

The Potential for Mediation to Resolve Environmental and Natural Resources Disputes

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Environmental and natural resource conflicts are ubiquitous. Everywhere and every day, people compete for scarce resources, including access to clean air and water, oil and gas, minerals, timber, farmland, or to preserve habitat for plants and animals. In competition for these resources, people struggle to resolve issues such as how to balance resource exploitation with the need to preserve air and water quality, how to supply water to arid regions while protecting surface and groundwater supplies, or how to permit genetic modification of plants and animals while preserving the integrity of naturally evolved species and ecosystems. Each of these issues involves a distinct “how” question that collectively defines the core challenge of environmentalism: How can we promote the use of our natural resources and technology, while preserving the long-term quality and integrity of those resources on which current and future generations depend?

The late 1960s and early 1970s in the United States was a time of significant environmental activity as Congress sought to answer these “how” questions by enacting numerous environmental statutes that preempted many state regulations on the environment.¹ Congress also established two agencies responsible for carrying out these and other legislative directives including the Environmental Protection Agency (EPA) and the National Oceanic and

¹ See e.g., The National Environmental Policy Act of 1969 at 42 U.S.C. §§ 4321-4370a; The Resource Conservation and Recovery Act of 1970 at 42 U.S.C. §§ 6901-6992; The Clean Air Act Amendments of 1970 at 42 U.S.C. §§ 7401-7642; The Ocean Dumping Act of 1972 at 33 U.S.C. §§ 1401-1445; The Coastal Zone Management Act of 1972 at 16 U.S.C. §§ 1451-1465; The Environmental Pesticide Control Act in 1972 at 7 U.S.C. §§ 136-136y; and The Clean Water Act Amendments of 1977 at 33 U.S.C. §§ 1251-1376.

Atmospheric Administration (NOAA).² Many of these statutes empowered these and other agencies to enforce provisions against businesses for any action that circumvented the proscriptions in the laws – a liability scheme that complimented historical responses to environmental problems through the common law. Some of these statutes also created so-called “citizen-suit” provisions that allowed individuals and organizations to challenge business practices and agency enforcement actions and regulations in court. The result has been a flood of litigation in federal and state courts that continues today.³

This litigation has been costly and time consuming. The archetypal environmental case entails a large legal effort because these cases often require extensive factual investigations, numerous witnesses, and considerable legal research and knowledge of the area in dispute due to the complex and evolving nature of environmental legal precedent. Lawyers that prosecute or defend environmental cases typically review many documents, take extensive depositions, commit long hours to the effort, and charge big bills.⁴ In light of these difficulties, representatives of business, citizen groups, environmentalists, and local, state, and federal administrators have increasingly turned to alternative forms of dispute resolution like mediation to resolve disputes they would otherwise take to court.⁵ Mediation has also been used to help people address issues that are not ripe for litigation, such as what information an agency will draw on when developing a new regulation.⁶

² See U.S. Environmental Protection Agency, *History: Reorganization Plan No. 3 of 1970*, <http://www.epa.gov/history/org/origins/reorg.htm> (providing a detailed history of Presidential and Congressional plans to establish both the EPA and NOAA).

³ See Lawrence Susskind and Joshua Secunda, *Environmental Conflict Resolution: The American Experience*, in ENVIRONMENTAL CONFLICT RESOLUTION 16-17 (Christopher Napier ed., 1998).

⁴ Jay J. Madrid and Jay G. Martin, *Advantages of Using Mediation and Arbitration to Settle Environmental Disputes*, in ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS 43 (Ann L. MacNaughton and Jay G. Martin eds., 2002).

⁵ In addition to mediation, several other forms of alternative dispute resolution are applied in environmental disputes including binding arbitration or hybrid methods that combine mediation and arbitration. *Id.* at 44.

⁶ See Clare M. Ryan, *Regulatory Negotiation: Learning from Experiences at the U.S. Environmental Protection Agency*, in MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE 203, 208 (J. Walton Blackburn & Willa Marie Bruce eds., 1995).

This article explores the use of mediation to resolve environmental and natural resource disputes.⁷ Part I highlights the roots of environmental mediation and discusses its modern practice in the United States. Part II considers the major challenges associated with resolving environmental disputes and compares the pros and cons of mediation, as opposed to litigation, to address those challenges.

I. A Brief History of Environmental Mediation

In the United States and other nations with sophisticated judiciaries, environmental mediation is increasingly considered an important supplement to litigation. In other parts of the world, environmental mediation is also considered important when people cannot resolve their disputes in court because there are no environmental laws on which litigation can be based or there is a lack of political and judicial competence to enforce existing laws. In these settings, environmental disputants must rely almost exclusively on voluntary agreements and negotiated transactions for resolution.⁸ Mediation is also considered promising in the resolution of transnational disputes such as the regulation of interstate water supplies, the trade in genetically modified organisms, or the regulation of greenhouse gases.⁹

⁷ The terms “environmental” and “natural resource” dispute are used interchangeably to refer to any dispute that involves the management of living and non-living resources upon which humans rely. These include, among others, disputes over: air and water pollution, scenic beauty and wilderness preservation, extractive industries (timber, oil and gas, minerals), food industries (e.g., livestock, fisheries, and genetic engineering, fertilizers and pesticides), endangered species protection, waste reduction and cleanup, and global systems (e.g., climate, ozone).

⁸ Bonnie G. Colby and Tamra Pearson d’Estree, *Environmental Restoration: Challenges for the New Millennium: Evaluating Market Transactions, Litigation, and Regulation as Tools for Implementing Environmental Restoration*, 42 ARIZ. L. REV. 381, 393 (2000).

⁹ See Nancy Oretskin and Ann MacNaughton, *Is Mediation a Better Alternative for the Resolution of International Environmental Disputes?*, in ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS 207, 207-209 (Ann MacNaughton and Jay Martin eds., 2002) (noting four reasons why mediation may be a better tool than other dispute resolution mechanisms contained in international trade and environment agreements such as the North American Free Trade Agreement (NAFTA). First, in many transnational environmental disputes, it can be difficult to determine which international treaty or convention to apply and therefore which dispute resolution mechanism to use; in mediation, the parties’ do not have to fit their dispute into one provision or another from any number of applicable treaties. Second, many treaties have formal structures of dispute resolution like arbitration that constrain the potential resolutions to a conflict; in mediation, the parties have more leeway to explore creative resolutions to their dispute. Third, conflicts between states involve issues of both public and private significance that engage stakeholders with opposing points of view grounded in different cultures and value systems; mediators with cross-cultural expertise can help disputants sift through these differences and help people resolve their disputes without damaging relationships. Finally, parties may use mediation before a conflict escalates into a formal dispute; mediators can help people identify stakeholders affected by potential decisions and create early solutions to prospective problems.).

Mediation was first explicitly used to resolve an environmental dispute in 1973 that involved a long-standing conflict over the proposed location of a flood control dam on the Snoqualmie River near Seattle, Washington.¹⁰ As discussed earlier, around that time Congress had enacted environmental legislation on several environmental and natural resource issues. Many of these statutes articulated national goals, established compliance deadlines, and gave federal agencies enormous discretion to enforce federal standards. Consequently, federal courts soon became the testing ground to define the bounds of agency discretion.¹¹ Federal and state, local, and administrative courts also became the principle forums to resolve government enforcement actions against private parties as well as disputes between private parties themselves concerning the overarching laws set down by the federal statutes. Over the next decades, mediation responded to this surge in environmental disputes and specialized practices in environmental mediation evolved quickly.

