Environmental Mediation: A Viable Alternative to Costly Litigation

by Daniel Stein

When society addresses issues involving the environment, the central question is often, "What is the solution to this problem?" However, it has become apparent that the method implemented to arrive at a solution is equally important. Addressing the problem through the formal legal system frequently yields unsatisfactory, unworkable results. Environmental lawsuits are also particularly time consuming and expensive. Fortunately, another method of dispute resolution is available: mediation, "the process by which a neutral third-party intervenor helps disputants reach voluntary settlement."[1] Use of mediation in resolving environmental disputes is on the rise. Although mediation has ancient roots, over 90% of America's environmental mediations have taken place after 1978[2]. The 78% rate of voluntary agreement[3] suggests that the process is consistently yielding favorable results. Since mediated solutions are by definition mutually agreed to by all sides, they tend to be realistic and practical.

The Impracticalities of Environmental Litigation

Using the legal system to address environmental problems has many disadvantages. Environmental experts and natural scientists, with superior knowledge and expertise in matters involving the environment, assume a role secondary to the attorney. Even environmental lawyers are first and foremost experts in advocacy and legal procedure. They do not have as in-depth an understanding of environmental concerns as the scientists do.

Additionally, judges often lack expert knowledge of the environment. There is no court assigned specifically to environmental disputes in this country. Indeed, the courtroom forum serves independent, and often conflicting, societal interests. Assuring clean air and water, and preserving wildlife are not necessarily at the pinnacle of the judiciary's agenda. Judge Harold Leventhal[4] has analyzed the appropriate role of the bench in environmental disputes. Specifically, Judge Leventhal notes that the National Environmental Policy Act[5] (NEPA) strives to place environmental concerns on par in the eyes of the court with competing judicial values, yet concedes that, "Environmental matters are likely to be of secondary concern to agencies whose primary mission is nonenvironmental."[6] Leventhal, an avowed environmental activist, suggests that environmental cases, "require that the judicial role change from formalistic to policy-oriented legal reasoning."[7] Essentially, Leventhal concedes that the courtroom forum as it currently exists is inadequate; judges must mutate themselves into quasi-legislators in order to do justice in many environmental disputes. Judiciary reluctance to subsume the duties of the legislative branch is well documented-- deference to the legislature is the present norm; not radical activism.

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Furthermore, the parties who must eventually implement the solution concocted by the legal system assume a peripheral role in the decision-making process. Verdicts are generally hammered

out by lawyers and judges. Gail Bingham[8] discovered in her 10-year study of environmental disputes that overall success was greater when the parties who had the authority to actually implement the resulting agreements were directly involved in the decision-making process.[9] Further, while mediation only leads to agreement when both sides are satisfied with the result, in the litigation process only one side of the dispute usually wins. In situations where disputants are continual players, positions become polarized under the legal framework, stifling possibilities for voluntary cooperation.

Aside from the structural defects of environmental litigation, there are two other major shortcomings. First, litigation tends to progress slowly, while environmental hazards often call for immediate action. Environmental law is complex and cumbersome even by legal standards, thereby adding to the litigation gridlock. According to Bingham, the median duration of environmental civil suits in U.S. district courts is 23 months. 10% of litigated cases take over 42 months.[10] As environmental law expands, the process will be slower still. Says Colorado attorney John R. Jacus, "The bureaucracy has become so large that it's that much more difficult to get something done."[11] The second shortcoming is that environmental litigation is usually quite expensive. In fact, the expenses preclude many interested parties from voicing their concerns in court. This is partially due to the fact that every environmental situation has unique characteristics which force attorneys to continually begin at square one. To make matters worse, according to attorney Richard Stoll, "The EPA has done a terrible job in publicizing and cataloging its rules (compared to the IRS or SEC). It's not that EPA's interpretations are secret...but you've got to know what to ask for."[12]

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Mediation: A Practical Dispute Resolution Alternative

Ironically, many heated contemporary environmental battles are satisfactorily addressed by means of an ancient method of dispute resolution-- a process which pre-dates litigation by centuries: mediation[13]. Because of its many benefits, the practice of environmental mediation is expanding. According to Bingham, prior to 1978, mediation had been used to address environmental conflicts in America only nine times. By 1984, mediation had been used in 160 cases.[14] This number has grown exponentially since. To demonstrate why mediation has gained popularity, consider the following scenario:

Hypothetical: The San Refuzio Controversy

It comes to the attention of state officials that Sunnistate, USA will soon have a toxic waste crisis. The state's only toxic dumpsite, San Refuzio Toxic Landfill, has a projected lifespan of only 12-15 months before it will be filled to capacity. Investigating experts conclude that some action must be taken immediately. However, none of the proposed solutions are without disadvantages. None are supported unanimously.

Suggested options being considered by Sunnistate include:

(1) Expand San Refuzio landfill itself.

Problem: poses a possible health hazard and nuisance to residents of the rapidly growing city of San Refuzio.

(2) Build a new in-state toxic landfill.

Problems: will be expensive, is wanted by no residential communities.

