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# MEDIATION OF ENVIRONMENTAL ENFORCEMENT: OVERCOMING INERTIA.

*Bruce Stiftel\*\**

*Neil G. Sipe\*\*\**

## I. INTRODUCTION

Environmental regulation is an inherently conflictual activity.<sup>1</sup> Agencies charged with developing and enforcing environmental regulations must contend with pressures applied by industry and consumer groups, and they must respond to statutory mandates. Such pressures and mandates are widely recognized as containing conflicting points of view;<sup>2</sup> however, opposing interests have never had equal access to decision-making apparatus. Policy capturing,<sup>3</sup> mobilization,<sup>4</sup>

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1. See generally George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

2. See, e.g., CONTROVERSIES IN ENVIRONMENTAL POLICY 300-03 (Sheldon Kamieniecki et al. eds., 1986); HELEN M. INGRAM ET AL., A POLICY APPROACH TO POLITICAL REPRESENTATION 167-175 (1980); Bruce Stiftel, *Balance of Representation in Water Planning*, 17 ENV'T & PLAN. B: PLAN. & DESIGN 105, 106-09 (1990); Bud Ward & Jane Floyd, *Washington's Lobbying Groups*, 3 ENVTL. F. 9, 9-17 (1985).

3. PAUL J. CULHANE, PUBLIC LANDS POLITICS 1-2 (1981).

4. See THEODORE J. LOWI, THE END OF LIBERALISM 287-93 (1969).

and free-rider<sup>5</sup> problems create pressures on executive agencies that depart radically from even-handed representation of societal interests.

Environmental enforcement has been a particularly problematic subfield. In addition to the conflicting interests and representational difficulties endemic to all aspects of environmental regulation, enforcement is plagued by the following problems: disparities in access to information as well as disparities in staff capabilities between agencies and consumer groups on one hand and violators on the other;<sup>6</sup> difficulties in interpretation of highly technical rules and data;<sup>7</sup> political sensitivities which make fines and penalties difficult to implement;<sup>8</sup> and peculiar institutional characteristics of the judicial branch, an essential actor in a large proportion of enforcement cases.<sup>9</sup> Beyond the difficulties of enforcement which are unique to environmental regulation, there are a larger number of difficulties endemic to government implementation in general.<sup>10</sup>

Overall, it is difficult to maintain attention on environmental enforcement cases because government enforcement agencies are understaffed while polluters believe that delay works to their advantage.<sup>11</sup> This absence of partisans interested and oriented toward selling environmental enforcement cases may be termed the "inertia of non-settlement."

Mediation, a tool which responds to many of the problems of environmental enforcement indicated by political and economic theory, has become widely suggested for resolving environmental controversies.<sup>12</sup> The arguments in favor of environmental mediation closely parallel those made widely for mediation of public policy disputes. Mediation is claimed to result in faster settlement times,

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5. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 33-36 (1965). See generally Terry M. Moe, *A Calculus of Group Membership*, 24 AM. J. POL. SCI. 593 (1980).

6. See CLIFFORD S. RUSSELL ET AL., *ENFORCING POLLUTION CONTROL LAWS* 1-9 (1986); Marc J. Roberts & Susan O. Farrell, *The Political Economy of Implementation: The Clean Air Act and Stationary Sources*, in *APPROACHES TO CONTROLLING AIR POLLUTION* 152, 160-69 (Ann F. Friedlaender ed., 1978).

7. PAUL DOWNING, *ENVIRONMENTAL ECONOMICS AND POLICY* 132 (1984); Connie P. Ozawa & Lawrence E. Susskind, *Mediated Science-intensive Policy Disputes*, 5 J. POL'Y ANALYSIS & MGMT. 23, 27-30 (1985); Henry H. Perritt, Jr., *Negotiated Rulemaking in Practice*, 5 J. POL'Y ANALYSIS & MGMT. 482, 484-89 (1986).

8. DOWNING, *supra* note 7, at 281-84; KEITH HAWKINS, *ENVIRONMENT AND ENFORCEMENT* 110-11, 117-18 (1984). See generally MATTHEW A. CRENSON, *THE UN-POLITICS OF AIR POLLUTION* (1971) (analyzing case studies of two cities' approaches to the problems of air pollution, and how political pressures contribute to municipal neglect in this arena).

9. See R. SHEP MELNICK, *REGULATION AND THE COURTS* 13-18 (1983).

10. See DANIEL A. MAZMANIAN & PAUL A. SABATIER, *IMPLEMENTATION AND PUBLIC POLICY* 12 (1983); JEFFREY L. PRESSMAN & AARON B. WILDAVSKY, *IMPLEMENTATION* at xx-xxv (1984).

11. DOWNING, *supra* note 7, at 277-78; HAWKINS, *supra* note 8, at 118-22; RUSSELL ET AL., *supra* note 6, at 6-7.

12. See, e.g., LAWRENCE S. BACOW & MICHAEL WHEELER, *ENVIRONMENTAL DISPUTE RESOLUTION* 18-20 (1984); PATRICIA A. BIDOL ET AL., *ALTERNATIVE ENVIRONMENTAL CONFLICT APPROACHES* 23, 27 (1986); JULIA M. WONDOLLECK, *PUBLIC LANDS CONFLICT AND RESOLUTION* 212-14 (1988); An Painter, *The Future of Environmental Dispute Resolution*, 28 NAT. RESOURCES J. 145, 145-70 (1988).

lower settlement costs, greater achievement of joint gains, improved implementation of agreements, and improved relationships among parties.<sup>13</sup> Arguments particularly underscoring the potential for mediation of environmental disputes include the multi-party, multi-issue nature of many of these disputes,<sup>14</sup> disagreements over the scientific and technical basis of decisions on many environmental issues,<sup>15</sup> and the historical difficulties of achieving implementation in conventional dispute resolution frameworks.<sup>16</sup> Paramount to the calls for mediation is a belief that mediators will bring cases to settlement in situations they otherwise would not settle by maintaining attention on the underlying issues at hand.<sup>17</sup>

Little empirical work has been done to examine the validity of these many claims. A variety of case studies document the application of mediation to environmental controversies,<sup>18</sup> and at least one effort compiles the record of such cases in a descriptive manner.<sup>19</sup> Leonard Buckle and Suzann Thomas-Buckle provide the lone quantitative study of the efficacy of environmental mediation conducted in a causal framework.<sup>20</sup> Gerald Cormick described the situation as "like a bandwagon with a large and diverse group of riders" which has led to questionable applications and unreasonable expectations of success.<sup>21</sup> Harvey Jacobs and Richard Rubino express concern over the "almost faddish application"

13. See, e.g., SUSAN L. CARPENTER & W.J.D. KENNEDY, *MANAGING PUBLIC DISPUTES* 26 (1988); DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 1-26 (1986); John Forester, *Planning in the Face of Conflict*, 53 J. AM. PLAN. ASS'N 303, 303-14 (1987); Philip J. Harter, *Negotiated Regulations: A Cure for Malaise*, 3 ENVTL. IMPACT ASSESSMENT REV. 75, 80-83 (1982).