Since 1973, mediation has been used to successfully resolve numerous environmental and natural resource conflicts. In the commercial context, many businesses prefer mediation to formal litigation or arbitration for contractual disputes such as issues surrounding warranties and indemnities for contamination of land and compliance of industrial plants and equipment with environmental laws and regulations.¹² Similarly, mediation has also been used extensively to resolve complex multi-party disputes, particularly those that involve landscape-scale

¹⁰ Susskind and Secunda, *supra* note 3, at 18, citing Gerald Cormick, *Mediating Environmental Controversies: Perspectives and First Experience*, 2 EARTH L.J. 215 (1976).

¹¹ Karen Liepmann, *Confidentiality in Environmental Mediation: Should Third Parties Have Access to the Process?*, 14 B.C. ENVTL. AFF. L. REV. 93, 100 (1986).

¹² Christopher Napier, *The Practice of Mediation in Commercial and Environmental Disputes*, in ENVIRONMENTAL CONFLICT RESOLUTION 198 (Christopher Napier ed., 1998).

management issues like endangered species conservation, river or estuarine water quality, grazing allotments and timber sales, commercial fisheries, and many more.¹³

Several authors have studied the use of mediation to resolve environmental disputes. Some authors have written about mediation as a tool to resolve particular disputes such as how to site and cleanup contaminated sites,¹⁴ authorize new hydroelectric plants,¹⁵ or permit projects that adversely impact endangered species and their habitats.¹⁶ Others have offered more summative analyzes of environmental mediation, discussing the nuts and bolts of the mediated process, key issues environmental mediators should consider,¹⁷ and the challenges inherent in mediating disputes involving public values and government agencies.¹⁸ This article draws on this extensive literature in order to highlight the major challenges inherent in environmental dispute resolution and to suggest ways in which mediation can be used to address these challenges.

In addition to this scholarship on environmental mediation, several organizations have been established in the past three decades to provide specialized environmental mediation services. The Washington, D.C. based non-profit organization RESOLVE, for example, provides specific expertise to manage environmentally-related alternative dispute resolution and consensus-building processes for the public and private sector.¹⁹ Other entities like CDR &

¹³ Gail Bingham, *What is Consensus-Building and Why is it Important for Resource Management?*, Resolve, <http://www.resolve.org/pubs/Whatis.htm>.

¹⁴ See e.g., Bradford Mank, *The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?* 19 B.C. ENVTL. AFF. L. REV. 239, 279 (1991).

¹⁵ See e.g., Environmental Law Reporter, *Calm After the Storm: Grandmother of Environmental Lawsuits Settled by Mediation*, 11 ELR 10074 (1981).

¹⁶ See e.g., Melanie Rowland, *Biodiversity and Ecological management: Bargaining for Life: Protecting Biodiversity Through Mediated Agreements*, 22 ENVTL. L. 503 (1992).

¹⁷ See e.g., ROSEMARY O'LEARY AND LISA BINGHAM (eds.), *THE PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* (2003); ANN MACNAUGHTON AND JAY MARTIN (eds.), *ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS* (2002); LAWRENCE SUSSKIND, PAUL LEVY, AND JENNIFER THOMAS-LARMER, *NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS COSTS, AND UNNECESSARY LITIGATION* (2000); CHRISTOPHER NAPIER (ed.), *ENVIRONMENTAL CONFLICT RESOLUTION* (1998); DOUGLAS J. AMY, *THE POLITICS OF ENVIRONMENTAL MEDIATION* (1987); GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1986); LAWRENCE BACOW AND MICHAEL WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* (1984).

¹⁸ See e.g., Robert Zeinemann, *The Characterization of Public Sector Mediation* 24 ENVIRONS ENVTL. L. & POL'Y J. 49, 49 (2001).

¹⁹ RESOLVE, *What is RESOLVE?*, <http://www.resolve.org/about/index.html>.

Associates provide a range of environmental dispute resolution services; CDR also maintains an active list of environmental mediators who specialize in water, land-use, and endangered species law.²⁰ National and state-sponsored mediation programs are also on the rise. At the federal level, there is the U.S Institute for Environmental Conflict Resolution, which maintains a roster of mediators who can engage ordinary citizens affected by proposed federal policies or actions and help them participate in the formulation, revision, and implementation of those policies or actions.²¹ At the local and state level, organizations like the Montana Consensus Council and court-affiliated mediation programs have also specialized in environmental mediation.²² A mixture of funding sources including funds from the disputants themselves, government agencies,²³ and philanthropic organizations²⁴ have supported these organizations.

II. Use of Mediation to Address the Challenges of Environmental Dispute Resolution

Environmental disputes are difficult to resolve for at least five reasons. First, most environmental disputes concern scientific and technical uncertainties and complexities, so parties must act without perfect knowledge of the ecological or socio-economic impacts of their decision. Second, such disputes typically involve numerous stakeholders, including undefined and unorganized parties, which makes it difficult to know who the stakeholders in a dispute actually are and what they want. Third, many environmental disputes concern issues of immense importance to the parties, which can increase the intensity of conflict and force people to take uncompromising positions on how a dispute should be resolved. Fourth, many environmental disputants have asymmetrical resources and power. Parties with superior resources and power

²⁰ CDR & Associates, *Collaborative Decision-Making Procedures and Dispute Resolution Systems*, <http://www.mediate.org/DSDPage.htm>.

²¹ U.S. Institute for Environmental Conflict Resolution, *What is Environmental Conflict Resolution*, <http://www.ecr.gov/what.htm>.

²² See e.g., The Montana Consensus Council, <http://mcc.state.mt.us/>.

²³ BINGHAM, *supra* note 17 at 161.

²⁴ See e.g., The William and Flora Hewlett Foundation, *Environmental Conflict Resolution Program*, <http://www.hewlett.org/Programs/ConflictResolution/ConsensusBuilding/envCR.htm>.

can prolong the resolution of a dispute, while those with limited resources and power may resort to extra-legal means to achieve their objectives. Fifth, the government is involved in many environmental disputes such as prosecutorial actions, which puts unique pressures on the dispute resolution processes used to resolve public sector disputes.

These five challenges are present no matter what process the parties to an environmental dispute elect to resolve their dispute. Traditionally, most disputants have elected compulsory processes like litigation, but, as discussed earlier, mediation has increasingly been used to resolve such disputes. Part II of this article discusses the five challenges of environmental disputes highlighted above and addresses some of the strengths and weaknesses of mediation as opposed to litigation to address these challenges.²⁵

A. Environmental Disputes Are Scientifically and Technically Complex and Uncertain

Scientific and technical complexity and uncertainty is probably the most significant factor that distinguishes environmental disputes from other kinds of conflicts. Most decisions on whether and how resources should be used impact a wide diversity of people at the local, regional, and national level. These decisions also have inter-generational and global impacts that are beginning to be taken into account.²⁶ Large or small, when environmental controversies arise, advocates, policy makers, and adjudicators look to science and technical experts to inform their decisions.²⁷ Scientists can provide information about the short and long term impacts of a proposed project (e.g., logging old growth forests). Technical experts can offer advice on whether a proposed industrial development (e.g., design of a power plant) will function in compliance with existing environmental regulations and adapt to new regulations over time.

