

Environmental Mediation: The Promise and the Challenge

by Jennifer Harder

"So you see," said the zebra, addressing the crab, "here are people of real consequence, who know what they are talking about."

"Then they know there's more water in the world than there is land," asserted the crab, in a shrill, petulant voice.

"Ladies and gentlemen," said the zebra, "please pardon my poor friend, because he is ignorant and stupid, and does not understand...pray tell him that the world contains more land than water, and when he has heard your judgment I will carry him back and dump him into his pool, where I hope he will be more modest in the future."

"But we cannot tell him that," said Dorothy gravely, "because it would not be true."

At this the crab began laughing in queer chuckles that reminded Dorothy of the way Billina the hen sometimes cackled.

"I'm sorry I asked you to decide this question," said the zebra, crossly. "So long as neither of us could prove we were right we quite enjoyed the dispute; but now I can never drink at that pool again without the soft-shell crab laughing at me."

- The Emerald City of Oz¹
L. Frank Baum

Some people would rather fight than finish. If, like the zebra, you prefer to feud, then alternative dispute resolution (ADR) is not for you. But if you're searching for a practical tool for solving environmental problems, you'll want to pay attention to how decision-makers are using this centuries-old practice today.²

Environmentalists cannot afford to ignore ADR. Congress is writing environmental ADR into law, federal and state agencies are incorporating it into their regulations, and industry is settling environmental disputes via ADR. Few statutes or common-law doctrines govern alternative processes³, so those who use ADR are making up the rules as they go along. Environmental lawyers have a dual role to play in this formative era; as attorneys, we should be concerned about the substantive and procedural interplay between mediated and litigated issues, and as citizens who value environmental quality, we should be concerned about the

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results. In order to ensure that quality processes shape the outcome of environmental issues, environmental lawyers should participate in the formative stages of the marriage between ADR and environmental decision making.

Some environmentalists remain skeptical about the value of settling controversies through ADR. This skepticism is healthy; continuing dialogue encourages high standards and inspires increasingly principled dispute resolutions. Cynics, however, need to recognize that under the right circumstances, ADR accomplishes its goals. In fact, the most comprehensive empirical analysis to date on environmental mediation discovered a voluntary agreement rate of 78% among parties opting for ADR.⁴

ADR refers to a variety of processes used to resolve conflicts both inside and outside traditional forums.⁵ Commonly applied in labor and commercial disputes, divorce, insurance and the international arena, ADR is riding a wave of popularity encompassing many new areas, including environmental law. Mediation is the form of ADR most frequently used to resolve environmental controversies.⁶ A mediator is a third-party neutral who facilitates dispute settlement. Traditionally, mediators do not authoritatively direct the course of agreement or offer opinions on the merits of the dispute⁷, but instead encourage communication by helping each party understand the other's goals. Mediators emphasize common ground in order to build a consensus that allows parties to design their own settlement.

Mediation assumes that conflicts arise when parties advocate different positions, i.e., specific actions or policies designed to reach underlying goals.⁸ Sometimes these underlying goals, or *interests*, are better served by pursuing alternative *positions*.⁹ Mediators help disputing parties identify which of many possible positions best accommodates their collective vital interests.¹⁰ Unlike conventional adversarial methods, mediation implements the "emerging paradigm" of consensual, interest-based bargaining.¹¹ Mediators help participants learn the techniques of consensus, to focus on issues instead of personalities, and to pay attention to non-verbal signals. The ultimate goal of mediation is to replace traditional power contests with principled negotiations for the benefit of all parties.

Although ADR stands for *alternative* dispute resolution, the term is a misnomer. Mediation and other ADR techniques are more usefully considered as supplements, not alternatives, to traditional processes.¹² Many mediation advocates agree that disputes involving important legal precedents, fundamental moral conflicts¹³ or high-stakes distributional questions¹⁴ ought to be subject to traditional forums.¹⁵ Consider, for example, that if the Mono Lake case¹⁶ had been mediated, then California would not have the benefit of the public trust doctrine to protect in-stream flows. The Society of Professionals in Dispute Resolution (SPIDR) emphasizes that ADR can "never fully replace the courts which must interpret the law, establish precedent or provide a forum for decision by a jury of one's peers."¹⁷

When parties consider whether to mediate a dispute, they analyze the issue at two levels. First, they look for factors such as precedent-setting legal issues that indicate the dispute ought to be decided through traditional methods. Second, the parties evaluate whether mediation serves their own best interests. Litigation, political action, or administrative appeal may provide better alternatives than mediation, depending on the stakeholders' true goals. These available options limit the possibility that parties will mediate a dispute that belongs in another forum.¹⁸

Mediators likewise evaluate chances for a successful settlement prior to accepting disputes. Pioneer mediator Gerald Cormick¹⁹ identifies four factors that tend to predict success in mediation: a stalemate in decision-making or recognition that stalemate is inevitable, voluntary participation, some room for flexibility, and a means of implementing agreements.²⁰ Daniel Yamshon, a Sacramento-based mediator, evaluates cases by asking himself two questions: 1) How do the characteristics of the mediator complement the parties' needs? and 2) Are the parties motivated to negotiate in good faith?²¹ Mediators are motivated to evaluate potential cases very carefully, because successful settlements enhance their professional reputations.²²

People who fear that mediation subverts the protections that traditional forums supply don't realize that mediation provides comparable checks on abuse. Courts require that litigants meet certain thresholds, such as stating a cause of action and establishing standing. In mediation, stakeholders and

facilitators serve as their own gatekeepers. The parallels between the two processes should both concern and encourage environmentalists. Environmental attorneys should be concerned about developing mediation practices that protect legal rights but still provide the advantages of consensus. Courts and other forums have had years to establish fair and equitable rules for protecting rights; this process is just beginning in ADR. On the other hand, environmentalists should be encouraged because they have an opportunity to contribute to the debate over rules now, in its early stages.

