ENVIRONMENTAL MEDIATION: EXPERT ASSESSMENT OF AN ECLECTIC THEORY

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A dissertation submitted to the Faculty of the
Virginia Polytechnic Institute and State University
in partial fulfillment of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

Public Administration and Public Affairs

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October, 1987
Blacksburg, Virginia

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(ABSTRACT)

This dissertation developed an eclectic theory of environmental mediation and submitted it to 31 environmental mediation experts for an assessment of the 63 propositions of the theory. The propositions which represented factors which the mediation experts assessed as important elements contributing to effective mediation were grouped into an "Essential Model," and the propositions which represented less important elements contributing to effective mediation were grouped into a "Secondary Model." Key dimensions which distinguish the two models were identified. The eclectic theory was developed from the case and theoretical literature, and practitioner comments on the art of environmental mediation. The expert assessment was

conducted by submitting an instrument containing 63 propositions to the 31 mediation experts with a request that they rate the importance of each proposition in contributing to effective environmental mediation outcomes. The dissertation presents three alternative general models of mediation, and compares and contrasts the practice of environmental mediation with these models. Recommendations for further research are made, and critical reflections on the state of the art of environmental mediation are presented.

ACKNOWLEDGEMENTS

This dissertation was developed over a number of years with the assistance of a variety of individuals. Various sources of ideas and information contributed to the development of the research, and a number of environmental mediation practitioners gave their reactions to proposed prescriptive statements.

This dissertation constructs and checks a comprehensive "eclectic" theory of environmental mediation against the real experience of environmental mediators. The term "eclectic" is used to suggest that the concepts in the theory were collected from a variety of sources in the research literature. It was the profusion and variety of ideas, practices, recommendations and reflections in the literature of environmental mediation that suggested the need for a theory that is checked against the experience of environmental mediators. This dissertation submits the concepts mentioned in the literature to the review of environmental mediators to provide an evaluation of the importance of each concept in the practice of mediation. The method used in the construction of the eclectic theory and the check against the experience of environmental mediators is as follows:

1. Review of the literature on environmental mediation and construction of theoretical prescriptions for effective environmental mediation.

2. Structuring of the theoretical prescriptions into a ten stage Eclectic Theory of Environmental Mediation. The stages arrange the prescriptive statements in order in terms of when they first become relevant in a mediation effort.

3. The identification of 40 mediators who had participated in conducting environmental mediation.

4. The design of an instrument to obtain an evaluation of the importance of each prescription for effective environmental mediation by mediation practitioners.

5. The submission of the instrument to the environmental mediators to obtain their expert assessment of the importance of each prescription in reaching a mediated settlement. These assessments constitute "informant reports" on the viability and efficacy of the prescriptions as means for reaching mediated settlements of environmental disputes.

In the Conclusions portion of the dissertation, the results of the informant reports, or expert assessments, were used to construct an Essential Model of Environmental Mediation. The Essential Model consists of the prescriptions which were shown by expert review to be the

most important in contributing to effective environmental mediation outcomes. An analysis of the Essential Model identifies several dimensions of the model which appear to contribute to successful outcomes of environmental mediation.

A chapter in the dissertation presents three models of mediation in general. These models serve as a basis for comparison of the Essential Model with mediation in a generic sense in the Conclusions. The comparison of the Essential Model of environmental mediation with these other models highlights the similarities of the Essential Model to mediation in general, and emphasizes the unique characteristics of the Essential Model.

A section in the Conclusions presents a critical assessment of the state of the art of environmental mediation and makes recommendations for further research.

The author has been interested in the topic of environmental mediation for more than ten years. The concept first came to the attention of the author in an article in the CHRISTIAN SCIENCE MONITOR in the late 1970's. The approach sounded like a whole new and creative means for resolving environmental conflicts. Additional interest was stimulated when an Associate with the Conservation Foundation, spoke to a class at Virginia Tech

on the subject in 1980. The author pursued the topic further by attending a Professional Development Seminar on Negotiation, Mediation and Consensus Building in Fredericksburg, Virginia in 1981.

As a part of Ph.D. coursework, the author wrote papers that dealt with the application of conflict resolution to public sector problems.

A practice dissertation prospectus was entitled "The Potential for Conflict Resolution in Water Resources Planning." This led to employment by the Water Resources Research Center to assist in research on conflict resolution in water resources planning, in collaboration with professors Leonard Shabman, of Agricultural Economics, and William Cox, of Civil Engineering, both at Virginia Tech. The results of that effort were published under the title DEVELOPMENT OF PROCEDURES FOR IMPROVED RESOLUTION OF CONFLICTS RELATED TO INTERJURISDICTIONAL WATER TRANSFER, by the Virginia Water Resources Research Center.

Other activities related to environmental mediation included conducting interviews with professionals with an interest in environmental mediation, and attending the Second National Conference on Environmental Dispute Resolution in Washington, D.C. in 1984. The author completed a 20 hour course in community mediation under the

auspices of the Dispute Settlement Service of the New River Valley in 1985, and by 1985 this dissertation was begun.

In the course of research with the Virginia Water Resources Research Center, the author became convinced that further research was needed to document carefully the actual practice of environmental mediation. While there had been attempts to develop a theory of environmental mediation, practitioners had described mediation in general and prescriptive terms, and, although case studies existed, no comprehensive treatment of environmental mediation was available. The attempts to develop theory and prescribe for environmental mediation did not reflect accurately the practices and experiences presented in the case study literature. No framework was found which reflected the great variety of concepts, activities and considerations which appeared in the literature. This dissertation is an attempt to identify the concepts, activities and considerations which belong in a comprehensive theory of environmental mediation, and to check empirically their importance in environmental mediation practice.

Great appreciation is due to my committee chairman, Orion White, who always gave the right kind and amount of advice and encouragement to keep me on track without taking too much control. His editorial advice was always on target

and his support was encouraging. Charles Goodsell was especially conscientious in making editorial suggestions which greatly improved the text. John Rohr had specific recommendations of ways to strengthen the legal foundations of environmental mediation. Much appreciation is due to the other committee members, John Dickey, and Jim Wolf, for helping to shape an empirical approach which distinguishes this research from other studies in the field, and gives it practical utility for shaping the practice of environmental mediation. Thanks is also due to all faculty at the Center for Public Administration and Policy for being dedicated teachers and scholars who make the program unusually rewarding and challenging.

My wife, was invaluable in suggesting improvements, providing training in the use of the computer, and boosting me over the rough spots. Her love made the effort enjoyable. She made sure that I achieved the "narrative punch" and varied expression which Orion wanted, without losing track of the subject. She provided thorough editorial advice and criticism, especially to finish every paragraph with the concluding sentence so beloved by she made sure I suffered the same torture had inflicted on her to conclude all paragraphs elegantly. Our sons, were extremely tolerant. When the

computer was not doing what it was supposed to do, they moved out of earshot without complaining. They were cheerleaders when each milestone was passed along the way, and their encouragement is deeply appreciated.

Special appreciation goes to all of the faculty, students and staff of the Center for Public Administration and Policy who make it a unique and extraordinary intellectual and social community, and who made the years as a student extremely rewarding and productive in valuable friendships. Special thanks go to who initiated CPAP and set the tone for the enterprise.

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CHAPTER I

INTRODUCTION

Mediation is an approach to conflict resolution which has been applied in a great variety of contexts. The practice of mediation falls along a spectrum that defies definition. The specifics of mediation depend on what is being mediated, the parties in dispute, who is doing the mediating, and the setting in which mediation is offered. In the broadest sense mediation is simply an intervention that is intended to resolve disputes and manage conflict by facilitating decision making. More specifically, it is a process by which the participants, together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs. Mediation is a process that emphasizes the participants' own responsibility for making decisions that affect their lives (Folberg and Taylor, 1984).

Mediation is not a novel invention but an adaptation of that which has already existed in other cultures and other times. Forms of conflict resolution in which a third party helps disputants resolve their conflicts and come to their

own decisions have probably been practiced since the existence of three or more people on earth. In ancient China, mediation was the principal means of resolving disputes (Folberg and Taylor, 1984).

The most familiar model for mediation in the United States comes from the dispute resolution procedures in labor-management relations. There are some important ways in which environmental mediation differs from labor mediation which limit the applications of its lessons to environmental conflicts. First, labor-management disputes are bilateral; environmental disputes are usually multilateral. Second, in labor-management negotiations it is usually clear who the parties and their representatives are. It is less clear who should be a party to an environmental mediation effort. Third, in a labor-management dispute, both sides have a strong incentive to bargain - neither side really wants a strike. In many environmental disputes those who want to stop a project may have no motive to bargain. Fourth, in labor-management disputes, it is not difficult to identify the terms of the bargaining although it may be hard to define the final compromise level of those terms. In environmental disputes, it is unclear what the actual terms of the bargaining ought to be (Susskind, 1981).

Environmental mediation is an approach which employs mediation to resolve environmental disputes. The Institute for Environmental Mediation uses the following definition when discussing the mediation process:

> Mediation is a 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 settling their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.

A number of important considerations are implicit in this definition: (1) Involvement of the parties in the mediation process and their acceptance of the mediator is voluntary. (2) The parties will jointly explore and debate the issues, both in joint sessions and in caucuses of one or more of the parties with the mediator. (3) The mediator facilitates the negotiation process by assisting the parties to reach a settlement acceptable to them. (4) An agreement requires the support of all parties. (5) The mediator shares with the parties the responsibility of ensuring that any agreement reached represents a viable solution that is technically, financially, and politically feasible to implement (Cormick, 1982).

The first explicit effort to mediate an environmental dispute was the Snoqualmie-Snohomish Dam dispute. Beginning

in 1973, mediators brought together farmers, sportsmen, government agency representatives, developers, environmentalists, and other citizens to negotiate an agreement providing for flood and growth control in conjunction with the building of a dam on the Snohomish River (Cormick, 1982). Shorett (1980) notes that in 1974 the signing of an agreement concerning land use controls and development in Washington's Snoqualmie Valley marked the first time that formal mediation procedures were used to produce an agreement which settled an environmental dispute.

In the intervening years the mediation process has been used with increasing frequency to resolve environmental disputes. In a book published in 1983, Talbot observed that the history of environmental mediation covered nearly a decade - "perhaps 40 site-specific disputes" have been resolved through mediation. It has been used in cases ranging from disputes involving Indian tribal lands to the siting of an interstate highway in a major metropolitan area (Lee, 1982). Mediators have established an impressive track record, enabling adversaries to negotiate agreements in places as distant as Washington and Maine, on subjects as different as freeway design and dam operation.

IMPORTANCE OF THE TOPIC

Although environmental mediation is receiving wide recognition as a means of resolving environmental disputes, there is no comprehensive theory of the process which draws upon an examination of the case literature and the experience of environmental mediators. The literature which is available either appears to generalize from a limited number of mediation experiences or develops a conceptual model which is based as much upon imagining what logical processes might be appropriate as upon the actual practices and experiences of environmental mediators. The production of an empirically tested theory provides a framework within which practitioners can improve their applications. They can identify dimensions and techniques to improve the practice, identify those which are not applicable except under particular circumstances, and identify those which are not effective.

Research on the practice of environmental mediation is important also because other models of mediation have limited applicability to environmental mediation. This type of mediation is both qualitatively and quantitatively different from other approaches. While labor and neighborhood disputes typically focus on direct relationships between contending parties, environmental

disputes focus on actions with broad potential repercussions on the environment. The geographical scope and temporal dimensions of these impacts is often unknown. The nature of the individuals, interests, groups and agencies which may eventually be involved in environmental mediation is often unknown at the initiation of the mediation effort. The attitudes and concerns which the parties to environmental mediation may bring to their participation in mediation are highly unpredictable. The relationships among members in the interest groups involved, the organizational structure of agencies and organizations which may participate, and the mandate of public agencies concerned with environmental issues are extremely varied in environmental disputes.

Environmental mediation is much less structured and defined than labor mediation. Over the years since industrial labor disputes were marked by bloodshed, labor mediation has evolved into an orderly and usually predictable process. Federal legislation, and such organizations as the Federal Mediation and Conciliation Service, confine the moves of contending parties within identifiable boundaries. The sides have an idea of what is fair, and what is unfair, and appeal processes are readily accessible for breach of these norms. The representatives of parties in labor mediation have the tradition and

precedents of years of mediation to draw upon to shape their approaches to mediation and to guide their interactions. The outcome of mediation procedures are embodied in the tangible specifics of labor contracts, and the constant repetition and testing of these specifics have built a repertoire of specifications which work.

Environmental mediation lacks the tradition and structure of labor mediation. It is a practice dating from 1974. No credentials exist to license and qualify environmental mediators. Individuals from extremely diverse backgrounds conduct environmental mediation. Approaches to the process, therefore, are extremely varied. The details of different methods of environmental mediation remain to be extensively documented.

The diversity of environmental situations which confront environmental mediators is one of the most distinct feature of this practice. Contested environmental issues range from the massive potential impacts of hazardous waste disposal, or highway construction, to concern over a small area of forest which constitutes the habitat of an endangered species, or the impact of changing water management practices of a dam on a small stream. The diversity of individuals and organizations which may become involved in environmental mediation is another distinct

feature which heightens the unpredictability and complexity of mediation efforts.

Most neighborhood disputes which are the focus of community mediation involve a few individuals. The range of disputes addressed falls within a limited range, and the disputes follow reasonably predictable patterns. The solutions worked out tend to be similar. The parties usually have long-term relationships. Environmental mediation is distinct from this approach to mediation in subject matter, breadth of issues addressed, and number and types of parties which are usually involved.

GUIDE TO THE LITERATURE

This research is an attempt to develop a comprehensive theory inclusive of the essential components, considerations and activities of environmental mediation, and to evaluate their relative importance in the environmental mediation process. Susskind and Weinstein (1981) produced a model of environmental mediation containing nine steps, in an attempt to develop a framework for a theory of environmental mediation. Their model, however, omitted several important activities and elements which practitioners had identified

as very important in environmental mediation.

In 1983, Talbot brought together six case studies of environmental mediation in a booklet entitled SETTLING THINGS. He attempted to assess when mediation works in the resolution of environmental disputes, what sorts of results it achieves, and what future role can be expected of the process based on the case studies. This assessment did not outline the key components and considerations embodied in environmental mediation in detail, nor incorporate the observations of practitioners found in the literature.

In articles written in 1980 and 1982, Cormick suggests some of the critical conceptual elements which must be addressed in environmental mediation in an attempt to understand the sources and process of environmental conflict and differing types of intervenor and intervention processes currently being applied in such conflicts. He gives attention to defining the role of the mediator and exploring some of the ethical and structural dimensions of the role. His observations have great credibility due to his status as a "founding father" of environmental mediation. He was not in a position at that time, however, to draw upon the experience of a variety of practitioners who later wrote about environmental mediation.

Clark (1980) reported that his inquiries to "pros"

asking for established techniques in the field of multi-party conflict resolution yielded one response: there are almost no guidelines, theory, or recorded experience. Busterud and Bingham (1980) write that the growing body of experience in environmental conflict management is providing new insights into the nature of such disputes and the techniques used to resolve them, and is forming the basis for development of theoretical frameworks for environmental conflict management. Shorett (1980) discusses some of the conditions under which mediation is appropriate, and briefly examines how a mediation process could be structured.

In the absence of a comprehensive theory of environmental mediation which draws upon the literature produced by practitioners, and upon the case study literature, this research attempts to supply that theory. It refines the theory by testing it empirically with a survey of practitioners.

RESEARCH METHODOLOGY

The research methodology involved several steps. They were:

1. The author made an extensive search of the

literature on environmental mediation.

2. The author attended a workshop and a national conference on environmental dispute resolution.

3. The author consulted several experts on environmental mediation on the nature and dimensions of the subject. In a pretest of an instrument to obtain expert assessments of the activities and conditions which contribute to successfully mediated settlements, two practitioners contributed two concepts which were included in an instrument which was submitted to environmental mediation experts.

4. A survey instrument was prepared which assembled 63 concepts which had been identified in the literature of environmental mediation, and by the practitioners consulted, as elements contributing to effective environmental mediation. This instrument asked environmental mediation practitioners to rate the importance of the 63 items in contributing to successfully mediated settlements. Respondents were asked to rate the importance of each item numerically on a Likert scale. The ratings were: three points if the item was critical to a mediated settlement; two points if it was very important; one point if it was moderately important; and zero points if it was irrelevant. The reactions of the environmental mediation practitioners

are termed "informant reports."

5. An extensive effort was made to identify environmental mediation practitioners to respond to the survey instrument. A letter was written to the organizations listed in the DISPUTE RESOLUTION RESOURCES DIRECTORY (National Institute for Dispute Resolution) to obtain names and addresses of practitioners. A practitioner shared an address list of attendees at a national workshop on environmental mediation. Practitioners who had described their work were listed. The list of attendees at the Second National Conference on Environmental Dispute Resolution was combed for prospects. In total, 40 environmental mediation practitioners were identified.

6. Survey instruments were sent to forty practitioners. Followup letters were sent to those who did not respond. Nine responses were obtained.

7. An additional followup effort was conducted, this time using telephone interviews. This netted an additional twenty-two responses, for a total of thirty-one completed informant reports. Three followup calls were made to each prospective respondent. Some refused to answer, and others were never "available" or never returned the calls.

8. The informant report responses were tabulated using the Statistical Package for the Social Social Sciences. The

"condescriptive" feature was used to generate average importance scores for each item on the survey instrument.

CHAPTER CONTENTS

Chapter II examines the literature on environmental mediation to identify the key activities, circumstances and conditions which writers indicate contribute to the successful mediation of agreements. It shows how the observations of writers led to the inclusion of prescriptions in the Eclectic Theory of Environmental Mediation.

Chapter III outlines The Eclectic Theory of Environmental Mediation structured into ten stages. The rationale for the inclusion of each prescriptive item is presented from the perspective of the researcher based upon familiarity with the literature on environmental mediation.

Chapter IV presents three relevant models of mediation which are the basis for comparisons with an Essential Model of environmental mediation developed from the informant reports obtained from practitioners of environmental mediation. The relevant models were chosen as representatives of mediation in general. They were selected because they represent both major efforts to pull together the most effective techniques used by general mediation

practitioners and for their relevance to the practice of environmental mediation.

Chapter V describes how the research for the dissertation was carried out, and presents the analytical framework. It provides an interpretation of the meaning of the different importance ratings given to the theoretical assertions by the mediation experts who responded to the instrument used to obtain the informant reports.

Chapter VI is an analysis of the results in conclusion form. The items on the survey instrument which received the highest importance ratings are grouped into an Essential Model of environmental mediation. An inductive examination of the Essential Model identifies several common dimensions of the items which contribute most significantly to effective environmental mediation. Principles for effective environmental mediation are abstracted from this analysis. An comparison of the similarities and differences of the Essential Model with the relevant models presented in chapter IV emphasizes the distinctive features of the Essential Model, and some characteristics common to other models. Recommendations for further research are made. Critical reflections on the state of the art of environmental mediation are presented.

CHAPTER II

THE LITERATURE ON ENVIRONMENTAL MEDIATION

This chapter offers a sampling of the literature which provided most of the concepts which are incorporated as prescriptions into the Eclectic Theory of Environmental Mediation. Telephone interviews with two environmental mediation practitioners provided the remainder of the concepts. The term "concept" is used to mean activity, consideration or component, as a way of simplifying the text.

The two final sections of the chapter address the issues of the politics of environmental mediation, and the justice of mediated settlements. The field of environmental mediation is developing to the point that scholars are examining the broader implications of mediation practice.

Three types of literature contributed concepts - theoretical, practitioner, and cases. The theoretical literature is represented by the Nine Steps Model, developed by Susskind and Weinstein (1981) - a comparison of the Nine Steps Model with the Eclectic Theory is presented in the chapter on the Eclectic Theory. The writings of a variety of practitioners provided the largest proportion of concepts. The case literature provided several concepts

which were not found in the theoretical or practitioner literature.

In the sections below which introduce prescriptions derived from the practitioner and case literature, the material is presented as a series of ten phases. The phases structure the concepts, or prescriptions, roughly in the order in which they first become relevant in an environmental mediation effort. Some concepts may be relevant only briefly, while others may be relevant in more than one phase. The phases provide an outline of the major considerations which are addressed in the Eclectic Theory of Environmental Mediation in chapter III. As such, they define a generalized structure for approaching the practice of environmental mediation.

The ten phases of mediation in the Eclectic Theory of Environmental Mediation are entitled as follows:

1. Identification of the Mediator.
2. The Preconditions for Mediation
3. Recruitment of the Participants in Mediation
4. Design of the Mediation Process
5. Identification of the Issues
6. Establishing the Information Base
7. Development of the Preliminary Agreement
8. Consulting Constituents on the Appropriateness of the

Preliminary Agreement

9. Making the Agreement Final

10. Assuring the Implementation of the Agreement

THE NINE STEPS MODEL

Susskind and Weinstein (1980-81) have made a contribution to the development of a theory of environmental mediation. They identified "nine steps" to resolving environmental disputes. Their model is built upon attempts to resolve environmental disputes and upon efforts to engage competing publics in the city planning process (Susskind and Weinstein, 1980-81). It consists of the following steps:

Step 1 - Identifying the Parties That Have a Stake in the Outcome of a Dispute

Naming the interests that have a stake in a particular dispute is not only a procedural problem that must be solved in order for bargaining to proceed, it is also a substantive problem in some disputes. Conflict may arise, for instance, because one group feels it should be involved but a second group insists that the first group be excluded. The first step toward resolving such disagreements is to identify the parties that want to participate in a bargaining effort.

Step 2 - Ensuring That Groups or Interests That Have A Stake in the Outcome Are Appropriately Represented

It is essential to develop an effective means of determining whether the spokesmen who claim to represent various interests are indeed able to do so. There are three strategies for identifying legitimate interest group representatives. The first involves reliance on networks of existing organizations. The second involves ad hoc elections. The third depends on the capacity of administrators, regulators, or the mediator to select representatives who have credibility with the larger groups involved. None of these techniques is foolproof, but individually or in combination they can work effectively if the choice of a method for ensuring legitimate representation is, itself, open to scrutiny and involves the participation of, at least, surrogate group representatives.

It is important to use criteria for the selection of participants in mediation which can withstand legal challenges, especially because a major reason for using mediation is to avoid the costs and rigidities of litigation. A standard for selecting participants is found in the "injury in fact" norm in the law of standing. The standing issue asks essentially whether the party in question should have the right to "stand" before a court and

argue a case based upon sustaining an "injury in fact" (Warren, 1982). Until the late 1960s the courts would perceive an injury only as an instance in which one party suffers a direct monetary loss as a result of another's action. Pressures placed on the courts since then by citizen, consumer and legal action groups have been successful in softening standing requirements. In "Warth v. Seldin," 422 U.S. 490 (1975), the Supreme Court recognized that standing could be granted a petitioner on the basis of a claimed noneconomic injury and a substantial probability that the party would be injured by a governmental action. This case may have encouraged the lower federal courts to liberalize standing law. In "Resident Advisory Bd v. Rizzo," 425 F. Supp. 987 (E.D., Pa. 1976), Judge Broderick, building on "Warth" ruled that those being denied housing opportunities were entitled to standing because they could demonstrate an actual injury and show how the court could provide remedial measures. Although there was no allegation that the Resident Advisory Board was injured as an organization, the Board did estasblish injury to its members because of failure to build a scheduled public housing project, thus denying them the opportunity to live in the facility (Warren, 1982). Warren observes that in the future we can expect that the courts will grant standing almost

routinely, as long as the plaintiffs can pass the simplest standing test of showing only a fairly reasonable causal connection between an injury or likely future injury and the defendent's action.

The choice of whom to select to represent interests in mediation should conform to the "injury in fact" test. Potential settlements of environmental disputes may have an impact upon a wide variety of interests and parties. Any perspective which could show a reasonable causal connection between a possible mediated settlement and a potential injury to their interests should have a representative in mediation. The ruling of Judge Broderick emphasizes the legitimacy of organized groups to have standing in a mediation case if the interests of members could be affected, even if the organization itself would sustain no damage. Mediators can protect themselves from legal challenge by becoming familiar with the rulings and norms in the law of standing, and using the "injury in fact" criteria in choosing representatives of interests in mediation.

Step 3 - Narrowing the Agenda and Confronting Fundamentally Different Values and Assumptions

There are times when contending parties have only a vague idea about why they are for or against a project.

Often they can express their preference in only the most generalized terms. For example, it is easy to find vocal proponents and opponents of off-shore oil exploration, but both groups would, if asked, have difficulty pinpointing the issues on which they disagree. Proponents and opponents of dam-building are easy to find, but the precise issues at stake are often hard to specify. Involved are such considerations as the protection of endangered species, the use of water by nearby as well as distant consumers, power generation, farming, sport fishing, and real estate development. When confronted with such cases, stakeholders must consider various strategies for narrowing the issues. The agenda will change as the decision cycle evolves; additional issues may emerge as new groups enter the process.

Step 4 - Generating a Sufficient Number of Alternatives or Options

Bringing all the parties to the bargaining table is a necessary but not sufficient condition for reaching a settlement. Even with adequate representation and a clarification of deeply-rooted value differences, in order to move toward a no-lose trade-off or consensus solution, it is necessary to generate a sufficient number of policy,

project, or program alternatives. Every group must be able to find an option that it favors. This often means that a do-nothing or no-build option must be included. The most important measure of the sufficiency of the options generated is the ability of all the parties to a dispute to find one that they favor. This helps to ensure that all the points of contention can surface and that every group feels that there is a reason to proceed with the bargaining.

Step 5 - Agreeing on the Boundaries and Time Horizon for Analysis

No matter what a dispute centers on, the need to specify the boundaries and to designate a time horizon for analysis is overriding. By broadening the boundaries used to assess the impacts of a proposed action or policy, it is possible to tip the overall balance of costs and benefits implied by a project. By shifting the time horizon, it is possible to cut off the boundaries for analysis either before or after a dramatic impact occurs.

Step 6 - Weighting, Scaling, and Amalgamating Judgments about Costs and Benefits

There may be impacts of special concern to each of the

contending parties. While part of every bargaining process must focus on the list of impacts to be discussed, the entire group must ultimately accept the financial and time limits on the analyses available to them and reach accord on the best way of investing in research and data-gathering. How the contending parties relate to each other and judge the advantages and disadvantages of the options available depends, in large part, on the attitudes of the parties toward the appropriateness of the forecasts that are made. Appropriateness, in this instance, refers to the scales chosen for calibrating each type of impact, the weight attached to each of the many impacts that the groups have insisted on including in the analysis, and procedures used to amalgamate summary judgments.

Step 7 - Determining Fair Compensation and Possible Compensatory Actions

If the options or elements of a project that can be bartered or traded are not made explicit, it is very difficult to reach a settlement. It is not clear at the outset in most environmental disputes exactly how to specify appropriate or acceptable mitigation measures or compensation. For example, if one group insists that losing any additional range land is absolutely out of the question

and another group has a legitimate claim on that same land, but for purposes that would eliminate grazing, there is very little room for bargaining. The problem is to determine what each group is willing to trade.

Perhaps those concerned about the preservation of the range will be willing to accept a deed for other land now in private hands or a sum of money that might be used to reclaim grazing land lost in past years. Unless and until compensatory actions can be specified, there is very little hope that a compromise can be reached.

Step 8 - Implementing the Bargains That are Made

All the groups involved in bargaining must be made aware of the problems involved in implementing proposed cost compensation or impact mitigation measures. There are, sometimes, compromises that a group of disputants can reach that break a deadlock, but for reasons beyond their control cannot be implemented. There may be legal prohibitions or outside parties who refuse to cooperate. Disputes that occur subsequent to a failure to implement a previous bargain are much harder to reconcile; all the parties to the bargaining have good reason to doubt the prospects of fulfilling the agreements that are being proposed. It is absolutely crucial that all parties to a bargaining process

accept and understand the obstacles to implementation when they attempt to reach closure on an issue.

Step 9 - Holding the Parties to Their Commitments

It is critical to develop mechanisms that will bind all bargaining parties to the terms of their agreements. The participants must be confident that the agreements they have made are certain and that their "certainty" will be capable of objective measurement. At a minimum, this calls for agreements that are either self-enforcing or are enforceable through legal means (contract or tort) and some form of monitoring to insure that predicted/prescribed outcomes do not exceed or drop below anticipated levels.

