undated.
4. American Arbitration Association Research Institute, Conflict Management in the Fuel Use Act Exemption Process, prepared for the Economic Regulatory Administration, Department of Energy, July 6, 1979.
5. Joel R. Russell, "Agency Management of the NEPA Process: Translating a Legal Mandate into Administrative Practice," report to the Council on Environmental Quality and the Department of Energy, June 1979; subsequently a working paper under the CEQ/RALI Environmental-Energy Dispute Settlement Project (see Appendix C).
6. American Management Systems, Inc., Issue Paper: The Potential of Mediation for Resolving Environmental Disputes Related to Energy Facilities, report submitted to the Policy Analysis Division, Office of Technical Impacts, Office of the Assistant Secretary for the

Environment, U.S. Department of Energy, December 1979.

7. "Statement of Involvement: Conflict Management Workshop Program," appended to the Agreement between the Four Corners Regional Commission and the Resource and Land Investigation(s) Program, Geological Survey, U.S. Department of the Interior, September 1979.

8. Federal Highway Administration, U.S. Department of Transportation, Virginia's Early Coordination Process: Scoping, Environmental Action Plan Report No. 8, August 1979.

9. Telephone conversation with Judge Abraham Sofaer, New York City, December 12, 1979.

10. Centaur Associates, Inc., Siting of Hazardous Waste Management Facilities and Public Opposition, report prepared for the U.S. Environmental Protection Agency, Office of Solid Waste, 1979.

11. Telephone conversations with Michael Barclay, Hazardous and Industrial Waste Division, Environmental Protection Agency, December 10, 1979 and March 17, 1980.

12. "Cities, States, Feds at the Bargaining Table," Planning, Volume 46, Number 2, February 1980, pp. 6-8.

## APPENDIX B:

## Questionnaire/Interview Forms and Respondents

- Environmental Conflict Management Practitioners: Questionnaire Respondents
- Sample Question Form
- Federal Agency Personnel Familiar With Mediation: Interviewees
- Sample Telephone Interview Form

Environmental Conflict Management Practitioners: Questionnaire Respondents

Jerome Barrett and Edward Hartfield, Federal Mediation and Conciliation Service, Washington, D.C.

Howard Bellman and Cynthia Sampson, Wisconsin Center for Public Policy, Madison, Wisconsin

Ronnie Brooks, Upper Midwest Council, Minneapolis, Minnesota

Susan Carpenter and John Kennedy, ROMCOE, Boulder, Colorado

Peter Clark, Clark-McGlennon Associates, Boston, Massachusetts

Gerald Cormick, Office of Environmental Mediation, Seattle, Washington

Michael Doyle, Center for Collaborative Problem Solving, San Francisco, California

Laura Lake, University of California, Los Angeles, California

Richard Livermore and Barbara Vaughn, RESOLVE, Palo Alto, California

Jane McCarthy, New York, New York

David O'Connor, Boston, Massachusetts

Roger Richman, Old Dominion University, Norfolk, Virginia

Malcolm Rivkin, Rivkin Associates, Washington, D.C.

Donald Straus, American Arbitration Association, New York, New York

Lawrence Susskind, Massachusetts Institute of Technology, Cambridge, Massachusetts

Questionnaire: Conflict Management Practitioners

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FEDERAL INVOLVEMENT IN ENVIRONMENTAL MEDIATION EFFORTS

Mediation-type Activities (please use reverse sides and extra sheets as needed).

1. Have any of your environmental mediation-type* activities involved federal agencies? Please list the activities and the precise office of the federal agency. (E.g., third party mediation at an impasse; Department of the Interior, Bureau of Reclamation, (State) Office of Environmental Policy, Office of the Director.)

1a. What potential federal "action" (e.g. a plan, a permit) was present to warrant agency involvement?

2. Did the federal agency initiate the mediation activity? If not, who did?

3. What was the crux of the issue or dispute (potential or actual)?

4. How did the agency(s) participate over time? (As active

* Conflict anticipation, conflict assessment, facilitation, conciliation, mediation.

negotiator? Observer? Not an active participant but kept informed through caucuses with the mediator?) Why was that role chosen?

