

ENVIRONMENTAL MEDIATION - ANOTHER PIECE FOR THE PUZZLE

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INTRODUCTION

Environmental mediation is a new and developing field.¹ Documented cases demonstrate that mediation has great potential for resolving environmental disputes of varied degrees of complexity. These cases range from disputes which are local in nature, such as the siting of a sanitary landfill dump site,² to regional and national disputes involving sophisticated scientific data and the reconciliation of seemingly conflicting legislative policies.³ Each year more is

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1. Gerald W. Cormick, Executive Director for the Institute for Environmental Mediation in Seattle, Washington (also referred to herein by its former name, the Office of Environmental Mediation), recently made the following statement regarding the history of environmental mediation in the United States:

The first explicit effort to mediate an "environmental dispute" began in the fall of 1973 when the author and a colleague, Jane E. McCarthy, initiated discussions with parties to a flood control/land use planning conflict in Washington State. In December of 1974, the lengthy and difficult mediation effort culminated in a unanimous written agreement between the dozen or so parties at interest. That widely documented and discussed mediation effort has become the prototype for a variety of similar efforts, both by the Institute for Environmental Mediation and its predecessor, the Office of Environmental Mediation, and by other emerging organizations. Since that time, environmental mediation has evolved from an interesting and novel concept to an accepted but often misunderstood part of the environmental decision-making lexicon.

G. Cormick, *Environmental Mediation in the U.S.: Experience and Future Directions 1* (unpublished paper presented to the American Association for Advancement of Science, 1981 Annual Meeting, Toronto, Canada). For a more detailed history, see S. MERNITZ, *MEDIATION OF ENVIRONMENTAL DISPUTES* 65-73 (1980).

2. See Bellman, *Siting for a Sanitary Landfill for Eau Claire, Wisconsin*, 2 *ENV'T'L PROFESSIONAL* No. 1, 56-57 (undated).

3. See Straus, *Mediating Environmental, Energy and Economic Tradeoffs: A Search for Improved Tools for Coastal Zone Planning*, in *ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS* (L. Lake ed. 1980), for a discussion of techniques for resolving disputes involving "a large number of complex and interrelated variables." *Id.* at 123. See also Clark, *Mediating Energy, Environmental, and Economic Conflict Over Fuel Policy for Power Generation in New England*, in *ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS* (L. Lake ed. 1980), for an informative discussion of the use of mediation techniques to de-

written documenting environmental mediation efforts and formulating theories and approaches for the use of mediation in resolving environmental disputes.⁴

Professor Lawrence E. Susskind has devoted much time, effort, and thought to the subject of environmental dispute resolution. His article entitled *Environmental Mediation and the Accountability Problem*⁵ advocates a methodology for improving environmental decisionmaking and dispute resolution when mediation is used. His approach would alter traditional notions of mediation by changing the role of the mediator and making him or her suable for alleged deficiencies in the procedural or substantive quality of a settlement effort.⁶ The proposal is provocative and deserves careful and thoughtful consideration.

If mediation is to be used in a significant way to resolve any type of dispute, the following conditions must be present:

1. It must be acceptable to the parties to the dispute;
2. there must be a corps of qualified and acceptable mediators who are willing to serve;
3. there must be a means for bringing the disputants and the mediators together, and
4. there must be a method for funding mediation efforts.

The first two conditions are the most crucial because they are essential to the viability of mediation. The third and fourth conditions facilitate its use by disputants.

Mediation has fundamental characteristics⁷ which make it ac-

velop a New England regional oil to coal energy conversion policy. The article documents the intervention of personnel from the Center for Energy Policy to assist in the formation of consensus in a complex multiparty setting. Seemingly conflicting national energy policies relating to clean air standards and the increased use of coal as an alternative to foreign oil were involved.

4. For an interesting collection of articles, see ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS (L. Lake ed. 1980).

5. Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1 (1981).

6. Professor Susskind expressly rejects the traditional labor-management collective bargaining model of mediation. *Id.* at nn.14, 15. The proposal would alter fundamental and universal characteristics of the mediation process.

7. See text at notes 15-24 *infra*.

ceptable to disputants as a settlement device and attractive to individuals who are qualified to act as mediators. If those characteristics are significantly altered, or if one or more are absent from the dispute-settlement mechanism, the procedure which remains cannot legitimately be characterized as mediation.⁸ No matter what the procedure is called, there is danger that it will lose its appeal to disputants as an acceptable settlement mechanism. In addition, certain types of alterations are likely to affect the willingness of qualified individuals to serve as mediators.

In this article the meaning of mediation in a broad context is examined to determine its fundamental and universal characteristics. Those characteristics and the four conditions described above are used as standards by which to judge the viability of the Susskind proposal. The importance of defining the role of mediation in resolving environmental disputes and the need to institutionalize the process so that qualified mediators will be available are also discussed.⁹

8. Cormick states:

[M]ediation has quickly become a bandwagon which attracts a large and diverse group of riders.

This popularity has been accompanied by claims for mediation and suggested applications of the process that appear to be beyond reasonable expectations, based on our experience with the mediation process in other contexts. Mediation, a particular approach to conflict resolution developed and used for centuries in international relations and extensively for the past five decades in labor disputes, has become a "buzz word" used to describe the bewildering array of conflict intervention processes and styles. A danger we now face is that the overselling of the process and its misapplication by inexperienced intervenors anxious to enter the field will result in failures, costly to the parties, that could broadly discredit the mediation process.

G. Cormick, *supra* note 1, at 2.

9. Before going further, I must acknowledge that my experience with mediation has been solely in the labor-management field. I have had no practical experience with the mediation of environmental disputes. I have relied heavily upon the conclusions of authors who have substantial experience as environmental mediators and who have analyzed the methodology of and problems with using mediation to resolve environmental disputes: See, e.g., S. MERNITZ, *supra* note 1; Cormick, *Mediating Environmental Controversies: Perspectives and First Experience*, 2 *EARTH L.J.* 215 (1976); Cormick & Patton, *Environmental Mediation: Defining the Process Through Experience*, in *ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS* (L. Lake ed. 1980); Lake, *Characterizing Environmental Mediation* in *ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS* (L. Lake ed. 1980); Lake, *Environmental Conflict and Decision Making*, in *ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSEN-*

I. DEFINING MEDIATION

Mediation is one of several mechanisms available to disputants who wish to use a neutral to assist in achieving settlement. These mechanisms are differentiated by their degree of procedural formality and the role played by the neutral in influencing the final settlement. Mediation is relatively informal.¹⁰ Fact-finding and arbitration are the most prominent of the more structured mechanisms.

Fact-finding involves a hearing before a neutral¹¹ whose function is to make a written report containing recommendations for resolution of the issues in dispute.¹² A fact-finding hearing is normally informal, but provides the parties with an opportunity to present evidence and argument in support of their positions. Post-hearing briefs may also be submitted. The recommendations contained in the written fact-finding report are not binding and may be rejected by one or all of the parties.

Arbitration involves a more significant role for the neutral.¹³ A hearing is held at which the parties may submit evidence and make oral statements of position. Posthearing briefs may be submitted at the option of the parties or at the request of the arbitrator. The arbitrator renders a written decision which is normally, by statute or agreement between the parties, a binding resolution of the dispute.¹⁴

SUS (L. Lake ed. 1980); McCarthy, *Resolving Environmental Conflicts*, 10 ENV'T'L SCI. & TECH. 40 (1976); Straus, *supra* note 3; Cormick, *supra* note 1.

10. Conciliation is similar to mediation in nature and function. I shall not seek to differentiate between the two but will assume that mediation includes conciliation-type functions. For relevant discussion, see W. SIMKIN, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* 25-26 (1971).

11. An alternative format is to have a fact-finding panel consisting of a representative of each party and a neutral chairman.

12. W. SIMKIN, *supra* note 10, at 26; Newman, *Mediation and Fact-Finding*, in *PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 198, 201-06 (M. Gibbons, R. Helsby, J. Lefkowitz, B. Tener eds. 1979); F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 4-5 (3d ed. 1973).

13. F. ELKOURI & E. ELKOURI, *supra* note 12, at 2-4; Lake, *Characterizing Environmental Mediation*, *supra* note 9, at 61.