PRESCRIPTIONS DERIVED FROM THE PRACTITIONER LITERATURE ON ENVIRONMENTAL MEDIATION

The practitioner literature produced concepts which are presented as prescriptions for effective environmental mediation. These prescriptions are used to structure the ten phases of an Eclectic Theory of Environmental Mediation which is presented in chapter III. In this chapter, the titles of the phases used in the theory are used as subtitles to structure the material.

The concepts which reflect the observations of practitioners are presented as prescriptions for effective mediation. Because many of the concepts are interrelated, some authors discuss more than one concept in the same context.

I. Identification of the Mediator

The qualification of the mediator to conduct the mediation effort is one of the earliest considerations in environmental mediation and is therefore included in phase I of the Eclectic Theory. Two concepts emerge which are relevant.

Cormick (1980) stresses that it is important that the mediator not have any direct interest in a dispute. He states that the mediator should be an independent actor who has an organizational base outside of the parties to the dispute. The mediator must be acceptable at some level of confidence to all of the parties in the dispute and be able to understand and accept the legitimacy of the values, perceptions and positions of all the parties. If the mediator is an employee of an organization or agency which has some interest in the outcome of the dispute, the individual cannot be independent.

Cormick (1982) argues that the mediator should not have

technical expertise in the issues involved in a dispute. There are several reasons for this assertion. First, "experts" have a tendency to rely on their own assumptions and values, rather than allowing the participants 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 the dispute, and end up focusing 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.

The greater the technical expertise of the mediator in the subject area, the more the agreement is likely to be a result of the mediator's "leading" the parties and the less committed the parties will be to the difficult task of implementing the agreement. However, the mediator does have a responsibility to become 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.

The practitioner observations relevant to Phase I - Identification of the Mediator were interpreted in two

prescriptions. These were:

1. The mediator should not have an interest in the outcome of the dispute.

2. The mediator should not have great technical expertise on the subject of the dispute.

II. The Preconditions for Mediation

Environmental mediation practitioners suggest that several "preconditions" may enhance or impede the possibilities for productive environmental mediation. These preconditions constitute phase II of The Eclectic Theory.

Cormick (1980) suggests that mediation is most appropriate when it is focused upon immediate and specific issues. Similarly, Busterud (1980) states that mediation has generally been employed once the issues have crystallized and positions hardened. Talbot (1983) suggests that mediation becomes feasible when a conflict matures to the point where the issues are clearly defined.

Uncertainty about the outcome of a dispute in a forum other than mediation may make mediation relatively attractive. Cormick (1982) notes that actual or threatened litigation is often a necessary prerequisite to the willingness of a party proposing some action to negotiate; it is the source of power and influence that brings the

parties to the table and to mediation. Cormick (1982) suggests that citizen and environmental groups often must develop their power resources through legal challenges and the delay and uncertainty which they represent.

One of the conditions which is mentioned most often in the literature as a prerequisite for productive mediation is a minimum balance of power among contending parties. If one party has the capability to overwhelm all opposition, it will have no incentive to make any accommodations and there would be no reason for it to participate in a dispute resolution process.

McCarthy (1976) suggests that mediation is appropriate when contending parties perceive that their opponents are able to inflict sufficient costs - in terms of resources, future uncertainties, and public censure - that an accommodation of differences is a more desirable alternative than confrontation. In environmental dispute situations where power parity has been achieved, there is often a willingness to reach an accommodation based on recognition that defeat of the opposition is neither a realistic nor a completely desirable outcome.

Cormick (1980) points out that early involvement in intervention processes that promise mutually derived outcomes may inhibit the development of sufficient power to

ensure true mutuality. If a party abandons protest and confrontation too early in order to enter a cooperative mode of interaction, that party may lose relative influence. Patton (1983) states that opposing interests must be organized for a fight before they can be organized for a settlement.

The threat of economic costs from environmental conflicts may encourage parties to enter mediation. Susskind and Weinstein (1980-81) point out that for the relatively minor cost of litigation, an environmental group can inflict millions of dollars in added interest charges, and other costs of delay, on a developer.

Environmental disputes are sometimes characterized by such extreme ideological differences that contending parties refuse to acknowledge the legitimacy of each other's concerns (Susskind, 1981). This situation would preclude the willingness of both sides to listen to reason and to make rational debate, which Golten (1980) argues is a precondition for mediation.

Another consideration is whether the central issue in a dispute has importance in setting a precedent. If there is solid ground for the case, and one party can win in court, mediation is not useful (Shorett, 1980). Contending parties may be willing to concentrate a large proportion of their

resources on such cases because a win on any issue is transferable to the same situation in any other jurisdiction. This is not true for a mediated settlement. due to their potential repercussions.

A history of contentious relationships among contending parties may pose difficulties for a mediation effort. In a conflict situation where there is a high level of mistrust among the parties and in which coercion has been used, a focus upon purely substantive issues may be unproductive as a starting point. Three sources in the literature warn of the hazards. Carpenter and Kennedy (1980) state that efforts to solve environmental problems in terms of purely technical criteria often cause more conflicts than they resolve. Lake (1980) writes that in the absence of good faith on the part of participants, technical information and education only serve to fuel the dispute. Creighton (1980) maintains that in conflicts that have a high interpersonal or emotional element, it is often necessary for the participants to clarify the basis for their emotional reaction before they are willing to communicate about it to their opponents.

These practitioner comments were constructed into ten prescriptions of the Eclectic Theory of Environmental Mediation. They are relevant to Phase II - The

Preconditions for Mediation, and are as follows:

1. The mediator should assess the suitability of the dispute for mediation.

2. The issues in the dispute should be concrete and specific.

3. There should be real consequences to the parties if mediation is not attempted, which make mediation the best alternative.

4. There should be uncertainty about possible outcomes of the dispute in a context other than mediation, i.e., in the courts, before a regulatory body, etc.

5. There should be a perceived balance of power among contending parties.

6. It should be clear that the parties to the dispute have reached a stalemate, or an impasse.

7. Contending parties should have potential to experience economic costs if a mediated settlement is not reached.

8. The dispute should not have potential to set important legal precedents.

9. The dispute should not center on strongly held ideological or philosophical differences.

10. The opposing parties should not have a history of contentious relationships.

III. Recruitment of the Participants

A variety of considerations, approaches and activities may be appropriate in recruiting participants in environmental mediation.

Obtaining an equitable selection of representatives in mediation is important, and sometimes difficult. Lake (1980) states that if non-judicial dispute settlement processes are to become viable alternatives to environmental litigation, it will be necessary to regularize equitable, feasible selection criteria so that the results of negotiations are not invalid because of arbitrary or capricious exclusion of parties. The task is challenging because the interests are often diffuse, sometimes participants are only indirectly involved in the dispute, and there are multiple groups claiming to represent the same general interests (e.g., hunters and wilderness preservationists). From this universe of parties and interests the mediator must select a small number of participants who will adequately represent all parties. Any bias in selecting the participants can sabotage successful implementation of the dispute settlement plan, or even the development of consensus.

The selection of participants in mediation by the environmental mediator is similar to choices which agencies

make in regard to hearings. The agency must make a determination of who has a right to intervene, or to be a party in the hearing. Davis (1972) states that in the absence of specific statutory provisions or agency rules, standing and the right to intervene tend to be governed by the same considerations. (For an explanation of the the law of standing see above in the discussion of Step 2 in the "Nine Steps Model"). Environmental mediators typically are either independent consultants or members of nonprofit organizations devoted to mediation activities. This organizational independence is important in assuring their impartiality. For these reasons, they are not under the umbrella of a governmental agency. In these circumstances, there are no statutory provisions or agency rules to govern the selection of participants. The liberalization which has occurred in the law of standing and the determination of "injury in fact" since the 1960s, however, make it a useful basis for the selection of participants in mediation. Rulings in regard to "injury in fact" in the law of standing provide guidance to the mediator in obtaining an equitable selection of participants which can withstand legal challenge. The mediator should become familiar with the law of standing. This knowledge of the law provides a secure base for applying other selection criteria.

One of the most frequently cited reasons for identifying the parties and interests which have a stake in the outcome of a mediation effort is to avoid the blocking of an agreement by post settlement litigation or administrative appeals by an individual or group not included in the mediation process. Shorett (1980) states that it is crucial to the success of negotiations that all significant parties be represented. By excluding a critical party, the ultimate mediation result may be useless because litigation or other adverserial alternatives will continue to be pursued. For example, in the context of environmental mediation over long-term water supply issues, Bingham (1982) points out that efforts to meet the water needs of any large metropolitan area will have a significant effect on many different interests. Therefore, a genuine effort to involve the full spectrum of those affected is essential if a lasting agreement is to be reached. Again, the law of standing provides a broad perspective for selecting participants in a way which will preclude litigation.

Carpenter and Kennedy (1980) recommend identifying main interest groups, secondary groups, and key individuals. They want the mediator to know the main spokespeople for each of the groups, what other individuals have become publicly identified with the issue, who the major

opinion-makers are, and who could have a major influence on the participants. They stipulate that the mediator should become familiar with the attitudes, values, perceptions, style, basis of power, and goals of each of the groups. They indicate that the mediator should attempt to determine what groups have a lesser stake in the problem and what other groups may become involved for reasons outside the specific issue.

In disputes which have been before the public for some time and in which the participants are well known to each other from previous encounters at public hearings or other forums, participants in mediation may be chosen by the parties themselves. They are the individuals who have the power, usually based on organizational relationships, to circumvent any agreement that does not have their approval (Shorett, 1980).

Cormick states that identifiable, cohesive constituencies with secure leadership are necessary in order that negotiators be able not only to negotiate and reach agreement but make meaningful commitments to abide by and support agreements (Cormick, 1980). An organizational structure conducive to developing, amending and ratifying positions may be needed (Cormick, 1982b). He also argues that it is a responsibility of those promoting mediation to

ensure that both the issues and the processes are sufficiently widely publicized that all who may reasonably wish to participate are aware of the opportunity to do so. Potentially contending parties may need to build a power base, establish a constituency, develop leadership, and gain sufficient public notice of the issues so that any eventual agreement will have sufficiently broad support that a recurring cycle of new issues and new parties appearing during actual implementation is forestalled. Parties may engage in initial skirmishes to build their power through gaining public notice. Also, they may attempt to measure one another's "clout" and seek to impress on opponents the fact that limitations will be placed on unilateral action. Initial confrontation often takes place in the press, in public hearings or meetings, and may even be represented by support of candidates or issues in local political campaigns (Cormick, 1980).

Because environmental mediation is a new and complex function, the prospective mediator may need to educate potential parties about the process. The representatives who will participate are likely to come with different expectations and goals for the process, and varying degrees of understanding of the nature, potential, and limitations of mediation (Huser, 1982; Cormick, 1980). The process of

jointly developing ground rules, or of reviewing ground rules prepared by a mediation manager, should help representatives understand how the process will operate and what the role of participants will be. The participants will also need to understand the politics of compromise and what it takes to bring a dispute to the bargaining table (Fanning, 1979). They may need to be aware that a complex mediation process could involve a significant commitment of time and resources. Bingham (1982) identifies planning sessions, task group meetings, individual preparation on the issues, and communication with constituents as time consuming efforts. Independent data collection and verification, when information is uncertain or in dispute, can be expensive. A decision whether or not to organize a mediation effort may rest on the willingness of potential parties to commit the necessary time and resources.

A translation of the comments of these practitioners produced the following prescriptions relevant to Phase III. Recruitment of the Participants, of the Eclectic Theory:

1. Particular effort and attention should be devoted to the selection of participants in mediation.

2. All parties with a substantial interest in the dispute should be represented in mediation.

3. Participants in mediation should have clearly

identifiable constituencies.

4. The mediator should educate the contending parties on the mediation process.

5. New parties should be added as the mediation process evolves and new issues are identified.

IV. Design of the Mediation Process

Establishing the design of the mediation process may involve a variety of considerations and activities.

The development of ground rules for the environmental mediation effort may play an important role in setting the atmosphere, or general tenor, of the mediation activities. Creighton (1980) recommends that norms that encourage openness and candor should be established, and discussion techniques prescribed. The exclusion of media coverage may also encourage frank and productive discussion of sensitive topics, help to minimize posturing, allow participants to adjust their positions more easily in response to new information, and allow them to brainstorm more creatively about new ideas (Kennedy and Lansford, 1983). Participants may also need assurance that frankness and candor will not be overdone. In addressing the initial session of the Metropolitan Water Roundtable, Kennedy emphasized that the proposed ground rules were derived from other successful

problem-solving efforts of national and international significance, and in essence say that participants will treat each other with decency, moderation, tolerance, and forebearance (Kennedy and Lansford, 1983).

The practice of excluding the media from mediation sessions raises serious questions concerning the rights of public access to such proceedings. While the exclusion of the media may foster a more frank interchange of perspectives on sensitive issues, there are costs to such exclusion. The conduct of mediation efforts which have the potential to have an impact upon the use of public property are public issues. The public needs to know about proposals which may affect their future use of public property. Media access, however, at critical junctures in mediation has the potential to bring the process to a halt. Potential exposure in the media may distort the real meaning and importance of proposed exchanges between opposing parties, and lock the contending parties into stances which are put forward only as initial, tentative proposals. A standard is needed to discern when the facilitation of negotiations in mediation needs protection from media scrutiny due to a compelling state interest, and when there is little need to protect the mediation process from media inspection. Models in other arenas include the openness of the petit jury,

versus the exclusion of the media from grand jury proceedings. Similarly, the right of public bodies to exclude the media from proceedings involving personnel matters provides an example of a criterion for exclusion.

The problem of the development of criteria for when it is appropriate to exclude the media from environmental mediation is one needing research. Environmental mediation practitioners with experience in mediation can suggest the best way to initiate such research. This consideration is beyond the scope of this dissertation because it focuses upon the macro framework for environmental mediation. This project is an effort to identify the key dimensions and dynamics of effective environmental mediation. The more discrete, minute aspects of the processes of negotiation within the macro framework of environmental mediation are details which need further exploration once the broader elements of effective environmental mediation are identified. It is important here to simply point out that media access has significant potential to impact the mediation process. Environmental mediators must develop criteria to discern when media access may have critical negative impact upon the mediation process, and when the media access has little potential to damage an environmental mediation effort.

Ground rules which help to build a positive attitude between contending parties may be helpful. Lee (1982) points out the importance of establishing a fruitful negotiating relationship between parties. The building of trust may be an important preliminary to negotiations (Fanning, 1979).

The atmosphere in which mediation takes place may hinder or facilitate the generation of alternatives. If few options are suggested, and opinions are polarized on an issue, the problem may lie in the unwillingness of the parties to talk with one another, and conciliation may be needed. If the mediation process can be managed in a way which encourages the groups to acknowledge and understand each other's interests and goals, it may be possible to avoid polarization, and parties can form new opinions about historical adversaries (Carpenter and Kennedy, 1980). Creighton (1980) writes that out of sharing perceptions and clarifying each others' positions, it is hoped that new options or possible ways of resolving the conflict will emerge. In addition, empathy for each other's position is built during this exchange, laying the groundwork for further negotiation.

Trust is also an important ingredient of the relationship of the mediator with the contending parties.

Cormick (1982) suggests that all parties must trust the mediator to carry messages and to honor confidential remarks.

A ground rule which may encourage participation is to reach decisions by consensus. Talbot (1983) describes a mediation effort in which the idea of consensus initially bothered the members, but gained their support when they recognized that this would mean that everyone in the process would be equal because anyone could veto an agreement. Cormick (1982) recommends ground rules which do not permit votes, nor majority/minority opinions. Consensus processes increase the likelihood that agreements will be implemented and that parties can work through differences in the future.

Carpenter and Kennedy (1980) state that, in clearly establishing boundaries and guidelines which are agreed to by participants, the facilitator gains a tool for controlling difficult individuals and managing relationship problems that may occur during discussion. They recommend developing a statement of expectations, and the establishment of review of a group contract.

Deadlines may be a useful part of the design of the environmental mediation process. The mediator may attempt to facilitate progress by developing deadlines by which mediation must be concluded, with or without agreement

(McCarthy, 1976). The strain of attempting to meet a deadline may increase the sense of common purpose (Susskind, 1981).

Five prescriptions for the Eclectic Theory were derived from this mediator experience relevant to Phase IV. Design of the Mediation Process of the Eclectic Theory. These are

1. Contending parties should participate in designing the mediation process.

2. The participants and the mediator should develop ground rules for the process.

3. The ground rules for mediation should be approved by all participants.

4. Positive attitudes and interaction should develop among representatives of contending parties to mediation.

5. The mediator should obtain the trust of the contending parties.

V. Identification of the Issues

Sometimes the issues in a dispute are obvious enough that formal identification of the issues is not necessary. In other instances, however, a formal procedure is needed. Two practitioners comment on this issue.

Carpenter and Kennedy (1980) state that their approach to conflict management is based on the premise that better

decisions are made when all affected parties join in defining the issues and developing alternatives. People must feel a sense of ownership in both problem identification and the development of solutions if lasting solutions are to be found. The earlier people begin working together, the lower the social, financial, and physical costs are likely to be and the better the chances are of achieving long-term solutions, rather than short-term gains.

Shorett (1980) writes that "Often the mediator will draft a statement defining the scope of issues. The mediator will circulate the statement and receive agreement on the 'mediation agenda.' An agreement on what will be discussed is a big step." She states that certain decisions are crucial to the success of mediation. Before the negotiation process begins the issues, participants, and structure should be established.

This discussion by practitioners indicated the importance of the following prescription in the Eclectic Theory relevant to Phase V:

The issues in dispute should be clearly identified.

VI. Establishment of the Information Base

The case studies contained more observations about activities concerned with establishing an information base

than did the practitioner literature. One writer, however, made some relevant observations:

Clark (1980) suggests that if the participants engage actively in the validation of the data base by questioning the assumptions of other members and contributing their own information and working assumptions, a commonly accepted description of the problem evolves.

A prescription to provide for this in the Eclectic Theory follows:

Agreement should be reached among participants in mediation on the facts and data relevant to the dispute.

VII. Development of the Preliminary Agreement

The practitioner literature identifies a number of activities which contribute to the development of a preliminary agreement.

In any complex dispute which involves a variety of parties and interests it is important to generate several alternatives or options so that each group can find a favorite solution, or it will have no incentive to enter into negotiations with the other parties. This helps to insure that all the points of contention can surface and that every group feels that there is a reason to proceed with bargaining. It may be necessary to include a

do-nothing option. The procedure should also permit new options or alternatives to be added along the way (Susskind, 1981; Susskind and Weinstein, 1980-81).

The mediator may engage in a wide variety of activites while assisting the parties to develop a preliminary agreement. McCarthy (1976) writes that the mediator serves as an interpreter of the power, positions, perspectives, and even language between parties, trying out possible areas of agreement that the parties themselves feel constrained from placing on the table. The mediator also can act as a scapegoat to help one or both parties to save face as they move from their initial positions.

Susskind (1981) describes the activities of one mediator in the private meetings as acting as a sounding board for new positions or proposals, allowing parties some feedback on ideas without the risks inherent in presenting them to the group as a whole. On occasion, he presented ideas and options of his own in an effort to broaden the spectrum of possibilities under consideration.

Assisting in the drafting of an agreement is another function the mediator may provide. Shorett (1980) describes this activity as follows:

> As the mediation progresses, the mediator's role intensifies, as agreements are drafted and distributed to and exchanged between the parties. The language in the agreement is continually changed to satisfy individual concerns. The

> mediator often hand delivers new drafts to the parties, making on-the-spot changes in the draft to meet the needs of each of the parties. The mediator frequently rephrases language to meet the concerns of one person and then tests new ideas and language with the other parties. The mediator can be the "agent of reality," letting one party know which ideas can be accepted by another party and which items in the agreement are crucial for a given constituency.

The use of caucus sessions may be a key feature in developing the preliminary agreement. Cormick (1982) observes that during the negotiation portion of mediation, the mediator is likely to spend the majority of his time in individual caucuses with one group or subgroup of the parties, helping them explore positions and formulate alternatives, advising on mediation processes, carrying messages, and "trying out" offers on behalf of the parties.

Richman (1982) describes the functions of joint and caucus sessions as follows:

> The structured negotiations process includes both joint meetings and caucus sessions. The parties usually will begin their negotiations in the joint meeting room to discuss specific issues or proposals and will then adjourn to caucus rooms to review the information gained in the joint setting. Caucuses allow team members to speak openly with each other and to confirm their reactions to proposals.

Huser (1982) notes that in one dispute, for every hour spent at the negotiating table, the mediators spend 11 1/2 hours working behind the scenes.

While developing the preliminary agreement, it may be

important to be sure that the representatives to a mediation effort keep in touch with their constituencies. Fanning (1979) quotes a mediator who states that "We spend a lot of time with such a group in terms of asking, 'How does the leadership relate back to its constituency to make sure it doesn't get too far out in front and get cut off?'" The leadership is mediating within the organization at the same time it is mediating without. The leaders have to bring the constituency to agreement among themselves before they can make an agreement with others. Cormick (1982b) emphasizes that representatives often forget that the give-and-take of joint sessions, which can build understanding, trust, and even affection for those across the table, is not shared by constituents who may see accommodations as capitulation, rather than as carefully developed positions. Creighton (1980) warns of the danger that identification within the leadership may transcend commitment to followers, creating pressure for resolution, but also creating the possibility that followers will eventually rebel and get new leaders whose primary commitment is to their followers.

Cormick (1982b) suggests that procedures by which representatives will check regularly with constituents should be determined before negotiations begin. The mediator may find it necessary to assist the representatives

in maintaining their communication with constituents, and as an agreement emerges should help ensure that the parties do not affix their signatures to an agreement that is likely to be repudiated by one or another of the constituencies.

Communicating with those who will be responsible for implementing a mediated agreement may be an important activity, if these parties are not direct participants in mediation. Lee (1982) points out that it is important to identify parties which may have a critical role in implementing any agreement emerging from the dispute resolution process. These may be official bodies which must endorse or adopt the terms of settlement, or fund the implementation process (Lee, 1982). The mediator may help to ensure that negotiations are moving toward an outcome that will be acceptable to outside forces by keeping lines open to potentially affected government agencies, if they are not parties to the mediation process. This helps to ensure that the agreement will hold no surprises for those charged with implementing the recommendations (McCarthy, 1976).

When it is not feasible or appropriate to involve some interests directly, the mediators may provide a link to key parties "not at the table." In a case described by Cormick and Patton (1980) these parties included the Governor, the

Corps of Engineers, and county and state officials. These linkages were essential to ensure that the emerging recommendations would be translated into public policy at the local, state, and federal levels of government.

Cormick (1982) suggests that mediators should question whether there are reasonable assurances that governmental agencies will cooperate in carrying out an agreement if one is reached.

Public procedures and ceremonies may help to strengthen the commitment of parties to mediation, or those responsible for implementation, to the fulfillment of pledges. The public signing and endorsement of mediated agreements is an example. Shorett (1980) mentions a signing ceremony that occurred at a press conference. In one case, the parties signed the formal agreement on television: local government officials simultaneously put into effect administrative procedures to carry out additional parts of the mediation package. Cormick (1982) states that written statements signed by all parties may specify actions to be undertaken or ceased.

Eleven prescriptive components of the Eclectic Theory relevant to Phase VII. Development of the Preliminary Agreement were developed from these observations:

1. A variety of alternative solutions should be

generated by the participants in mediation.

2. The contending parties and the mediator should hold informal meetings.

3. The contending parties should hold their own caucus sessions.

4. The mediator should assist the participants in mediation who represent a particular side to reach agreement within their membership on positions to be put forward in mediation.

5. The mediator should spend time interacting with participants in mediation on a one-on-one basis.

6. Communication should be maintained with those who will be responsible for implementing the agreement.

7. Parties responsible for implementing a mediated agreement should provide assurances that they will follow through.

8. Clear means should exist for binding the parties to the agreement.

9. The mediator should not have power to influence strongly the mediated agreement.

10. The mediator should put forth trial solutions.

11. The mediator should assist in drafting the wording of the preliminary agreement.

VIII. Consulting Constituents on the Appropriateness of the Preliminary Agreement

Once a preliminary agreement is developed, participants in mediation may need to consult with their constituents on the adequacy of the preliminary statement. Shorett (1980) writes that participants in mediation processes must have a clear understanding that it is not just what they and other negotiators can agree to that is important, but what they can sell to their constituents that counts (Huser, 1982). In one instance, in negotiations over alternative flood control plans, an environmental representative returned to his constituency to find that any proposed dam on a tributary was unacceptable. New solutions had to be explored to obtain agreement (Shorett, 1980).

These comments of practitioners suggested the value of the following prescriptions relevant to Phase VIII. Consulting Constituents on the Appropriateness of the Preliminary Agreement in the Eclectic Theory:

1. Participants in mediation should maintain regular contact with their constituents.

2. The participants in mediation should consult with their constituents on the suitability of the preliminary agreement.

3. The constituents consulted should suggest

modifications in the preliminary agreement.

4. The constituents consulted should approve the preliminary agreement.

5. A preliminary agreement should be reached.

6. A preliminary agreement should be put into writing.

7. No major group of constituents should oppose the preliminary agreement.

IX. Making the Agreement Final

Once the participants in mediation have developed a preliminary agreement, the mediation process is ready for producing a final document. Shorett (1980) notes that the process of submitting the preliminary agreement to constituents for ratification may produce revisions. These revisions are then considered by the participants. The product of a successful mediation is an agreement signed by all the parties in mediation.

The implications of these observations were incorporated into the following prescriptions for the Eclectic Theory relevant to Phase IX. Making the Agreement Final:

1. Modifications recommended by constituents of representatives to mediation should be incorporated into the final agreement.

2. The mediator should assist in drafting the wording of the final agreement.

3. An agreement should be reached which is approved by all parties to mediation.

X. Assuring the Implementation of the Agreement

Actions which may help to assure the implementation of the agreement may take a variety of forms.

Creighton (1980) recommends that a local political figure should act as guarantor of the agreement. This could be an individual on whom both sides are politically dependent - a key Congressman, U.S. Senator, or Governor.

Having the constituents of representatives to mediation ratify an agreement may be helpful. Cormick (1982) notes that environmental disputes typically involve a number of groups and organizations, many with large constituencies. The purpose of mediation is to assist representatives of these various organizations and interest groups to formulate a mutually acceptable agreement which will be ratified by their constituents.

Developing mechanisms to monitor, or even revise, agreements may be useful. Lee (1982) points out the value of having individuals or parties be responsible for

monitoring a mediated agreement. An explicit, though perhaps unofficial, oversight process can help in several ways. It is useful as a communication channel between the parties and implementing agents; as an organized forum for new constituencies, including those drawn in by the process of implementation; as a managerial conscience, prodding implementation along and sustaining the spirit of the agreement; and as a decision-making body, to ratify changes and devise substitutes to meet changing conditions.

Prescriptions for the Eclectic Theory relevant to Phase X. Assuring the Implementation of the Agreement developed from these practitioner observations are as follows:

1. There should be public support for mediation.

2. At least one public figure should agree to guarantee the agreement.

3. The agreement should be ratified, or approved, by the constituents of the representatives to mediation.

4. Means should be provided for monitoring the agreement.

5. Means should be provided to re-make, or re-decide the agreement, if necessary.

PRESCRIPTIONS DERIVED FROM THE CASE LITERATURE ON ENVIRONMENTAL MEDIATION

The case literature on environmental mediation often highlights different aspects of mediation than that covered by the practitioner literature.

Summaries of Case Studies

Eight case studies provided illustrations of concepts which were incorporated into the Eclectic Theory of Environmental Mediation. They are summarized below.

The Hudson River Dispute

The Hudson River dispute began when an ad hoc group was formed in 1963 to oppose the granting of an operating license to the Consolidated Edison Company of New York for the construction of a hydroelectric facility at the base of Storm King Mountain, 40 miles north of New York city. It came to involve three environmental groups, four public agencies, and five electric utility companies in the course of 17 years before it was settled.

In 1979, the opposing parties concluded that mediation of the dispute would be appropriate. Russell Train, former administrator of the Environmental Protection Agency, was chosen to mediate the dispute. At the first mediation

sessions, 28 people were present representing 11 groups.

After an initial session which dealt with setting mediation procedures, the opposing sides presented proposals for discussion. By the third mediation session, it became evident that progress depended upon resolving differences over estimates of fish mortality under different proposed solutions. After a technical subcommittee was unable to develop an answer, a computer model was found which told what the probable effects would be.

With acceptable information available, the utilities and environmental groups moved toward an agreement. The EPA, however, held out for more stringent requirements. The mediator was able to put pressure on the EPA to exhibit flexibility, and bargaining continued. By early December, 1980, the parties produced a draft agreement, and the final agreement was signed in December, 1980.

