

MANDATORY MEDIATION OF COASTAL ZONE PLANNING DISPUTES IN ALASKA — AN INNOVATIVE APPROACH TO ADMINISTRATIVE DECISIONMAKING

I. INTRODUCTION

Alaska's coastal zone management program¹ incorporates a novel provision mandating mediation between the state's Coastal Policy Council and individual coastal resource districts when all or part of a coastal management program submitted by a district is found to be deficient under state program standards.² Coastal zone management is an extremely complex field requiring extensive coordination among local, state, and federal agencies. The allocation and protection of coastal resources tend to be hotly contested by a wide range of interested parties. Consequently, development of coastal management programs is often attended by controversy at every stage of the regulatory process, and disagreements between the state and local districts are likely to develop.³

Alaska's coastal zone mediation statute reflects a nationwide movement to expand the use of mediation beyond the traditional collective bargaining context to many other types of disputes.⁴ In Alaska, coastal planning mediation is only one facet of a statewide

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1. ALASKA STAT. § 46.40 (1982); ALASKA ADMIN. CODE tit. 6, §§ 80.010-900 (Apr. 1984); *id.* §§ 85.010-900.

2. ALASKA STAT. § 46.40.06(b) (1982); ALASKA ADMIN. CODE tit. 6, § 85.170 (Apr. 1984).

3. *See infra* text accompanying notes 13-14. Indeed, the mediation provision itself was developed in response to one such controversy which resulted in the withdrawal of a district program from Council consideration in the face of almost-certain rejection and a subsequent long delay in implementation of a revised program. Telephone interview with William R. Ross, Associate Director for Fisheries and the Environment, Office of the Governor, Washington, D.C. (Sept. 1983).

4. The search for alternative means of dispute resolution has developed largely in response to perceived overloading of the judicial system, as well as dissatisfaction with the costs and results of litigation. *See, e.g.,* Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

mediation project currently being established within the Office of the Governor.⁵ In other states, mediation has been used increasingly in recent years to resolve environmental disputes, which characteristically present issues and dynamics similar to those which arise in coastal zone planning.⁶ Negotiation techniques such as mediation also have been proposed as possible supplements to traditional administrative rulemaking procedures.⁷ Alaska's system of mediation for coastal zone planning draws heavily on the labor mediation model but also shares elements of these later developments. While the system is structured as part of a regulatory process, the disputes triggering mediation are likely to reflect strong substantive conflicts about the proper management of coastal resources. Alaska's use of mediation places it among the small group of states pioneering the institutionalization of the mediation process outside of the labor management field.⁸

The purpose of this note is to examine the significance and potential effectiveness of Alaska's system of coastal zone management mediation. After a brief introduction to coastal zone management issues and procedures in Section II, Alaska's mediation provision will be examined from two basic perspectives. Section III will de-

5. The project will operate within the Office of Management and Budget's Governmental Coordination Office and will be funded partially by a grant from the National Institute for Dispute Resolution. Project functions will include dispute evaluation and screening, mediator training, and public education and consultation. The Office of the Attorney General strongly supports the Mediation Project as one means of relieving pressure on the judicial system. Telephone interview with Joe Geldhof, Assistant Attorney General, Office of the Attorney General (Aug. 28, 1984).

For a summary of additional mediation developments in Alaska, primarily in the areas of divorce and child custody disputes, see L. FREEDMAN, LEGISLATION ON DISPUTE RESOLUTION 3-16 (ABA Special Committee on Dispute Resolution Monograph No. 2, 1984).

6. See *infra* notes 39-69 and accompanying text.

7. See *infra* notes 70-81 and accompanying text.

8. No other state requires mediation of coastal zone management regulations, although mediation has been used on a limited basis in New Jersey to seek consensus on data needs for coastal planning. See Straus, *Mediating Environmental, Energy, and Economic Tradeoffs: A Search for Improved Tools for Coastal Zone Planning*, in ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS 123 (L. Lake ed. 1980).

Several other states provide for negotiation, if not expressly for mediation, of hazardous waste facility siting disputes. See, e.g., WIS. STAT. ANN. § 144.445 (West Cum. Supp. 1983).

The most common application of mediation to non-labor disputes has been the establishment of local dispute resolution centers to resolve relatively small civil disputes outside the judicial system. For a listing of such programs, see L. FREEDMAN, STATE LEGISLATION ON DISPUTE RESOLUTION (ABA Special Committee on Alternative Means of Dispute Resolution Monograph No. 1, 1982).

velop an analytical framework within which Alaska's system can be compared to three other models of mediation practice: traditional labor mediation, environmental mediation, and regulatory negotiation/mediation. These models offer useful insights by which to evaluate the Alaska scheme. Section IV will examine the specific regulations governing Alaska's mediation process in terms of their practical feasibility, consistency with other regulations, and vulnerability to judicial attack. Finally, overall conclusions concerning the regulations and their implications for expanded use of mediation in Alaska government and resource management will be presented in Section V.

II. OVERVIEW OF THE COASTAL ZONE MANAGEMENT PROGRAM AND RELATED ISSUES

A. Coastal Zone Management Program Structure

Ultimate responsibility for coastal zone management in Alaska is vested in the Coastal Policy Council (the Council), an appointive body operating within the Office of the Governor. Council membership is structured to represent nine geographic regions of the state, as well as the various state agencies whose substantive responsibilities include coastal matters.⁹ The administrative office responsible for day-to-day management of the program is the Office of Coastal Management (OCM) within the Office of Management and Budget (OMB). The Council and the OCM coordinate and supervise the development and administration of comprehensive management programs developed by local coastal resource districts.¹⁰ The district programs set forth the allowed and prohibited coastal land uses and permit requirements and are the chief mechanisms of coastal zone management. District programs must conform to state guidelines,¹¹ which in turn must comply with the federal Coastal Zone Management Act (CZMA).¹²

The potential for conflict among competing interests, and the variety of issues inherent in coastal zone planning, are evidenced by the diverse objectives of the statutory program.¹³ A "full and fair

9. ALASKA STAT. § 44.19.155 (Supp. 1983).

10. *Id.* §§ 44.19.161-162.

11. *Id.* § 46.40.030 (1982); ALASKA ADMIN. CODE tit. 6, § 85 (Apr. 1984).

12. 16 U.S.C. §§ 1451-64 (1976 & Supp. 1980). For a brief overview of CZMA provisions and issues, see generally ELIOPOULOS, COASTAL ZONE MANAGEMENT: PROGRAM AT A CROSSROADS (Env't. Rep. (BNA) Monograph No. 30, 1982); Weinberg, *Coastal Area Legislation: Taking Arms Against a Sea of Troubles*, 6 SETON HALL LEGIS. J. 317 (1983).

13. ALASKA STAT. § 46.40.020 (1982). The goals which must be accommodated are: use, management, and enhancement of overall environmental quality; development of industrial or commercial enterprises; use and protection of coastal area re-

evaluation of all demands" on coastal lands and waters must be achieved.¹⁴ The difficulty of accommodating and balancing these objectives is compounded by the state's dual role as both an arbitrator among competing claimants for use of coastal resources and a proprietor and user of coastal areas in its own right.¹⁵

Detailed guidelines and procedures for the development of district coastal management programs are set forth in sections 46.40.040-.090 of the Alaska Code. Extensive public notification and comment activities are required to ensure that district planners consult and consider the views of all interested parties in the district, including those of adjacent government bodies and state and federal agencies.¹⁶ After this process is completed, the district program is submitted to the OCM for review and recommendations, and a final determination on its acceptability is made by the Council.¹⁷ At this stage, the mediation process which is the subject of this note may be triggered.

B. Overview of Mediation Requirements

Alaska's Coastal Zone Management statute provides:

[If] the council finds that a district coastal management program is not approvable or is approvable only in part . . . , it shall direct that deficiencies in the program submitted by the coastal resource district be mediated. In mediating the deficiencies, the council may call for one or more public hearings in the district. The council shall meet with officials of the coastal resource district in order to resolve differences.¹⁸

Specific procedures for the conduct of the mediation are outlined in title 6, section 86.170 of the Alaska Administrative Code. The statute limits the parties involved in the mediation to the Council and the district. The parties mutually may agree on a mediator, but if they are unable to agree within ten days, they must request a mediator from the Federal Mediation and Conciliation Service (FMCS). The Council may hold public hearings on the issues before mediation begins, and the record of any such hearing must be made avail-

sources; protection of land and water uses which are particularly dependent on the coastal location; protection of significant historic, cultural, and esthetic values; prevention of damage caused by inconsistent land or water uses adjacent to sensitive areas; and recognition of energy supply needs.

14. *Id.*

15. *Cf.* Kuersteiner, Sullivan & Temin, *Protecting Our Coastal Interests: A Policy Proposal for Coordinating Coastal Zone Management, Natural Defense, and the Federal Supremacy Doctrine*, 8 B.C. ENVTL. AFF. L. REV. 705, 706 (1980).

16. ALASKA ADMIN. CODE tit. 6, § 85.130 (Apr. 1984).

17. *Id.* § 85.150.

18. ALASKA STAT. § 46.40.060(b) (1982). APA procedures are codified at *id.* §§ 44.62.010-.650 (1982).

able to the mediator. The mediator is given wide latitude in setting rules and scheduling the mediation sessions, but an agreement must be reached within sixty to ninety days. Failure to meet this deadline, or to obtain an earlier certification by the mediator that the parties are at an impasse, will terminate the mediation process. At this point, the Council must call for a public hearing and make findings as prescribed by Alaska's Administrative Procedure Act (APA).¹⁹ Following the adjudicatory hearing, the Council is empowered to direct that the district plan be amended and adopted in accordance with its findings.²⁰ These statutory provisions will be discussed in detail in Section IV below. Before considering the specifics of the process, however, it is useful to compare Alaska's coastal dispute resolution scheme with other applications of the mediation process.

III. ANALYTICAL PERSPECTIVE — TRADITIONAL AND ALTERNATIVE APPLICATIONS OF MEDIATION

A. Definition and Fundamental Characteristics of the Process

Mediation is a dispute settlement process involving intervention between conflicting parties in order to promote reconciliation, settlement, compromise, or understanding.²¹ Mediation is distinguished from simple negotiation by the presence of a skilled and neutral facilitator who has the confidence of the disputing parties and works to bring them to a mutually acceptable agreement. Mediation is distinguished from more coercive techniques, such as arbitration or litigation, by the fact that participation is purely voluntary, and that agreement must be created and enforced by the parties.²² Unlike litigation, mediation is extremely flexible; as one commentator has observed, "one is tempted to say that it is all process and no structure."²³ Although this note does not attempt to provide a comprehensive summary of mediation techniques and dynamics,²⁴ specific points relevant to Alaska's coastal zone mediation system will be examined below.

B. Labor Mediation

The most established application of mediation is in the negotia-

19. *Id.* § 46.40.060(b).

20. ALASKA ADMIN. CODE tit. 6, § 85.170(c) (Apr. 1984).

21. WEBSTER'S 3D NEW INT'L DICTIONARY (P. Gove ed. 1971).

22. Sander, *supra* note 4, at 115.

23. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 307 (1971).

