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The Politics of Environmental Mediation

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INTRODUCTION

Put most simply, environmental mediation is a process in which representatives of environmental groups, business groups, and government agencies sit down together with a neutral mediator to negotiate a binding resolution to a particular environmental dispute.¹ Since its beginning in the mid-seventies, environmental mediation has been the subject of serious political disagreement.² Proponents argue that environmental mediation is often less costly and less time consuming than litigation.³ In addition, they claim mediated agreements are impartial and just.⁴ It is assumed that the agreements are mutually beneficial to the parties. In part, this assumption is based on the fact that mediation, as opposed to arbitration, is seen as a purely voluntary process in which the mediator has no power to impose a settlement.⁵ The voluntary nature of the process is thought to ensure that no party is forced into accepting a disadvantageous agreement.

Despite this reassuring view of mediation and despite a growing

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1. In this essay, the term "environmental mediation" refers to a number of different dispute resolution approaches that use a neutral intervener. For a discussion of the distinctions between the various forms of environmental mediation, see Bellman, Bingham, Brooks, Carpenter, Clark & Craig, *Environmental Conflict Resolution*, ENVTL. CONSENSUS, Winter 1981, at 1.

2. See, e.g., S. MERNITZ, *MEDIATION OF ENVIRONMENTAL DISPUTES* (1980); Northern Rockies Action Group, *Selected Transcripts From the NRAG Conference on Negotiations*, NRAG PAPERS, Fall 1980 [hereinafter cited as *NRAG Transcripts*]; O'Gara, *Should This Marriage Be Saved?*, ENVTL. ACTION, Mar. 11, 1978, at 10.

3. MERNITZ, *supra* note 2, at 48-49.

4. *Id.* at 50.

5. Bellman, Bingham, Brooks, Carpenter, Clark & Craig, *supra* note 1, at 5.

list of successful mediation efforts,⁶ suspicion about mediation continues to exist among environmentalists. One environmental organizer recently complained that mediation "strikes me as being pro-establishment. I think that environmentalists who get involved in the process tend to be co-opted."⁷ David Brower has also criticized cooperative strategies such as environmental mediation. "Polite conservationists," says Brower, "leave no marks except the scars on the landscape that could have been prevented."⁸ These kinds of intuitive suspicions have been fueled by several stories in environmental publications that have claimed that "industry clearly likes the idea" of mediation and that some mediation efforts and mediation institutes have been heavily funded by corporate foundations and by corporations with poor environmental records, including Dow Chemical, U.S. Steel, and Union Carbide.⁹

How reasonable are these suspicions? Are environmentalists indulging in guilt by association, or is the mediation process actually biased toward the interests of developers? Are mediated agreements always mutually beneficial? Are they always in the public interest? Are they always purely voluntary? These are important questions for those concerned with environmental policy. The answers bear on the issues of how fair and impartial mediation actually is and whether or not environmental groups should embrace this alternative to litigation. Despite their importance, very little effort has been made to examine these politically charged questions in a careful and systematic way. Legal scholars have done some work on the politics of mediation as it is practiced in neighborhood justice centers,¹⁰ but relatively few studies have been done of the politics of environmental mediation. Most of the scholarly work on environmental mediation has focused on mediation techniques or descriptions of particular cases;¹¹ little has been written specifically about the possibility of political bias in this process.¹² This article will begin to fill this gap and to help those involved in environ-

6. For a description of some of the successes and failures of environmental mediation, see MERNITZ, *supra* note 2, at 79-121.

7. Telephone interview with James Benson, Director of the Institute for Ecological Studies (November 17, 1981).

8. Quoted in J. Crowfoot, *Negotiations: An Effective Tool for Citizen Organizations?*, NRAG PAPERS, Fall 1980, at 25.

9. O'Gara, *supra* note 2, at 11-13.

10. See, e.g., Abel, *The Contradictions of Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE* 267-320 (Abel ed. 1982).

11. E.g., MERNITZ, *supra* note 2; A. TALBOT, *ENVIRONMENTAL MEDIATION: 3 CASE STUDIES* (1981).

12. There are some exceptions to this. Two notable attempts to begin to deal with the possibility of political bias in environmental mediation are Crowfoot, *supra* note 8 and Cormick, *Intervention and Self-determination in Environmental Disputes: A Mediator's Perspective*, ENVTL. CONSENSUS 1 (Winter 1982), at 1.

mental policymaking and environmental disputes to evaluate and use mediation as a tool in dispute resolution.

There is little question that there are *potential* political biases against environmentalists in mediation. In particular, the possibility of co-optation is ever-present in mediation, as it is in all forms of citizen participation.¹³ This essay will categorize and describe the various forms of bias and co-optation that can be present in mediation. The three forms that will be examined are: (1) the possibility that the congenial atmosphere created by mediators serves to disarm and co-opt environmentalists; (2) the possibility that superior political and economic resources create imbalances of power that allow pro-development interests to extract unfair concessions from environmentalists at the bargaining table; and (3) the possibility that the mediation process itself tends to redefine environmental issues in a way that favors pro-development interests. In addition, this essay will consider how proponents of environmental mediation attempt to rebut these charges of bias. Finally, this essay will conclude with some thoughts about how environmentalists should approach mediation.

