Negotiating Settlements

A GUIDE TO ENVIRONMENTAL MEDIATION

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Chapter 3

Negotiating Agreement

The official announcement of the appointment of the mediator signals the start of the negotiating process. The designated mediator will already have gained assurances from the representatives of all significant interest groups that they will participate in settlement discussions. The mediator also will have described in general terms how the negotiations will be conducted and will have asked participating groups to select their representatives. **The first session is generally held as quickly as possible after the announcement of the appointment in order to sustain the sense of optimism that a negotiated settlement can be achieved and to convey an impression of urgency for reaching agreement.** The need for timely resolution is reinforced by the agreed-upon deadline for concluding negotiations if a solution is not found.

THE FIRST MEDIATION SESSION

At the first session, the parties meet under new conditions; the express purpose is to explore settlement options. In planning the session, great attention is paid to establishing a setting that promotes constructive discussion. This setting contrasts sharply with previous settings where inflammatory rhetoric heightened hostility and encouraged intransigence.

Two important aspects of creating an appropriate atmosphere are the physical setting and the format and agenda for discussion. The mediator, in consultation with the participants, will suggest a comfortable place to hold the meeting at a location convenient for all negotiators. If the participants are widely dispersed in terms of the locations of their homes and offices, a convenient midpoint should be selected so participants travel roughly comparable distances.

The meeting will usually not be scheduled at a site directly associated with one of the parties or with events that have sparked the dispute. Cooperation may be difficult to achieve if the meeting takes place in an office or room that has previous negative associations. Likewise, a boardroom of a corporation taking part in the negotiations would usually be

unsuitable. Not only would participants opposed to the company's position be at a psychological disadvantage, it may appear that the mediator favors the company. Of course, a boardroom could be used if the mediator knows this location would not jeopardize an open and frank discussion.

It is often difficult to select a mutually convenient time for the meeting. Government officials usually prefer meetings during the working day, while community and environmental activists, whose livelihoods are usually not directly involved with the dispute, prefer to meet at breakfast or after work. If the meeting time becomes a problem, scheduling can be rotated so that the burden is shared more or less equally.

The mediator should also be concerned with the physical layout of the meeting room, the availability of the room for as long as necessary, and perhaps the supplying of refreshments. If the meeting is held in a building that must be closed at a specific time, there will be pressure to conclude the meeting, perhaps just at the moment of real progress or understanding. Meetings are frequently held in conveniently located motel and hotel conference rooms, with advance assurances from the facility's management that the room is not tightly scheduled for other groups.

The arrangement of furniture in the room can either contribute to or detract from the prospects for constructive discussion. A long table is generally preferred over rows of seats. The placement of furniture in classroom lecture style creates an authoritarian environment that is ill-suited to give-and-take discussion. This setting also undermines the sense that the parties are in control of the process. An oval table permits all participants to be in full view of one another. Ideally, the table should be long enough to provide comfortable seating, but not so wide as to inhibit informality. The table makes it easier to take notes, provides an object to lean on, and seems to promote a congenial yet serious atmosphere.

Mediators typically do not sit at the head of the table but stand back and wait to see how participants seat themselves. Mediators then select a position roughly midway between opposing factions. Here again, the aim is to emphasize indirectly that the mediator is assisting the parties, who have primary responsibility for fashioning a settlement. Participants with similar viewpoints naturally tend to group together, at least in the first few sessions. If there is a team of mediators, they generally sit apart from one another so that they do not become the center or focus of discussion.

Time permitting, the mediator will examine the room before the first session, moving tables and chairs if necessary to create an appropriate

setting. When this is not possible, the mediator may alter the arrangement of furniture as the session gets under way. In fact, getting the participants to work together to move furniture can help to establish the first glimmerings of a cooperative effort. At the first mediation session in the dispute over the management plan for Acadia National Park in Maine, the mediator arrived after most of the participants had taken seats arranged in lecture room style, with a desk and chair facing rows of seats. Before beginning the meeting, the negotiators were asked to rearrange their chairs in a semicircle to permit maximum eye contact and to minimize the mediator's control and leadership role. The request to rearrange the meeting room provided a slightly unsettling distraction. The momentary confusion of scraping chairs eased tensions and promoted informality.

The provision of food and drink has more than a nutritional or refreshment purpose. A coffee urn in a corner of the room provides an opportunity to walk around, offering a minor distraction that may aid in reconsidering a position or help to dissipate mounting tension or anger. The choice of food, of course, depends on local and personal preferences and the time of day or night that the meeting is held. A standard favorite of mediators is awkward, sticky food, such as glazed doughnuts or large cookies with chocolate or loose sugar coatings. The act of eating cumbersome or messy food furthers the sense of informality, lowers conversational barriers, and is a temporary but often welcome interruption. As the meeting progresses, the atmosphere becomes less restrained as the accumulated paper napkins and used coffee cups create a sense of shared enterprise.

In attempting to promote a positive negotiating environment, the mediator seeks comments and suggestions from the participants concerning convenience in location and time, and, if necessary, discusses alternatives for future sessions. If the desired environment was created for the first session, it may be important to schedule meetings in the same room since the negotiators will associate the setting with a sense of progress.