24. For a general overview of negotiation dynamics and techniques, see R. FISHER & W. ÜRY, *GETTING TO YES* (1981); H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

tion of labor union contracts, and the public most often associates mediation with this setting. The labor model of mediation must form the starting point for any evaluation of other applications for several reasons. Not only has labor mediation provided an essential body of experience and expertise for use in developing other applications, but the institutional structures developed for the delivery and evaluation of labor mediation services are an important model.²⁵ Furthermore, alternative mediation applications are usefully analyzed in terms of the extent to which they share or depart from key characteristics of the labor model. These characteristics are discussed briefly below.

Labor mediation takes place between two parties: the union and the company management. The nature of the parties' relationship provides several conditions which have been identified as crucial to the success of mediation. The two parties are bound by mutual interdependence, since neither party can fulfill its goals without reaching some accommodation with the other.²⁶ Further, the parties share a long-term relationship and are aware that any one set of negotiations constitutes part of a cycle that will repeat itself in the future.²⁷ The parties' ongoing relationship forces them not only to seek short-term gains but also to create and maintain long-term relations.²⁸ These factors taken together provide a strong incentive to negotiate in good faith despite the voluntary nature of the process. The most significant difference between labor mediation and the other models discussed below is the fact that there are only two parties. Since all relevant interests are readily identified and present in the negotiations,²⁹ the parties may have confidence in the validity and stability of the agreement. Moreover, an acceptable level of consensus is easier to achieve between two parties than it would be in the case of larger groups with more complex power dynamics.³⁰

Issues in labor mediation tend to be relatively well-defined and

25. The implications of Alaska's reliance on the labor model are discussed *infra* at Section IV.

26. Fuller, *supra* note 23, at 310.

27. *Id.* at 311.

28. *Id.*

29. See Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 6 n.14 (1981).

30. See, e.g., Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 92-93 (1982) (discussing complexities of determining consensus among multiple parties). Fuller suggests that labor mediation experience indicates that negotiation cannot succeed among *more* than two parties, given the likelihood that adding more parties will shift the mediator's function from that of the neutral balance in a triad to a more active role. Fuller, *supra* note 23, at 309, 312-14. However, even Fuller recognizes the value of "mediative" intervention among larger numbers of disputants. *Id.* at 334-37 (consultative process appropriate for water resource allocation

recognized by both parties to the negotiations, although their goals and priorities naturally may be expected to differ.³¹ The relevant terms and their implications tend to be well-established and foreseeable in labor contracts because there is an extensive body of experience in the negotiation, interpretation, and enforcement of labor contracts.³² Further, because of the nature of the parties' relationship and the subject matter of the negotiations, all aspects of the negotiations are characterized by economic tradeoffs,³³ and the parties generally are comfortable in measuring gains and concessions in economic terms.³⁴ In sum, the parties in labor mediation may have very different goals, but they share a common set of expectations and standards.

Labor mediation takes place within a well-defined legal and institutional framework. The use of mediation is recognized by the Taft-Hartley Act³⁵ and many similar state statutes,³⁶ and mediation services are provided and regulated through the FMCS.³⁷ As a result, parties to labor negotiations typically know when mediation will be appropriate or required, as well as how mediation services may be obtained and funded. The parties also have access to a well-developed body of precedent and standards by which the conduct of the negotiations and the legality of resulting agreements may be judged.³⁸

C. Environmental Mediation

The term "environmental mediation" is applied to the mediation of disputes which focus on the proper development, allocation, and protection of environmental resources.³⁹ The development of

disputes). See also Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 91 (1981) (any number of parties may participate).

31. See generally Susskind, *supra* note 29, at 6 n.14.

32. *Id.*

33. Fuller, *supra* note 23, at 310-11.

34. Susskind & Weinstein, *Towards a Theory of Environment Dispute Resolution*, 9 B.C. ENVTL. AFF. L. REV. 311, 327 (1980).

35. Taft-Hartley Act § 201, 29 U.S.C. § 171 (1978). See generally H. NOR-THRUP, *COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES* 155-62 (1966); Simkin, *The Third Seat at the Bargaining Table—A Government Point of View*, 14 LAB. L.J. 5 (1963).

36. See, e.g., ALASKA STAT. § 23.40.190 (1981) (providing for mediation of public-sector labor disputes); *id.* § 23.05.060(2) (Alaska Dep't of Labor may act as a mediator in labor disputes in the interest of industrial peace.).

37. See generally FRES, *LABOR DISPUTES* § 71 (1977); Susskind, *supra* note 29, at 4-5 n.9. Detailed regulations governing the FMCS are found at 29 U.S.C. §§ 1400-1403 (1984).

38. See generally Susskind, *supra* note 29, at 4-5.

39. For an operational definition of environmental mediation as contrasted with labor mediation, see Cormick & Patton, *Environmental Mediation: Defining the*

environmental mediation has been spurred by a perceived need for alternatives to litigation⁴⁰ in the environmental area and by the success of preliminary mediation efforts. The process of environmental mediation now has a small but established group of regular practitioners and promoters,⁴¹ a growing body of environmental mediation theory and experience,⁴² and at least the beginnings of a trend toward institutional recognition and governance.⁴³

Mediation has been employed successfully in a wide range of environmental disputes, encompassing three general categories.⁴⁴ The first category seeks consensus on broad policy issues.⁴⁵ The second addresses mixed policy and site-specific issues; Alaska's coastal zone mediation provision has been cited as an example of this type of environmental mediation.⁴⁶ Finally, and most commonly, environmental mediation has been used to resolve site-specific disputes, typically between proponents of facilities such as mines, dams, or coal-powered electric utilities and local residents and environmental interest groups.⁴⁷

Process Through Experience, in ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS, *supra* note 8, at 76-79.

40. Susskind & Weinstein, *supra* note 34, at 314.

By limiting the access of interested parties, restricting the information available for consideration, restricting the range of concerns to legally recognizable causes of action, and "segmenting" complex and interrelated problems into discrete legal actions, the courts make it practically impossible to reach a judgment that acknowledges the real concerns of all interested parties.

Id. at 320; see also Watson & Danielson, *Environmental Mediation*, 15 NAT. RES. LAW. 687, 689-90 (1983) (The typical focus of environmental litigation on procedural shortcomings, such as the failure to prepare environmental impact statements and secure necessary permits, is not well-suited to resolution of real issues "on the ground.").

41. For a list of environmental mediation practitioners see RESOLVE CENTER FOR ENVIRONMENTAL CONFLICT RESOLUTION, ENVIRONMENTAL CONFLICT RESOLUTION ORGANIZATIONS, PRACTITIONERS AND RESEARCHERS 1-15 (1980), *excerpted in* OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. EPA SW-944, USING MEDIATION WHEN SITING HAZARDOUS WASTE MANAGEMENT FACILITIES 35-43 app. B (1982) [hereinafter cited as USING MEDIATION]. For a general listing of organizations involved in various forms of dispute resolutions see NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, DISPUTE RESOLUTION RESOURCE DIRECTORY (1984).

42. See, e.g., literature cited in Susskind, *supra* note 29, at 4 nn.3-6.

43. See *supra* note 8.

44. Watson & Danielson, *supra* note 40, at 690, 691.

45. *Id.* at 690.

46. *Id.* at 690 & n.7. It is the position of this note, however, that Alaska's program can more accurately be characterized as a hybrid which partakes of key elements of the labor, environmental, and regulatory negotiation models. See *infra* discussion at Section III(E).

47. Watson & Danielson, *supra* note 40, at 690-91.

Environmental mediation specialists have emphasized a number of characteristics which are typical of environmental conflicts and which distinguish mediation of environmental disputes from the typical labor mediation. From this perspective, environmental disputes address fundamental questions of resource allocation and protection and hence are essentially political in character.⁴⁸ Unlike many other types of disputes, the effects of environmental dispute resolution are often irreversible; they are not amenable to renegotiation or reformulation over time.⁴⁹ In contrast to labor mediation, the parties, issues, and costs in dispute typically are indeterminate⁵⁰ and hotly disputed. To the extent that the interested parties can even be identified, they comprise a complex mixture of public and private, resident and nonresident interests, whose expertise and resources vary widely.⁵¹ The ongoing, interdependent relationships typical in labor relations are rare. Furthermore, costs and benefits are not only extremely difficult to assess, but typically are asymmetrical, in that costs and risks are borne by a relatively small segment of the population while benefits are realized much more diffusely.⁵² A final distinguishing aspect of environmental conflicts is the crucial role played by scientific and technical information and issues in this area.⁵³ Although environmental disputes frequently turn on such considerations, scientific "answers" concerning future risks and impacts can seldom be found. At the same time, the proliferation of scientific and technical information tends to cloak the underlying value and policy conflicts.⁵⁴ In addition, scientific determinations

48. See Cormick & Patton, *supra* note 39, at 77; cf. Harter, *The Political Legitimacy and Judicial Review of Consensual Rules*, 32 AM. U.L. REV. 471, 475 (1983).

Environmental issues are frequently described as "polycentric," a term developed by Lon Fuller.

As described by Fuller, the polycentric issue is characterized by a large number of possible results and by the fact that many interests or groups will be affected by any solution adopted; thus each potential solution will have complex and unique ramifications. In graphic terms, the polycentric controversy can be visualized as a spider web, since "[a] pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole."

Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 116-18 (1972).

49. See Lake, *Environmental Conflict and Decisionmaking*, in ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS, *supra* note 8, at 1, 6; Susskind & Weinstein, *supra* note 34, at 324.

50. Susskind & Weinstein, *supra* note 34, at 324.

51. See Lake, *supra* note 49, at 6.

52. See Susskind & Weinstein, *supra* note 34, at 328-29.

53. See Lake, *Characterizing Environmental Mediation*, in ENVIRONMENTAL MEDIATION: THE SEARCH FOR CONSENSUS, *supra* note 8, at 69.

54. See Susskind & Weinstein, *supra* note 34, at 318-19.

may be influenced by differences in the level of resources available to proponents of competing positions.⁵⁵

The dispute characteristics outlined above have special implications for the dynamics of environmental mediation and distinguish it in important ways from labor mediation. First, the question whether mediation is an available or advisable option becomes immensely more complicated. Because mediation is still a little-known option for environmental dispute resolution, its use may depend on active promotion by a would-be mediator.⁵⁶ Second, unlike labor mediators, environmental mediators must often begin by identifying the key interests and securing their participation in the negotiations. This process is perhaps the most crucial factor affecting the success of environmental mediation,⁵⁷ because it is axiomatic that mediation cannot succeed unless participation is voluntary, all parties have something to gain from participating in the negotiations, and no party with power to prevent implementation of an agreement is left out of the proceedings.⁵⁸ In environmental conflicts, affected interests are indeterminate and power relationships are complex. Consequently, the threshold tasks of determining who the parties should be and gaining their agreement to join the negotiations are key concerns in environmental mediation. The potentially large number of parties creates an additional problem typically not faced by labor mediators: the question of what should constitute an "agreement" when unanimity among the parties appears to be a practical impossibility but a consensus of the crucial interests must be obtained.⁵⁹ Finally, the link between individual negotiators and the interests they represent is often much more tenuous in environmental than in labor mediation, creating uncertainty about whether all necessary interests will be adequately represented in the negotiations and will ratify and accept the mediated agreement.⁶⁰ Thus, there is an additional burden on the mediator and the parties to maintain communications

55. Lake, *supra* note 49, at 6.

56. Many instances of environmental mediation have been initiated by the mediator's offer of services. Susskind, *supra* note 29, at 3 n.6. This contrasts with labor mediation practice, in which FMCS mediators are expressly barred from initiating contact with disputants absent "exceptional circumstances." Code of Professional Conduct for Labor Mediators, 29 C.F.R. app. § 1400.735 (1983).