The final agreement contained a number of commitments from both sides. The utilities forfeited the Storm King license, agreed to modifications in operating procedures, and provided funds for a fish hatchery and research activities, and the legal costs to the environmental groups. In return, all litigation and administrative proceedings were dropped, and the environmental groups agreed to support actively the agreement, and its costs before regulatory

agencies.

The Interstate-90 Dispute

The state highway department first proposed a 10-lane freeway for Interstate-90 in the Seattle area in 1964. Issues of highway design, neighborhood impact and basic transportation policy delayed construction until 1975, when preliminary work was begun. But when the municipalities concerned with the highway could not agree on the design, it seemed appropriate to use environmental mediation to attempt to reach agreement on a plan. It was hoped that a mediated settlement would produce a proposal which could withstand challenges from environmental groups.

Gerald Cormick and Leah Patton agreed to mediate the dispute. The affected organizations and municipalities agreed to participate, but the environmental groups refused to meet the condition of being bound by any agreement. The mediation effort was announced by the governor. There was one full session in 1976, but the process centered on informal meetings to avoid the inhibition and posturing often encouraged by press attendance.

A compromise emerged in bits and pieces offering everyone a little bit of what they wanted, but eventually the process became deadlocked over design details. When the

governor threatened to recommend that the funds earmarked for I-90 be used elsewhere, a way was found to break the impasse. The mediators tied together the elements of the agreement in a draft which all the parties agreed to take back to their councils for ratification. The agreement was signed, with minor modifications, over the next few weeks.

The CREST Dispute

The Columbia River Estuary Study Taskforce (CREST) dispute concerned resource protection and port development. The Institute for Environmental Mediation provided mediation services.

The conflict concerned five large sites stretching along some seven miles of the Oregon side of the Columbia River estuary. The development of a matrix, which included a detailed listing of each site, options for developing or maintaining that site, and criteria for each option, enabled the parties to engage one another in a series of tradeoffs.

The dispute involved a number of parties. On the pro-development side were four local jurisdictions, and the Oregon Department of Economic Development. On the pro-protectionist side were the Oregon Department of Fish and Wildlife, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the Environmental

Protection Agency. Other agencies - including the Army Corps of Engineers, the Oregon Department of Land Conservation and Development, and the Oregon Department of State Lands, were pro-development or pro-protection, depending on one's point of view.

As a resolution of the dispute, three levels of agreement were reached. There was an agreement on "findings," an agreement on development designation, and an agreement on subarea policies.

The Denver Metropolitan Water Roundtable

Proposals for meeting the future water needs of metropolitan Denver have been the subject of intense dispute and costly litigation for decades. In the spring of 1981 the president of the Boettcher Foundation asked ACCORD Associates if they would be able to mediate an impending dispute over the development of a dam on the South Platte River. In response, ACCORD suggested that a process enabling a variety of parties to take a more comprehensive look at ways to meet Denver's future water demands would be appropriate. The Foundation funded such a request.

ACCORD developed a consensus-building procedure to address the issues. Four working groups were set up to develop lists of interests which the Roundtable should

address. Next, Roundtable members were divided into three task groups to examine various ways to meet water needs. Based upon the reports prepared by the task groups, the Roundtable prepared agreements in principle, all but three of which were adopted.

Next, members of the Roundtable developed alternative proposals, which were the focus of negotiations between various perspectives. Hard bargaining led to the preparation of an agreement.

The Swan Lake Dispute

The Swan Lake dispute centered on the proposed use of the Swan Lake dam in Maine to produce hydroelectric power. The residents of Swanville were concerned about how the management of lake levels for power production would affect their property, and their use and enjoyment of the lake. The lake levels had been allowed to rise so that the water began touching the foundations of some of the homes. After someone tore some rocks from the gate area of the dam, the release of water and a dry spring lowered the water so that rocks, water intake pipes, and stretches of sand began to appear.

The two protagonists in this dispute were Gary Gleeson, who had obtained the rights to the use of the water of Swan

Lake, and the selectment of Swanville. When the suggestion was made that the dispute be mediated, the attorney representing the selectmen advised them to participate in the process. David O'Connor acted as the mediator.

The first question addressed in the dispute was the adequacy of water flow in the watershed to maintain appropriate water levels. Once this issue was settled, the dispute focussed upon maintaining water levels acceptable to the residents of Swanville, while managing the water levels in a way appropriate to the production of electric power.

A meeting with the town residents, and a boat tour, were central in achieving an agreement on appropriate lake levels. A concern over the management of a small park beneath the dam was addressed by the formation of a joint committee of Gleeson and the selectmen.

The Portage Island Dispute

The Portage Island case involved a dispute between an Indian tribe and a county park board in Washington state. The county had purchased an island within an Indian reservation, where it wished to create a public park. The tribe, which controlled access to the island, would not let anyone on it.

The dispute eventually reached the desk of the

Secretary of the Interior. The director of the Department of Interior field office obtained the assistance of Leah Patton and Verne Huser to mediate the dispute.

The opposing parties completed an agreement in which the Indian Tribe would buy the county's interest in Portage Island, for the island's use as a park.

The Port Townsend Dispute

The Port Townsend case concerned where the state of Washington would construct a new ferry landing in Port Townsend. Local residents seemed hopelessly divided. The state had waited for more than two years for the townsfolk to agree on a site.

A state senator was instrumental in obtaining the services of George Yount and Alice Shorett to mediate the dispute. They selected nine people to participate in mediation.

A technical advisory committee was appointed, and a member of the committee developed an entirely new solution which was eventually accepted. The state marine division approved the proposal, and construction on the ferry terminal was begun.

The Snoqualmie River Dispute

The farmers and residents of the Snoqualmie River valley had suffered from serious periodic flooding. The environmentalists feared that the construction of a dam to provide flood protection would lead to heavy commercial development and would spoil one of the few remaining naturally scenic areas readily accessible to Seattle.

Mediation of the dispute was suggested by the governor. It was initiated in 1974, with Gerald Cormick and Jane McCarthy serving as mediators. They identified key participants who would be persuasive for all constituency groups concerned. A dam site was agreed upon which provided less flood protection than one proposed by the Army Corps of Engineers, but it was acceptable to the environmentalists because it would cause much less damage to the scenic area. In accordance with the agreement, an Interim Basin Coordination Committee was appointed by the governor. The committee developed recommendations on how to implement the agreement.

Concepts Relevant to the Eclectic Theory

The case literature is particularly useful in emphasizing concepts which are relevant to six phases of the Eclectic Theory. The first phase which is relevant is Phase II, which deals with the preconditions for mediation.

II. The Preconditions for Mediation

Several of the case studies contained observations which related to preconditions for mediation.

In the Hudson River conflict, Russell Train did some "quiet checking" with the parties involved before formally assuming the role of mediator (Talbot, 1983).

In the Port Townsend dispute, the state of Oregon marine division made its position very clear: either the disputants would reach an agreement for the site of the new ferry terminal, or the funding would have to go elsewhere, and there would be no terminal (Talbot, 1983).

In the Interstate 90 controversy, a member of the Seattle City Council felt that the Council got pushed unwillingly into the mediation effort. There was a suggestion by the mayor and the state highway department that a highway design would get forced through one way or another. Mediation was the only way which would give the Council an influence upon the design (Talbot, 1983).

In describing the CREST dispute, Huser (1982) found that the parties entered mediation on a "pragmatic basis." Each knew that it could not unilaterally achieve all of its goals but hoped an agreement could be reached that each could accept. Without an agreement supported by all of the negotiating parties, no single party could be assured of

achieving even its minimum goals. Administrative appeals and litigation had proved costly in time and money and uncertain in outcome. It was the inability of the parties to succeed through other forums which brought them to the negotiating table.

In the Interstate-90 dispute, at one point the mediation effort appeared to be ready to fail. The Governor pressured the parties to continue by threatening to switch funds for the project to some other part of the state.

These observations helped to emphasize the importance of the following prescriptions appropriate for inclusion in The Eclectic Theory relevant to Phase II. The Preconditions for Mediation, as follows:

1. The mediator should assess the suitability of the dispute for mediation.

2. There should be real consequences to the parties if mediation is not attempted, which make mediation the best alternative.

3. There should be uncertainty about possible outcomes of the dispute in a context other than mediation: i.e., in the courts, before a regulatory body, etc.

4. Contending parties should have potential to experience economic costs if a mediated settlement is not reached.

III. Recruitment of the Participants in Mediation

One case study documented an effort of the mediators to understand the attitudes of the potential participants toward the possibilities of participating. Cormick and McCarthy took six months prior to entering the Snoqualmie River Conflict to determine whether the involved parties were ready to compromise and would really give mediation a fair chance. They felt that such careful preparation was necessary because mediation is a voluntary process that cannot work if either side is seriously hesitant about participating (Dembart and Kwartler, 1980).

These instances in the case literature suggested a prescription relevant to the Eclectic Theory concerning Phase III. Recruitment of the Participants in Mediation:

The mediator should obtain a clear understanding that none of the potential participants in mediation have mental reservations about participating in mediation.

IV. Design of the Mediation Process

One case study indicated the value of a mediation design which fostered the development of positive interactions among participants. In the Portage Island dispute, trust appeared to grow between contending parties as they became better acquainted. One of the participants

observed about an opponent that "I grew to trust one of the park board members particularly. He listened. When he spoke he showed he had heard us. This guy wasn't into control and power. He wanted the island to be a park, but in a way we could live with." (Talbot, 1983).

This incident suggested the value of the following recommendation for the Eclectic Theory relevant to Phase IV. Design of the Mediation Process:

Positive attitudes and interaction should develop among representatives of contending parties to mediation.

V. Identification of the Issues

Reaching an agreement on the geographical boundaries and time horizons for analysis may be a useful part of issue identification. In the Denver Metropolitan Water Roundtable mediation effort, the initial definition of the geographical boundaries of the area of concern was difficult. A continuing committee was formed to define the geographic area and the extent of water need (Kennedy and Lansford, 1983).

This example supported the inclusion of the following prescription in the Eclectic Theory to facilitate an appropriate execution of Phase V. Identification of the Issues:

Agreement should be reached among contending parties on the geographical boundaries and time horizons of the issues in dispute.

VI. Establishment of the Information Base

Three case studies emphasized aspects of efforts to establish an information base.

The use of small groups, and technical advisors, was a prominent element in some mediation efforts. In the Denver Metropolitan Water Roundtable, small task groups were established to examine ways to meet water needs. The subject areas to be considered were developed by the Roundtable members themselves. Later in the process, a Technical Scoping Committee was created to address legal, institutional, financial, and technical questions (Kennedy and Lansford, 1983).

In the Port Townsend conflict, one of the members of a technical committee introduced a sketch which became the basis for a settlement (Talbot, 1983). In the Denver Metropolitan Water Roundtable, some technical resource people who were not members of the Roundtable participated in task groups to lend their technical expertise (Kennedy and Lansford, 1983). In the CREST dispute, the mediators spent many hours checking with technical advisors (Huser,

1982).

Reaching agreement on the validity of data to be used in mediation may require explicit attention. Huser (1982) notes that in the CREST dispute, the disputing parties developed an agreement on "findings," containing the factual data that all parties would use in their deliberations. In the Denver Metropolitan Water Roundtable, a technical consultant was hired to resolve data disagreements among participants (Kennedy and Lansford, 1983).

This documentation from the case literature suggested the following prescriptions for the Eclectic Theory in regard to Phase VI. Establishment of the Information Base:

1. Efforts should be made to be sure that all representatives of parties to mediation have an adequate understanding of the facts relevant to the dispute.

2. Contending parties should have equal ability to obtain and understand the facts and data relevant to the dispute.

3. Agreement should be reached among participants in mediation on the facts and data relevant to the dispute.

4. The issues in dispute should be broken into logical pieces for consideration.

5. Small groups should be used to address technical questions in the dispute.

6. Advisors, or advisory groups, should be used.

X. Assuring the Implementation of the Agreement

The involvement of public agencies in mediation may provide an impetus, and support, for the mediation effort.

Talbot (1983) notes that in some mediation cases public agency initiation or endorsement of mediation was helpful in sustaining the effort. In the Interstate 90 dispute, the highway department of Washington clearly initiated mediation, as did the marine division of the Washington State Department of Transportation in Port Townsend. In the Swan Lake dispute, the Federal Energy Regulatory Commission strongly encouraged the two sides to negotiate their differences rather than go to a formal hearing. The Interior Department played a strong supporting role in the Portage Island dispute.

These instances suggested the value of the following prescription for inclusion in The Eclectic Theory to enhance Phase X. Assuring the Implementation of the Agreement:

There should be public support for mediation.

Although the case literature is not explicitly prescriptive as is much of the practitioner literature, recommendations relevant to six of the phases of the Eclectic Theory were developed from an examination of case

studies of environmental mediation. This theory is explained in the next chapter.

THE POLITICS OF ENVIRONMENTAL MEDIATION

The practice of environmental mediation dates from the Snoqualmie River case in Washington in 1974. The quantity of literature which has developed since then on the practice and the theory of environmental mediation is surprisingly modest, for an approach to conflict resolution which appears to have such great potential to overcome many of the shortcomings of litigation and regulatory agency dispute settlement. The shortage of literature may relate to the nature of individuals who engage environmental mediation practice. The people who engage in environmental mediation tend to be active, process, people oriented individuals. To engage in environmental mediation requires considerable willingness to take risk, and enthusiasm for working with people in complex group situations. The people with the initiative and enthusiasm for this kind of practice tend to be very outgoing, action oreinted, and experimental. Environmental mediation is still very much a developing and evolving practice. The kind of people who are helping it to grow and develop are not the scholarly individuals who are

comfortable digging in libraries for long periods and cogitating on the broader dimensions and theoretical bases of environmental mediation. They are those who want to keep trying to make the process work better in new situations. Thus, the slow development of literature may be readily explained by the nature of the people who are pushing forward the frontiers of environmental mediation practice.

The field of environmental mediation has reached a point at which a literature is beginning to develop which goes beyond attempts to describe and prescribe for the improved practice of environmental mediation. Writers are beginning to examine the strengths and weaknesses of environmental mediation from a societal perspective. One approach is to explore the politics of environmental mediation. This has been done in a book published in May, 1987, entitled THE POLITICS OF ENVIRONMENTAL MEDIATION, by Douglas Amy (1987).

The purpose of the Amy book is to examine the implications and effects of environmental mediation in very broad context. To do this, he relates environmental mediation to a great variety of sources in the literature on social theory, political science, dispute settlement in general, citizen participation, economics, law, negotiation, and community mediation. He discusses how the practice of

environmental mediation, which differs so drastically from conventional litigation, may change the relationships among contending parties and lead to substantially different kinds of settlements. The most valuable point he makes is that sometimes parties with less sophistication and resources than their opponents may be coopted into agreeing to a settlement which they might not accept in the more adversarial setting of the courts. He suggests that the less structured approaches used in environmental mediation may often put weaker parties at a disadvantage. He argues that environmental mediation has gained the support of large organizations precisely because such bodies see the opportunity to gain advantages over weaker opponents which would not be available in litigation.

The arguments made by Douglas Amy are well taken, and environmental mediators would do well to give careful attention to his position. What Amy fails to explain, however, is that the practice of environmental mediation, as properly conducted, has safeguards built into the process which protect the interests of weaker parties. The selection of participants in environmental mediation is given great care to obtain participants who are articulate and sophisticated enough to represent their interests effectively. They touch base with their constituencies

before reaching a final agreement. Participants in mediation jointly develop ground rules to structure the process in a way which allows all perspectives to obtain a fair hearing. Contact is maintained with those who will be responsible for implementing a mediated settlement to be sure that an agreement is reasonable and feasible for implementation. In short, the points which Amy makes merit careful consideration, yet those who practice environmental mediation can use techniques which guard against the miscarriages of justice which he warns are possible. The position which is taken by Douglas Amy is a valuable warning to practitioners of environmental mediation, however, and those who manage mediation processes would do well to be aware constantly of the need to be sure that weaker parties are not coopted into agreements which are to their disadvantage.

THE JUSTICE OF MEDIATED SETTLEMENTS

One of the major virtues touted for environmental mediation is that it avoids the narrow, often limited procedural scope, expense, and time limitations of litigation. The negative side of the coin, however, is that environmental mediation does not have the tradition,

precedent, the explicit sanctions, and clear limits provided by the legal context of litigation. In such an undefined context, there is potential for the development of mediated agreements which do an injustice to one or more parties to the mediation effort. Two aspects of environmental mediation contribute to this potential for injustice. First, the parties to mediation typically engage in extended interpersonal interaction in the course of working out an agreement. In some instances these interactions lead to the development of trust among contending parties. The less sophisticated participants may be led to agree to settlements which depend upon the good faith actions of their opponents. In the absence of legal sanctions for noncompliance, once mediation is ended, the parties which can gain from not fullfilling their obligations may be tempted to renege on the promises made in the context of mediation. The naive, trusting parties may be left with no recourse to enforce the obligations of the opposing parties.

A second aspect of environmental mediation which may contribute to injustice is the unpredictability of how the implementation of an agreement will work in practice. The complexity of means which are used in solving environmental problems often lead to unexpected side effects. Changes in in the environment can add complications to the

implementation process. In addition, the parties who are responsible for carrying out actions to achieve implementation may see their instructions differently than the parties to mediation viewed them. Thus, there is considerable potential for the implementation of agreements to work out in practice substantially differently than the parties to mediation would have expected. Again, the lack of legal sanctions to shape the implementation according to the agreed upon settlement may leave less sophisticated, less powerful parties to mediation vulnerable to the abuse of their interests.

The potential for the development of unjust settlements in environmental mediation imposes a heavy burden of responsibility on the mediator to assure a settlement which is fair to all parties. In extreme instances, the mediator may have not choice but to make clear his/her objections to the substance of the agreement and terminate involvement in the mediation effort.

The problem of obtaining a mediated agreement which serves the interests of all parties to mediation in a just and fair way has received attention in the literature of environmental mediation. Susskind (1981) describes seven criteria, adapted from Fisher (1979), which mediators may use to determine whether a settlement is just and fair.

They are as follows:

The first criterion is that the results of a dispute resolution effort must appear fair to the community; that is, "the outcome is better if it is consistent with shared notions of equity and justice." The emphasis should be on the results of the dispute resolution effort and not just on the fairness of the negotiations process.

The second criterion is that the results of a dispute resolution effort must "well reconcile the interests of the parties." This criterion is an appeal for what economists call "Pareto optimality." The parties to a dispute cannot, by themselves, assess the extent to which their interests have been well reconciled; a neutral observer must be convinced that joint net gains have been maximized. At the very least, the parties ought to think that their interests have been well served after they have heard what others in the community have said about the agreements.

The third criterion is that the results of a dispute resolution effort should be "consistent with principles reflecting pre-existing practice." This proposition does not mean, of course, that there is no room for new or creative solutions to difficult disputes. What appear at first glance to be similar situations might be redefined by looking at them in a fresh light or by recasting the questions at hand. Thus, the argument that dispute resolution efforts must be consistent with past principles is not an argument for mechanical justice. It is, however, a plea for attention to past precedent.

The fourth criterion is that an agreement should set "a good precedent for the parties involved as well as for other parties" 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.

The fifth criterion is agreement should be "reached quickly and at low cost." The obvious questions is: As opposed to what? It is not hard to agree with the claim that the more efficient dispute resolution processes are better than the less efficient processes. When costs and benefits to the community at-large are weighed, however, it is often difficult to prove that a particular

> outcome is efficient. Nevertheless, the cost of reaching agreement should be minimized when opportunities to do so are apparent.
>
> The sixth criterion is a bit easier to measure: "The process of decision should be one that tends to improve rather than exacerbate the relationships among the parties." The more closely they can work together in the future, the better. It may seem that the sixth criterion must by definition be met, if the first five criteria are met. There may be instances, however, in which the parties feel that their interests have been well reconciled by a settlement, but the experience of reaching the agreement embittered them to such an extent that future negotiations will be impossible.
>
> Finally, the seventh criterion is that the results of the negotiation process ought to be readily acceptable to the parties, "the more willingly they accept and comply with the terms of the agreement, the better."

The problem of the level of justice and fairness achieved in mediated settlements will need ongoing attention. Whether the criteria elaborated by Susskind are adequate, and actually used by mediation practitioners, will need investigation. Environmental mediation has great potential to forestall some of the undesirable costs of litigation. Whether mediated settlements produce other, sometimes unrecognized, costs to vulnerable parties should be considered when comparing the advantages of environmental mediation with the more traditional means of dispute resolution.

The next chapter presents an Eclectic Theory of Environmental Mediation. This theory was developed from a

careful examination of environmental mediation theory, and the practitioner and case literature presented in earlier portions of this chapter.

CHAPTER III

AN ECLECTIC THEORY OF ENVIRONMENTAL MEDIATION

The following Eclectic Theory of Environmental Mediation was developed from the research conducted for this dissertation. Three sources were relied upon for theory development. These were case studies of environmental mediation, the writings of environmental mediation practitioners, and attempts to develop a theory of environmental mediation. The environmental mediation efforts which are the basis for the case studies vary widely on several dimensions. They differ in the environmental issues which were the focus of the mediation effort, in the approaches which were employed by the mediators, in the nature of the contending parties, in the size and scope of the mediation effort, and in the sophistication of the mediation efforts employed. Similarly, the writings of environmental mediation practitioners about mediation practice vary widely on the points which were emphasized, in the "principles" which were identified, and the procedures which are recommended for future mediation practice. In many of these writings, the authors identified particular dynamics of mediation, and procedures which were used, and made sweeping recommendations about environmental mediation

practice based upon only one or two particular mediation efforts examined.

Approaches to the development of theory for environmental mediation were widely divergent. Different emphases reflected the different disciplines, training and experiences of the theoreticians. The theoretical frameworks, consequently, showed little correspondence in main features.

The result of constituting a proposed theory from such diverse sources is that the theory in its entirety will not apply to any particular case of environmental mediation. Rather, various components will apply more or less well to any one instance of environmental mediation. Components of the theory may not have consistency among themselves. Contradictions among portions of the proposed theory simply represent the wide contrasts in context and substance of the disputes mediated, differences in approaches used in mediation, and variations in the dynamics of interactions among participants in the mediation process.

The activities or conditions recommended in relation to a stage in the mediation process are not necessarily unique to that particular stage, but may recur in various stages. In addition, the stages themselves are not determinate in the order in which they occur, nor will every stage

identified be found in every mediation effort. The diversity and variability of environmental disputes and mediation efforts create a challenge to the attempt to develop a theory of environmenmtal mediation.

In the development of the Eclectic Theory of Environmental Mediation, the Nine Steps Model proposed by Susskind and Weinstein (1980-81) was the starting point. In examining the literature on environmental mediation, however, it was discovered that mediation practitioners employed several activities which Susskind and Weinstein did not identify. In addition, the Nine Steps Model contained activities which practitioners did not mention. The Eclectic Theory is a substantially different approach to environmental mediation than the Nine Steps Model.

The Eclectic Theory contains two major considerations not mentioned by Susskind and Weinstein which are important for setting the stage for mediation. The first addresses the identification of the mediator, and the second concerns an examination of the conditions surrounding the dispute to determine whether mediation is appropriate - the "preconditions for mediation." The third stage in the Eclectic Theory - "recruitment of the participants in mediation" - includes two of Susskind and Weinstein's nine steps: "identifying the parties that have a stake in the

outcome of a dispute" and "ensuring that groups or interests that have a stake in the outcome are appropriately represented."

A widely used activity of the Eclectic Theory was not mentioned by Susskind and Weinstein - the "design of the mediation process." This approach is widely used to set the stage for mediation and obtain the commitment of participants to mediation. The fifth stage of the Eclectic Theory is implied, but not explicitly addressed, in the Susskind and Weinstein proposal. The stage of the Eclectic Theory is "identification of the issues," while Susskind and Weinstein use "narrowing the agenda and confronting fundamentally different values and assumptions." The sixth stage of the Eclectic Theory is another widely used activity in mediation not specifically addressed by the Susskind and Weinstein approach - "establishing the information base."

Three of the later stages of the Eclectic Theory diverge greatly from the techniques employed in Susskind and Weinstein's approach. While the Eclectic Theory includes "development of the preliminary agreement," "consulting constituents on the appropriateness of the preliminary agreement," and "making the agreement final," the Susskind and Weinstein approach mentions "agreeing on the boundaries and time horizon for analysis," "weighting, scaling and

amalgamating judgments about costs and benefits," and "determining fair compensation and possible compensatory actions." The need for a more comprehensive theory is clear when the observer notices that Susskind and Weinstein make no provision for steps which develop a preliminary agreement, nor establish a final agreement. The only one of these steps used by Susskind and Weinstein which appeared to be employed by practitioners was that concerned with agreeing on the boundaries and time horizons for analysis.

Similarities between the two models can be seen in the final stages. The final stage of the Eclectic Theory is "assuring the implementation of the agreement," and this incorporates Susskind and Weinstein's final two steps - "implementing the bargains that are made," and "holding the parties to their commitments."

An Outline of The Eclectic Theory

The Eclectic Theory of Environmental Mediation consists of ten stages. They are presented below in the order in which they first become important in operationalizing an environmental mediation effort. Specific components of a stage may be important in some other stage, however, the purpose here is to present a chronology of the phases of the mediation process.

I. "Identification of the Mediator." Two considerations are important in the selection of the mediator. One is that the mediator not have a personal interest in the outcome of the dispute, and the second is that the mediator not have great technical expertise in the subject of the dispute.

II. "The Preconditions for Mediation." The mediator should assess the suitability of the dispute for mediation in terms of whether the issues are concrete, whether there are real consequences for not entering into mediation, whether there is uncertainty about possible outcomes in contexts other than mediation, whether there is a balance of power among contending parties, whether the parties have reached a stalemate, whether the parties may experience economic costs from not reaching a mediated settlement, whether the dispute has potential to set legal precedents, whether the dispute centers on ideological grounds, and whether there is a history of contentious relationships among contending parties.

III. "Recruitment of the Participants in Mediation." Particular effort needs to be devoted to be sure that all parties with a substantial interest are represented in mediation, that the parties involved have clearly identifiable constituencies, and that the potential

participants do not have reservations about participating in the process. Provisions should be made to add new parties as the mediation process evolves, and participants should be educated on the mediation process.

IV. "Design of the Mediation Process." This includes developing ground rules, setting deadlines, and holding regularly scheduled meetings. The mediator should obtain the trust of the participants in mediation, and positive attitudes should develop among the participants.

V. "Identification of the Issues." In addition to clearly identifying the issues, the participants should agree on the geographical boundaries and time horizons of the issues in dispute.

VI. "Establishing the Information Base." All participants should have an adequate understanding of the facts of the case. The mediator may use subgroups to facilitate the consideration of technical issues.

VII. "Development of the Preliminary Agreement." This involves developing alternative solutions, the use of informal meetings and caucus sessions, reaching agreement within constituencies on positions to be put forth in mediation, maintaining the same negotiators throughout mediation, communicating with parties responsible for implementing the agreement, identifying means for binding

parties to the agreement, the development of trial solutions by the mediator, and putting the preliminary agreement into writing.

VIII. "Consulting Constituents on the Appropriateness of the Preliminary Agreement." The representatives of parties in mediation have the responsibility to maintain regular contact with constituents and to obtain suggestions for modifications of the agreement. It is important to be sure that no major group of constituents opposes the agreement.

IX. "Making the Agreement Final." This involves incorporating recommendations from constituents of representatives to mediation into the agreement. In addition, the mediator may assist the contending parties by drafting the wording of the final agreement. mediator assistance in drafting the final agreements.

X. "Assuring the Implementation of the Agreement." Considerations in this phase include: obtaining public support for the agreement, getting the agreement ratified by constituents of the representatives to mediation, and providing for monitoring the agreement and for revising the agreement.

An Eclectic Theory of Environmental Mediation

The following text presents the rationale for each of the stages of the environmental mediation process, and an explanation of the need for each of the components of the stages, based on the author's knowledge of the literature.

I. Identification of the Mediator

Once an environmental dispute emerges and the contending parties become aware that mediation is a possible means of settling the dispute, a mediator needs to be selected.

1. The mediator should not have an interest in the outcome of the dispute.

The condition that the mediator should not have an interest in the dispute is inherent in the concept of mediation. If the mediator stands to reap personal gain from the outcome of the dispute, the role of assisting the contending parties to reach a mutually satisfactory adjustment of interests in the mediated agreement would be compromised.

