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Williams: Williams: Consensual Approaches

Consensual Approaches to Resolving Public Policy Disputes

I. INTRODUCTION

Those with knowledge of the present state of affairs at the local, state, and federal governmental levels understand the difficulty often faced when government officials attempt to implement controversial programs. Whether it be the construction of a prison, the building of a municipal power plant, the establishment of housing for low-income families, or the formulation of policy regarding the disposal of hazardous waste, implementation of any of these programs will often be met by intense opposition from many interested groups and individuals. Without fail, many groups will attempt to block the government from moving forward on controversial projects, regardless of how pressing the need for those projects may be. Typically, the respective government officials will press on, realizing the importance of the program to the local area or the nation as a whole. Often, those for and against the controversial program or project will attempt to resolve their differences through litigation.

At a theoretical level, one may surmise that the resolution of public policy disputes should be accomplished through the judicial process. One may ask, who is better equipped than the courts to handle disputes concerning such important matters affecting so many individuals? If the court system can resolve civil disputes between private individuals, one would imagine it should be used to resolve large-scale conflicts between numerous individuals and interests.

While public policy disputes appear best suited for a judicial remedy, this is often not the case in practice. A comparison of the typical public policy disputes within the general private civil suit reveals the shortcomings of litigation as a tool for resolving public conflict. The typical private civil suit will involve a small number of parties, often fighting over a limited number of interests. The dispute will often be viewed as a win-lose situation where one party wishes to take all to the exclusion of the other—a zero-sum game. While proponents of Alternative Dispute Resolution (“ADR”) would contend that this dispute would be better resolved in a forum outside the formal judicial system, one may concede that the present judicial framework is best designed to resolve private disputes between two opposing interests.¹

Contrast the aforementioned private suit with the typical public dispute—for example, the proposed construction of a landfill. Unlike many private suits, the number of interested parties will be great. Residents in the proposed area of construction and environmental activists may vehemently oppose the building of the landfill. Clearly, the government officials or agency who proposed the landfill will support its construction. Why, then, is this dispute, where opposing interests are at

1. Sandra M. Rennie, *Kindling the Environmental ADR Flame: Use of Mediation and Arbitration In Federal Planning, Permitting, and Enforcement*, 19 ENVTL. L. REP. 10479 (1989). “ADR is a catch-all phrase for a variety of techniques and procedures used by third-party neutrals to help stakeholders in a dispute find a basis for agreement.” *Id.* at 10479. See *infra* text accompanying note 89.

a stand-off, not best suited for a judicial resolution? The answer is that this controversy, unlike many private suits, involves resolving "distributional disputes."²

Most often, resolution of private civil disputes will hinge solely on the parties' legal rights. Whether a tort or contract claim, the ultimate judgment will rest on legal principles. In contrast, the construction of the landfill will involve much more than legal rights. It will concern the greater issue of distributing a public need among the citizenry. Proponents of the landfill will emphasize its necessity, while those opposed will want it built at another location. If built elsewhere, the citizens there will likely oppose its construction as well. As one can see, public disputes are not solely win-lose situations. One party may not succeed to the total exclusion of other interests. The underlying problem will not disappear at the conclusion of the dispute—the problem must eventually be resolved. If the proponents of the landfill lose a suit to their opponents blocking the landfill's construction, the same dispute may arise later if the landfill is proposed in another location. Therefore, approaching this dispute in the same manner as a private civil suit will not lead to an effective nor permanent solution for many interested parties. Litigation will simply postpone a final solution, and at great delay and cost to all concerned.³

A better solution to public disputes may be reached outside the realm of traditional litigation. The parties must view their dispute not as a win-lose situation, but instead as a dispute where all parties may gain if they work together.⁴ The combatants must set aside their differences and work towards a cooperative solution. "All-gain agreements can only be achieved when the parties stress the cooperative, and not the competitive, aspects of their relationship. . . . This requires cooperation, even in the face of competing self-interests."⁵ Instead of proceeding directly to litigation, opposing parties in a public dispute may achieve better results if non-traditional dispute resolution processes are employed.⁶ Specifically, unassisted negotiation and assisted negotiation⁷ may provide more effective resolutions to complex public disputes in shorter fashion, and at less cost.⁸

This Comment will explore various consensual approaches and their application to public disputes. Specifically, unassisted and assisted negotiation will be examined in detail.⁹ In addition, the specific application of consensual approaches will be explored in the context of public environmental disputes.¹⁰ Finally, the issue of

2. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 17 (1987). Distributional disputes differ from private suits which center primarily on the definition of legal rights. "Distributional disputes focus on the allocation of funds, the setting of standards, or the siting of facilities (including how we use our land and water)." *Id.*

3. See DOUGLAS J. AMY, *THE POLITICS OF ENVIRONMENTAL MEDIATION* 17-39 (1987).

4. SUSSKIND & CRUIKSHANK, *supra* note 2, at 33-34.

5. *Id.*

6. See *infra* text accompanying notes 12-69.

7. SUSSKIND & CRUIKSHANK, *supra* note 2, at 11. Unassisted negotiation and assisted negotiation are also referred to as "negotiated approaches to consensus building." *Id.*

8. AMY, *supra* note 3, at 17-39.

9. See *infra* text accompanying notes 12-69.

10. See *infra* text accompanying notes 70-112.

alternative resolution to public disputes at the federal administrative level will be examined.¹¹

II. CONSENSUAL SOLUTIONS TO PUBLIC DISPUTES

A. Overview

Litigating public disputes often leads to unsatisfactory results for all interested parties. If one accepts this statement as true, the subsequent issue one faces concerns possible alternatives to litigation. The first alternative involves the use of the political process.¹² Since what is at issue is of public concern, one would anticipate that resolution through the established political regime would be a viable alternative. Referenda, the voting process, and other political activities can resolve public disputes, but they have a limited ability to resolve these disputes quickly and efficiently.¹³ Accordingly, parties should attempt to resolve their differences through more informal processes.