The format and agenda for discussion is governed by a range of conditions, including the size of the negotiating group, the level of representation, media involvement, and the amount of prior interaction between the parties. The sequence and topics for discussion will also depend on the disputed issues and the mediator's style. In some situations, the mediator asks each negotiator to prepare a formal statement of his or her group's position before the first session; in others, the meeting is structured to elicit a list of disputed issues in a more participatory and cooperative approach. If there have been several public

hearings, a list of the issues may create impatience. While there are wide variations in the way negotiations are structured, there are basic elements that are typically included in the first session. The meeting generally covers in some form the following items:

- Introduction by the mediator, including an explanation of the process, timetables, and goals. The mediator will ask if all parties necessary for settlement are represented.
- Introduction of each negotiator and the organization he or she represents.
- Brief position statements from each negotiator.
- Discussion of the sequence in which the issues will be discussed at future meetings.
- Agreement on the issues to be discussed at the next meeting.
- Agreement on the way information will be released to the media.
- If appropriate, agreement on location, date, and time for the next session.

The first session provides the opportunity for the parties to express the priority of their concerns. Publicly enunciated statements may have emphasized extreme positions in order to capture media attention. These positions may previously have been stated as nonnegotiable items; the parties may have characterized their opponents as unreasonable, stubborn, or, at the very least, misguided. While one might expect the presentation of testimony throughout a sequence of public hearings to sharply illuminate the spectrum of opinion, this is often not the case. Opposing groups may not be fully cognizant of their opponents' views, since there is a tendency to ignore or at least be less attentive to positions that are contrary to one's own. Selective listening, with the focus on countering arguments rather than absorbing content, creates misconceptions regarding the substance of the opponents' positions. Thus, an important objective for the first meeting is for each group to gain as full an understanding as possible of the views of each negotiator.

If the first meeting exposes wide discrepancies in the data used to support the parties' positions, specific discrepancies are noted. If the validity of data is an important element in reaching settlement, an approach for handling these differences may be discussed. If, for example, the dispute concerns construction of an electric-generating facility, disagreements over utility demand projections may be sufficiently important to warrant an examination of the assumptions underlying each set of projections. In this case, the agenda for the second meeting could include a discussion of ways to resolve the problem of contradictory data. If,

however, the demand projections presented by environmental groups were used as a tactic to delay construction while their real goal was the installation of additional air-pollution control equipment, data conflicts may not be sufficiently important to require special attention.

At the first session, the mediator seeks agreement on seemingly simple procedural issues, such as an agenda for the next meeting and the time and place for a subsequent meeting. These items represent more than administrative concerns. They are relatively easy to reach, value-free decisions that demonstrate, albeit on a small scale, that cooperation can be achieved.

Another procedural matter discussed at the first meeting is the deadline for concluding mediation if agreement is not reached. Interim deadlines to report progress to the government official who initiated the process may also be discussed. By defining the time parameters at the first session, the mediator builds a sense of urgency that helps to keep discussion focused.

Negotiating breakthroughs do not usually occur in the first session. This meeting may, however, provide unexpected insights for one or more of the participants. Fundamental misconceptions regarding the motivation and rationale for strongly held positions may be corrected. This developing understanding is encouraged by the format of the meeting, which emphasizes explanation rather than confrontation. In the first mediation session in the dispute over flood control in the Snohomish River Basin, a remarkable new insight occurred when the leader of a major environmental coalition was taken aback by statements from a leading farmer stressing the need to place land-use controls on the valley and the willingness of the agricultural community to support moves to inhibit development. Before this, the environmental activists believed that the farmers were really land speculators. The farmers actually saw land-use controls as a way to preserve the agricultural economy by lifting the burden of tax assessments based on the development potential of the land rather than its agricultural value. Although the farmers had expressed this view at other meetings, their position was construed by opponents as a strategy to gain approval for the construction of a flood-control dam. Recognition by environmental groups that the farmers were sincere in their willingness to accept development restrictions set the tone for future discussions and was an important factor in achieving eventual agreement.

The presence of the media will affect the level of discussion and the prospects for creating a constructive negotiating environment. Local newspaper and television coverage at the first meeting will inhibit discussion and perpetuate the kind of adversarial posturing that brought

the dispute into the public limelight. Various aspects of the media's coverage of mediation are discussed later in this chapter. The concern here is solely with its role at the first meeting.

While the presence of the press at the first meeting may inhibit to some extent the frank exchange of views, this is not usually critical since the first meeting is generally a forum for each group to restate views that are already widely known. As a rule, reporters who insist on attending the first session will not be excluded. In the Quonset Point dispute over industrial development, a reporter from the *Providence Journal* was unpersuaded that press coverage would impair the negotiating ability of the parties. Despite the mediator's assurances that she would contact the reporter immediately after the session, the reporter insisted on attending. The views of the 30 representatives from state agencies, business, labor, and environmental groups had been expressed publicly on many other occasions. The reporter who attended the session was not rewarded with fresh insights into the parties' positions. Generally, the lack of solid news from the first session dissuades the press from covering future meetings.