2. The mediator should not have great technical expertise on the subject of the dispute.

It is important that the mediator not possess great

technical expertise on the subject of the dispute because this may incline the mediator to favor particular technical solutions to the dispute which, while technically desirable, may not be equally attractive to different disputants. What is needed in mediated settlements is an agreement that parties to the conflict can live with and will support to the point of implementation.

II. The Preconditions for Mediation

A number of conditions may make an environmental dispute unsuitable for mediation. Mediation is a tool which is appropriate only under selected circumstances.

1. The mediator should assess the suitability of the dispute for mediation.

Mediation is an alternative to the settlement of a dispute through the courts, or by determination of regulatory bodies. The mediator should determine whether the dispute fits these more traditional approaches, or possesses characteristics that make mediation a more suitable approach for resolving the dispute.

2. The issues in dispute should be concrete and specific.

The issues in the dispute should be concrete and specific so that disputants know how their interests could

be affected by the outcome of mediation. A vague description of a problem will not attract the attention of all the parties who should be involved in a mediation effort.

3. There should be real consequences to the parties if mediation is not attempted, and the consequences should be such that mediation appears to be the best alternative for settling the dispute..

Participation in a mediation effort may require a considerable amount of time and resources on the part of the contending parties. Unless there are real consequences of not participating in mediation, the disputants will not have sufficient incentive to maintain their involvement throughout the mediation process until a settlement is reached.

4. There should be uncertainty about possible outcomes of the dispute in a context other than mediation, i.e., in the courts, before a regulatory body, etc.

If any of the contending parties to environmental mediation feels certain that it could obtain a favorable settlement through the courts or before a regulatory body, that party will pursue that route rather than face the uncertainty of outcome from a mediated settlement.

5. There should be a perceived balance of power among contending parties.

If one of the parties to a dispute has such a disproportionate power that it can overwhelm any opposition, it will have no incentive to enter mediation, where fair consideration is given to each perspective in the dispute.

6. It should be clear that the parties to the dispute have reached a stalemate, or an impasse.

Until the parties in a dispute have reached a stalemate, or impasse, they will not be inclined to enter into a mediation process. As long as one party is gaining advantage over another, it will not have an incentive to invest the time and resources to participate in mediation.

7. Contending parties should have potential to experience economic costs if a mediated settlement is not reached.

If there is not an economic cost associated with failure to reach a mediated agreement, contending parties will not have sufficient motivation to enter into mediation. Some potential financial expense as a result of not settling a dispute should be a strong motivation to participate in mediation.

8. The dispute should not have the potential to set important legal precedents.

Adjudicated settlements of environmental disputes may be important for their potential to establish precedents for similar conflicts elsewhere. If a contending party sees a potential for a court settlement which will set a precedent favorable to its perspective, it may be willing to invest enormous resources to achieve such an outcome to save the cost of confronting the same issue in other circumstances. The inability of mediation to set precedents would make it an undesirable alternative in such a situation.

9. The dispute should not center on strongly held ideological or philosophical differences.

The importance of strongly held ideological or philosophical beliefs to the worldview, or basic outlook, of individuals leads people to maintain these perspectives against strong opposition. When a position in an environmental dispute is based upon such beliefs, the representatives of the perspective may be willing to make substantial sacrifices on principle to uphold their position. They may be unwilling to make the kinds of concessions which are a part of the mediation process.

10. The opposing parties should not have a history of contentious relationships.

If opposing parties have been in contention over an

extended period, and attitudes towards opponents have become strongly negative, it may be fruitless to bring them together in the context of mediation. Animosity among these parties may keep the effort from focussing upon substantive issues which need mediation.

III. Recruitment of the Participants in Mediation

The resolution of disputes often involves actions which have widespread impacts upon the environment. The repercussions of decisions may have effects which touch the interests of a great diversity of parties. It is important, therefore, to choose participants in mediation carefully to be sure that the mediated settlement fairly represents the interests of those who will experience the impact of a mediated agreement.

1. Particular effort and attention should be devoted to the selection of participants in mediation.

Because participants in mediation often represent many other people with similar interests, they bear the responsibility for representing their perspective effectively. They need to be knowledgeable, articulate, energetic, and committed if they are to fulfill this responsibility. Careful selection is needed to choose those who will do the best job representing the perspectives of

the various parties whose interests may be affected by a mediated agreement.

2. The mediator should obtain a clear understanding that none of the potential participants in mediation have reservations about participating in mediation.

The effort to establish that potential participants do not have reservations about mediation is important because a high degree of cynicism or skepticism toward mediation may condemn it to failure. A mediation effort may require a substantial commitment of time and resources on the part of the contending parties to reach a settlement. If the participants have reservations about the viability of the process, it is unlikely that they will devote the time and effort needed to make it succeed.

3. All parties with a substantial interest in the dispute should be represented in mediation.

If all parties with a substantial interest in a dispute are not represented in mediation, there is potential for an unrepresented party to resort to a lawsuit, or other obstructive tactic, to block the achievement of a settlement or the implementation of an agreement.

4. Participants in mediation should have clearly identifiable constituencies.

If participants in mediation are to be accountable for the positions they take in mediation, they need to articulate their perspective with a particular perspective in mind. Unless the population they represent is a clearly identifiable constituency, they will be merely representing their own position and interests, rather than those of a segment of the public.

5. The mediator should educate the contending parties on the mediation process.

Because mediation is a new and developing practice in settling environmental disputes, participants need to be educated in how the process works of they are to develop creative solutions without the use of majority vote.

6. New parties should be added as the mediation process evolves and new issues are identified.

Because environmental disputes often involve potentially complex, interrelated and extensive effects upon the environment, as participants develop solutions new interests may be affected. As these interests are identified, representatives of parties which will be affected should be incorporated into the mediation process.

IV. Design of the Mediation Process

Because environmental mediation may involve a number of parties with stongly held positions on widely differing interests, strong emotions may surface during mediation. Careful attention should be given to designing a process in which positions may be clearly stated without leading to disruptive emotional displays. Although too much emphasis upon structure and procedure may impede the development of creative solutions, insufficient attention to these considerations may allow the process to become diverted into unproductive activities.

1. Contending parties should participate in designing the mediation process.

The participation of the contending parties in designing the mediation process gives them "ownership" in mediation, and assures a design which will give fair consideration to all perspectives. This ownership in mediation supports a strong commitment to the process so that participants continue to be active in working toward a settlement in spite of obstacles which develop.

2. The design of the mediation process should be done with the advice and consent of the mediator.

Because the mediator will manage the mediation process,

it is important that the process be designed with his advice and consent. The approach of each mediator is different. The process should be designed to facilitate the use of the particular style of the mediator who will manage the mediation process.

3. The participants and the mediator should develop ground rules for the process.

Ground rules for mediation help to regulate and structure the interactions among participants, and between the participants and the mediator. Joint participation in developing ground rules assures that the participants share "ownership" in the process, that the procedures are suitable for the conflict being mediated, and that the activities are appropriate to the individuals who represent interests being mediated. Ownership in the process helps to assure that the participants will maintain participation until a settlement is reached, in spite of difficulties encountered and the time and resources which may be demanded of participants to make the process work.

4. Ground rules should be developed for dealing with the the news media.

Because the mediation of environmental disputes often touches upon sensitive issues and particular tradeoffs

between contending parties which can easily be misinterpreted or misunderstood by the public, ground rules are needed to manage the release of information to the news media. Premature exposure of positions can lock participants into postures which may only represent initial bargaining postures, rather than vital perspectives that define ultimately desired concerns on which the outcome will be based. Flexibility is needed so that positions can be changed in response to concessions from opposing parties.

5. The ground rules for mediation should be approved by all participants.

The formal approval of the ground rules by all participants helps to strengthen the ownership of the mediation process. It helps to assure that ground rules are practical, fair and reasonable.

6. Clear and enforceable deadlines should be developed to provide an impetus for a mediated settlement.

Setting deadlines helps to maintain momentum in the mediation process. Without deadlines, the process may drag when difficulties are encountered, or participants are distracted by competing responsibilities.

7. Contending parties and the mediator should hold regularly scheduled meetings.

The use of regularly scheduled meetings helps to maintain momentum in the mediation process.

8. Positive attitudes and interaction should develop among representatives of contending parties to mediation.

The cooperative development of creatively shaped settlements in mediation needs a positive social climate and interaction among participants. Negative attitudes can hamper movement toward agreements which meet the needs of all participants.

9. The mediator should obtain the trust of the contending parties.

Because the mediator needs to know more about the strengths and weaknesses of the positions of the contending parties than they know about each other, he has access to very sensitive information. The participants must trust the mediator to use this information without compromising the interests of the parties, or revealing more about particular positions than the parties wish. The development of trust in the mediator provides the basis for the contending parties to share this information with the mediator.

V. Identification of the Issues

Although the points of contention in an environmental dispute may appear to be simple and straightforward, different parties in the dispute may perceive the issues quite differently. An explicit effort may be needed to identify the issues clearly.

1. The issues in dispute should be clearly identified.

Because the different desires and needs of parties involved in an environmental dispute may lead them to perceive the issues from sharply different perspectives, an explicit effort is needed to identify clearly the issues at the center of the dispute.

2. Agreement should be reached among contending parties on the geographical boundaries and time horizons of the issues in dispute.

Because it is often difficult to determine the geographical limits of the impact of an activity upon the environment, an effort should be made to establish a geographical boundary for the issues under consideration. Similarly, the repercussions of an activity may extend indefinitly into the future. A limit should be set upon the time over which potential effects of an activity will be considered to be relevant to a settlement of the dispute.

VI. Establishing the Information Base

Before the parties in mediation can make progress in settling a dispute, a base of data about the current state of the environment needs to be identified or developed.

1. Efforts should be made to be sure that all representatives of parties to mediation have an adequate understanding of the facts relevant to the dispute.

Misperceptions of points at issue in a dispute may be based upon an inadequate grasp of facts. An effort to be sure that all representatives have an adequate understanding of the facts helps to avoid confusion over issues.

2. Contending parties should have equal ability to obtain and understand the facts and data relevant to the dispute.

If a particular party to mediation has less ability than other participants to obtain and understand the facts and data relevant to a dispute, that party may be at a disadvantage in developing its position in mediation. Disputants representing each position should have an equal opportunity to understand information which is relevant to their positions and interests, or they may obstruct the proceedings.

3. Agreement should be reached among participants in mediation on the facts and data relevant to the dispute.

Without reaching agreement on the basic facts and data relevant to a dispute, participants may talk past each other without realizing that different perceptions of the conditions and circumstances under consideration are the the cause of their difficulties. Common agreement on an information base early in mediation may prevent needless conflict.

4. The issues in dispute should be broken into logical pieces for consideration.

Enviromental disputes often involve issues with many dimensions with great complexity. Breaking the issues into logical pieces for consideration facilitates a complete comprehension of each aspect separately in a manageable quantity.

5. Small groups should be used to address technical questions in the dispute.

Some technical aspects of environmental disputes may not be of particular interest or relevance to many of the participants. The use of small groups to address such issues avoids the expenditure of time and resources on such issues by those with no interest in the subject. In addition, the expertise of participants with a particular interest in the technical aspects of the dispute can be used

most efficiently in small groups.

6. Advisors, or advisory groups, should be used.

Advisors, or advisory groups, are useful for bringing technical expertise into a mediation effort which is not available from among the contending parties.

VII. Development of the Preliminary Agreement

Once the mediation process has been designed, and an information base has been established, the participants can begin to develop a preliminary agreement. The development of a preliminary agreement allows the representatives of parties to mediation to consult with their constituents on the suitability of this interim agreement before moving toward a final settlement.

1. A variety of alternative solutions should be generated by the participants in mediation.

It is important that a variety of alternative solutions be considered so that all perspectives in mediation can identify with an approach to settlement which incorporates their interests. The various alternatives bring out considerations which may be combined into an agreement which is satisfactory to all perspectives.

2. The contending parties and the mediator should hold

informal meetings.

Because the mediator may need to obtain sensitive information about the positions of contending parties, he will need to meet informally with groups of participants representing different perspectives.

3. The contending parties should hold their own caucus sessions.

Representatives holding similar positions should have the opportunity to hold caucus sessions in order to reach agreement among themselves on the positions they will take in mediation. This enables them to present a united front and prevents confusion in the mediation process.

4. Small groups should be used to address single issues in the dispute.

Because the logistics of managing large group discussions are complex, small groups should be used to address single issues to facilitate rapid progress in reaching agreements.

5. The mediator should assist the participants in mediation who represent a particular side to reach agreement within their membership on positions to be put forward in mediation.

Within constituencies representing a particular

perspective on the issues in contention, there is often a variety of positions on the dispute. If the representatives of these constituencies are to take a firm position on the issues being mediated, it is important that there be agreement among constituents on the position being taken by their representative to mediation.

6. The mediator should spend time interacting with participants in mediation on a one-on-one basis.

The mediator needs to understand the orientation of each of the participants in mediation in order to determine whether proposed components of the preliminary agreement are satisfactory to these individuals. One-on-one interaction with these representatives in mediation facilitates the development of this understanding.

7. The same individuals should serve as negotiators throughout the mediation effort.

The development of a preliminary agreement is often based upon subtle patterns of exchanges and interactions among participants in mediation representing opposing positions. A change in negotiators will disrupt this pattern and interrupt the mediation process. Maintaining the same negotiators throughout mediation prevents such disruption.

8. Communication should be maintained with those who will be responsible for implementing the agreement.

The implementation of a mediated agreement often requires a commitment to certain actions, and the commitment of resources, on the part of individuals and organizations which are not directly involved in mediation. Participants in mediation need to communicate with these parties as the preliminary agreement is being developed to be sure that actions proposed as a result of the agreement will be suitable and feasible for implementation.

9. Parties responsible for implementing a mediated agreement should provide assurances that they will follow through.

As the preliminary agreement is being developed, it is important to obtain assurances from those responsible for implementation that they will follow through on their commitments.

10. Clear means should exist for binding the parties to the agreement.

As the process of developing the preliminary agreement moves forward, the participants should develop means by which the parties to the agreement will be formally committed to fulfilling their responsibilities in honoring and implementing the agreement.

11. The mediator should not have power to influence strongly the mediated agreement.

It is important that the preliminary agreement truly represent the interests of the contending parties. This can be brought about most effectively when the parties have a major role in shaping the agreement. If the mediator has power to influence strongly the shaping of the agreement, the contending parties will not have the investment and ownership in the document to maintain a strong commitment to the settlement. The agreement will represent the interests and concerns of the mediator more than those of the participants.

12. The mediator should put forth trial solutions.

The mediator will usually have knowledge about the positions of each of the contending parties which the opponents will not know about each other. He is in a position, therefore, to shape a trial solution without revealing how close it is to the positions of representatives of different positions. The parties can accept or reject a trial solution without the risk of revealing details about what they are willing to concede in order to reach a settlement. It should be noted that this mediator intervention is dangerous. There is the potential that parties will read into the trial solution their

opponents' position. They may adjust their negotiating stance in response to this misinformation, rather than perceive the trial solution as a settlement that should be satisfactory to all perspectives. Thus, the trial solution might prolong the mediation process rather than hasten an agreement.

13. A preliminary agreement should be reached.

A preliminary agreement should be reached so that constituents of representatives to mediation can react to something substantive and explicit before the mediation process moves toward a final agreement.

14. A preliminary agreement should be put into writing.

The act of putting a preliminary agreement into writing is important to assure that all participants have a document in explicit, tangible form which facilitates understanding. The preliminary agreement is a document which is communicated to constituents explicitly, assuring that the constituents of different parties to mediation receive the identical information.

15. The mediator should assist in drafting the wording of the preliminary agreement.

Because the wording of the preliminary agreement should be neutral with regard to the contending parties, the

mediator is best suited to the development of such wording.

VIII. Consulting Constituents on the Appropriateness of the Preliminary Agreement

Once the preliminary agreement is developed, it needs to be submitted to the constituents of representatives to mediation for review. It should either receive their approval, or suggestions for modifications.

1. Participants in mediation should maintain regular contact with their constituents.

The representatives in mediation may move substantially away from the positions they assumed at the initiation of mediation. Constituents need to be informed of the movements away from the original position, and the reasons for these movements, so that they will not be suddenly confronted with a substantial shift in position toward the end of the development of the preliminary agreement. Regular contact with constituents allows the representatives to bring along constituents in a gradual manner -- which facilitates an understanding of the rationale for the changes needed.

2. The participants in mediation should consult with their constituents on the suitability of the preliminary

agreement.

The consultations of the representatives in mediation with their constituents helps to assure that the terms of the preliminary agreement are in accord with the interests and concerns of the constituents.

3. The constituents consulted should suggest modifications in the preliminary agreement.

Because it is unlikely that the preliminary agreement will be satisfactory to constituents in all respects, they should suggest modifications in the agreement to address their concerns. This participation and investment in the mediation process promotes their support of the mediation effort and the eventual agreement.

4. The constituents consulted should approve the preliminary agreement.

Once the constituents of representatives of mediation have suggested modifications in the preliminary agreement, they should approve the agreement. This approval enhances the legitimacy of the position of the representatives to mediation and legitimizes the outcome of mediation.

5. No major group of constituents should oppose the preliminary agreement.

The preliminary agreement should reasonably accurately

represent the interests of constituency groups represented in mediation. Consequently, no major group of constituents should oppose this agreement.

IX. Making the Agreement Final

Once the preliminary agreement has been modified to accommodate the concerns of the consituents of representatives to mediation, the stage is set to move toward the development of the final agreement.

1. Modifications recommended by constituents of representatives to mediation should be incorporated into the final agreement.

In order to satisfy the concerns of constituents of representatives to mediation, modifications which were suggested should be incorporated into the final agreement.

2. The mediator should assist in drafting the wording of the final agreement.

As with the preliminary agreement, the neutral position of the mediator makes it appropriate for the mediator to take a major role in drafting the final agreement in words which favor none of the perspectives represented in mediation.

3. An agreement should be reached which is approved by all

parties to mediation.

An agreement which is approved by all parties to mediation is the ultimate goal of environmental mediation. Approval by all parties assures that the agreement meets the needs of all participants, within the constraints of the competing demands.

X. Assuring the Implementation of the Agreement

Once a mediated agreement is reached, measures need to be taken to be sure that it is implemented.

1. There should be public support for mediation.

Public support for mediation is important for two reasons. First, public support for the process helps to assure that mediation is carried out with proper regard for the interests of all parties which might be affected. Second, it helps to legitimize the mediated agreement so that it will be implemented.

2. At least one public figure should agree to guarantee the agreement.

A guarantee of the agreement by a public figure provides visibility for the process and enhances its legitimacy. These factors improve the chances that the agreement will be implemented.

3. The agreement should be ratified or approved, by the constituents of the representatives to mediation.

The final agreement should be ratified or approved by constituents of the representatives to mediation as a final, tangible endorsement to enhance the chances for implementation.

4. Means should be provided for monitoring the agreement.

Monitoring the implementation of the agreement is important to assure that the provisions of the agreement are being adhered to faithfully as they are put into effect.

5. Means should be provided to re-make or re-decide the agreement, if necessary.

Because conditions change, the implementation of the agreement may not be reasonable, practical or feasible in its original form. The agreement may need to be revised so as to adapt it to changing circumstances.

The next chapter provides three models of mediation as a basis for comparison with the Eclectic Theory.

CHAPTER IV

RELEVANT MODELS OF MEDIATION

This chapter describes three models of mediation in general which provide a basis for contrast and comparison with the findings of this research on environmental mediation. The three models were chosen because they represent both major efforts to pull together the most effective techniques used in general mediation by practitioners. They are models which have the most relevance to environmental mediation. The third model of general mediation presented is actually a model of negotiation - a component part of mediation. The concepts identified in that model, however, are principles which have implications for the practice of environmental mediation.

The purpose of comparing and contrasting environmental mediation with these three models is to show the extent to which environmental mediation follows patterns which are generic to mediation in general, and the extent to which environmental mediation has its own dynamics, characteristics, requirements, and activities. In the final chapter, environmental mediation is compared and contrasted with these three models to highlight its unique characteristics.

THE DORCHESTER URBAN COURT MODEL

In their book on programs in community justice and conflict resolution, Alper and Nichols (1981) include a chapter on mediation. They describe the Dorchester Urban Court program in mediation and reconciliation as "A Model Program." The Dorchester Urban Court emerged from a successful effort to remove from the bench a patently unfair and unjust judge. The confidence gained from the effort led community members to develop an innovative program to ensure continued community participation in the local administration of criminal justice.

The program aims to resolve disputes between persons with ongoing relationships by means of four primary objectives: (1) To resolve potential criminal disputes in a manner that satisfies the parties that justice has been rendered and recurrence of future problems will be averted by addressing the basic issues of the dispute; (2) To enable community mediators to effect such resolution and thereafter to compare their results with other methods of informal resolution in the court and in the police station; (3) To determine the most effective models and intake points in achieving resolution of criminal disputes; and (4) To build community goodwill toward the court, the police, and the prosecutor's office. These objectives provide an

opportunity for the community to play a constructive and vital role in the criminal justice system. The following text outlines and describes the mediation procedures used by the Dorchester Urban Court.

Preparing for Mediation

Parties to the dispute are asked to arrive at the offices at least fifteen minutes before the hearing begins in order to permit a staff member to learn the nature of the dispute. A panel of mediators, usually consisting of two or three members, is at the office. Very little background is given to the panel in order to avoid prejudgment. While the panelists discuss the format for the session among themselves, the staff member greets the disputants and endeavors to put them at ease. When the panel is ready to begin, both disputants are brought to the conference room by the staff member and introduced to the panel of mediators. The staff member leaves but remains outside.

The session begins with one member of the panel outlining the mediation procedure in order to acquaint the parties with what they may expect and to initiate an atmosphere of trust, which it is hoped, will prevail throughout the process. Two factors lessen the anxiety and distress that the participants in mediation may feel. First, the conference does not take place in a criminal

courtroom. Second, panel members are concerned community volunteers who are prepared to listen and help. The parties to the dispute are helped to perceive that the process is truly in their own hands and that if agreement emerges, it will be a result of their own attitude and efforts.

The introduction is key, for it encourages disputants to relax and gives them opportunity to ask questions and to establish rapport, thus laying the basis for trust, in a climate of neutrality and impartiality. They are told that the mediation hearing is not a court and that the panelists are not judges; rather, the panel is there to listen to both parties and to assist them in resolving their conflict in a mutually satisfactory manner. The panel explains that if agreement is reached during a session, it will be one that the disputants themselves have shared in creating and feel they can live with. The confidentiality of the process is emphasized.

The panel also explains that from time to time they may wish to confer among themselves or to speak in private with one or the other of the disputants. These individual caucuses usually occur two or more times during a mediation session, at which point one or both parties will be asked to leave the room.

Describing the Dispute

After the introduction, each party to the dispute is invited to describe how they see the problem as fully as possible. Panel members may ask questions where appropriate in order to probe more deeply, in an effort to arrive at a complete understanding of each party's perception of the dispute and its underlying or aggravating circumstances. Emotions can run very high during this phase, but all parties are encouraged to speak openly. Once the basic facts have been aired to the satisfaction of all parties, both sides will be asked to leave the conference room while the panel members discuss the case among themselves. Panel members want to be certain that they agree on the character of the problem, and at the same time provide a short break for the parties who have been confronting one another.

Caucusing

When the panel has completed its deliberations, each of the parties is invited to confer with the panel individually. Further questions are raised, and new information will often be proffered by a disputant at this stage. The panel at this point will encourage each party to set out the terms of settlement that each is seeking from the other without making any suggestions of its own as to how this may be done. During this caucusing phase, the

panel most fully mediates or "goes between" the parties by communicating to each the terms that the other is seeking.

Identifying Areas of Agreement and Disagreement

Once each party has set forth its position, the panel can identify the areas of agreement and disagreement. This enables the panelists to convey from one party to another what each is asking, in positive, less-emotional fashion than might be possible if the two parties were in continuous confrontation with each other throughout the entire process.

Putting the Agreement in Writing

When the final agreement has been devised, the panel presents it in writing to both of the parties together. Each of them is free to request changes or additions.

Signing the Agreement

When both parties express satisfaction with the proposed agreement, they sign it, the panel members sign as witnesses, each party is given a copy, and the session ends. The agreement is not a legally binding document, but the panelists encourage the disputants to get in touch with the program if they feel that the agreement is not working. The panel also informs the disputants that a staff member will be calling to monitor the agreement.

Monitoring the Agreement

Once the agreement has taken effect, Urban Court staff monitor its progress. Disputants are contacted two weeks after the initial mediation session and again in three months. They are asked whether the agreement is working, whether the parties continue to be satisfied with the mediation process, and whether any requested social services have been received. If the mediated agreement has begun to break down, additional efforts are made to settle the problem without further court action. Staff members will contact uncooperative disputants to remind them of their agreement and may call the parties in for a second mediation session. In some cases, the monitoring process involves more specific instructions, especially when an agreement includes an exchange of property. In these cases, resource coordinators will contact the parties to make certain that the exchange has taken place and may even help in the process if the parties prefer not to have further contact with one another.

THE FOLBERG AND TAYLOR MODEL

Folberg and Taylor (1984) have developed a seven-stage model of mediation. They point out that their suggestions in regard to the mediator's role and methodology reflect

their own collective experience in providing mediation services. The methodology and steps presented constitute their particular "style" of mediation. The stages which Folberg and Taylor present appear to relate most directly to disputes which involve a small number of parties within the context of a single community. They attempt to make the model generic by reference to "environmental, labor, commercial and crisis mediation" (Folbert and Taylor, 1984).

What follows is an abbreviated presentation of the Folberg and Taylor Model:

Stage One: Introduction - Creating Structure and Trust

Stage One, the introduction, is vital to the establishment of a relationship that will facilitate the rest of the mediation process. The mediator must provide initial structuring, gain the participants' trust and cooperation, and elicit their active participation in the process.

Mediators enter a dispute by referral or by direct choice of the participants. Some participants may accept mediation only to avoid negative consequences, such as litigation, and may respond to Stage One with resistance. How the mediation process is initiated determines how much effort must be exerted by the mediator to create both understanding and acceptance of mediation. An important

task of stage one is to assess the participants' attitudes about mediation and their readiness for the process. There are seven steps in the Introduction, as follows:

Step 1 - Obtain Information about Participants' Attitudes and the Conflict

This step is used to gather relevant information about the participants' perceptions of the conflict, their goals and expectations, and the conflict situation. Essential information should be gathered during this stage:

- The participants' motivation to use mediation

- The immediate background and precipitating events of the conflict

- The interactional and communication styles of the participants

- The present emotional state of the participants

- Arrangements for legal processes and the involvement of other participants

- The presenting problem as opposed to the hidden agenda

- Immediate safety and security concerns for each participant and dependents

Step 2 - Outline Roles of Mediator and Participants

The next step begins with a preparatory statement that outlines the roles of both mediator and compliments the participants for having made the risky decision of coming to the session. If one participant arrives later than the other, the mediator summarizes all that has been said to the other participants, no matter how redundant it may be for those who arrived earlier.

Step 3 - Confirm Case Data

The next step is to "confirm case data" - whatever the mediator knows about the participants and their situation - in the presence of all. This review serves the same purpose as repetition for latecomers: It confirms by action that the mediator is not keeping secrets.

Step 4 - The "Handover"

The next step is the "handover" to the participants - a definitive signal from the mediator, usually verbal, that indicates the need for the person to become an active part of the communication. The handover shows the mediator's willingness to openly confront the major emotional tendencies of the participants, and displays a truthful picture of the interactions. It is important not only to encourage such involvement but also to reward it verbally, since to express deep personal feelings is risky and threatening to the participants.

Step 5 - Discussion of Expectations, or Positions

The "discussion of expectations or positions" is next. This tends to expose hidden agendas or "icebergs" - conflicts that are only barely acknowledged by the participants. By using open questions and silence, the mediator can facilitate discussion while maintaining control and providing recognition and encouragement by means of interpretations and summary.

Step 6 - Review the Mediation Guidelines

The next step, "review the mediation guidelines," helps calm the tension - partly because it is a break in the sequence, partly because it reminds the participants that they will not be allowed to get out of control despite their strong emotions. It sets up explicit expectations. Participants can take an emotional time-out from their initial anxiety while the mediator is busy explaining the structure of the mediation process.