The basic characteristics of informal approaches are important to understand because they help explain why these dispute resolution processes better satisfy the parties' interests. Specifically, five main characteristics of informal dispute resolution processes should be present.¹⁴ First, the process should be *ad hoc*.¹⁵ In other words, the process should be flexible enough to allow the parties to fashion the process to suit their particular needs. Second, the process should be informal, meaning that the parties should deal with each other directly—not through hired advocates.¹⁶ Third, the process should be consensual.¹⁷ The parties must treat all interests, including those of others, as important. Fourth, the dispute resolution process should be conducted face-to-face.¹⁸ Finally, as discussed above, informal resolution of public disputes is most appropriate when the conflict is restricted to distributional issues.¹⁹

Utilizing informal processes to resolve public disputes under the guidelines set out above will lead to “joint problem solving,” and will avoid the adversarial shortcomings of litigation.²⁰ This approach will foster better relations between the parties, and lead to a more acceptable result for all involved.

The characteristics outlined above provide only a cursory overview of informal means of solving public disputes. Within the realm of “negotiated approaches to

11. See *infra* text accompanying notes 113-36.

12. See SUSSKIND & CRUIKSHANK, *supra* note 2, at 35-76.

13. *Id.* This Comment will not explore in detail the shortcomings of the political process in resolving public disputes. In short, the political branches are not equipped to resolve public disputes quickly or efficiently. *Id.*

14. *Id.* at 76-79.

15. *Id.* at 77.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* See *supra* note 2.

20. SUSSKIND & CRUIKSHANK, *supra* note 2, at 77.

consensus building” there exists more specific processes which may be divided between unassisted negotiation and assisted negotiation.

B. Unassisted Negotiation

Defined broadly, unassisted negotiation occurs when parties involved in a public dispute voluntarily agree to informally seek a resolution to their dispute *without the aid of an intermediary*.²¹ The parties seek to reach a consensus on a particular issue that is agreeable to all. This “voluntary negotiation” often will better serve the needs and interests of all concerned. “Consensus . . . is more likely to resolve a dispute than a vote of a legislative body, a decision by an administrative agency, or a court decree because it is likely to meet more of [the parties’] interests.”²²

Unassisted negotiation of public disputes is appropriate in only very limited circumstances. This is because of the very nature of public disputes. Return to the above example of the dispute surrounding the construction of a landfill. In this scenario, numerous parties will have an interest in the outcome of the dispute. Also, the dispute will involve many technical and scientific considerations beyond the purview of the average citizen. It would be extremely difficult to informally gather all interested parties and have those individuals resolve such a complex dispute. In circumstances such as these, informal resolution requires the aid of a professional intermediary.²³

Not all public disputes involve countless parties and complex, technical facts. In some instances, unassisted negotiation may produce excellent results. Three preconditions have been identified in which unassisted negotiation may be appropriate.²⁴ First, the issues in dispute and the number of interested parties involved should be “few in number and readily identifiable.”²⁵ Second, the parties must establish clear channels of communication to foster settlement.²⁶ Third, all parties must believe that the uncertainty of litigation is sufficiently high in comparison to settlement.²⁷ When these factors are present, resort to unassisted negotiation may be appropriate. Overall, the number of public disputes which satisfy the above criteria is somewhat small. More often, the dispute has numerous issues and various interests. Lines of communication are often unclear. Finally, parties often are overconfident of the success of litigation. Nevertheless, when these criteria are not all met, but the parties are willing to informally resolve the dispute, assisted negotiation will be most appropriate.

21. See *id.* at 80-135.

22. *Id.* at 81.

23. See *infra* text accompanying notes 28-49.

24. See SUSSKIND & CRUIKSHANK, *supra* note 2, at 133-35.

25. *Id.* at 133.

26. *Id.*

27. *Id.*

C. Assisted Negotiation

Assisted negotiation involves the use of an *independent intermediary* to aid in resolution of the dispute.²⁸ The process remains consensual, but employs outside aid in helping promote understanding and settlement.²⁹

Certain characteristics warrant consideration of the use of assisted negotiation in public policy disputes.³⁰ First, complex issues beyond the understanding of a normal judge or jury implicates the need for assisted negotiation.³¹ Second, the presence of interests which may not be adequately addressed by traditional legal remedies also will create a need for a non-judicial resolution to the dispute.³² In addition, a party's desire for a quick and private settlement to a public dispute will be better satisfied through assisted negotiation.³³

Two main forms of assisted negotiation exist: facilitation and mediation. In choosing which process is most appropriate, the parties must determine how much assistance they will require in reaching a settlement. In other words, the key question becomes: "How much assistance in managing the negotiation process are [the parties] likely to require in order to reach a satisfactory conclusion?"³⁴ While this may be a difficult question for the parties to answer, the final determination will hinge on what degree of management of the process will be needed.³⁵

Facilitation and mediation differ in regard to the degree of control over the procedure which is given to the intermediary.³⁶ When more control is required, the parties should choose the aid of a mediator. When less control is needed, a facilitator will be more appropriate. An overview of both processes will make the distinction clearer.³⁷

Facilitation is the least complex form of assisted negotiation.³⁸ Facilitation "focuses on getting the parties to understand the issues at stake and jointly find a solution that meets their needs."³⁹ The facilitator's role is limited to ensuring that the parties lines of communication are free and open - she is concerned with procedural, not substantive matters.⁴⁰ "The facilitator focuses almost entirely upon process, making sure meeting places and times are agreed upon, sees that meeting space is

28. *See id.* at 136-85.