57. See, e.g., Susskind & Weinstein, *supra* note 34, at 337-38.

58. See Harter, *supra* note 30, at 42-43.

59. *Id.* at 92-97 (discussing the complexities of determining consensus among multiple parties).

60. See Lake, *supra* note 53, at 67-69; Susskind & Weinstein, *supra* note 34, at 338-39.

and cultivate the commitment of key decisionmakers among the represented constituencies throughout the negotiations.⁶¹

As suggested above, the nature of the issues themselves creates further important differences between labor and environmental mediation. The parties in environmental disputes may face greater difficulty in narrowing the agenda for discussion.⁶² Issues tied to values the parties are unable or unwilling to compromise may have to be excluded from the discussions altogether and may even make some parties unwilling to negotiate at all.⁶³ In contrast to labor negotiations, the point at which issues in an environmental dispute have become sufficiently "ripe" for mediation may be difficult to identify.⁶⁴ Perhaps most importantly, the highly technical and indeterminate nature of the scientific questions involved makes the quantification and evaluation of gains and concessions in mutually acceptable terms extremely difficult.⁶⁵ Because technical and scientific information is so crucial to environmental decisions and yet remains so incomplete, indeterminate, and subject to fierce partisan dispute, the parties' first task may be to negotiate a consensual set of facts to be used as input to further substantive discussions. Such a "data mediation" process may require the aid of experts in order to identify data needs, to determine which data are unreliable, and to identify and narrow disputed areas as far as possible while clearly labelling remaining areas of disagreement as beyond the scope of the negotiations.⁶⁶

A final important point of contrast between environmental mediation and labor mediation is in the degree of institutional recognition accorded to each of them. As noted earlier, few states provide for mediation of environmental disputes.⁶⁷ Similarly, no institutional body currently accredits or polices the practices of environmental mediators. The development of a special code of ethics for environmental mediators has been suggested as a possible undertaking,⁶⁸ but no such code is currently in effect. To some extent, environmental mediation is likely to continue developing on an ad hoc basis, so the need for future development of rigid institutional struc-

61. Harter, *supra* note 30, at 92; Stulberg, *supra* note 30, at 116; USING MEDIATION, *supra* note 41, at 13.

62. See Susskind & Weinstein, *supra* note 34, at 339-40.

63. Harter, *supra* note 30, at 49 ("Competing interests cannot negotiate an agreement if the disputed issue concerns fundamental values."); Watson & Danielson, *supra* note 40, at 696 (Other considerations aside, parties may refuse to negotiate in order to avoid conferring legitimacy on the adversary and its goals or needs.).

64. See Harter, *supra* note 30, at 47.

65. See *supra* notes 53-55 and accompanying text.

66. Harter, *supra* note 30, at 91.

67. See *supra* note 8.

68. McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 VT. L. REV. 49, 65 n.58 (1981); Susskind, *supra* note 29, at 42.

tures for providing and regulating mediators may be limited.⁶⁹ In fact, the very flexibility that makes mediation an attractive alternative would appear to militate against the specification of detailed rules for its use.

D. Regulatory Negotiation

A final mediation model relevant to Alaska's coastal zone mediation process involves direct negotiation (with or without a mediator) among interested parties to determine the structure and content of administrative regulations.⁷⁰

Although informal negotiation and communication among interested parties and regulatory officials are important elements in the early stages of the regulatory development process, opportunities for direct and interactive participation in decisions about the content of regulations are limited.⁷¹ Moreover, under current law, actual negotiation of regulations faces several potential procedural barriers.⁷² The Administrative Council of the United States (ACUS) has adopted a resolution recommending that Congress enact legislation expressly authorizing such negotiations and removing legal and procedural barriers to its use.⁷³ This recommendation has not yet been implemented. Indeed, at present, Alaska's coastal zone mediation process appears to be the only state regulation which expressly integrates a mediation process into its rulemaking procedures.⁷⁴

Proponents of regulatory negotiation argue that the process will mitigate several serious drawbacks of standard regulatory rulemak-

69. See generally Susskind, *supra* note 29, at 45.

70. See generally Boyer, *supra* note 48; Harter, *supra* note 30; Harter, *supra* note 48; Schuck, *Litigation Bargaining & Regulation*, REG., July-Aug. 1979, at 26; Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256 (1981); Note, *Rethinking Regulation Negotiation as an Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871 (1981). The problems and procedures involved would vary depending on whether the agency with responsibility for developing the regulations participated in the negotiation and adopted the result as its proposed regulation, or whether the interested private parties reached a separate agreement presented to the agency as part of the public participation process during the rulemaking. This issue is moot for the statute considered here, since state agency participation is mandated by the statute. For a general discussion of the pros and cons of agency participation, see Harter, *supra* note 30, at 57-66.

71. Harter, *supra* note 30, at 7, 32.

72. See generally *id.* at 107-08; Note, *supra* note 70, at 1880-90. Specific potential obstacles are discussed *infra* at section IV.

73. Procedures for Negotiating Proposed Regulations, Recommendation No. 82-84, 47 Fed. Reg. 30,708, at 30,709 (1982) (adopted June 10, 1982), reprinted in Harter, *supra* note 48, at 491-93 [hereinafter cited as *Procedures*].

74. However, Alaska's coastal zone mediation is significantly restricted in scope compared to the ACUS procedure, since only the Council and district are participants. See *infra* discussion at Section IV(B)(1).

ing procedures, which are criticized as being slow, cumbersome, excessively adversarial, and lacking in legitimacy because of ineffective public participation mechanisms and excessive agency discretion over essentially political choices.⁷⁵ Since often the only option available to parties trying to advance their interests is a judicial challenge of the regulations, direct negotiation also represents an alternative to the costs and limitations of litigation.⁷⁶ Proponents also argue that regulatory negotiation allows parties to participate directly and immediately in decisions affecting their interests. Moreover, these proponents point out that negotiation participants tend to wield more direct authority than intermediaries such as lobbyists or litigation counsel.⁷⁷

Proposals for the use of mediation in regulatory negotiations draw heavily on the theory and experience of environmental mediation. The two applications are similar since they deal with issues which are frequently polycentric, value-centered, and which require determination of complex factual issues. The problem of multiple parties and diffuse interests, typical of environmental conflicts, is also characteristic of regulatory disputes. Consequently, the principles of environmental negotiation generally apply in the regulatory context as well.⁷⁸ However, regulatory negotiation raises a number of special issues. On a pragmatic level, attempting to integrate formal negotiations with the already complex requirements of existing rulemaking procedures is likely to raise many procedural issues and potential conflicts. Further, there appears to be an underlying policy tension between the need for flexibility and confidentiality that is fundamental to negotiation, and the commitment to open and impartial agency decisionmaking that is central to administrative procedure requirements.⁷⁹ The literature of regulatory negotiation suggests that the process offers a promising alternative to standard rulemaking procedures in some, but by no means all, circumstances, but stresses that such a process will require considerably more development and experimentation before its potential scope and feasibility can be determined.⁸⁰ Nevertheless, regulatory negotiation provides a valuable perspective for analyzing Alaska's mediation regulations.⁸¹

75. See Harter, *supra* note 30, at 22-24; Note, *supra* note 70, at 1871.

76. Schuck, *supra* note 70, at 30.

77. Harter, *supra* note 30, at 29-31.

78. *Id.* at 41-42.

79. Schuck, *supra* note 70, at 31.

80. Harter, *supra* note 30, at 112-13. See generally sources cited *supra* note 70.

81. See specific points discussed *infra* at Section IV.

E. Coastal Zone Management Mediation in Alaska — Mixing the Models

Examining the provisions of Alaska's coastal zone management mediation regulation in light of the three applications discussed above suggests that Alaska's system is a hybrid which shares important characteristics of each but which cannot be classified neatly within any one application. In order to evaluate Alaska's mediation system, it is important to identify how it resembles or differs from each of the three other models, because appropriate mediation practice and procedure will vary with the fundamental assumptions underlying each application.

Alaska's regulation draws on the established procedures of labor mediation in several important ways. The resemblance to labor mediation is most obvious in the regulation's express provision for the mediation and in its reliance on the services and standards of the primarily labor-oriented FMCS. By limiting parties to the Council and the district, the regulation also fosters mediation dynamics which strongly resemble those found in labor negotiations. Thus, as in labor mediation, the parties to coastal zone management mediation will share an ongoing relationship based upon their common responsibility for implementing the coastal management program. The substantive standards of the state and federal coastal zone programs also provide the parties with a mutually binding external body of standards and precedent to guide the deliberations. Since mediation does not begin until the Council has refused to approve specific district program provisions, the regulation ensures that the issues to be mediated will be relatively well-defined and ripe for resolution at the time of the negotiations. These factors appear to eliminate at the outset many of the indeterminacies and complications inherent in the environmental and regulatory mediation models.

Despite these similarities to the relatively clearcut model of labor mediation, other fundamental characteristics of Alaska's regulation are more analogous to environmental or regulatory mediation values and procedures. First, the substantive issues underlying coastal zone regulation disputes are likely to involve environmental questions and reflect the kinds of multivalent problems that environmental mediation efforts have been designed to address. Second, even though the regulation limits the parties to the Council and the district, the questions at issue will almost always touch the interests of many other parties, whose exclusion from the negotiations might place the legitimacy or stability of the resulting agreements in doubt. Therefore, in some ways, environmental mediation is a better model than labor mediation, because the parties involved in coastal zone management mediation frequently will have to accommodate

outside interests and political pressures not typically faced by labor mediators. Finally, the fact that the mediation arises in the context of an administrative procedure raises many of the same issues found in regulatory mediation. For example, interweaving the mediation requirements with the public participation process mandated by the APA allows the indirect inclusion of the other interested parties but creates new complications, which are discussed further below.

In summary, regardless of its substantive context or content, each of the mediation applications shares common elements inherent in the mediation process itself. Furthermore, each of the three basic models — labor, environmental, and regulatory mediation — has some special relevance to Alaska's coastal zone management mediation process. Thus, Alaska's system should be analyzed within the framework of all three models, rather than any one model.⁸² Further, an analysis of the Alaska statute itself provides a potentially interesting and valuable illustration of the ways in which the various models interact. The remainder of this note examines the coastal zone mediation provisions by considering both their relation to previous mediation applications and their potential success in promoting efficient and stable resolution of coastal zone planning disputes.

IV. ANALYSIS OF SPECIFIC MEDIATION PROVISIONS

A. Initiation of Mediation

As noted earlier, mediation is triggered automatically whenever the Council rejects all or part of a program submitted for approval by a local coastal resource district;⁸³ there is no initial consideration whether mediation is feasible or desirable in individual cases. This

82. The hybrid quality of Alaska's approach may represent a highly realistic response to the subject matter at issue, and hence may offer valuable procedural flexibility over any single approach taken alone. For example, Boyer states:

[P]olycentric controversies exhibit a blend of technical, factual, and political attributes that often seem nearly impossible to separate or accommodate within a single procedural framework. . . . [In the absence of more explicit legislative guidance on such issues,] the next best approach may be for . . . agencies to use mixed procedural forms that encompass both consensual and nonconsensual devices. . . . Even when trial-type hearings are [ultimately] required, it may be possible to approximate [the desirable procedural flexibility] by using the pretrial phases to provide appropriate . . . consensual techniques

Boyer, *supra* note 48, at 169.