The guidelines should address the question of whether the participants will be allowed to talk separately with the mediator. Separate sessions are a common practice in environmental, labor, commercial, and crisis mediation but are less frequent in family mediation. Separate caucusing may be an effective mediation technique, but it does raise significant ethical consideration. Participants are encouraged by some mediators to talk to them separately if they are feeling discouraged or want to end mediation. This gives the mediator a chance to discuss concerns privately, get a better understanding of the underlying conflicts, and encourage without embarrassment. It must be established in the guidelines, however, that an acknowledgement of the separate conversation and its general contents will be conveyed to the other participant in the next mediation session.

Step 7 - Sign An Employment Agreement

The next step, "sign an employment agreement," is an overt method of gaining cognitive, if not emotional, commitment to mediation on the part of the participants; it is also a legal necessity for the mediator. If the mediator has been skillful up to this point, the participants will have enough information about the process (and emotional relief) to feel good about mediation.

Stage Two: Fact Finding and Isolation of Issues

Before good decisions can be reached, both participants must have equal information and both must fully understand what the issues are. Stage Two of mediation is used to find out all the relevant facts and isolate the true issues for the participants. The mediator must help the participants fully understand their areas of agreement and conflict. Often some idea of the manifest and the underlying conflicts

has already been gained in the first stage.

During Stage Two the mediator must determine the nature of the participants' underlying and manifest conflicts by using the following evaluative criteria:

A. Immediacy of the conflict

This criterion concerns how pressing the conflict is in terms of the immediate interests of the contending parties. A conflict which involves the livelihood and emotional wellbeing of parties may be an entirely different undertaking than one which touchs the lives of contestants in less personal ways.

B. Duration of the conflict

This criterion focuses upon how long the conflict has persisted. A dispute which has arisen a short time prior to the time contesting parties are entering mediation may have entirely different dynamics than one which has simmered over months or years.

C. Intensity of feelings about the conflict

This criterion focuses upon the emotional invovlement of the disputants. A conflict which inspires strong emotions is a different type of entity than one which the contesting parties view from aa more impersonal and detached perspective.

D. Rigidity of positions

This criterion focuses upon a dimension of the attitude of participants. If the initial positions of the contesting parties are held with great tenacity, the conflict may need an entirely different approach to mediation than one which is entered from a relatively open minded, flexible perspective.

This stage of mediation requires delineation of all the issues. In complex conflicts, such as environmental and divorce cases, there are usually several issues that must be addressed. By using a worksheet, the mediator helps the participants cover all the areas of dispute and interrelated issues they must discuss to produce the desired outcome: a plan they can live with. The mediator acts as a tour guide, showing what is important to examine. The mediator also acts as a scribe, recording data and determining which areas are closed (or already resolved) and which are open for discussion.

This stage comes to a close when the mediator knows where the disagreements and conflicts lie, what the underlying conflicts are, and what each participant wants and what each will not accept under any circumstances. It may take several sessions to complete this stage, depending on the number of underlying conflicts that are related to

the participants' self-concept.

At this point the mediator, along with the participants, must determine a case-specific set of goals, objectives, and strategies that incorporates the participants' values and intentions. It is the participants who must determine whether they seek resolution of all issues or only some, while identifying and managing those that remain.

Stage Three: Creation of Options and Alternatives

Stage Three asks the basic question: "How can you do what you want to do in the most effective way?" All participants must be involved in finding the answer. After going over the worksheet or notes, the mediator needs to review the issues of conflict. Sometimes the answer to the question for a dozen issues rests on the answer to the most basic questions or issue of highest priority.

After reviewing the issues, the mediator should list any options that have been mentioned and then make a statement reminding the participants of the criteria to be used in evaluating these options. Folberg and Taylor suggest the following criteria for developing alternatives:

- Needs of the participants and others who will be affected by the decision

- Projections of the past onto the future (likely predictions)

- General economic and social forecasts that may affect an option

- Legal and financial norms, roadblocks, and limitations

- New people and situations that are anticipated

- Predictable changes in any of these criteria

More specific criteria may need to be suggested by the mediator for the situation being mediated. There are two main tasks at this stage: (1) to help the participants articulate the options they know or want and (2) to develop new options that may be more satisfactory than previous ones. The mediator's role must reflect this duality, for the mediator must be a facilitator for the first task and an originator or synthesizer for the second. It is important not to let the latter role overshadow the former, since a mediator who is offering too many new options too fast will inhibit the participants' own expression and views.

This stage of mediation is perhaps the most creative part. Mediators must attempt to connect and integrate bits of information expressed earlier in mediation. This role is vastly different from the nondirective role espoused by many

counselors and the highly authoritarian role taken by those who function as arbitrators. The mediator needs to be a resource person: an expert who can suggest new options based on extensive knowledge of the subject in conflict. The mediator must offer new options in such a way that the participants can either accept or reject them. The participants should not feel pressured to consider an option nor accept a trial period they do not think will be beneficial. As facilitator and developer, the mediator often feels a strong urge at this point to rush to completion and closure. If mediators have staked their egos on the selection of a particular option, they will be unable to function as neutral facilitators of the process. Coercion, favoritism, and bias must not be allowed. Mediators should be especially aware of the ethical responsibilities of their role while providing new insights and guiding the participants.

Stage Four: Negotiation and Decision Making

Cooperation of the participants is the major task of Stage Four in mediation, along with an outcome that has been mutually agreed to by the participants. Participants must be urged to compromise on some of the smaller items in order to accomplish this task. For each major issue, participants must choose the option they can live with, even if it is not

what they originally wanted. Participants should be encouraged to take the risky step and decide.

The negotiation and decision-making stage is a time when participants examine the reality and consequences of the options they have developed. The mediator's task is to reframe this bargaining to ask the question: "Which option will best meet everyone's needs?" Mediators should move the participants from competitive negotiation to cooperative problem solving while encouraging interaction between them.

The mediator's role during this stage is to start the interchange between participants and then monitor it so that each person is given a chance to talk, make offers, and consider them without undue pressure. Both participants must have the opportunity to understand the other's perspective and feel that their own viewpoint is understood.

Stage Five: Clarification and Writing a Plan

Most participants will be able to make choices among options during Stage Four. The function of Stage Five of mediation is to produce a document that outlines clearly the participants' intentions, their decision, and their future behavior. This agreement, or plan of action, should be written in a form the participants can read easily and review later if the issues resurface. It should be written concisely, yet be complete, with language understandable to

the participants, set in a clear format. The participants should understand it to be a working document that can be modified after legal review or by subsequent written amendments to reflect the reality of the moment.

The mediator should be the primary person involved in recording, organizing, and accurately reflecting the decisions that have been reached. The participants, either separately or jointly, may need to write their own wording of an option to ensure that it reflects their idea of the agreement and submit it to the mediator for inclusion in the mediated plan. The mediator can supply a model on which they can base their version.

The mediated plan should include not only some provision, mutually agreed upon, for legal review and processing but also a statement regarding the revision policy and procedures that can be used when future changes necessitate rewording of the agreement.

Copies of the proposed plan should be given to the participants to think about and review with others before the next session. If there are underlying conflicts that have not been resolved during earlier mediation stages, they will surface at this time - often in the form of a manifest conflict over the wording of a section that addressed the underlying conflict.

The signing of this mediated plan is a symbolic act that should be marked by special behavior. A ritual, such as toasting the effort, is a frequent choice.

Stage Six: Legal Review and Processing

Stage Six, "legal review and processing," is necessary when the conflicts being mediated must be connected to society at large. This stage and the next are the two phases of mediation that are contingent upon forces outside the mediation process itself. In these stages the power, control, and responsibility are no longer entirely in the hands of the participants and mediator. For this reason stages Five and Six are less universal than the preceding stages and depend on the subject of mediation as well as the setting of mediation services. They are perhaps more suited to the areas where individuals are mediating for themselves, rather than when representatives knowledgeable in relevant laws and systems are the mediation participants. The inclusion of these two stages is appropriate for educational, workplace, and family -- but not environmental disputes.

Stage Seven: Implementation, Review, and Revision

In Stage Seven the participants in mediation are trying to implement the terms of the mediated agreement they have

produced. This stage, similar to Stage Six, takes place outside the confines of the mediation setting and does not demand the active, continuous involvement of the mediator. Although this stage does not appear to be congruent with the others in that its accomplishment depends upon the participants, there is in fact a dynamic role for the mediator in it -- though an indirect one. Many types of disputes - family, educational, some neighborhood and workplace conflicts -- involve relationships that must continue after the resolution of the dispute. In these instances, the mediator needs to monitor the implementation of the agreement to determine how well it is beingd achieved. If major problems arise, the mediator must consider whether the agreement should be reviewed and adjusted in some manner, or whether the parties can work out their own individual solutions.

During the first few weeks and months following the signing of the mediated plan, the participants are trying to bring to fruition what was only conjectural before. It is a difficult time at best. While they may intend to follow the agreement as written, the participants' ability to match their intentions may have suddenly and drastically been altered. Unforeseen problems may arise, stemming either from the fluidity of the situational context that was

mediated or from the introduction of new factors beyond their control - a sudden job layoff, a death in the family, unexpected technological or environmental changes, and so on.

In summary, then, follow-up is a process of eliciting feedback from the participants at certain intervals during the implementation stage. Such contacts may lead to a suggestion from the mediator to hold a review and revision session at which the terms of the mediated plan can reviewed.

THE "PRINCIPLED NEGOTIATION" MODEL

The "Principled Negotiation" model, as articulated by Fisher and Ury (1981), can be boiled down to four basic points which define a straightforward method of negotiation that can be used under almost any cirumstance. Each point deals with a basic element of negotiation, and suggests what should be done about it.

People: Separate the people from the problem.

Interests: Focus on interests, not positions.

Options: Generate a variety of possibilities before deciding what to do.

Criteria: Insist that the result be based on some objective standard.

The first point responds to the fact that human beings are not computers. They are creatures of strong emotions who often have radically different perceptions and have difficulty communicating clearly. Emotions typically become entangled with the objective merits of the problem. Taking positions just makes this worse because people's egos become identified with their positions. Hence, before working on the substantive problem, the "people problem" should be disentangled from it and dealt with separately. Figuratively, if not literally, the participants should come to see themselves as working side by side, attacking the problem, not each other. Hence the first proposition: "Separate the people from the problem."

The second point is designed to overcome the drawback of focusing on people's stated positions when the object of a negotiation is to satisfy their underlying interests. A negotiating position often obscures what people really want. Compromising between positions is not likely to produce an agreement which will effectively take care of human needs that led people to adopt these positions. The second basic element of the method is: "Focus on interests, not positions."

The third point responds to the difficulty of designing optimal solutions while under pressure. Trying to decide in

the presence of an adversary narrows one's vision. Having a lot at stake inhibits creativity. So does searching for the one right solution. The participant can offset these constraints by setting aside a designated time within which to think up a wide range of possible solutions that advance shared interests and creatively reconcile differing interests. Hence the third basic point: Before trying to reach agreement, "invent options for mutual gain."

Where interests are directly opposed, a negotiator may be able to obtain a favorable result simply by being stubborn. Being stubborn tends to reward intransigence and produce arbitrary results. However, one can counter such a negotiator by insisting that his single say-so is not enough and that the agreement must reflect some fair standard independent of the naked will of either side. This does not mean insisting that the terms be based on the standard one selects, but only that some fair standard such as market value, expert opinion, custom, or law determine the outcome. By discussing such criteria rather than what the parties are willing or unwilling to do, neither party need give into the other; both can defer to a fair solution. Hence the fourth basic point: "Insist on using objective criteria."

The four propositions of principled negotiation are relevant from the time one begins to think about negotiating

until the time either an agreement is reached or a decision is made to break off the effort. That period can be divided into three stages: analysis, planning, and discussion.

During the "analysis" stage one is simply trying to diagnose the situation - to gather information, organize it, and think about it. The negotiator will want to consider the people problems of partisan perceptions, hostile emotions, and unclear communication, as well as to identify one's own interests and those of the other side. One will want to note options already on the table and identify any criteria already suggested as a basis for agreement.

During the "planning" stage the same four elements must be dealt with a second time, to both generate ideas and decide what to do. How can the people problems be handled? Of the participants' interests, which are the most important? And what are some realistic objectives? Additional options and additional criteria for deciding among them should be generated.

During the "discussion" stage, when the parties communicate back and forth, looking toward agreement, the same four elements are the best subjects to discuss. Differences in perception, feelings of frustration and anger, and difficulties in communication can be acknowledged and addressed. Each side should come to understand the

interests of the other. Both can then jointly generate options that are mutually advantageous and seek agreement on objective standards for resolving opposing interests.

In contrast to positional bargaining, the principled negotiation method of focusing on basic interests, mutually satisfying options, and fair standards typically results in a "wise" agreement. The method permits the participants to reach a gradual consensus on a joint decision "efficiently" without all the transactional costs of digging in to positions only to have to dig out of them. Separating the people from the problem allows one to deal directly and empathetically with the other negotiator as a human being, thus making possible an "amicable" agrement.

The models of general mediation (including one which develops principles for the negotiation dimension) presented in this chapter present a basis for highlighting the ways in which environmental mediation is similar to generic mediation in general. It is also a basis for understanding the ways in which environmental mediation has its own unique characteristics, requirements, activities, considerations and dynamics. The final chapter compares and contrasts environmental mediation with these models.

CHAPTER V.

INSIGHTS FROM EXPERTS

This chapter describes how the research for the dissertation was carried out, and presents the analytical framework. It provides an interpretation of the meaning of the different importance ratings given to each theoretical assertation by the respondents to the survey instrument.

APPROACH TO RESEARCH, AND ANALYTICAL FRAMEWORK

This research used a survey instrument as the means for gathering data. The instrument was designed to solicit information from environmental mediation practitioners. They were asked to evaluate the contribution of sixty-three conditions, considerations, and activities (which shall be referred to as "items" for the sake of simplicity) toward the achievement of a successful environmental mediation effort. A successful outcome was defined in the questionnaire as "a mediation effort which has led to an agreement which has been implemented, or is in the process of being implemented, according to the stipulations of the agreement (or in accordance with the wishes of the representatives of parties to the mediation effort when unforeseen circumstances have required changes in implementation)." A copy of this instrument is presented in

Appendix A.

The sixty-three items in the instrument were derived from literature on environmental mediation. Many were considerations and activities which writers had argued were keys to achieving mediated agreements. Others were contextual elements or activities of mediation efforts which had achieved success, as described in the case literature on environmental mediation. All were considered as potential contributing elements to effective environmental mediation. It was assumed that each had been considered carefully by at least one environmental mediation practitioner in terms of the effect it would have upon a mediation effort. These items, or considerations, are those which the author felt had the greatest potential to facilitate mediation settlements, based upon familiarity with the literature on environmental mediation. They are considered as potentially key elements in effective mediation of environmental disputes.

An extensive effort was made to identify environmental mediation practitioners who could appropriately respond to the questionnaire. A letter was written to the organizations listed in the DISPUTE RESOLUTION DIRECTORY (National Institute for Dispute Resolution) to obtain names and addresses of practitioners. One practitioner shared an

address list of attendees at a national workshop on environmental mediation. Practitioners who had described their work in the literature on environmental mediation were listed. The list of attendees at the Second National Conference on Environmental Dispute Resolution was combed for prospective respondents. In total forty environmental mediation practitioners were identified.

Questionnaires were sent to each of these practitioners. Follow-up letters were sent to those who did not respond promptly. A total of nine responses were obtained from this initial effort. Recognizing that this response rate was insufficient, an additional follow-up effort was conducted, this time using telephone interviews. These interviews netted an additional twenty-two responses, for a total of thirty-one completed questionnaires, or a response rate of 78 per cent. In order to obtain this response rate, three phone calls were made to each identified contact who had not responded. Within the 22 per cent who failed to complete a questionnaire, some refused to answer, and others were never "available" or never returned the calls.

Items on the questionnaire were evaluated by each practitioner according to their perceived importance. The respondents were asked to rate each item on the

questionnaire according to a scale of 3 to 0, with "critical" equal to 3; "very important" equal to 2;, "moderately important" equal to 1; and "irrelevant" equal to 0 in regard to their contribution to a successfully mediated settlement. Average ratings received by the items ranged from 0.30 to 2.80.

The numerical value assigned to each question by the respondents was entered into the computer using SPSS-X. The computer generated an average importance score for each element. Analyses were conducted using both condescriptive statistics and factor analysis. It soon become evident that a great diversity of conditions and activities are relevant to environmental mediation. No linear cause-effect pattern of association could be detected. The factor with the highest factor loadings had twenty component elements. This indicated that the factor analysis would not sort out discrete, identifiable component factors which are integral elements of the mediation process. Rather, the many activities and process of mediation are so highly interrelated that no small subsets emerged from this method of analysis. A more pedestrian, inductive analysis was done by simple examination of the patterns which were apparent by thoughtful examination. The results of these inductive analyses appear in the conclusions.

The results of the ratings by practitioners were grouped into four importance categories. Those which received an average importance rating of between 2.50 and 2.80 were grouped into a category labelled "A". This category contained nine questionnaire items. The next category of 2.00 to 2.49, which contained twenty-five elements, was called category "B". A category of items which ranged between 1.50 and 1.99 included seventeen items, and was called "C". The lowest category, called "D" began at 0.30, went to 1.49, and included twelve items. Restructuring the categories was done to divide the items reasonably evenly into groupings. Natural breaking points in the 0.00 to 3.00 scale of the questionnaire were more useful.

With this new scale, however, thirty-four items, or a little over half of the sixty three items in the questionnaire, were in the top two importance categories, A and B. The interpretation of the findings is cast within the revised categories. Tables which present the average importance ratings of each element appear in Appendix B.

The reliability of the items on the questionnaire was established by using concepts which were as one dimensional and simple as possible. Clear language facilitated the understanding of the questions by the persons asked. The

derivation of the items from the literature of environmental mediation grounded them in a real world context familiar to practitioners. Simplicity of expression and directness were the determinants of reliablilty.

Validity is the extent to which an item measures what it is intended to measure. Common sense is the key test of face validity (Welch and Comer, 1983). In this research face validity is assured by the grounding of the questionnaire items in the literature of environmental mediation practice. The language chosen reflects the contingencies facing practitioners in actual mediation situations. The fact that respondents only raised questions about two of the items suggests that the rest of the items had some form of face validity.

The first item doubted was "The mediator obtained a clear understanding that none of the potential participants in mediation had mental reservations about participating in mediation." The second was "The mediator did not have power to influence strongly the mediated agreement." Both "mental reservations" and "to influence strongly" may, therefore, not be valid concepts. In the case of "mental reservations," the expectation that the mediator could in fact determine whether or not potential mediation participants had such reservations was unrealistic. The

mediator simply would have no means for making any such precise assessment of individual attitudes on the basis of a brief and impersonal encounter in the preliminary stages of preparation for mediation. In the instance of power "to influence strongly," the degree of strength or weakness of the influence of the mediator is simply too subjective to be meaningful. No standard exists for measuring whether a mediator's influence is strong or weak. The expert respondents were, therefore, unable to evaluate the importance of this item in any meaningful sense.

The Eclectic Theory of Environmental Mediation was constructed by organizing the considerations and activities of mediation as prescriptions for effective environmental mediation. These were divided into ten sequential stages according to when they first became relevant in a mediation effort. The thirty-four items which were rated either as "almost always" or "usually important" were considered to be validations of prescriptions in the theory. They were grouped into an Essential Model of Environmental Mediation. Analysis was made of the common elements. The patterns discovered were generalized into recommendations for environmental mediation which are presented in Chapter VI.

INTERPRETATION OF THE FINDINGS

This section is the heart of the entire research enterprise, because it provides meaning to the empirical findings. In the interpretation of the meaning of the importance ratings placed in category A is taken to confirm the theoretical assertion for the particular item. The interpretation of the items in category B explains the situations in which the item is not important. That is, while in most environmental mediation cases the item is important, an explanation is needed of the occasional circumstances in which the consideration does not contribute to a successfully mediated conflict. The items rated as C or D in importance only contribute to success in mediation in exceptional situations. The unusual circumstances in which they are helpful in mediation are described. These interpretations are speculations based upon the author's knowledge of the literature of environmental mediation.

Identification of the Mediator

That "The mediator should not have an interest in the outcome of the dispute" received the highest importance rating of any item on the questionnaire. This indicates simply that this condition of mediation is inherent in the nature of mediation. The mediator simply cannot have some direct benefit in one or another of the outcomes of his

efforts to resolve the dispute and be an effective mediator.

That "The mediator should not have great technical expertise on the subject of the dispute" should be rated as only D in importance is surprising. The mind set of those with technical expertise is different from the process and relationship orientations which seem appropriate to those playing the mediator role. Therefore, a technical orientation would hinder mediator effectiveness. This difference in orientation is so widely accepted and well known in mediation circles, however, that it simply rarely becomes an issue. If it is not an issue, it is not a problem, and therefore is of little importance to the effectiveness of mediation.

The Preconditions of Mediation

The findings of this research on the preconditions of mediation appear to undermine much of the conventional wisdom on the situations which are most appropriate for the use of mediation. None of the ten preconditions qualified in category A in importance. Three were rated in category B.

The prescription that "The mediator should assess the suitability of the dispute for mediation" received a rating of B in importance. It is surprising that it was not rated in the A importance category, because the mediation process

may involve many people, including the mediator, and require that they commit much time, resources and effort to working through the mediation process. Without a careful assessment of the suitability of a dispute for mediation, there is potential for a false start, and much wasted effort. There are a number of disputes, however, which have such clear potential for mediation that such an assessment is not needed. Others may just as clearly be unsuitable. An experienced mediator may decide very quickly whether to stop or move ahead. No great effort to make an assessment is needed. An assessment of the suitability of a dispute for mediation is often appropriate, but not needed in many other instances. It is not an almost universal requirement.

The only B rating given to "The mediator should assess the suitability of the dispute for mediation" is surprising because a mediation process may involve many people committing much time, effort and resources to reaching a solution. Without a careful assessment, time and effort can be wasted. Potential disputes may exist, however, which a mediator may not need to assess for suitability. The situation is so obviously promising or umpromising, that the need to go ahead or abstain from action is perfectly clear. There is no need to ponder and explore the situation to decide whether to become involved.

Another dimension of assessing the suitability of a dispute for mediation relates to the mediator's potential excitement and personal involvement in reaching an agreement. If the issues in contention relate to aspects of the environment which the mediator greatly values, the personal desire to achieve a resolution may motivate involvement so strongly that no assessment is necessary. Alternatively, the issues may seem inconsequential relative to the values of the mediator, and the idea of mediation may seem like a lot of bother over nothing.

A personal reaction to the potential parties in mediation may make an assessment unnecessary. If the mediator develops a personal rapport with at least one of the individuals involved on either side of the dispute, the prospect of helping them participate in a mediation effort may be pleasant. If the personal chemistry of the mediator with the prospective disputants is very negative, the mediator may decide on the spot to abort the effort. Again, a careful assessment process is not needed.

The item on the questionnaire which stated that "There should be real consequences to the parties if mediation is not attempted, which makes mediation the best alternative" having an only a B importance rating was unexpected. Mediation usually involves much time and effort, and the

avoidance of negative consequences seems like a powerful motivating force for participating in mediation.

Disputes do occur, however, in which the consequences of not participating in mediation are not clear. The parties involved are anxious to settle a dispute and solve a problem, even though the results of not dealing with the issues are obscure. This inability to see into the future and estimate the repercussions of not mediating a conflict mean that no apparent "real consequences" push the contending parties to settle their dispute.

In some disputes, a positive approach to problem solving focuses attention upon preventing problems from developing. The parties concerned about the situation recognize that there are different perspectives on the use of resources and that the situation can get ugly if it is left alone. They decide to begin addressing the situation before positions begin to harden, and hostilities begin to develop. A creative, positive effort conducted early can nip a conflict in the bud. In such circumstances, since the dimensions of the dispute have not emerged in detail, negative consequences are not readily apparent. Not being yet visible, there are no "real consequences" to motivate the mediation effort.

The third element of preconditions which was given a B

rating by respondents as contributing toward a successful outcome of mediation was that "There should be uncertainty about possible outcomes of the dispute in a context other than mediation, i.e., in the courts, before a regulatory body, etc."

A very positive, proactive, problem solving approach to settling environmental disputes may push out concerns for outcomes in other contexts. The desire to do something as soon as possible to preclude greater problems later motivates quick action. Having a problem solving technology easily available forestalls thoughts of letting a potential dispute reach more formal, traditional forums for conflict resolution. While uncertainty about results of conventional approaches, i. e. the courts or regulatory bodies, is rated as B in importance, mediation practitioners and environmentalists are gaining enough experience in intervening early in disputes that these old approaches are sometimes irrelevant. The ability to solve problems more creatively and resolve substantive issues more completely than through the courts is an attraction of mediation apart from the lack of control over outcomes in other contexts.

Preconditions which were rated as only C in importance contradict conventional wisdom even more strongly than the three which were rated in the B importance class. The

observations and speculations of the practitioners and theorists who were the first to write about the practice of environmental mediation, which concluded that these preconditions were essential to successful mediation, now seem incorrect.

With the growing sophistication of environmental mediation and the environmentalist movement, it is only "sometimes" the case that "The issues in dispute should be concrete and specific." While once this immediate, tangible aspect of issues was essential so that the disputants could easily comprehend and grapple with the subject of the conflict, experience in the use of environmental mediation has enabled mediators to employ mediation techniques earlier in disputes, before positions have hardened and issues have been concretely and narrowly defined. The confidence and skill of mediators is great enough that potential combatants can be convinced of the value of forestalling heavy combat by joint problem solving while the exact nature of the problems is still vague.

The development of sophistication in collaborative problem solving also explains why "There should be a perceived balance of power among contending parties" is only rated as C in importance. Early, positive and proactive approaches to dispute resolution move the focus of efforts

away from estimating the power of opponents toward solving problems. While some disputes may enter phases in which opponents need to size up the opposition before entering mediation, many mediation efforts involve participants so completely in developing mutually acceptable outcomes that there is no need to be so highly adversarial.

The diversity of repercussions of environmental disputes are such that economic dimensions are only rated as C in importance. Thus, the contention that "Contending parties should have potential to experience economic costs if a mediated settlement is not reached" is becoming less and less important in environmental disputes as other considerations receive more attention. As the environmental movement has gained stature and a larger and larger proportion of the public is becoming appreciative of the esthetic and health benefits of environmental management, the direct economic costs pale in importance. Even if there are "economic costs," such as fees for lawyers and time taken from work to appear in court associated with litigation, the desire to have healthful conditions and an attractive environment are stronger forces encouraging mediation than are the simple cost considerations.

Among the most surprising findings of the survey are the low importance ratings received by the four items which

were rated in the D importance category. Conventional ideas of how conflicts develop and about the factors which make mediation difficult are discounted in these results.

It seems logical that "It should be clear that the parties to the dispute have reached a stalemate, or an impasse" before they will be motivated to enter mediation. The concepts of "stalemate," and "impasse," however, imply an assessment of whether a particular side is gaining or losing ground in a dispute. If the parties to a dispute can achieve mutually beneficial results by entering mediation it is much more desirable to be working hard to develop jointly satisfying results than to be estimating the direction of movement. Before a dispute stabilizes in an equal contest of wills, progress in developing a creative solution takes over.

The value of using legal precedents to establish a framework for resolving disputes in similar contexts in other jurisdictions is the rationale for the contention that "The dispute should not have potential to set important legal precedents." Each environmental dispute, however, differs so much from any other such conflict that legal precedents may be difficult to apply. The focus is too narrow to apply to the complexity of environmental conflicts. Furthermore, the environmental movement may have

achieved so many legal precedents already that few arenas remain in which they can be established. The ability to achieve creative solutions through mediation is so much more adaptable to the diverse circumstances of different environmental disputes that the legal route is obsolete.

The power of ideological and philosphical differences to lock disputants into unmovable positions is the rationale for the argument that "The dispute should not center on strongly held ideological or philosophical disputes." The rare importance of this factor in blocking mediated settlements is an indication that contending parties are moving toward solving problems before they are tempted to resort to philosophical or ideological arguments to support their positions. The satisfaction gained from working toward viable solutions, in spite of obstacles, makes the mediation process constructive and rewarding. Contending parties do not need to raise philosophical and ideological objections to the proposals of their opponents in order to make themselves heard. The mediation process involves them so intensely in working toward a settlement which is satisfactory to all positions that philosophical and ideological defenses are not needed.

The difficulty of overcoming hostility is the basis for the argument that "The opposing parties should not have a

history of contentious relationships." The improving track record of environmental mediation, and the creativity of solutions which have been achieved, enable opposing parties to put aside personal enmity and animosity toward opponents which have developed from previous encounters. The formal guidelines for managing the mediation process impose a structure on the process which shifts the focus from the particular participants to the substantive issues being addressed. Involvement with the process in a well organized framework removes the temptation to focus on personalities and old grievances.