²⁵ Other authors have also explored the nature of environmental disputes and the challenges inherent in mediating such disputes. See, e.g., Susskind and Secunda, *supra* note 3 (providing a useful analysis of the challenges of mediating environmental disputes and comparing those challenges to those that mediators confront when working in the labour context).

²⁶ Peter Adler, Robert Barrett, Martha Bean, Juliana Birkhoff, Connie Ozawa, Emily Rudin, *Managing Scientific and Technical Information in Environmental Cases: Principles and Practices for Mediators and Facilitators*, RESOLVE 6 (no date).

²⁷ *Id.* at 6.

Unfortunately, there are a variety of reasons why the advice that scientific and technical experts provide on these and related matters is inconclusive and of limited value to decision-makers.

For instance, scientists often lack information to fully assess the risks to human health and the environment that would result from an industrial activity. Without full information, scientists often disagree on the risks from such activities, which can exacerbate conflicts between stakeholders who prefer one scientist's view to another.²⁸ By contrast, sometimes, the problem with science is not an absence of information, but an overabundance. Decision makers on natural resource issues are often barraged with large volumes of information that require diverse expertise to interpret and that is subject to honest differences of interpretation.²⁹ Some of these data may be so voluminous that they require extensive time to analyze,³⁰ but decision-makers in conflict generally do not have flexible timetables in which to make their decisions.

In addition to limited information and the overabundance of information, scientists also have to moderate their advice to decision-makers to reflect the fact that knowledge is constantly changing. Today, a scientist may be confident that a particular environmental decision will have a certain impact, but down the road that scientist or others may determine that that decision had many unanticipated consequences. For example, some climate scientists are reasonably confident about how local environments will change if the earth's temperature continues to rise; however, predicting climate change is a very complex endeavor so it is plausible if not probable that future scientists will discredit at least some of the assumptions and predictions of those that came before them. This uncertainty does not mean people should not act on the advice of modern

²⁸ MACNAUGHTON AND MARTIN, *supra* note 17 at 9.

²⁹ Bingham, *supra* note 13.

³⁰ Gail Bingham, *When the Sparks Fly: Building Consensus When the Science is Contested* 7 (2003), at http://www.resolve.org/pubs/Resolve_Monograph.pdf.

science, but it does limit the predictive force of scientific opinions and leads some scientists to cloud their advice to decision-makers with a number of caveats about scientific uncertainties.

The challenge of scientific and technical uncertainty in litigation.

Scientific and technical uncertainties invariably form part of the backdrop of most civil environmental suits. Once adversaries, parties may compromise the free exchange of scientific and technical information. For instance, businesses may keep private waste management records but refuse to disclose those records to others. Even if everyone can access such records, understaffed or low-budget organizations may lack scientific or technical experts to interpret the records and they may have different tolerances for the complexity of this information.³¹

Once parties are in litigation they are also less likely to trust one another and the science they bring to any pretrial settlement discussions. Understandably, parties often distrust scientists whose studies are paid for by their opponents, a problem that frequently occurs when a party with the means to pay for an environmental impact study of a proposed project is a business that seeks financial gain from that project.³² On the other side of the fence, environmentalists might site studies from scientists who have profound environmental sympathies and whose values undoubtedly influence the questions they ask, their research methods, and the conclusions they draw from their research.³³ Scientists might have particular difficulty separating their personal values from their science when a proposed project will adversely affect their own study sites.

Litigation also poses problems for judges and juries who often lack the economic, technical, and scientific training to fully understand the complexities of an environmental suit,³⁴ particularly when the parties themselves are unable to fully understand the complexities of their

³¹ *Id.* at 8.

³² *Id.*

³³ *Id.*

³⁴ See Liepmann, *supra* note 11, at 102.

dispute.³⁵ Judges and juries must rely on the parties to help them understand these complexities, but, in doing so, they may erroneously rely too heavily on one party's explanation of those scientific and technical complexities. Given this limited knowledge base, they must spend considerable public resources (including staff time in the case of judges) to develop sufficient knowledge prior to rendering an equitable decision.³⁶

The use of mediation to address scientific and technical complexity and uncertainty.

One significant benefit of mediation compared to litigation is that in mediation disputants do not have to educate a court or jury about the complex, scientific and technical issues that define their dispute. Instead, parties can hire a mediator with expertise in the relevant area of dispute.³⁷ Mediators can also hire other experts to help them understand the scientific and technical underpinnings of the dispute,³⁸ which can be particularly useful where the subject of a dispute requires detailed knowledge of an agency's regulations. On a related note, sometimes parties do not need a mediator to understand the technical and scientific data presented to them; all they need is a facilitator whose real job is to just keep the parties talking.³⁹

Where a dispute resolution process is mired in scientific and technical uncertainty, mediations can also be helpful. For instance, when scientists disagree, the mediator can help parties to agree upon an expert whose opinions will be trusted in the course of reaching an agreement. Sharing an expert can keep down costs and avoid the drama of the "battle of the experts" that often plays out in litigation.⁴⁰ On a related point, where parties find that data is unavailable to answer a key question, a mediator can help the parties develop and manage a joint

³⁵ See Madrid and Martin, *supra* note 4, at 43.

³⁶ See Liepmann, *supra* note 11, at 102.

³⁷ Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution in Environmental Conflicts*, 19 DAYTON L. REV. 1305, 1338 (1994)

³⁸ *Id.*

³⁹ Liepmann, *supra* note 11, at 102.

⁴⁰ *Id.* at 103.

fact-finding process to collectively research or fund a study.⁴¹ According to environmental mediator Gail Bingham, there are six steps to collaborative or joint-fact finding efforts, including: 1) clarifying the questions to be asked, 2) determining what information is needed, 3) identifying what information the parties already have and what needs to be collected, 4) developing a good plan for data collection and analysis, 5) deciding who will conduct any needed studies, and 6) determining how parties will learn from the results and use those results in decision-making. Bingham argues that following this collaborative learning process does not have to be burdensome and so can be handled by the key decision-makers themselves. Nevertheless, where the levels of controversy, complexity or stakes are very high, parties may also consider forming a joint technical working group (which may be composed of people outside the dispute) to guide the learning,⁴² and the learning from these groups can be useful in reaching a mediated agreement. Some scholars stress that mediated agreements are only credible when all parties to the agreement had sufficient access to and understanding of the scientific and technical information they needed to reach agreement,⁴³ which makes joint fact-finding exercises particularly important.

Another benefit to using mediation instead of litigation is that in mediation the parties can draft flexible or adaptive agreements that take into account changing conditions and unexpected events. Management of ecosystems is an uncertain practice as scientists are constantly learning about how different elements in these systems interrelate, the effects of pollutants or resource extraction on these systems, and how the loss of certain species may precipitate the decline of other species or ecosystem functions (e.g., air and water cycling, soil production). As opposed to

⁴¹ See Bingham, *supra* 30, at 9.

⁴² *Id.* at 10. Note that technical committees and information sharing workshops have also been used to help people develop mediated agreements. See Bingham, *supra* note 13.