29. Rennie, *supra* note 1. "When traditional mechanisms used to resolve conflict fail or are otherwise unsatisfactory, a third party without a stake in the outcome may be involved to provide the needed guidance, communication, and problem solving often necessary to deal with differing interests and values." *Id.* at 10479.

30. *See* Bert P. Krages, *Mediation as A Tool for the Environmental Advocate*, 12 NAT. RESOURCES & ENV'T 209 (1998).

31. *Id.* at 211.

32. *Id.*

33. *Id.*

34. SUSSKIND & CRUIKSHANK, *supra* note 2, at 151.

35. *Id.*

36. *Id.*

37. Nancy Kubasek & Gary Silverman, *Environmental Mediation*, 26 AM. BUS. L.J. 533, 536 (1988). Important to remember is that the facilitator or mediator will have no authority to force the parties to reach an agreement, instead they act solely to promote communication between the parties. *Id.*

38. SUSSKIND & CRUIKSHANK, *supra* note 2, at 152.

39. Krages, *supra* note 30, at 210.

40. SUSSKIND & CRUIKSHANK, *supra* note 2, at 152.

arranged appropriately, and ensures that notes and minutes of the meeting are kept."⁴¹ In other words, "[t]he role of the [facilitator] is to facilitate communication and ensure that the parties understand each other."⁴²

Most importantly, the facilitator should not interject her ideas into the dialogue between the parties. Instead, the facilitator seeks to simply promote discussion and understanding.⁴³ The facilitator's role may be defined as seeking to "foster an environment conducive to joint problem solving."⁴⁴ The facilitator's job is not to fashion a remedy to the dispute, but to aid the parties in designing a solution which fits their interests. "[F]acilitation is called for when the disputing parties need some assistance, but want that help limited to focusing or moderating their discussions."⁴⁵

Mediation, in contrast to facilitation, requires the intermediary to be more involved with the substance of the dispute. The mediator retains control over procedures like the facilitator, but increases her participation in fashioning a settlement between the parties.⁴⁶ "In evaluative mediation, the parties advocate their positions to the mediator who then offers an opinion of the merits of their cases."⁴⁷ The mediator in this sense may be best described as a "knowledgeable neutral."⁴⁸ The key function of the mediator is to help the parties resolve their dispute, "not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."⁴⁹

D. Selecting an Intermediary

Upon choosing to proceed with assisted negotiation, one of the most important decisions which must be made by the parties to the dispute will be selecting the facilitator(s) or mediator(s) who will oversee the settlement process. Locating the services of an experienced and knowledgeable facilitator or mediator is an essential step in the negotiation process.

Should the parties chose to elicit the aid of an intermediary, the parties must chose an objective facilitator or mediator.⁵⁰ "An objective [intermediary] has no connection to any groups or organizations that favor a specific outcome . . . [and] has the professional skills and experience necessary to bring a group of diverse people

41. *Id.*

42. Krages, *supra* note 30, at 210.

43. SUSSKIND & CRUIKSHANK, *supra* note 2, at 152.

44. *Id.*

45. *Id.* at 162.

46. See SUSSKIND & CRUIKSHANK, *supra* note 2, at 162-65.

47. Krages, *supra* note 30, at 210.

48. See SUSSKIND & CRUIKSHANK, *supra* note 2, at 162-65.

49. Kubasek & Silverman, *supra* note 37, at 536. Note that the final settlement should always be reduced to a written agreement to increase the likelihood that participating parties will abide by their agreement in the future. See also Lawrence Susskind, *Multi-Party Public Policy Mediation: A Separate Breed*, DISP. RESOL. MAG., Fall 1997, at 6. "Informally negotiated outcomes need to be transformed into formal mechanisms that will bind the parties in credible ways." *Id.*

50. See Sandra VanAllen Baker & Richard Matwysher, *Seven Steps to Achieving a Genuine Public Consensus on an Emotional Issue: With Specific Examples of How Citizen's Task Forces Have Sometimes Failed*, 5 BUFF. ENVTL. L.J. 410, 412 (1998).

to a consensus.⁵¹ Thus, the intermediary must act purely as a neutral. Her failure to do so will jeopardize the fairness of the negotiation process.⁵²

Furthermore, in complex public disputes, the facilitator or mediator must have some knowledge about the issues of concern to the parties.⁵³ Otherwise, the intermediary will spend too much time deciphering the background to the dispute, and inadequate time aiding the parties to reach a settlement.

Accordingly, once the parties choose to proceed with assisted negotiation, the decision of *whom* to retain as a facilitator or mediator will be very important. Often, the intermediary will be the key factor in whether the parties reach a resolution to their dispute.

Many organizations today provide the professional facilitation and mediation services required to solve public disputes. Among these providers include the Policy Consensus Initiative,⁵⁴ the Udall Center for Studies in Public Policy,⁵⁵ and RESOLVE, Inc.⁵⁶ In addition, many private attorneys engaged in full-time ADR practice are listed in Martindale-Hubbell's Dispute Resolution Directory.

E. Who Should Be Involved in Resolving Public Disputes?

Thus far this section has discussed *how*, and by *whom* public disputes may be better resolved through consensual processes. A final consideration concerns *who* should participate in the resolution of these disputes.⁵⁷ As discussed earlier, in complex public disputes interested parties may be numerous and, in some cases, difficult to ascertain. In order to reach a satisfactory resolution, all those concerned should have a voice in the process. Three main groups should be involved in the resolution process of most public disputes: citizens, business interests, and public officials.