Recruitment of the Participants in Mediation

The importance ratings of the items relating to the recruitment of participants in mediation were spread across all levels of importance, with the average rating toward the low importance end of the spectrum.

The one item in this category which was rated as A in importance was that "All parties with a substantial interest in the dispute should be represented in mediation." This broad representation of positions in mediation assures that the product of the mediation effort will at least minimally satisfy the whole range of concerns of parties with an interest in the dispute. The danger is avoided that a neglected party will use the courts to block the process.

Two items concerned with recruitment were rated as in the B classification. "Particular effort and attention should be devoted to the selection of participants in mediation" applies to environmental disputes which are complex and involve a diverse range of interests. When a dispute is narrowly defined and the problems involved are clearly evident to the opposing sides, little effort may be needed to obtain well qualified representatives to participate in mediation. This item applies to the environmental conflicts of broad scope, but is not a condition for successful mediation in more limited conflicts.

Similar dimensions of environmental conflict apply to the B rated position that "The mediator should educate the contending parties on the mediation process." In the exceptional cases in which the dispute is narrowly focused, the management of the mediation process may be simple and straightforward. The small number of participants can deduce easily for themselves how the process will be conducted, or may even design the process to suit their needs as they go along. The dynamics are simple and familiar enough that mediation develops its own momentum and the groups are able to manage the dynamics of their interaction with little difficulty. The mechanics of

managing the process do not distract from achieving results, and the rewards of progress motivate the disputants to overcome difficulties as they arise.

In mediation efforts which are large scale, and which involve many individuals or groups, the dynamics are so complex that the participants need to understand how mediation will operate before they begin the process. Because the ground rules used in mediation are not the conventional ones used in public meetings, the participants need to know what will be happening before the process begins.

The theortical position that "Participants in mediation should have clearly identifiable constituencies" derives from the concept that those who take positions in mediation represent larger publics of like-minded individuals. The C rating of this item, however, suggests that in the majority of cases individuals who are fair-minded, articulate and effective represent the public without having to be related to a clearly identified constituency. Their skill in presenting positions will satisfy the public interest so well that no disgruntled group of individuals will claim to have been ignored. They may represent groups or organizations which have such great legitimacy with the general public that few, if any, individuals will take issue

with their right to articulate the interests of a particular perspective on the conflict.

The increasing sophistication of environmental mediation may account for the D importance rating which two items related to recruitment of participants received. In few situations or for few mediators is it necessary that "The mediator should obtain a clear understanding that none of the potential participants in mediation have mental reservations about participating in the process." "Mental reservations," at least at the beginning of the process, may in fact not be obstacles to achieving a mediated agreement. When the initial steps are being taken to set up an environmental mediation effort, the prospective participants should enter the process with their eyes open. Unless they are very experienced in participating in environmental mediation, which is probably a rare condition, they will wonder whether the process will benefit them or whether it will even work. Experienced environmental mediators will gain the confidence of the participants as the effort is designed and the participants begin to make progress in mediation. While "reservations" about mediation in the later phases may be a problem, at the initiation of the effort it is not often a concern.

The position that "New parties should be added as the

mediation process evolves and new issues are identified" is obsolete due to the experience which has been gained in mediation by practitioners. The ability to find competent and articulate individuals to represent all major perspectives in mediation precludes the need to add any parties later. Environmental mediation has achieved such legitimacy that capable representation can be found for all of the concerns, issues and perspectives which are likely to emerge in a mediation effort.

Design of the Mediation Process

The elements in the questionnaire which focused on the design of the mediation process achieved importance ratings which were better than average. Three items were rated in the A category of importance.

Ground rules are a key element in environmental mediation. A joint effort is indicated by the item "The participants and the mediator should develop ground rules for the process," and the questionnaire item was rated as A in importance. The mutual effort helps the mediator to establish rapport with participants. The ground rules are appropriate to the group using them because they were collaboratively produced. The constructive interaction which results from joint effort provides a framework and a structure for a process which often involves intense

differences of opinion and perspective. The ground rules guide behavior into positive patterns, maintain the focus upon substantive issues, and help to avoid personal attacks.

In some mediation efforts, the participants may not in fact actually participate in developing the ground rules. Giving their approval of the ground rules is the next best level of involvement, as is promoted in the contention that "The ground rules for mediation should be approved by all participants." This approval legitimizes the ground rules so that the participants do not feel as though they are arbitrarily imposed. The approval process implies the opportunity to revise ground rules which appear to be inappropriate.

The third A ranked proposition is that "The mediator should obtain the trust of the contending parties." This is simply a basic condition which facilitates the intense interactions which take place in mediation. The open communication which fosters the give and take needed for productive negotiation is based on trust.

The B rated condition that "Contending parties should participate in designing the mediation process" facilitates structure and activities in which the particular participants feel comfortable. Their involvement strengthens ownership of and commitment to the mediation

process. In a few mediation efforts, however, the participants accept the design suggested by the mediator. Skilled mediators know the designs which are most suitable to the particular disputes being addressed and the dispositions of the participants involved. Relatively simple conflicts over straightforward issues may need the barest minimum of structure to guide the process.

The proposition that "The design of the mediation process should be done with the advice and consent of the mediator" ranking only in the B category suggests that the mediator is willing to accept a process which has been designed by others on occasion. A few organizations which design and manage mediation efforts are so experienced in conducting environmental mediation and mediators who work with them are so familiar with their approach to design that the mediator can take over the effort after the plan of structure and process has been completely worked out. In other cases a mediator may be invited to assist in an effort begun by another mediator, or to complete a resolution process which another mediator was not able to finish, and the substitute has no need to design the approach.

Another recommendation which is classified as B in importance is that "Ground rules should be developed for dealing with the news media." Some mediation cases are of

vary narrow scope and involve few interests. Others focus upon extremely technical issues. The local media may simply have little interest in environmental disputes in others. These instances need no effort to protect the mediation process from possible distortions in reporting, or to provide confidentiality for the sensitive interactions which take place during negotiations.

Three items related to the design of mediation were rated in the C importance category. The contention that "Clear and enforceable deadlines should be developed to provide an impetus for a mediated settlement" is relevant to cases in which the participants fail to develop enough momentum to complete a settlement on their own. When recurrent obstacles slow down mediation, some participants lose motivation to tackle the difficulties of the final agreement. Members begin to enjoy the process too much for its own sake. The provision of deadlines provides the extra push to achieve a settlement.

The position that "Contending parties and the mediator should hold regularly scheduled meetings " is appropriate only to situations in which this artificial method will boost along a lagging process. In most mediation efforts, the movitations of participants themselves is strong enough to keep the process moving. A flexible schedule is more

appropriate to the time constraints of competing individual personal and business commitments and to the need to research some issues at length before positions can be worked out. These contingencies make a flexible approach to scheduling more appropriate.

The most surprising proposition in those rated as only C in importance is that "Positive attitudes and interactions should develop among representatives of contending parties to mediation." The development of a positive climate would seem to be an essential prerequisite for the level of trust needed to work through intense disagreements. In the majority of mediation cases, however, the commitment of the participants to reachng a solution is so strong, and the design of mediation is so skillfully structured to focus on issues and away from personal antagonisms that progress is possible without the development of friendly relationships. Participants in mediation realize that they have an unusual opportunity to achieve creative solutions not possible within more traditional dispute resolution approaches. They are determined to obtain the best results possible. The development of friendly personal relationships is not an important factor motivating a mediated settlement.

Identification of the Issues

The position that "The issues in dispute should be clearly identified" was rated as B in importance. It is strange that this activity did not receive a higher importance rating because having a clear statement of issues appears to be a prerequisite for clear communication on the substance of the dispute. In mediation cases which are limited in scope, which involve a small number of issues, and in which the issues are clearcut, the issues are so obvious to all participants that a particular effort to identify them clearly would be unnecessary. The participants approach the mediation process with sufficient information on the issues to proceed immediately into mediation.

In disputes which focus on complex issues, involve serious enviromental impacts and which cover wide geographical areas, it is understandable that "Agreement should be reached among contending parties on the geographical boundaries and time horizons of the issues in dispute." This item was rated in the C division of importance. Environmental disputes which concern narrow geographical areas, in which the disputants are few and in which the facts are simple need no effort to define geographical scope and time horizon for analysis.

Establishing the Information Base

The items on the questionnaire relevant to establishing the information base were below average in importance. Only two of the six items were given an importance rating as high as B.

The expert respondents rated as B the item "Efforts should be made to be sure that all representatives of parties to mediation have an adequate understanding of the facts relevant to the dispute." Occasionally disputes involve a narrow scope of simple issues. In such situations, the parties to mediation obtain adequate understanding of the issues with a minumum of individual effort. In addition participants in some disputes may have previous familiarity with the situation or may have a technical training relevant to the issues in dispute. Thus, it is not always necessary to devise means of informing participants on the details of the dispute.

An item which also received the B importance rating was "The issues in dispute should be broken into logical pieces for consideration." This approach is particularly important for addressing complex environmental issues with many dimensions. In disputes with simpler issues, however, it is important to try to see the issues in wholes. Eventually, the environmental impacts of proposed actions will have to

be seen in their entirety.

Three items were rated in the C importance classification. In this rating category is "Contending parties should have equal ability to obtain and understand the facts and data relevant to the dispute." In unusual instances there will be substantial differences in the level of sophistication of the representatives to mediation - some individuals will be at a disadvantage in comprehending technical aspects of environmental evaluation. In the majority of cases, however, the representatives to mediation will trust their opponents to communicate clearly on issues so as to compensate for differences in background. In addition, some representatives simply will not be interested in technical details, and will trust those with the appropriate background to summarize findings. In a number of environmental conflicts, the issues are simple enough that no specialized knowledge is required to participate on an equal basis.

Another item, which is had a C level of importance, is "Agreement should be reached among participants in mediation on the facts and data relevant to the dispute." This applies to cases involving highly complex environmental impacts, situations in which environmental effects are especially widespread, or conflicts with high levels of

suspicion among disputants. Where trust and open communication develop in mediation, representatives will accept specialized information on faith. If the facts and data are simple and straightforward, no special effort is needed to assure that all parties comprehend the information equally well.

That "Small groups should be used to address technical questions in the dispute" is only rated at C in importance relates mostly to unusual environmental disputes with very technical aspects to be addressed. The use of subgroups should be avoided because they tend to fragment the process, as information must be communicated to the main sessions at some point. Small groups with members who have particular expertise and interest can function far more efficiently than large groups, but are appropriate only in the most technical context.

The ranking of only C received by the element "Advisors, or advisory groups, should be used" indicates that in the great majority of mediation efforts it is possible to deal with the technical aspects of the dispute directly among participants. The parties to mediation obtain the information they need except for the occasional situation with highly complex aspects beyond the understanding of the average mediation participant.

Advisory groups are needed rarely.

Development of the Preliminary Agreement

The one item in the "Development of the Preliminary Agreement" category which ranked as A in importance was that "Communication should be maintained with those who will be responsible for implementing the agreement." This effort helps to assure that the agreement being developed in mediation is related to the realities of implementation. Those responsible for implementation will be more effective with when they have complete and timely information.

Eight of the items received importance ratings which placed them in the B category of importance. While in most instances, the items are relevant to mediation, there are occasional mediation efforts in which they are not applicable. An explanation is provided for these occasional circumstances when the consideration is not important.

The recommendation that "A variety of alternative solutions should be generated by the participants in mediation" is relevant for the majority of disputes in which a wide variety of solutions are possible. In some mediation efforts, however, the participants develop a productive working relationship in the early phases of mediation, and are able to hammer out a single resolution or a small number of alternative solutions which embody the concerns of all

perspectives. An intimate familiarity with the interests and objectives of opponents makes it possible to narrow the differences between positions so that a small number of obvious solutions begin to emerge. Small scale environmental disputes involve issues of sufficient simplicity that the parties are able to narrow the options quickly.

It is of B level importance that "The contending parties and the mediator should hold informal meetings." In a few highly complex mediation efforts, however, a formal structure and regular schedule may be necessary to keep the work on track. In mediation efforts in which contending parties mistrust one another, formality of interaction between the mediator and the parties assures that all perspectives receive equal time and treatment. Informality is not appropriate if mistrust exists.

It is important that "The contending parties should hold their own caucus sessions," and this item was rated in the B category. In small scale mediation efforts where communication is especially open and a high level of trust is developed among all participants, the use of caucus sessions may be superfluous or even have a negative impact. Direct interaction will be more effective. Caucusing can detract from cooperation.

The B rating of the need that "The mediator should spend time interacting with participants on a one-on-one basis" implies that the mediator will rarely encounter circumstances where face-to-face interaction is not appropriate. Such an unusual circumstance may occur in an especially complex mediation effort involving a variety of parties. In such an effort, diverse perspectives and complicated issues requie a formalized and bureaucratic structure.

A few circumstances of mediation do not include the requirement, ranked B, that "Parties responsible for implementing a mediated agreement should provide assurances that they will follow through." These are instances in which those who will implement a mediated settlement are directly involved in mediation. Commitments made in the process of developing a solution for the dispute assure the implementation of the agreement so that no formal agreement is necessary.

Another contention which is rated B is that "Clear means should exist for binding the parties to the agreement." Exceptional circumstances are the situations in which the mediated settlement clearly satisfies the concerns of all interests so that all are strongly motivated to fulfill their obligations. Another exception is the

solution which is so simple that it will be obvious to all parties whether or not the agreement has been satisfied. A moral impetus inspires participants to fulfill their commitments.

It is B in importance that "A preliminary agreement should be reached." Such a document gives the constituents something tangible to discuss. Mediation efforts which do not need such an agreement are those small disputes in which the participants in mediation do not have large constituencies to consult. They have the trust of those whom they represent so that they can produce a final settlement without interim consultation. In those few mediation cases which do not need a preliminary agreement, there is no need to put a nonexistent agreement into writing. Consequently, in these few mediation efforts, there is no need that "A preliminary agreement should be put into writing."

Four aspects of the development of the preliminary agreement are only rated C in importance. One of these was that "Small groups should be used to address single issues in the dispute." This technique should be used only occasionally in especially complex mediation cases when particular difficulties are encountered on detailed elements. A small group can achieve agreement much more

quickly than a larger group. The interrelatedness of environmental issues, however, makes it desirable ordinarily to avoid subdividing substantive issues because the result of mediation must meet the conditions of an integral environmental situation.

A C rated activity is that "The mediator should assist the participants in mediation who represent a particular side to reach agreement within their membership on positions to be put forth in mediation." This assistance is needed in the few instances in which the participants have large constituencies and lack the skill to bring the membership to agreement on positions in mediation. In the majority of mediation efforts constituencies are small. Representatives are in a position to take a strong position without consultation because they have highly legitimate leadership positions or the expected reactions of constituencies are highly predictable.

The usually stable representation in the majority of mediation efforts is reflected in the C importance ranking of "The same individuals should serve as negotiators throughout the mediation effort." Careful selection of representatives to mediation, strong commitments to achieving a mediated settlement on the part of negotiators, and mediation efforts which are skillfully managed to

maintain steady progress make concern about continuity unnecessary.

That "The mediator should assist in drafting the wording of the preliminary agreement" is only C in importance reflects the skill of participants in the majority of mediation cases. The representatives are usually capable and articulate individuals who need no assistance in wording a preliminary agreement to meet the concerns of all perspectives. Mediator involvement at this stage is not often needed.

Two items on the questionnaire were only importance enough to fit the D category. One of these was that "The mediator should not have power to influence strongly the mediated agreement." A basic principle of mediation is that the contending parties themselves must develop mutually acceptable solutions to the conflict. Only direct involvement of all participants in creating outcomes which address their concerns will obtain unanimous acceptance. The use of too much influence by the mediator on the development of an agreement will interfere with the full participation of the parties in producing a settlement. For these reasons, it is rarely important for the mediator to have the power to influence strongly the mediated agreement.

An intervention on the part of the mediator which is

only ranked D in importance is that the "Mediator should put forth trial solutions." In the majority of mediation efforts open communication and a high level of trust enable the contending parties to develop mutually satisfactory agreements without mediator suggestions. In unusual situations in which a mediation effort has lost momentum due to serious disagreements, the development of a trial solution by the mediator may fit the pieces of a resolution together better than the contending parties can themselves. As just noted, however, this situation, will not happen often.

Consulting Constituents on the Appropriateness of the Preliminary Agreement

In the mediation efforts in which a preliminary agreement is developed, it is important in the A category that "The participants in mediation should consult with their constituents on the suitability of the preliminary agreement." This consultation allows the constituents to be informed of progress in mediation while they still have an opportunity to suggest changes. It prevents the rejection of the final agreement because the mediators were out of touch with the concessions which their constituents would support.

A consideration which ranked as B in importance is is

that "Participants in mediation should maintain regular contact with their constituents." In some instances, the representatives have the full confidence of their constituencies and are in touch with their attitudes toward the issues in conflict. An occasional meeting with constituents is sufficient to keep them informed.

Because it is important for the participants in mediation to have the full support of their constituents, it is important at the B level that the "Constituents consulted should approve the preliminary agreement." This affirmation enhances the legitimacy of the representatives in mediation. In some instances, however, constituents may not need to approve the preliminary agreement, but trust their representatives to recommend changes which are feasible. They have full confidence in the agreement which their representatives will approve. No formal validation is necessary.

A B-ranked dimension is that "No major group of constituents should oppose the preliminary agreement." In a few cases, an agreement is so solidly supported by the majority of parties to mediation that opposition from a major group of constituents will not damage the whole process. Public legitimacy and support prevent the preliminary agreement from being subverted by a major party

who remains unconvinced. In the typical mediation process, however, opposition to a preliminary agreement could make it extremely difficult to achieve a mediated settlement.

A consideration which is in the C category of importance is that "The constituents consulted should suggest modifications in the preliminary agreement." In most mediation efforts the preliminary agreement will be acceptable to constituents. In a few instances, however, modifications suggested by constituents will improve the preliminary agreement.

Making the Agreement Final

An A-level importance consideration is that "An agreement should be reached which is approved by all parties to mediation." Approval by all parties gives legitimacy to the mediated agreement so that it will withstand attack.. If all parties to mediation do not agree to the mediated settlement, difficulties can be encountered in implementation.

The expert respondents rated as B in importance that "Modifications recommended by constituents of representatives to mediation should be incorporated into the final agreement." Once constituents see improvements which can be made in a preliminary agreement, the representatives to mediation have an obligation to be sure that their

suggestions are reflected in the final document. In the mediation cases in which constituents recommend no changes, logically, incorporation of modifications into the final agreement is not required.

In making the agreement final "The mediator should assist in drafting the wording of the final agreement" is only rated in the C category. In the majority of instances, the contending parties to mediation will have developed productive working relationships and developing the wording of a final agreement will be worked out with no major difficulties. In a small minority of difficult disputes, however, the mediator can help to maintain momentum by intervening to develop wording which is acceptable to all perspectives.

Assuring the Implementation of the Agreement

An importance rating in the A classification was received by the contention that "The agreement should be ratified, or approved, by the constituents of the representatives to mediation." This ratification provides the final stamp of approval to give powerful public legitimacy to the mediated settlement. Without formal ratification, those represented may not realize that a settlement has been formalized and the mediation process is completed.

A B-ranked importance element to facilitate implementation of the agreement is that "Means should be provided for monitoring the agreement." Oversight of implementation provides pressure to assure that commitments are met. In some instances, the implementation activites are simple enough that no monitoring is needed. When parties to mediation develop solutions which work equally to the benefit of all, the support and legitimacy given to implementation from all perspectives is a moral force which may forestall the need for monitoring.

While it is B in importance that "Means should be provided to re-make, or re-decide the agreement, if necessary," this option is sometimes not taken. Disputes which are simple and straightforward are concluded in readily acceptable ways which need no subsequent adjustments. In very complex disputes, however, unforseeable environmental changes may occur. A provision for revisions in the agreement is necessary to deal with these contingencies.

Two dimensions of implementation help to reinforce public legitimacy for mediated settlements. They rated only in the D category of importance. One was that "There should be public support for mediation." If the mediation process is carefully designed, the participants have strong

ownership in the process and progress is made in reaching a fair settlement. Reliance on the legitimizing element of public support to facilitate implementation is not needed. The internal dynamics of mediation, and the bearing of the agreement on the interests of the participants, will provide the momentum to assure implementation.

The respondents to the questionnaire also rated as D in importance that "At least one public figure should agree to guarantee the agreement." The internal dynamics and motivating forces in mediation are more critical to successful implementation than is the external influence of a guarantee by a public figure. Legitimation is developed within the mediation process, not by the involvement of public figures.

CHAPTER VI

CONCLUSIONS

In this chapter the most important concepts are grouped into an Essential Model of Environmental Mediation, and common dimensions of the concepts are developed inductively. In order to highlight strongly the major characteristics of the Essential Model, a comparison is made with those items which received importance ratings in the C and D categories. These lower ratings are characterized as the Secondary Model. Four dimensions which distinguish the Essential Model from the Secondary Model are described. Principles are abstracted from these groupings into recommendations for effective environmental mediation. An analysis of the similarities and differences of the Essential Model with the relevant models discussed in Chapter IV emphasizes the distinctive features of the Essential Model. Recommendations for further research are made. Critical reflections on the state of the art of environmental mediation conclude the chapter.

THE ESSENTIAL MODEL OF ENVIRONMENTAL MEDIATION

The items on the questionnaire which were ranked either in the A or the B category of importance are abstracted here as "The Essential Model of Environmental Mediation." They

are the considerations, procedures and processes which are most critical to the success of an environmental mediation effort. The items in each importance category are listed, and themes, or dimensions, are identified inductively by examining the concepts for similarities. The relationship of each questionnaire item to the theme is then explained. A final section translates the themes and dimensions into a set of prescriptions for successful environmental mediation.

Items in Importance Category A

The following items on the questionnaire received the highest ratings and were, therefore, classified in importance category A.

1. The mediator should not have an interest in the outcome of the dispute.
2. All parties with a substantial interest in the dispute should be represented in mediation.
3. The participants and the mediator should develop ground rules for the process.
4. The ground rules for mediation should be approved by all participants.
5. The mediator should obtain the trust of the contending parties.
6. Communication should be maintained with those who will be responsible for implementing the agreement.

7. The participants in mediation should consult with their constituents on the suitability of the preliminary agreement.

8. An agreement should be reached which is approved by all parties to mediation

9. The agreement should be ratified, or approved, by the constituents of the representatives to mediation.

These items were examined inductively to identify common characteristics. Among them three dimensions were apparent: "participative equity," "accountability," and "interpersonal interaction." Five items reflected "participative equity" - which means that those concerned with the dispute or involved in mediation have equal opportunity to have their say and influence the outcome of mediation. The relevant items are 1, 2, 3, 4, and 8.

The neutral position of the mediator helps to assure that all perspectives receive the equal consideration of the mediator. The equal representation of all parties with a substantial interest in the dispute assures that no major interest is deprived of the opportunity to have its concerns heard. The joint development of ground rules by the mediator and participants assures that the mediation process will be conducted in such a way that all perspectives receive fair treatment. The approval of the agreement by

all parties assures that it does indeed respond fairly to the interests of all parties.

"Accountability" concerns the requirement that participants in mediation maintain contact with their constituencies and with those who will implement a mediated settlement. This aspect is reflected in items 6, 7 and 9. Communication with those who will implement the agreement assures that the settlement produced will be feasible for implementation. Consultation with constituents assures that the agreement will reflect their interests. Obtaining the ratification of constituents reinforces responsiveness to their concerns.

The dimension "interpersonal interaction" contains only Item 5. which concerns the development of trust between the mediator and the contending parties. This quality of relationships facilitates the frank and open communication needed to shape an agreement which reflects all interests equally. Interpersonal interaction skills are the nuts and bolts of mediation. A mediator who is unable to listen and to facilitate dialogue will be inadequate to the task.

Items in Importance Category B

Twenty-five items on the questionnaire received average rankings which were classified as B in importance. These are listed, then discussed below.

1. The mediator should assess the suitability of the dispute for mediation.

2. There should be real consequences to the parties if mediation is not attempted, which make mediation the best alternative.

3. There should be uncertainty about possible outcomes of the dispute in a context other than mediation, i.e., in the courts, before a regulatory body, etc.

4. Particular effort and attention should be devoted to the selection of participants in mediation.

5. The mediator should educate the contending parties on the mediation process.

6. Contending parties should participate in designing the mediation process.

7. The design of the mediation process should be done with the advice and consent of the mediator.

8. Ground rules should be developed for dealing with the the news media.

9. The issues in dispute should be clearly identified.

10. Efforts should be made to be sure that all representatives of parties to mediation have an adequate understanding of the facts relevant to the dispute.

11. The issues in dispute should be broken into logical pieces for consideration.

12. A variety of alternative solutions should be generated by the participants in mediation.

13. The contending parties and the mediator should hold informal meetings.

14. The contending parties should hold their own caucus sessions.

15. The mediator should spend time interacting with participants in mediation on a one-on-one basis.

16. Parties responsible for implementing a mediated agreement should provide assurances that they will follow through.

17. Clear means should exist for binding the parties to the agreement.

18. A preliminary agreement should be reached.

19. A preliminary agreement should be put into writing.

20. Participants in mediation should maintain regular contact with their constituents.

21. The constituents consulted should approve the preliminary agreement.

22. No major group of constituents should oppose the preliminary agreement.

23. Modifications recommended by constituents of representatives to mediation should be incorporated into the final agreement.

24. Means should be provided for monitoring the agreement.
25. Means should be provided to re-make, or re-decide the agreement, if necessary.

These propositions were analyzed inductively to identify common themes, or dimensions. Among the twenty-five items which were ranked in importance category B, five patterns were found. These were "stage setting considerations," "procedures which assure participative equity," "mechanics of operations," "interpersonal processes," and "procedures which assure accountability."

The "stage setting considerations" focus upon whether the conditions found in the environmental conflict make it suitable for mediation. These were items 1, 2 and 3. The first step, logically, is for the mediator to assess the suitability of the dispute for mediation. The two conditions which usually set the stage for productive mediation are "real consequences if mediation is not attempted," and that "there is uncertainty about the outcome of the dispute in a setting other than mediation."

The second pattern here consists of procedures which assure "participative equity." These were items 4, 5, 6, 7, 9, 10, 12, and 14. Devoting particular effort and attention to the selection of participants in mediation promotes participative equity by assuring that each perspective on

the dispute is represented by a spokesperson who is strongly committed to the interests of the parties being represented, and who is knowledgeable and articulate. The procedure of educating the contending parties on the mediation process enhances the effectiveness of each participant by assuring that each representative in mediation understands how the process works and how the interests of each party are protected. Having the issues in the dispute clearly identified enhances participative equity by assuring that all participants have an equal level of understanding of what the dispute is about. Assuring that all participants have an adequate understanding of the facts protects participants from being unable to participate equally due to gaps in their understanding. Generating a variety of alternative solutions assures that every point of view will have one or more solutions that addresses that perspective. That is, each party to mediation will find at least one alternative which embodies the concerns and interests which they bring to mediation. The use of caucus sessions assures effective representation of each viewpoint by allowing opportunities for consultation so that positions are clearly and forcefully articulated in a unified voice.

Two questionnaire items related to the "mechanics of operations." These were numbers 8 and 11. Procedures

developed for dealing with the news media protect the confidentiality of mediation and assure publicity which does not threaten the process through misinterpretation. Breaking the issues into logical pieces is a process which facilitates comprehension of complex environmental issues.

"Interpersonal processes" of mediation were addressed in items 13 and 19. The use of informal meetings between the mediator and the contending parties helps the mediator to develop trust and rapport with the participants. Similarly, one-on-one interactions with the participants helps to accomplish the same purpose. Open communication is a prerequisite to a successful mediation effort.

A dimension which was the focus of ten items was "procedures which assure accountability." These were represented by items 16 through 25. Obtaining assurances that those responsible for implementing a mediated settlement will follow through makes the implementors accountable to those participating in mediation. Clear means of binding the parties to the agreement commits the participants in mediation to honoring the agreements. The development of a preliminary agreement and putting it into writing provide a document which the participants in mediation can share with their constituents. Maintaining regular contact with constituents keeps the participants in

mediation in touch with constituent concerns and interests. Obtaining constituent approval of the preliminary agreement and incorporating modifications recommended by constituents into the final agreement provide an opportunity for their direct response to the mediation effort. Avoiding the opposition of any major group of constituents keeps the agreement from facing major obstacles later from interests which were not adequately addressed. Providing for monitoring the implementation of the agreement assures that those carrying out the mandate of the settlement will have advice, if needed, and puts pressure on them to adhere to the intentions of the participants in mediation. Making provisions to re-make, or re-decide, the agreement keeps the settlement responsive and accountable to revisions needed due to unexpected changes in the environment.