14. See Lawrence E. Susskind & Alan Weinstein, *Toward a Theory of Environmental Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 311-57 (1980).

15. Merrie G. Klapp, *Bargaining with Uncertainty: The Brooklyn Navy Yard Incinerator Dispute*, 8 J. PLAN. EDUC. & RES. 157, 161-63 (1989); Ozawa & Susskind, *supra* note 7, at 23-39.

16. See generally SCOTT MERNITZ, *MEDIATION OF ENVIRONMENTAL DISPUTES* (1980); ALLAN R. TALBOT, *SETTLING THINGS* (1983).

17. Heidi Burgess, *The Uses of Mediation*, in LAWRENCE E. SUSSKIND ET AL., *RESOLVING ENVIRONMENTAL REGULATORY DISPUTES* 122, 208-09 (1983); Thomas Taylor, *A Practical Theory of Negotiation for Planners* 78 (November 9, 1989) (unpublished Ph.D. dissertation, Virginia Polytechnic and State University).

18. See, e.g., *RESOLVING ENVIRONMENTAL REGULATORY DISPUTES* (Lawrence E. Susskind et al. eds., 1983); Bruce Stiftel & Rafael Montalvo, *Florida's Twenty-day Meeting: Resolution of the Appeal of the Development Order for the Tampa Bay Park of Commerce*, 9 ENVTL. IMPACT ASSESSMENT REV. 367, 367-90 (1990).

19. See generally GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* (1986).

20. See generally Leonard G. Buckle & Suzann R. Thomas-Buckle, *Placing Environmental Mediation in Context: Lessons from 'Failed' Mediations*, 6 ENVTL. IMPACT ASSESSMENT REV. 55 (1986).

21. Gerald W. Cormick, *The Myth, the Reality and the Future of Environmental Mediation*, in *RESOLVING LOCAL CONFLICT* 302, 303 (Robert W. Lake ed., 1987).

of the process.<sup>22</sup> There are arguments that mediation may result in lowered legitimacy of public decision-making<sup>23</sup> and exacerbation of power differences among stakeholder groups.<sup>24</sup>

This Article aims to examine the claims for the usefulness of environmental mediation in the context of enforcement through consideration of two environmental enforcement cases processed by the Florida Department of Environmental Regulation (DER) during 1990-1991. Specifically outlined is a pilot mediation program designed to improve the resolution of the cases. Next, two DER cases are described and compared, in detail; the two cases are quite similar except that one underwent mediation and one did not. Finally, this Article draws conclusions about environmental enforcement dispute resolution processes. Particularly examined is the success of mediation at overcoming the reluctance of environmental enforcement partisans to move their cases to settlement — to overcome the inertia of non-settlement.

## II. THE PILOT MEDIATION PROGRAM

A pilot mediation program recently initiated by DER creates the potential for examination of claims made concerning the efficacy and legitimacy of environmental mediation. DER, an agency which previously processed 1,300 annual environmental enforcement cases (125 of which advanced to litigation or pre-litigation negotiations), has begun to use professional mediators provided through the Florida Growth Management Conflict Resolution Consortium (CRC) in an attempt to resolve some of this caseload.<sup>25</sup> During fiscal year 1991, eight cases were referred to mediation under this "pilot" program.<sup>26</sup>

DER became interested in mediation as a result of its involvement in mediations ordered by judges under the Florida civil circuit court-annexed mediation program.<sup>27</sup> In that program, circuit court judges are able to remand cases to mediators certified by the Florida Supreme Court.<sup>28</sup> During 1989-1990,

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22. HARVEY M. JACOBS & RICHARD G. RUBINO, PREDICTING THE UTILITY OF ENVIRONMENTAL MEDIATION: NATURAL RESOURCE AND CONFLICT TYPOLOGIES AS A GUIDE TO ENVIRONMENTAL CONFLICT ASSESSMENT 2 (1988).

23. DOUGLAS J. AMY, THE POLITICS OF ENVIRONMENTAL MEDIATION 149 (1987); JOHN FORESTER, DEPARTMENT OF CITY AND REGIONAL PLANNING, CORNELL UNIVERSITY, ENVISIONING THE POLITICS OF PUBLIC SECTOR DISPUTE RESOLUTION 31 (1990).

24. See Lawrence E. Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 6-8, 40-47 (1981).

25. FLORIDA GROWTH MANAGEMENT CONFLICT RESOLUTION CONSORTIUM, PROGRESS REPORT: 1989-1991, at 34-37 (1991) [hereinafter PROGRESS REPORT].

26. *Id.* at 35.

27. FLA. STAT. ch. 44.102 (1991); FLA. R. CIV. P. 1.760.

28. FLA. STAT. ch. 44.102; FLA. R. CIV. P. 1.760.

three DER cases were ordered to mediation; all three settled quickly and at minimal cost.<sup>29</sup>

The CRC is a statewide office, funded with general state appropriations, that promotes and facilitates the use of alternative dispute resolution techniques for solving environmental- and land-use-related public policy matters.<sup>30</sup> The office is one of 12 similar statewide offices in the United States established as prototypes and affiliated with the National Institute of Dispute Resolution, a private non-profit organization based in Washington, D.C.<sup>31</sup>

Under the pilot mediation program, DER nominates enforcement cases in which, generally, at least one other involved party is a government agency and in which DER expects that settlement is at least possible.<sup>32</sup> If CRC agrees with the appropriateness of the case, then a pre-mediation session is scheduled at which time CRC personnel describe mediation and alternative dispute resolution principles to the parties and solicit agreement to move forward with the contracting of a mediator and the scheduling of a mediation.<sup>33</sup> Mediators are drawn from a panel of eight mediators selected by CRC at the beginning of the pilot program due to their prior mediation experience, familiarity with Florida environmental issues, and location.<sup>34</sup> The panel mediators agree to work at a fixed scale (\$500 per day) and to bill only for actual mediation session hours.<sup>35</sup> Of the eight, six are attorneys, and three are certified under the Florida civil circuit court-annexed mediation program.<sup>36</sup>

DER enforcement disputes range over a wide spectrum of environmental matters including air quality, dredge and fill, domestic waste, groundwater, hazardous waste, industrial waste, drinking water, stormwater, toxic materials,

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29. Interview with Larry Morgan, Deputy General Counsel of the Department of Environmental Regulation (May 1990). The mediations each required less than one day of mediator time, and cost DER less than \$500 in mediator fee portions. *Id.*

30. PROGRESS REPORT, *supra* note 25, at iv-3; see also GOVERNOR'S GROWTH MANAGEMENT ADVISORY COMMITTEE, STATE OF FLORIDA, FINAL REPORT 33-34 (1986).