The Advantages (and Disadvantages) of a Consensual Approach to Problem-Solving

Advocates of mediation and other ADR techniques believe that environmentalists don't like mediation because they don't understand the process. Environmental activists perceive mediation as a closed, secret system in which business people make shady deals that are impervious to the light of democracy. Environmentalists that understand mediation, however, have discovered that the process can have advantages for both sides. For example, Friends of the River (FOR), an activist grass-roots organization, recently mediated a dispute concerning the South Fork of the American River. The FOR staff would never have submitted to mediation if they thought the process would compromise the public's rights to environmental protection. They agreed to mediate the issue because they trusted the merits of this approach.²³ More environmental groups might use mediation if they had a greater understanding of the advantages (and disadvantages) of the process.

The Good...

In some circumstances, mediation can be less time consuming²⁴ and less expensive²⁵ than litigation. Legal procedures often frustrate prompt resolution of a case.²⁶ In pre-trial discovery, for example, the goal may be "to obscure rather than disclose;"²⁷ in mediated fact-finding, the goal is to reach consensus. Mediators modify or eliminate inefficient procedures according to the needs of individual cases.²⁸ This flexibility, which includes the freedom to speak confidentially with the parties and to make timely suggestions, is a major factor in mediation's appeal and success.²⁹

Many environmental disputes turn on complex technical issues. Judges and juries generally do not have scientific backgrounds, and consequently evaluate competing theories by weighing the relative "credibility of disagreeing experts."³⁰ In contrast, mediators may retain a neutral environmental scientist to analyze the facts.³¹ The parties negotiate the questions and the type of analysis the scientist performs, but they never have any direct contact with that person. The scientist may either analyze competing scientific models for strengths and weaknesses or meet with the mediator in order to reach agreement on the facts.³² This evaluation lays the groundwork for an eventual settlement, but the parties only have to rely on it to the extent they agree upon.³³ Because the facts are consensually approved, the ultimate outcome may be more satisfying to all of the parties. When negotiating parties have the authority to implement a decision, they may achieve their goals more readily than through more adversarial methods.³⁴ Recognizing this benefit, California courts now encourage the use of neutral fact-finders during certain trial phases.³⁵

Mediated results are desirable in other ways. Flexibility fosters innovation; disputants fashion creative agreements that benefit both sides—what game theorists call "win-win" outcomes. Judicial solutions, in contrast, are often "zero-sum" because they usually generate criticism from at least one party. The losers may be bitterly disappointed, as Baum's zebra was when he was told that the world

contained more water than land. In the real world, however, people do not simply walk away from disputes. Instead, the parties may perpetuate the battle on other fronts, at everyone's expense.

Mediation allows the parties to communicate with each other, instead of through their attorneys.³⁶ By focusing on common interests, groups that initially do not like each other learn to be civil.

The communication that occurs during mediation often forms the basis for the resolution of future disputes.

Civility, in turn, may grow into genuine friendship. The communication that occurs during mediation often forms the basis for the resolution of future disputes.³⁷ For this reason, mediation is particularly suitable in disputes in which the parties have ongoing relationships.³⁸ At the close of a recent mediation, facilitator Daniel Yamshon was informed that his services were no longer needed; the parties had learned enough about working together that

they could forego future combat and instead solve their differences through cooperation. "Being told 'you've worked your way out of a job'" says Mr. Yamshon, "is the biggest compliment a mediator can receive."³⁹

The Bad...

Critics believe that ADR lacks the integrity of traditional decision-making processes.⁴⁰ Mediation, for example, can reduce accountability. There is nothing akin to public notice when parties choose to settle a dispute.⁴¹ Without public notice, interest advocacy groups may never find out about a dispute. In addition, only "cloutful people"—people who have a "stake" in the outcome—participate in a mediation.⁴² "Stakes" that generally count include money interests or the ability to thwart a negotiated agreement. The process thus disenfranchises non-stakeholders, potentially leaving no one to "speak for the trees."⁴³

Even if the process is relatively inclusive, the parties at the table may not have equal resources. Industry and government often have more negotiating expertise and greater access to information than environmental groups.⁴⁴ Some commentators argue that such power imbalances create a mere illusion of voluntary agreement:

The climate of understanding and progress in working toward mutually satisfactory solutions creates subtle pressures to be reasonable and conciliatory. These dynamics undermine the determination of unsophisticated parties to stand their ground on issues... The parties with less experience and sophistication may walk away with an agreement which favors their perspective much less than would have been possible in a more public, adversarial context.⁴⁵

In other words, while learning to like one's opponent may smooth the path to productive communication, this conversion may also adversely affect one's ability to achieve substantive goals.