Key Dimensions of the Essential Model

In order to highlight the key dimensions of the Essential Model, the 34 prescriptions which received an average importance rating of 2.00 and above (categories A and B) were compared with the 29 prescriptions which were given average evaluations of importance by experts of less than 2.00 (categories C and D). The 29 lower rated prescriptions were termed the Secondary Model. Thus, the

prescribed activities, processes and conditions which most strongly facilitate successfully mediated agreements compose the Essential Model, while those items which make a lesser contribution to effective mediation are the Secondary Model.

The comparison of the Essential Model with the Secondary Model revealed four dimensions on which they contrasted. These dimensions were:

1. Flexible, adaptive and coherent aspects were found to characterize the Essential Model, while the Secondary model was formalistic, structured, and compartmentalized. The flexible, adaptive and coherent aspects relate to persons and processes, while the formalistic, structured, and compartmentalized aspects relate to facts and analysis.

2. Participative dimensions of the Essential Model were clearly evident, while the Secondary Model was more authoritative.

3. The Essential Model contained many items which demonstrated accountability, while the Secondary Model no major accountability item.

4. In the Essential Model, the interpersonal relationships emphasized the relationship of the contending parties with the mediator, while in the Secondary Model, there was more

emphasis upon the interpersonal relationships among contending parties.

A manifestation of these dimensions is seen in the contrast in the mediator roles found in the Essential Model as opposed to the Secondary Model. In the Essential Model, the mediator serves as a facilitator and educator, while in the Secondary Model the mediator functions in a more directive, controlling capacity. The following text is an elaboration of the differences between the Essential Model and the Secondary Model. It should be noted that the most overarching and comprehensive dimension of the Essential Model in contrast to the Secondary Model is the flexible, adaptive and coherent aspect, as against the formalistic, structured, and compartmentalized aspects. The next two dimensions - the participative versus authoritative, and accountability versus nonaccountability aspects - fit under the first dimension, but also highlight different aspects of the major, overarching dimension. The last dimension addressed - the interpersonal relationships of the mediator - is a distinctive aspect of comparison of the Essential Model with the Secondary Model.

1. The flexible, adaptive and coherent versus the formalistic, structured, and compartmentalized dimension.

The flexible, adaptive nature of the Essential Model is first demonstrated in the prescription that the mediator should not have an interest in the outcome of the dispute. This means that the mediator will see no particular direction that a settlement process will take, nor a specific type of settlement which is most appropriate. The mediator can then let the process evolve in accord with the interests of the participants in a flexible manner, rather than follow a particular logically determined path to a solution.

Three of the preconditions for mediation fit the flexible, adaptive, coherent dimension of the Essential Model (categories A and B), while four of them fit into the formalistic, structured, compartmentalized dimension of the Secondary Model (categories C and D). The need for the mediator to assess the suitability of the dispute for mediation is a general prescription which defines no particular, formal criteria for determining suitability. The mediator conducts a subjective, personal evaluation of the suitability of the dispute for mediation rather than formalalistic, predetermined criteria. The mediator has flexibility in personally deciding whether the dispute is appropriate for mediation.

Two other preconditions to mediation which were in the

Essential Model illustrate the flexible, adaptive dimension. The prescription that there should be uncertainty about possible outcomes of the dispute in a context other than mediation is a general criterion which does not specify particular types of uncertainty which must be identified. The perception that there is some uncertainty is enough. No precise, formal standard is needed for establishing the suitability of a dispute for mediation. Likewise, the prescription that there should be real consequences to the parties if mediation is not attempted and the consequences should be such that mediation appears to be the best alternative for settling the dispute, fits the flexible, adaptive aspects of the Essential Model. The real consequences are not required to be indentified in terms of specific, concrete, formal criteria, but are general enough to fit a great variety of environmental disputes. The mediator has flexibility in establishing whether the supposed consequences of not reaching a settlement appear to be substantial and significant enough to make mediation suitable.

Four of the preconditions for mediation were rated less than 2.00 in importance - that is, in categories C and D, and fit the formalistic, structured aspects of the Secondary Model. That the issues in dispute should be concrete and

specific is a criterion which requires that a conflict should have reached a stage in which detailed information is available on the substance of the dispute. It does not allow the contending parties to collaboratively examine a problem as it first becomes apparent, and determine for themselves which aspects of the dispute they will address. It assumes that progress on reaching a settlement can begin only when problems are formally defined and structured. It does not allow the parties the flexibility to describe and evaluate the issues in terms which are most meaningful to them and most helpful in working toward a settlement.

Another formalistic prescription is that there should be a perceived balance of power among contending parties. This focuses attention upon a particular aspect of the relationship among contending parties rather than upon the resolution of the dispute. It requires a careful, formal examination of the perceptions of the different parties of their opposition. By emphasizing power, rather than cooperative problem solving, it may emphasize and solidify the barriers between the parties rather than help them to explore solutions to their differences.

A similar prescription is that it should be clear that the parties to the dispute have reached a stalemate, or an impasse. Again, the emphasis is upon measuring and

evaluating precisely whether the dispute has reaching a barrier, rather than upon moving forward collaboratively toward a solution. The focus is upon a particular, formal condition rather than upon the means for overcoming differences.

The fourth prescription is that the contending parties should have potential to experience economic costs if a mediated settlement is not reached. This criterion requires that the nature of the dispute be examined in precise, formal, monetary terms, rather than on the existence of a dispute in more general terms. It suggests that the opposing parties will be motivated only if they feel they may suffer consequences to their pocketbooks if they do not reach a settlement. It closes the door to more altruistic concerns for the environment or the community welfare. It narrows the focus, rather than allowing the parties to adjust and adapt the mediation process as the participants collaboratively examine their differences and explore various ways in which solutions can be reached. It suggests that monetary compensation may be the most effective means for adjusting differences.

Three of the prescriptions of the Essential Model which concern the recruitment of participants illustrate the

flexible, adaptive dimensions of that model, while one prescription in the recruitment stage illustrates the formalistic, structured aspects of the Secondary Model. That all parties with a substantial interest in the dispute should be represented in mediation is a general criterion for involving the parties. It does not specify in formal, concrete detail which particular kinds of parties need to be involved. The mediator, or whoever undertakes the task of recruiting participants, than, has an open ended, flexible mandate for recruiting participants, rather than a specific, deterministic set of criteria.

The prescription that particular effort and attention should be devoted to the selection of participants in mediation does not provide detailed instructions for how the task will be carried out. Those recruiting participants are instructed, simply, to carry out the task with diligence and care. The particular methods they employ are not as important as the attitude with which they approach the job. They have latitude and flexibility for the undertaking.

The third flexible, adaptive prescription is that the mediator should educate the contending parties on the mediation process. Again, the specifics of how the mediator should provide this education are not given. The education provided to the participants enables them to understand the

principles and dynamics of mediation. This information empowers them to shape and modify the process itself to suit their interests, needs and individual characteristics. The mediator does not provide specific, formal instructions on how they are to behave, but gives them the information they need to shape the process to their needs.

The contrasting, formalistic, structured prescription in the recruitment stage, which qualifies for inclusion in the Secondary Model, is that the mediator should obtain a clear understanding that none of the potential participants in mediation have mental reservations about participating in mediation. This criterion suggests that the mediator must make a formal evaluation of the attitude of the potential participants in mediation before the process begins. An attitude of skepticism, however, may be quite appropriate. Until the mediation process actually begins and the participants become more involved in and knowledgeable about what is going on, it may be more constructive to be skeptical than to be too willing to follow directions without an awareness of what the process can achieve and ways in which it may be carried out. The evaluation of mental reservations is too formal and deterministic, as well as being premature. Enthusiasm for the process should develop as a result of participation in the process - it

should emerge in response to the perception that mediation can address the concerns of the participants. Simply being convinced that it will work, without substantial evidence, can border on naivete and allow participants to be led toward solutions they might regret later.

In the stage of mediation which concerns the design of the process, three prescriptions fit the flexible, adaptive aspects of the Essential Model, while one prescription fit the formalistic, structured dimension of the Secondary Model. That the participants and the mediator should develop ground rules for the process is a flexible recommendation which does not indicate specifically what rules are appropriate. It allows the participants to select ground rules which fit their preferred style of interaction and decision making. The mediator might suggest a variety of options, and the participants could pick and choose those which seemed most suitable. The choices are adapted flexibibly to the characteristics and needs of the participants, and the preferred style of the mediator rather than being prescribed from a predetermined set of formal procedures to be employed under all circumstances.

A prescription which is similar to the preceding is that the contending parties should participate in designing the mediation process. A predetermined, formal design is

not designated and implemented by the mediator. The participants themselves shape the process according to the issues in dispute and their particular preferences.

The third flexible, adaptive prescription indicates that the design of the mediation process should be done with the advice and consent of the mediator. This suggests clearly that the mediator does not prescribe and determine how mediation will be designed, but participates as an expert who advises, rather than dictates, how mediation will be structured.

A prescription which was rated less than 2.00 in importance, and which therefore fits the Secondary Model, is that clear and enforceable deadlines should be developed to provide an impetus for a mediated settlement. This is an artificial, predetermined design element which assumes that the participants themselves cannot develop their own momentum and motivation to move toward a solution to the dispute. It suggests that the formal provision of deadlines must substitute for a process which will reach closure when the participants are all ready for it to conclude.

The stage of mediation which focuses upon the identification of issues contains two prescriptions which fit the contrasting models. The stipulation that the issues in dispute should be clearly identified does not indicate

that this process should lay out the issues in great detail. It does suggest, however, that at least a generalized statement of the issues is useful for establishing an understanding among all participants of the basic substance of the dispute. The identification of issues simply focuses participants in a similar direction, but does not force them to identify and analyze the issues in structured detail. While this prescription helps to formalize the process of mediation, it does not have such specificity that it narrows the process to a final determination of the content and substance of every aspect of the dispute.

The contrasting prescription which fits the formalistic, structured dimensions of the Secondary Model is that agreement should be reached among contending parties on the geographical boundaries and time horizons of the issues in dispute. This focuses the contending parties on particular dimensions of the dispute, and upon establishing specific geographical and time parameters. Rather than focusing upon reaching a resolution of the issues, attention is directed to obtaining, formal, structured, detailed information which will define and confine the dispute.

In the stage of mediation which involves the establishment of the information base for mediation, four prescriptions were found which were divided between the

Essential Model and the Secondary Model. One of the prescriptions fitting the Essential Model is that efforts should be made to be sure that all representatives to mediation have an adequate understanding of the facts relevant to the dispute. It is important to emphasize here, that an "adequate" understanding is not the same as a complete, or comprehensive command of the facts. The representatives to mediation need to have the amount of knowledge which they feel is useful and appropriate. A complete understanding of technical details is not necessary. Thus, the flexible, adaptive approach of the Essential Model provides the amount of information which is requested by the participants. The provision of information is flexible, adaptive and responsive to the needs of participants, rather than predetermined by what information is available or obtainable to fit a formula for basic data needed.

In contrast, a prescription which was rated at less than 2.00 in importance, and which therefore is contained in the Secondary Model, is that agreement should be reached among participants in mediation on the facts and data relevant to the dispute. The stress in this criterion on "agreement" suggests that participants should wrestle with substantive, detailed information until they are of a common

mind about what are the true conditions of the environment upon which the dispute is focused. Whether or not this level of detailed information is really needed is not addressed in this prescription. Rather, it follows the logic of a formalistic, structured approach to obtaining information which collects all the facts before problem solving can begin.

Two prescriptions from the two different models relate to the coherence, as against the compartmentalized dimension, of mediation. In the Essential Model, it is suggested that the issues in dispute should be broken into logical pieces for consideration. While this is indeed a formalistic, structured approach to the process, the stipulation does not indicate that the group itself involved in mediation should be subdivided. It is the information, not the process and interaction of participants, which is broken into pieces. The process remains coherent and integrated. When an environmental dispute addresses a variety of complex issues, their division into subunits may facilitate understanding by providing information in more digestible bites. Eventually, these pieces of information will need to be reassembled into a picture of the whole. By keeping the entire group involved, however, the group itself is not fragmented, and members are not left with only

fragments of information needed. All participants are in touch with the information they need for understanding the dimensions of the dispute.

A contrasting prescription which fits the Secondary Model is that advisors, or advisory groups, should be used. These groups provide specialized, technical information which may not be readily accessible to the participants in the mediation process. Because they are not integral to the mediation process as participants, they compartmentalize the mediation process. They bring in new information which may be difficult for the participants to understand. The technical expertise of these outsiders may intimidate the participants, and because of the credentials of such experts, the participants may hesitate to question the value or validity of the information offered. This fragmentation adds a difficulty to maintaining a coherent, flexible and adaptive process in which all participants move along together in acquiring the understanding they need to address issues. It interrupts the gradual, incremental development of an adequate understanding of the facts with a potentially large dose of new, and possibly unfamiliar, information. Outside informants may intrude on the process, and interrupt the flexible, adaptive development of understanding appropriate to the needs of participants.

In the stage of mediation which focuses on the development of the preliminary agreement, four prescriptions show the contrast between the Essential Model and the Secondary Model. The provision that a variety of alternative solutions should be generated by the participants in mediation fits the flexible, adaptive mode of the Essential Model. Rather than develop a particular, rational, logical solution as an agreement, the participants produce a variety of alternatives. This opens up many different ways of conceptualizing a settlement, and provides for enough approaches that at least one angle will represent the interests of each party to mediation. By starting with variety, the participants can mix and match elements of the different alternatives to flexibly and adaptively synthesize a preliminary agreement. No formalistic, structured logic dictates a series of steps in which a formal, correct preliminary agreement emerges automatically. Instead, the interaction and interplay of the ideas of the contending parties begins to shape wholely new and innovative ways of constructing a preliminary agreement. The stimulation and challenge of reaching for diversity and variety creates still further variety, and an agreeable settlement gradually emerges from the interaction of participants.

Another prescription which contributes to the flexible,

adaptive and coherence of the Essential Model is that the contending parties and the mediator should hold informal meetings. The informality of such meetings, and the lack of structure, enhances the potential for participants to interact creatively and synergistically in shaping proposals for a settlement. They follow no structured format which inhibits innovation and channels problem solving into formalistic patterns. The informality allows each participant to contribute as much or little as seems appropriate to argue for a perspective or interest. The satisfaction of participants themselves determines when the process has reached a satisfactory conclusion rather than a formal concept of what is appropriate.

In regard to the formalistic, compartmentalized dimension of the Secondary Model, a prescription that fits is that small groups should be used to address single issues in the dispute. The use of a small group in this manner fragments the mediation process. While the use of a small group of individuals with a particular interest in a single issue may facilitate their efficient examination of the issue, this group becomes an entity with a dynamic and process separate from the main body of the mediation effort. This fragmentation may interrupt the flexible, adaptive development of a preliminary agreement which reflects the

knowledge and perspective of every participant in mediation. The particular expertise and knowledge of the issue gained by the small group may be at the expense of continuity and momentum in the main group. Thus, the use of the small group represents the formalistic, structured, compartmentalized dimension of the Secondary Model, in contrast to the flexible, adaptive, coherent aspects of the Essential Model.

In the stage of mediation which involves consulting constituents on the suitability of the preliminary agreement, one prescription particularly illustrates the dimensions of the flexible, adaptive approach. This recommendation is that the participants in mediation should consult with their constituents on the suitablility of the preliminary agreement. The very act of consulting with constituents implies that any feedback from constituents has potential to modify the preliminary agreement. The concept of a preliminary agreement, also, implies potential modification to shape an agreement which will be in accord with the wishes of constituents and obtain their support for implementation. A flexible, adaptive approach is therefore required if this stage is to serve to obtain information on the wishes of constituents and incorporate their desires into an agreement.

The stage of mediation which is making the agreement final contains one prescription which fits the flexible, adaptive mode of the Essential Model. This is that an agreement should be reached which is approved by all parties to mediation. This unanimous approval implies that any final objections to the preliminary agreement will be addressed and worked out to the satisfaction of all before a final agreement is reached. The ability to deal with objections, then, requires a flexible, adaptive approach to this stage.

The last stage of the mediation process, concerned with assuring the implementation of the agreement, contains four prescriptions which highlight the contrast between the Essential Model and the Secondary Model. One prescription maintains that the agreement should be ratified or approved, by constituents of the representatives to mediation. This implies flexibility and adaptibility of the agreement to potential objections of constituents, should they fail to ratify or approve the agreement. Presumably, this eventuality would be rare due to careful consultation with constituents at earlier stages, but the ratification process does contain the potential for further modifications to meet any final objections to the agreeement.

The flexible, adaptive approach is very explicit in the

prescription that means should be provided to re-make or re-decide the agreement, if necessary. If environmental conditions should change, and unexpected contingencies arise in the implementation process, the possibility of re-making the agreement to address such contingencies embodies substantial flexibility and adaptability.

Two prescriptions in the final stage are a part of the Secondary Model due to their importance ratings. They reflect a potential fragmentation of the process, as opposed to the coherence dimension of the Essential Model. One of them recommends that at least one public figure should agree to guarantee the agreement. This is a formalistic, structured activity outside of the process of arriving at an agreement which directly involves the parties to mediation. The concerns of such an outside actor, as conditions for providing such a guarantee, may be based upon entirely different considerations and knowledge than that used by the participants to reach the settlement. If this actor suggested modifications as a price for support provided, these could disrupt the integrity of the agreement produced in the mediation process. It has the potential to fragment the agreement itself. It is in stark contrast to the adaptive, flexible and coherent processes used by the direct participants in reaching their conclusion. The other

prescription, that there should be public support for mediation, has similar potential to fragment the mediation process by bringing in extraneous considerations late in the mediation process. The involvement of the participants themselves in a flexible, adaptive, coherent mediation effort should given them a strong sense of ownership. They should then become strong advocates for the agreement. Potentially diffuse public support will not be nearly as powerful a force to assure implementation as the investment and ownership of the direct participants in mediation.

2. The participative versus the authoritative dimension.

The participative dimension of the Essential Model contributes to the flexible, adaptive and coherent aspects of the Model, yet it is a slightly different aspect. The active participation of the contending parties in mediation helps the mediation process adapt flexibly to their needs and interests. The participative aspect, however, is distinctly evident in several of the prescriptions included in the Essential Model. Likewise, the authoritative aspect can be seen in several prescriptions included in the Secondary Model.

The participative element is first evident in the Essential model in the stage in which the recruitment of

participants is carried out. The prescriptions that all parties with a substantial interest in the dispute should be represented in mediation, and that particular effort and attention should be devoted to the selection of participants in mediation enhances participation by assuring that every major perspective has equal representation. This care in recruitment and selection of participants dignifies the process, and emphasizes the importance of the contribution of each participant to the mediation process. The care used in the selection of participants helps to assure that each perspective has an articulate, effective spokesperson. These preparatory activities help to develop a climate for mediation in which the contribution of each participant is treated with respect and consideration. This enhances the active participation and involvement of each representative in the mediation process.

Another prescription which enhances the participative aspect of mediation is that the meditor should educate the contending parties on the mediation process. This background and knowledge about mediation provides the participants with a clear understanding of the roles they should play and their responsibilities in mediation. This strengthens and encourages their active participation in mediation.

The stage of mediation in which the process is designed contains three prescriptions which strongly encourage participation. That the contending parties should participate in designing the mediation process is very directly, and substantively, a participative activity. Likewise, that the participants and the mediator should develop ground rules for the process is directly participative. And third, that the ground rules for mediation should be approved by all participants assures an equal, participative voice for the representatives of each perspective in mediation.

The stage which concerns establishing the information base for mediation contains a prescription which strengthens the participative dimension of the Essential Model. This is that efforts should be made to be sure that all representatives of parties to mediation have an adequate understanding of the facts relevant to the dispute. The simple assurance that each representative has adequate understanding enhances participation by preventing any participant from being at a disadvantage because he/she is lacking in comprehension of the issues in mediation.

In the stage of mediation which addresses the development of the preliminary agreement, three prescriptions highlight the participative versus

authoritative differences between the Essential Model and the Secondary Model. The prescription that a variety of alternative solutions should be generated by the participants in mediation enhances the participative aspect of the Essential Model by assuring that at least one alternative represents the interests and concerns of each perspective in mediation. Because each perspective has a favored alternative, the different perspectives begin the process of development of the preliminary agreement on an equal basis. This equality anhances the motivation of the representatives of different perspectives to be actively involved in shaping a preliminary agreement.

Two prescriptions in the Secondary Model illustrate the authoritative dimension. These are that the mediator should put forth trial solutions, and that the mediator should assist in drafting the wording of the preliminary agreement. These represent authoritative, directive actions on the part of the mediator. They put the responsibility for results on the mediator, and take away from the participative responsibilities of the participants. They put the mediator more in control.

In the stage of mediation which involves making the agreement final, a similar contrast between the Essential Model and the Secondary Model can be seen. The

participative aspect of the Essential Model is clearly seen in the prescription that an agreement should be reached which is approved by all parties to mediation. Each party participates actively in this stage because each must approve the agreement. In contrast, in the Secondary Model, the prescription is that the mediator should assist in drafting the wording of the final agreement. This is an authoritative, controlling role for the mediator.

3. The accountability versus the nonaccountability dimension.

Accountability is a major aspect of the Essential Model, and is represented in six prescriptions of this model. None of the major accountability prescriptions were found in the Secondary Model. Thus, accountability is a critical component of the Essential Model. Accountability fits within the flexible, adaptive, coherent dimension because being responsive and accountable to interests and parties not directly involved in mediation requires a readiness to adapt the substantive aspects of mediation to considerations and concerns of these outside actors.

Accountability first appears as an aspect of the Essential Model in the stage which is the development of the preliminary agreement. A prescription recommends that

communication should be maintained with those who will be responsible for implementing the agreement. This effort helps to assure that an agreement is feasible to be implemented. If those responsible for implementation see problems with the preliminary agreement, they will suggest modifications to make implementation more workable.

The prescription that a preliminary agreement should be reached demonstrates accountability. Because the agreement is preliminary, rather than final, it is subject to modification in response to concerns of the constituents of the parties to mediation.

Two prescriptions in the stage which involves consulting constituents on the appropriateness of the preliminary agreement directly implement the mechanics of accountability. The prescription that participants in mediation should maintain regular contact with their constituents keeps them in touch with the desires and concerns of their constituents. The prescription that the participants in mediation should consult with their constituents on the suitability of the preliminary agreement is another means of directly implementing accountability.

In the stage of mediation which concerns making the agreement final, there is provision for accountability. The prescription that modifications recommended by constituents

should be incorporated into the final agreement is another instance in the Essential Model in which accountability is directly facilitated.

In the stage which concerns assuring the implementation of the agreement, an element provides for accountability. This is the prescription that the agreement should be ratified or approved, by the constituents of the representatives to mediation. The constituents have one last chance to register any objections to the agreement. The knowledge of this possibility may help the participants in mediation to be more aware of shaping an agreement which will be readily approved by these constituents.

4. The interpersonal relationships dimension

In comparing the Essential Model with the Secondary Model, a clear difference in the importance ratings of interpersonal relationships was found. In the Essential Model, the relationships of the mediator with the contending parties was emphasized, while with the Secondary Model, relationships between the contending parties was emphasized.

Two prescriptions of the Secondary Model focus on interpersonal relationships. The first specifies that the opposing parties should not have a history of contentious relationships. The low importance of this rating, which

placed it in the Secondary Model, indicates that such a history of relationships need not be a barrier to an effective mediation process. The second prescription maintains that positive attitudes and interaction should develop among representatives of contending parties to mediation. Again, the low rating indicates that the lack of such positive attitudes need not be a barrier to reaching an agreement. Thus, while contending parties must develop a working relationship in order to reach an agreement, and should at least maintain respect for each other, any warmer relationship than that is not a key prerequisite to achieving a mediated settlement.

In contrast, the relationship between the mediator and the contending parties needs to be built upon trust, and the parties need to relate well with the mediator, according to the importance ratings received by the prescriptions contained in the Essential Model. The most basic prescription of this model is that the mediator should obtain the trust of the contending parties. This trust facilitates meaningful interactions in the processes stressed in the two other prescriptions which were a part of the Essential Model. One is that the contending parties and the mediator should hold informal meetings. The other is that the mediator should spend time interacting with

participants in mediation on a one-on-one basis. The emphasis of these prescriptions in the Essential Model, then, is upon the relationship between the mediator and the contending parties. Of less importance are the prescriptions of the Secondary Model which address the relationships among the contending parties.

PRESCRIPTIONS FOR EFFECTIVE ENVIRONMENTAL MEDIATION

The "Essential Model" can be translated into a set of prescriptions for effective environmental mediation. The mediator must:

- Be sure that all perspectives on an environmental dispute have equal representation in the mediation process.
- Establish trust and rapport with the participants in mediation.
- Be sure that the participants in mediation keep in touch with those who will be responsible for implementing the agreement to be sure it is feasible for implementation.
- Be sure that the participants in mediation keep in touch with their constituents so that the mediated agreement reflects constituent interests.

- Assess the dispute for its suitability for mediation, in terms of uncertainty of outcome in the courts, and real consquences for the parties if mediation is not attempted or is not successful.

- Attend to the mechanics of mediation to protect its integrity and facilitate the analysis of issues.

A COMPARISON OF THE ESSENTIAL MODEL WITH OTHER MODELS OF MEDIATION

The questionnaire items which were rated as either as A or B in importance - The Essential Model - are compared here with other models of mediation. The comparison begins with the A-category of importance grouping.

The Essential Model, developed from this research, is the only model of mediation which explicitly states that the mediator should not have an interest in the outcome of the dispute. It also is the only model which stresses the importance of involving all parties with a substantial interest, although the Nine Steps Model starts with the identification of parties who have a stake in the outcome of the dispute. These two features are aspects of "participative equity," a dimension which fosters long term commitment to mediated agreements.

The development of ground rules, and the approval of

these rules by all participants, are other distinct features of the Essential Model. The closest similarities in another model are the outlining of the roles of participants and a review of the mediation guidelines in the Folberg and Taylors Model. These roles and guidelines are already stipulated, however, rather than emerging as a part of the development of the mediation process. The emergence of rules and guidelines from within the mediation effort of the Essential Model facilitates "participative equity," forestalling early resistance to the process.

Developing an atmosphere of trust in mediation is emphasized in two other models, although it stands out more strongly as a separate element in the Essential Model. The Folberg and Taylor Model mentions in passing that a purpose of the introductory stage is to "gain the participants' trust and cooperation." A panel member outlines the mediation procedure "to initiate an atmosphere of trust" in the Dorchester Urban Court model. The high rating received by the item concerned with trust on the questionnaire underscores its central importance. The Essential Model highlights the value of trust during the mediation process, while trust is treated more casually in other approaches.

The item in the Essential Model which recommends that communication should be maintained with those who will be

responsible for implementing the agreement is unique - no other mediation model contains a comparable element. Environmental disputes involve manipulation of the environment - usually by a party not participating directly in mediation. People who will implement the agreements need to understand what manipulations are possible. Communication throughout the mediation process helps those with relevant responsibilities to develop ownership of proposals which are being developed. This communication process often will need to continue for an extended period of time because carrying out activities which alter the environment typically are slow processes. Construction activities may take years to go through the planning and implementation phases.

Another distinct feature of the Essential Model is the need for the participants in mediation to consult with their constituents and obtain their ratification of the settlement. The only similar aspect in another model is the recommendation in the Folberg and Taylor Model that participants in mediation should review the proposed settlement with "others" before a final confirmation sessions takes place. In contrast, the Essential Model recognizes that by keeping supporters informed, participants in mediation avoid the danger of becoming removed from

constituent interests. The risk is that constituents will eventually reject a settlement because they do not understand the rationale for the settlement. The Essential Model minimizes this risk.

The prescription of the Essential Model that "An agreement should be reached which is approved by all participants" sounds like a universal element of mediation. Perhaps because it is implicit, however, only one other model mentions it. In the "Signing of the Agreement" stage of the Dorchester Urban Court model, "When both parties express satisfaction with the proposed agreement, they sign it ..." The joint approval feature of the Essential Model assures investment of the participants in the implementation of the agreement. Such investment develops a sense of commitment to the realization of the purposes of mediation.