(3) Transport toxic waste to an available out-of-state site.

Problems: expensive, and may jeopardize Sunnistate highways.

(4) Enact legislation to limit toxic waste production.

Problem: strongly opposed by industry and labor.

(5) Invest in technology in hope of finding a solution.

Problem: no guarantee of success, and failure would result in certain disaster.

Likely interested parties include:

A) The legislative subcommittee which must recommend a course of action;
B) Corporate management of the largest toxic waste producers, who do not want their operations jeopardized;
C) The labor lobby, interested in protecting in-state industrial positions;
D) The environmental lobby, interested in insuring the safety,integrity, and responsible operation of landfills, and also favors reductions in toxic waste production;.
E) The homeowners group most proximate to the San Refuzio landfill.

The Role of Mediation in the San Refugio Controversy

Clearly, action must soon be taken, but how can each of these divergent parties play a role in the outcome? Can this battle be efficiently waged within the courtroom forum? Perhaps, but because of the aforementioned drawbacks of environmental litigation, this is probably not the first course to be taken. Fortunately, this dispute lends itself well to the mediation format.

What is mediation? In the simplest sense, mediation is a negotiation process in which the disputing parties and a neutral third party participate. This third party, the mediator, serves as an unbiased conduit between the disputants. With the mediator's support, the disputants analyze and actively discuss the dispute. Unlike a judge, jury or arbitrator, the mediator never determines which side prevails, nor does the mediator mandate how the dispute will be resolved. Rather, the mediator helps the disputants create their own agreement.[15] The bulk of the mediation session consists of communications between the disputants, but an essential aspect of mediation is the caucus phase. During this portion, the mediator meets confidentially with the parties individually. This allows the parties to speak more frankly about matters which the disputants do not wish to openly disclose, and
allows the mediator to acquire a fuller understanding of the dispute. Information disclosed during caucus is not repeated by the mediator without the disclosing party's consent. When addressing complex environmental debacles, often a panel of three or more serves as the mediator, which allows for expanded accommodation of the concerned factions. Given the complexity of the San Refuzio hypothetical, an experienced mediation panel would best serve the parties.[16] Given the expansiveness of this dispute and number of interested parties, a single mediator would most likely be inadequate.

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Since the mediation process requires voluntary participation, there is some risk that one of the parties will be skeptical about coming to the table. However, there are many reasons why parties who understand the process rarely object to attending. The

mediation session is predicated on an oath of confidentiality by all participants. By California statute[17], mediators have the right not to testify in later court proceedings. Parties need not disclose secret information until a sufficient level of trust has been established, or can opt to discuss confidential matters with the mediator alone during the caucus phase. Parties who fail to attend risk being "locked out" of a successful agreement between the other parties. Furthermore, mediation is a substantially less expensive proposition than legal representation. Therefore, there are many incentives which compel attendance by the necessary parties.

Mediation allows the relevant parties to unravel and analyze the problem themselves. Parties are encouraged to speak freely about the problem from their own perspective. In this regard, the mediator's task is to ask questions which progress the communications in an orderly fashion, and to objectively describe and frame the dispute. It is often useful for one disputant to hear another side's perspective from the mediator rather than from the other side. For example, the CEO of SOS Chemical, Inc. may gain insight by hearing the environmental lobby's perspective from the mouth of the trusted, unbiased mediator. Competent mediators focus on the true interests behind the concrete positions of the parties, because there may exist a satisfactory solution which nonetheless conflicts with one party's position. For instance, the San Refuzio homeowners may be adamantly opposed to any expansions, due to their concerns for safety and property value. Therefore, if it were possible to expand San Refuzio landfill without sacrificing the safety or pecuniary interests of residents, this would satisfy the homeowners' true interests.

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The skill of the mediator is integral to the success of the mediation process. The mediator has the critical task of guiding the process, of framing the relevant issues, and providing the foundation for the agreement phase. As indicated by researcher Joseph Stulberg, the mediator must often assume various roles throughout the negotiation. Indeed, the mediator's job includes that of catalyst, educator, translator, agent of reality, bearer of bad news and scapegoat.[18] Once actual agreement is reached, the mediator is often called upon to draft a written agreement which accurately reflects the agreed terms. Such an agreement can be made legally binding at the parties' discretion.

As soon as the parties agree to mediate, they have taken the crucial first step toward resolution. The Bingham study, which analyzed the 162 American environmental mediations which took place between 1973 and 1984, indicates that the probability of mutual agreement among disputants is high once the parties come together with the mediator's guidance. In 133 of 162 cases, the main objective was to reach agreement. Overall, agreement was reached in 104, or 78% of these cases.[19] Subject matter, size, and complexity were factors having no bearing on whether the mediation was successful. However, where mediation was implemented early-on, and where the parties with actual authority participated directly, the correlation of success was markedly higher:

"Where parties at the table had authority to make and to implement their agreements, they were able to reach an agreement in 82% of the cases. When agreements took the form of recommendations to a decision-making body that did not participate directly in

negotiations, the parties reached agreement 74% of the time... When those with authority to implement decisions were directly involved, implementation rate was 85%; when they were not, only 67% of the agreements reached were fully implemented."[20]

Furthermore, Bingham confirmed that mediation was faster than litigation. 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.[21]

However, agreement is not always reached through mediation. A key obstacle is each party's **BATNA**[22] (best alternative to negotiated agreement). Sometimes no possible agreement can satisfy each party's BATNA; the sacrifices of compromise can outweigh the cost of not agreeing.