31. National Institute for Dispute Resolution, *Statewide Offices of Mediation: Experiments in Public Policy*, in DISPUTE RESOLUTION FORUM 1, 1-15 (December 1987). The other state offices include: California, Hawaii, Massachusetts, Minnesota, Montana, North Dakota, New Hampshire, New Jersey, Ohio, Oregon, and Texas. *Id.*

32. See Memorandum from Robert Jones, Director of the Florida Growth Management Conflict Resolution Consortium, to Larry Morgan, Deputy General Counsel of DER 2 (June 4, 1990) (copy on file with the *Journal of Dispute Resolution*).

33. *Id.*

34. See Memorandum from Robert Jones, Director of the Florida Growth Management Conflict Resolution Consortium, to Larry Morgan, Deputy General Counsel of DER 3-4 (May 23, 1990) (copy on file with the *Journal of Dispute Resolution*).

35. *Id.*

36. See Memorandum from Robert Jones, Director of the Florida Growth Management Conflict Resolution Consortium, to DER Pilot Mediation Program Mediator Panel 3-4 (July 5, 1990) (copy on file with the *Journal of Dispute Resolution*).

and underground storage tanks.<sup>37</sup> The eight cases chosen for mediation during 1990-1991 included four hazardous waste cases, two solid waste disposal cases, and two wastewater treatment cases.<sup>38</sup>

Mediated cases always involve another governmental unit because of the ground rules negotiated for the establishment of the pilot program by DER and CRC.<sup>39</sup> Fiscal year 1990-1991 cases involved two state agencies, two federal agencies, three county governments, three city governments, two private firms, and one group of neighborhood residents.<sup>40</sup> While each of the issues had implications on potentially affected publics, with one exception no effort was made to expand representation beyond named disputants.

### III. RESEARCH DESIGN

*Florida Department of Environmental Regulation v. Flagler County*<sup>41</sup> and *Florida Department of Environmental Regulation v. Columbia County*,<sup>42</sup> the two cases examined by this Article, were chosen because they are typical of a large class of disputes processed by state environmental regulatory agencies and because they are quite similar to each other with the exception that one case underwent mediation and one did not.<sup>43</sup> Each case pits a rural county government against

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37. Memorandum from Daniel H. Thompson, General Counsel of DER, Section II-C., at 16.4 to 16.7 (1989) (internal DER memorandum entitled "Florida's Statutory Environmental Enforcement Remedies") (copy on file with the *Journal of Dispute Resolution*).

38. Cases were chosen based on seven criteria: (1) parties have reached an impasse on their position in negotiations with DER; (2) the case is in litigation or litigation is imminent; (3) principal parties have been identified and their interests are, or can be, clearly articulated; (4) parties can agree to participate in good faith, see a solution of the problem as desirable, and have some authority to commit to agreements reached; (5) the availability of technical information does not present a major obstacle to agreement; (6) parties are willing to make a financial commitment to pay for the mediator; and (7) if the case is in litigation, the parties secure, as necessary, judicial concurrence with the mediation effort. PROGRESS REPORT, *supra* note 25, at 34. Of the eight cases, four advanced to mediation during the year; of these, two settled, one is near settlement, and one did not settle. *Id.* at 35-36.

39. See Memorandum from Robert Jones to Larry Morgan, *supra* note 32, at 1.

40. The entities were: Florida Department of Natural Resources; Florida Department of Transportation; United States Environmental Protection Agency; United States Department of the Interior; Columbia County; Calhoun County; Martin County; City of Belle Glade; City of Kissimmee; City of Stuart; Dean Development, Inc.; Lee Aviation; and citizens of Stuart. See PROGRESS REPORT, *supra* note 25, at 35.

41. No. 90-373-CA (Fla. Cir. Ct. Sept. 17, 1991).

42. No. 89-405-CA (Fla. Cir. Ct. Nov. 11, 1990).

43. See Neil G. Sipe & Bruce Stiftel, Department of Urban and Regional Planning, Florida State University, DER Versus Columbia County: The Use of Mediation in a Landfill Enforcement Dispute 5 (January 1992) (unpublished monograph, on file with the *Journal of Dispute Resolution*) [hereinafter Sipe & Stiftel, DER Versus Columbia County]; Neil G. Sipe & Bruce Stiftel, Department of Urban and Regional Planning, Florida State University, DER Versus Flagler County: Negotiating a Landfill Enforcement Dispute 4 (January 1992) (unpublished monograph, on file with the *Journal of Dispute Resolution*) [hereinafter Sipe & Stiftel, DER Versus Flagler County].

a state regulatory agency over the closing of an illegal solid waste landfill.<sup>44</sup> No additional parties were known to have a significant interest in the cases. Each had a long history of contentious interaction between the parties involved: The Flagler County case had been in dispute since 1984;<sup>45</sup> the Columbia County case since 1987.<sup>46</sup> Each showed no immediate prospects for settlement.<sup>47</sup> One of the two, Columbia County had been nominated by DER for mediation, and preliminary assessment by CRC suggested that mediation would likely take place.<sup>48</sup> The second case, Flagler County, was chosen from DER's open case files to match the Columbia County case as closely as possible.<sup>49</sup> Flagler County had not been nominated for the pilot mediation program because the dispute did not seem to have potential for settlement.<sup>50</sup>

Three methods of data collection were used: interviews, participant observation, and document review.<sup>51</sup> All principal actors were interviewed during the pre-meeting stage in each case.<sup>52</sup> The interview protocol concerned identification of parties and issues, initial positions, and assessments of prospects for successful resolution.<sup>53</sup> Each significant bilateral meeting was observed by the research staff, which recorded setting, tone, and content of interactions, strategies, and tactics (by both the parties and the mediator), as well as the outcome.<sup>54</sup> After the meetings and, to allow for the greatest probability of settlement as close to the end of the research as possible, interviews were conducted with each person interviewed in the pre-meeting stage.<sup>55</sup> These interviews focused on events transpired, assessments of outcomes, and appraisals of the efficacy of the dispute resolution processes.<sup>56</sup> Throughout the data-collection period, DER files were reviewed and all documents prepared as part of the dispute process.

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44. Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 5; Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 4.

45. Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 4.

46. Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 5.

47. *See* Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 10-12; Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 13-15.

48. Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 5.

49. Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 4.

50. *See* Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 10-12.

51. Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 5; Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 7.

52. *See* Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 5-6; Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 7.

53. *See* Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, app. A; Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, app. A.

54. *See* Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 6; Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 7.

55. Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, at 6; Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 7.

56. *See* Sipe & Stiftel, *DER Versus Flagler County*, *supra* note 43, app. B; Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, app. B.