51. *Id.*

52. *See id.*

53. Susskind, *supra* note 49. "Mediators of public policy disputes need to know something about the substantive realm in which they are working, and be extremely sensitive to the larger context of their work." *Id.* at 5.

54. PCI, *Policy Consensus Initiative* (last modified Jan. 12, 2000) <<http://www.agree.org>>. Policy Consensus Initiative ("PCI"), formed in 1997, works with state governments to develop and strengthen consensus building and alternative dispute resolution programs within the framework of state governments. PCI works with leaders in states to establish and strengthen consensus building and conflict resolution as methods for enhancing the effectiveness and efficiency of state government.

55. The University of Arizona, *Udall Center for Studies in Public Policy* (visited May 11, 2000) <<http://udallcenter.arizona.edu/index.html>>. The Udall Center for Studies in Public Policy, located at the University of Arizona, states as its mission to facilitate, analyze, and provide options for the solution of major policy issues through research, education, and public service. In addition, the Udall Center provides assistance in resolving public environmental disputes. *See also* U.S. Institute for Environmental Conflict, *U.S. Institute for Environmental Conflict* (visited May 11, 2000) <<http://www.eecr.gov>>.

56. RESOLVE, *Center for Environmental & Public Policy Dispute Resolution* (visited May 11, 2000) <<http://www.resolve.org>>. RESOLVE, Inc. is a non-profit organization located in Washington, D.C. which describes itself as a leader in mediating solutions to controversial problems and broadening the techniques for consensus building on public policy issues. RESOLVE, Inc. provides mediation and facilitation services in an effort to resolve public policy disputes.

57. *See* SUSSKIND & CRUIKSHANK, *supra* note 2, at 186-236.

Clearly, citizens affected most by the public dispute must be involved in the consensual process. Those who do participate "should reside in the community which they represent and have a stake in the resolution of the issue."⁵⁸ A problem arises in identifying and representing the diverse interests of a large citizenry. Selecting an experienced facilitator or mediator will aid most in alleviating this problem.⁵⁹ Skilled intermediaries will have the requisite abilities to identify key public interests and bring them to the bargaining table.⁶⁰

An additional concern in resolving public disputes is the perceived bargaining power imbalance between private citizens and governmental and business interests.⁶¹ Again, the most appropriate way to deal with this dilemma is to secure the services of an experienced and knowledgeable intermediary.⁶²

A final concern relating to citizen involvement in assisted negotiation relates to the level of involvement. In some circumstances, the number of affected individuals in a public dispute may reach into the millions. In our hypothetical landfill dispute, the number of concerned citizens could number in the thousands. Clearly, all interested parties can not participate directly in the negotiation. Most commentators believe that the intermediary must limit who participates to a manageable number.⁶³ But, "parties substantially affected by the negotiations must be included in the negotiations."⁶⁴

In appropriate circumstances, business interests, meaning parties with a direct financial stake in the resolution of the dispute, should be involved in the negotiation process. The most obvious justification for business involvement in public dispute resolutions is the potential monetary implications on specific business interests.⁶⁵ Delays caused by litigation can result in increased costs to business interests involved in the construction of public projects. By involving themselves in the resolution of the dispute, business interests may expedite settlement and save themselves money in the process.⁶⁶

Finally, government officials should normally be involved in the resolution of public policy disputes. "The pluses of government involvement are many. Participation by government officials can play a vital role in legitimizing the negotiation process for other participants."⁶⁷ Note that for government officials to participate in a public negotiations, they must resolve to give away some power to

58. Baker & Matwysner, *supra* note 50, at 413.

59. See Raymond E. Tompkins, *Mediation, the Mediator, and the Environment*, 11 NAT. RESOURCES & ENV'T 27, 28-30 (1996).

60. See *id.*

61. SUSSKIND & CRUIKSHANK, *supra* note 2, at 210-13.

62. See *id.*; Tompkins, *supra* note 59, at 28-30.

63. Rosemary O'Leary, *Environmental Mediation: What Do We Know and How Do We Know It?*, in *MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE* 17, 23-24 (J. Walton Blackburn & Willa Marie Bruce eds., 1995). "The number of people involved in environmental mediation must be limited. Limiting the size of an audience and extending specific invitations may increase the likelihood that the desired people will participate." *Id.* at 24.

64. *Id.* at 23-24.

65. See AMY, *supra* note 3, at 20-21.

66. Kubasek & Silverman, *supra* note 37, at 540. "From a business perspective, delays in beginning a project may result in increased costs when the project is finally completed." *Id.*

67. O'Leary, *supra* note 63, at 25.

the citizenry and business interests.⁶⁸ Overall, government involvement in the resolution process will increase the chances for long-term success.⁶⁹

III. CONSENSUAL RESOLUTION OF PUBLIC DISPUTES

A. *Resolution of Environmental Disputes*

As discussed in the preceding section, consensual resolution of public policy disputes is often more advantageous than a protracted litigation. Through the use of unassisted and assisted negotiation, parties may reach better solutions to issues of public policy.