83. ALASKA ADMIN. CODE tit. 6, § 85.170(a) (Apr. 1984). The mandatory character of CZM dispute mediation contrasts with the voluntary system recommended by Alaska's Civil Litigation Task Force. In that context, where the potential volume of disputes is much greater than in coastal management, the Task Force commented that although "the concept of mandatory mediation [is] highly desirable . . . sufficient resources do not currently exist on which to frame a mandatory mediation

contrasts markedly with the practice in other areas. In labor mediation, for example, although parties to a labor contract dispute are required by law to notify the FMCS of upcoming negotiations, only a small number of the disputes for which such notification is received are actually mediated.⁸⁴ Many labor contract disputes can be resolved by direct negotiation without the assistance of a mediator, and others to which a mediator officially is assigned may require very little active assistance.⁸⁵ In environmental mediation, the question whether mediation is appropriate, and whether interested parties are willing to participate, is a major threshold issue.

Two questions must be considered in order to assess the mandatory aspect of Alaska's system. First, are foreseeable conflicts between the Council and local districts concerning regulation of coastal zone activities generally amenable to negotiation? Second, is it reasonable to subject *all* such conflicts to mediation?

1. *When is Mediation Appropriate?* Because coastal zone planning presents a classic problem in environmental management — the optimum allocation, development, and protection of coastal resources — it is appropriate to consider environmental mediation practice and experience as a means of resolving coastal planning disputes between the Council and coastal management districts.⁸⁶ The potential value of mediation in resolving coastal zone planning problems has been specifically recognized by the state of New Jersey, which has experimented with mediation as a means of reaching consensus concerning data collection and evaluation needs in developing coastal management plans.⁸⁷ Even if mediation offers a helpful approach to the substantive issues in dispute, it remains necessary to consider whether the dynamics of the Council-district relationship and the procedures specified by the regulation are also likely to be conducive to successful mediation.

A number of criteria for judging the appropriateness of mediation in particular situations have been advanced in the mediation

structure." Alaska Civil Litigation Task Force, Proposed Civil Rule 90.2, comment a, reprinted in L. FREEDMAN, *supra* note 5, at 13.

84. Simkin, *supra* note 35, at 6.

85. *Id.*

86. See, e.g. Stockholm, *Environmental Mediation: An Alternative to the Courtroom*, 15 STAN. LAW. 1, 21 (1979):

It seems that mediation will be most useful . . . to resolve issues where there is considerable administrative discretion and room for accommodation. Land use disputes over location of industry, landfill sites, and wilderness areas may be prime candidates. . . . Siting of facilities like dams, highways, and power lines may be other examples of mediable controversies.

87. See Straus, *supra* note 8.

literature.⁸⁸ While the degree of elaboration varies, each formulation reflects core concerns about the voluntariness of participation, the parties' willingness to compromise in order to reach an agreement, and the mediator's neutrality.

The criteria developed by Philip J. Harter as a consultant to the ACUS⁸⁹ offer a useful standpoint from which to assess the appropriateness of coastal zone mediation in Alaska. Several of the criteria are clearly satisfied on the face of Alaska's regulation: the number of parties is limited, the issues are ripe,⁹⁰ and both parties are aware that some resolution of the conflict is imminent⁹¹ (given the default provision for an adjudicatory hearing). The regulation also provides some assurance that any agreement the parties reach will in fact be implemented, by directing that a successfully mediated and ratified agreement will constitute a final settlement of the issues.⁹²

A second cluster of criteria focuses on the power dynamics between the parties. First, both the Council and the district must expect to benefit from the mediation and see the negotiations as the best overall method of achieving their respective goals.⁹³ Although this assessment is likely to vary in individual cases, it appears that, other considerations aside, mediation will offer more benefits to both parties than will the alternative of an adjudicatory hearing. Because the Council remains the ultimate authority in a hearing decision, the district may well feel that its best advantage lies in negotiation. Similarly, the Council will likely wish to avoid the delay and expense of a hearing, and feel that it will have more discretion in negotiation than it would in an adjudicatory hearing. A second power-related criterion requires that each party feel the other has enough countervailing power to place the outcome of an alternative resolution process in doubt.⁹⁴ Here again, cases may vary; however, the very fact that a dispute has survived all the earlier stages of program development (in which there is typically considerable informal communication between the district and the OCM) suggests that there must be significant power on both sides.

88. See, e.g., Harter, *supra* note 30, at 42-52; USING MEDIATION, *supra* note 41, at 13-14.

89. Harter, *supra* note 30, at 43-53.

90. *Id.* at 46-47.

91. *Id.* at 48.

92. *Id.* at 51. The potential stability of the mediated agreement is discussed further *infra* at Section IV(F)(2).

93. Harter, *supra* note 30, at 43.

94. *Id.* at 46. See *infra* Section IV(E)(2) (implications of Council's role as ultimate adjudicator on power dynamics between the parties); cf. Harter, *supra* note 30, at 58-59 (general factors counterbalancing apparent power advantage of agency in regulatory negotiation).

The other criteria specified by Harter appear to be more dependent on the nature of the particular disputes. In order to be an appropriate subject for mediation, the dispute must not involve fundamental values that either party is unwilling to compromise.⁹⁵ The parties must see some opportunity for gain in a substantive settlement.⁹⁶ Enough options and issues must be present so that each party can find something to support and to trade off.⁹⁷ Either there must be no need for fundamental research or the parties must be able to agree on what is needed and be willing to accept the research results.⁹⁸ Whether particular coastal planning disputes will meet these criteria cannot be predicted in advance; thus it is impossible to predict whether mediation will be appropriate in all cases.

Importantly, Harter and other mediation authorities stress that it is unlikely all, or even most, of these "ideal" conditions will be met in any mediation situation, and that such conditions are not necessary for mediation to be considered appropriate and worthwhile.⁹⁹ Application of these criteria to foreseeable coastal zone planning disputes in Alaska suggests that mediation may be a reasonable dispute resolution mechanism for some disputes. Nevertheless, the question remains whether it is reasonable to require mediation even when, for various reasons, mediation clearly seems unsuitable. The following discussion considers this issue.

2. *Should Mediation Be Mandatory?* The foregoing analysis strongly suggests that some coastal zone planning disputes may be unsuitable for mediation, and others conceivably could be resolved by direct negotiation without a mediator's assistance. Nevertheless, the mediation requirements provide screening and diversion functions which suggest that the mandatory nature of the process will not be unduly burdensome. First, given the elaborate procedural and public participation requirements preceding the district's submission of its program, and the likelihood that informal negotiations already will have occurred during earlier stages, any disputes remaining at the point of the Council's decision on the program are likely to be serious ones that may benefit from a mediator's assistance. Indeed, the prospect of mandatory mediation may itself provide additional motivation to the parties to resolve their differences informally. A second and more compelling point is that disputes clearly unsuitable for mediation can be removed from the process relatively quickly

95. Harter, *supra* note 30, at 49; Harter, *supra* note 48, at 479 (discussing problems of value conflicts in regulatory setting).

96. Harter, *supra* note 30, at 48.

97. *Id.* at 50.

98. *Id.*

99. *See id.* at 44 & n.249.

and returned to the standard adjudication process through the mediator's certification that an impasse has been reached.¹⁰⁰

The practical effectiveness of the impasse provision as a means of diverting disputes which are not appropriate for mediation may depend largely upon the time and effort necessary to secure a mediator and to reach a determination that an impasse exists. A mediator sensitive to the needs and limitations of the process may be able to screen out disputes which are obviously inappropriate for mediation on the basis of an initial consultation with the parties, at minimal cost in time and expense. The state might expedite this process, and the mediation generally, by adopting several additional measures. First, it could make an effort to familiarize potential disputants with the mediation process *before* district submissions undergo Council review. This would facilitate actual mediations and reduce the possibility that disputants might adopt an intransigent attitude out of reluctance to engage in an additional and unfamiliar procedure. Second, the state might institute a mechanism analogous to the notification filing required in labor disputes to alert potential mediators of pending disputes which may require intervention. This would enable the mediator to contact the parties, familiarize himself with the facts, and prepare for the mediation at the earliest possible point.

In summary, the mandatory character of the mediation provision is likely to introduce some inefficiency into the process, because in very "easy" or very "hard" disputes the parties must go through at least the initial stages of the mediation process even though mediation ultimately will be unnecessary or impossible. This potential "overkill," however, is counterbalanced by the advantage of promoting the use of mediation in appropriate cases. This advantage, together with the potential for screening and diversion of inappropriate cases, supports a conclusion that mandatory mediation should not be unduly burdensome.

B. Identification of Parties and Representatives

1. *Parties.* The mediation regulation expressly limits the parties to the mediation to the Council and the district. This limitation offers several advantages. First, the limitation avoids the complex issues which would be raised by the need to identify the additional interests which should be represented in a comprehensive negotiating group. Identification of appropriate parties has presented a major challenge for environmental mediators to date.¹⁰¹ Identifying

100. See ALASKA ADMIN. CODE tit. 6, § 85.170(a)(3)-(4) (Apr. 1984).

101. See *supra* notes 29-30, 57-59 and accompanying text.

and including outside parties also would require additional, complex, and time-consuming procedures, such as those proposed by the ACUS.¹⁰² Second, environmental and regulatory mediation experts have stressed the importance of limiting the negotiating group to a manageable size — for example, where necessary, determining the minimum number of groups or individuals sufficient to represent adequately a given set of “interests.”¹⁰³ Alaska’s two-party limitation clearly avoids this complication.

Although this dyadic structure parallels the established structure of labor mediation, from the viewpoint of either environmental or regulatory mediation it represents a substantial limitation which may undercut the effectiveness of mediation by failing to capitalize on its potential to secure the direct participation and agreement of multiple parties in complex disputes. Thus, the limitation of parties will deprive other interested parties of the opportunity to affect *directly* regulations which will impinge on their interests. As a result, the agreement reached may be less effective and more vulnerable to outside attack than one reached by a consensus of all interests.¹⁰⁴

The limitation of parties may be justified, both theoretically and pragmatically, by the extensive rulemaking and public commentary procedures which precede the mediation and the opportunity provided for public review and comment on the final outcome.¹⁰⁵ The resulting record is likely to direct the attention of the negotiating parties to the needs of the absent interests, both by providing a source of factual information and by reminding the parties of their social and political constituencies. Nevertheless, a record developed by the traditional public participation process will still be essentially adversarial rather than consensual. The parties will tend to advocate inflexible positions, overstate points, and understate nuances.¹⁰⁶ The Council could mitigate these problems, at least partially, by routinely exercising its discretionary authority to call public meetings before holding mediation sessions.¹⁰⁷ The public notice of the hearings would help to identify the issues to be resolved and to emphasize the nature of the mediation process and the need for nonadversarial statements of priorities and concerns.¹⁰⁸ Under the

102. See *Procedures*, *supra* note 73, at 494-96; Harter, *supra* note 30, at 67-98.

103. See, e.g., Harter, *supra* note 30, at 46; USING MEDIATION, *supra* note 41, at 16.

104. See generally Boyer, *supra* note 48, at 168 (“[W]here the agency bargains as a surrogate for affected segments of the public it may prove an ineffective bargainer, or may be perceived by the public as ineffectual, thereby weakening either the accuracy or the acceptability of the decision.”).