I

MEDIATION AS SEDUCTION

A. *The Charge*

One of the most common charges leveled at environmental mediation is that the subtle conciliation techniques often used in mediation can "seduce" environmentalists into compromising their ideals and granting overly generous concessions to their opponents.¹⁴ It is pointed out, for instance, that mediators bring conflicting parties together in informal settings, often over lunch or dinner, and encourage them to get to know and eventually like one another.¹⁵ Opponents suggest that in this congenial atmosphere, environmentalists can lose their fighting edge and end up making too many concessions to their new found "friends." As James Benson of the Institute for Ecological Studies explains it:

All of a sudden you are hobnobbing with industry leaders you used to think of as enemies, and now you are sitting down having dinner and drinks with them Environmentalists are not really very feisty people, and when they get around a bunch of high power corporate types they don't want to be unreasonable. They don't want to get into arguments. They want things to be peaceful and gentlemanly [They] get carried away, and really may lose sight of what it is they

13. See Arnstein, *A Ladder of Citizen Participation*, 1969 J. AM. INST. PLANNERS, 216, 216-24.

14. Benson, *supra* note 7.

15. *Id.*

may be trading off. They may be trading off something in the negotiations that others may be unwilling to trade off.¹⁶

The focus here is not on the possibility that this problem is due to some personal bias against environmentalists on the part of the individual mediator; rather, the focus is on sources of co-optation that are built into the mediation process itself and that are at work irrespective of who the individual mediators are. There are good reasons to believe several inherent aspects of mediation encourage the kind of seduction to which Benson alludes. For example, most mediators would acknowledge that "[o]ne of the prime goals of negotiation/mediation is to promote an atmosphere of cooperation, reasonableness and understanding"¹⁷ Moreover, even proponents of mediation, such as Gail Bingham of the Conservation Foundation, admit that during prolonged negotiations "people tend to get to know each other and to like each other. There gets to be a personal bond—it's a natural human response."¹⁸ Some mediators also use conciliation and facilitation techniques to diffuse hostility and minimize personal animosities. They encourage participants to move beyond the initial preconceptions and negative stereotypes they may have of each other.¹⁹ Some environmentalists may be uneasy with this "touchy-feely" approach to negotiations, believing that they may become psychologically disarmed as they are encouraged to get to know and trust their opponents. In the eyes of the environmentalists, conciliation too easily becomes pacification.

B. *The Defense*

Proponents of mediation argue, however, that such appearances can be deceiving. According to proponents, conciliation efforts are attempts to clear away the emotional and psychological obstacles that often get in the way of rational negotiations, rather than attempts at seduction. As negotiators from the Rocky Mountain Center on the Environment²⁰ have pointed out, opponents in mediation attempts often bring to the bargaining table a whole history of antagonistic relationships, misperceptions, and miscommunications that must be dealt with if serious and straightforward negotiations over the substantive issues are to take place.²¹ Thus, in the eyes of mediators, conciliation

16. *Id.*

17. MERNITZ, *supra* note 2, at 157.

18. Telephone interview with Gail Bingham of the Conservation Foundation (September 22, 1981).

19. Carpenter & Kennedy, *Environmental Conflict Management*, 2 THE ENVTL. PROF. 71 (1980).

20. ROMCOE, or the Rocky Mountain Center on the Environment, is located in Denver, Colorado, and has been at the forefront of the attempt to bring together business, government, and public interest groups to address environmental problems in that region.

21. Carpenter & Kennedy, *supra* note 19.

techniques are an attempt to overcome the barriers that stand in the way of effective negotiations, not an attempt at seduction.

Should we rely simply on the assurances of mediators in this matter? After all, it would seem to be clearly in their self-interest to engage in seduction if it will increase the chances of reaching an agreement. Mediators point out, however, that in practice, attempts at seduction could easily backfire and actually interfere with the final dispute resolution.²² For example, even if an environmental representative made unusually large concessions at the bargaining table, those concessions could easily be repudiated later by the organization he or she represents. As Gerald Cormick, executive director of the Institute for Environmental Mediation in Seattle, has argued, mediators must be careful not to construct an atmosphere that is too congenial. He points out that there is a danger that the participants:

will begin to like and trust and understand each other to the point that they forget that their constituents have not had the benefit of the same intensive and cooperative interaction. Solutions that are not politically viable may gain credence in the rarefied atmosphere of cooperative negotiations, but be repudiated as a 'sell-out' by constituents.²³

C. *Seducible Environmentalists*

Most mediators could cite cases in which environmentalists made greater concessions than seem warranted by the situation; the key question in such cases is to pinpoint where the responsibility for making such overly generous concessions lies. Some mediators insist that the responsibility should lie with the participants, not with the mediators:

Environmental organizers are wary of mediation because in mediation the grassroots type will be in a room with a bunch of corporate executives, and they will wind up saying, 'Oh my God, the executives are only people. They put their pants on one leg at a time. They are nice guys. They buy me lunch. Gee, golf may not be such a bad game after all.' And so all of these environmentalists who were full of good character and right thinking are suddenly going to get perverted, because the mediator is going to seduce them by putting them together with the big shots. But that attitude is so naive, it's so flimsy, it's so indicative of never having done mediation. I can't change your character. If you have the courage of your convictions, you have it before you get there and I'm not going to take it away from you. If you are subject to being seduced, you are going to be seduced. But there is nothing I do that