14. F. ELKOURI & E. ELKOURI, *supra* note 12, at 5-8, 17-22. In recent years a procedure called mediation-arbitration has been used by some neutrals with the consent of the parties

Defined in most general terms, mediation is the "intervention between conflicting parties or viewpoints to promote reconciliation, settlement, compromise, or understanding."¹⁵ Like the more formal fact-finding and arbitration procedures, it is a mechanism for facilitating agreement in a negotiation process.¹⁶ It involves the intervention of a person who does not have a stake in the dispute which is the subject of negotiations. The process is voluntary because the mediator does not have the power to impose a settlement on the disputants.¹⁷

To define fully the nature of mediation it is necessary to consider the role of the mediator, the mediator's relationship with the disputants and the manner in which mediators operate.

[T]he formal use of the mediation process implies the intervention of a third party whose primary role is to promote

to disputes. Under this mechanism the parties agree that the neutral who acts as the mediator has authority to make a binding determination for settlement if the mediation effort fails. For a discussion of mediation-arbitration and its pros and cons, see Kagel, *Comment*, in *NEW TECHNIQUES IN LABOR DISPUTE RESOLUTION 186-90* (H. Anderson ed. 1976); Meagher, *New Frontiers in Dispute Resolution: Skills and Techniques*, in *NEW TECHNIQUES IN LABOR DISPUTE RESOLUTION 168-70* (H. Anderson ed. 1976). The Wisconsin legislature has adopted mediation-arbitration as a method of resolving municipal employment collective bargaining disputes. *WIS. STAT. ANN.* § 111.70(4), (6) (West 1974 & Supp. 1980-81).

15. *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* (P. Gove ed. 1971). An additional helpful definition is set forth in the Straus article: "[Mediation] is the activity of a neutral person skilled in using the available techniques for producing consensus, and in using them at the most effective time and stage in the process of solving problems." Straus, *supra* note 3, at 126.

16. "The most important point to remember when discussing mediation is that it is nothing more or less than a device for facilitating the negotiation process: Negotiations can and do occur without a mediator but mediation can never occur in the absence of negotiation." G. Cormick, *supra* note 1, at 3.

17. Professor Lon Fuller observed that the mediator's "powers may derive as much from the urgency of the situation as from any special gifts of his." Fuller, *Mediation—Its Forms and Functions*, 44 *S. CAROLINA L. REV.* 305, 324 (1971).

The Institute for Environmental Mediation uses the following definition when discussing mediation with parties to a dispute:

Mediation is a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.

G. Cormick, *supra* note 1, at 3; Cormick & Patton, *supra* note 9, at 78.

agreement among conflicting parties. This third-party intervenor, or mediator, has no power to impose solutions Neither can the mediator be an advocate for any of the conflicting parties It is essential that the mediator work from an impartial base. A perception by any of the parties [sic] to a dispute that the mediator is directly supported by or beholden to any interest group which is a party to that dispute not only destroys the credibility of the mediator, but also creates broad distrust of the legitimacy of the mediation process.¹⁸

It is essential that a mediator have a confidential relationship with the parties to the dispute. Typically, the disputants are reluctant to disclose fully to each other their positions or the priorities attached to their various demands. A mediator can overcome this barrier to settlement

by holding separate confidential meetings with the parties, where each party gives the mediator a relatively full and candid account of the internal posture of his own interests. Armed with this information, but without making a premature disclosure of the details, the mediator can then help to shape the negotiations in such a way that they will proceed most directly to their goal, with a minimum of waste and friction.¹⁹

18. Cormick & Patton, *supra* note 9, at 79-80.

19. Fuller, *supra* note 17, at 318. Robert Coulson, President of the American Arbitration Association (AAA), recently made the following statement regarding the importance of confidentiality:

Public policy requires that mediators be privileged from disclosing information acquired in the course of their mediation duties. It is deponent's belief that the mediation process would be severely damaged if parties are not permitted to speak freely to the mediators. Coupled with free disclosure is the knowledge that the mediator may not subsequently make disclosures as a witness in some other proceeding to the possible disadvantage of a party to the mediation. Mediation's success depends upon total privacy.

Deponent's experience is that without complete confidentiality the usefulness of third party intervention in the settlement of future disputes would be seriously impaired if not destroyed.

This statement is contained in an affidavit filed in support of a successful motion to quash a subpoena served upon the mediator of an environmental dispute in *Adler v. Adams*, No. 673-73C2 (W.D. Wash., filed May 1, 1979).

The AAA is a private, nonprofit, dispute-settlement organization which is headquar-

The function of a mediator "is to assist the parties by being creative and innovative in finding areas of agreement and compromise to reach a final resolution of the impasse."²⁰ The methods employed by individual mediators to achieve this objective will vary.

As with negotiation itself, there are no set rules for conciliation and mediation. Much depends on circumstances, and the personalities involved, including the personality of the mediator

The mediator listens. The mediator is neutral, and can sympathize impartially with each disputant in turn while hearing the story of the iniquity and unreasonableness of the other. This makes it possible to size up the people, who are part of the problem, as well as the facts

[Mediators] can suggest ways out of what appear dead ends to the negotiators They have no emotional "blocks" that blind them, as the participants are sometimes blind to unconsidered possibilities. They talk the language of either side, and both. Mediators can help both sides "save face" when they have gotten into untenable positions.

Frequently it is the mediator who finds the magic formula that will resolve the dispute. If skillful, he or she will bring both sides around unconsciously, to thinking it was their idea.²¹

tered at 140 West 51 Street, New York, New York 10020, and has regional offices in major cities throughout the United States. It maintains panels of arbitrators, mediators, and fact-finders and acts as an administrative tribunal for providing disputants with the services of these neutrals.

20. Newman, *Mediation and Fact-Finding*, in *PORTRAIT OF A PROCESS—COLLECTIVE NEGOTIATIONS IN PUBLIC EMPLOYMENT* 198 (M. Gibbons, R. Helsby, J. Lefkowitz & B. Tener eds. 1979).

Mediation is most often thought of as a procedure to be used when parties have reached a stalemate or impasse in negotiations. It has not, however, been used exclusively in that context. Mediation has been successfully employed as a preventative measure to defuse potential disputes. Newman, *supra* note 12, at 200-01. It has also been used in the preliminary phases of negotiating environmental disputes to seek agreement among the parties on a factual basis for discussing the resolution of their differences. Straus, *supra* note 3, at 130; H. Burgess, *The Foothills Water Treatment Project: A Case Study of Environmental Mediation* 127 (Sept. 1980) (unpublished report prepared for the Environmental Negotiations Project, Laboratory of Architecture and Planning, Massachusetts Institute of Technology, under a grant from the Environmental Protection Agency).

21. E. BEAL, E. WICKERSHAM & P. KIENAST, *THE PRACTICE OF COLLECTIVE BARGAINING*

Mediators have procedural flexibility not available to judges or to decisionmakers who function in a quasi-judicial capacity. They need not be concerned with prohibitions against *ex parte* communications,²² with supervising the formation of a record or with other formalities which would prohibit or impair confidential relationships with the parties and would inhibit settlement efforts. A mediator may adopt procedures or methods of operation which meet the needs of each situation, and may alter those procedures if the need arises. This procedural flexibility, which includes the freedom to communicate confidentially with the parties, coupled with the mediator's ability to make timely substantive suggestions for resolution, have been cornerstones for the success of mediation. The absence of a precise or uniform format for mediation caused Professor Lon Fuller to observe: "For of mediation one is tempted to say it is all process and no structure."²³

The foregoing discussion draws on sources which analyze the use of mediation in a variety of settings. It reveals that the process of mediation has the following fundamental and universal characteristics:

1. The neutrality or impartiality of the mediator (both perceived and actual),
2. The voluntariness of the process,
3. The confidentiality of the relationship between the mediator and the parties, and
4. The procedural flexibility available to the mediator.

It is these characteristics which have sustained the process and made it adaptable for the resolution of many different types of disputes.²⁴ They are the characteristics which are used to judge the

208-09 (5th ed. 1976).

22. Rule 45 of the AAA labor arbitration rules provides: "Communication with Arbitrator—There shall be no communication between the parties and a neutral Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator." AMERICAN ARBITRATION ASSOCIATION, VOLUNTARY LABOR ARBITRATION RULES 45 (Jan. 1, 1979).

23. Fuller, *supra* note 17, at 307.

24. See generally AMERICAN ARBITRATION ASSOCIATION, 4 NEWS AND VIEWS (Fall 1980); S. MERNITZ, *supra* note 1, at 43; Fuller, *supra* note 17; Lake, *Characterizing Environmental Mediation*, *supra* note 9, at 59-60; Sviridoff, *What's New in Dispute Resolution?*, 183

viability of Professor Susskind's proposal.