105. See ALASKA ADMIN. CODE tit. 6, § 85.150(g) (Apr. 1984).

106. See generally Harter, *supra* note 30, at 19-22.

107. ALASKA ADMIN. CODE tit. 6, § 85.170(a) (Apr. 1984).

108. Cf. Harter, *supra* note 30, at 79, 117 (Federal Register notice of proposed

Alaska regulation, the record of any hearing is given to the mediator,¹⁰⁹ who can use it as a guide in his interactions with the parties and possibly as a means of reminding the parties of their responsibility to consider the fairness and advisability of any contemplated agreements in light of absent interests.

Despite the potential advantages achieved by structuring the mediation for only two parties, with public review and participation at earlier and later points, mediation theory and experience suggest that the exclusion of other parties from the negotiations may be fatal to the effectiveness of the process in some cases. As discussed earlier, mediation cannot be expected to produce a stable and effective agreement when any interested party with the power to block implementation of the agreement perceives itself to be unrepresented.¹¹⁰ Potential power to block implementation of an agreement is provided by the procedures of the CZM program and the APA to any interested party with the motivation and resources to oppose ratification of the mediated provisions.¹¹¹ It certainly is conceivable that such a situation might arise in the coastal planning context, given the potentially volatile nature of the issues and the commitment and resources of concerned interests. Thus, in some cases, mediation efforts involving only the Council and district, however effective between those parties, may be rendered pointless by continued opposition from other interests; whereas including other interested parties in the negotiations might result in a mutually agreeable and ultimately more efficient outcome.

2. *Representatives.* An important characteristic of mediation is that although interested parties participate directly in the negotiations, the actual individuals engaged in the negotiations are not principals but rather are agents of their respective interests.¹¹² Thus, the various negotiating individuals must remain aware that they cannot unilaterally bind their constituencies, but instead must educate and persuade them to accept the mediated outcome.¹¹³

Alaska's mediation statute and regulations are silent on the selection and qualifications of mediation participants. The mediation literature suggests that the representatives should have sufficient authority and/or access to key decisionmakers to ensure that the

regulatory negotiation is designed to maximize consensual participation by affected interests and thus minimize subsequent legal challenges by absent parties.).

109. ALASKA ADMIN. CODE tit. 6, § 85.170(a) (Apr. 1984).

110. See *supra* notes 57-58 and accompanying text.

111. Potential avenues of attack by such parties are discussed *infra* at text accompanying notes 186-201.

112. Fuller, *supra* note 23, at 311.

113. See Lake, *supra* note 53, at 67-69; Susskind & Weinstein, *supra* note 34, at 337-38.

agreement reached will be accepted and implemented by them.¹¹⁴ Participants also should have ready access to administrative support resources, staff, and expertise which may be helpful in negotiations.¹¹⁵ In Alaska, both requirements are likely to be satisfied because the negotiators will be fairly high-level staff members or officials of the Council or district having access to significant organization resources.¹¹⁶ Further, by limiting participation in the mediation to the two government bodies, Alaska has avoided a difficult issue typically faced in environmental and regulatory mediation: ensuring that the individuals present are actually representatives of the complex and diffuse "public interests" for whom they claim to speak.¹¹⁷ Thus, except for the limitation of parties discussed above, Alaska's mediation process does not appear to raise significant issues concerning the participants in mediation. Should the process ever be expanded to include other interests, however, this issue would gain considerable importance.

C. Selection and Qualifications of Mediators

1. *Requirements of the Regulation.* Under the regulation, the parties may mutually agree on a mediator, or they may request that the FMCS appoint one. If the parties cannot agree within ten days of the Council decision that triggers the mediation requirement, they *must* request an FMCS nominee. If either party disagrees with the FMCS nomination, the FMCS is to submit the names of three qualified mediators, and the mediator will be the nominee remaining after each party has eliminated one name.¹¹⁸

Beyond the use of the term "qualified mediators"¹¹⁹ in describing FMCS nominees, the regulation is silent on the issue of mediator qualifications or characteristics. At present, parties may be forced to

114. See Harter, *supra* note 30, at 54-55 & nn.302-03.

115. *Procedures, supra* note 73, at 495 (agency should provide financial or other support necessary to foster broadly-based, successful negotiations); Susskind & Weinstein, *supra* note 34, at 352 (regulatory agency as important potential source of technical and scientific support).

116. This conclusion assumes that both Council and district budgets will receive sufficient funding to maintain the necessary level of staff support for program development activities, including mediation. If coastal planning funds are significantly reduced in the future, the quality of negotiations under the mediation provision might suffer as a result. Cf. Jones, *Major Issues in Developing Alaska's Outer Continental Shelf Oil and Gas Resources*, 1 ALASKA L. REV. 209, 258-62 (1984) (discussing potential adverse effects of funding cuts on ability of Alaska state and local governments to manage coastal programs).

117. See Susskind & Weinstein, *supra* note 34, at 333.

118. See ALASKA ADMIN. CODE tit. 6, § 85.170(a)(1) (Apr. 1984).

119. *Id.* § 85.170(a)(1).

choose either an experienced labor mediator, with little or no substantive background in coastal zone management or regulatory disputes, or accept the services of a mediator whose qualifications and experience must be judged without the assistance of established accrediting mechanisms.¹²⁰ A number of general characteristics and skills that would be desirable in an ideal mediator have been described in the mediation literature and should provide some assistance in selecting and evaluating mediators.¹²¹ Because mediation is so process-oriented and dispute-specific, spelling out such requirements by statute or regulation is neither necessary nor desirable.¹²² Rather, the parties should retain the flexibility to choose someone with whom they feel comfortable.¹²³ Nevertheless, the importance of mediator selection cannot be overemphasized, since the extent to which the mediator's skills and personality complement those of the negotiating parties will be crucial to the success of the mediation.

2. *Appropriateness of Labor Mediation Credentials and Experience as Qualifications for Mediating Coastal Zone Regulation Disputes.* The Alaska regulation implicitly recognizes that labor mediators are qualified to perform coastal zone management mediation by allowing parties to select mediators through the FMCS and by stating that mediators in coastal zone management disputes will be bound by the Code of Ethics for Labor Mediators.¹²⁴ The FMCS provides an existing pool of seasoned mediators who are readily available for service. Since many of the functions of a mediator remain substantially constant across different substantive areas, it is likely that a qualified labor mediator will possess the basic process skills required by the parties. Nevertheless, several important distinctions should be borne in mind in selecting a mediator from this group.

First, labor mediators may be expected to lack substantive familiarity with coastal zone management issues. Substantive expertise plays an important role in effectively resolving disputes. Environmental and regulatory mediators and theorists have attached varying degrees of importance to this factor. Most agree that the mediator must at least be capable of becoming educated in the basic

120. Where no mediators experienced in the particular substantive area of an environmental dispute are available because no such dispute has been mediated, disputants are advised to "look for the most nearly similar experience" in terms of comparable issue complexity and party dynamics. USING MEDIATION, *supra* note 41, at 30.

121. See, e.g., Stulberg, *supra* note 30, at 94-95; USING MEDIATION, *supra* note 41, at 29-31.

122. McCrory, *supra* note 68, at 75.

123. See USING MEDIATION, *supra* note 41, at 29 (The most basic criterion for mediator selection should be acceptability of the mediator to all parties.).

124. ALASKA ADMIN. CODE tit. 6, § 85.170(a)(1) (Apr. 1984).

technical areas at issue.¹²⁵ However, the time needed for even minimal education could delay the process. There also appears to be a significant danger that a labor expert might miss chances to make imaginative connections and suggestions about important nuances of coastal zone management disputes. At the other end of the spectrum, one prominent environmental mediator cautions that a mediator with *too much* substantive expertise may tend to impose his own interpretation of the information and issues upon the parties to the mediation.¹²⁶ This also creates a danger of missing important new insights and may result in an agreement which is imposed by the mediator rather than created by the parties.

Second, in most cases labor mediators do not have to consider any parties or interests aside from those directly present at the negotiation table.¹²⁷ This background may make them relatively inflexible in the more polycentric and politically-oriented coastal zone regulatory disputes. This limitation may be less serious, however, in the case of individuals with experience in negotiating public-sector employment disputes, where external and political interests play an extremely important role.

These potential drawbacks might be minimized in several ways. The Council could identify or develop a pool of experienced mediators with appropriate substantive qualifications and make their existence known to potential disputants before mediation situations develop. In the absence of such guidance, parties forced to select among labor mediators might seek out those with experience in disputes having dynamics at least roughly analogous to those found in the coastal zone management setting. At least some screening and matching of available mediators and disputes might be obtained by providing the FMCS with information about the scope of the dispute and the special needs of the coastal zone management process. In addition, public hearings directed specifically toward the mediation, as discussed earlier, would provide an important mechanism for educating the mediator about the issues in dispute.

3. *Selection and Evaluation of Non-FMCS Mediators.* At present, non-FMCS mediators as a general class are not subject to any officially-recognized system of training, accreditation, or discipline comparable to that provided in labor mediation by the

125. Lake, *Unifying the Concept of Third-Party Intervention in Environmental Disputes*, ENVTL. COMMENT, May 1977, at 6, 7; Stulberg, *supra* note 30, at 96.

126. McCrory, *supra* note 68, at 57 n.27 (quoting G. Cormick, *Environmental Mediation in the U.S.: Experience and Future Directions 1* (unpublished paper presented to the American Association for Advancement of Science, 1981 Annual Meeting, Toronto, Canada)). This view is also reflected in USING MEDIATION, *supra* note 41, at 30.

127. Susskind, *supra* note 29, at 15.

FMCS.¹²⁸ A growing body of organizations and individuals, however, have accumulated considerable experience in alternative dispute resolution.¹²⁹ These organizations and individuals are an important resource for parties who may be interested in the mediation of their disputes. The use of a mediator affiliated with one of these groups may provide valuable assurance of a nonlabor mediator's experience.

4. *Ethical Standards and Mediator Accountability.* Alaska's statute provides standards governing the mediator's conduct by incorporating the FMCS Code of Professional Conduct for Labor Mediators (the "FMCS Code").¹³⁰ No such code has yet been developed expressly for environmental mediation. The FMCS Code, by its terms, is designed to apply to "all professional mediators employed by city, State or Federal agencies or . . . privately retained by parties."¹³¹ Thus, the incorporation of this provision may serve a valuable function in Alaska by establishing a clearly-defined common standard of conduct for all mediators, whether supplied by the FMCS or otherwise agreed upon by the parties. Such a statutory standard may be especially important in view of the novelty of the statute, the parties' lack of experience in evaluating the credentials even of experienced mediators, and particularly, the potential need for "consumer protection" if the Council and districts find themselves confronted with numerous offers to mediate by inexperienced or non-accredited individuals.