22. Bingham, *supra* note 18.

23. G. Cormick, *Environmental Mediation in the U.S.: Experience and Future Directions* 11 (1981)(unpublished paper presented to the American Association for the Advancement of Science Annual Meeting).

changes your character.²⁴

This is probably mediators' strongest line of defense against the charge that environmental mediation seduces the unsophisticated participant. Even if one acknowledges that the tendency toward seduction is inherent in the conciliatory aspects of mediation, it is difficult to deny that a large part of the responsibility for any concessions must ultimately lie with the negotiators themselves. If environmentalists cannot have dinner with their opponents and engage in calm discussion without capitulating, it hardly seems fair to blame mediators or mediation. More likely these concessions indicate a weakness in the negotiating ability of environmentalists.²⁵

This conclusion need not be a discouraging one for environmentalists. On the contrary, an understanding of the problem brings with it the promise that it can be at least partially overcome. If part of the problem lies in the naive attitude of environmental negotiators, then one can expect this problem to be ameliorated as environmentalists gain more experience at mediation and learn to be tougher negotiators. Thus, while the possibility of seduction will remain ever-present in environmental mediation, the problem may not be as intractable as some environmentalists suggest. There are, however, other forms of co-optation or political bias in mediation that may prove much more troublesome for environmentalists.

II

THE PROBLEM OF POWER

A second source of political bias in environmental mediation is the typical imbalance of power between environmental and pro-development groups. Pro-development groups, whether they are private concerns or public agencies, usually have a better established financial/political power base and greater access to economic and political resources than do environmental groups, especially local ones.²⁶ This situation has led one environmentalist to conclude that "mediation is not an even match between environmentalists and industrialists."²⁷

Imbalances in power tend to favor developmental interests and thus undermine the assumed neutrality of the mediation process in three different ways: First, these imbalances can affect who is allowed

24. Interview with Howard Bellman, regional director for the Institute for Environmental Mediation, in Oberlin, Ohio (September 25, 1981).

25. In fact, environmentalists sometimes offer this very interpretation of the problem. For example, James Benson attributed much of it to the fact that many environmental negotiators are simply too polite and not feisty enough. See *supra* text accompanying note 16.

26. See Crowfoot, *supra* note 8, at 39.

27. Benson, *supra* note 7.

to participate in mediation efforts; Second, superior resources can give pro-development groups the advantage of superior technical analysis; and Third, environmentalists' lack of power can make their participation less than voluntary.

A. *Unequal Access to Mediation*

Power may be a passport into the mediation process. Mediators are often faced with the task of choosing which groups will participate in the mediation effort, and in order to maximize the chance of agreement, some mediators prefer to limit participation to as small a number as possible. Often, the main criterion in choosing the participants is whether a group has enough power to block or subvert any final agreement. According to one mediator:

One of the reasons that mediation works is that it is usually limited to people that have some impact on the situation. . . . I don't ask people who don't have clout to participate in the mediation. This is not public participation, this is cloutful people's participation. That's a real important difference I don't have anything to do with people without power because they can't affect what I'm doing. It's a pragmatic test.²⁸

Although limiting participation on this ground is perfectly understandable from a mediator's point of view, some obvious political problems flow from that approach. A wide variety of interests are usually directly affected by an environmental dispute,²⁹ but not all have sufficient political and economic resources to insist that they be included in any mediation attempt. Local citizens and environmental groups especially have difficulty in amassing the resources that would allow them to wage the prolonged legal and political battles necessary to establish themselves as "cloutful people." The result is that these types of groups tend to be left out of the bargaining process, and this can skew the results of any settlement. In environmental mediation, as in pluralist political theory, the assumption of neutrality and fairness in the decisionmaking process rests largely on the presupposition that all interests have free and equal access to the process.³⁰ The fulfillment of this requirement is in jeopardy when power serves as the passport to

28. Bellman, *supra* note 24.

29. For example, one controversy involving the expansion of Boston's subway system eventually involved more than 50 different governmental organizations, environmental groups, business groups, and neighborhood organizations. L. Susskind, *The Importance of Citizen Participation and Consensus Building in the Land Use Planning Process* 7 (1977)(unpublished paper from Environmental Impact Assessment Project at the Massachusetts Institute of Technology).

30. Many of the criticisms of pluralist democratic theory bear a resemblance to the criticisms this essay makes about environmental mediation. For a classic critique of pluralist theory in general and the problem of access in particular, see R. Wolff, *Beyond Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* (1965).

participation in mediation efforts.³¹

One example of how the choice of participants can affect the substance of negotiated agreements is found in the dispute over the White Flint Mall in Maryland.³² Developers of the mall actively sought negotiations with the residents living in the area of the proposed site, presumably in the belief that the opposition of this group could do them the most damage. The final negotiated agreement reflected only the concerns of the two groups involved: the developers received neighborhood approval of their mall, and the residents received guarantees that the mall would be designed not to disrupt their neighborhood³³ and that the developers would buy their houses at pre-mall prices if their property values decreased because of the mall.³⁴ Although these two groups were satisfied with the agreement, the question remains whether building this modified mall met the interests of all the citizens in the area, especially those concerned with the detrimental effects of shopping centers on struggling downtown areas. While in this example the participants were essentially chosen by the developer rather than a mediator, the point is the same: mediated agreements can hardly be thought of as fair, just, or in the public interest when some interested groups are excluded from the negotiations.