Another aspect of the first meeting is the way in which position statements and negotiating progress will be communicated to the media. Typically, the mediator suggests that, in an effort to avoid misunderstandings, all communications regarding negotiating progress be channeled through the mediator. If the parties are adequately prepared for mediation, this should not present a problem since it is understood that the purpose of mediation is to promote settlement, not to further inflame the controversy.

The emphasis on structure and format for the first session reflects the importance of creating a constructive negotiating climate that sets the tone for future negotiations. There are standard features and approaches that are typical of the first meeting. For subsequent meetings, there are so many variations in approach, tactics, and strategy that descriptions of these elements would not have general applicability. After the first meeting, the negotiating format is flexible, taking its form and content from the degree of progress being made, the mediator's style, and the preferences of the parties. The need for joint sessions or separate caucuses, the importance of scientific data, the level of confrontation, and the number of negotiators and their sophistication all affect the subsequent exchanges.

THE MEDIATOR'S STRATEGY

After the first meeting, the mediator is usually bombarded with a variety of evaluations regarding the content and progress of the meeting.

Some participants will feel that time was wasted covering old ground; others will be amazed by new insights. Despite prior disclaimers from the mediator, some will be disappointed that agreement was not reached in a single session. In any event, the mediator will contact all the participants to gain their reactions on the value of the session, their appraisals of possible settlement options from their own perspective, and their assessment of proposals that might be presented by their adversaries. These informal contacts are the first of many the mediator will have with the negotiators to discuss progress and new approaches to settlement. The mediator should express willingness to discuss any aspect of the dispute at virtually any time. This sense of availability is a signal to the negotiators that the mediator is genuinely concerned with the issues and encourages the free flow of information necessary for productive negotiations.

In furthering the negotiations, the mediator must consider a wide range of substantive and procedural options and continually adjust his or her strategy in response to new factors. A determination must be made concerning the timing and approach to discussion. The mediator may see a crucial, overriding issue as so fundamental to agreement that it must be thoroughly discussed among the parties at the onset of negotiations. Alternatively, the mediator may believe that resolution of smaller issues will provide a climate favorable for the discussion of more difficult issues. A combination of these approaches may be taken or the mediator may alter course when negotiations seem to be sidetracked.

For the first few sessions, the mediator may suggest seeking consensus on the sequential treatment of issues. Agreement on the topical order of discussion not only symbolizes the willingness of all parties to be reasonable and to work conscientiously toward settlement, it also assures the participants that issues of particular significance to them will be included in the negotiations. Typically, the dispute is dissected into discrete elements, with issues scheduled for discussion in a series of joint sessions. Negotiators may make elaborate presentations to illustrate the importance and validity of their positions. In the Snohomish River Basin dispute, negotiators for the environmental groups prepared graphic materials that described "nonstructural" options for flood control. Maps are frequently used to highlight various boundary configurations. The information presented should create a clearer understanding of the problem and aid in examining potentially acceptable alternatives. The number of sessions in which these presentations are made depends on the complexity of the issues and the negotiating distance separating the parties. As the area of agreement expands, the search for realistic options becomes a particularly energetic and usually cooperative enterprise.

In some instances, the mediator's proposed framework for handling

the issues is challenged. This may be the first opportunity the parties have to exert control over the negotiations. This can be construed as a positive indication that they are seriously engaged in negotiating or as a sign of dissatisfaction with the mediator's style. In any case, the mediator should be responsive to these initiatives and encourage suggestions about how to usefully structure the discussions.

The issue of representation may arise after the first meeting, when it becomes clear that one or more individuals at the bargaining table make negotiating difficult. Problems of multiple representation are usually sorted out naturally after a few meetings. Individuals who attend simply out of curiosity generally lose interest when the discussion focuses on the difficult and technical aspects in controversy and on the tedious process of drafting language for the agreement. Bargaining is a difficult process; those who persevere do so out of a strong conviction about the nature of the settlement and a desire to reach an accommodation.

Problems may arise when a large number of interest groups participate in the negotiations; meaningful discussion tends to be impeded by expressions of opinion from negotiators who represent relatively minor shades of difference. Attention declines when seemingly repetitive comments distract from the major issues. When an unmanageable number of interest groups are represented, the mediator or one of the parties may suggest that negotiations could be aided by using a committee structure. One or more committees are formed based on specific topics in dispute. Negotiators select committees based on the importance of the issues to their groups. The committees meet informally and bring proposed alternative solutions to the group as a whole for approval or further discussion. Another approach to streamlining negotiations is for participants to select an executive committee to handle detailed negotiations; the executive committee, then, periodically reports to the larger group on its progress. This was the approach used in the Rhode Island dispute in which the six-member executive committee was composed of two members each representing business, labor, and the environmental community.