A final observation should be made in defining the mediation process. The concept of neutrality or impartiality does not require that the mediator have no knowledge of the dispute or the substantive issues involved. In the labor-management field, individuals are hired as mediators by the Federal Mediation and Conciliation Service (FMCS)²⁵ and are appointed to panels of mediators by credentialing agencies such as the American Arbitration Association (AAA)²⁶ and state agencies providing mediation services, on the basis of their knowledge of labor law and their experience in collective bargaining as representatives of labor or management. This knowledge and background does not taint their neutrality or disqualify them from serving as mediators. As a practical matter, the quality of the mediation effort should be improved where the mediator has at least general knowledge about the subject matter of the dispute and the issues involved.²⁷

N.Y.L.J. 1 (May 21, 1980); Symposium: Non-Judicial Resolution of Housing Disputes, 17 URB. L. ANN. 227 (1979).

25. The Federal Mediation and Conciliation Service (FMCS) is an independent federal governmental agency which provides mediation and arbitration services for private and public sector labor disputes. The mediators used are employees of the agency. The FMCS maintains panels of private arbitrators and acts as an administrative tribunal for arbitration services. The agency is headquartered in Washington, D.C. and maintains regional offices throughout the United States.

26. See note 19 *supra*.

27. There is room for disagreement on this point. Professor Susskind states that, to be effective, environmental mediators will need to be knowledgeable regarding the substantive environmental and regulatory issues involved in the dispute. Susskind, *supra* note 5, at 42. Cormick states:

It has been the experience of the Institute that where a mediator has a personal expertise in the issues in dispute, he or she may be less effective. There are several reasons for this. First, "experts" have a tendency to rely on their own assumptions and values, rather than allowing the parties to "teach" them about the dispute. Second, there is an inclination to filter information and communication based on their independent assessment of the facts. Third, the discussions tend to move away from the underlying sets of values and perceptions which led to and underly the dispute and to focus on technical concerns. This can result in solutions that are technically appropriate yet do not represent a real accommodation of the more basic value differences. Finally, the greater the technical expertise of the mediator in the subject area, the more the agreement is likely to be the result of the mediator's "leading" the parties and the less the commitment of the parties to the diffi-

II. AN OVERVIEW OF THE SUSSKIND PROPOSAL

Professor Susskind seeks to improve the quality of environmental decisionmaking by proposing a broader role for the mediator in a dispute resolution process. Within this broad context the mediator would have a greater degree of accountability for the outcome of a mediation effort than traditionally imposed.

The object of this broader approach is to ensure that the public at large is adequately represented during a mediation effort and adequately protected in a mediated settlement.

[E]nvironmental mediators ought to accept responsibility for ensuring (1) that the interests of parties not directly involved in negotiations, but with a stake in the outcome, are adequately represented and protected; (2) that agreements are as fair and stable as possible; and (3) that agreements reached are interpreted as intended by the community-at-large and set constructive precedents.²⁸

Professor Susskind states that "self-interested negotiation must be replaced by 'principled negotiation,'"²⁹ and expresses concern about long-range spillover effects of mediated settlements which may be detrimental to the interests of unrepresented persons.³⁰ In this context it is said that mediators should be accountable for "the fairness of the processes in which they engage as well as the quality of the agreements they help to reach."³¹ Although several methods of achieving accountability are discussed, Professor Suss-

cult task of implementing the agreement.

However, the mediator *does* have a responsibility to make himself sufficiently conversant with the issues in dispute and the legislative, legal and organizational environment within which they occur to be able to communicate effectively with the parties and to assist them in devising viable solutions.

G. Cormick, *supra* note 1, at 12-13.

I tend to agree with Susskind that substantive knowledge and expertise relating to matters in dispute will make a mediator more effective. However, a mediator should be aware of the dangers suggested by Cormick so that his or her expertise and personal judgments will not adversely affect the mediation effort.

28. Susskind, *supra* note 5, at 18.

29. *Id.* at 16.

30. *Id.* at 7.

31. *Id.* at 16.

kind concludes that "accountability can only be achieved if the mediators can be effectively chastised, fired, or sued by the parties directly or indirectly involved" in a mediated settlement.³²

Theoretically a mediator should have a broad view of his or her responsibilities and should expect to be held accountable for the full and professional execution of those responsibilities. The Susskind proposal would, however, significantly change the role and function of mediators and thereby alter the mediation process. The effect of these changes would stifle the use of mediation by destroying its procedural flexibility, by reducing its acceptability to disputants, and by discouraging qualified persons from serving as mediators.

A prediction regarding the type of individuals who will serve as environmental mediators is an integral part of the Susskind proposal. He states that many environmental disputes are likely to be mediated by individuals with "clout."³³ The notion of a mediator with clout appears to be borrowed from the Heidi Burgess study of the Foothills Water Treatment Project mediation effort.³⁴ The mediator in that dispute was Congressman Wirth, who was successful, under difficult circumstances, in bringing the parties to an agreement.³⁵ Congressman Wirth is portrayed, by both Burgess and

32. *Id.* at 46.

33. *Id.* at 42.

34. H. Burgess, *supra* note 20, at 129-30.

35. Burgess apparently does not share Susskind's opinion regarding the frequency that mediators with political clout will be used for environmental disputes.

Thus a skilled political mediator has a great advantage, although such individuals are *very* hard to find. The political risks of failure are so high that few politicians will want to get involved. In addition, the time requirements of the position make it a difficult one to do part time. A final disadvantage of a politician acting as mediator is that in some cases (such as this one) it is technically illegal for a politician to be a mediator. Since the three branches of the government are supposed to remain separate, Congressmen are forbidden by law from influencing judicial proceedings. Since the Foothills case was being litigated in two Federal courts, Tim Wirth was technically meddling with the judicial cases. Although no one actively tried to stop him on this basis, had someone tried, they probably would have succeeded. Thus Wirth faced many risks and took many chances—something few politicians are likely to do.

Id. at 130.

Susskind, as a mediator who was able to keep the parties at the negotiation table and to bring them to agreement because of his political influence. His clout did not derive from his stature as a person with knowledge or expertise regarding the issues which were the subject of the dispute or his deftness in the use of mediation skills (though the Burgess account would suggest that he was quite good in that respect). Rather, its source was his perceived ability to impose sanctions through political influence if the parties did not continue their negotiation effort and reach an agreement. It seems clear that Congressman Wirth had influence which approached the power of compulsion.

III. SEEKING A ROLE FOR MEDIATION—A GLANCE BEHIND THE SUSSKIND PROPOSAL

Professor Susskind predicts that if the current trend in the use of mediation to resolve environmental disputes continues, "many of the most important resource allocation decisions made each year could depend on the success of independent mediators."³⁶ He advocates using mediation for environmental disputes relating to the allocation of fixed resources, setting public policy priorities, and setting (and enforcing) environmental standards.³⁷ It is appropriate to reflect upon the implications of these statements and to consider realistically the role that mediation can play in settling environmental disputes.

Under our form of government, basic policy regarding environmental matters, like all areas subject to governmental regulation, is established by legislative bodies. The authority to implement policy is delegated to administrative agencies or officials within the

In December of 1980 the oldest energy related environmental dispute, the Con Edison Storm King plant siting dispute was settled. This complex dispute, which was the subject of litigation and "seventeen years of acrimonious debate," was resolved through an 18-month mediation effort. NATIONAL RESOURCES DEFENSE COUNCIL, INC., 1 NRDC News, No. 2, at 1 (Spring 1981). It is highly doubtful that many persons holding political office would have the time, background, or desire to become involved in such complex and demanding mediation efforts.

36. Susskind, *supra* note 5, at 3-4.

37. *Id.* at 10.

governmental structure.³⁸ Although governmental decisions are not always made as quickly or as effectively as we might wish, methods for dealing with environmental disputes must operate within the established constitutional and statutory frameworks.

It is apparent that Professor Susskind believes that legislative bodies are incapable of fairly reconciling all competing interests and are, therefore, unable to establish appropriate policy with respect to environmental matters.³⁹ He is also critical of the efforts of governmental agencies to develop standards for the implementation of environmental policies.⁴⁰ Finally, he does not trust the parties to an environmental dispute to look beyond their respective self-interests in negotiating a settlement.⁴¹ In view of Professor Susskind's attitude toward governmental bodies and individuals who now make environmental decisions, one may question the appropriateness of the role he would assign to mediation in resolving environmental disputes. It may legitimately be asked if he sees mediation as a vehicle for correcting the shortcomings at all levels of environmental decisionmaking, including the establishment and implementation of policy.⁴² One can fully agree with Professor Susskind's allegations that legislatures and administrative agencies have not done an effective job but can question his assumption

38. Involved here are the constitutional principles that comprise the so-called "Delegation Doctrine" (also called the "Non-Delegation Doctrine"). The basic premise of the doctrine is that "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate." *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring). "At its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body." Wright, *Beyond Discretionary Justice*, 81 *YALE L.J.* 575, 583 (1972). See generally B. SCHWARTZ, *ADMINISTRATIVE LAW* §§ 11-21, at 31-52 (1976); K. DAVIS, 1 *ADMINISTRATIVE LAW TREATISE* §§ 3:1-3:18 (2d ed. 1978 & Supp. 1980).