Proponents of environmental mediation are not oblivious to the imbalances in power between disputants. Their primary focus, however, is often on how this problem threatens the expansion of mediation opportunities. As Gerald Cormick has pointed out, mediation "requires some relative balance of power between the parties."³⁵ In other words, disputing parties are unlikely to submit to mediation until it is clear to them that the other group has enough power to delay or block their own goals.³⁶ Thus, proponents of mediation worry that if environmentalists are too weak, they will not be able to force developers to the bargaining table. This likelihood has led to the argument that "[f]or mediation to become more broadly applied it will be necessary to develop sources of influence for protesting [environmental]

31. It should be pointed out that groups can be left out of mediation attempts for other reasons besides lack of power. For example, some groups may not be aware of the mediation and others may be unorganized. One might also include future generations as a group that is often left out of mediation efforts.

32. RESOLVE CENTER FOR ENVIRONMENTAL CONFLICT RESOLUTION, ENVIRONMENTAL MEDIATION: AN EFFECTIVE ALTERNATIVE? 41 (1978) [hereinafter cited as RESOLVE CONFERENCE REPORT].

33. For example, the developers agreed that there would be no access to the shopping center through the neighborhood. *Id.* at 42.

34. *Id.*

35. Cormick & Patton, *Environmental Mediation: Defining the Process Through Experience* (1978) in ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS 84 (Lake ed. 1980).

36. *Id.*

constituencies."³⁷

Another troublesome aspect of the imbalances of power is that instead of avoiding mediation or seeking to exclude other groups from the process, powerful interests may actively embrace mediation as a way of co-opting their weaker opponents.³⁸ Indeed, established groups might easily *prefer* mediation over more formal approaches like litigation because mediation can be considerably less costly in terms of both time and money.³⁹ For powerful groups, mediation may be the most efficient means to their ends, especially if they are able to translate their political and economic superiority into advantages at the bargaining table. Distribution of power may determine not only who participates, but also who has the upper hand in the negotiations themselves. Among the several types of advantages that more powerful groups can enjoy in the mediation process, the most obvious is greater access to expertise.

B. The Advantages of Expertise

Because most environmental disputes involve complex legal, economic, and scientific issues, effective negotiating usually requires access to experts in those areas. At a minimum, one needs professional advice on how to analyze various policy outcomes and help with devising plausible alternatives. As one might expect, scholars have found that groups with better access to information and expertise enjoy a substantial advantage over their opponents.⁴⁰ In practice, this means that the advantage goes to pro-development interests because they typically possess the economic resources necessary to purchase expertise. Of course, imbalances in expertise do not exist in every case. Large national environmental groups have been developing in-house experts to narrow this deficit, but even so, they remain outnumbered and outspent in most bargaining situations. The situation is often much worse for local environmental groups that have even smaller financial resources. Thus, there is probably much truth to the environmentalists' complaint that "environmentalists who get involved in mediation are certainly outmanned and perhaps even intimidated. It is clearly a mismatch when it comes to being able to counter the industries' side when they have a wealth of information, computer models, and analysts."⁴¹ In

37. Cormick, *supra* note 23, at 15.

38. As Cormick has observed, "[w]here there has not been this opportunity for the challenging party to establish a power base, the more established party may seek to select or initiate an intervention process and may even underwrite the expenses of the intervention or the intervener." Cormick, *supra* note 12, at 4.

39. MERNITZ, *supra* note 2.

40. See, e.g., Lake, *Environmental Conflict and Decisionmaking* in ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS 8 (Lake ed. 1980).

41. Benson, *supra* note 7.

politics, information is power, and this is true even in such "informal" political processes as environmental mediation.

C. *The Illusion of Voluntariness*

Imbalances in power can further undermine the equality and impartiality of negotiations by affecting whether or not the final agreement of all parties is purely voluntary. The question of voluntariness is crucial. Advocates often defend the fairness and neutrality of mediated agreements on the grounds that the process is purely a voluntary one, and that no parties are forced to accept unfavorable agreements.⁴² Research has shown, however, that power and coercion can enter into mediation processes in subtle ways. For example, in her study of the mediation done in neighborhood justice centers, Christine Harrington found that subtle threats of outside sanctions often make mediation less than voluntary.⁴³ She points out that local prosecutors sometimes "persuade" people to participate in mediation by dangling over their heads the threat of formal prosecution.⁴⁴ Similar kinds of outside forces may introduce coercion into environmental mediation as well. Environmental groups that lack substantial sources of formal power may be forced into mediation because the other available options are even more undesirable. For instance, a local environmental group that cannot sustain a prolonged court battle and that has little influence on a city council might easily conclude that it has little choice but to mediate. It will thus enter into negotiations from a position of weakness. In contrast, a pro-development group may enter into negotiations from a position of strength, confident that if negotiations fail, it can always turn to more formal political avenues to pursue its case. In such situations, developers will be inclined to offer only token concessions to environmental groups. Because environmentalists are bargaining from a position of weakness, they will be inclined to accept what amounts to only a slight modification of an undesirable project, reasoning that even a few concessions are better than nothing. Indeed, James Benson argues that this is the actual result of many mediation efforts: "Basically, what industry is doing is giving crumbs to its opponents and walking off with pretty much what it wanted in the first place."⁴⁵