The FMCS Code previously has been suggested as a starting point for an environmental mediators' code.¹³² Indeed, the majority of the Code's provisions are applicable to any mediation effort, since they concern such matters as the mediator's duties of neutrality, integrity, and confidentiality.¹³³ Nevertheless, because the FMCS Code is designed expressly for *labor* mediators, consideration of whether it is equally well-suited to govern the conduct of coastal zone management mediation is appropriate.

The FMCS Code contains seven explicit references to labor

128. See *id.* at 4-5.

129. See *supra* note 41.

130. 29 C.F.R. § 1400 app. (1983).

131. *Id.* at Preamble (emphasis added).

132. See McCrory, *supra* note 68, at 65 n.58; Susskind, *supra* note 29, at 42.

133. For example, the Code states:

Since mediation is essentially a voluntary process, the acceptability of the mediator by the parties as a person of integrity, objectivity and fairness is absolutely essential. . . . The quality of his character as well as his intellectual, emotional, social and technical attributes will reveal themselves by the conduct of the mediator and his oral and written communications with the parties . . . and the public.

29 C.F.R. § 1400 app. at 46 (1983).

mediation, collective bargaining, and other labor-oriented matters. The majority of these may be harmonized with other uses of mediation without altering the substance of the Code simply by disregarding the labor terminology or substituting neutral terms such as "mediation" or "negotiation."¹³⁴ Other portions of the Code, which deal with relations among several mediators involved in the same dispute and with the special responsibilities of mediators who are government employees, may have limited relevance to any given coastal zone dispute and simply could be disregarded when the provisions are irrelevant. In two instances, however, the explicitly labor-oriented language of the FMCS Code arguably makes it inappropriate for coastal zone mediation.

The first such instance deals with the mediator's obligation of substantive expertise. The FMCS Code states that "[t]he mediator has a continuing responsibility to study industrial relations to improve his skills and upgrade his abilities."¹³⁵ This provision is clearly irrelevant to the practice of coastal zone management mediation in Alaska. More importantly, the provision reflects an essential difference between labor mediation and other mediation applications. The FMCS Code contemplates a "typical" mediator, who can make a full career of resolving collective bargaining disputes and who has access to an established body of ongoing experience, precedent, and specialized expertise, the mastery of which is relevant to his effectiveness in settling that particular type of dispute.¹³⁶ By contrast, Alaska's mediation process and the disputes it addresses are more likely to resemble the environmental model, in which individual disputes are relatively isolated and infrequent. Consequently, the volume of disputes is unlikely to require a pool of full-time mediators or lead to the development of an ongoing body of experience.¹³⁷ Thus, the practical realities and underlying purpose of the continuing study requirements for labor mediators appear to be absent in Alaska's coastal zone management.

Continuing study and education in labor relations is unnecessary for effective mediation of coastal zone management issues. Consequently, a conscientious mediator who wishes to comply with the spirit of the Code's requirements for coastal zone dispute

134. *E.g.*, "The primary responsibility for the resolution of a labor dispute rests upon the parties themselves."; "It is desirable that agreement be reached by *collective bargaining* without mediation assistance."; "*Collective bargaining* is, in essence, a . . . voluntary process."; "[T]he mediator does not regulate or control any of the content of a *collective bargaining* agreement." *Id.* at 46, 47 (emphasis added throughout).

135. *Id.* at 47.

136. *See supra* notes 35-38 and accompanying text.

137. *See supra* note 69 and accompanying text.

mediators will be faced with some difficulty in divining the legislature's real intent with regard to this requirement. The simplest response such an individual might make to this provision would be to disregard it. Another possible interpretation would be to infer a substitute requirement that the mediator educate himself in coastal zone management issues or in administrative procedure, in order to obtain a level of practical expertise similar to that of the experienced labor mediator in the collective bargaining area.¹³⁸ As discussed earlier, however, environmental and regulatory mediation experts disagree about the extent to which such substantive expertise is necessary or even desirable. Additionally, such an interpretation appears to run counter to the legislature's willingness to accept labor mediators as qualified coastal zone mediators. Likewise, a requirement of expertise or education in coastal planning might significantly narrow the pool of qualified mediators. On this issue, then, the legislature's blanket adoption of the FMCS Code has created unnecessary ambiguity as to the intended expertise requirement.

The second instance in which the FMCS Code's application to coastal zone mediation merits further examination is in its treatment of the mediator's responsibility to the public. The Code states emphatically that "[t]he primary purpose of mediation is to assist the parties to achieve a settlement."¹³⁹ The implication is that the mediator typically need *not* be primarily concerned with the effects of a settlement on nonparties, as long as the settlement is agreeable to the parties to the mediation¹⁴⁰ and is not "obviously contrary to public policy."¹⁴¹ The Code recognizes a limited, labor-specific exception when the public interest would be served by having "a particular dispute settled; . . . a work stoppage ended; and normal operations

138. This approach would be analogous to that proposed by Alaska's Civil Litigation Task Force, which would require divorce and child custody mediators to certify (1) familiarity with Alaska court procedures and property division issues; (2) possession of a law degree or substantively relevant graduate degree plus two years' relevant experience and (3) at least 40 hours of mediation or conciliation training. Alaska Civil Litigation Task Force, Proposed Civil Rule 90.2(b)(2)(A), reprinted in L. FREEDMAN, *supra* note 5, at 11-12.

139. 29 C.F.R. § 1400 app. at 47 (1983).

140. See Susskind, *supra* note 29, at 6 (The mediator is presumed to have done a good job if the immediate parties are pleased with the outcome and the bargain holds.).

141. 29 C.F.R. § 1400 app. at 47 (1983) (Even here the mediator has no power or duty to prevent such an agreement, but "conceivabl[y] . . . might find it necessary to withdraw . . . if it is patently clear that the parties intend to use his presence as implied governmental sanction for [such] an agreement.").

. . . resumed."¹⁴² As noted earlier, the issue of public interest representation will be both different and more complex in coastal zone mediation than in classic labor mediation.¹⁴³

The extent to which a mediator should hold himself bound to safeguard the interests of parties not present in the negotiations has inspired spirited debate in the environmental mediation literature. One commentator has suggested that the mediator should adopt an extremely active role in order to maximize the substantive fairness of the ultimate agreement and its soundness as a substantive precedent in future disputes.¹⁴⁴ Others, including some experienced labor mediators,¹⁴⁵ have rejected this viewpoint as not only unrealistic from a practical standpoint, but also unsound because it would undermine the fundamental neutrality of the mediator's role.¹⁴⁶ As discussed earlier, the Alaska statute's exclusion of interested parties other than the Council and the district from participation in the negotiations may place considerable pressure on the mediator to act as a surrogate for absent interests. The Alaska regulation raises the possibility of enlisting the mediator to safeguard the public interest, by directing that the record of any pre-mediation hearings be supplied to the mediator.¹⁴⁷ No further guidance is provided, however, with respect to how the mediator should use such a record in the negotiations. Alaska's blanket adoption of the FMCS Code suggests that whether or not the legislature considered this issue, it passed up a potential opportunity to clarify the mediator's responsibility to the public in the special setting of coastal zone management disputes.

D. Confidentiality Issues

The need to preserve the confidentiality of information revealed to the mediator is recognized universally as an indispensable element of successful mediation.¹⁴⁸ This concern is reflected in the Alaska

142. *Id.* The classic example of such a case would be a strike by public employees performing vital functions (*e.g.*, teachers, garbage collectors).

143. *See supra* at notes 48-52 and accompanying text.

144. *See Susskind, supra* note 29, at 40-47.

145. *See McCrory, supra* note 68; Stulberg, *supra* note 30 (both written in response to Susskind).

146. *See, e.g., McCrory, supra* note 68, at 59. Making the mediator responsible for substantive fairness and wisdom of agreements (*e.g.* by subjecting mediators to suit by the parties), "would . . . significantly change the role and function of mediators and thereby alter the mediation process. The effect of these changes would stifle the use of mediation by destroying its procedural flexibility, by reducing its acceptability to disputants, and by discouraging qualified persons from serving as mediators." *Id.*

147. ALASKA ADMIN. CODE tit. 6, § 85.170(a) (Apr. 1984).

148. *See, e.g., USING MEDIATION, supra* note 41, at 31:

Handling of Confidences. The mediator's ability to assist the parties is proportional to the parties' willingness to share confidences regarding their basic concerns, possible areas of agreement, and even their willingness to cede certain positions. The mediator should clearly be able to differentiate

statute's express provision that "[m]ediation sessions must be conducted in a manner so that the parties will have the assurance and confidence that information disclosed to the mediator will remain confidential."¹⁴⁹ The more specific requirements of the FMCS Code are incorporated into the Alaska statute by reference. The Code specifies that "[c]onfidential information acquired by the mediator should not be disclosed to others for any purpose, or in a legal proceeding or be used directly or indirectly for the personal benefit or profit of the mediator."¹⁵⁰ The Code also restricts the release of public information,¹⁵¹ and bars the mediator from disclosing confidential bargaining positions, proposals, or suggestions without the permission of the communicating party.¹⁵² While such provisions may be vital to the success of mediation, the state's participation in the process creates an unavoidable tension between the need for confidentiality and the countervailing policy value of openness in government.¹⁵³ Several commentators have expressed uncertainty whether mediation proceedings may be made subject to state public records ("freedom of information") and open meetings ("government in the sunshine") laws, thereby discouraging participation in the mediation.¹⁵⁴

Despite these concerns, an examination of Alaska statutes governing public access to state meetings and records suggests that the confidentiality of coastal zone mediation arguably could be shielded from forced disclosures. Under the state's Public Meetings Act "[a]ll meetings of . . . [any] administrative . . . council . . . or other organization, including subordinate units . . . of the state or any of its political subdivisions . . . supported wholly or partly by public money . . . are open to the public except as otherwise provided by this section."¹⁵⁵ Among the exceptions, however, are meetings

between information to be conveyed from one party to another with attribution, information to be conveyed but only as a mediator's observation or guess, and information that is given strictly for the mediator's own background and not to be conveyed to other parties. Violation or misunderstanding of such confidences is grounds for dismissal of a mediator.

149. ALASKA ADMIN. CODE tit. 6, § 85.170(a)(3) (Apr. 1984).

150. 29 C.F.R. § 1400 app. at 47 (1983).

151. "[T]he mediator may release appropriate information with due regard (1) to the desires of the parties, (2) to whether that information will assist or impede . . . settlement . . . and (3) to the needs of an informed public." 29 C.F.R. § 1400 app. at 47 (1983).

152. *Id.* at 47.

153. Schuck, *supra* note 70, at 31.

154. *See* Harter, *supra* note 30, at 83-84; Stockholm, *supra* note 86, at 25. The ACUS has recommended that Congress enact legislation to provide that "information tendered to [regulatory negotiation groups] should not be considered an agency record under the Freedom of Information Act." *Procedures*, *supra* note 73, at 493.