A wide array of public disputes may be better resolved through consensual processes. For example, disputes concerning health care as well as low-income housing may be resolved through alternative means. To date, consensual resolution of public disputes has occurred with greatest frequency in the environment area.⁷⁰ “[E]nvironmental mediation is now beyond the status of an experiment; it is slowly becoming a recognized alternative or a complement to litigation.”⁷¹

Environmental disputes encompass many of the characteristics typically found in other public disputes. Specifically, large numbers of interested parties are concerned with the outcome of the dispute and the issues involved are of great public importance. As addressed above, litigating disputes of this nature often results in a substantial outlay of time and money, and often leads to unsatisfactory results for all involved. Instead, many environmental disputes may be better resolved through the consensual processes detailed in the previous section.⁷²

Furthermore, due to the complex nature of environmental disputes, the use of an intermediary, meaning a facilitator or mediator, is almost assuredly necessary to increase the chances of settlement.⁷³ Facilitation and mediation “enables the parties to appreciate any flaws in their positions and the merits of an agreed resolution as a sensible alternative to litigation.”⁷⁴

Four justifications arise for employing the use of a facilitator or mediator in resolving environmental disputes. First, an intermediary will be able to identify interested parties.⁷⁵ As will be addressed below, this will increase the chances of settlement. Second, a facilitator or mediator will better explain the benefits and disadvantages of a consensual process as compared to litigation.⁷⁶ “[An] environmental mediator must help the parties recognize some of the real costs they

68. *Id.* at 26.

69. See Susskind, *supra* note 49, at 5.

70. See MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE (J. Walton Blackburn & Willa Marie Bruce eds., 1995).

71. Kubasek & Silverman, *supra* note 37, at 539.

72. See Susskind, *supra* note 49; Tompkins, *supra* note 59. “[M]ediation is particularly appropriate in those cases where the cost of litigation is expected to be great, the issues complex, the parties numerous, [and] the stakes high . . .” *Id.* at 30.

73. Susskind, *supra* note 49, at 5.

74. Tompkins, *supra* note 59, at 30.

75. O’Leary, *supra* note 63, at 29.

76. See *id.*

face if the matter is not resolved through [facilitation or mediation].”⁷⁷ Third, an intermediary is crucial in resolving environmental disputes due to the ever present concerns of inequality of information among the parties as well as inequality of bargaining power.⁷⁸ An effective facilitator or mediator will address these concerns. Fourth, an intermediary will help build trust among the parties, increasing the chances for settlement.⁷⁹

B. Advantages and Disadvantages of Mediating Environmental Disputes

“Environmental mediation has been used increasingly since the mid-1970’s, with varying degrees of support from business interests, environmentalists, and government agency employees.”⁸⁰ The increase in the use of facilitation and mediation to resolve environmental disputes may be attributed to a number of factors.⁸¹

First, this increase may be attributable, to a large extent, to public dissatisfaction with the ability of the federal judicial system to handle environmental disputes.⁸² “A substantial number of the arguments in favor of mediation hinge on the inability of our litigation system, as it presently functions, to handle environmental disputes in a timely and cost-effective manner.”⁸³ The failure of the judicial system to resolve environmental disputes in a timely fashion hurts all parties involved. Interest groups opposed to a particular project may find it difficult to maintain support until the completion of litigation.⁸⁴ In addition, those charged with completion of an environmental project, including governmental and business entities, may incur substantial additional costs due to prolonged delay.⁸⁵

Second, consensual approaches to resolving environmental conflict are often superior to litigation because of the lower cost of facilitation and mediation compared to litigation.⁸⁶ Exact figures are difficult to estimate, but one author conservatively estimated that, “Complex mediation cases could run into thousands of dollars, but complex lawsuits could cost millions.”⁸⁷

As mentioned above, another factor demonstrating the advantages of facilitation and mediation over litigation in environmental disputes revolves around the litigation process itself.⁸⁸ “The courts are primarily designed to resolve private disputes

77. *Id.*

78. *Id.*

79. *Id.* at 30.

80. Kubasek & Silverman, *supra* note 37, at 535.

81. *See id.* at 533.

82. *Id.* at 539.

83. *Id.* “The inability of the system to handle these cases efficiently stems in large part from the increasing number of cases our federal courts are being forced to handle, resulting in increasing delays.”
Id.

84. *See* ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS (Laura M. Lake ed., 1980).

85. *See* AMY, *supra* note 3, at 20-21.

86. *See* Kubasek & Silverman, *supra* note 37.

87. *Id.* at 541.

88. *See supra* text accompanying notes 82-85.

between two parties; environmental disputes often affect many parties.”⁸⁹ Modern rules of civil litigation generally envision a suit between two opposing interests. Other parties may join the lawsuit as additional plaintiffs, but judges often are not eager to permit many parties to join the case. Consensual processes, which are not close-ended in nature, allow all major interests to have a voice in the resolution of environmental disputes.⁹⁰ Furthermore, “Having a greater number of parties at the mediation table is . . . desirable because it maximizes benefits and minimizes costs [because each] party is seeking a solution that gives the greatest gains to its interests at the least cost.”⁹¹ Moreover, government involvement in the consensual process increases the chances of settling environmental disputes.⁹²

Finally, many commentators contend consensual processes are preferable when resolving environmental disputes because the use of an adversarial process such as litigation is often counterproductive.⁹³ Specifically, the adversarial process, which often fosters hostility between the disputants, is troublesome in environmental disputes because, after the litigation ends, the parties must coexist peacefully.⁹⁴ “Conflicts are bound to occur in the future, and the negative feelings engendered by the litigation process will make it more difficult for the parties to resolve future disputes.”⁹⁵ In addition, because facilitated or mediated solutions do not require a winner or a loser like litigation, parties “are more likely to perceive the outcome as fair, abide by the agreement, and mediate or negotiate future misunderstandings.”⁹⁶

Despite the many benefits of resolving environmental disputes through consensual processes, certain factors indicate that some environmental disputes may be better resolved through litigation.⁹⁷ First, many environmental statutes are purposefully designed *not* to be resolved quickly. “Many environmental statutes expressly require elaborate procedural safeguards because speedy and final resolution of environmental problems may not always be in society’s best interests.”⁹⁸

Second, many environmental statutes are drafted in such a way as to require an affirmative decision which may prevent compromise.⁹⁹ “[S]ome environmental disputes involve such highly charged issues and potentially devastating effects to health and the environment that there is simply no room for compromise.”¹⁰⁰ For

89. Kubasek & Silverman, *supra* note 37, at 541. See RICHARD B. STEWART & JAMES E. KRIER, ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS, AND NOTES 316-24 (2d ed. 1978).