#### IV. TWO COUNTIES: ONE PROBLEM

Over the past 10 years, Florida has significantly changed its management of solid waste. In 1980, the state had 500 open dumps, one small waste-to-energy plant, and virtually no recycling programs.<sup>57</sup> Because the state derives most of its water from groundwater supplies, and because sanitary landfills have been known to cause groundwater contamination, liner and closure standards were adopted for all landfills in 1985.<sup>58</sup> In early 1990, the liner requirements were significantly strengthened by requiring a composite, or double liner, system for all landfill construction after June 1, 1990.<sup>59</sup>

By Spring 1990, several Florida counties, among them Flagler County and Columbia County, had not yet complied with the 1985 regulations.<sup>60</sup> Both are predominantly rural counties in DER's Northeast District, headquartered in Jacksonville.<sup>61</sup>

In both cases, closure of the existing illegal landfill was the key issue of interest to DER, and the local governments agreed that closure was necessary.<sup>62</sup> Each county, however, had to secure a new disposal site for its solid waste in order to make closure possible.<sup>63</sup> In addition, DER, anxious not to establish bad precedent for other local government disputes, was concerned that fines and penalties be paid by the counties at a level sufficient to discourage similar behavior by other governments in the future.<sup>64</sup>

##### A. Flagler County Landfill

Flagler County is located on the east coast of Florida between Jacksonville and Daytona Beach.<sup>65</sup> Seventy-four percent of the 1990 population of 28,701 lives outside incorporated areas,<sup>66</sup> but most of the population is clustered in Palm

57. FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION, SOLID WASTE MANAGEMENT IN FLORIDA: 1990 ANNUAL REPORT 1 (1990) [hereinafter SOLID WASTE MANAGEMENT].

58. *See id.* at 4.

59. FLA. ADMIN. CODE ANN. r. 17-701.050 (1991).

60. *See* Sipe & Stiffler, DER Versus Flagler County, *supra* note 43, at 12; Sipe & Stiffler, DER Versus Columbia County, *supra* note 43, at 13.

61. *See* Sipe & Stiffler, DER Versus Flagler County, *supra* note 43, at 8 (Figure 1); Sipe & Stiffler, DER Versus Columbia County, *supra* note 43, at 11 (Figure 1).

62. *See* Sipe & Stiffler, DER Versus Flagler County, *supra* note 43, at 12-13; Sipe & Stiffler, DER Versus Columbia County, *supra* note 43, at 16-18.

63. Sipe & Stiffler, DER Versus Flagler County, *supra* note 43, at 13; Sipe & Stiffler, DER Versus Columbia County, *supra* note 43, at 17.

64. *See* Sipe & Stiffler, DER Versus Flagler County, *supra* note 43, at 13-14; Sipe & Stiffler, DER Versus Columbia County, *supra* note 43, at 17-18.

65. *See* Sipe & Stiffler, DER Versus Flagler County, *supra* note 43, at 8 (Figure 1).

66. Search of CompuServe Information Service, CENDATA - Census Bureau Online Service (January 15, 1991) [hereinafter CENDATA]; *see also* Sipe & Stiffler, DER Versus Flagler County, *supra* note 43, at 7.

Coast, a large subdivision developed by International Telephone and Telegraph.<sup>67</sup> Since 1980, the county population has grown by more than 17,700, making it the fastest-growing county in the state.<sup>68</sup> The county seat is Bunnell, population 1,873;<sup>69</sup> the largest city is Flagler Beach, population 3,820.<sup>70</sup> Flagler County is governed by a county commission, whose members are elected at large.<sup>71</sup> Its chief executive is a county administrator appointed by the commission.<sup>72</sup> The county government's annual budget was more than \$25 million for fiscal year 1990;<sup>73</sup> property taxes were levied at the rate of approximately 4.6 mils in 1989.<sup>74</sup>

In 1984, Flagler's permit for the Old Kings Road Landfill, its only landfill, expired.<sup>75</sup> The new state requirements slated to take effect on January 1, 1985, did not permit continued operation of this facility.<sup>76</sup> Negotiations over the future disposal of Flagler's solid waste took place between DER and the county over a four-year period to no conclusion.<sup>77</sup> In 1988, the county attorney told DER that the county would not comply with any ruling against them in this matter short of one issued by the Florida Supreme Court.<sup>78</sup> In October 1985, before proceeding with legal action, DER's deputy assistant secretary made a presentation to the county commission at which he attempted to lay-out what DER considered to be the entire set of facts.<sup>79</sup> In September 1989, DER filed suit in circuit court to force closure of the Old Kings Road Landfill.<sup>80</sup> Some settlement negotiation occurred between filing and the beginning of our research in July 1990, but agreement could not be reached.<sup>81</sup> The county continued to operate the landfill in apparent violation of the 1985 regulations as well as the newer 1990 regulations.<sup>82</sup> A timeline setting forth the major events in the case is shown in

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67. CENDATA, *supra* note 66; *see also* Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 7.

68. CENDATA, *supra* note 66; *see also* Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 7.

69. CENDATA, *supra* note 66; *see also* Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 7.

70. CENDATA, *supra* note 66; *see also* Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 7.

71. *See* Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 8.

72. *See id.*

73. CENTER FOR PUBLIC MANAGEMENT, FLORIDA STATE UNIVERSITY, FLORIDA COUNTY GOVERNMENT HANDBOOK 149 (August 1990) [hereinafter GOVERNMENT HANDBOOK].

74. *Id.*

75. Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 10.

76. *Id.*

77. *Id.* at 11.

78. *Id.* at 10.

79. *See id.* at 11.

80. *Id.*

81. *Id.* at 11-12.

82. *See id.* at 12.

**Figure 1:** major phases in the negotiation are shown above the timeline; significant deadlines, events, and interventions are shown below the timeline.

### B. Columbia County Landfill

Columbia County is located on the Georgia-Florida border at the crossroads of two major interstate highways, Interstates 10 and 75.<sup>83</sup> Seventy-seven percent of the 1990 population of 42,613 lives outside incorporated areas.<sup>84</sup> Since 1980, the county has grown by slightly more than 7,000.<sup>85</sup> The county seat and largest city is Lake City, population 10,005.<sup>86</sup> Columbia County is governed by a county commission whose members are elected from single-member districts.<sup>87</sup> Its chief executive is a county coordinator appointed by the commission.<sup>88</sup> The county government's annual expenditures were approximately \$18 million for fiscal year 1990;<sup>89</sup> property taxes were levied at the rate of approximately 8.7 mils in 1989.<sup>90</sup>

Columbia's Central Landfill, the only landfill located in the county, is a 100-acre facility owned and operated by the county using the trench and area methods of disposal.<sup>91</sup> It receives over 20 tons, or 50 cubic yards, of waste per day on average.<sup>92</sup> DER issued a permit for Columbia's Central Landfill in 1985 which required that the county provide a clay liner to the bottom and sides of all new waste disposal units, and that it maintain and operate a leachate collection and treatment system.<sup>93</sup> Early negotiations over the county's violation of this permit resulted in a 1987 consent order in which DER allowed the county to continue

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83. Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 9.

84. CENDATA, *supra* note 66; *see also* Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 9.

85. CENDATA, *supra* note 66; *see also* Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 9.

86. CENDATA, *supra* note 66; *see also* Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 9.

87. *See* Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 10.