155. ALASKA STAT. § 44.62.310 (1980).

concerning "matters which by law or ordinance are required to be confidential."¹⁵⁶ Given the express provision for confidentiality in the mediation statute, this exception could be used to justify exclusion of the public from the mediation process where necessary to promote a successful agreement.¹⁵⁷ Similarly, although public disclosure of agency records is mandated by section 95.010(a) of the Alaska Administrative Code, the Code exempts records from disclosure where authorized by a valid state or federal "regulation, or by a privilege, exemption or principle recognized by the courts, or by an agency protective order authorized by law."¹⁵⁸ Here again, nondisclosure would appear to be supported by the confidentiality language of the mediation statute. Nondisclosure of mediation records is further supported by recognized exemptions under the federal Freedom of Information Act¹⁵⁹ and by the judicially recognized privilege shielding labor mediators from forced testimony concerning mediation proceedings.¹⁶⁰

Finally, claims of confidentiality may be strengthened further by the mediation statute's provision for public information and review both before and after the mediation and in the rulemaking process as a whole. These procedures might be viewed by the courts as serving the same function — providing public access to government

156. *Id.*

157. Even if a court were to conclude that failure to open mediation sessions to the public violated the Public Meetings Act, there is precedent for declining nonetheless to void the mediated agreement under the Act. In *Hammond v. North Slope Borough*, 645 P.2d 750, 767 (Alaska 1982), the supreme court affirmed a lower court's refusal to void an offshore oil leasing program which it found to be a product of agency participation in meetings with interested parties in violation of the Public Meetings Act. The court reasoned that voiding the action was not required because the violation was harmless, the administrative record demonstrated substantial public input at all stages leading up to the final decision, and the ultimate decision was made by the agency commissioner and not by the groups participating in the closed meetings. *Id.* at 764-65. The same reasoning should provide persuasive support for a similar finding in the case of a properly conducted mediation proceeding.

158. ALASKA ADMIN. CODE tit. 6, § 95.010(b) (Apr. 1984).

159. See Feerick, *Labor Relations—Continued Vitality of the Privilege of Federal Mediators*, N.Y.L.J., Feb. 6, 1981, at 2 (citing Pipefitters Local Union No. 208 v. Mechanical Contractors Ass'n, No. 79-C-1382 (D. Colo. June 26, 1980)).

160. "Courts and other adjudicative bodies have upheld the privilege because of a public interest in maintaining the mediator's neutrality Were this not the case, parties to labor disputes might decline to use mediation services." *Id.* The privilege also protects individual mediators' future impartiality from being discredited. *Id.*

The mediator's privilege has been successfully asserted by an environmental mediator. See *id.* at 2 & n.15.

— as the disclosure requirements and hence as reducing the need for direct public access to the negotiations.¹⁶¹

E. Failure to Agree: Impasse Determination and Its Consequences

1. *Determination and Effects of an Impasse.* The regulation provides that if the mediator determines the negotiations have reached an impasse, the mediation will be terminated and the matter will be set for an adjudicatory hearing.¹⁶² The question of what constitutes an impasse is not addressed in the statute or the regulation. Failure to address this question is consistent with general mediation practice and experience, since the mediator is left free to exercise his own judgment under the unique circumstances of each case. Once the mediator decides that the parties are at an impasse, he has ten days to notify the parties of his determination.¹⁶³ Twenty days after the time of the impasse determination, the Council is directed to begin adjudicatory hearing proceedings.¹⁶⁴ The mediator is required to declare an impasse if an agreement has not been reached within sixty to ninety days from the commencement of the negotiations.¹⁶⁵

The statutory mediation deadline represents a significant departure from environmental mediation theory. Mediation experts generally agree that some time limits must be set if negotiations are to succeed;¹⁶⁶ nevertheless, they place an equal or greater emphasis on preserving the mediator's ability to tailor the pace and conduct of the mediation to the particular circumstances he confronts.¹⁶⁷ From this viewpoint, the automatic cutoff mandated by Alaska's statute may be inadvisable as a matter of policy, because it may foreclose some

161. See Harter, *supra* note 30, at 85. Harter argues that closed sessions are both necessary for successful negotiation and offset by other aspects of the process:

The procedures of the negotiation process itself provide the safeguards that accrue from public meetings. The political legitimacy of the resulting rule derives from [its] acceptance by the parties in interest, and not on the public procedures by which it was developed. Further, the parties should feel no inhibition from meeting on a confidential basis with the mediator or other parties to the negotiation.

Id. at 84 (citation omitted).

162. ALASKA ADMIN. CODE tit. 6, § 85.170(5)(c) (Apr. 1984).

163. *Id.* § 85.170(a)(4) (Apr. 1984).

164. *Id.* § 85.170(a)(3) (Apr. 1984). Conceivably, however, negotiations could be reopened during the ten-day period between the mediator's notification of impasse to the parties under subsection (a)(4) and the Council's deadline for setting an adjudicatory hearing date (twenty days from the declaration of impasse) under subsection (c).

165. The statutory cutoff period is sixty days; however, the mediator and both parties may agree to a single thirty-day extension. *Id.*

166. See, e.g., Harter, *supra* note 30, at 75. "[N]egotiations are likely to work best if a decision is inevitable, or even better, imminent." *Id.* at 47.

167. See, e.g., McCrory, *supra* note 68, at 56.

potential mediation agreements in favor of a more adversarial adjudicatory proceeding, which may ultimately consume equal or greater time and resources than a successful mediation would have.

The practical effect of the statutory deadline remains to be seen. Its potential to foreclose agreements, however, may be mitigated substantially by the fact that the mediation most likely will follow a long process of regulatory development, including considerable communication and informal negotiation. Consequently, issues should be clear and relations among the parties well-established at the outset of the mediation. As a result, if an agreement can be reached at all, it probably will be reached in a fairly short time.

2. *Implications of Using the Administrative Hearing under the APA as a Fallback to the Mediation Process.* The coastal zone mediation statute and its accompanying regulations provide that where mediation fails, the final content of the district program shall be determined by the Council after an adjudicatory hearing to which both the district and the interested public may be parties. Specifically, section 46.40.060(c) of the Alaska Code states:

If, after mediation, the differences have not been resolved to the mutual agreement of the coastal resource district and the council, the council shall call for a public hearing and shall resolve the differences in accordance with the Administrative Procedure Act [APA, section 44.62 of the Alaska Code]. . . . After [the] hearing, the council shall enter [judicially enforceable] findings which may require (1) that the district . . . program be amended to make it consistent with the provisions of this chapter of the guidelines and standards adopted by the council; (2) that the district . . . program be revised to accommodate a use of state concern; or (3) any other action be taken by the . . . district as appropriate.¹⁶⁸

Under the accompanying regulation,¹⁶⁹ the hearing must be set within twenty days from the determination of an impasse. Notice must be served on the district and on all parties who commented on the OCM's original recommendation to the Council and the Council's initial rejection of the district plan. Any party served with such notice may intervene as a party to the hearing.

This provision serves as a necessary mechanism for the transition from the mediation process back to the standard rulemaking process when mediation is unsuccessful.¹⁷⁰ By providing a stringent procedural backup system, the provision also insulates the state from

168. ALASKA STAT. § 46.060(c) (1982).

169. ALASKA ADMIN. CODE tit. 6, § 85.170(c) (Apr. 1984).

170. See Boyer, *supra* note 48, at 167. "The absence of [economic and structural incentives to negotiate found in labor but not in regulatory negotiations] means that an alternative, nonconsensual form of decisionmaking must be available, and the form that this coercive process takes can have a great impact on the form and structure of the bargaining." *Id.* (citation omitted).

potential criticism that the mediation process is excessively informal or experimental. Yet the fact that one party to the mediation also will be the primary decisionmaker if the mediation is unsuccessful may be expected to significantly influence the dynamics of the negotiations.

An important threshold question in this regard is whether the Council's potential role as the ultimate decisionmaker gives it too much power in a dispute, which may cause the district to see itself as having nothing to gain from good faith mediation. If this were the case, the prospects for a mediated settlement would be poor and the mediation process will simply add yet another layer to the already cumbersome regulatory development process.¹⁷¹ Several factors suggest, though, that the balance of power between the parties actually will be significantly less skewed toward the Council than the adjudicatory hearing fallback provision indicates. First, the achievement of a more informal settlement and the avoidance of a full-scale administrative hearing procedure is likely to be attractive to both parties. Second, although the fact that the mediation procedure has been triggered indicates deep-seated disagreement between the two parties, the district may still prefer a negotiated agreement to a formal order emerging from an APA hearing. Thus, mediation may offer more advantages to both parties than would an administrative hearing provision.

Moreover, the appearance of a potential power imbalance created by the Council's dual statutory role as a mediation participant and as the final adjudicator may be neutralized by the establishment of procedures rigidly separating the two functions within the Council. Such separation is a common and necessary practice among regulatory bodies which combine investigatory and adjudicatory functions.

A potentially more serious issue raised by the use of the adjudicatory hearing as a fallback procedure if mediation fails concerns its potential influence on the parties' negotiating strategies. To the extent that the hearing procedure is perceived by one of the parties as more advantageous than mediation, its availability as an alternative may encourage the parties to negotiate half-heartedly or to "force" an impasse. A party anticipating a subsequent adjudication might be tempted to use the mediation process to gain information which would be useful at the hearing stage or to build a record which would be advantageous to its adversarial position. By putting the parties on notice that the mediation record may not be used in later judicial proceedings, the regulation's confidentiality provisions can insulate the mediation process from such maneuvers. The dynamics

171. See *supra* notes 94-95 and accompanying text.

of the mediation and the effects of the hearing alternative are difficult to anticipate since they may be expected to vary in each case.¹⁷² The problem of parties retaining litigation as a strategic option, however, is not unique to coastal zone management disputes, and an important function of the mediator is to establish and enforce standards of good faith negotiation that will minimize such abuse.¹⁷³ Furthermore, where good faith negotiation appears impossible, the mediator retains the power to declare an impasse and re-route the dispute into the traditional rulemaking procedure with minimal expenditures of time and resources.¹⁷⁴ In summary, although the availability of adjudicatory hearings may influence the mediation dynamics, the provision does not appear fatal to the potential success of the mediation program.

A final issue not directly addressed by the statute or regulations concerns situations in which the Council and the district are able to negotiate and agree on some matters, despite reaching an impasse on others. The mediation provisions do not expressly address such a situation; however, they do not expressly preclude a case in which some matters could be settled by mediation, leaving others for the administrative hearing process. In this situation, it would appear inefficient to include in the hearing matters on which the Council and the district were able to agree.

F. Agreement: Formalization and Stability of a Mediated Settlement

1. *Formalization.* The statute specifies that once the parties have reached an agreement its terms must be set out in writing.¹⁷⁵ Mediation authorities agree that reducing the agreement to writing is crucial to the mediation process, and that this requirement may represent one of the most difficult stages of negotiation.¹⁷⁶ Harter recommends that in regulatory negotiations, the ultimate agreement should specify the exact wording of the version agreed upon.¹⁷⁷ This level of specificity tests the parties' consensus and identifies areas which may require additional consideration and negotiation.¹⁷⁸

172. See *supra* note 24.

173. See Harter, *supra* note 30, at 82-83 (mediator's role in establishing ground rules and maintaining good faith negotiations).