THE ROLE OF THE MEDIA

The media play an essential role in environmental disputes. It is probably not an exaggeration to assert that disputes are only recognized as such when they are covered by newspapers and television. Without media attention, disputing parties would find it extremely difficult to challenge the positions taken by government officials or business and

development interests. The media provide the opportunity for those opposing a proposed action to express alternate positions and to build constituencies in an attempt to persuade officials and the public of the validity of their cause. Since the media play an active role in publicizing the issues and the disputants, they are expected to have keen interest in the mediation process.

The role of the media during the mediation of environmental disputes is not as firmly established as it is in labor–management bargaining. In labor–management disputes, media coverage is limited to interviews with the participants before and after negotiating sessions; it is clearly understood that coverage of meetings in progress would severely impair the ability of the parties to negotiate. It is difficult enough for the parties to adjust their public positions to accommodate demands from their adversaries without having to do it under press scrutiny. The presence of the media encourages the parties to stand firm. A show of weakness could erode their bargaining position and perhaps even jeopardize their leadership positions within their constituencies. It seems clear that intensive press attention in the negotiating session would hamper progress. Thus, the exclusion of the media from labor–management negotiating sessions is seen to be in the public interest, even when there is an explicit public interest, such as contract negotiations for police, firefighters, and teachers.

In contrast, the media are usually not persuaded that serious negotiating in environmental disputes cannot take place if the press reports on the meeting. Thus, mediators in environmental disputes usually must accept the presence of the press if reporters and editors demand to cover negotiations. To do otherwise would endanger the negotiating process, which is particularly fragile in its initial stages. A critical newspaper article attacking the mediation process on grounds of secrecy would most certainly result in a breakdown of negotiations. The mediator must achieve a delicate balance between the assertion of the right to know, the requirements of the "sunshine" and open-meeting laws, and the parties' need for privacy.

As was noted in an earlier section, the press usually needs a newsworthy story if it is to continue coverage. If the first session fails to produce news, reporters generally do not return for other meetings. Furthermore, the time and location for subsequent meetings are generally not publicized. If negotiators are seriously considering a range of options directed toward settlement, they are unlikely to encourage press coverage. In the later negotiating stages, informal contacts and extensive telephone conversations increasingly take the place of scheduled meetings. Furthermore, press attention in environmental disputes may be

less acute because the dispute and the negotiations do not have the immediacy and news impact of a strike deadline or work stoppage.

The mediator should make every effort to cooperate with press requests for information and encourage the parties to refrain from making public statements that may undermine negotiating progress. If the parties agree to refer all questions from the press to the mediator, the danger of ill-considered expressions of opinion that would hamper negotiations is minimized. The mediator may periodically update those reporters who express interest in the progress of the dispute. When a settlement is reached, there is frequently a press conference to announce the agreement.

MAINTAINING CONSTITUENCIES

The constituencies vital to a successfully negotiated agreement are the groups represented by individual negotiators and the public official who endorsed the mediation activities. Without the support of these factions, no meaningful agreement will be achieved. The mediator should be concerned with the ability of the negotiators to gain acceptance for the concessions among the membership of their groups. There is a tendency for negotiators to become so familiar with the issues and the ramifications of an array of alternatives that they lose touch with their not so fully informed colleagues. If the negotiators lose trust or credibility within their own groups, an agreement reached at the bargaining table may not be supported.

If the mediator senses that a negotiator seems to be getting too far out in front of his or her group, this impression should be conveyed to the negotiator. In some cases, negotiations may be postponed until significant concessions or changes in position have been discussed and approved by a group's membership. It is important to know at the earliest possible moment if problems may arise in gaining necessary group support; continuing efforts to refine an agreement only to discover that the basic building blocks were unacceptable to one of the parties creates a level of hostility among other participants that can make further negotiating impossible.

An example of this occurred during negotiations between a Denver community group and officials of a metal recycling plant. The company proposed to site a recycling facility near an area slated for a golf course in a location residents wanted to maintain as a greenbelt. Negotiations between the community group and the company seemed to be moving toward an agreement to permit construction of the plant, with the understanding that it would be removed in 10 years at the end of its useful

life. These terms seemed attractive to community negotiators because the golf course segment of the greenbelt would not be completed for six years and it would take even longer to bring other sections into the proposed greenbelt. The emerging settlement was upset, however, when a member of the community group that opposed settlement brought suit against the company. In response, the company withdrew from mediation. The company prevailed in the lawsuit and the plant was constructed.

It is also important for the mediator to report negotiating progress to the official who appointed the mediator and initiated the mediation activities. Since the settlement is meaningful only if approved by the official, it is essential that he or she be aware of the terms of agreement. If negotiations are progressing in a direction opposed by this official, the participants should be informed so that adjustments can be made.

In addition to the groups directly participating in the negotiations, there are usually a number of other government agencies and groups whose views should be considered because they may be influential in implementing the agreement. If these groups are not consulted, they may give less than enthusiastic support to the agreement. The mediator is generally responsible for keeping these groups informed about negotiating progress and seeing that the views of outside interests are incorporated in the negotiations.