The illusion of voluntariness that surrounds mediation not only obscures subtle forms of coercion, but also grants an air of reasonableness and legitimacy to mediated agreements. James Crowfoot made

42. MERNITZ, *supra* note 2, at 49-50.

43. Harrington, *Voluntariness, Consent, and Coercion in Adjudicating Minor Disputes: The Neighborhood Justice Center*, in POLICY IMPLEMENTATION 131 (1980).

44. *Id.* at 149.

45. Benson, *supra* note 7.

this point in his study of whether negotiations can be an effective tool for citizens' organizations:

In terms of the elite's interests, negotiation/mediation is a very good tool if you have controlling power. It can be quite useful in a situation of conflict in which there is a need to provide a sense of participation to other interest groups. . . . Participation [of citizens' groups] in such processes can also make elite goals and perspectives seem to be fair and reasonable.⁴⁶

This air of legitimacy and reasonableness may be difficult for developers to come by otherwise. When they are forced to use their financial and political clout to gain victories before legislative bodies or courts, developers risk being seen as the "heavies" in the public's view. If developers can achieve virtually the same goals through mediation, however, they have also achieved a public relations coup. Their (slightly modified) project now has the voluntary seal of approval from environmentalists. The advantage of such an approach was shown in the case of the White Flint Mall.⁴⁷ After the developers granted some design concessions to local residents, the residents actually testified on the developers' behalf before the zoning board.⁴⁸

D. An Uncommonly Clear Example

It is very difficult, of course, to establish that developmental interests enter mediation with the intention of co-opting environmentalists in the ways described above. Few would readily admit that that was their purpose. Fortunately, there is a little-known government study that reveals in an uncommonly clear way the co-optive intentions that can lie behind mediation offers.⁴⁹ This report was intended to familiarize federal officials who must deal with environmental issues and groups with the various advantages of mediation:

[I]t is the thesis of this paper that Federal decisionmaking and, specifically, public sector planning and regulation often can be improved by early involvement of all key interest groups likely to attempt to block a Federal action. Using conflict management tools such as conciliation, facilitation, and mediation—which build consensus among constituents with a stake in proposed Federal action—officials can in certain circumstances reduce unnecessary court delays, avoid regulatory stand-offs and move opponents to mutually acceptable settlements. Environmental conflict will be less disruptive to agency decisionmaking if offi-

46. Crowfoot, *supra* note 8, at 36.

47. See *supra* note 32 and accompanying text.

48. RESOLVE CONFERENCE REPORT, *supra* note 32, at 42.

49. P. CLARK & W. EMRICH, NEW TOOLS FOR RESOLVING ENVIRONMENTAL DISPUTES (1980) (Report for the Council on Environmental Quality and the Geological Survey, U.S. Department of the Interior).

cials learn to use conflict management tools⁵⁰

While this passage contains such appealing phrases as "mutually acceptable settlements," it is clear that the overriding purpose of mediation efforts from the perspective of the authors is to "manage" conflict. They seem primarily concerned with avoiding or dampening conflicts that could "block" or "disrupt" the efficient implementation of agency policy. Later in the report, Clark and Emrich go into greater detail as to how an agency can give the illusion of negotiating with opposition groups while maintaining its authority to make the basic policy decisions:

[Some agencies] fear a loss of agency authority in the context of a group negotiating process. . . .

[But] a properly managed mediation process *guarantees* retention of agency authority; it does not challenge or weaken it. At the very outset, the mediator requires the agency to outline its specific constraints—regulatory, political, economic—under which it must operate and within which any final agreements must fall.⁵¹

Thus, by using the notion of "constraints," an agency is able to set the parameters of what will be negotiable and what will not, and in that way retain the essential power in the situation. In practice, this means that although the agency may be willing to grant concessions on details, the basic policy decisions remain non-negotiable. This tactic is used by private developmental concerns as well. The issue of mall development again illustrates how this tactic can be applied in a specific conflict. As one environmental lawyer has complained, shopping center developers often seem eager to negotiate, but rarely over the basic question of whether the mall should be built at all:

I was involved in a case in which a company wanted to build a massive regional shopping center in a suburban county. It would have effectively destroyed what had been accomplished downtown—a classic case. . . .

Of course we continually wanted to negotiate. But the developers wanted to negotiate things like how to make it pretty and how many parks they would give . . . I refused to negotiate until they agreed to negotiate on the basic land use question. The truth is, we were telling them [that] our bottom line was no regional shopping center . . . but we had to go to court because they were unwilling to put that issue on the table.⁵²

Powerful public and private organizations using mediation to give the illusion of significant and widespread participation, while retaining essential policymaking power, is classic textbook co-optation: partici-

50. *Id.* at 2.

51. *Id.* at 12 (emphasis in original).