This analysis is, admittedly, a simplistic treatment of the governmental decisionmaking framework. It provides, however, an adequate context for considering whether Susskind has, at least by implication, assigned to mediation an inappropriate role with respect to environmental decisionmaking.

39. Susskind, *supra* note 5, at 12.

40. *Id.* at 13.

41. *Id.* at 6-7.

42. Susskind is not alone in his criticism of governmental mechanisms for establishing and implementing environmental policy. See, e.g., E. HAEFELE, *REPRESENTATIVE GOVERNMENT AND ENVIRONMENTAL MANAGEMENT* (1973).

that the problem can be addressed through the process of mediation.⁴³ It appears that he advocates precisely what Gerald W. Cormick, a pioneer in the field of environmental mediation, has cautioned against—misapplying the term mediation with the resulting “danger that mediation can and will be used to replace or short-circuit existing processes.”⁴⁴

An investigation of the materials written by experienced environmental mediators suggests that most have accepted mediation for what it is, recognizing its strengths and limitations as a dispute-settlement mechanism.⁴⁵ There appears to be substantial agreement that not all environmental disputes are mediatable.⁴⁶ Thus, efforts have been made to establish criteria for determining when mediation should be used for a particular dispute.⁴⁷ Profes-

43. Haefele proposes a reordering of governmental structures to improve environmental decisionmaking. *Id.* at 59-62.

44. Cormick, *supra* note 9, at 217. See also note 8 *supra*.

45. See, e.g., Straus, *supra* note 3, at 125-27.

46. McCarthy, *supra* note 9, at 42-43; Cormick, *supra* note 9, at 218. See Greason, *Humanists as Mediators: An Experiment in the Courts of Maine*, 66 A.B.A.J. 576 (1980), for a like conclusion with respect to the use of mediation as an alternative to civil litigation.

47. In Cormick & Patton, *supra* note 9, at 79-84, the authors describe criteria used by the Office [now Institute] for Environmental Mediation. In a more recent paper Cormick set forth the following questions which the Institute discusses with disputants to determine if mediation should be used:

1. Are all parties represented who have a stake in the outcome of the negotiations? Is any party excluded who could prevent an agreement from being carried out?
2. Have all parties reached general agreement on the scope of the issues to be addressed?
3. Are the negotiators for each party able to speak for their constituency? Is there reason to believe that if the negotiators reached an agreement, that agreement will be honored by the groups they represent?
4. Have the immediate parties and the eventual decisionmakers committed themselves to a good faith effort to reach a consensual agreement?
5. Has a realistic deadline been set for the negotiations?
6. Are there reasonable assurances that affected governmental agencies will cooperate in carrying out an agreement if one is reached?
7. Does the mediator operate from a base that is independent of both the immediate parties and the decisionmakers with jurisdiction over the dispute?
8. Do you trust the mediator to carry messages when appropriate and to honor confidential remarks?

Cormick, *supra* note 1, at 4-5.

In addition, see AMERICAN MANAGEMENT SYSTEMS, INC., THE POTENTIAL OF MEDIATION

sor Susskind, on the other hand, would make fundamental changes in the mediation process, apparently to make it a vehicle for settling a broad range of environmental disputes. It appears that he has failed to consider adequately the fundamental nature and limitations of the mediation process.

In addition, in the writings of environmental mediators careful attention is given to the need for mediation to function within governmental regulatory frameworks.

Environmental disputes usually involve decisions to be made in the political arena. The mediator must not only work for agreement between the parties, but must ensure that negotiations are moving toward an outcome that will be acceptable to outside political forces. Consequently, the mediator keeps lines open to affected government agencies to make certain the agreement does not hold surprises for those charged with implementing the recommendations. Conversely, this process of verification ensures the immediate parties to the process that they are not engaged in a sterile exercise. The mediation process also provides protection for decision-makers by involving a spectrum of groups that provide broad support for the recommendations once they are accepted.⁴⁸

It is not clear whether Professor Susskind has fully taken into account these practical considerations. For example, he says little about regulatory frameworks and does not address the question of how a mediator's accountability would be affected if a regulatory agency were required to approve the mediated settlement.

The Susskind proposal is flawed by a failure to consider, in a practical way, the role that mediation can and should play in the resolution of environmental disputes. It is not designed to establish policy or to establish standards which implement policy. Mediation is part of a negotiation process, and its function is to help parties

FOR RESOLVING ENVIRONMENTAL DISPUTES RELATED TO ENERGY FACILITIES 19-20 (Dec. 1979) (available from the United States Dep't of Energy), which summarizes criteria used by the Institute, RESOLVE, and Clark-McGlennon Associates.

48. McCarthy, *supra* note 9, at 42. See also Cormick, *supra* note 9, at 219; Lake, *Characterizing Environmental Mediation*, *supra* note 9, at 61-62; S. MERNITZ, *supra* note 1, at 33-37.

to a dispute reach their own agreement. As such, mediation has great potential as a device for developing a consensus which might aid in establishing or implementing policy.⁴⁹ The distinction between using mediation to establish policy and using it to aid such an effort is one of significance. A mediator is a facilitator, not a decisionmaker nor a policymaker. It is important to recognize mediation for what it is and to formulate the role which it will play in resolving environmental disputes accordingly. Alteration of the process in the ways suggested by Professor Susskind is likely to curtail rather than to enhance its acceptability and use.

IV. METHODS FOR HOLDING ENVIRONMENTAL MEDIATORS ACCOUNTABLE

Professor Susskind states that environmental mediators are not subjected to the moral, legal, and economic pressures of accountability which apply to mediators in other fields.⁵⁰ To fill this perceived void, he proposes that guidelines be established to ensure that mediation efforts are structured properly and that these guidelines be institutionalized so that they are enforceable.⁵¹ Three approaches for holding environmental mediators accountable are suggested: credentialing (licensing, certifying, and registering),⁵² linking mediators to regulatory agencies and to courts,⁵³ and creating an informed public.⁵⁴ A fourth proposal for achieving accountability would make mediators suable.⁵⁵ In the following pages these approaches to accountability are discussed.

A. Credentialing

Credentialing of environmental mediators, whether by government or by private agencies,⁵⁶ would provide an effective means for

49. See Clark, *supra* note 3.

50. Susskind, *supra* note 5, at 5-6. It would appear that Susskind overestimates the legal accountability of mediators in other fields.

51. *Id.* at 41.

52. *Id.* at 42.

53. *Id.* at 43.

54. *Id.* at 44-5.

55. *Id.* at 46.

56. Much of the environmental mediation to date has been done by persons from pri-

accomplishing an objective of the Susskind proposal. It could be used as a mechanism to institutionalize standards for environmental mediators. Although there would be danger of destroying the flexibility of the process if the standards were made too specific, a code of ethics for environmental mediation would be helpful. Such a code has been adopted by agencies which provide collective bargaining mediation services.⁵⁷ A similar document might be devised for environmental mediators.⁵⁸

Credentialing agencies could also be used to ensure that there is a readily available source of qualified mediators with adequate "substantive knowledge about the environmental and regulatory issues at stake" in a dispute.⁵⁹ Agencies could catalog panelists according to their special knowledge, experience, and areas of interest, to facilitate locating those individuals best able to handle particular types of disputes.⁶⁰ Although it would be unwise to require that all environmental mediation be done by credentialed persons,⁶¹ disputants who need a neutral would have established sources and procedures for selecting a mutually acceptable person.

Credentialing agencies can also sponsor publications and programs designed to improve the quality of mediation services. Newsletters, printed summaries of documented mediation efforts, and similar publications containing information relating to current

vate, nonprofit organizations or university-based agencies. S. MERNITZ, *supra* note 1, at 72. Examples of such organizations are the Center for Energy Policy, the Wisconsin Center for Public Policy, RESOLVE, The Institute for Environmental Mediation, Clark-McGlennon Associates, Inc., and the New England Environmental Mediation Center. Funding has come from private and public grants.