⁴³ Susskind and Secunda, *supra* note 3, at 33.

judgments imposed in the course of litigation, mediated agreements can navigate this uncertainty by mandating adaptive management – a process where parties design certain strategies to address an environmental problem, monitor the implementation of that strategy, and then develop a plan to evaluate the effectiveness of that strategy.⁴⁴ For instance, imagine a nuisance lawsuit filed by a citizens’ group against a trash incineration business where the citizen group questions whether a new but less costly pollution control technology will abate the nuisance. In mediation, the parties can reach a flexible but binding agreement that might allow the business to install the technology while forcing that party to monitor and evaluate whether the technology proves effective. If the technology fails, the parties could build into their agreements a trigger that forces the company to install a new technology; such detailed contingency plans to take into account scientific and technical uncertainties are unlikely to result from a judge’s ruling.

B. Environmental Disputes Often Involve Multiple Parties and Agendas

Mediation is normally used to resolve disputes between two opposing parties such as in the course of divorce proceedings, contract negotiations, and lease agreements. In the environmental context, however, two-party environmental disputes are less common. Environmental impacts from industrial operations, proposed resource development projects, or government policies have ill-defined boundaries because these impacts can be spread across time and locations. Consequently more individuals and organizations become wrapped up in decisions like how an area should be cleaned up, whether a resource should be appropriated, or how a policy should be crafted, particularly when the implications of these decisions will have effects across administrative and legislative jurisdictions.⁴⁵ The fact that many decisions about the

⁴⁴ George F. Wilhere, *Adaptive Management In Habitat Conservation Plans*, 16[1] CONSERVATION BIOLOGY 20, 20-21 (2002).

⁴⁵ MACNAUGHTON and MARTIN, *supra* note 17, at 6-8; Zeinemann, *supra* note 18, at 56.

environment will have far reaching effects also raises the stakes of these decisions, which ultimately attracts more public attention and brings new people into the dispute.⁴⁶

The challenge of managing multiple parties with multiple agendas in litigation.

Concerned parties in an environmental dispute may include community residents, business and industry representatives, government regulators, elected officials, and a diversity of representatives from the non-profit sector. Each of these has different ideological perspectives, organizational structures, strategies, and capacities to engage in dispute resolution, which makes any effort to resolve their disputes difficult, regardless of whether such efforts occur in mediation, pre-trial settlement conferences, or through court order.⁴⁷ Courts, however, have particular difficulty handling all of these parties and their varying interests. Many commentators have stressed that courts lack the time, facilities, and trained personnel to navigate the complex net of issues different parties bring to court, their conflicting interests, and the voluminous number of comments that circulate around multiparty cases.⁴⁸ Moreover, procedural principles of standing, jurisdiction, and ripeness often artificially narrow the scope (subject matter, number of parties, time horizon, and remedies) of the dispute in court, which may make the dispute easier to resolve in the immediate term, but does not necessarily create sustainable solutions for all parties over the long-term.⁴⁹

The use of mediation to address the numerosity of parties and their agendas.

Mediation is a process appropriate for two-party or multi-party disputes. Two-party mediations often occur between commercial actors, revolving around issues like the costs of

⁴⁶ MACNAUGHTON and MARTIN, *supra* note 17, at 10.

⁴⁷ See Zeinemann, *supra* note 18, at 56; *see also*, Bingham, *supra* note 30, at 5.

⁴⁸ Liepmann, *supra* note 11, at 101-2; *see also*, JANE MCCARTHY, NEGOTIATING SETTLEMENTS: A GUIDE TO ENVIRONMENTAL MEDIATION 55 (1984) (quoting Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia who stressed that “[the courts are not the proper forum] either to resolve the factual disputes, or to make the painful value choices [on technical and scientific issues].”

⁴⁹ See MACNAUGHTON and MARTIN, *supra* note 17, at 10.

remediating contaminated land, the amount of compensation for harm caused to people or the environment, or other liability issues.⁵⁰ But, where mediation is perceived as particularly valuable is in multiparty disputes. Such disputes create a rat's nest of complexity as the more parties who are involved in a dispute the more likely a dispute will be complicated by issues like the scope of an agency's authority, the need to guarantee equitable access to information to all parties, the clash of value differences between parties, the credibility and communication skills of parties, and any power struggles within factions of parties.⁵¹ Mediation is considered a useful process to help parties sort through this complexity in a way that a judge and jury never could.

One technique that mediators can use to manage the numerosity of voices and the challenges inherent in working with multiple disputants is to create coalitions of disputants and then to encourage each coalition to choose one individual to be their negotiator. For these coalitions, the mediator can make sure that the chosen representatives conduct regular internal briefings with those not directly participating in the negotiation.⁵² A mediator can also work with the parties to establish subcommittees to tackle specific problems that underlie the major problems in dispute. Moreover, mediators can hold roundtable conversations with small segments of the parties to gain a sense for areas where people share common ground.⁵³

Another advantage of using mediation in multiparty environmental disputes is that mediation affords parties with continuing relationships an opportunity to sustain or improve those relationships.⁵⁴ It is not uncommon, for example, for historic adversaries to meet in mediation and to emerge with a more cordial working partnership. In some instances, these relationships have improved so much that historical adversaries have invited one another to their

⁵⁰ Napier, *supra* note 12, at 198.

⁵¹ MACNAUGHTON and MARTIN, *supra* note 17, at 10.

⁵² Bingham, *supra* note 30, at 5.

⁵³ *Id.*

⁵⁴ Liepmann, *supra* note 11, at 104.

respective organizations to give presentations.⁵⁵ Utility companies, neighboring cities and towns, business and non-profit interests, and different federal and state agencies, have long term relationships with one another, and some of these relationships would benefit from more face-to-face talks facilitated by a mediator.

C. Environmental Disputes Often Involve Seemingly Intractable Disputes Over Values

Another distinctive characteristic of environmental disputes is that they are often grounded in fundamental value differences or opposing ideologies between parties. One's approach to environmental protection depends on where his or her beliefs fall on a spectrum of questions that concern how humans relate to the rest of nature. These questions as articulated by facilitator Melanie Rowland include:

- 1) "Are we separate and apart from the rest of nature?"
- 2) "Does nature exist primarily for the benefit of humans?"
- 3) "Is our greatest challenge to tame and control nature for our own ends?"
- 4) "Or, are we inseparable from the natural world?"
- 5) "Does it exist in its own right, apart from any benefit it may bestow upon us?"
- 6) "And is our greatest challenge to tame and control ourselves, so we do not destroy all that has come before us, simply because it would be wrong?"⁵⁶

Given the nature of these broad questions, it is not surprising that people answer them differently. Those who answer any of these questions in fundamentally different ways are more likely to fight each other over an existing or proposed project or policy in court.

Pursuing ideologically-driven arguments through litigation.

Sometimes the only way to resolve a values-based environmental dispute is to go to court. Indeed, litigation is probably more appropriate than mediation for environmental organizations that seek to achieve objectives that are grounded in fundamental or ideological values (e.g., that non-human animals should *never* be tested on or that nuclear power should *never* be used). For these parties, the courts offer the most effective path for accomplishing their

⁵⁵ BINGHAM, *supra* note 17, at 72.