88. *See id.*

89. GOVERNMENT HANDBOOK, *supra* note 73, at 99.

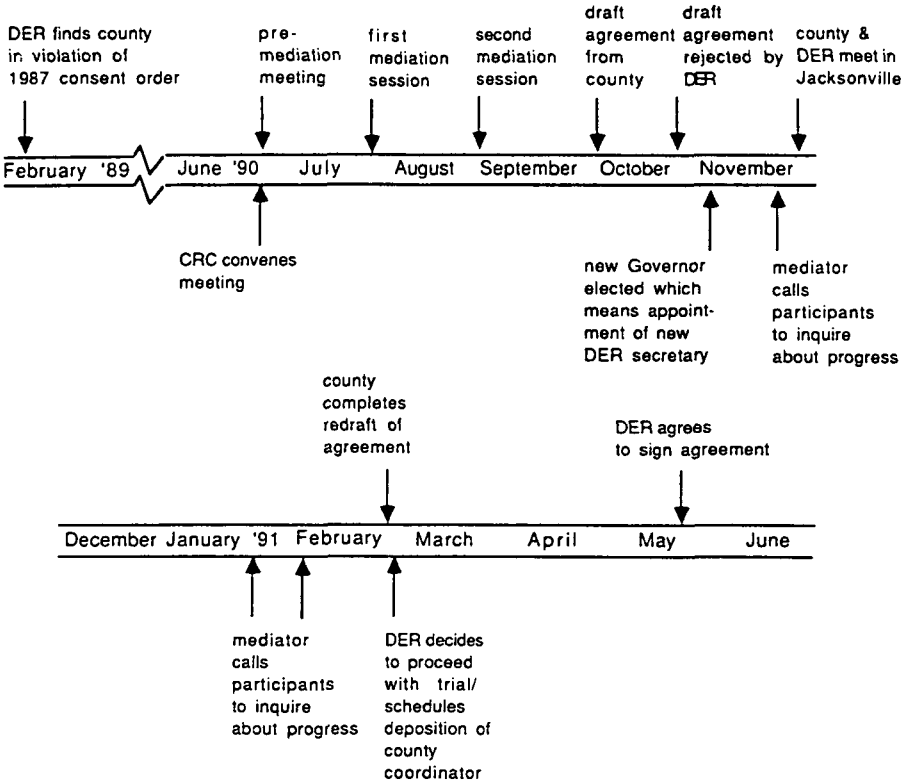
90. *Id.*

91. Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 9. The trench and area methods are two common landfill disposal methods. Philip R. O'Leary et al., *Land Disposal*, in THE SOLID WASTE HANDBOOK: A PRACTICAL GUIDE 259, 260-63 (William D. Robinson ed., 1986). With the trench method, solid waste is spread and compacted in an excavated trench. *Id.* at 261. The area method involves spreading and compacting the solid waste on the natural surface of the ground. *Id.* at 262.

92. Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 9. This is the maximum amount received and is based on the definition of Class I landfills. *See* FLA. STAT. ch. 403.703(18) (1991).

93. Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 9. The principal concern in the operation and construction of a landfill is the formation of contaminated water that may emanate from the base of the landfill. *See* O'Leary et al., *supra* note 91, at 289.

FIGURE ONE



landfill operations until July 1989 if certain conditions were met.<sup>94</sup> In 1988 and 1989, DER issued a series of deadline extensions although the previously agreed-to conditions had not been met, but continued to insist that the conditions be met.<sup>95</sup> DER also imposed a new condition that an application to construct a new lined landfill conforming to the 1990 regulations must be filed by the county before December 1989.<sup>96</sup> Finally, in April 1990, DER filed a petition for enforcement in circuit court.<sup>97</sup> The county continued to operate the landfill in apparent violation of the 1985 and 1990 regulations.<sup>98</sup> The timeline of the major events in the mediation is shown in **Figure 2**: significant events in the mediation are shown above the timeline, while deadlines, interventions, and other events are shown below the timeline.

## V. FLAGLER COUNTY: A NEGOTIATED AGREEMENT

Closure of the existing landfill in Flagler County was DER's overriding concern in the dispute,<sup>99</sup> DER had received a critical program audit which noted that several Florida counties were operating unlined landfills.<sup>100</sup> Under Florida statute, closure requires a DER permit and procedures developed to insure that the closed facility poses no threat to human health or the environment.<sup>101</sup> Such a closure involves substantial expenditure to the operator: DER statistics for 1989-90 landfill closures indicate costs of \$20,000-\$40,000 per acre.<sup>102</sup> For Flagler County, those costs could run to \$1 million.<sup>103</sup> Timing and availability of these funds were of considerable concern to the county because of the large expenditure relative to the county's budget. In addition, Flagler County would have to find an alternative disposal facility.<sup>104</sup>

Both parties agreed that the existing landfill needed to be closed; the dispute centered around the schedule for doing so.<sup>105</sup> Initially, it appeared that the driving force in setting the closure date would be the opening date of a new lined county landfill.<sup>106</sup> However, the county was able to enter into an agreement

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94. Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 13.

95. *See id.* at 13-14.

96. *See id.* at 14.

97. *See id.* at 15.

98. *See id.*

99. Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 12.

100. *Id.* at 12-13.

101. FLA. ADMIN. CODE ANN. r. 17.701.070 ; *see also* Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 13.

102. SOLID WASTE MANAGEMENT, *supra* note 57, at 4.

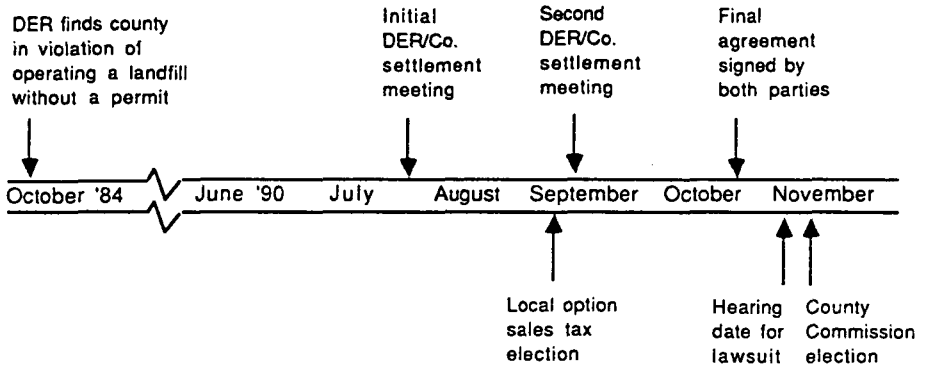
103. *See* Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 13. This value is determined by multiplying a closure cost of \$20,000 per acre by 50 acres, which is the size of the county landfill.