The importance of these groups to the success of the mediation depends on the scope of the dispute and the need for their support in implementing the agreement. An agreement between a local citizens' group and a developer over plans to construct an apartment house may be self-implementing. The only outside influence may be the local zoning board that must approve the zoning variances agreed upon by those directly involved in mediation. If, however, the dispute involves a wide number of interests outside the mediation process, these groups may be as important as those who participate directly. In the dispute over a management plan for Acadia National Park, outside interests included congressional committees handling legislation on national parks, a national coalition of environmental groups, several state agencies, prominent land owners, and the Maine congressional delegation. Since the mediated agreement would be reflected in a management plan that required congressional approval, support from these outside groups was essential.

BARGAINING AND TRADEOFFS

Bargaining occurs when each of the parties with a stake in the dispute prefers settlement to a continuation of the dispute. Each views the con-

sequences of the status quo or further confrontation in the courts as less acceptable than the prospect of granting concessions. The recognition that agreement requires alterations in firmly held positions, however, does not by itself bring about accommodation. Adversaries do not easily change strongly held positions. It is the mediator's task to promote an atmosphere in which the negotiators are encouraged to review alternative solutions. This requires a willingness to listen and to consider the goals and priorities stated by each group. When these goals and priorities are clearly understood, a number of issues usually emerge where compromise may not require the sacrifice of basic positions.

In environmental disputes, negotiations concern the allocation of both financial and natural resources. The financial aspects include expenditures for public works, electric-generating facilities, parks, fisheries, and pollution-control equipment. They sometimes concern balancing financial resources, as in proposals to trade federal highway trust funds for mass transit funds. Natural resource issues involve the allocation of land for airports, mining, commercial development, and wilderness. In a dispute over the construction of a shopping center, for example, community interests may seek a smaller center or a different location, as well as larger expenditures for landscaping, noise barriers, traffic lights, and road improvements to mitigate the effect of increased traffic. In a dispute over port development, resource and land allocation issues may include space for recreation areas, sites for dredge spoils, access for shipping, cargo storage, and commercial development. The financial component may cover cost allocations between government agencies and private developers and payments to enhance environmental values.

The mediator encourages exploration of alternatives and acceptance of concessions that do not fundamentally conflict with a group's objectives. It is not uncommon for the parties to be unaware of the fact that concessions have been offered. For example, a corporate negotiator, after launching a sustained and angry verbal attack against community representatives, proposed several areas where concessions were possible. The community negotiators, taken aback by the stinging outburst, focused their attentions on countering the attack and were deaf to the positive elements in the presentation. After the session, the mediator restated the corporate negotiator's position and emphasized the offered concessions. The mediator discussed with both groups the differences in negotiating styles and appropriate negotiating behavior that promotes constructive communication.

The mediator's approach to structuring negotiations is influenced by the negotiators' experience with both mediation and the mediator. If the mediator is well known to one or more of the parties and has helped

fashion successfully implemented settlements in the past, there will be an expectation that success will again be achieved. In such cases, the mediator has more latitude to suggest settlement alternatives. If the mediator is working with the parties for the first time, great care must be given to how alternative positions are timed, phrased, and presented.

The mediator generally proposes ways to organize the discussion so that the negotiators are in a position to analyze the opportunities for offering and receiving concessions. In preparing for mediation, each group considers the concessions it would be most willing to make and the tradeoffs that would be the most difficult to concede. Negotiators are also encouraged to speculate on concessions that might be offered by their adversaries. This analysis of positions often brings with it a recognition that opposing sides may list similar concessions. For instance, in disputes over plans for a housing development or a shopping center, both the developer and the community groups may reach separate but similar positions regarding acceptable mitigation measures for buffering noise and minimizing the impact of lighting.

In the early stages of negotiation, the mediator may suggest that a concession which a group acknowledges will eventually be offered could appropriately be made in the initial negotiations if a valued counter-concession can be gained. The tradeoff possibilities in complex environmental disputes are virtually limitless. Bargaining may cover issues that were not even considered a part of the original dispute. A controversy over construction of a flood-control dam grew in scope to include consideration of a new regional land-use planning agency covering sections of two counties; a dispute over boundaries of a national park developed into a radically new federal computation formula in lieu of tax payments to local government to cover costs of public services. Many, if not most, potential tradeoffs in environmental controversies are not of the either/or variety customary in labor disputes. Unlike bargaining over wage rates, where an increase in labor's share directly and proportionately affects company profits, the acceptance of concessions by one group in an environmental dispute does not necessarily require a direct and corresponding sacrifice from an opposing faction.

In examining the elements that may hold promise for achieving concessions, the mediator may see common areas not visible to the parties, who, having been locked in combat, tend to emphasize the differences rather than the similarities in position. In the controversy between Indian tribes and the State of Washington over a resource management plan for steelhead fish, the mediator emphasized that everyone agreed that a management plan would be beneficial and also acknowledged that agreement on a formula to allocate the number of harvestable steelhead

between the Indians and other fishermen would aid enforcement activities. Furthermore, they all agreed that the native steelhead (that is, indigenous as opposed to fish planted in the stream) should be protected. Indians view native stock as important to their cultural heritage; sport fishermen favor native fish populations because they are a stronger fighting, more sporting fish. Thus, they all wanted the native spawning grounds to remain undisturbed by sport fishing when steelhead were known to be entering the river. While these areas of agreement appeared obvious after the settlement, they were far from clear to the parties at the beginning of the negotiations. In the steelhead dispute, many years of extreme antagonism and a lengthy court battle over fishing rights so colored the parties' perceptions of each other that it would have been extraordinary if they had been able to perceive the wide area of common interests.