⁵⁶ Rowland, *supra* note 16, at 516.

objectives because courts can establish precedent in an undecided area of law and, given the federal overarching structure of environmental law, such precedent can have regional or national effect.⁵⁷ Similarly, business organizations may chose not to mediate if the substance of the dispute concerns a matter of vital corporate interest (such as a major product); a corporation may want the factual, legal, and scientific underpinnings of its case to be heard in public and to prevail in a legally binding forum.⁵⁸

For ideologically driven conflicts, the mediated process may also prove unworkable because in mediations, mediators try to obscure underlying value conflicts to help people reach compromise. Mediators often cast a dispute in terms of conflicting *interests* that are legitimate and value neutral, instead of in terms of *values* that involve moral judgments.⁵⁹ But obscuring such fundamental value differences or asking people to compromise them may actually exacerbate conflict or may deprive environmentalists of what some perceive to be an important “moral high ground” argument at base in many environmental disputes, that is, that current generations should protect the environment for future generations.⁶⁰ Thus, where people hold deep ideologically driven values, litigation maybe most appropriate because in litigation a judge can render an opinion that is, at least in theory, in concert with broad public values on the matter.

Pursuing ideologically-driven arguments through mediation.

Mediations greatest attributes are that the process allows people to share information and to listen and better understand one another. For some, no level of information or communication will change their views on what should be done in a particular environmental controversy.

⁵⁷ Zeinemann, *supra* note 18, at 60.

⁵⁸ Napier, *supra* note 12, at 200.

⁵⁹ Rowland, *supra* note 16, at 519-520; *see also* Liepmann, *supra* note 11, at 104-5; *but see* MACNAUGHTON and MARTIN, *supra* note 17, at 270 (arguing that one of the strengths of mediation is that the process can force parties to concentrate on their value differences. Adversarial systems like litigation and arbitration, with their formalized rules of procedure, often insulate a dispute from the volatility of emotional and values conflicts. Mediation, by contrast, embraces these emotional and value conflicts. They write, “it is because mediation takes emotion into account that resolution (instead of decision) is possible.”).

⁶⁰ Rowland, *supra* note 16, at 519.

Nevertheless, even those who hold strong ideological views on an environmental issue might elect mediation as the best forum in which to realize their goals.

Consider, for example, the use of mediation to combat projects that will adversely affect endangered species for financial gain. Many endangered species advocates hold profound sympathies for the plight of such species, but they nonetheless elect mediation (and all its requirements of compromise) to protect species, thereby signaling that the process may still be superior to court battles to realize their goals.

One explanation for this surprising use of mediation in the species protection context is that domestic laws to protect endangered species such as the Endangered Species Act (ESA) are still wholly inadequate to prevent the demise of species. Over the ESA's history, the Act has suffered from inadequate funding, which makes it impossible to list all endangered species or to develop and implement recovery plans for these species. Moreover, the agencies charged with enforcing permits under the ESA rarely exercise their enforcement duties.⁶¹ In the midst of this regulatory incapacity, regulators never get around to developing and implementing recovery plans for most endangered species. Some of these recovery plans, however, could be developed through mediation,⁶² which presents an opportunity for endangered species advocates to participate directly in the protection of species through the formation of preserves, animal and plant recovery programs, and wetland restoration projects.

Of course, endangered species disputes are not the only value-laden conflicts that may be readily resolved through mediation. The permitting of industrial facilities is another values-charged issue that might well be placed before a mediator. Environmental

⁶¹ Rowland, *supra* note 16, at 524-525.

⁶² Rowland, *supra* note 16, at 525, *citing* MICHAEL J. BEAN ET AL., RECONCILING CONFLICTS UNDER THE ENDANGERED SPECIES ACT: THE HABITAT CONSERVATION PLANNING EXPERIENCE 3 (1991) (providing an excellent discussion of habitat conservation planning for endangered species and detailed case studies of negotiated agreements).

justice⁶³ advocates argue that businesses all too often try to site their facilities in poor urban communities⁶⁴ where residents may be less politically organized and lack discretionary funds to challenge the permitting process or permit. When residents do mobilize to fight an industrial permit, the ensuing battle can become hostile. Residents may feel downtrodden due to their economic position and the fact that they may already bear a disproportionate burden from industrial pollution. Business leaders may become frustrated because they need to site a facility quickly and may have thought community members would want a facility that would yield economic benefits and job opportunities. In these situations, a mediator can help the parties channel their conflict into a constructive dialogue about one another's positions and underlying interests; through this process, they may learn that they share common objectives in economic development and environmental protection and, by working together, they can maximize both.

D. Environmental Disputants Often Have Asymmetrical Resources and Power

In the public's eye, the quintessential environmental dispute pits a small struggling non-profit organization against a large and powerful corporation. In reality, the vast majority of environmental disputes are more complicated than that, some occurring between business actors with similar resources and expertise and some involving a host of parties of different sizes and levels of resources. Nevertheless, in many environmental disputes, the so-called "environmentalists"⁶⁵ tend to be outnumbered and less endowed with financial, legal, and technical resources when compared to those who seek to continue an industrial operation,

⁶³ Environmental Justice is the "fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." U.S. Environmental Protection Agency, *Environmental Justice*, <http://www.epa.gov/compliance/environmentaljustice/>.

⁶⁴ See Environmental Justice Initiative, *Mission and Goals*, <http://eji.snre.umich.edu/goals.html>.

⁶⁵ The term "environmentalists" is used in this paper to denote those individuals who on behalf of themselves or a non-profit organization seek to conserve and restrict access to natural resources and/or who seek heightened controls on industrial pollutants such as sulfur dioxide emissions, pesticides, or hazardous waste.

develop a resource, or maintain the status quo of an existing law. This is because in such disputes, there are typically several parties with an interest in disposing of their waste in a commons like the nation's air or water resources and/or exploiting a natural resource like land or water for economic gains. Often, these representatives are variable enough that they each may be entitled to a seat at the bargaining table, whereas, people representing the environmental or conservation faction might only come from one or two non-profit organizations.⁶⁶

Thus, regardless of whether environmentalists chose litigation or mediation to achieve their objectives, they will typically be underdogs and must use a disproportionate amount of their resources to pursue any pre-existing or new legal rights. These discrepancies have implications for whether or not environmentalists are willing to try mediation to resolve their dispute, even if their opponents are willing. With this in mind, mediation may be inappropriate for environmental underdog parties, and litigation more appropriate. Nevertheless, there are some instances where mediation may still be beneficial for environmentalist underdog parties.

The problem with mediation and the benefits of litigation when parties have asymmetrical resources and power.

One of the more significant challenges in litigation is the costs of seeking to effectuate pre-existing or new legal rights in court. Mediation however can also be quite costly. At a minimum, each participant in mediation requires funds for travel expenses, information collection, evaluation, and expert advice. Government agencies and private corporations have the resources and staff to participate actively in mediations, but many other parties lack sufficient staff or volunteers and the financial and technical resources to participate effectively.⁶⁷ In particular, many non-profit organizations find it very difficult to participate in time-demanding

⁶⁶ Rowland, *supra* note 16, at 515.