104. *Id.*

105. *Id.*

106. *Id.*

FIGURE TWO



with adjacent Volusia County allowing for disposal of Flagler's waste in that county for a one-year period.<sup>107</sup> Once this agreement was reached, the principal obstacle to closure was the availability of the funds to do so.<sup>108</sup> DER insisted on closure by June 1990; Flagler County called for closure in March 1991.<sup>109</sup>

Flagler County was aware that DER could levy penalties of up to \$10,000 per day for each day the county operated a landfill without a permit.<sup>110</sup> In addition, the county could have been subject to fines for not monitoring groundwater and for other operational problems;<sup>111</sup> these fines and penalties could have totaled more than \$20 million.<sup>112</sup> The county believed that there was potential for a \$3-4 million fine, but expected that a judge would never levy such a fine on a local government,<sup>113</sup> and they were ill-prepared to pay even a modest fine.<sup>114</sup> DER was much less concerned with fines and penalties than with closure, but it maintained that such payments would be necessary.<sup>115</sup>

One of the negotiators was a county commissioner who was running for re-election in November 1990, and he wanted to report to the voters that the landfill matter had been resolved before the re-election vote.<sup>116</sup> He was also concerned about another environmental enforcement case which Flagler County had recently lost to DER in court wherein the county had to comply with the agency's orders and pay substantial legal costs. In response to his prompting, Flagler County called for a meeting with DER and requested that no attorneys be present.

The settlement meeting was held on August 20, 1990, in Jacksonville at the DER Northeast District Office.<sup>117</sup> The county's landfill administrator began the discussion with a presentation of an interim operations plan for the existing landfill leading to closure in March 1991.<sup>118</sup> The county indicated that negotiations with Volusia County would result in a temporary alternative disposal site after that date;<sup>119</sup> the county cautioned that its progress was contingent on voter approval of a local-option one-cent sales tax in the upcoming September 4 election.<sup>120</sup>

107. *See id.* at 13, 15.

108. *Id.* at 13.

109. *Id.*

110. *Id.* at 13-14; *see* FLA. STAT. ch. 403.141 (1991).

111. FLA. STAT. ch. 403.141.

112. *See* Sipe & Stiffler, *DER Versus Flagler County*, *supra* note 43, at 14. This is based on a \$10,000 daily fine which amounts to \$3,650,000 per year. The county had been operating their landfill without a permit for approximately six years, *see id.*, which totals \$21,900,000.

113. *Id.*

114. *See id.*

115. *See id.*

116. *See id.* at 23.

117. *Id.* at 14.

118. *Id.* at 15.

119. *Id.*

120. *Id.* at 16.

On the issue of penalties and fines, the county asked for clarification of the potential use of in-kind contributions in lieu of cash payments.<sup>121</sup> DER explained that in-kind contributions would have to amount to 1.5 times the cash payment, that the contribution would have to improve the environment, and that existing projects would not qualify.<sup>122</sup> The county indicated that they would not be in a position to execute a consent order until after the September 4 election;<sup>123</sup> therefore, a follow-up meeting was scheduled for September 14.<sup>124</sup>

At the follow-up meeting, DER proposed penalties of \$150,000 in cash or \$300,000 in-kind.<sup>125</sup> During subsequent phone conversations, several minor issues were worked out, and a settlement was reached. The parties agreed upon a closure date of March 31, 1991,<sup>126</sup> the county agreed to penalties of \$5,000 per day if they failed to close by the March date and to in-kind contributions of \$300,000.<sup>127</sup>

During the entire negotiation process, DER's Office of General Counsel pursued its legal action against Flagler County; a hearing date had been set for November 1, 1990.<sup>128</sup> After the successful August settlement meeting, the Flagler County attorney was upset that DER would not postpone the hearing date, but DER attorneys maintained that after five years of little progress on the dispute, the only way to insure that the county would act was to pursue the legal action.<sup>129</sup>

Flagler County appears to be moving forward with implementation of the agreement.<sup>130</sup> The inter-local agreement with Volusia County has been signed, and a listing of 1991-1992 in-kind projects has been submitted and approved by DER.<sup>131</sup> The county has stopped accepting solid waste at the Old Kings Road landfill.<sup>132</sup>

## VI. COLUMBIA COUNTY: MEDIATION AD INTERIM

As in Flagler County, closure of the old landfill was DER's overriding concern.<sup>133</sup> Both parties agreed that the landfill needed to be closed but disagreed over the timing of closure: Columbia County wanted to tie closure to

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121. *Id.*

122. *Id.*

123. *Id.* at 17. This is because without voter approval of the sales tax, the county would not have the resources to close the existing landfill.

124. *Id.*

125. *Id.* at 19.

126. *Id.* at 20.

127. *Id.*

128. *Id.*

129. *Id.*

130. *See id.* at 21.

131. *Id.*

132. *Id.*

133. Sipe & Stiftel, *DER Versus Columbia County*, *supra* note 43, at 16.



the opening of a new landfill facility; DER wanted a firm date for closure, October 1991, irrespective of progress on the new facility.<sup>134</sup> The county, based on engineering advice, estimated that they could have a new facility on-line by January or February 1992.<sup>135</sup> Thus, before mediation began, the two sides were only three or four months apart on the issue of a closure date.

On the issue of fines, DER wanted agreement to liquidated damages of \$6,000 per day for any day after the agreed-to closure deadline that the landfill remained open.<sup>136</sup> The county wanted no liquidated damages as well as the opportunity to have a judge assess the necessity for any damages; DER wanted \$513,900 in fines and penalties for prior violations.<sup>137</sup> The county argued that one government agency should not be fining another and insisted that it was the very lack of funds which had caused the county to delay closure until this time.<sup>138</sup>

A pre-mediation meeting organized by CRC was held in June 1990 in Lake City in the county commissioner's room.<sup>139</sup> At this meeting, CRC staff explained the concepts underlying mediation of policy disputes as well as the logistics of the pilot program to representatives of the two parties and answered questions; the parties agreed that they wished to go ahead with mediation.<sup>140</sup> The selection of the mediator, from a list provided by CRC, took place about one week later and was handled over the telephone.<sup>141</sup> The mediator selected was a practicing attorney from St. Petersburg, Florida who was also a certified mediator under the Florida court-annexed mediation program.<sup>142</sup>

Mediation began with a nine-and-a-half-hour session on July 30, 1990, at the Suwannee River Water Management District in Live Oak, Florida.<sup>143</sup> Five persons attended from DER, five from Columbia County, and one from CRC.<sup>144</sup> Three and one-quarter hours of the day were spent in joint session, more than four hours were spent in caucuses between the mediator and either of the two sides, and one hour was spent in caucus among the two partisan attorneys and the mediator.<sup>145</sup>

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134. *Id.* at 17.

135. *Id.* This information was based on the advice of the county's consulting engineer, Frank Durabi. *Id.*

136. *See id.* at 18. Liquidated damages are such that they do not require DER to show cause. *See id.*

137. *See id.*

138. *Id.*

139. *Id.* at 19.

140. *Id.*

141. *Id.*

142. *See* FLA. STAT. ch. 44.106 (1991); FLA. R. CIV. P. 1.760.

143. Sipe & Stiffler, *DER Versus Columbia County*, *supra* note 43, at 19.

144. *Id.*

145. *See id.* at 19-20.