The form or pattern of bargaining depends on the initiative and style of the negotiators. A common pattern is the proposal/counterproposal approach in which, for example, the community and environmental groups and industry–development interests each have a list of demands. These positions start out far apart. As the issues are discussed and modifications are made in the initial proposals, the parties are brought closer together. In another pattern of bargaining, one coalition of interests prepares a list of demands and the others do not. In a dispute over an automobile raceway, the community group prepared a seven-page list of demands that were reviewed item-by-item by the corporation. This list of demands became the basis for discussion and negotiations; the agreement incorporated items on the list that were accepted or modified through the negotiating process.

Another bargaining pattern is the open-ended approach. The issues under discussion are not resolved separately and sequentially, but remain on the table until the final agreement is in place. This was the case in a mediation involving diking districts along the Snohomish River. The diking districts, formed in the early 1900s to build levees and drainage channels, were the source of long-standing disputes between districts. Dikes built to protect one district could result in the flooding of neighboring farms. Government officials called these disputes a "diking war." In mediation, the negotiators did not draw up lists of demands, but worked as a group to come up with a list of problems that they agreed were the basis for the disputes. After reviewing the list, the groups designed a process for gathering the information needed to make informed technical decisions about the appropriate location and height of the dikes for each district. The agreement, drafted by the mediator and revised in a joint meeting, was circulated and approved by the negotiators and distributed to county officials for adoption.

Negotiations require continuous review and the realignment of each group's priorities as concessions are presented and either accepted or refused. If the mediator senses that negotiators for one or more groups have lost the thread of their negotiating positions, he or she may suggest that the negotiators meet with their memberships to sort out specific areas for possible accommodation and counterconcessions.

Within the bargaining process, each negotiator should appear to be both resolute and flexible—resolute so as not to concede more than necessary, and flexible so bargaining can progress. Flexibility may be achieved through offering immediate concessions on peripheral items and creating pressure on opponents to respond with comparable tradeoffs. The gradual narrowing of differences on minor issues clears the way for consideration of high-priority matters. Thus, the mediator frequently directs negotiations to issues on which agreement is expected to be relatively easy to achieve. This approach has a positive psychological effect, builds goodwill, establishes a sense that the negotiators are flexible, and encourages greater freedom in discussing more sensitive issues. In short, these small building blocks create the momentum that moves negotiations forward.

The mediator, in carrying messages between the parties, must express proposed concessions in a way that will not damage the bargaining position of any of the interest groups. One tried and true strategy is the expression of proposed concessions without a clear attribution to the source. This is frequently done through "if"-type questions. For example, the mediator may ask, "*If* the environmental groups agreed to permit limited dredging in the port, would your group accept limits on industrial development?" It is purposely unclear whether a concession is being offered by the environmental group or whether the mediator is simply testing the willingness of industrial interests to make concessions within these limits. In the discussion of proposed tradeoffs, representatives from one of the groups may well ask, "Is this offer on the table or is it a suggestion from the mediator?" Since the proposed concession is usually contingent on a counterconcession, the mediator's response may be that he or she believes the concession may be obtained if a similar flexibility is evidenced on the other side.

A tactic employed to create or sustain negotiating momentum is a deadline for reporting progress or for a decision. There are other timing factors that aid negotiating progress, such as the need to complete one or more phases of the negotiations because one of the negotiators will be out of town or otherwise unable to attend meetings.

In some cases, the time at which the meeting is scheduled can promote momentum for settlement. If the mediator seeks to put pressure on the parties to resolve an issue that has been fully discussed and on

which agreement seems imminent, a meeting might be set for a weekday breakfast when many participants must leave to go to work. If the mediator believes the complexity of the issues requires more time than is available at an evening meeting, a structured day-long Saturday session may be suggested. In some cases, momentum can be maintained by creating a convivial setting for negotiations—for instance, a dinner meeting.

In an attempt to maintain negotiating momentum, the mediator may temporarily divert attention from a particularly divisive issue. In the dispute over the operation of an automobile raceway, the mediator reviewed notes from early interviews with the parties to identify issues that seemed more readily resolvable than the issue currently being discussed. This approach can add new energy to the negotiations. The particularly thorny issues can then be reintroduced at a later stage when only that one obstacle remains in the way of an agreement.

In some cases, the mediator will search for "new facts" to overcome impasse situations. In a dispute over waterfront development, environmental groups were adamant that an equality provision be included in the agreement. That is, an equivalent amount of estuary land for preservation had to accompany allocations for commercial waterfront development. The equivalency problem was resolved when the mediator discovered that a key public agency owned a large tract of wetlands that it was willing to set aside for preservation. The impasse was overcome and the compromise became a central element in the agreement.