57. Code of Professional Conduct for Labor Mediators (1971) (adopted jointly by the Federal Mediation and Conciliation Service of the United States and state agencies represented by the Association of Labor Mediation Agencies).

58. For a thoughtful interdisciplinary discussion of ethics and mediation, see G. Cormick, *The Ethics of Mediation: Some Unexplored Territory* (Oct. 24, 1977) (unpublished paper prepared for The Society of Professionals in Dispute Resolution, Fifth Annual Meeting).

59. Susskind, *supra* note 5, at 42.

60. See text accompanying notes 29-31 *supra* regarding the desirability of using mediators with special knowledge or technical expertise.

61. It is unlikely that all qualified persons would choose to be on the panel of an accrediting agency.

events and important developments could be distributed to mediators and other interested persons. Seminars and workshops at which mediators could share their experiences, discuss common problems, and focus on emerging issues and problems would foster an informed and studied development of the process of environmental mediation.

Educational programs could also be sponsored for potential consumers of mediation services. Such programs could be structured to familiarize interested persons and the public with the methodology and advantages of mediation and to introduce them to mediators on the agency panels. Ignorance and misunderstanding of the mediation process is probably a major factor inhibiting its use in resolving environmental disputes. Education and personal contact with mediators could do much to lower these barriers and to promote wider and more productive use of mediation.

In view of the potential advantages of a system for credentialing environmental mediators, Professor Susskind's rejection of the idea is puzzling.⁶² One of the reasons he gives for rejecting credentialing is incompatible with his fundamental premise that standards are needed to ensure that mediation efforts are structured properly. He states:

[M]any environmental disputes are likely to be mediated by individuals called upon to intervene because of their positions and not their credentials as mediators. Their success may well depend on their capacity to operate free from the constraints that mediators typically feel. Congressman Wirth and others like him will not be successful if they are bound by procedures promulgated by associations responsible for credentialing professional mediators.⁶³

The reference is, of course, to mediators with clout. The quoted language suggests that there would be a privileged category, mediators with clout, who would have special status and not be bound by any standards. If there were such a special category,

62. Susskind, *supra* note 5, at 47. Susskind concludes that efforts to credential environmental mediators are not likely to be effective.

63. *Id.* at 42.

what are the implications with respect to accountability? Would a mediator with "clout" be suable in the same manner as other mediators?⁶⁴

B. *Links to Regulatory Agencies and Courts*

Professor Susskind is optimistic about the prospects for achieving accountability by linking environmental mediators to regulatory agencies and courts. His framework for accomplishing this linkage, however, leaves several questions unanswered. For example, it is not clear whether mediators would be salaried employees or would be hired on an ad hoc basis. It is also unclear whether mediators would be paid out of public or private funds. At one point Professor Susskind states that the regulated and the regulators would select the mediator.⁶⁵ Later he states that mediators might be employed on the staff of the attorney general's office, and that court-appointed mediators "would be paid in the same manner as judges."⁶⁶ He also refers to the possibility of volunteers mediating disputes.⁶⁷ These questions must be answered before the Susskind proposal can be fully evaluated.

In his discussion of linkages to courts and agencies, Professor Susskind suggests that potential mediators should be required to disclose their views in writing on certain ethical and procedural issues. These issues include the need to protect underrepresented groups, strategies for maximizing joint net gains and the importance of taking into account the precedent-setting nature of mediated agreements.⁶⁸ This suggestion is impractical. The precise strategy for identifying interests to be protected, to the extent that they are identifiable, will vary from case to case. A mediator will not be able to devise strategies for achieving the optimal resolution of a dispute until he or she has become involved in the mediation effort. An attempt to make such decisions in advance, and prema-

64. Susskind states that Wirth was accountable primarily to the voters in his district. *Id.* at 38.

65. *Id.* at 43.

66. *Id.*

67. *Id.*

68. *Id.*

ture disclosure, could destroy the procedural flexibility which a mediator must have. It might also limit his or her ability to interject innovative substantive proposals for resolution and to deal with unanticipated issues and situations which may arise after mediation is underway.

If mediation is to achieve acceptability as a technique for resolving environmental disputes, governmental linkages and support will be required. This aspect of the Susskind proposal is valid. Governmental support could satisfy two important needs: providing systems to deliver mediation services and providing funds for the expenses of mediation. Due to the nature of environmental disputes and the parties involved, it is not realistic to expect that the parties can or will share the expenses of mediation.⁶⁹ Most environmental mediation to date has been done by individuals or private agencies which were able to donate their services because they operate with funding from private sources or government grants. The use of mediation for environmental disputes will remain limited unless a broader base of support is established.

Legislative bodies must recognize that the public welfare will be served by the efficient and amicable resolution of environmental disputes. Such recognition is contained in the statement of policy for the FMCS,⁷⁰ which provides free mediation services to the parties to collective bargaining disputes. The time has come for a similar commitment to the resolution of environmental disputes.

69. [T]he labor-management analogy provides a useful point of departure. Virtually all mediation services are supported and/or provided by state or federal governments as a matter of public policy. Except in unusual circumstances, the parties do not directly pay for mediation services, either singly or collectively. There are a number of reasons why a similar reality will operate in environmental/economic disputes, including: 1) the disparate nature of the conflicting parties and their differential ability to finance mediation services; 2) the absence of any pre-existing relationship through which the parties could agree to share the cost of mediation services; and 3) the inordinate amount of time which a mediator must routinely spend developing a possible negotiating relationship without any assurance that a particular dispute will, in fact, progress to viable negotiation of the issues.

Cormick, *supra* note 1, at 17.

70. 29 U.S.C. § 172 (1976).

The manner in which mediation services would be coordinated under a governmentally funded effort, and the level of funding, will require study and planning.⁷¹ Governmental efforts should be coordinated with efforts of existing private mediation agencies.⁷² It would be advisable to assign the new mediation function to an existing independent agency such as the FMCS, or to establish a similar new agency.⁷³ Attaching mediators to environmental agencies might raise doubts as to their impartiality when the agency has a regulatory function or is a party to a dispute.

There would be distinct advantages to having a central governmental agency to coordinate environmental mediation services. Given the potential number, variety, and complexity of environmental disputes, it is unlikely that the agency itself could employ a staff to serve the demand adequately. Arrangements with private agencies and private individuals would assure the availability of adequate numbers of mediators, provide a source of mediators with special qualifications, and serve as a hedge against excessive overhead costs associated with fluctuating demands for mediation services.

71. For an interesting recent study of alternative structures for providing mediation services, see S. CARNDUFF & J. RUSSELL, *ALTERNATIVE ENVIRONMENTAL MEDIATION STRUCTURES WITHIN THE FEDERAL GOVERNMENT* (March 1980) (available from the United States Council on Environmental Quality).

Cormick states:

The paramount issue in the long-term provision of mediation services for environmental disputes is where the services should be located. Here the labor-management analogy suggests the need for some agency or base independent and insulated from operating departments and agencies. Unlike the labor-management sector where the services are provided at either the federal or state level and where public agencies, when involved, are also at one or another level, most environmental conflicts will involve local, state and federal agencies. For this reason, the Institute has been particularly interested in exploring the use of regional and joint state-federal bodies as an appropriate location for environmental mediation services.

Cormick, *supra* note 1, at 18.

72. Private mediation agencies have pioneered environmental mediation and are likely to continue to provide leadership in the field.

73. I find Susskind's suggestion that mediators be assigned to the attorneys' general offices or to courts to be impractical. If the former is to be a prosecutor, the mediators would not be viewed as neutral. In any event, neither is likely to have an administrative organization which could efficiently coordinate and deliver mediation services.

A governmental mediation agency, whether at the state or federal level, could also serve important administrative functions. It could screen disputes according to established criteria to determine if free or partially subsidized services should be provided, or if referral should be made to a private agency. The agency could also resolve initial questions regarding identification of parties for mediation and could insulate mediators from making awkward decisions during the course of mediation. For example, an interest group may seek to intervene after mediation is underway. Having to rule on the entry of a new party may jeopardize the credibility and perceived impartiality of the mediator. A decision permitting or denying intervention may be seen as favoring one faction or another. The need to cope with the issue could also be a significant distraction to the mediation effort. If the agency could make the intervention determination, it would preserve the mediator's credibility and insulate the process from time-consuming and distracting influences which might diminish the quality of the mediation effort.