5. What was the outcome of the mediation activity?

6. Did the agency(s) "accept" the outcome? Did it involve any implementation action on the part of the agency(s)?

7. What is the agency's current opinion of the mediation effort? (Have there been any subsequent problems to alter their viewpoint?)

8. Who would be the best person to contact at the agency for more information? (Please furnish phone number.)

Education and Training

1. Has any federal agency requested your involvement in conferences or workshops related to environmental conflict resolution? What was the specific topic, and what was the nature of your involvement?

2. In your eyes, was it "successful"? In what way? e.g. Do you know if the agency has ever "put any of it to work"?

3. Who would be the best person at the agency to contact for more information? (Please include phone number.)

Other

1. What other kinds of involvement have you had from federal agencies? (e.g. funding support? organizational backing?) How was it set up?

2. Please comment on the advantages and disadvantages of these arrangements.

3. Who would be best to contact at the agency? (Please include phone number.)

Your Chance to Comment

1. What in general has been your opinion of federal agency involvement? What have been the positive aspects, and what have been the problems?

2. Under what circumstances do you think federal agency involvement is mediation-type activities (as participant or supporter) is appropriate?

3. Under what circumstances do you think the federal agencies themselves would actually "buy" (use) it?

Further, under what circumstances would they initiate it themselves?

Federal Agency Personnel Familar with Mediation: Interviewees

Richard Azzaro, Federal Energy Regulatory Commission, Washington

Bruce Blanchard, Department of the Interior, Washington

Duane Day, Department of Energy, Region I

David Dougherty, Federal Regional Council, Region X

Nan Evans, Department of Energy, Region X

Steve Frank, Department of Energy, Washington

John Hough, Department of the Interior, Region X

Jack Kent, Department of Energy, Region X

Joel Pickelner, National Park Service, Washington

Jim Rathlesberger, Department of the Interior, Washington

Jack Robertson, Department of Energy, Region X

Peter Ruane, Department of Defense, Washington

Craig Rupp, Forest Service, Region VI

William Whalen, National Park Service, Washington

Telephone Interview: Agency Personnel Familiar with Mediation

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FEDERAL INVOLVEMENT IN ENVIRONMENTAL MEDIATION EFFORTS

1. In what situations do you think it would be appropriate for your agency to try mediation?

2. Are there barriers to using mediation? What kind? (e.g. attitudinal, administrative, legal, political, etc.) Which are the biggest barriers?

3. How would you recommend overcoming these barriers? (e.g. education and training programs, agency policies, statute revisions by agency, Congressional legislation, etc.)

4. If a new organization were set up to help overcome some of these barriers, do you think it should be in the federal government (independent agency, or part of an existing one?) or outside of it? Why?

5. Does your agency have plans to try/initiate? mediation in the future? Are there any plans for an agency policy, or directive to field personnel, on the subject?

## APPENDIX C

## CEQ/RALI Project Handbook Materials

An introduction to innovative environmental conflict management is provided in a background paper:

"New Tools for Resolving Environmental Disputes: Introducing Federal Agencies to Environmental Mediation and Related Techniques," by Peter B. Clark and Wendy M. Emrich.

A series of working papers have been prepared to follow "New Tools" and give greater detail on different aspects of conflict management:

"Agency Management of the NEPA Process: Translating a Legal Mandate into Administrative Practice," by Joel R. Russell.

"A Procedure for Assessing Energy-Environmental Disputes," by Philip A. Marcus.

"Designing an Effective Scoping Process: Suggestions for Federal Compliance with the NEPA Regulations of 1978," by Philip A. Marcus.

"Environmental Mediation in the Federal Government," by Susan B. Carnduff.

"Managing Complexity," by Donald B. Straus.

"Selecting a Conflict Management Strategy," by Peter B. Clark and Francis H. Cummings, Jr.

These papers were produced as part of the CEQ/RALI project on Energy-Environmental Dispute Settlement. For information on how to obtain copies, contact:

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