The business community has been and continues to be an avid supporter of environmental mediation.⁴⁶ Some environmentalists are suspicious of this eager support. In removing our respective black and white hats, they ask, are we making ourselves vulnerable to a sneak attack? Will environmentalists be seduced by their former enemies and lose hard-won legal rights in the "touchy-feely" atmosphere of mediation? "Polite conservationists," argues one activist, "leave no marks except the

scars on the landscape that could have been prevented.”⁴⁷

...And The Ugly: The Deeper Debate⁴⁸ Over Environmental Mediation

Some environmentalists challenge mediation on a deeper level. The practical benefits of mediation, they say, don't really matter because the basic theory of consensus is flawed. This camp takes issue with the assumptions of mediation, which include:

- (1) Most environmental disputes have little to do with conflicting values or principles
- (2) Many disputes are the fault of misinformation, mistaken preconceptions, and poor communication
- (3) All disputants have equally valid interests and concerns
- (4) Compromise is usually the best outcome in disputes
- (5) The interests and goals of business and environmentalists are fundamentally compatible.⁴⁹

Clearly these assumptions are open to challenge. Many environmental conflicts, for example, arise directly out of conflicting values or principles. Without the conflict in values, the dispute wouldn't exist. Environmentalists who believe that saving the Earth requires a massive reordering of contemporary values may worry that by agreeing to negotiate, they are implicitly accepting a hostile world-view. If a global paradigm-shift is on the agenda, an environmentalist may well refuse to cooperate in mediation efforts.⁵⁰

Corporate support of mediation makes environmentalists even more nervous. Industry often operates out of coerced respect for legal rights to environmental protection; environmentalists struggling to establish fundamental moral principles fear that if courts and agencies abandon traditional oversight, compromise and cooperation⁵¹ will subsume their campaign of moral outrage.⁵² Environmentalists who lament the professional, corporate “pin-striped” image that some contemporary environmental groups cultivate already see the need for a “renewed moral outrage”.⁵³ Activists who seek to harness the power of rage and passion do not want to further diffuse the emotional intensity surrounding environmental issues.

Another school of environmentalists believe that mediation, far from undermining the cause, actually *further*s the “new environmental agenda”.⁵⁴ Based on communitarian principles⁵⁵, this new agenda rejects the idea that business is inherently immoral. Instead, the scope and manner of conducting business becomes all-important. “New” environmentalists believe that economic growth and development, *if properly managed*, are vital to human health. Human health and biotic health then become inseparable—decision-makers cannot address one issue without affecting the other.⁵⁶ Even world leaders are beginning to agree on this point: “[a]lthough this [plan for reducing greenhouse gas emissions] may cost a lot,” commented (then) Prime Minister Margaret Thatcher, “I believe it to be money well and necessarily spent because the health of the economy and the health of the environment are totally dependent upon each other.”⁵⁷

Integral to this new environmentalism is the concept of sustainable communities. The policies and practices of a sustainable community are aimed at “...maintaining a healthy environment to support long-term community development and managing economic growth in order to protect and restore the natural environment over the long run.”⁵⁸ In the post-industrial era, people cannot depend on traditional job sources (manufacturing, agriculture and “extractive” industries)⁵⁹ to provide long-term security.

Communities have started to explore ways to “diversify and encourage smaller-scale economic activities”.⁶⁰

The most egregious environmental harms, pollution and loss of biodiversity, are often caused by the aggregate effect of industry.⁶¹ Under the right conditions, a diversified small-scale economic base may be less ecologically destructive than large-scale economic activity.⁶² A community that believes that the health of the economy and the health of the environment are dependent on each other will protect both. In sustainable communities, then, environmentalists and business may find common ground. Because mediation focuses on common interests, this process can help adversaries establish relationships on which to build a sustainable future. In addition, mediation techniques can guide our attempts to solve the differences that arise in a more cooperative future. Perhaps the assumptions of mediation, given the new environmental agenda, are not so problematic after all.

Beyond the Academic Debate: What’s Happening in the “Real World”?

While environmentalists and academics continued to debate the merits of environmental mediation, its popularity has exploded. From 1993-94, the American Arbitration Association (AAA) settled at least 27 environmental disputes through mediation in Northern California alone.⁶³ In contrast, the most comprehensive study of environmental mediation to date found that in a period of ten years, only 161 environmental disputes were settled by mediation throughout the entire nation.⁶⁴ While no central clearinghouse, public or private, gathers statistics on mediation, anecdotal evidence indicates that a growing number of attorneys, consultants and other professionals are offering mediation services. Without comprehensive, empirical analysis, we have no way of knowing how many mediators exist or what volume of business they do.

Evidence also indicates that the federal government has been using ADR with increasing frequency over the past decade. The Environmental Protection Agency (EPA) has been mediating and arbitrating hazardous waste cases under the Comprehensive Environmental Compensation, Response and Liability Act (CERCLA)⁶⁵ since the early '80s.⁶⁶ CERCLA authorizes Superfund dollars for cleaning up toxic waste sites across the United States; if EPA disputes any claims, CERCLA requires the use of arbitration to settle the matter. According to mediator Sandra Rennie, in CERCLA’s early days “[c]reative government attorneys...found ways to benefit from the use of third-party neutrals in Superfund cases where the parties subject to enforcement had been using mediation to settle disputes among themselves.”⁶⁷ The Superfund Amendments and Reauthorization Act⁶⁸ (SARA) of 1986 likewise encourages federal agencies to use ADR to settle claims when total response costs are \$500,000 or less.⁶⁹