90. Kubasek & Silverman, *supra* note 37, at 542.

91. *Id.* at 543 (quoting Lawrence Susskind & Connie P. Ozawa, *Mediated Negotiation in the Public Sector*, 27 AM. BEHAV. SCI. 255, 266 (1983)).

92. Tompkins, *supra* note 59, at 30.

93. Kubasek & Silverman, *supra* note 37, at 544.

94. *See id.* at 545-46.

95. *Id.* at 546. “The contrary impact occurs as the result of mediation. Even when the parties do not agree with each other and cannot resolve their problem, they often report an improvement in their ability to communicate with the other disputants.” *Id.* at 546 n.74.

96. *Id.* at 546.

97. *See id.* at 547-52.

98. *Id.* at 547. “For example, a decision to grant a permit that would require an irretrievable commitment of natural resources should not be hastily made.” *Id.* at 548 n.85. See David Schoenbrod, *Limits and Dangers of Environmental Mediation*, 58 N.Y.U. L. REV. 1453 (1983).

99. Kubasek & Silverman, *supra* note 37, at 547. See Schoenbrod, *supra* note 98, at 1468.

100. Tompkins, *supra* note 59, at 68.

example, disputes over the enforcement of environmental statutes, where one is either in compliance or violation of a statute, often require a "yes-no" decision.¹⁰¹

A third problem which may arise in mediating environmental disputes concerns uniformity of application. Unlike litigation where judges rely on judicial precedent when establishing their decisions, facilitated or mediated outcomes are in no way bound by previous decisions. Some commentators argue that the potential for widely disparate outcomes is unfair.¹⁰²

Parties who do not like certain [environmental] regulations may try to achieve a mediated settlement whereby they avoid the direct application of the rule. There is always the danger that [facilitation or] mediation will short-circuit the administrative process established by Congress to protect the public interest.¹⁰³

A fourth potential problem with mediating environmental disputes is the possibility that not all interested parties may become involved in the resolution process. Where all parties with authority to implement a settlement agreement are present, the chances of reaching and implementing an agreement are substantial.¹⁰⁴ But where "those with the authority to make settlements cannot be forced to the bargaining table, the chances of success declines."¹⁰⁵

A fifth problem with mediating environmental disputes arises when an issue of great significance needs resolution. Settlement reached through facilitation or mediation will not establish judicial precedent.¹⁰⁶ In addition, a consensual settlement is not subject to judicial review.¹⁰⁷ "Thus, [facilitation and mediation] subjects the disputants to a process in which there is no accountability. There is no means to ensure that the settlement was proper."¹⁰⁸

Furthermore, troubling issues of confidentiality may arise when environmental issues affecting the public interest are resolved behind closed doors.¹⁰⁹ "Some sectors of the public, if not actually involved in the mediation process, may view mediation as inconsistent with the cherished notion that matters affecting the public should be discussed and resolved in the open."¹¹⁰

101. Kubasek & Silverman, *supra* note 37, at 547 n.87.

102. *Id.* at 548.

103. *Id.* at 549.

This argument should perhaps be limited to mediation of compliance disputes. It is . . . argued that allowing a citizens' group to sue to seek enforcement of statutes such as the Clean Water Act is unfair because it allows private citizens to determine which firms will be prosecuted, and such decisions should be made by the EPA.

Id. at 548 n.93. See ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS, *supra* note 84, at 178-80.

104. Kubasek & Silverman, *supra* note 37, at 550. See GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE 104 (1986) (demonstrating that the participation of parties with decision making authority increased success rate).

105. Kubasek & Silverman, *supra* note 37, at 550.

106. Schoenbrod, *supra* note 98, at 1457.

107. *Id.*

108. Kubasek & Silverman, *supra* note 37, at 552.

109. Tompkins, *supra* note 59. "One of the hallmarks of mediation is confidentiality, but this same aspect of mediation that makes it an attractive alternative to costly litigation may clash with the idea of public participation found in most environmental statutes and regulations." *Id.* at 68.

110. *Id.*

A final concern with mediating environmental disputes involves a potential imbalance of power. Some commentators believe that dispute resolution in the environmental context may not serve environmental interests if too much influence is placed in the hands of opposing interests.¹¹¹ The litigation process in some instances may protect the interests of environmentalists in ways consensual processes may not.¹¹²

Overall, this discussion reveals that many public policy disputes, especially those concerning environmental issues, may be better resolved through consensual means rather than through traditional litigation. For many public environmental disputes, consensual processes may lead to better and more long-lasting results than a judgment in a judicial proceeding may provide.

IV. CONSENSUAL APPROACHES AT THE ADMINISTRATIVE LEVEL

A. Administrative Rulemaking and Public Disputes

The preceding section presented disputes concerning the interpretation and application of *existing* laws and regulations to public policy issues. For instance, the above scenario of the disputed landfill would center around economic and social policy issues, environmental concerns, as well as applicable federal and state laws. In that scenario, consensual approaches to resolving the dispute, namely unassisted and assisted negotiation, may be employed to great success.