These nine A-ranked components of the Essential Model reflect a strong emphasis upon participation as a means of developing involvement, commitment, ownership and solid support for the mediation process. The dimension of accountability to parties outside of mediation is a distinctive theme. Part of this is the element of representative democracy in regard to constituencies. The other part is the responsibility for developing an agreement which outside agencies will indeed be willing and able to

implement.

The amount of initiative and responsibility required of the participants in environmental mediation, as shown in the Essential Model, is greater than the apparent involvement of parties to mediation in the other approaches, with the exception of the Principled Negotiation model. Environmental mediation requires a knowledge of substantive dimensions of environmental disputes. Participants often deal with a diversity of both common and opposing perspectives in working toward a settlement which will satisfy all points of view. They have responsibilities toward both constituents and those who will be responsible for implementing the mediated settlement, and often must work actively to communicate the substance of emerging points of contention and common interest to outside parties. While this is implicit in Principled Negotiation, it is explicit in the Essential Model. Representatives in mediation who will not be actively and energetically involved in developing and communicating solutions are simply inadequate.

Twenty-five of the components of the Essential Model were rated at a B level of importance. Some reflect the same principles found in the first nine elements, but many of them are more related to the mechanics of operations.

Three elements of the Essential Model reflect the often large scale of environmental mediation. The need for the mediator to assess the suitability of the dispute for mediation, the need for uncertainty about possible outcomes in other contexts, and the need for real consequences if mediation is not attempted are considerations which prevent the investment of the resources and attention of many parties without due cause. The scale of most environmental mediation efforts is too great to be initiated without adequate justification. Contending parties and the mediator should not commit time and resources to a mediation effort unless the situation is conducive to constructive and positive participation in mediation.

The principle of obtaining effective representation of all interested parties on a dispute is reiterated in the "usually important" need to devote particular effort and attention to the selection of participants in mediation. This is a distinctive element of the Essential Model.

An operational dimension of the Essential Model which is reflected in other models is the need to educate the contending parties on the mediation process. In the Dorchester Urban Court model the mediation procedure is outlined for the contending parties. A preparatory statement in the Folberg and Taylor Model outlines the roles

of mediator and participants. An introduction stage to mediation gets the participants moving in the same direction.

The B-rated importance of participation of the contending parties in designing environmental mediation reiterates the unique participatory dimension of the Essential Model. This involvement may initially appear time consuming, which could explain its absence from other models. Early and active involvement of participants, however, will, in the long term facilitate the process.

The need for the design of mediation to be done with the advice and consent of the mediator does not appear anywhere except in the Essential Model. This reflects the developmental aspect of environmental mediation, while in other approaches the design is already specified. That is, participants are actively involved in the development of the design of the mediation effort itself as it evolves according to the concerns and interests of the participants, and in accord with the emerging dimensions of the issues in dispute. Just as the participants need to be involved in designing the mediation, the mediator must have a strong voice, as the manager of the process.

An operational aspect unique to the Essential Model is the development of ground rules for dealing with the news

media. This reflects the often broad scope and widespread impact of environmental disputes. The other models make no mention of media considerations because their focus is narrower, and the interpersonal nature of the disputes make confidentiality important. Today's media representatives seem committed to the enforcement of disclosure and accountability on the part of those who represent the public. Certainly, mediation efforts are not immune to this scrutiny.

The need for the issues in dispute to be identified clearly was common to two other models. The Dorchester Urban Court model specifies that parties are asked to describe how they see the problem, and the panelists ask clarifying questions. An initial step in the Folberg and Taylor Model brings out the participants' perceptions of the conflict. Stage Two is addressed to "Fact Finding and Isolation of the Issues." The Essential Model reiterates this dimension with the contention that efforts should be made to be sure that all representatives to mediation have an adequate understanding of the facts and data relevant to the dispute. The "Principled Negotiation" model emphasizes getting at the interests which lie behind the ostensible issues in the dispute - this enables the settlement to address human needs rather than merely positions initially

advanced. Thus, the Essential Model reflects an element common to all other models examined here. This suggests that issue identification and a clear understanding on the part of the participants are fundamental considerations of mediation approaches.

A feature of the Essential Model which highlights the relative complexity of environmental disputes is the unique recommendation that issues should be broken into logical pieces for consideration. No one can understand nor absorb great amounts of data at a time, nor is it possible to act on many issues and participate in many events simultaneously. This practical procedure incorporates a realism that is not evident in the other models reviewed as a part of this research.

The three other models contained reflections of the need to generate a variety of alternative solutions found in the Essential Model. One of the four points of the "Principled Negotiation" model is to generate a variety of possibilities before deciding what to do. A designated time is set aside to think up a "wide range of possibile solutions." In the Nine Steps model one of the steps is "Generating a Sufficient Number of Alternatives or Options." Stage Three of the Folberg and Taylor Model is "Creating Options and Alternatives." The frequency with which

generating a variety of alternatives appears indicates the fundamental importance of this activity in mediation.

A distinctive aspect of the Essential Model is the emphasis of two components on informal interaction of the mediator with participants. The components are "the contending parties and the mediator should hold informal meetings" and "the mediator should spend time interacting with the participants in mediation on a one-on-one basis." Only one other model emphasizes such interaction processes. In the Folberg and Taylor model, an extensive effort is to be devoted to obtaining an understanding of the participants' attitudes toward conflict. This attempt to identify these attitudes suggests a substantial amount of interaction between the mediator and the participants. The relatively greater emphasis these interaction processes in environmental mediation may relate to the complexity of issues often encountered in environmental mediation and the number of parties who may be involved. It takes time for the mediator to develop a rapport and an understanding of the contrasting perspectives. Informal interaction is the means by which the depth of understanding is enhanced.

The use of caucus sessions is found in the Essential Model and in a varied form in one other model. The Dorchester Urban Court model has a section on "Caucusing."

This process involves a meeting of the panelists, who function in a "mediator role," with each side of the dispute separately. In contrast, in the Essential Model, caucuses involve contending parties who hold meetings to reach agreement among members on positions to be put forth in mediation.

The concern for implementation is found in the need to obtain assurances from those responsible for implementation that they will follow through. The requirement for assurances is an element of the accountability dimension which distinguishes the Essential Model, because the participants in mediation usually do not have control over the means for implementing the agreement.

The provision in the Essential Model that clear means should exist for binding the parties to the agreement is reflected in weaker form in the Folberg and Taylor Model. Stage Five is "Clarification and Writing a Plan," which documents clearly the participants' intentions and their future behavior. In the Dorchester Urban Court model staff members of the court may put pressure on uncooperative disputants by reminding them of their agreement and suggesting a second mediation session to work out difficulties, if needed. The Nine Steps model has a step called "Holding the Parties to Their Commitments" which

mentions agreements that are enforceable through contract or tort. Monitoring is recommended to be sure that the prescribed outcome meets expectations. The various techniques used in these different models to hold participants to commitments suggests an underlying accountability dimension to the mediation process.

The Essential Model is the only mediation model which specifically prescribes a preliminary agreement. The Folberg and Taylor Model specifies a written plan, which is preliminary in the sense that it is subject to amendments to reflect later contingencies. The preliminary agreement prescribed by the Essential Model reduces the possibility that participants in mediation are surprised by compromises which may emerge. Involvement of participants in the preparation of a preliminary agreement is a feature of representative democracy, because it offers a point of access to constituents. This distinguishs the Essential Model from other forms of mediation.

The two prescriptions of the Essential Model which concern monitoring the agreement and providing for re-making or re-deciding the agreement are reflected in two other models. The Dorchester Urban Court model has an explicit step focussed on Monitoring the Agreement. The possibility of a folloup mediation session is mentioned. In the Folberg

and Taylor Model the potential effects of unforeseen circumstances are recognized in the allowance for a review and revision session in which provisions of the plan can be changed. These prescriptions recognize that the world is dynamic. Monitoring creates a moral force which puts a subtle pressure on parties to uphold their commitments. The flexibility provided by the potential for making revisions makes mediation adaptable to the changing world. The Essential Model's pragmatism is illustrated by these two prescriptions.

The distinctive aspects of the Essential Model reflect the complexity of environmental mediation, the interdependence of participants with groups outside the mediation effort, and the participatory dimensions of this type of mediation. The prescriptions of the Essential Model which were similar to elements of other models were operational considerations rather than fundamental dimensions. Thus the Essential Model does provide innovative insights into the question of how to achieve success in environmental mediation.

RECOMMENDATIONS FOR FURTHER RESEARCH

A major question needing further research is whether there are two basic approaches to conducting environmental

mediation - one being a flexible, adaptive, coherent approach, which emphasizes people and participatory processes, as opposed to another which is a formalistic, structured, and compartmentalized, which emphasizes facts and analysis, and an authoritative role for the mediator. Approaches to mediation, on the other hand, may range along a continuum between these two extremes. The literature at this time is not clear on this issue.

At one extreme is a formalistic, highly structured approach which follows many, and possibly most, of the phases identified in this research in step-by-step fashion. This approach tends to emphasize logical analysis of substantive issues with predetermined procedures. It is a mechanistic model which can be memorized and executed serially.

The opposite orientation is that of bringing the contending, or the potentially contending, parties together to begin problem solving before the dimensions of the environmental conflicts which may need to be confronted are explicitly known. The prospective participants in this kind of mediation are aware of a proposed use of a portion of the environment in a way that will affect various interests differently. This process of mediation evolves dynamically as participants develop their own means of exploring issues

and reaching decisions. Initially, much attention is given to the development of the process, and with a framework in place, the participants are ready to focus upon substantive issues. This flexible-adaptive approach is less easily defined and articulated, but may be more effective as it allows mediation to be adapted to diverse conditions and to change in response to the emerging concerns and knowledge of participants, and changing interaction patterns among contending parties. Clearly, research is needed to establish whether these orientations represent two basic approaches to environmental mediation and whether mediators tend to choose either one or the other, or whether mediation efforts tend to combine elements of both approaches, and to range along a continuum favoring one or the other but not being exclusively in either category.

The Essential Model is more like the flexible-adaptive approach than the formalistic, structured approach. One clue is the absence from the two top importance categories of the prescription that "The issues should be concrete and specific." This indicates that participants should participate jointly in examining the issues before they are narrowed down to specifics. The collaborative identification of issues helps to prevent conflict over facts which favor one or another position. The parties to

mediation develop a cooperative, problem-solving mode of interaction early in the mediation process, and this mode of joint discovery helps the process adapt flexibly to the issues and needs of participants as mediation evolves. By avoiding a more formalistic approach to issue identification, unproductive conflict over irrelevant issues is precluded.

Another clue is the absence from the top two categories of importance of the prescription that "The mediator should obtain a clear understanding that none of the potential participants in mediation have mental reservations about participating in mediation." Some initial skepticism about the process may be appropriate. In the Essential Model, the process of involving the participants in designing the mediation effort assures them that their concerns will be given adequate attention. Their reservations are removed as the mediation effort develops in a flexible-adaptive mode.

The importance given to participative involvement of the participants, to selecting the most qualified participants, to establishing solid communication patterns and accountability, to assuring understanding on the part of the participants, and to fostering effective interaction patterns are dimensions of the Essential Model which focus attention more upon processes than upon substance. The

assumption is that if the appropriate conditions and tools are available for the mediation process, the participants will identify the substantive information they need by themselves. The structured, formalistic approach, in contrast, would place more emphasis upon initially identifying the issues and addressing the substance of the dispute in a logical progression. While the Essential Model does not rule out such a logical series of steps at appropriate points in mediation, the greater emphasis is upon creating the appropriate atmosphere, and the necessary communication and interaction patterns to enable the participants themselves to find their own solutions. A settlement does not emerge logically from self-evident technical resolutions of issues, but evolves gradually through the development of increased understanding between contending interests as they collaboratively engage in problem solving. The participants are free to put as much effort into any particular element of the Essential Model as they feel is appropriate, and are not led through a pre-determined series of prescribed steps in a rigid way. The flexible-adaptive orientation makes the Essential Model effective for the wide range of issues which may be addressed in mediation. The approach is appropriate to both small-scale and large-scale mediation efforts, and is useful

for the many different kinds of organizations and individuals which may participate in mediation. The approach is adaptable to great variations in technical sophistication of participants, mandates of different governmental entities, and varied perspectives of private organizations.

A research effort is needed to examine whether the geographic scale and complexity of environmental disputes determine the approaches which are most favored by mediation practitioners. It is logical that a more bureaucratic, structured approach would be appropriate for more complex, geographically large scale disputes. The opposite reality may be that the favored design and style of mediation used by any particular mediator is more determinate of the approach which is employed than scale or complexity aspects. Research should focus on whether it is the nature of the dispute or the nature of the mediator which determines the methodology employed.

Three notable dimensions of environmental mediation - participative equity, accountability, and interpersonal interaction - have been identified in the Essential Model. Additional research on the practice of mediation should explore further the relative importance of these dimensions in effective mediation. Research should establish whether

environmental mediators in general value these dimensions, whether each mediator places different emphasis upon one or another of them, or whether some mediators value none of them.

CRITICAL REFLECTIONS ON THE STATE OF THE ART

Scholars and practitioners of environmental mediation have made an excellent beginning in developing literature on the theory and practice of environmental mediation, and in applying its principles in practice. From the inception of the practice of environmental mediation, observers and practitioners have described environmental mediation activities. They have identified considerations and activities that are critical to success. A number of case studies have been written that document the events and activities of specific environmental mediation efforts. This is necessary, but insufficient for refinement of theory.

The genesis of the research effort from which the Essential Model was developed was the discovery of the lack of a comprehensive theory of environmental mediation that incorporates the reflections and observations of practitioners and the documented evidence of practice as reflected in case studies. This research remedies this

deficiency.

The results of the survey reported in this dissertation also indicated a gap between what the literature on environmental mediation indicated was important, and the techniques and considerations which are most important in actual practice. Writers on environmental mediation have identified a great variety of elements which appear to be essential components of practice. The empirical research reported here finds that many of these elements have only slight relevance to effective practice. Some concepts which were stated emphatically to be key considerations in environmental mediation were rated by respondents as only sometimes or rarely important. This research is a step toward sorting out the less useful and practical procedures from the more effective techniques, activities, and considerations.

This gap between what what some observers claim is important and what practitioners appear actually to use creates difficulties for practitioners. It means that there is little guidance in the literature for practitioners who wish to improve their practice or refine their techniques. So many practices, considerations and activities have been claimed to be important that the practitioner has little useful guidance. Practitioers are in danger of wasting time

and resources on efforts which contribute little to effective results in mediation efforts. This condition is normal in a field which is just beginning to develop.

The problem is caused by the assumption that the particular instance of environmental mediation that is being discussed is typical of environmental mediation efforts elsewhere. Observations are stated emphatically as though they are truths which should guide all environmental mediation practice. Writers do not realize that a number of circumstances and conditions seen in a particular situation may be peculiar to that case. As a result, statements of basic principles or essential elements, have proliferated. The key elements and considerations lie buried in a jungle of ideas and claims which often contradict each other.

The writers of case studies have contributed to this circumstance inadvertantly. For the most part, the cases chosen for documentation were complex cases. They involved a number of interest groups, and the issues were complicated. Some were chosen because the outcomes had a major impact on public policy. The widespread interest in these cases made them prime candidates for documentation. Such choices, however, provide an unrealistic picture of environmental mediation cases as a whole.

The field of environmental mediation, and various

approachs to mediation in general, are beginning to develop a diverse literature. The experience of mediation practitioners is being documented with increasing frequency. There is a need to draw upon this literature to develop a comprehensive theoretical framework for mediation in general. The three relevant general mediation models described in this disseration, and the Eclectic Theory of Environmental Mediation, provide the outlines and substance for the creation of such a comprehensive framework. The considerations and dimensions, the activities and dynamics, and the conditions and factors, which contribute to and which inhibit mediation efforts are being described in detail. The techniques and styles of mediators using different approaches are emerging in the literature. Enough practical experience is available from the application of different approaches that mediation practitioners can compare notes on the advantages and disadvantages of various techniques and methods. The level of maturity in the field of mediation has been reached so that it is now appropriate for the development and testing of a comprehensive framework.

The "Principled Negotiation" model, used by Fisher and Ury, has received wide recognition. It provides the most theoretically abstract principles for the negotiation

aspects of mediation, yet these principles have potential application in many of the other stages of mediation. Particular attention is needed to test these principles in diverse types of mediation to evaluate their universality for mediation. Research is needed to establish whether the principles are suitable for application in many, or all, stages of mediation, and in many, or all, contexts, or whether there are circumstances which limit the applicability of the principles.

This research from which the Essential Model has been developed is a step toward separating the more critical considerations and activities from those which are pertinent only occasionally. It applies the reactions of practitioners to sort the A-importance and B-importance aspects from the C-importance and D-importance elements. It is a step forward in the refinement of the practice of environmental mediation.

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APPENDIX A

TABLES

TABLE 1

Identification of the Mediator

Item on Questionnaire	Importance Rating	Standard Deviation
1. The mediator should not have an interest in the outcome of the dispute	2.80	0.48
2. The mediator should not have great technical expertise on the subject of the dispute.	0.80	0.85

TABLE 2

The Preconditions for Mediation

Item on Questionnaire	Importance Rating	Standard Deviation
1. The mediator should assess the suitability of the dispute for mediation.	2.37	0.76
2. The issues in dispute should be concrete and specific.	1.62	0.90
3. There should be real consequences to the parties if mediation is not attempted, which make mediation the best alternative.	2.13	0.82
4. There should be uncertainty about possible outcomes in a context other than mediation, i.e., in the courts, before a regulatory body, etc.	2.07	0.94
5. There should be a perceived balance of power among contending parties.	1.70	1.09
6. It should be clear that the parties to the dispute have reached a stalemate, or an impasse.	1.23	1.25
7. Contending parties should have potential to experience economic costs if a mediated settlement is not reached.	1.77	0.93

TABLE 2 (contd.)

The Preconditions for Mediation

Item on Questionnaire	Importance Rating	Standard Deviation
8. The dispute should not have potential to set important legal precedents.	0.97	1.02
9. The dispute should not center on strongly held ideological or philosophical differences.	1.21	0.98
10. The opposing parties should not have a history of contentious relationships.	0.39	0.68

TABLE 3

Recruitment of the Participants in Mediation

Item on Questionnaire	Importance Rating	Standard Deviation
1. Particular effort and attention should be devoted to the selection of participants in mediation.	2.40	0.72
2. The mediator should obtain a clear understanding that none of the potential participants in mediation have mental reservations about participating in mediation.	0.83	0.83
3. All parties with a substantial interest in the dispute should be represented in mediation.	2.73	0.45
4. Participants in mediation should have clearly identifiable constituencies.	1.79	0.73
5. The mediator should educate the contending parties on the mediation process.	2.10	0.80
6. New parties should be added as the mediation process evolves and new issues are identified.	1.48	1.15

TABLE 4

Design of the Mediation Process

Item on Questionnaire	Importance Rating	Standard Deviation
1. Contending parties should participate in designing the mediation process.	2.20	0.92
2. The design of the mediation process should be done with the advice and consent of the mediator.	2.27	0.91
3. The participants and the mediator should develop ground rules for the process.	2.60	0.67
4. Ground rules should be developed for dealing with the news media.	2.17	0.75
5. The ground rules for mediation should be approved by all participants.	2.73	0.58
6. Clear and enforceable deadlines should be developed to provide an impetus for a mediated settlement.	1.77	0.77
7. Contending parties and the mediator should hold regularly scheduled meetings.	1.93	0.96
8. Positive attitudes and interaction should develop among representatives of contending parties to mediation.	1.93	0.75
9. The mediator should obtain the trust of the contending parties.	2.63	0.49

TABLE 5

Identification of the Issues

Item on Questionnaire	Importance Rating	Standard Deviation
1. The issues in dispute should be clearly identified.	2.43	0.86
2. Agreement should be reached among contending parties on the geographical boundaries and time horizons of the issues in dispute.	1.96	0.90

TABLE 6

Establishing the Information Base

Item on Questionnaire	Importance Rating	Standard Deviation
1. Efforts should be made to be sure that all representatives of parties to mediation have an adequate understanding of the facts relevant to the dispute.	2.10	0.80
2. Contending parties should have equal ability to obtain and understand the facts and data relevant to the dispute.	1.70	0.95
3. Agreement should be reached among participants in mediation on the facts and data relevant to the dispute.	1.97	0.82
4. The issues in dispute should be broken into logical pieces for consideration.	2.00	0.95
5. Small groups should be used to address technical questions in the dispute.	1.72	1.03
6. Advisors, or advisory groups, should be used.	0.90	1.01

TABLE 7

Development of the Preliminary Agreement

Item on Questionnaire	Importance Rating	Standard Deviation
1. A variety of alternative solutions should be generated by the participants in mediation.	2.33	0.76
2. The contending parties and the mediator should hold informal meetings.	2.23	0.77
3. The contending parties should hold their own caucus sessions.	2.24	0.95
4. Small groups should be used to address single issues in the dispute.	1.67	0.96
5. The mediator should assist the participants in mediation who represent a particular side to reach agreement within their membership on positions to be put forward in mediation.	1.89	0.85
6. The mediator should spend time interacting with participants in mediation on a one-on-one basis.	2.24	0.83
7. The same individuals should serve as negotiators throughout the mediation effort.	1.97	0.72
8. Communication should be maintained with those who will be responsible for implementing the agreement.	2.70	0.54

TABLE 7 (contd.)

Development of the Preliminary Agreement

Item on Questionnaire	Importance Rating	Standard Deviation
9. Parties responsible for implementing a mediated agreement should provide assurances that they will follow through.	2.33	0.55
10. Clear means should exist for binding the parties to the agreement.	2.14	0.87
11. The mediator should not have power to influence strongly the mediated agreement.	1.38	1.01
12. The mediator should put forth trial solutions.	1.41	1.05
13. A preliminary agreement should be reached.	2.32	0.94
14. A preliminary agreement should be put into writing.	2.48	0.89
15. The mediator should assist in drafting the wording of the preliminary agreement.	1.68	1.16

TABLE 8

Consulting Constituents on the Appropriateness of the Preliminary Agreement

Item on Questionnaire	Importance Rating	Standard Deviation
1. Participants in mediation should maintain regular contact with their constituents.	2.43	0.77
2. The participants in mediation should consult with their constituents on the suitability of the preliminary agreement.	2.50	0.79
3. The constituents consulted should suggest modifications in the preliminary agreement.	1.65	1.09
4. The constituents consulted should approve the preliminary agreement.	2.18	0.88
5. No major group of constituents should oppose the preliminary agreement.	2.00	0.98

TABLE 9

Making the Agreement Final

Item on Questionnaire	Importance Rating	Standard Deviation
1. Modifications recommended by constituents of representatives to mediation should be incorporated into the final agreement.	2.11	0.82
2. The mediator should assist in drafting the wording of the final agreement.	1.81	1.18
3. An agreement should be reached which is approved by all parties to mediation.	2.81	0.48

TABLE 10

Assuring the Implementation of the Agreement

Item on Questionnaire	Importance Rating	Standard Deviation
1. There should be public support for mediation.	1.03	0.91
2. At least one public figure should agree to guarantee the agreement.	1.30	1.22
3. The agreement should be ratified, or approved, by the constituents of the representatives to mediation.	2.63	0.69
4. Means should be provided for monitoring the agreement.	2.26	0.81
5. Means should be provided to re-make, or re-decide the agreement, if necessary.	2.00	0.92

APPENDIX B

SURVEY INSTRUMENT

ENVIRONMENTAL MEDIATION QUESTIONNAIRE

This questionnaire is an attempt to identify the critical and important conditions and activities which facilitate successful environmental mediation. Successful environmental mediation is defined as a mediation effort which has led to an agreement which has been implemented, or is in the process of being implemented, according to the stipulations of the agreement (or in accordance with the wishes of the representatives of parties to the mediation effort when unforeseen circumstances have required changes in implementation).

This questionnaire asks you to rate the relative importance of a number of conditions which may surround environmental mediation, and activities and processes which may be a part of environmental mediation.

You will be asked to read a statement and then rank its relative importance for each substantive issue category according to the following scale:

0 - Irrelevant
1 - Moderately Important
2 - Very Important
3 - Critical

CONDITIONS OF MEDIATION

1. Participants in mediation had clearly identifiable constituencies _____

2. All parties with a substantial interest in the dispute were represented in mediation _____

3. The issues in dispute were concrete and specific _____

4. There was a perceived balance of power among contending parties _____

5. It was clear that the parties to the dispute had reached a stalemate, or an impasse _____

6. There was uncertainty about possible outcomes of the dispute in a context other than mediation, i.e. in the courts, before a regulatory body, etc. _____

7. There were real consequences to the parties if mediation was not attempted, which made mediation the best alternative. _____

8. Contending parties had potential to experience economic costs if a mediated settlement was not reached. _____

9. There was public support for mediation. _____

10. The dispute DID NOT have potential to set important legal precedents _____

11. The dispute DID NOT center on strongly held ideological or philosophical differences _____

12. Contending parties had equal ability to obtain and understand the facts and data relevant to the dispute. _____

13. The mediator DID NOT have power to influence strongly the mediated agreement _____

14. The mediator DID NOT have great technical expertise on the subject of the dispute _____

15. The mediator DID NOT have an interest in the outcome of the dispute _____

16. The opposing parties did not have a history of contentious relationships _____

17. Clear and enforceable deadlines provided an impetus for a mediated settlement. _____

18. The same individuals served as negotiators throughout the mediation effort _____

19. Parties responsible for implementing a mediated agreement provided assurances that they would follow through. _____

20. Clear means existed for binding the parties to the agreement. _____

ACTIVITIES OR PROCESSES OF MEDIATION

21. The mediator assessed the suitability of the dispute for mediation _____

22. The mediator obtained a clear understanding that none of the potential participants in mediation had mental reservations about participating in mediation. _____

23. The mediator obtained the trust of the contending parties _____

24. Particular effort and attention was devoted to the selection of participants in mediation. _____

25. Participants in mediation maintained regular contact with their constituents. _____

26. New parties were added as the mediation process evolved and new issues were identified. _____

27. Contending parties participated in designing the mediation process. _____

28. The design of the mediation process was done with the advice and consent of the mediator. _____

29. The mediator educated the contending parties on the mediation process. _____

30. The participants and the mediator developed ground rules for the mediation process. _____

31. The ground rules for mediation were approved by all participants. _____

32. Ground rules were developed for dealing with the news media. _____

33. The issues in dispute were clearly identified. _____

34. The issues in dispute were broken into logical pieces for consideration. _____

35. Efforts were made to be sure that all representatives of parties to mediation had an adequate understanding of the facts relevant to the dispute. _____

36. Agreement was reached among participants in mediation on the facts and data relevant to the dispute. _____

37. Agreement was reached among contending parties on the geographical boundaries and time horizons of the issues in dispute. _____

38. The mediator spent time interacting with participants in mediation on a one-on-one basis _____

39. Positive attitudes and interaction developed among the representatives of contending parties to mediation. _____

40. The contending parties and the mediator held informal meetings. _____

41. Small groups were used to address single issues in the dispute. _____

42. Small groups were used to address technical questions in the dispute. _____

43. Advisors, or advisory groups, were used. _____

44. The contending parties held their own caucus sessions. _____

45. The mediator assisted the participants in mediation who represented a particular side to reach agreement within their membership on positions to be put forward in mediation. _____

46. Contending parties and the mediator held regularly scheduled meetings. _____

47. A variety of alternative solutions were generated by the participants in mediation. _____

48. The mediator put forth trial solutions. _____

49. A preliminary agreement was reached. _____

50. A preliminary agreement was put into writing. _____

51. The mediator assisted in drafting the wording of the preliminary agreement. _____

52. The participants in mediation consulted with their constituents on the suitability of the preliminary agreement. _____

53. The constituents consulted suggested modifications in the preliminary agreement. _____

54. The constituents consulted approved the preliminary agreement. _____

55. No major group of constituents opposed the preliminary agreement. _____

56. Communication was maintained with those who would be responsible for implementing the agreement. _____

57. The mediator assisted in drafting the wording of the final agreement. _____

58. An agreement was reached which was approved by all parties to mediation _____

59. Modifications recommended by constituents of representatives to mediation were incorporated into the final agreements. _____

60. The agreeement was ratified, or approved, by the constituents of the representatives to mediation. _____

61. At least one public figure agreed to guarantee the agreement. _____

62. Means were provided for monitoring implementation of the agreement. _____

63. Means were provided to re-make or re-decide the agreement, if necessary. _____

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