In 1987, EPA Administrator Lee M. Thomas issued a memo encouraging EPA officials to adapt mediation and non-binding arbitration techniques to resolve other types of enforcement issues.⁷⁰ The directive did not result in the referral of many new cases to ADR,⁷¹ presumably because of poorly addressed institutional obstacles at EPA.⁷² The memo did, however, help launch a pilot program in which the agency used ADR to successfully settle four out of five cases with documented cost-savings to the EPA.⁷³

EPA is not the only federal agency evaluating alternative techniques. The Administrative Dispute Resolution Act (ADRA) of 1990⁷⁴ mandates that agencies consider ADR in “rulemaking, litigation, enforcement actions, licensing and permitting and formal and information adjudications.”⁷⁵

The Negotiated Rulemaking Act of 1990⁷⁶ authorizes agencies to settle regulatory disputes using ADR. While the House Report accompanying the bill notes that federal agencies inherently possess authority to use negotiated rulemaking, this express authorization lends further legitimacy to results reached through alternative methods.⁷⁷ Since environmental standards often have their basis in federal regulations, the ADRA and the Negotiated Rulemaking Act will undoubtedly increase the use of alternative processes in this area.⁷⁸

California has also written ADR into several environmental statutes. New laws designate alternative processes as approved methods of apportioning liability for hazardous waste cleanup,⁷⁹ mitigating modifications to stream flows,⁸⁰ and resolving land use disputes. While the first two statutes mandate the less consensual ADR technique of binding arbitration, the last signifies California's recognition of the promise of environmental mediation:

When a public agency approves a development project that is not in accordance with the law, or when the prerogative to bring suit is abused, lawsuits can delay development, add uncertainty and cost to the development process, make housing more expensive, and damage California's competitiveness. This litigation begins in the superior court, and often progresses on appeal to the Court of Appeal and the Supreme Court, adding to the workload of a state's already overburdened judicial system.

It is, therefore, the intent of the Legislature to help litigants resolve their differences by establishing formal mediation processes for land use disputes...⁸¹

The California legislature just adopted this provision last year, providing environmentalists with an exciting opportunity to evaluate mediation at work. Environmental attorneys should watch to see if this new rule actually results in the referral of land-use conflicts to mediation, and if so, how mediation efforts affect the ultimate outcome.

Courts are also acknowledging the benefits of ADR. California has required court-annexed judicial arbitration in civil cases involving less than \$50,000 for over a decade.⁸² In 1993, the State Bar of California released the Guide to Court-Related ADR, which expressly recognizes the utility of environmental mediation:

...statistics show that most civil disputes are not resolved at trial, and court-related ADR programs hold substantial promise for resolving these cases earlier, at less expense and with less emotional toll on the parties and any existing relationships they may have...the parties in some environmental or land use disputes may be able to reach an agreement through mediation which accommodates more of their underlying interests and thereby obviates the need for future litigation over the same dispute.⁸³

The Guide suggests using ADR to resolve cases at an early stage, perhaps even before filing.⁸⁴ Lester Levy, Director of Northern California Environmental Dispute Forum for JAMS Endispute, Inc., believes, "As mediation of environmental cases becomes more commonplace, if not standard...parties will begin to prepare for mediation from the time they either file or accept service."⁸⁵ In fact, many Bay Area courts now encourage early discussion of mediability.⁸⁶

A wide variety of public and private interests use ADR processes to make important decisions. Standards and practices in mediation vary among mediators and may change from situation to situation. Mediators appreciate the current lack of regulation because it allows both flexibility and innovation.⁸⁷ Legislators, however, are proposing ADR regulations despite mediators' misgivings.

On February 23, 1995 California State Senator Newton R. Russell introduced a bill that would establish mediator certification standards and procedures.⁸⁸ While this bill does not address environmental mediation specifically, such regulation *will* have an impact on the practitioner pool. The bill requires the California Dispute Resolution Council to appoint a task force to designate a mediator-certifying organization. The organization will "...identify clear standards for assessing a mediator's competence and ability to appropriately conduct a mediation."⁸⁹ Environmentalists will want to oversee the identification of standards in order to promote rules that are effective in the context of environmental mediation. For example, environmentalists may want to evaluate whether applications and performance reviews indicate which mediators have strong scientific backgrounds.

Mediation: A Promising Alternative Career Path for Attorneys

While a 1984 study found "...no clear set of professional credentials or experience that provides entry to the field,"⁹⁰ attorneys play a critical role in mediation. A good grasp of the legal issues involved in a dispute is necessary in determining the threshold issue of whether mediation is appropriate. Legal

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skills are also pivotal in the course of negotiations. Furthermore, as ADR becomes "the dispute resolution process of choice" for many clients, lawyers and law firms have an incentive to develop a greater understanding of ADR processes.⁹¹ Finally, an increasing number of attorneys perceive litigation as "too acrimonious, unpleasant and draining", leading them to search for alternatives to traditional practice.⁹² Mediation may be a suitable career option for battle-weary attorneys. One

researcher notes that while the backgrounds of professional mediators differ considerably, "they share some key personal characteristics—they [are] low-key, likable people."⁹³ Lawyers and law students who enjoy solving problems but dislike the adversarial nature of litigation may be drawn to mediation. Properly cultivated, mediation could become one of the hottest legal career paths of the twenty-first century.