C. *An Informed Public*

There can be no quarrel with the notion that there is a vital public interest which should be considered in environmental decisionmaking. The extent to which the mediation process and individual mediators can and should be responsible for protecting that interest is, however, another matter. Gerald M. Cormick, in explaining the experience of the Institute for Environmental Mediation, made the following observation:

[M]ediation has become a popular concept and to define one's actions as "mediation" may become a misleading effort to redefine or revive a planning and/or citizen participation process. We feel strongly that mediation is *not* a planning or participation/information process but a decision-making process.⁷⁴

Issues relating to public participation in negotiation and mediation and the public's "right to know" are not new, nor are they

74. Cormick, *supra* note 9, at 216.

peculiar to environmental disputes. They have been the subject of much debate and experimentation in the area of public sector collective bargaining.⁷⁵ In that context it has been suggested that there is no homogeneous public interest which can be identified or responded to with certainty. One commentator has observed: "Those who drumbeat for 'the public's right to know' do not define the public; and it is clear that there are many publics, each with separate and often lamentably narrow interests."⁷⁶

Professor Susskind is critical of environmental mediation because so-called "public interest representatives" have not been "duly appointed" by the interests they represent.⁷⁷ If there is no homogeneous identifiable public interest, there are obvious procedural problems associated with appointing its representatives. Moreover, making a mediator legally accountable for protecting such vague and amorphous interests is difficult to justify. Such difficulty should not imply, however, that a mediator should ignore identifiable unrepresented interests or need not be sensitive to a broad sense of the public interest. These considerations are important and the parties to a dispute should be reminded of them at appropriate times.⁷⁸

75. Two recent and informative collections of commentaries are PUBLIC ACCESS: CITIZENS AND COLLECTIVE BARGAINING IN THE PUBLIC SCHOOLS (R. Doherty ed. 1979); THE IMPACT OF THE MEDIA ON COLLECTIVE BARGAINING (L. Miller ed. 1980).

For an expansive study of the public interest in public sector collective bargaining see R. SCHICK and J. COUTURIER, THE PUBLIC INTEREST IN GOVERNMENT LABOR RELATIONS (1977).

76. Newman, *The Need for Confidentiality in the Third-Party Processes*, in THE IMPACT OF THE MEDIA ON COLLECTIVE BARGAINING 12 (L. Miller ed. 1980).

77. Susskind, *supra* note 5, at 40.

78. In his paper on *The Ethics of Mediation*, Cormick lists three variables which mediators might take into account while engaged in a mediation effort. Included is the following:

2. *The greater the impact of the issues in dispute on parties not at the table, the more critical the responsibility of the mediator.* This variable recognizes that in certain areas of negotiation, such as in public sector collective bargaining or in environmental disputes, all segments of the community may not be activated at the point in time when negotiations take place. As a result, all of the interests of the broader public may not be adequately represented "at the table." Where this is the case, the mediator has a responsibility to recognize and to keep before the parties the possible impact of their decision on these broader publics and of the broader public possible influence

No solutions are offered here to the important and complex problems of public access to, and participation in, mediation of environmental disputes. The search for solutions must take into account practical as well as theoretical considerations. In this regard, it is worth noting that there is a relevant body of experience upon which to draw in the field of public sector collective bargaining.⁷⁹ Although there is not exact symmetry between environmental disputes and public sector labor disputes, there is a wealth of experience in the labor area, where the public interest is substantial, which should not be rejected out of hand.⁸⁰

Professor Susskind proposes a long-range strategy for accountability through public participation in environmental mediation.

The most effective way to hold environmental mediators accountable, would be to increase the public's capacity to demand fair and effective behavior on the part of mediators. This strategy is long-term and could begin with the provision of government funds to ensure the representation of disadvantaged groups with a stake in a mediated dispute. To the extent that certain groups feel they are not competent to participate in technical aspects of negotiation, funds should be provided for them to appoint qualified agents to represent them. There are numerous public interest groups that could provide such assistance. Representatives of all stake-holding interests ought to be given funds to caucus with the people

over the actual implementation of any joint agreement.

G. W. Cormick, *supra* note 58, at 10-11.

He also lists the following as one of ten ethical criteria for mediators:

10. The mediator should keep before the parties a consideration of the realities of the broader public interest.

This criterion is related to the concern with the viability of agreements discussed above. It is not suggested that the mediator attempt to impose the interest on the parties, but rather that he or she has an ethical responsibility to ensure that the parties consciously consider the public interest and ways in which it might affect any arrangement which they might reach.

Id. at 15.

79. For an extensive listing of state statutes providing for mediation as a dispute settlement mechanism for public sector collective bargaining see Kincaid, *Resolving Public Sector Disputes—A Guide for West Virginia*, 79 W. VA. L. REV. 23, 87-88 n. 214 (1976).

80. Susskind appears to reject all labor-management experience as not relevant to environmental mediation. Susskind, *supra* note 5, at nn.14, 15.

they represent. These are some of the costs associated with creating an informed public.⁸¹

This proposal has many dimensions which have both cost and procedural implications. We have not yet devised a method for funding the more direct costs of mediation, such as the payment for the services of mediators. If this proposal is taken at face value, the potential financial burden would be enormous. In addition, the likelihood for saddling mediators with procedural distractions would be significant. These distractions might be associated with parties and nonparties seeking to obtain funds for experts to represent their interests and marginally interested parties seeking funds to support intervention. If such requests were denied, the mediation procedures might be challenged as being unfair.

D. *Suing the Mediator*

The most provocative aspect of the Susskind proposal is contained in the following statement:

Accountability requires that the parties to a dispute as well as members of the community-at-large be able to hold environmental mediators to their responsibilities. Assuming that those responsibilities are clearly articulated and agreed upon in advance, accountability can only be achieved if the mediators can be effectively chastised, fired, or sued by the parties directly or indirectly involved.⁸²

Mediators may always be chastised or fired. Making them suable adds a new dimension to the process of mediation. To explore that dimension, four questions must be answered: (1) Suable by whom? (2) Suable for what? (3) What remedies would be available? and (4) What standards would be used to determine if a mediator has breached his or her responsibilities so that a remedy could be imposed?

The foregoing quotation provides the answer for the first question. A mediator is accountable to the parties to the mediation ef-

81. *Id.* at 44.

82. *Id.* at 45-6.

fort and to anyone else in the community at large who is directly or indirectly affected by the settlement agreement. The pool of potential plaintiffs would be large and, very likely, undefined during the course of a mediation effort. Governmental agencies would probably be among parties which would be eligible to sue.

The duty which environmental mediators would have, which could be breached and become the basis for suit, relates to "the fairness of the processes in which they engage as well as the quality of the agreements they helped to reach."⁸³ The emphasis "should be on the results of the dispute resolution effort and not just on the fairness of the negotiations process."⁸⁴ Thus, the answer to the second question is that a mediator could be sued on both procedural and substantive grounds.

Procedural grounds might include the ground rules established by the mediator, the nature and substance of his or her communications with the parties in joint or private meetings, the mediator's decisions regarding intervention of an interest group and the level of participation accorded to parties and nonparties during a mediation effort. Substantively, the agreements reached would be expected to maximize the joint net gains of various interests, including the interests not represented in the mediation effort. In other words, the mediator must help the parties find the best balance for all of the competing interests. The broad sweep of the Susskind proposal would suggest that the remedies available in the suit against a mediator would include⁸⁵ an order enjoining or requiring certain mediation procedures, an order requiring a mediator to allow intervention, an order setting aside a mediated settlement, and recovery of money damages resulting from the implementation of a settlement agreement that did not maximize joint net gains.

The most complex inquiry relates to the standards which would be applied in determining when a plaintiff would prevail in a law suit against a mediator. Professor Susskind states that a me-

83. *Id.* at 16.

84. *Id.* at 17.

85. Susskind does not discuss remedies. Therefore, I am suggesting examples which would be consistent with his accountability proposal.

diator's responsibilities could be spelled out in legislation⁸⁶ or in a contract between the parties to a dispute and the mediator.⁸⁷ He also proposes specific criteria for judging the fairness of the mediation process and the quality of settlement agreements.⁸⁸ The following discussion examines the feasibility of establishing mediators' responsibilities by statute or contract and the utility of Professor Susskind's proposed criteria.

It is unlikely that an enforceable statement of a mediator's responsibilities could be set forth in a statute. If mediation is to maintain its character as a flexible process, rather than a structured procedure, a rigid statutory framework will do more harm than good.⁸⁹ Due to the nature of environmental regulation, substantive standards by which to judge the quality of the mediated agreement and the potential liability of a mediator would be even more difficult to establish by statute.