Negotiation experts Roger Fisher and William Ury explain, "If you enter an antique store to buy a sterling silver George IV tea set worth thousands of dollars and all you have is $100, you should not expect skillful negotiation to overcome the difference. In any negotiation there exist realities that are hard to change."[23] Mediation benefits disputants by helping to accentuate the parameters of each party's BATNA. Mediation allows each party to more fully understand the BATNAs of other disputants (and their own), which creates more realistic, solution-oriented proposals from the parties. In any event, parties acquire a clearer picture of the problem, which is valuable whether or not an agreement results from the mediation.

The Environmental Mediation Explosion

The number of groundbreaking environmental mediation successes continues to grow[24]. For example, mediation was recently used in a dispute between Exxon and the state governments of New York and New Jersey, spurred by an extensive oil spill which damaged East Coast wetlands and waterways.[25] While litigation of the issue would likely have lasted many years and cost each side a small fortune, the mediation settled the matter in five months, with Exxon agreeing to either pay $10 million over five years, or purchase or restore the impacted lands.[26] Another successful mediation was recently completed in Oregon. The dispute involved a conflict between a $100 million irrigation project and a major salmon run on the Columbia River and its tributary, the Umatilla. Despite considerable friction and polarization between the parties beforehand, an amicable compromise resulted from a three month, $20,000 mediation.[27]

Conclusion

As industrialization of the planet continues, Earth's precious ecosystems are further strained, and the threat of environmental catastrophe increases. Humankind must develop effective methods for resolving environmental disagreements if we hope to preserve the planet. The critical actors in environmental disputes are in a state of perpetual confrontation and interdependence. In order for society to handle the growing environmental concerns, cooperation and consensus must be achieved. Litigation is intrinsically competitive and adversarial. It is a system which endorses "winner take all" solutions. Hence, this forum tends to discourage cooperation and permanent agreement. By contrast, mediation allows communication and understanding to increase, and mutual trust to flourish. The focus of mediation is

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not on winners and losers, but on realistic solutions. When disputing parties become polarized and fail to communicate, the cost to the environment is immeasurable. And since the future of the planet is at stake, one wonders whether this expense is one we can afford.

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ENDNOTES

1. Nancy Kubasek & Gary Silverman, "Environmental Mediation", 26 American Business L.J. 533, 536 (1988).
2. Gail Bingham, "Resolving Environmental Disputes: A Decade of Experience", Resolving Locational Conflict 314 (Center for Urban Policy Research)(1987).
3. Id. at 317.
4. Circuit Judge, of the United States Court of Appeals for the District of Columbia Circuit.
5. 42 U.S.C. §§ 4321-47 (1970).
6. Judge Harold Leventhal, "Environmental Decisionmaking and the Role of Courts", 122 U.Penn L.J. 509, 515 (1974).
7. Id. at 526.
8. Social scientist at the Conservation Foundation in Washington D.C..
9. Bingham, supra note 2, at 318.
10. Id. at 322.
11. Keeva, Steven, "Environmental Law Take Root", ABA Journal- The Lawyer's Magazine, May 1992, at 58.
12. Id. at 56.
13. Principled litigation, composed of bench, bar and jury, emerged in feudal England during the fifteenth century. Donald R. Kelley, History, Law and the Human Sciences 207-228 (Variorum Reprints)(1984). Mediation, by contrast had been used in China to resolve interpersonal conflict several centuries earlier.
14. Bingham, supra note 2, at 314.
15. Stephen Goldberg, Eric Green & Frank Sander, Dispute Resolution 91 (Little, Brown and Co.)(1985).
16. Jay Folberg and Alison Taylor, "Mediation", Dispute Resolution 121 (Little, Brown and Co.)(1985).
17. California Evidence Code §1152.5.
18. Stulberg, Joseph, "The Theory and Practice of Mediation: A Reply to Professor Susskind", 6 Vt. L. Rev. 85, 92-93 (1981).
19. Bingham, supra note 2, at 317.
20. Id. at 318.
21. Id. at 322.
22. Roger Fisher & William Ury, Getting to Yes 101-111 (Penguin Books)(1983). Throughout the mediation process, each party must evaluate the total cost of not reaching agreement. 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. Reminding parties of their BATNA is an important task of the mediator.
23. Id. at 101.
24. The increased usage of environmental mediation is documented in Consensus, published by the Public Disputes Network at Harvard University.
25. "Mediation for Exxon's East Coast Oil Spill", Consensus 1, (Public Dispute Network)(April 1991).
26. Id. at 1.
27. "Having it all in Oregon", Consensus 1 (Public Disputes Network)(July 1992).