If you're convinced of the importance of learning more about mediation, what next? This may be the most problematic question of all. Just when and where environmental mediation occurs is hard to ascertain. Specialist Gail Bingham's 1986 study focused on 161 disputes that met her criteria for "environmental mediation".⁹⁴ In identifying these cases, Ms. Bingham was fortunate to have the resources of the Conservation Foundation at her disposal.⁹⁵ The Foundation, now called Resolve, no longer focuses on research—they are "in the business of paying bills." Facilitating disputes is apparently more lucrative than gathering statistics.⁹⁶ In the ten years since the Foundations's study, the process of gathering statistics has become increasingly difficult.

The challenges to gathering numbers on environmental mediation are plentiful. First, While AAA was able to provide statistics upon request, the other major California provider, JAMS Endispute, could not. JAMS' refusal was based on the fact that JAMS, unlike AAA, is for-profit; JAMS competes

with AAA and independent providers for clients, and is understandably hesitant to share the secrets of success. Second, the process is confidential. Disputants have full control over the release of information relating to their mediation. The California Evidence Code protects confidentiality of "...information gathered and discovered through mediation, including both verbal exchanges and written documents, unless all parties involved consent to disclosure."⁹⁷ Therefore, if the disputants don't want case information released to the public, they cannot be compelled to do so. Third, while most mediators affiliate with either JAMS or AAA, independent practitioners do exist, and their numbers may be increasing. Independent mediators are difficult to track without a central clearinghouse. Fourth, classification is a problem: representatives of both AAA and JAMS warn that while some disputes are clearly "environmental", many cases blur into other related fields such as insurance, personal injury (toxic torts), construction, and real estate.⁹⁸ Fifth, "mediation" itself is an amorphous term encompassing any number of non-binding, consensual processes.⁹⁹ Since these factors make it nearly impossible to know when and where environmental mediation is happening, individual case-studies, rather than broad-based empirical analysis, is the more effective way to study the phenomenon. The willingness of participants to share information limits the availability of cutting-edge data.

Don't despair - if you are interested in environmental mediation, California is a good place to start. The Golden State is something of a "hot-spot" for mediation in general, and environmental mediation in particular. AAA data indicate that in 1993-94, 273 of 1,208 disputes mediated nationwide were located in California.¹⁰⁰ In addition, California was one of the first seven states whose bar associations recognized environmental ADR as "a possible response to the increasing amount of litigation."¹⁰¹ What does this recognition mean for environmental attorneys? First, they have quick access to a lot more information than is available in other states. Second, they have access to a growing number of programs that provide opportunities for internships or jobs. The list of private attorneys, consultants and firms in California that offer mediation services grows every year. Some practitioners, including AAA, now offer mediation training courses. Courts, administrative agencies, law firms, and consulting groups may be able to provide practical mediation experience. Environmental attorneys who are interested in mediation should take advantage of these increasing opportunities.

The Promise of Environmental Mediation

"A strange thing happened the other day...a bunch of people who traditionally considered themselves enemies sat down to talk...."¹⁰²

Mediation can lay the foundation for cooperative relationships and preclude future disputes between parties. However, in a world of limited resources and ever-increasing populations, we will probably never see the end of new environmental disputes. Skilled mediators will always be in demand, but tomorrow's mediators may find their craft utilized in situations very different than those of today. Consider the previously mentioned American River case, in which a local attorney mediated a dispute arising out of conflicting uses of the South Fork of the American River. Despite initial threats of legal and regulatory sanctions, the parties were able to develop an innovative solution that reduced environmental impacts on the river and benefitted all of the stakeholders. At the end of the process, all involved agreed to use the skills they had learned during negotiation to solve future disputes—without the assistance of the mediator.¹⁰³

The parties took their education one step further. They brought in a consultant skilled in consensus theory, not to solve disputes, but to *preclude* them. On September 25, 1995, the first ever

American River "Jaw Session" was held. This "floating caucus" was designed to bring all of the stakeholders on the South Fork (federal, state and county regulatory agencies, hydropower plants, utilities, developers, private citizens, city officials and environmental groups) together to *talk*. The facilitated group meeting used an interest-based approach to negotiation and communication. The techniques of an interest-based approach resemble those of mediation: a focus on issues, not personalities, decisions based on objective reason rather than power or coercion, and an acceptance of all interests as given, rather than an evaluation of those interests as right or wrong. Like mediation, interest-based

bargaining attempts to achieve a "good and lasting situation" for all parties, rather than a "win" for just one side.¹⁰⁴ The difference between mediation and interest-based bargaining is that while mediation *resolves* disputes, interest-based bargaining *precludes* them.

While ADR is not a panacea for the defects of other forums, under the appropriate circumstances mediation and other ADR techniques are valuable problem-solving tools.

Parties to environmental controversies are finding interest-based bargaining useful in many situations. In May, 1994, policy-makers for the Smith River National

Recreation Area and Redwood National Park came together to "...explore opportunities for diverse stakeholders in Del Norte County...to work together in active partnership for sustainable economic development".¹⁰⁵ Similarly, in 1995, California water policy leaders spent six months discussing issues affecting the San Francisco Bay and the Sacramento-San Joaquin Delta. This "Environmental Water Caucus" (EWC) focused both on the details of process - reorganizing the caucus, broadening participating membership and sharing information - as well as on strategy development and consensus.¹⁰⁶ The EWC was the model for the American River "Jaw Session", whose participants held a second, larger session on November 14, 1995.¹⁰⁷ All in attendance agreed on a third session, tentatively scheduled for early January 1996, in which they look forward to developing relationships that were previously thought to be impossible. In turn, participants hope that these positive relationships will lead to productive dialogue, which will form the basis for the policies the parties ultimately pursue. Interest-based bargaining assumes that stakeholders will not fight policies if those policies address their interests appropriately.