In the initial caucuses, Columbia County outlined a schedule for closure that it saw as realistic and suggested its unwillingness to negotiate on penalties.<sup>146</sup> The county attorney suggested postponing discussion of penalties until after future performance could be assessed.<sup>147</sup> The county also claimed it had a problem getting effective information from DER.<sup>148</sup> DER, in its opening caucus with the mediator, insisted that penalties were unavoidable, as was groundwater monitoring; it claimed an information flow problem from the county and argued that the county's credibility was poor.<sup>149</sup>

Next, in a session with both parties' attorneys and the mediator, each side placed its proposals on the table.<sup>150</sup> It appeared that agreement on a closure date was possible, but the two sides were clearly far apart on penalties.<sup>151</sup> The mediator, sensing that penalties could prevent agreement, suggested that the mediation be separated into two parts, with penalties tabled until tentative agreement was reached on the other issues.<sup>152</sup>

After lunch, the first joint session took place, dominated by the county's consulting engineer.<sup>153</sup> He showed progress on the new landfill site and presented a timeline for completion of the project which would have the new landfill on-line by December 1991.<sup>154</sup>

After another series of caucuses, the mediator convened a joint session; the CRC representative was concerned that the two parties saw little progress toward settlement and were losing confidence that agreement would be reached through sequential caucusing.<sup>155</sup> During this joint session, DER accepted the December 1991 closure/opening date, but no agreement was reached on penalties.<sup>156</sup> The penalties were set as the subject of a second mediation session to be held later in August.<sup>157</sup>

The second mediation session was a three-and-one-half-hour meeting held on August 31, 1990, at a church camp in Live Oak, Florida; attendance was identical to the first.<sup>158</sup> Again, the preponderance of meeting time was spent in single-party caucus with the mediator.<sup>159</sup> The meeting began with the mediator meeting with the two parties' attorneys, who insisted that they could not move to

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146. *Id.* at 22.

147. *See id.*

148. *See id.* at 23.

149. *Id.*

150. *Id.*

151. *See id.* at 23-24.

152. *Id.* at 24.

153. *See id.*

154. *See id.*

155. *See id.* at 26.

156. *See id.* at 27.

157. *See id.* at 29-35.

158. *Id.* at 29.

159. *See id.*

the other side's position on penalties.<sup>160</sup> In the first joint session, the mediator summarized progress to date and encouraged the parties to focus on the issues rather than past actions.<sup>161</sup> After this, the two sides presented their calculations for penalties for both past performance failures and potential future performance failures.<sup>162</sup> The sides seemed far apart: DER wanted fines of more than \$500,000 for previous violations and \$6,000 per day for any future performance failures; Columbia County was unwilling to accept any penalty.<sup>163</sup> The joint session thereby ended, leaving to DER to reconsider its calculations.

After its caucus, DER explained that it was willing to reduce the penalty to \$100,000 in cash or \$150,000 of in-kind contributions for past violations and \$5,250 for future performance failures.<sup>164</sup> The county representative agreed to take the DER proposal to the county commission.<sup>165</sup> It was agreed that the county attorney would redraft the consent order and forward it to DER within two weeks of the August meeting.<sup>166</sup>

The redrafted consent order was not forwarded to DER until the beginning of October 1990.<sup>167</sup> DER was unwilling to accept this draft, claiming that several points of agreement at the August 1990 mediation were not reflected accurately in it.<sup>168</sup> In November 1990, the mediator contacted the parties to assess implementation of the verbal agreement.<sup>169</sup> Following his prompting, the county coordinator contacted the DER deputy assistant secretary requesting a meeting with no attorneys present.<sup>170</sup> The county coordinator said the commission directed him to take this action in the belief that legal wording was causing problems.<sup>171</sup> The county was also eager to see the matter closed before the change of Florida state administrations in January 1991.<sup>172</sup>

On November 27, 1990, the requested meeting took place at the DER District Office.<sup>173</sup> The county coordinator balked at all of the previously agreed-to terms but promised that a reworded consent order draft would be sent to DER soon thereafter.<sup>174</sup> When the redraft failed to appear, the mediator again contacted the parties. Following this action, DER resolved to move ahead

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160. *Id.*

161. *See id.* at 31.

162. *See id.* at 31-32.

163. *See id.* at 31.

164. *Id.* at 34.

165. *See id.* at 35.

166. *Id.*

167. *Id.*

168. *Id.* at 35-36.

169. *See id.* at 36.

170. *Id.*

171. *Id.*

172. *See id.* at 41.

173. *Id.* at 36.

174. *See id.* at 36-37.

with its legal action and scheduled the county coordinator's pre-trial deposition for March 1991.<sup>175</sup>

The county forwarded the redrafted consent order to DER a few days before the county coordinator's deposition, and, in May 1991, DER indicated that it was willing to sign the redraft.<sup>176</sup> Columbia County delayed six months before signing the agreement, claiming that DER's delay in issuing one of the interim permits put the achievability of the December 1991 deadline in jeopardy.<sup>177</sup> So, while substantive agreement was reached in November 1990, it was a full year before a stipulation for settlement was provided to the court.

## VII. THE MECHANICS OF DISPUTE SETTLEMENT

This Article began with two similar environmental enforcement cases: one which would go to mediation; one which would proceed through negotiation. The mediation-bound case (Columbia County) was perceived as having greater likelihood of settlement by the regulatory agency responsible than was the non-mediation bound case (Flagler County).<sup>178</sup> Both cases settled: the mediated case in 18 months;<sup>179</sup> the non-mediated case in six.<sup>180</sup> This cannot be taken as a ringing endorsement of mediation for the resolution of environmental enforcement disputes. Likewise, it cannot be taken as a condemnation of mediation. Careful interpretation of the processes involved and of the results lead to a variety of interesting conclusions about the mechanics of dispute settlement.

Previous environmental enforcement studies point out the difficulty of obtaining resolutions of environmental enforcement disputes.<sup>181</sup> These disputes frequently involve polluters for whom resolution is likely to mean expenditure of large sums of money in fines or new equipment, if not the cessation of production altogether.<sup>182</sup> Such polluters have little interest in resolving the matters; they often perceive that if they drag their heels, agency conviction will change, or at the least penalty payments will be deferred until a time when the payments are worth less in present value.<sup>183</sup> Agencies, on the other hand, have difficulty pressing forward on cases because they are overburdened and understaffed.<sup>184</sup> Under such conditions, they have trouble devoting effort to any but the highest priority cases and those cases which demand attention through the actions of

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175. *See id.* at 37.

176. *Id.*

177. *See id.* at 37-38.

178. *See id.* at 5-6; Sipe & Stiftel, DER Versus Flagler County, *supra* note 43, at 4.

179. *See* Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, app. C.

180. *See* Sipe & Stiftel, DER Versus Columbia County, *supra* note 43, at 22 (Table 1).

181. DOWNING, *supra* note 8, at 281; HAWKINS, *supra* note 8, at 118; RUSSELL ET AL., *supra* note 6, at 3.

182. DOWNING, *supra* note 8, at 283.

183. *See id.* at 283-84.