Significant disputes, specifically in the environmental area, may arise over the enactment of the laws themselves.¹¹³ As discussed earlier, resolution of public disputes may be sought through the political process.¹¹⁴ "When a new environmental law is introduced in Congress or the state legislatures, interest groups who expect to be helped or hurt compete with one another to persuade or pressure the elected representatives."¹¹⁵ Often, the political process will not provide adequate solutions to the concerns of many interested individuals.

Note that the enactment of legislation by the legislature does not end the law making process. "The legislature endorses a fairly broad policy, then delegates to an administrative agency the task of promulgating regulations that will carry [the law] out."¹¹⁶ In theory, the administrative agency is charged with implementing the

111. O'Leary, *supra* note 63.

The potential disadvantages of environmental mediation include (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.

Id. at 21.

112. *See id.*

113. *See* LAWRENCE S. BACOW & MICHAEL WHEELER, ENVIRONMENTAL DISPUTE RESOLUTION 279-322 (1984).

114. *See supra* text accompanying notes 12-13.

115. BACOW & WHEELER, *supra* note 113, at 279.

116. *Id.* at 279-80.

legislative will. In practice, the administrative agency has broad power to implement often comprehensive and ambiguous legislative intent.¹¹⁷

By manipulating the substantive and procedural rules it adopts, the agency can significantly strengthen or dilute the apparent impact of the law. As a consequence, the same interest groups that lobbied hard during the bill-drafting stage are very likely to remain involved in the administrative rulemaking process.¹¹⁸

Unlike the public disputes examined above, where formal recourse was available only through the court system, disputes at the administrative level are governed by statutory law.¹¹⁹

Federal administrative procedures are governed by the Administrative Procedure Act ("APA" or "Act")¹²⁰ which "establishes uniform procedures for certain formal actions such as rule making and adjudication by any federal administrative tribunal or official."¹²¹ Much of the work at the administrative level is accomplished through the rulemaking process.¹²² "Rule making is an agency action that regulates the future conduct of persons, through formulation and issuance of an agency statement (the rule) designed to implement, interpret or prescribe law or policy."¹²³ The rulemaking process itself may lead to public policy disputes.¹²⁴ "In many environmental policy decisions, conflicts between competing interest groups arise, and policy making is often delayed, incomplete, or subject to lengthy litigation."¹²⁵

Similar to the public environmental disputes discussed in the preceding section, resolution of administrative disputes between interested parties may take long periods of time.¹²⁶ It may be years before a final decision is rendered in an administrative dispute which travels through the traditional administrative adjudicative process. Again, better results to these disputes may be reached through consensual means. "Because of . . . problems with the conventional [administrative]

117. *See id.*

118. *Id.* at 280.

119. *See* Clare M. Ryan, *Regulatory Negotiation: Learning From Experience at the U.S. Environmental Protection Agency*, in *MEDIATING ENVIRONMENTAL CONFLICTS: THEORY AND PRACTICE*, *supra* note 70, at 203-16. "The regulatory activities of a federal agency are governed by overarching statutes that have been developed and approved by Congress." *Id.* at 204.

120. Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994 & Supp. IV 1998).

121. Ryan, *supra* note 119, at 205.

Three primary requirements for rule making are included in the Act: (1) Notice that rule making is going to take place; (2) opportunity to participate; and (3) a concise general statement of the basis and purpose for the rule. A major objective of the APA is to provide an opportunity for all affected interests formally to submit comments on proposed rules. The Act requires the agency to conduct information gathering and sharing activities . . . and to hold hearings to obtain public comment prior to specific decision points.

Id.

122. *Id.* "Federal regulatory agencies rely heavily on rule making as a means of formulating policy . . ." *Id.* at 204.

123. *Id.*

124. Dennis H. Esposito & Kristen W. Ulbrich, *Negotiated Rulemaking in Environmental Law*, R.I. B.J., Apr. 1998, at 5. "Final [agency] regulations are . . . replete with uncertainty as they are vulnerable to challenge in court. Litigation over agency rules further protracts the rulemaking process and can significantly escalate costs of rulemaking for all parties involved." *Id.* at 5.

125. Ryan, *supra* note 119, at 204.

126. *Id.* at 205. "[T]he process of developing and finalizing a rule takes several months, often years." *Id.*

process, federal agencies have been encouraged through legislation and Executive Order to use alternative means to develop rules.¹²⁷ Namely, the Negotiated Rulemaking Procedures Act¹²⁸ and similar state legislation¹²⁹ permits federal and state administrative agencies to resolve disputes which arise through the rulemaking process in non-adversarial ways.

B. *The Negotiated Rulemaking Act*

“The Negotiated Rulemaking Act establishes a framework for federal agencies to use regulatory negotiation to develop proposed regulations and clarifies the agencies’ authority to use this consensual technique.”¹³⁰ The use of regulatory negotiation, commonly referred to as “Reg-Neg,” allows administrative agencies to work cooperatively with interested parties in an attempt to reach a consensus regarding proposed regulations.¹³¹

During reg-neg, representatives of the agency and other interested parties engage in face-to-face negotiations concerning the text of the proposed rule. The parties work toward achieving a *consensus* on the rule, at which point the APA notice and comment provisions take over.¹³² The process often results in a regulation more acceptable to all interests than traditional notice and comment rulemaking would have produced.¹³³

As mentioned briefly above, many administrative disputes involve promulgation of environmental regulations. In response, federal environmental agencies, namely the Environmental Protection Agency (“EPA”), have incorporated consensual Reg-Neg procedures in their formal rulemaking processes.¹³⁴ The EPA has used Reg-Neg in rulemaking under the Clean Air Act, the Federal Insecticide, Fungicide, and Rodenticide Act, and various other environmental regulations to great success.¹³⁵

Negotiated rulemaking offers many advantages over traditional notice and comment rulemaking. As detailed above, Reg-Neg often results in more satisfactory results for the participants at less cost, and in shorter fashion. Commentators note that negotiated rulemaking is more appropriate in certain circumstances than in others.