Legislatures broadly define policy and assign administrative agencies the task of determining how those policies will be implemented.⁹⁰ It may take an agency months or years of study to determine how a particular policy or set of policies will be implemented. It is not unusual for the resolution of an environmental dispute to require the reconciliation of seemingly conflicting regulatory policies.⁹¹ Under these circumstances, it is unrealistic to expect that a legislative body could provide the needed guidance for a judge or jury that must determine if a mediator has helped to find the best settlement.

The suggestion that a mediator's responsibilities can be defined in an enforceable contract is also troublesome. It would indeed be optimistic to assume that parties who cannot resolve their dispute could agree upon a contract that would spell out, with en-

86. Susskind, *supra* note 5, at 43.

87. *Id.* at 46.

88. *Id.* at 17-8.

89. Mediators employed by the FMCS have the statutory duty to use their "best efforts, by mediation and conciliation, to bring [the parties] to agreement." 29 U.S.C. § 173(b) (1976).

90. *See* note 38 *supra*.

91. Clark, *supra* note 3, at 176-82.

forceable precision, mediation procedures to be followed or standards for judging the quality of the mediated agreement. Even if such an agreement could be drafted, there remains the matter of protecting the interests of the unrepresented. Must the mediator represent those interests when the contract is drafted? If so, he or she would be placed in an awkward position for two reasons. First, the interests which need protection may not be identifiable, if at all, until after the mediation is underway. Second, the mediator's status as a neutral, actual or perceived, would be jeopardized. He or she would have to represent interests which might be adverse to those of disputants who would be parties to the contract.

Complications may also arise if new parties enter the mediation effort after the contractual obligations have been established. There may be a question as to whether the contract should be renegotiated, which would be, at best, a significant distraction to the mediation effort. At worst, it could cause substantial delays or destroy the effort entirely. One or more of the original parties might withdraw rather than enter into a new agreement and would then become an unrepresented interest which would need to be protected by the mediator.

Even if the foregoing problems could be overcome, the idea of specifying a mediator's responsibilities in a contract is inconsistent with the nature of the mediation process. A mediator needs the flexibility to adjust procedures to meet specific needs which may arise from time to time, including the intervention of new parties and the interjection of new issues. Flexibility is also needed with respect to the substantive outcome of the mediation effort. An important part of the mediator's job is to reorient the thinking of the parties so that they will be more receptive to new ideas and compromise.⁹² He or she must have the latitude to move the parties toward solutions which they could not anticipate.

Finally, Professor Susskind states that contracts will be needed where the mediator is acting on a one-time-only basis.⁹³ Such an individual would probably be inexperienced in the ways of

92. Fuller, *supra* note 17, at 325.

93. Susskind, *supra* note 5, at 46.

mediation and be unable to judge all of the implications of his or her contractual obligations. If the parties were also inexperienced, the situation would be even more troublesome. The possibility of misunderstandings or disagreements evolving into a lawsuit would be quite real. This setting would not be a healthy and stable one for a mediation effort.

E. *The Proposed Criteria for Judging a Mediation Effort*

The criteria for judging the fairness of a mediation process and the quality of the mediated agreement proposed by Professor Susskind are the following:

1. "[T]he outcome is better if it is consistent with shared notions of equity and justice;"
2. The resolution should "well reconcile the interests of the parties;"
3. The resolution should be "consistent with principles reflecting pre-existing practice;"
4. The "agreement should set 'a good precedent for the parties involved as well as for other parties;'"
5. The "agreement should be 'reached quickly and at low cost;'"
6. "The process of decision should be one that tends to improve rather than exacerbate the relationships among the parties;" and
7. The agreement should be readily acceptable to the parties to ensure acceptability and compliance with its terms.⁹⁴

For purposes of discussion, the focus will be on the fairness and practicality of using these criteria as the basis for determining if a mediator should be liable for damages because the mediated settlement did not maximize joint net gains.

As a preliminary observation, Professor Susskind states: "Principled negotiation rests on the assumption 'that the proper standards for judging a process of conflict resolution are *not* those that may produce a particular result in a particular case, but

94. *Id.* at 17-18. Susskind relies upon and quotes from R. Fisher, *Some Notes on Criteria for Judging the Negotiations Process 1* (Nov. 1979) (unpublished paper distributed at the negotiations seminar of the Harvard Negotiation Project, Harvard Law School).

rather those standards that will tend to produce desired results in an indefinite series of cases.'"⁹⁵ Judging a process and judging an individual mediation effort are two different things, especially if the purpose of the evaluation is to determine if the mediator will be liable for the payment of damages. When the focus is on a process, the concern is not an individual effort, which may or may not fit a pattern. When the focus is on judging the quality of an individual effort, the pattern is secondary. Thus, it is unclear how reliable these process-oriented criteria are for judging a single mediation effort. In addition, it is not stated whether, or how, the criteria would apply if the mediator's responsibilities were set forth in a contract establishing a different basis for judging his or her performance.

The explanatory comment which accompanies the first criterion states that emphasis should be on the results of the dispute-resolution effort.⁹⁶ The explanation for the second criterion adds that a neutral observer must be convinced that joint net gains have been maximized.⁹⁷ What emerges is a format under which liability would be determined in a judicial proceeding in which a judge, or a jury, must examine a settlement to determine if the best result were achieved. This evaluation would not be fair for at least two reasons. First, it must be remembered that the settlement is that of the parties to the dispute, not the mediator. Second, in context of a statutory scheme of environmental regulation, it would be inappropriate for a court to determine which result or decision would be best. It is likely that the court would have to deal with matters which have been delegated to an administrative agency by Congress or a state legislature. Under such circumstances, it would be the agency's job to seek the best solutions for the problems at hand. When a court engages in judicial review of the agency's determination, it applies a test of "reasonableness" not "rightness."⁹⁸

95. *Id.* at 16 (quoting Fisher).

96. *Id.* at 17.

97. *Id.*

98. B. SCHWARTZ, ADMINISTRATIVE LAW, 595-97, 603-06 (1976). If issues in the suit against a mediator are matters which have been assigned to an agency for decision, the court may be required to defer to the agency under the doctrine of primary jurisdiction. For an explanation of the doctrine, *see id.* at 481-95.

The fourth criterion relates to the precedential value of a settlement. Professor Susskind offers the following explanation: "It may well be, that the way to ascertain whether this criterion has been met is to see whether a precedent has been set that helps to achieve the first three criteria over time."⁹⁹ This explanation suggests that the quality of a mediated settlement cannot be judged on the basis of information available to the mediator and to the parties at the time that it is made. Hindsight is always better than foresight. It would be unfair to determine the mediator's liability on the basis of information which was not available when agreement was reached.

With respect to the fifth criterion, Professor Susskind states: "When costs and benefits to the community-at-large are weighed, however, it is often difficult to prove that a particular outcome is efficient."¹⁰⁰ Implicit in this observation is recognition of the highly subjective nature of environmental decisionmaking. Reasonable minds may differ as to the solution to a particular problem. It would be unwise, under such circumstances, to have a judge (or jury) determine liability, thereby imposing his or her (its) notion of the best solution. It has been said that mediation is more reliable than a judicial proceeding for finding solutions for environmental problems.¹⁰¹

In summary, it would not be fair, practical, or desirable to apply the criteria suggested in a judicial proceeding for the purpose of determining a mediator's liability. Recall that the agreement reached is that of the parties to the dispute. Professor Susskind says nothing regarding their responsibility or liability. In many cases, an administrative agency which has a regulatory function will be directly or collaterally involved in a mediation effort. Nothing is said in the explanation of the criteria regarding the mediator's liability when such an agency concurs in or adopts the mediated settlement.

99. Susskind, *supra* note 5, at 17.

100. *Id.* at 18.

101. S. MERNITZ, *supra* note 1, at 3-12.

V. THE EFFECT OF THE SUSSKIND PROPOSAL ON THE MEDIATION PROCESS

At the beginning of this article, four fundamental and universal characteristics of mediation were identified.¹⁰² They are characteristics which have made the process acceptable, durable, and adaptable for use in many situations. Also identified were conditions which must be present if mediation is to be used in a significant way to resolve environmental disputes.¹⁰³ Implementation of the Susskind proposal would, to some degree, compromise each one of mediation's fundamental characteristics and would seriously jeopardize the two most crucial conditions for its use: the acceptability of the process, and the willingness of qualified persons to serve as mediators.