Conclusion

A new paradigm for decision-making is on the horizon. Mediation may provide the link between traditional, adversarial methods and the emerging consensus-based approach of interest-based bargaining. While ADR is not a panacea for the defects of other forums, under the appropriate circumstances mediation and other ADR techniques are valuable problem-solving tools. As environmental law students, attorneys and activists we face this challenge: become involved, or be left out! Mediation will happen with or without our participation. Don't let this inevitability, however, dampen your enthusiasm. We should celebrate the chance to actually resolve environmental disputes, and welcome the opportunity to participate in their resolution. Remember the cranky zebra who became annoyed at finally discovering the answer to his question? Let us keep open minds, lest we acquire similarly stubborn reputations.

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NOTES

- ¹ L. FRANK BAUM, *THE EMERALD CITY OF OZ* 158-160 (1910).
- ² Daniel Stein, *Environmental Mediation: A Viable Alternative To Costly Litigation* 16 ENVIRONS 69, 74 n.13 (1993), citing DONALD R. KELLEY, *HISTORY, LAW & THE SOCIAL SCIENCES* 207-228 (1984). ("Principled litigation, composed of bench, bar and jury, emerged in feudal England during the fifteenth century. Mediation, by contrast had been used in China to resolve interpersonal conflict several centuries earlier").
- ³ Karen L. Liepmann, *Comment: Confidentiality in Environmental Mediation: Should Third Parties Have Access To The Process?* 14 B. C. ENV'T'L. AFF. L. REV. 93 (1986).
- ⁴ GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 73 (1986).
- ⁵ Gail Bingham, *Executive Summary of RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* xv, xvi (1986) (Traditional forums include litigation, administrative appeals and political action).
- ⁶ John Folberg et. al. *The Use of ADR in California Courts: Finding & Proposals* 26 U. S. F. L. REV. 343, 430 (1992). (Through survey analysis, the authors found that respondents used mediation to solve environmental disputes 73% of the time, arbitration, 27%. This article was adapted from a Report prepared by the authors in 1991 under a contract with the Judicial Council of California/ Administrative Office of the Courts).
- ⁷ Telephone interview with Wendy Kiefer, American Arbitration Association (October 23, 1995).
- ⁸ Guy Burgess & Heidi Burgess, *Beyond the Limits: Dispute Resolution of Intractable Conflicts in MEDIATING ENVIRONMENTAL CONFLICTS: THEORY & PRACTICE* 101, 108 (J. Walton Blackburn & Marie Willa Bruce eds., 1995) *citing generally* ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENTS WITHOUT GIVING IN* (1991).
- ⁹ *Id.* at 108.
- ¹⁰ Stein, *supra* note 2, *citing generally* ROGER FISHER & WILLIAM URY, *GETTING TO YES* 101-111 (1983). ("Although mediation may not fully satisfy every party's interests, in most disputes there exists a spectrum of possible solutions which each party will prefer to no solution at all").
- ¹¹ Manual by Steve Barber, Barber and Gonzales Consulting Group, *Navigating the Emerging Paradigm: An Overview of Problem Solving in the Workplace through Decision Making and Negotiation* 5 (1995) (on file with Barber and Gonzales Consulting Group).
- ¹² Bingham, *supra* note 4, at 73. *See also* STATE BAR OF CALIFORNIA, OFFICE OF RESEARCH, *GUIDE TO COURT-RELATED ADR: PROGRAMS TO FACILITATE SETTLEMENT* I-6 (1993).
- ¹³ Douglas J. Amy, *Environmental Dispute Resolution: The Promise and the Pitfalls in ENVIRONMENTAL POLICY IN THE 1990s* 211, 226 (Norman J. Vig & Michael E. Kraft eds., 1990).
- ¹⁴ Burgess & Burgess, *supra* note 8, at 102.
- ¹⁵ J. Walton Blackburn & Willa Marie Bruce, *Introduction to MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE* 1, 2 (1995). *See also* Burgess & Burgess, *supra* note 8, at 102.
- ¹⁶ *National Audubon Soc'y v. Superior Court* 33 Cal.3d 419, 189 Cal.Rptr. 346, 658 P.2d 709 (1983).

17 State Bar of CA, *supra* note 12, at I-6 citing SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, PUBLIC ENCOURAGEMENT OF PRIVATE DISPUTE RESOLUTION: IMPLICATIONS, ISSUES, AND RECOMMENDATIONS (unedited version), 4 WORLD ARBITRATION AND MEDIATION REPORT 100-101 (1993).

18 Fisher & Ury, *supra* note 10, at 97-101 (Fisher & Ury call available options BATNAs, or Best Alternative To a Negotiated Agreement. BATNAs are often discussed in the context of stalled negotiations; parties refuse to commit to a settlement because they feel they can get better results in another forum. Anecdotal evidence leads me to believe that parties also evaluate their BATNAs prior to mediation, and that their perception that a better forum exists can preclude the possibility of mediation altogether).