⁶⁷ Bingham, *supra* note 30, at 6.

mediations because they only have a few leaders who can participate in these exercises and who have the authority to make decisions for their organization.⁶⁸

Exacerbating these resource asymmetries are power asymmetries. As discussed earlier, in many environmental disputes, polluters and resource developers outnumber those who seek to restrict pollution or conserve a resource. While mediated agreements are generally based on full consensus among the parties (an arrangement that empowers minority parties to prevent agreements), these numerical imbalances still present a real problem for minority parties. In negotiation, these imbalances may shift the burden of proof concerning whether and how a proposed action will impact the environment to the minority party or parties that advocate for more stringent environmental controls or restrictions on resources exploitation. Burdened by a higher standard of proof, these parties often need more data and more convincing technical arguments for their position than other parties require for their own.⁶⁹

Power asymmetries have other implications beyond the issue of who bears the burden of proof during negotiations. Mediations typically take place in an informal setting where people are free to be candid with one another and to think “outside the box” about solutions to their problems. But, where huge asymmetries in power are present, some scholars feel that this informality may allow more powerful parties to impose their will on weaker parties.⁷⁰ For example, powerful negotiators could limit the range of choices for negotiation to those that are most beneficial to the dominant party, which will typically be the business interest.⁷¹ Powerful

⁶⁸ BINGHAM, *supra* note 17, at 162.

⁶⁹ Rowland, *supra* note 16, at 515.

⁷⁰ Zeinemann, *supra* note 18, at 52.

⁷¹ *Id.* at 53; *but see* Lisa Jones, *Howdy, Neighbor!: As a last resort, Westerners start talking to each other*, 29[9] HIGH COUNTRY NEWS, May 13, 1996, 3-4, at: http://www.hcn.org/servlets/hcn.PrintableArticle?article_id=1828 (noting that some non-profit environmental groups are simply threatened by mediation because it is a threat to their organization’s advocacy tactics and not because the process might render environmental decisions less protective. In her article, she quotes Seth Diamond, a wildlife program manager of the Intermountain Forest Industry Association who was working with the National Wildlife Federation and Defenders of Wildlife to reintroduce grizzlies to Idaho’s Selway-Bitterrot Wilderness. In his quote, Diamond responded to criticism waged by The Sierra Club concerning consensus-based decision-making processes like mediation, “The Sierra Club is

organizations could also fool parties with less negotiation experience into accepting a less favorable resolution than could be secured in court.⁷²

Mediation's informality and cordial atmosphere may also undermine environmentalists' ability to use conflict and media attention as a source of power. Many underdog parties have relied successfully on hostile media campaigns against so-called "big business" to generate publicity for their work and to attract the attention of funders with strong environmental convictions. Much of the media and funders thrive on conflict and develop a keen interest in the "winner-takes-all" decisions rendered in court. Voluntary dispute resolution processes like mediation, however, are often not combative enough to warrant media attention and may not be aggressive enough to attract funds from wealthy and passionate environmentalists.⁷³

One final problem with mediation for underdog parties is one of time frame. One common mediator strategy is to narrow the time frame and issue parameters that parties consider. Environmentalists, however, tend to think about and define problems over relatively long time periods. Even if there are no apparent limits to people's consumption of resources and production of waste, environmentalists think about the long-term cumulative impacts of these behaviors and about how these impacts may combine and reinforce each other over time. By contrast, business interests tend to think in terms of short-term profits for their shareholders, so they operate in a shorter time frame and with a narrower focus on activities. To keep the parties talking and the scope of negotiations manageable, a mediator may coerce environmentalists to artificially narrow the timeframe and issues in dispute, which favors some businesses.⁷⁴ In

threatened by local people working out their differences. Their organization generates resources by fostering and operating in a climate of hostility and polarization. So when people closer to the resources and the issues work out their differences, it becomes difficult to raise funds – and the kind of anger they use to generate those funds...The key issue with grizzly bear recovery is creating an environment where people aren't hostile.”)

⁷² Mank, *supra* note 14, at 280.

⁷³ See BINGHAM, *supra* note 17, at 159-160.

⁷⁴ Rowland, *supra* note 16, at 520.

litigation, however, environmentalists can frame their complaints with whatever scope and timeframe they deem appropriate; judges then have the power to tailor relief to take into account the long-term effects of pollutants or the use of a particular resource.

Mediation as a tool to address asymmetrical resources and power.

All of the above shortcomings are not highlighted to undermine the value of mediation; rather, they are raised to point out particular pitfalls of using the process when parties have huge discrepancies in resources and power. Where that is the case, proponents of mediation point out that environmentalists can simply not mediate if they perceive the chips are stacked against them. Indeed, smaller organizations with less bargaining power and savvy negotiation skills might be wise to pursue resolution of their dispute in court.⁷⁵ Nevertheless, there are at least four reasons why even groups who position themselves to go to court might benefit from mediation.

First, even if an organization has the funds to litigate, that does not mean it has standing to sue. U.S. Supreme Court jurisprudence on standing has created significant problems for some environmental groups who cannot easily show an “injury in fact” by a proposed project.⁷⁶ In mediation, opposing parties may still be willing to reach compromise solutions, even if they are not sure that a plaintiff would have standing to sue in court. On a related point, in mediation both parties can test out different theories of a case, which might make an impending litigation more efficient for those organizations with limited resources.⁷⁷

Second, for parties who have the money and power to go to court, mediation may still be preferable because the process may allow them to reach an agreement that is better and timelier than the one they could reach in court. Pursuing a claim in court takes a great deal of time because courts cannot respond promptly to the huge number of civil cases filed each year. Once

⁷⁵ Mank, *supra* note 14, at 281.

⁷⁶ See *Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177 (1990).

⁷⁷ Susskind and Secunda, *supra* note 3, at 40.

a court does hear a party's case, there is no guarantee that these overloaded courts will reach better resolutions to controversies or encourage fairer settlements between parties when compared to mediation.⁷⁸

Third, in light of the time and expense associated with going to court, most parties in environmental disputes settle their claims, but the non-mediated processes in which these settlements take place do not necessarily guarantee a more equitable result than could be arrived at through mediation. This is because, unlike other disputes like those between labor and management, parties to an environmental dispute lack any pre-defined structure to negotiate a resolution.⁷⁹ Mediators, therefore, can establish an improved negotiation process so that environmental disputants can resolve their disputes more constructively. Along similar lines, mediators can also play an active role in promoting negotiation by initiating and setting the ground rules for negotiation, helping parties to listen to one another, and guiding them through the more advanced stages of dispute resolution such as writing and enforcing agreements.⁸⁰

Fourth and finally, to make mediation more attractive to underdog organizations, some mediators and organizations have taken special steps to help such organizations participate in mediation. For example, to enhance the participation of environmental and citizen groups, some agencies like the Environmental Protection Agency provide grants that allow these organizations to participate in mediated processes and other consensus-building exercises; these agencies also provide under resourced groups with funds for technical assistance during the negotiations.⁸¹

Some philanthropic organizations and corporations with a stake in the resolution of a controversy

⁷⁸ Mank, *supra* note 14, at 281.

⁷⁹ In labor management disputes, for example, unions and management are required by federal law to negotiate with each other. This, and the legalization of the strike, has empowered unions to participate in labor decisions. BINGHAM, *supra* note 17, at 162.