184. *See* Richard N.L. Andrews, *Deregulation: The Failure at EPA, in* ENVIRONMENTAL POLICY IN THE 1980S: REAGAN'S NEW AGENDA 169, 173 (Norman J. Vig & Micheal E. Kraft eds., 1984).

interest groups or courts.<sup>185</sup> This might be described as the *inertia of non-settlement*. That is, in the absence of a constituency actively forcing progress on an environmental enforcement case, the case is likely to stay immobile, the way a physical object at rest remains at rest without the direct application of an outside force.

Under a situation of the inertia of non-settlement, a mediator can become the constituency-forcing progress. For good, or bad as is sometimes recognized,<sup>186</sup> mediators like to settle cases. They sell their services, or defend their positions, largely in terms of settlement rates. A mediator's entry into a case provides the potential for a force that will keep the case moving, an individual who will prompt each side to take the next step even when inaction is more desirable.<sup>187</sup> The sides will have difficulty resisting, because to do so will be seen as actively avoiding movement toward resolution.

The Columbia County case is an illustration of what happens when a mediator intervenes in a case already experiencing the inertia of non-settlement who does not continuously push the parties toward settlement. The mediator in this case accepted his responsibility of convening two mediation sessions. When the county failed to produce the written draft agreement that it had promised at the second mediation session, the mediator did not know about it and did not follow up on the matter until he was contacted about it by the CRC. As soon as he became involved again, progress ensued. When the Columbia County agreement languished because the county had second thoughts about what it had agreed to, the mediator did not know about it and did not follow up on the issue, and the case languished for another six months. It is hard to fault the mediator for these inactions; his contract stipulated only that he facilitate the formal mediation sessions and indeed made clear that he would not be paid for time spent on the case beyond those sessions.<sup>188</sup>

In contrast, several aspects of the two cases illustrate the effect of an outside force in overcoming the inertia of non-settlement. In the Flagler County case, the existence of the November 1990 trial date, the two elections that fall, and the pending change of administrations pushed the long stagnant dispute into action at the eleventh hour — action that ended in settlement.<sup>189</sup> In the Columbia County mediation, some movement did occur whenever outside forces intervened: first with the offer of mediation and mediation sessions; later with the approach of the county administrator's deposition date.<sup>190</sup>

185. See generally CRENSON, *supra* note 8; MELNICK, *supra* note 9, at 195-207.

186. See AMY, *supra* note 23, at 158, 188-89, 197.

187. See CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICTS* 24 (1986); Burgess, *supra* note 17, at 208.

188. See Memorandum from Robert Jones to Larry Morgan, *supra* note 35; Memorandum from Robert Jones to Larry Morgan, *supra* note 32.

189. See *supra* notes 99-132 and accompanying text.

190. See *supra* notes 135-77 and accompanying text.

The lesson seems clear. When the case involves parties who are not motivated to settle, it is imperative that the mediation process and the mediator become the constituency for settlement. It is up to the neutrals in the case to keep the case at a position of prominence on the agenda of the parties. Moreover, given the prevalence of inertia of non-settlement in environmental enforcement matters, these case experiences suggest a very strong potential for improved resolution of environmental enforcement cases through mediation.

A second observation suggests an alternative route for overcoming inertia. It has been widely recognized that when disputes drag on for long periods of time, disputants become committed to prior courses of action in a manner that escalates the conflict.<sup>191</sup> This escalation makes it difficult to find rational solutions to the dispute. Negotiators begin to take the dispute personally, losing sight of the real value of the issues at hand, in favor of the ego value of winning or the extraction of vengeance on their perceived uncooperative opponent.<sup>192</sup> Examples of this sort of behavior in negotiations abound<sup>193</sup> and have become the subject of considerable laboratory research.<sup>194</sup> Escalation commentators advise that change of personnel in these situations will likely result in an easier and superior outcome.<sup>195</sup> Therefore, when negotiators have been at a stalemate for long periods of time, replacement negotiators may well be able to break the stalemate, and when negotiators have been personally embarrassed or challenged in a dispute, replacements may more easily separate the issues from the personalities.<sup>196</sup>

The Flagler County case supports this advice. After five years of contentious dispute, the disputants changed. The county commission turned over its membership almost entirely, hired a new attorney to handle the matter and hired a new county administrator; DER staff turnover changed the entire responsible staff on the case. These staffing changes were not foreseen at the time DER assessed the case as unlikely to settle. They proved instrumental in moving the case toward settlement, suggesting that an additional route to

191. See JOEL BROCKNER & JEFFREY Z. RUBIN, *ENTRAPMENT IN ESCALATING CONFLICTS: A SOCIAL PSYCHOLOGICAL ANALYSIS* 1-7 (1985).

192. See ALLAN I. TEGER, *TOO MUCH INVESTED TO QUIT* 12-20 (1980).

193. See *id.*

194. See Jeffrey Z. Rubin & Joel Brockner, *Factors Affecting Entrapment in Waiting Situations: The Rosencrantz and Guildenstern Effect*, 31 J. PERSONALITY & SOC. PSYCHOL. 1054 (1975); Martin Shubik, *The Dollar Auction Game: A Paradox in Noncooperative Behavior and Escalation*, 15 J. CONFLICT RESOL. 109 (1971); Barry M. Staw, *Knee-deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27 (1976); Ariel Levi, *Escalating Commitment and Risk Taking in Dynamic Decision Behavior* (1982) (unpublished Ph.D. dissertation, Yale University).

195. See generally BROCKNER & RUBIN, *supra* note 191, at 195-97; TEGER, *supra* note 192, at 12-20; Max H. Bazerman, *Negotiator Judgement: A Critical Look at the Rationality Assumption*, 27 AM. BEHAVIORAL SCIENTIST 211 (1983).

196. See generally BROCKNER & RUBIN, *supra* note 191, at 195-97; TEGER, *supra* note 192, at 12-20; Bazerman, *supra* note 195.

overcoming the inertia of non-settlement may be to effect changes of personnel involved in the negotiations.

### VIII. CONCLUSION

Overall, these cases underscore the importance of mediators as providing a constituency for settlement in cases experiencing the inertia of non-settlement. Both cases illustrate the pattern common in environmental enforcement of partisans who are not motivated to move the issues toward conclusion. In the mediated Columbia County case, when the mediator actively pursued the case, progress followed. When the mediator did not actively pursue the case, progress occurred only if outside deadlines forced action by the parties. Mediation could well be used broadly in environmental enforcement to improve settlement rates and time to settlement.

In addition, these cases support the contention that changes in personnel can help avoid problems of escalation in cases which have continued in dispute for long periods of time. Experimental literature had established such claims previously, but the Flagler County case shows directly that changes of personnel can overcome escalation in environmental enforcement practice. When cases drag on, personal acrimony can become a further impediment to settlement. Changing negotiators will help resolve such cases.