The final stages of the negotiation process are, at the same time, the most difficult and the easiest—the most difficult because the final stumbling blocks are those that have been unresolved because they represent real or symbolic concessions fraught with the greatest sensitivity, and the easiest because each of the interests can point with satisfaction to progress and see only a short distance to a successfully negotiated settlement. The negotiators have become accustomed to the mediator, who by the final stage has gained the full trust and cooperation of the parties. Having endured a series of long meetings and countless other disruptions in their normal schedules, the negotiators are loath to forfeit this expenditure of time and effort without the reward of a settlement. The anticipation that agreement is just around the corner provides a tantalizing "carrot" to energize final negotiating efforts.

Another element that encourages heroic last-ditch efforts is the presence of one or more individuals who assume mediator-like positions within their groups. Over the course of negotiations, these individuals have worked with the factions within their own groups and explained the advantages of the draft agreements, described the achieved gains,

and otherwise attempted to elicit full support from their fellow negotiators.

The personal characteristics of those involved in environmental disputes often help to create a positive framework for negotiations. Environmental activists who have successfully sidetracked the customary political decision-making process usually have political influence, knowledge of the political arena, and possess the analytical skills required to examine a range of approaches for achieving their goals. This sophisticated knowledge of *process* aids in mediation. Many negotiators in environmental disputes are keen observers of the bargaining process, are intrigued by the tactics employed by the mediator, and are curious about how the process unfolds. In a sense, they become "captivated" by the dynamics of negotiations and possess an almost professional interest in a successful outcome.

THE ROLE OF SCIENTIFIC INFORMATION

There are fundamental differences in the use of scientific information in a lawsuit and in mediation. In a legal action, the lawyer selects data that reinforce the client's position. A personal injury lawyer chooses medical experts to present evidence describing a client's injuries in the most severe terms; the insurance company's attorney counters with medical data designed to minimize the injury. Similarly, in environmental lawsuits, lawyers on each side present data that most strongly support their positions.

In contrast, scientific information presented during mediation is directed to problem-solving. While it is inevitable that there will be legitimate differences of opinion in complex scientific issues about the facts and their interpretation, these disagreements frequently can be resolved if they are examined on their merits rather than as justification for a public position.

Within the mediation format, negotiators may design an acceptable procedure for collecting, analyzing, and interpreting data. For example, prior to mediation, competing groups may have supported their positions with data based on different assumptions and research methodologies. In such a case, the mediator will suggest that early meetings be devoted to finding alternative research methodologies. Hopefully, the parties will agree on a research procedure that provides credible data. This data may also be used after agreement is reached to monitor compliance with the terms of the agreement. In negotiations over reclamation of an open-pit uranium mine in Colorado, mediators worked with the parties to

define the scientific issues to be researched. The dispute initially focused on the adequacy of the environmental impact statement relating to the reclamation of the mine. In mediation, agreement was reached on a research agenda for water quality, revegetation, and wildlife. The research components became part of the mediated settlement.

Scientific issues raised in a serious attempt to examine probable impacts of proposed land-use changes are often resolved rather easily. For instance, in a long-standing dispute over port development in Everett, Washington, a community group opposed to further port development raised a series of questions concerning the impact of proposed dredging on shoreline development, including the amount of dredge spoil produced each year by dredging operations, possible suitable locations for the dredged material, the cost of transporting and depositing spoils, and estimates of the amount of offshore acreage that would be filled with spoil material. Within an adversarial mode, each of these issues would have been the subject of controversy, with experts on each side challenging the validity of both the conclusions and the assumptions on which the conclusions were based. In mediation, these questions provided the basis for discussion of a shoreline management plan, one element of which was port development.

In the steelhead dispute, how scientific data would be collected was a negotiating issue among state and treaty tribe biologists. Biologists representing the Indian tribes and biologists for state game agencies negotiated the formula for predicting the level of "harvestable" steelhead stock. The compromise included an occasional creel census (a random count of fish being caught) to verify predictions derived from returning fish at one representative stream. In other mediation agreements, the data collection issue has been resolved through joint selection of a neutral whose data is accepted as accurate.

Issues of scientific information also concern the performance of state-of-the-art pollution-control devices and the adequacy of measurement and monitoring techniques. This was the case in a dispute between a municipal water and sewage treatment agency and local citizens over on-land application of sludge (dewatered municipal wastewater). The municipal agency used sludge to fertilize trees at an experimental university tree farm and was proposing the application of sludge to a Douglas pine tree farm plot. The tree farm sponsoring the proposal appointed a committee of local citizens to review the proposed action. The committee drew up a list of 17 concerns about sludge application. Following intensive technical analysis of these issues, the committee accepted the responses; the sewage-treatment agency agreed to frequently analyze the soils, unsaturated groundwater, the groundwater acquifer, and surface

waters for nitrate leaching and other contaminants. The monitoring program included observations of effects on wildlife, fish, and vegetation. The citizens' committee reviewed the monitoring data throughout the term of the project and a response plan was developed in the event that unacceptable levels of contaminants were detected.