⁸⁰ *See Id.*

⁸¹ *Id.* at 161.

also provide financial and technical resources to under-staffed and low-budget organizations.⁸²

These resources have helped underdog organizations demonstrate the scientific and technical validity of their arguments.⁸³

In addition to assistance provided by organizations, environmental mediators themselves have also taken steps to make mediation a more attractive option for underdog organizations. For example, to address the concern that some organizations lack the resources and skill to negotiate effectively in mediation, some mediators have built into their contracts with the parties an explicit responsibility for training the parties who ask for help. Some of these agreements have also included codes of conduct that permit a mediator to end the mediation when power imbalances become too severe to allow meaningful discussions to continue.⁸⁴

In summary, mediation poses some special problems and some unique opportunities for underdog environmental organizations. Where the resolution of environmental disputes is complicated by huge imbalances in resources and power, mediation may not be appropriate. Nevertheless, some underdogs recognize the benefits of consensus-based dispute resolution processes like mediation and consider these processes valuable to achieving their interests.⁸⁵

E. Government Is Often a Party In Environmental Disputes

⁸² Bingham, *supra* note 30, at 6. Some authors believe that grants and free technical assistance should not be provided to citizens' and environmental groups because these groups find money to pay for litigation, so they ought to be able to look for and spend money on mediation if that process suits their interests. Moreover, opponents of supporting these organizations stress that the government or whoever is supporting these groups should not spend money on "adversarial science;" instead, what is needed is joint scientific and technical inquiry, not new funds for others to perform their own studies. *See* BINGHAM, *supra* note 17, at 161.

⁸³ For example, in a facilitation on the construction of the Two Forks Dam in Washington, environmentalists questioned whether the dam was needed and argued that conservation measures could provide enough volume of water for future users. Others questioned the environmentalists' argument and asked them to document their claims. The environmentalists lacked funds to hire a computer analyst, so one of the business members of the roundtable provided money and technical assistance to complete their study; money was also provided through a technical fund available to the mediators. *See* BINGHAM, *supra* note 17, at 160.

⁸⁴ Susskind and Secunda, *supra* note 3, at 40.

⁸⁵ Bruce Farline, the Executive Director of Montana Trout Unlimited, has remarked that collaborative initiatives like mediation are one tool among others: "It's another tool...It works in some places and doesn't work in others. I've had mixed results with some (collaborative efforts), but I'm more hopeful than I was five years ago. They're not alliances; they're dialogues. And I have seen some beneficial stuff..." Jones, *supra* note 71, at 6.

There are many environmental disputes where a governmental agency brings a prosecutorial or enforcement action against a private party. Resolving environmental prosecutorial disputes can be challenging and present unique problems that are not present in ordinary dispute resolution processes between private parties. This section first explores the benefits of litigating and the problems with mediating such prosecutorial disputes. Next, the section discusses the use of mediation to resolve such disputes.

Pitfalls of mediation to resolve environmental prosecutorial disputes.

One of the reasons parties elect mediation over litigation is because they can resolve their dispute without exposing the nature of and resolution to their conflict to the public. In the context of government enforcement actions, however, this positive attribute can be a drawback. When a government mounts a prosecutorial action against a party, it generally does so for two reasons: first, to enforce a regulatory violation by that party, and second, to influence the substantive case law so that third parties will structure their business practices in compliance with a court's decision. All agencies have limited resources so they must rely heavily on the "guiding" force of judge made law to help private parties understand and comply with the law.⁸⁶

Given the context in which the government mounts prosecutorial actions, many scholars believe such actions should occur in the sunshine, rather than behind the closed doors of a mediated session. Indeed, most mediations with public officials must comply with open meeting, public, notice, and freedom of information requirements.⁸⁷ Unfortunately, compliance with such rules can undermine one of the core benefits of mediation – confidentiality. When mediations are not confidential, private parties will likely be more reticent to divulge all pertinent information

⁸⁶ Edward Brunet, *The Costs of Environmental Alternative Dispute Resolution*, 18 ELR 10515, 10516 (1988).

⁸⁷ Zeinemann, *supra* note 18, at 59.

that relates to a matter in controversy, which may limit the parties' ability to settle their dispute and/or find creative solutions to their problems.⁸⁸

A second challenge to mediating prosecutorial disputes with the government is that the government may have multiple and competing priorities or interests at stake in the dispute, which can make it difficult for a mediator to help the parties structure an agreement that meets everyone's interests. For instance, a company that is responsible for polluting a groundwater supply probably just wants to resolve its liability for the matter, but the government may have multiple agendas at stake in the dispute. An agency's project manager may be most interested in a speedy remedy to the problem before a contaminated plume migrates to another area; the agency's litigators may be more focused on securing a good legal precedent; the community involvement coordinator may be more focused on what the public will think about the government's enforcement strategy.⁸⁹ In short, unlike a private party, the government is not a single entity, which, as discussed, can make it difficult for the mediator and the private party to know whom they are dealing with. In litigation, however, government parties need to narrow down exactly the specific remedy they require to address a statutory violation.

The nature and promise of mediating prosecutorial disputes with the government.

Despite these concerns, in the past decade, environmental mediation has become the most common form of public sector mediation. The process has been supplementing and supplanting traditional legislative and judicial processes because public sector officials and administrators are

⁸⁸ One response to the problem of confidentiality in prosecuting government enforcement actions is to permit such mediations to be confidential. However, if that were the case, unscrupulous parties might mediate a dispute with the government only to avoid disclosing certain facts or information to the public, which would occur through litigation. Moreover, in such confidential negotiations, the actions of the public agency itself would be shielded from public view, which some might view as counterproductive in light of this nation's open government decision-making structures. Liepmann, *supra* note 11, at 105-6.

⁸⁹ Elissa Tonkin, *Mediating with an Environmental Enforcement Agency*, in ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS 62 (Ann L. MacNaughton and Jay G. Martin eds., 2002).

struggling to resolve disputes with limited resources and mediation helps them do just that.⁹⁰

Given this rising interest in mediation, it is likely the process will be used more frequently in the context of government enforcement actions. Recognizing this trend, some authors have sought to help non-governmental parties better understand the process of mediating with an environmental agency and have pointed to the benefits of resolving enforcement actions through mediation.⁹¹

Elissa Tonkin of the EPA has written a fairly comprehensive text on mediating with environmental agencies like her own. In her work, Tonkin notes that one of the key differences between mediating with the government rather than between private parties is that government decision makers are rarely at the negotiation table. Instead a government agency like the EPA often sends a professional negotiator (often a case lawyer) to the mediation who may or may not have settlement authority. While this negotiator generally has a bottom line (which may include a dollar amount and a set of remedial requirements of the offender), it can be frustrating for the private parties involved when they wish to develop more innovative measures to resolve their conflict that are beyond the authority of the government negotiator to accept.⁹²

A second problem private parties confront when mediating with the government is that the government has many approval procedures that are triggered when a private party puts new and unforeseen settlement options on the table. These varied and sometimes cumbersome approval processes are a frequent cause of negotiation setbacks and total breakdowns.⁹³ Making matters worse for the private party, government negotiators are often reluctant to speculate about how their office's internal deliberations on a settlement arrangement will unfold, which often alarms private parties who fear that the agency is withholding information, conducting an

⁹⁰ Zeinemann, *supra* note 18, at 50.