52. *NRAG Transcripts, supra* note 2, at 13.

pation without power.⁵³ Thus, the most basic problem of co-optation in mediation may not be the problem of naive environmentalists being seduced by congenial mediators, but rather the illusion of meaningful participation in a process where other parties actually possess the decisive power.

E. Biased Games With Impartial Referees

Power imbalances obviously can compromise the impartiality of environmental mediation; the question is whether mediators and mediation should be held responsible for the problem. Proponents of mediation argue that power imbalances already exist in the outside world and are not created by mediation or mediators. In this sense, then, environmental mediation actually remains politically neutral. Just as a finely made mirror neutrally reflects what is presented to it by the outside world, mediation impartially reflects the imbalances of power in society itself. We do not blame a mirror for what we look like, and neither should we hold mediation responsible for what it reflects.

There is much truth to this argument; mediation obviously is not responsible for the maldistribution of political and economic power in our society. That fact does not mean, however, that mediation cannot be held responsible for its built-in tendency to institutionalize and perpetuate that maldistribution. Environmental mediation may actually work to legitimize imbalances in power by conferring an air of fairness to inequitable or co-optive agreements, and in this sense, mediation and mediators may be culpable. It is as if the mediator were a referee who comes upon an informal game of soccer that is being played on a slanted field and where one of the teams has more and bigger players. If the referee neutrally accepts the game as it is and merely attempts to ensure that the players act in a fair and sportsmanlike manner, the game remains a biased one. Although the referee may congratulate himself on his impartiality in enforcing the rules of "fair play," he inadvertently institutionalizes an inherently inequitable game and confers upon it a sense of legality and legitimacy that it did not possess before. It is this kind of contribution for which mediators can be held responsible.

III

DEFINITIONAL BIAS

A third potential form of political bias in environmental mediation is what might be called "definitional bias." In mediation, environmental issues tend to be defined in ways that implicitly favor pro-development interests. An effort is usually made not to cast issues in moral

53. Arnstein, *supra* note 13.

terms; rather, disputes are seen as taking place between groups with equally valid demands.⁵⁴ For mediators, this amoral perspective on environmental conflict reflects in part their desire to remain neutral, but it performs another valuable function as well by laying a conceptual groundwork favorable to compromise. If disputes were seen in moral terms, where one party is right and the other is wrong, the attractiveness of compromise would be minimized. Compromise with those who are wrong would itself be seen as immoral. If one views environmental conflicts as clashes of different but equally valid *interests*, however, then compromise becomes the logical solution to the problem. From this perspective, "splitting the difference" is the fair and just solution to the conflict because each party gets some of what it wants.⁵⁵

On one hand, this view of environmental conflict as a clash between competing interests simply represents the mediators' commitment to neutrality and reasonable compromise. On the other hand, defining environmental conflict in terms of equally valid competing interests may work to the advantage of pro-development interests. In practice, it promotes the adoption of compromises that may actually come much closer to fulfilling the goals of developers than the goals of environmentalists. The logical compromise between the developers and environmentalists is usually some form of what is called "responsible development."⁵⁶ It is quite possible to see this approach as a reasonable integration of environmental and developmental interests. It is also possible, however, to see "responsible development" as satisfying developers more than environmentalists. This is particularly true if one believes that many pressing environmental issues do not involve choices between responsible and irresponsible development, but rather, choices between development and non-development.⁵⁷ Many environmentalists would undoubtedly argue that the responsible development of nuclear plants or the responsible development of oil drilling in national parks are "compromises" that are essentially victories for pro-development interests.

54. In Cormick's words, "there will be legitimate differences in priorities among persons with varying perspectives and divergent aspirations. These differences cannot be dealt with in terms of 'right' and 'wrong'—all are 'right' or legitimate concerns." Cormick, *Mediating Environmental Controversies: Perspectives and First Experience*, 2 EARTH L.J. 215 (1976).

55. One can draw parallels here between the perspective on political issues fostered by environmental mediation and the perspective fostered by the theory of interest-group pluralism. Pluralism also defines a just policy outcome as one in which the interest groups involved achieve some of their goals. See Wolff, *supra* note 30.

56. As Scott Mernitz pointed out in his book on environmental mediation, one of the main "goal[s] of mediation is to encourage responsible, planned and progressive development." MERNITZ, *supra* note 2, at 163.

57. Mernitz has stated that "future, mediated environmental settlements will tend to favor developmental interests in the sense that some development will occur." *Id.*

Some promoters of mediation will admit that responsible development is not a strictly neutral goal. This developmental bias poses little problem for them, however, because they believe that development is a natural part of social progress, and that mediation can ensure that this progress proceeds smoothly. According to Mernitz, "environmental mediation helps opposing parties to see the need for compromise as a means of furthering society's progress. Extensive delays, although sometimes valuable for selected interests, usually cause social, economic, emotional, and ecological traumas that are undesirable."⁵⁸