As negotiations progress, information needs may change. In a dispute over airport development, the parties came to realize that information was needed on the types of airport noise-abatement programs, regulations on military operations, and reversion clauses for a key parcel of surplus government property. The mediator provided examples of noise-abatement programs from several airports; discussed helicopter landings, control methods, and airport regulations with military personnel; and obtained documents relating to the surplus property. This information, presented in mediation, was an important reference source in writing sections of the agreement.

In some cases, information is uncovered that was previously unknown to the parties. In a dispute over a landfill site in Eau Claire County, Wisconsin, the mediator discovered a survey prepared by a state agency responsible for siting landfills that found eight alternative sites unsuitable. This led state officials to press for the landfill at the one suitable site. Town officials brought suit. An agreement was reached, and the town withdrew its lawsuit when government agencies agreed to conduct new soil borings and to follow a set of technical procedures.

The importance of scientific information in environmental disputes is sometimes overstated. While many serious and legitimate questions are raised in mediation sessions concerning the validity of data and the opposing views of experts, controversy over data erupts less frequently and with less fervor than would be expected based on arguments presented in litigation or public hearings. Within the framework of mediation, which is conducted outside the glare of media attention, each group considers the scientific issues with a view toward illuminating facts and structuring a responsible, constructive solution. If appropriate, the mediator may suggest that important questions dealing with conflicting data be submitted to a credible, neutral scientist.

In some cases, requests for scientific information are used to test the mediator's commitment to the mediation effort. In a dispute over flood control and land-use planning in Seattle, the mediators were asked to obtain opinions from experts on whether and for how long alder trees could be buried and survive under 40 feet of water. After contacting forestry professors at six universities, the mediator reported that none of the experts would venture an opinion. Since the issue was never again raised in the negotiations, it seems reasonable to conclude that the request

was a test of the mediator's willingness to go to great lengths to aid the negotiations.

Many, if not most, mediators take the position that disputes are not primarily over facts but over values. This is surely the case in disputes where the "facts" cannot be scientifically verified. For instance, the potential damage to health or the danger of a radioactive incident at a nuclear power facility cannot be established definitively. Even plans for evacuating residents in the vicinity of a nuclear plant cannot be accurately tested for validity under emergency conditions. Thus, the importance of scientific information depends in large measure on the degree of certitude or reliability of the data. Information on the level and extent of chemical contamination of a stream is subject to testing and validation; information based on extrapolation and untested or untestable assumptions contain value judgments that go to the heart of the dispute. Disputes that focus on issues where crucial scientific information is not clearly verifiable are generally not amenable to resolution within the mediation process.

It is sometimes observed that the mediator, as an advocate for the negotiation process, need not be fully conversant with the scientific details of specific issues. Indeed, it is sometimes suggested that this information, particularly if it is obtained prior to involvement in the dispute, can jeopardize the mediator's neutrality. While there may be an advantage to entering a dispute without preconceived notions regarding the merits of opposing positions, the mediator must develop a thorough familiarity with the scientific data and other technical information. Failure to fully understand the details of the dispute is a clear signal of disinterest and can seriously impede the mediator's usefulness. Furthermore, the mediator who has only a casual command of the relevant data may be unable to visualize and present practical alternative positions that could aid the settlement process.

It has been argued that scientific issues are not amenable to a mediated solution. This view was expressed in a *New York Times* article, "Mediating, Not Suing, Over the Environment," by Philip Shabecoff (May 29, 1983), in which Dr. Myra L. Karstadt, assistant professor of community medicine at Mount Sinai School of Medicine in New York City and an expert on environmental issues, was cited as believing that because corporations are in a position to present more data and to bring more experts to the bargaining table, they can place citizens at a disadvantage. The article went on to say that Karstadt sees the court as the appropriate forum for a full examination of the facts. This position indicates a fundamental misconception about the mediation process and the ability of the courts to address these issues. If citizen groups are at a disadvantage

in mediation because the disparity in financial resources makes it more difficult for them to marshal the facts, how is this imbalance overcome in costly litigation? Mediation seems a far superior approach for illuminating relevant information, since opposing groups can hammer out their disagreements without going to court.

Over the last several years, strong statements from jurists indicate their discomfort in a role that requires them to act as arbiters of complex and disputed scientific information. Chief Judge David L. Bazelon of the U.S. Court of Appeals for the District of Columbia Circuit has been especially articulate on this topic. Speaking before a conference of the Atomic Industrial Forum, he stated that the courts are not the proper forum "either to resolve the factual disputes, or to make the painful value choices" on technical and scientific issues. He went on to say that "it makes no sense to rely upon the courts to evaluate the agency's scientific and technological determinations; and there is perhaps even less reason for the courts to substitute their own value preferences for those of the agency." While Bazelon did not specifically endorse the use of mediation, his views seem to suggest that this approach is more suitable than a court-imposed solution. He noted that, "When the issues are controversial, any decision which is reached may be unsatisfactory to large portions of the community. But those who are dissatisfied with a particular decision will be more likely to acquiesce in it if they perceived that their views and interests were given fair hearing." Mediation attempts to reconcile these differences and to produce an agreement acceptable to all parties.