⁹¹ Note that agencies often approve of settlements arrived at through mediation because they represent better outcomes than otherwise would occur through litigation. Nevertheless, a mediated agreement does not mean the agreement is legal; all mediated agreements must meet the regulatory requirements of the agency. *See* Susskind and Secunda, *supra* note 3, at 39.

⁹² Tonkin, *supra* note 89, at 60-61.

⁹³ *Id.* at 59-60.

arbitrary review process, or that they are being manipulated by someone who is trying to extort another concession from them.⁹⁴ Moreover, agency supervisors who approve settlements negotiated by their staff may unexpectedly delay a decision or reach a decision that is inconsistent with what negotiators had discussed; in these contexts, disappointed parties from the private sector can react negatively and make quick and unconstructive decisions.

Mediators can play a special role in helping private parties weather the challenge of dealing with a government negotiator who lacks authority to explore flexible and unconventional means of resolving a dispute. The mediator, for example, can help a private party better understand the agency's decision-making processes, including the time frames in which agencies make decisions.⁹⁵ Moreover, mediators can help temper the anger that many private parties may express when they feel the government is being unfair. Mediators can help aggrieved parties interpret the information they receive from an agency and help them resist the impulse to make rash decisions that destroy settlement prospects.⁹⁶

A third unique aspect of mediating with a government party like EPA is the objectives of that government party. In a private party dispute, particularly one between two business actors, all parties typically want to avoid litigation costs, especially when the costs associated in preparing a case for litigation approach or exceed what is at stake in the litigation. Government litigators, however, may not mind spending more money to litigate a case than is actually at stake in litigation because losing money on a case is not necessarily bad government.⁹⁷

Since government litigators enforce the law through lawsuits, litigation is not an expensive distraction from their real work because litigation is their real work. Thus, when

⁹⁴ *Id.* at 61.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

government litigators predefine a settlement range for an environmental compliance violation, they do not structure that settlement range to take into account expenses for litigation or the risk that they may fail to win at trial.⁹⁸ Instead, according to Tonkin, government litigators structure settlement ranges based on how they answer particular questions about a given case, namely:

What result is necessary to ensure that the law has been properly and consistently enforced? What are the likely environmental consequences of different settlement options? By what settlement criteria are we bound as a matter of law and agency policy? What message will a particular result send to the regulated community? The public? What result will inspire confidence in the integrity of our enforcement program? Are there environmental justice concerns that would be better addressed by certain settlement options?⁹⁹

It is unlikely that private party disputants (even those between an environmental and business organization) would structure their settlement range according to how they answer such questions. Knowing this, a mediator can help private parties better understand the objectives of the government party and may be able to make recommendations for how to meet those objectives while still saving money.

A fourth factor that makes mediation a valuable process for resolving prosecutorial disputes between government and private entities is that mediators can help manage conflicts that have been inflamed when the parties have made provocative moral judgments about one another, which can make a dispute personal and settlement less likely. Tonkin writes,

Government enforcers typically believe – earnestly – that they have justice on their side, that they are working on behalf of the public good, and that they are redressing a wrong that has been committed. Respondents against whom an enforcement action is being taken often perceive that they are victims of Big Government run amok, that they are hard-working Americans who are being persecuted for obscure technical violations by bureaucrats who have no clue what it takes to run a business, and that the agency should be going after real polluters instead of responsible citizens.¹⁰⁰

⁹⁸ *Id.* at 61-62.

⁹⁹ *Id.* at 62.

¹⁰⁰ *Id.* at 63.

These filters through which people view their conflict routinely interfere with the parties' ability to focus on their own interests, which often involve settling the case. While mediators may have difficulty changing peoples' viewpoints, they can help them anticipate how the other side will interpret their communications and positions. In doing so, mediators can minimize unnecessary provocations and frame discussions in a way that prevents people from exhibiting righteous indignation toward one another.¹⁰¹ Moreover, mediators can help people differentiate between minor glitches in negotiations and major problems that occur on the path to settling a dispute.¹⁰²

In summary, resolving prosecutorial disputes with the government can be challenging, but mediators can help private parties weather these challenges and avoid bringing their dispute to court. Mediators can help parties better understand government negotiation processes and, in particular, how best to work with a government negotiator who is reticent to explore flexible and unconventional means of resolving a dispute. Mediators can also help parties understand and meet government enforcement objectives while potentially saving money. Finally, where private parties and government staff make provocative moral judgments about one another that exacerbate conflict, mediators can temper such judgments and keep negotiations on course.

Conclusion

Conflict over environmental and natural resource management issues can be severe and volatile. When managed well, conflict can bring people together to discuss their differences, understand the facts that underlie a dispute, and develop innovative responses to their problems. When managed poorly, conflict can consume massive quantities of time and money, destroy valuable relationships, block important projects, and escalate into physical aggression.¹⁰³

¹⁰¹ *Id.*

¹⁰² *Id.* at 64.

¹⁰³ Ann MacNaughton and Jay Martin, *Managing Environmental Conflict and Disputes for Improved EDR Results*, in ENVIRONMENTAL DISPUTE RESOLUTION: AN ANTHOLOGY OF PRACTICAL SOLUTIONS 270 (Ann MacNaughton and Jay Martin eds., 2002).

There are several dispute resolution processes available to address environmental conflict in a healthy and productive manner. Decisions about which one is preferable are always context-specific and depend on the goals and objectives of the stakeholders in conflict and the training, experience, and creativity of their advisors.¹⁰⁴ In the resolution of environmental disputes, adversarial processes like litigation are advantageous under certain circumstances, such as when there is an imbalance of power between disputants or when one or both parties aim to establish precedent in an evolving area of law. The threat of litigation also enhances the regularity in which parties use dispute resolution processes like mediation.¹⁰⁵ As one scholar has noted, “most environmental mediation takes place in the shadow of the law;”¹⁰⁶ consequently, litigation and mediation remain important complements to one another.

Against this backdrop, there are numerous reasons why parties choose to mediate an environmental dispute, even where litigation is practical. Mediated processes, for example, help parties control dispute resolution costs that might otherwise escalate when parties prepare for trial. These cost savings are advantageous regardless of whether a dispute concerns two businesses, a government prosecutorial action, or a “citizen suit” against developers. Mediated processes also allow people to maintain control over the dispute without delegating decision-making power to a third party or divulging confidential information. As a result, in mediation, parties can explore innovative means of dispute settlement that may offer joint gains for the parties and also improve environmental quality. In mediated processes, parties are also more likely to develop parallel dispute and information management processes such as joint fact-finding sessions to navigate the inevitable scientific and technical complexities and uncertainties that exacerbate environmental conflict.

¹⁰⁴ *Id.*

¹⁰⁵ See Susskind and Secunda, *supra* note 3, at 40.

¹⁰⁶ *Id.*

Over the past three decades, the use of mediation to resolve environmental disputes has been steadily on the rise and evidence suggests the practice will continue to gain in popularity. Private business actors are using mediation with increased regularity in order to resolve commercial environmental disputes such as those involving pollution indemnification or regulatory compliance. Mediation is also being used to address prosecutorial disputes between government and business. Finally, and more surprisingly, parties are turning to mediation to address seemingly intractable disputes over deep-seated values, which are often the source of environmental conflict and protracted court battles.