The mediator's role as a neutral would be seriously compromised by the Susskind proposal for two reasons. First, the mediator would have a real stake in the outcome of the dispute because he or she could be sued on the grounds that the settlement was not the best available. Indeed, this liability might give the mediator a larger personal stake than any other participant, or all combined. This interest would undermine his or her ability to orchestrate the mediation process in an open-minded and impartial manner. Second, the unrepresented interests which the mediator is responsible for protecting under the Susskind proposal are likely to be at odds with those of the participants, including the mediator. Actions by the mediator to be responsive to this duty, by directly representing the unrepresented or seeking to have others do so, would have great potential for arousing suspicion and mistrust. The mediator might also be placed in the position of having a conflict of interests.

If mediators with "clout" were routinely used for environmental disputes, the voluntariness of the process would be in doubt. The parties to a dispute would be reluctant to mediate if they believed or suspected that the mediator could impose a settlement through direct or indirect pressures. They would be especially re-

102. See text accompanying note 20 *supra*.

103. See text accompanying notes 7-8 *supra*.

luctant if the mediator was perceived as having a bias¹⁰⁴ or a stake in the outcome of the dispute. Disputants will not use mediation unless they believe they have something to gain and that their interests will receive full and fair consideration by the mediator.

If a mediator could be sued to challenge the procedural fairness of a mediation effort, the confidentiality of the process would be in serious jeopardy. Upon the filing of such a suit, it is likely that everything that occurred, including the mediator's private communications with the parties, would be subjected to judicial scrutiny. If this scrutiny were permitted, the damage to the mediation process would be irreparable. Parties would be reluctant to speak freely with mediators. The privacy of communications with the parties and the candor which such privacy encourages—which a mediator depends upon for success—would be lost.¹⁰⁵

The possibility of a lawsuit alleging procedural unfairness would also severely curtail the procedural flexibility which is vital

104. Susskind states that Congressman Wirth's success in resolving the Foothills dispute was based largely on the fact that he was widely perceived as being biased in favor of the project. Susskind, *supra* note 5, at 33. Burgess states that Wirth proposed a mediation procedure that was biased toward one powerful party to make mediation more attractive than other dispute-resolution alternatives. H. Burgess, *supra* note 20, at 116-17. I believe it would be unwise to conclude on the basis of the Foothills experience that biased mediators will enhance the use of mediation.

105. Simkin states:

[U]nless the parties are willing to confide in the mediator, his usefulness is limited. . . .

A second aspect of the confidential relationship concerns disclosure to the public or even informal disclosure to friends during or after a case. Mediators usually clear any statement to the press about a case with both parties, either as to precise content or in general terms. Reports of mediators to their agency are not available to others, even for research purposes, long after the case has been closed, except as specific approval may be granted after appraisal of the purpose and nature of intended use. Mediators do not testify in court in unfair labor practice and other types of cases on any matters occurring during negotiations that could be considered confidential. Mediators who teach classes or write books, like this one, must exercise great care not to disclose confidential information or anecdotes.

These confidential characteristics of the mediator's relationship with the parties are critical to useful performance. To violate a real confidence would destroy the mediator's effectiveness with the persons involved.

Simkin, *supra* note 10, at 33.

to the success of mediation. Mediators would tend to be guarded in their dealings with the parties and their ability to use tough and unpopular strategies would be inhibited. They would have to be concerned about making a record that would withstand judicial scrutiny and second-guessing. A party might use the threat of a lawsuit to intimidate or influence a mediator.¹⁰⁶ In short, if a mediator could be sued, form would prevail over substance and procedural flexibility would be the victim.

Doubts regarding the voluntariness of the process and the impartiality of the mediator would cause skepticism and mistrust. Mediation might also be viewed as a waste of time, resources, and effort if the settlement could be made the subject of costly litigation. Finally, the cost of mediation could become prohibitive. Individuals who would be daring enough to serve as mediators would have to charge a fee commensurate with their financial exposure or purchase malmediation insurance. The cost implications are obvious. Mediation would likely be priced out of the market as a dispute-settlement mechanism.

It is unlikely that qualified individuals would choose to serve as mediators if they could be sued. This reluctance would increase proportionately with the complexity of disputes and the stakes involved. The potential exposure to the expense and inconvenience

106. Arbitrators are generally held to be immune from suits by dissatisfied parties to insulate them from just such pressures.

Arbitrators exercise judicial functions and while not *eo nomine* judges they are judicial officers and bound by the same rules as govern those of officers. . . . Considerations of public policy are the reasons for the rule and like other judicial officers, arbitrators must be free from the fear of reprisals by an unsuccessful litigant. They must of necessity be uninfluenced by any fear of consequences for their acts.

Babylon Milk and Cream Co. v. Horvitz, 151 N.Y.S.2d 221, 224 (N.Y. Sup. Ct. Suff. Cty. 1956), *aff'd* 4 App. Div. 2d 777, 165 N.Y.S.2d 717 (2d Dep't 1957).

For similar holdings see *Corey v. N.Y. Stock Exch.*, 493 F. Supp. 51, 55 (D. Mich. 1980); *Hill v. Aro Corp.*, 263 F. Supp. 324 (D. Ohio 1967); *Cahn v. Int'l Ladies' Garment Union*, 203 F. supp. 191, 194 (D. Pa. 1962), *aff'd*, 311 F.2d 113, 114-115 (3d Cir. 1962); *Hoosac Tunnel Dock and Elevator Co. v. O'Brien*, 137 Mass. 424, 426, 50 Am. Rep. 323, 324 (1884); *Jones v. Brown*, 54 Iowa 74, 6 N.W. 140, 142 (1880). Cases relating to arbitrators' immunity are discussed in AMERICAN ARBITRATION ASSOCIATION ARBITRATORS' IMMUNITY FROM CIVIL LIABILITY—DEPOSITIONS OF ARBITRATORS IN LAWYERS ARBITRATION LETTERS 1970-1979, 171-176 (1981).

of litigation, and the danger of being held liable for damages would be an unreasonable risk.¹⁰⁷ Professor Susskind's article demonstrates the extensive nature of the risk. He suggests that the mediators involved in the Snoqualmie, Brayton Point, and Foothills disputes were not adequately concerned about the effects of the agreements reached upon unrepresented interests.¹⁰⁸ He states that adverse long-term impacts and spillover effects such as acid rain (the Brayton Point dispute) and adverse economic consequences (the Snoqualmie and Foothills disputes) may be the legacy for future generations. The implication is that, under his approach to accountability, the mediators involved in those disputes would be subject to being sued, and might well be liable for damages. The full extent of their exposure could not be determined until some future date. Needless to say, the potential liability in each case could be substantial. One must ask whether any of the mediators would have agreed to serve if faced with such financial exposure. Making mediators suable would not advance the cause of providing a corps of willing and qualified mediators.

CONCLUSION

Experience has shown that environmental mediation works. Its use has been limited because knowledge of the process is limited and there is no institutionalized system for making mediation services available. Implementation of the Susskind proposal would further limit or eliminate the use of mediation for environmental disputes, thereby depriving disputants of a proven effective and efficient means of resolving their differences.

The problems with the Susskind proposal stem from three

107. Recently a question was raised regarding the personal fiduciary liability of an arbitrator deciding pension fund trustee impasse cases under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(21)(A)(i), (iii) (1976) (ERISA). This exposure caused arbitrators to refuse such cases. See Memorandum from the Federal Mediation and Conciliation Service (FMCS) to Members of the FMCS Roster of Arbitrators (Dec. 14, 1979) (available from the FMCS, Washington, DC 20427). For a summary of recent case decisions and developments regarding arbitrators' fiduciary status under ERISA, see Memorandum from the Federal Mediation and Conciliation Service (FMCS) to Members of the FMCS Roster of Arbitrators (July 2, 1981).

108. Susskind, *supra* note 5, at 38.

omissions. First, he has not given sufficient attention to the nature of the mediation process and the characteristics which have made it acceptable to disputants and to neutrals. Second, he has not considered, in a practical way, the role that mediation can and should play in resolving environmental disputes. Finally, he has not considered the practical effect of his proposal on the mediation process. Mediation is not a panacea that can correct all the deficiencies in governmental decisionmaking regarding environmental matters. The key to its effective use will derive from understanding the process so that it can be employed at appropriate times for appropriate disputes.

If mediation is to reach its full potential for resolving environmental disputes, it should be used, not changed. This will require governmental commitment to foster and support its use similar to the commitment for the use of mediation to resolve collective bargaining disputes. The long-range benefits of such a commitment will far outweigh the costs.