174. See *supra* notes 162-65 and accompanying text.

175. ALASKA ADMIN. CODE tit. 6, § 85.170(a)(5) (Apr. 1984).

176. Harter, *supra* note 30, at 97-98; Susskind & Weinstein, *supra* note 34, at 345.

177. Harter, *supra* note 30, at 98.

178. *Id.* Harter also contrasts the desirable written product of a regulatory negotiation with the more formalistic preambles commonly provided for proposed agency rules: "Because the legitimacy of the rule rests on the collective judgment of the [parties,] the explanation . . . should be a discussion of the information the

In contrast to the rigid deadlines established for reaching an initial agreement, no specific deadlines are attached to the formalization stage,¹⁷⁹ even though extensive further discussions may be needed to establish the precise wording of an agreement after its general terms have been accepted by both parties.¹⁸⁰ The lack of a deadline at this stage may provide an escape valve from the strict time constraints otherwise imposed, at least where the parties and the mediator can agree that sufficient accord has been reached in order to frame an agreement. The mediator's power to declare an impasse even at this late stage¹⁸¹ would limit the potential for abuse of such a time extension by the parties.

2. *Stability and Review of Mediated Agreements.* Once the Council and the district have reached an agreement, its terms constitute "the final settlement of outstanding disputes, subject to ratification at a public meeting by the official bodies of each party. . . . [T]he agreement may be set aside only for fraud, misconduct, or gross mistake."¹⁸² If the parties give their consent, further mediation may be employed to resolve any differences which may arise from the public meetings.¹⁸³ This provision serves an important function because it assures that each party will consider itself bound by any agreement which is reached, and thus secures the agreement against challenge by either party.

Within twenty days after the Council and the district "reach accord in mediation,"¹⁸⁴ the Council must serve its modified decision on the district and the interested public and place the modified decision in its record file. "The modified decision will contain findings and conclusions based on the record file and additional material presented during mediation necessary to demonstrate that the modified decision is consistent with [the statutory or regulatory standards imposed under the Coastal Management Program]."¹⁸⁵

A final question which affects the stability of the mediated district program provisions concerns their potential vulnerability to judicial attack once established as final by the Council. As noted above, Alaska's mediation procedure specifically precludes such

[parties] thought necessary to an enlightened judgment, rather than a brief in defense of the rule." Harter, *supra* note 48, at 483.

179. The regulation requires simply that "[i]f the mediator determines that an accord has been reached, he or she shall direct the parties to set out in writing the terms of the agreement." ALASKA ADMIN. CODE tit. 6, § 85.170(a)(5) (Apr. 1984).

180. Harter, *supra* note 30, at 97-98; Susskind & Weinstein, *supra* note 34, at 345.

181. See *supra* note 162 and accompanying text.

182. ALASKA ADMIN. CODE tit. 6, § 85.170(a)(5) (Apr. 1984).

183. *Id.*

184. ALASKA ADMIN. CODE tit. 6, § 85.170(b) (Apr. 1984).

185. *Id.*

attacks by the parties themselves in the absence of fraud, abuse, or gross mistake.¹⁸⁶ A different problem is posed by challenges brought by interested parties who were excluded from the mediation by the mediation statute.¹⁸⁷

To the extent that legal challenges to a mediated district program deal with procedural points not affected by the mediation statute,¹⁸⁸ there appears to be no reason why normal judicial standards should not apply.¹⁸⁹ However, it is conceivable that the courts may also be presented with several issues unique to the mediation process.

One such issue is whether the informal and confidential process of mediation will yield a record which will satisfy a reviewing court that the standards of the APA have been met, and that the negotiations did not constitute impermissible undisclosed contacts under the *ex parte* doctrine developed by courts reviewing rulemaking procedures under the federal APA.¹⁹⁰ Although the APA does not explicitly prohibit agency communications outside the formal channels of public notice and comment,¹⁹¹ disclosure of such communications has been held to be an implied requirement of the APA's provision

186. ALASKA ADMIN. CODE tit. 6, § 85.170(a)(5) (Apr. 1984); *cf.* Harter, *supra* note 48, at 483-84 (agency should accord negotiated agreement deference and publish it as a proposed rule unless there is good cause not to do so).

187. This risk appears to be an inevitable tradeoff for the advantages gained by limiting the negotiation to the Council and district. *See supra* text at notes 101-03.

188. Different considerations may apply where nonparties to the mediation challenge the substance of a mediated agreement. *See infra* text at note 199.

189. For a brief overview of standards and procedures for judicial review of administrative decisions, see Harrington & Frick, *Opportunities for Public Participation in Administrative Rulemaking*, 15 NAT. RES. LAW. 537, 562-64 (1983).

Even without any relaxation of review standards for mediated regulations, Alaska courts may be expected to accord considerable latitude to agency decisions dealing with complex scientific and policy issues. Discussing the standard of review in a case challenging a state offshore oil-development leasing program under the coastal management program standards as well as other environmental statutes, the supreme court stated that " 'in cases concerning administrative expertise as to either complex subject matter or fundamental policy formulations,' an administrative agency's decision will be reviewed by the court only to the extent necessary to ascertain whether the decision has a 'reasonable basis.'" *Hammond v. North Slope Borough*, 645 P.2d 750, 758 (Alaska 1982) (quoting *Kelly v. Zamarello*, 486 P.2d 906, 917 (Alaska 1971)).

Where the administrative decision "is almost entirely a policy decision, involving complex issues that are beyond [the] court's ability to decide [it will apply only a limited review] . . . 'to ensure that [the decision] was not arbitrary, capricious, or prompted by corruption.'" 645 P.2d at 759 (citing *Moore v. State*, 553 P.2d 8, 36 n.20 (Alaska 1976)).

190. *See generally* Note, *Ex Parte Contacts Under the Constitution and the Administrative Procedure Act*, 80 COLUM. L. REV. 379 (1980).

191. *Id.* at 388.

for judicial review of agency decisions.¹⁹²

Strict application of the prohibition against *ex parte* contacts has been recognized as a potential legal barrier by proponents of regulatory negotiation,¹⁹³ who have called for specific legislation declaring the doctrine inapplicable to this setting.¹⁹⁴ Arguably, however, the doctrine technically would not apply to Alaska's coastal zone mediation scheme because the communications at issue will take place between two governmental bodies rather than between a state agency and regulated private interests. Further, while specific communications must remain confidential, the public will be informed of the existence and final tenor of the negotiations. Most importantly, the record developed will satisfy the underlying goals of the *ex parte* doctrine.

The Alaska regulations do not require preparation of a record during the mediation process itself. Moreover, the confidentiality, flexibility, and informal interchange which are essential in mediation may be incompatible with the development of the type of record typical in standard administrative proceedings.¹⁹⁵ Instead, the regulations provide for development of findings and conclusions sufficient to demonstrate consistency with the substantive standards of the CZM program.¹⁹⁶ The development of a pre-mediation public hearing record for the mediator's use and the requirement that mediated agreements be ratified at public meetings of the Council and the district governing body provide further safeguards against the abuse the record requirement and *ex parte* rules were designed to avoid.¹⁹⁷

192. *Id.* Courts and commentators have condemned such contacts as biasing decisionmakers, obstructing judicial review, and undermining the adversarial nature of informal rulemaking.

193. *See, e.g.,* Boyer, *supra* note 48, at 123; Harter, *supra* note 30, at 22 n.128; *id.* at 115; Stewart, *supra* note 70, at 1345-46.

194. *See, e.g.,* *Procedures, supra* note 73, at 492; Stewart, *supra* note 70, at 1353.

195. *See* Harter, *supra* note 30, at 106-07 (requiring such a record would be inappropriate because negotiated regulations are generated by direct consensus of interested parties rather than through the development of voluminous factual material).

[T]he court should require only that the [parties] have enough information to enable [them] to make an intelligent choice. . . . The negotiation process guarantees that [interested parties' concerns] are addressed, thereby eliminating the need to review the entire factual basis of the agreement. Therefore, judicial review of the factual basis of the negotiated rule need only consider the possibility of arbitrariness and irrationality.

Id.

196. Presumably the "reasonable basis" standard of review would apply to determine the sufficiency of this demonstration. *See supra* note 189. The *ex parte* doctrine, if applied, might require a summary of even *unsuccessful* negotiations to be placed on the record prepared for a later adjudicatory decision.

197. Relaxation of the record requirements on review of negotiated regulation "can be justified because a representative negotiating process resulting in a consensus position would provide safeguards functionally equivalent to those afforded by

Consequently, the Alaska mediation procedure does not appear vulnerable to attack on the grounds that the mediated agreement will be intrinsically unreviewable or procedurally inadequate under the APA.

Two additional types of judicial challenge may arise. The first would be based on the failure to comply with the procedural requirements of the mediation regulation (for example, failure to declare an impasse or agree on an extension after sixty days). The statute is silent on the consequences of such an omission. Harter argues persuasively, however, that purely procedural shortcomings should never be considered sufficient to invalidate an agreement.¹⁹⁸ The second type of potential lawsuit would be based on the parties' failure to consider or adopt the challenger's substantive viewpoint. Here again, Harter advocates adopting a strict rule of standing which would allow such challenges to proceed only when challengers can show that they either participated in the public review process at earlier stages or had good cause for not doing so.¹⁹⁹ Given the extensive provisions for public input in Alaska's coastal zone process generally, and in the mediation process particularly, such a restriction would be reasonable.

V. CONCLUSION

Alaska's coastal zone mediation procedure represents an important venture into the use of mediation to resolve difficult substantive and administrative problems arising outside the traditional labor context. Largely because the program is so innovative, specific developments under the law are difficult to predict. As the foregoing analysis suggests, experience may demonstrate the need for greater flexibility in some areas and greater specificity in others. This examination of the ramifications of a procedure which is fairly simple on its face also illustrates the validity of experienced mediators' cautions against a "hot tub" approach . . . in which the interests shed their adversarial stance and jump into mellow cooperation simply because the process is dubbed non-adversarial."²⁰⁰ Nevertheless, Alaska's mediation provisions offer an important testing ground for a new mediation application; and because the field is in its infancy

the existing hard look approach to judicial control. The reduced formalities retained would provide for sufficient judicial control of plain illegality." Stewart, *supra* note 70, at 1348 (citation omitted).

198. Harter, *supra* note 30, at 102-03.

199. *Id.* at 103-06.

200. Harter, *supra* note 48, at 476. See also Boyer, *supra* note 48, at 170 (need for thoughtful refinement of procedural techniques, sensitivity to needs and interest of affected interests).

this law has the potential to influence significantly the future of alternative dispute resolution in state government.²⁰¹ Alaska's mediation procedure is also of great interest as a unique, pragmatic integration of several theoretical models of mediation practice. Finally, by enacting the mediation provision, Alaska's legislature has recognized the need for new institutional approaches to the substantive problems of coastal zone planning and similar conflicts. In the words of one commentator:

[T]o the extent that [the legislature] delegates polycentric, multiple criteria problems to regulatory agencies . . . some form of structured bargaining appears to comprise an essential part of any problem-solving mechanism. Such problems are at root neither technical nor legal but political — that is to say, they are problems of social choice in a world of ever more limited resources. In such a world, bargaining may do for us what litigation and law increasingly cannot: it may nourish those impulses toward integration, accommodation, reconciliation, and mutuality of interests which an adversary society tends to stifle, but without which no society can effectively discharge its business.²⁰²

Jane Baluss

201. See generally L. FREEDMAN, *supra* note 8, at IV.

202. Schuck, *supra* note 70, at 34.