Many environmentalists, of course, would question Mernitz's equation of continuous development with the good life. Many environmental writers have argued that the pursuit of the good life now requires limits to development.⁵⁹ They argue that continuous economic growth and development, even in their "responsible" forms, only drain valuable non-renewable resources and threaten to stress our ecosystem to the breaking point.⁶⁰ From this perspective, environmental disputes do not simply involve conflicts of interest, but involve basic structural choices between two different ways of life, one based on ever-increasing development and maximization of GNP, the other based on limits to growth and ecological viability.⁶¹ When viewed this way, responsible development does not represent a reasonable compromise, but a destructive capitulation to the forces of growth. Understanding that what is at stake in many environmental controversies is a choice between two incompatible paths makes many environmentalists suspicious of mediation. One environmental lawyer thinks environmentalists "give away the whole ballgame" by agreeing to negotiate:

My point is based on my involvement in certain environmental issues, that there are some cases where the chance to negotiate equals giving up what you're fighting for. There *are* some absolutes in the world and I think lawyers are just going to have to flat-out fight to preserve them. I disagree that there are always going to be negotiations. There *are* going to be some ultimate decisions, but it should be clearly recognized that there are times when you just can't negotiate, because there are some things in the world that are non-negotiable.⁶²

Implicit in this statement is the idea that environmental mediation can obscure the fact that some environmental disputes involve fundamental moral and philosophical differences. Richard Abel, in his study of the political functions of neighborhood mediation and arbitration

58. *Id.* at 158.

59. *E.g.*, H. DALY, STEADY-STATE ECONOMICS (1977); W. OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY (1977); L. SCHUMACHER, SMALL IS BEAUTIFUL (1973).

60. OPHULS, *supra* note 59, at 1-137.

61. DALY, *supra* note 59, at 2-49.

62. NRAG Transcripts, *supra* note 2, at 21.

centers, makes a similar point.⁶³ He argues that these informal processes tend to obscure the systemic nature of many societal conflicts by defining disputes as individual grievances.⁶⁴ Mediators and arbitrators tend not to see disputes as basic clashes between classes or races, but rather as isolated problems involving individual landlords and tenants or particular merchants and customers. Consequently, according to Abel, the larger societal issues tend to drop from sight as mediators focus on the specific incidents and the particular personalities of the individuals.⁶⁵ A similar process of conflict redefinition occurs in environmental mediation; mediators would prefer to see disputes as conflicts of interests among local groups rather than as symptoms of larger structural and value choices facing society.

This approach not only tends to suppress the more fundamental environmental issues at stake, but also tends to shift the blame for the conflict away from pro-development groups. As Abel points out, mediators prefer not to see disputes as one-sided, or in the case of environmental issues, as caused by the forces of development threatening the environment.⁶⁶ When the blame rests on one party, compromise is hardly the just solution. The tendency on the part of mediators, therefore, is to see the conflict as caused by both parties' unreasonable demands and unwillingness to compromise. This assumption of mutual fault, which may be accurate in some cases, but certainly not all, serves to suppress the possibility that environmentalists are the wronged party and deserve vindication. This, in turn, morally disarms environmental groups. It puts pressure on them to be "reasonable," give up some of their "extremist" demands, and compromise on a "responsible" plan for development.

B. Avoiding the Problem

Although proponents of mediation are not unaware of this potential problem, they see it as one that can be avoided relatively easily. Politically sophisticated mediators recognize that some environmental issues are nonnegotiable and advise mediators to avoid trying to promote compromises on them.⁶⁷ For instance, Gerald Cormick cautions mediators not to attempt to mediate controversies over nuclear power plants. Recognizing that many environmentalists are philosophically opposed to nuclear power *per se*, he points out that "[t]here is no possible area of accomodation and no scope for good-faith negotiation and

63. Abel, *supra* note 10.

64. *Id.* at 287-89.

65. *Id.* at 289.

66. *Id.* at 285.

67. Cormick, *supra* note 54, at 218.

mediation.”⁶⁸

While it might seem that avoiding disputes where compromise is not appropriate would eliminate much of the problem of definitional bias, there are several reasons why this solution may not be workable. First of all, not all mediators are necessarily as responsible and conscientious as Cormick. Some have been known to distort the nature of disputes and to attempt to convince environmentalists to accept compromises on nonnegotiable issues. Dr. Irving Goldaber of the Center for the Practice of Conflict Management, for example, sees no problem with trying to mediate disputes over nuclear energy.⁶⁹ He has held seminars for utility company executives to teach them his “win/win” approach to conflicts over nuclear energy, a process of negotiation in which both sides allegedly win. In one such seminar, a simulated negotiation resulted in “utility executives” and “environmentalists” finally agreeing to (1) co-sponsor public hearings on general nuclear issues; (2) form a joint consumer advisory committee; and (3) allow a peaceful demonstration outside the secured area of the plant.⁷⁰ One participant reported that Goldaber, quite happy with this agreement, declared, “You see? There *is* a win/win solution, ladies and gentlemen, even in your situation, which at times seems so hopeless.”⁷¹ When asked if he really believed that people in the anti-nuclear movement would believe they had “won” if the plant remained under construction, Goldaber responded that “[t]hey’ve made some concessions, of course; but look what they’re going away with.”⁷² Undoubtedly some mediators would view Goldaber’s efforts in the nuclear area as a disservice to their profession. But the fact remains that others say compromise is possible “in nearly every conflict situation.”⁷³