19 Often called the “dean of environmental mediation”, Gerald W. Cormick was a co-mediator with Jane McCarthy in what is considered the first documented environmental mediation. The 1973 case involved a long-standing dispute over a proposed flood control dam on the Snoqualmie River in Washington. See SCOTT MERNITZ, *MEDIATION OF ENVIRONMENTAL DISPUTES: A SOURCEBOOK* 89-94 (1980).

20 ALLEN R. TALBOT, *SETTLING THINGS: SIX CASE STUDIES IN ENVIRONMENTAL MEDIATION* 99 (1983).

21 Telephone interview with Daniel Yamshon, Sacramento attorney and mediator (September 27, 1995). See also KNIGHT, FANNIN, DISCO & CHERNICK, *CAL. PRAC. GUIDE: ALTERNATIVE DISPUTE RESOLUTION* §3.53 (1995). (Prerequisites for a successful settlement include knowledge: “the parties and counsel must know enough about the case to be able to negotiate intelligently”, and interest in settling: “both sides must have a good faith interest in settling the case”) (emphasis in original).

22 Telephone interview with Daniel Yamshon, Sacramento attorney and mediator (September 27, 1995).

23 Interview with Laurie McCann, Executive Director, Friends of the River, in Sacramento, CA (October 24, 1995).

24 Stein, *supra* note 10, at 73, citing Bingham, *supra* note 4, at 127-148. (“The median duration of environmental civil suits was 23 months. If the case went to trial, the median duration was 42 months. By comparison, the median duration of environmental mediation was 5 months. Only 10% of the mediations took over 18 months to complete”). See also Lester J. Levy, *Mediation: A Case Study in Creative Structuring* 11 ENV’T L COMPLIANCE & LITIGATION STRATEGY 1,2 (1995).

25 Levy, *supra* note 24, at 2.

26 *Id.* at 2.

27 *Id.* at 2.

28 Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts* 19 DAYTON L. REV. 1305, 1306 (1994).

29 LAWRENCE S. BACOW & MICHAEL WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* 157 (1984).

30 Liepmann, *supra* note 3, at 102.

31 Lester J. Levy, *The Evolution of Environmental ADR* ENV’T L. RECORDER 44, 45 (1995).

32 *Id.* at 45.

33 *Id.* at 45.

34 Bingham, *supra* note 4, at 74-77.

35 State Bar, *supra* note 12, at IV-28. (Neutral fact-finders are also called referees, or special masters).

- 36 Telephone interview with Lester Levy, Northern California Director of Environmental Dispute Forums, JAMS Endispute (November 1, 1995).
- 37 Report from Daniel Yamshon, Mediator, *The American River Mediation Summary* 5 (1995) (on file with author).
- 38 Knight et. al., *supra* note 21, at §3.38.
- 39 Telephone interview with Daniel Yamshon, Sacramento attorney and mediator (September 27, 1995). *See generally* Report from Daniel Yamshon, Mediator, *The American River Mediation Summary* (1995) (on file with author).
- 40 Levy, *supra* note 31, at 1.
- 41 Telephone interview with receptionist, RESOLVE (November 1, 1995).
- 42 Amy, *supra* note 13, at 222.
- 43 Some commentators believe that environmental groups ought to have legal standing because nature cannot speak on its own behalf. *See generally* CHRISTOPHER STONE, SHOULD TREES HAVE STANDING: TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS (1974).
- 44 Amy, *supra* note 13, at 223.
- 45 *Id.* at 223-224, quoting J. Walton Blackburn, *Environmental Mediation as an Alternative to Litigation*, 16 POLICY STUDIES JOURNAL 563, 569 (1988).
- 46 *Id.* at 224.
- 47 Douglas J. Amy, *The Politics of Environmental Mediation* 11 ECOL. L. Q. 2 (1983), citing J. Crowfoot, *Negotiations: An Effective Tool for Citizen Organizations?* NRAG PAPERS 25 (1980) quoting David Brower.
- 48 Amy, *supra* note 13, at 226.
- 49 *Id.* at 226.
- 50 *Id.* at 226.
- 51 *Id.* at 226-228.
- 52 Geoffrey Wandesforde-Smith, *Moral Outrage and the Progress of Environmental Policy: What Do We Tell the Next Generation About How to Care for the Earth?* in ENVIRONMENTAL POLICY IN THE 1990s 325-47 (Norman J. Vig & Michael E. Kraft eds., 1990).
- 53 *Id.* at 340.
- 54 Christine M. Reed, *Mediation and the Environmental Agenda* in MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE 5 (J. Walton Blackburn & Willa Marie Bruce eds., 1995).
- 55 *Id.* at 14, citing generally DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION (1987).
- 56 Norman J. Vig & Michael E. Kraft, *Conclusion: Toward A New Environmental Agenda in ENVIRONMENTAL POLICY IN THE 1990s* 369, 372 (Norman J. Vig & Michael E. Kraft eds., 1990), citing OUR COMMON FUTURE (World Commission on Environment and Development, 1987); Jim MacNeill, *Strategies for Sustainable Economic Development* SCIENTIFIC AMERICAN 261 (September 1989), and *Growth Can Be Green* THE ECONOMIST 12-13 (August 26, 1989).
- 57 *Id.* at 372, quoting M. Thatcher in STEPHEN H. SCHNEIDER, GLOBAL WARMING: ARE WE ENTERING THE GREENHOUSE CENTURY? 280 (1989).
- 58 Reed, *supra* note 54, at 6.
- 59 *Id.* at 7.
- 60 *Id.* at 6.
- 61 *See id.* at 6.
- 62 *Id.* at 6.
- 63 Telephone interview with Wendy Kiefer, American Arbitration Association (October 23, 1995).