127. *Id.*

128. Negotiated Rulemaking Procedure Act, 5 U.S.C. §§ 561-570a (1994 & Supp. IV 1998).

129. Esposito & Ulbrich, *supra* note 124. “Based on the successful examples of negotiated rulemaking at the federal level, state and local governments have adopted and implemented their own variations of reg-neg.” *Id.* at 5. This Comment focuses solely on federal administrative procedures.

130. Ryan, *supra* note 119, at 205.

131. *Id.* “The technique [Reg-Neg] is based on the assumption that it is possible to bring the affected interest groups together to negotiate the text of a proposed rule. If the negotiators achieve consensus, the resulting rule is likely to be easier to implement and the possibility of litigation is reduced.” *Id.*

132. Esposito & Ulbrich, *supra* note 124, at 5 (emphasis added).

133. *Id.* “[T]he fact that the key interests have been represented in the process and have signed off on the final product significantly reduces the likelihood of opposition in the comment period or subsequent litigation over the rule.” *Id.* at 6 (citing Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 137 (1985)).

134. See Esposito & Ulbrich, *supra* note 124, at 7-8; Ryan, *supra* note 119, at 209-15.

135. Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 143-44 (1985).

First, people must believe that the expected outcome for them is equal to or better than that which could be achieved by pursuing other alternatives. There must be a balance of power between the parties, including the agency, such that they are interdependent and no one party can achieve its goals without the others. [Finally,] [t]he number of participants should . . . be limited.¹³⁶

When these conditions are present, Reg-Neg offers interested parties and administrative agencies an alternative means of resolving administrative disputes. Similar to unassisted and assisted negotiation, Reg-Neg, when employed in the appropriate disputes, allows once polarized interests to reach a consensual settlement to administrative disputes.

V. COMMENT

This Comment has demonstrated that in appropriate circumstances, consensual settlement processes may be utilized to resolve public disputes with greater effectiveness than traditional judicial and administrative adjudication. While the advantages of resolving public disputes informally appear infinite, the overall use of these procedures has been somewhat limited.¹³⁷

In environmental disputes, the use of unassisted and assisted negotiation has increased in recent years.¹³⁸ But the proliferation of public environmental disputes coupled with the increased costs and delays of resolving these suits judicially warrant an increased reliance on consensual processes to resolve these disputes. "While clearly not a panacea, environmental mediation should play an increasingly important role in resolving . . . environmental disputes."¹³⁹

The impetus for resolving environmental disputes informally must come first from government officials, followed by business interests and the public.¹⁴⁰ Increased use of consensual processes in certain well-defined environmental disputes will undoubtedly lead to more acceptable outcomes for all interested parties.¹⁴¹

State and local governments should follow the lead set by the federal government through its enactment of the Negotiated Rulemaking Procedures Act.¹⁴² This legislation demonstrates the federal government's commitment to resolving public administrative disputes informally. "Encouragement to use Reg-Neg as a rule making process in federal agencies will undoubtedly continue, and perhaps increase."¹⁴³

136. Esposito & Ulbrich, *supra* note 124, at 6 (quoting Mark Pelesh, *Regulations Under the Higher Education Amendments of 1992: A Case Study in Negotiated Rulemaking*, 57 LAW & CONTEMP. PROBS. 151, 156-57 (1994)).

137. See generally O'Leary, *supra* note 63.

138. See *supra* text accompanying note 80.

139. Kubasek & Silverman, *supra* note 37, at 552.

140. See Rennie, *supra* note 1. "One of the changes that has occurred during the past five years is the dramatic increase in effective use of environmental ADR by large corporations." *Id.* at 10483.

141. See Kubasek & Silverman, *supra* note 37. "A careful review of the successes and failures of environmental mediation reveals that, under a limited set of conditions, the use of environmental mediation may be highly appropriate, while in other situations its use should be avoided." *Id.* at 552.

142. See *supra* text accompanying notes 130-36.

143. Ryan, *supra* note 119, at 215.

Increased use of consensual processes such as negotiated rulemaking would be advantageous within the federal system as well. To date, negotiated rulemaking has been used most frequently by the EPA.¹⁴⁴ Other agencies confronted with public disputes should increase the number of suits resolved informally. "Other agencies considering the use of Reg-Neg should view the benefits of the process as encouragement to experiment with the technique and view the drawbacks as an opportunity to anticipate and perhaps avoid some of the pitfalls EPA has experienced."¹⁴⁵

VI. CONCLUSION

In summation, federal, state, and local governments must resolve to increase their use of consensual processes when confronted with public disputes. In turn, public representatives and business interests opposing each other or the government must voluntarily agree to settle more disputes informally.¹⁴⁶ By increasing the use of consensual processes to resolve public disputes, "parties can find solutions to problems that cannot be addressed by judicial remedies" and "can achieve results . . . that would be difficult or impossible to obtain through adjudicatory processes."¹⁴⁷

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144. *See id.* "Although EPA has a conducted [sic] a relatively small number of Reg-Neg processes, it has more experience using the technique that most other federal agencies." *Id.* at 215.

145. *Id.* at 216.

146. Kubasek & Silverman, *supra* note 37. "Because mediation generally is a voluntary process, and obtains many of its benefits from that voluntary nature, it should never be forced on disputants." *Id.* at 552.

147. Krages, *supra* note 30, at 210.