Another difficulty with the suggestion that mediators should simply avoid involvement in nonnegotiable issues is that it is often very difficult to distinguish between those conflicts that are negotiable and those that are not. Conflicts often involve a mixture of negotiable and nonnegotiable issues. In such cases, there is a natural temptation to try to suppress the more basic and controversial dimensions of the conflict and focus attention instead on the more negotiable—and peripheral—issues. The complex environmental disputes that arise over proposals to open up new uranium mines and mills are good examples. Issues range from local concern over disruption of the water table and the danger of radiation to local residents to the larger societal issues con-

68. *Id.*

69. For one description of Goldaber’s work, see Dowie, *Atomic Psyche-Out*, MOTHER JONES, May 1981, at 21.

70. Dowie, *supra* note 69, at 50.

71. *Id.*

72. *Id.*

73. MERNITZ, *supra* note 2, at 60.

cening the relationship of the mine to nuclear energy and nuclear weapons programs. While one could imagine arriving at mutually acceptable solutions to many of the local problems, the larger issues are more intractable. This is not simply a hypothetical situation; this narrowing of the issues has occurred in several controversies over uranium mines.⁷⁴ In one such case, the lawyer representing the environmental groups was quite eager to mediate the dispute but was frustrated in his efforts by a few environmentalists who refused to let go of some of the larger issues involved. He wrote:

The mining company has talked to us about the possibility of mediating this dispute. They would match their experts on reclamation, hydrology, wildlife and outdoor recreation against ours at a negotiation table. And we would try to reason to a result. I like that idea, and *some* of my clients like it, also. Not all. The ones that don't like it are, by and large, 'anti-nuclear' folks. Their main concern is not how good the reclamation or how restructured the hydrologic system will be. They simply don't want any contribution to the nuclear fuel cycle being made by our public land managers.⁷⁵

The passage leaves the impression that those concerned with the larger nuclear issues are being unreasonable, and that if only those larger issues could be set aside, then negotiations could go ahead much more efficiently and the dispute could be resolved.⁷⁶

While one can be sympathetic with the mediators' desire to keep discussion at a reasonable level, one can also see how this approach tends to downplay issues that are of greatest importance to some environmentalists. This tendency is not necessarily the result of any personal political bias on the part of individual mediators, but rather a function of the inherent limitations of the mediation process. Mediation sheds light only on certain types of disputes. It works best in disputes that are primarily local and that do not involve basic value conflicts or structural choices. There is a tendency for mediators to try to fit all disputes into this mold. If the only tool one has is a hammer, everything becomes a nail.

74. See, e.g., Golten, *Mediation: A "Sellout" for Conservation Advocates, or a Bargain?* 2 THE ENVTL. PROF. 62,65 (1980); Carpenter & Kennedy, *supra* note 19.

75. Golten, *supra* note 74.

76. This line of reasoning was apparent in a recent attempt by the ROMCOE Center for Environmental Problem Solving to mediate another uranium mine dispute in Utah. Carpenter & Kennedy, *supra* note 19. From the very beginning, the ROMCOE mediators made it clear that because of time limitations it would be most efficient to address only a limited agenda of issues: "In our opening remarks, we addressed the issue of nuclear warfare explicitly by pointing out that it was unlikely that we would solve that problem in one day, but it could easily absorb the entire time available. We suggested that the groups agree not to address the nuclear warfare issues because we wanted to know about the plans for the uranium mine." *Id.* at 73.

CONCLUSION

A number of potential sources of political bias and co-optation are inherent in environmental mediation. But how should an understanding of the political pitfalls of mediation affect whether environmentalists choose this alternative to litigation? There is no simple answer. As a rule, it would benefit environmentalists to have a healthy suspicion of mediation, especially when the offer to mediate comes from their opponents. It also should be kept in mind, however, that mediation can sometimes benefit environmentalists,⁷⁷ and the potential benefits will increase as environmentalists become more aware of the political traps built into this process and more adept at avoiding them. At times it may even be useful for environmentalists to actually embrace co-optation. If, for example, one is faced with a good possibility of losing entirely, it may be prudent to accept a mediated compromise even if one gains only token concessions. Something may be better than nothing. On the other hand, one might want to avoid this kind of mediation because of the air of legitimacy it might give undesirable developments. In short, the decision to enter into mediation is complex and difficult. It is an option that should not be entered into naively or precipitously, but neither should it be eliminated automatically because of its inherent political biases.⁷⁸

Finally, it is helpful to keep in mind that the problems of mediation are in many ways simply reflections of the larger political problems faced by environmentalists in our society. In mediation there may be political biases toward those with the most power and ideological biases toward development, but these are most properly seen as functions of the fact that we live in a society in which power is inequitably distributed and in which the economic system has a structural bias toward continuous growth and development. Understanding the political problems of environmental mediation in this way suggests that environmentalists should not waste time avoiding or condemning mediation. Instead, they should turn to the more difficult task of changing the larger political landscape. This task involves building greater sources of formal political power and promoting greater societal appreciation of the importance of environmental values and the costs of continuous development. In the end, that will be the most effective way to overcome the political biases of environmental mediation.

77. For examples of mediation efforts that have benefitted environmentalists, see RESOLVE CONFERENCE REPORT, *supra* note 32, at 37-46.

78. For an excellent discussion of how citizens' groups should go about deciding if mediation is appropriate in a particular situation, see Crowfoot, *supra* note 8.