- 64 Bingham, *supra* note 4, at 73. (The study spanned the years 1973-1984).
- 65 Comprehensive Environmental Response, Compensation & Liability Act (Superfund), 42 U.S.C. 961-9675 (1988), Pub. L. No. 96-510, 94 Stat. 2767 (1980).
- 66 Sandra M. Rennie, *Use of Mediation and Arbitration in Federal Planning, Permitting and Enforcement* 19 ENV'T'L L. REP. 10479, 10480-1 (1988).
- 67 *Id.* at 10480.
- 68 Superfund Amendment & Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986).
- 69 Stukenborg, *supra* note 28, at 1321.
- 70 Richard H. Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?* 18 ENV'T'L L. REP. 10087 (1988). *See also* Stukenborg, *supra* note 28, at 1321. Memorandum from Lee M. Thomas, Administrator, EPA, to Assistant Administrators and Regional Administrators *Re: Final Guidance on Use of Alternative Dispute Resolution Techniques in Enforcement Actions* (August 14, 1987).
- 71 Stukenborg, *supra* note 28, at 1322.
- 72 *Id.* at 1322. *See generally* Richard Mays, *Alternative Dispute Resolution and Environmental Enforcement: A Noble Experiment or a Lost Cause?* 18 ENV'T'L L. REP. 10087 (1988).
- 73 Stukenborg, *supra* note 28, at 1325-1326.
- 74 Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (November 15, 1990).
- 75 Stephen Crable, *ADR: A Solution For Environmental Disputes* 48 ARB. J. 24 (1993).
- 76 Negotiated Rulemaking Act, 5 U.S.C. 561-70 (Supp. IV 1992).
- 77 Stukenborg, *supra* note 28, at 1330.
- 78 Crable, *supra* note 75, at 24.
- 79 Cal. Health & Safety Code §253365.2, 25356.3.
- 80 Cal. Fish & Game Code §1601-1603, 15512, 7710.1.
- 81 Cal. Gov't Code §60030 et seq. (emphasis added).
- 82 State Bar of CA, *supra* note 12, at I-4.
- 83 *Id.* at IV-22 (emphasis added).
- 84 *Id.* at I-2.
- 85 Levy, *supra* note 24, at 2.
- 86 *Id.* at 2.
- 87 Telephone interview with Wendy Kiefer, American Arbitration Association (October 23, 1995).
- 88 1995 CA S.B. 873 (SN).
- 89 *Id.* at §1:5.
- 90 JANE MCCARTHY & ALICE SHORETT, *NEGOTIATING SETTLEMENTS: A GUIDE TO ENVIRONMENTAL MEDIATION* 80-83 (1984).
- 91 State Bar, *supra* note 12, at I-3.
- 92 *Id.* at I-3, 4.
- 93 Talbot, *supra* note 20, at 99.
- 94 Bingham, *supra* note 4, at 72. (Bingham notes that the environmental dispute resolution processes used in her study generally shared four characteristics: they were voluntary, the parties met face-to-face, the parties were assisted in their meetings by a mediator and the parties' goal was to reach a mutually acceptable resolution of the issues in dispute).
- 95 *Id.* at 7. (Bingham used several methods for identifying cases to include in her study: the Conservation Foundation staff examined literature in the field for all cases cited, sent letters to all organizations in the United States that publicly offer mediation services in environmental disputes, interviewed about 25 environmental mediators and sent a second round of letters that listed the cases

identified for each organization or individual and asked whether the list was complete).

96 Telephone interview with receptionist at RESOLVE (November 1, 1995).

97 Cal. Evid. Code §1152.5.

98 Telephone interview with Wendy Kiefer, American Arbitration Association (October 23, 1995).

99 *See generally* Bingham, *supra* note 4. (Bingham includes terms such as joint problem solving, policy dialogues and information exchanges). *See generally* Knight et. al., *supra* note 21.

100 Telephone interview with Wendy Kiefer, American Arbitration Association (October 23, 1995). (Ms. Kiefer indicates that mediation is something of a foreign word on the East Coast).

101 Stukenborg, *supra* note 28, at 1312, *citing* Michael Herman et. al., DISPUTE RESOLUTION HANDBOOK FOR STATE & LOCAL BAR ASSOCIATIONS 11 (1986). (The six other states were Colorado, Maine, Massachusetts, North Carolina, Ohio and Vermont).

102 Communique from Barber & Gonzales Consulting Group, to South Fork "Jaw Session" Invitee List (October 25, 1995) (on file with Friends of the River, Sacramento).

103 Telephone interview with Daniel Yamshon, Sacramento attorney and mediator (September 27, 1995).

104 Manual by Steve Barber, *supra* note 11, at 5.

105 Report from Conservation Solutions Del Norte Workshop, *Exploring Economic Development Opportunities Compatible with the Smith River NRA and Redwood National Park 1* (May 2, 1994) (On file with Conservation Solutions).

106 Progress Report from the San Francisco Foundation Environmental Water Caucus 1 (March 1 - August 31, 1995) (on file with author).

107 Interview with Laurie McCann, Executive Director, Friends of the River, in Sacramento, CA (October 24, 1995).