MEDIATION, ENVIRONMENTAL ASSESSMENT, and BILL C-78:

From Provisions to Practice

Background materials and highlights from a workshop held in Ottawa, November 15/16, 1990

Sponsored by
The Federal Environmental Assessment Review Office (FEARO)

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EXECUTIVESUMMARY

This report synthesizes discussion at a workshop sponsored by the Federal Environmental Assessment Review Office (FEARO), and held in Ottawa on November 15 and 16, 1990. The workshop brought together Canadian and American participants with experience in environmental assessment and dispute settlement. The task was to discuss proposals in Bill C-78, currently before a parliamentary committee, to include provision for a mediation mechanism in the federal environmental assessment (EA) process.

Mediation is not part of the current federal EA review process (EARP). Bill C-78 identifies mediation as an alternative to review panels, and envisions mediation as a dispute settlement tool that will be used in certain prescribed circumstances. When used successfully, it is expected to be a more efficient procedure for environmental problem-solving and for specifying impact mitigation and follow-up requirements.

The purpose of the workshop was to explore the concept of mediation and the manner in which it is framed in Bill C-78, and to analyze the policy and institutional options for implementing this approach.

Part I of this report, Background, includes the background information provided to the participants in advance of the workshop. Part II, Workshop Highlights, is a synthesis of workshop discussion. Part III provides conclusions and recommendations. A list of participants and observers, and suggested changes to the text of Bill C-78, can be found in Appendices A and B, respectively.

In general, the participants found the provisions for mediation in Bill C-78 too constraining and prescriptive. They called for more flexibility in both the ground rules for mediation, and in the relationship of mediation to the panel process. Mediation should be promoted as a problem-solving procedure of value, in the right circumstances, at each step in the EA process — from the earliest contact with proponents, communities and involved government agencies, to the review panel itself and subsequent mitigation and monitoring. This would not be *formal* mediation, as defined in the Bill, but wherever possible, the adoption of a collaborative style of problem-solving.

Bill C-78 proposes formal mediation as an alternative to the public panel in a bifurcated, two-stream process. General criteria are set out for referring a project down one route or the other. If mediation fails, the problem is referred to panel review. Workshop participants felt this approach was too limited. A number of options were identified, illustrating a variety of possible mediation/panel relationships. Several of these address situations where mediation is partially successful, that is, where the parties come to agreement on some but not all of the issues. Particularly in large, complex cases, this may be a frequent outcome, and need not be regarded as failure.

Workshop discussion clarified how formal mediation must be handled if it is to be successful. Effective work prior to mediation was viewed as particularly important. Initial "fact finding" identifies the parties and issues and assesses the prospects for successful mediation. If mediation seems appropriate, representation is confirmed and the terms of reference are established in a subsequent "convening" step. There will be little interest in mediation if the parties are not involved in the fundamental decisions.

The responsible authority and other departments with an interest must be among the parties to mediation. If necessary, to avoid overloading the process with government representatives, the mediator should facilitate the formation of a departmental caucus, development of a caucus position, and selection of a caucus representative. The same would be true when a large number of parties from the private or public interest sectors have a demonstrable interest.

The first task at the table is to reach agreement on procedures and the agenda. It should be noted that the agenda can be expected to evolve as the *perception* of self-interest changes. As this suggests, the mediator must be sensitive to timing issues, and must be highly flexible. Also critical is the mediator's role outside negotiation sessions, working to maintain contact and movement with parties, caucuses and constituencies. Team or co-mediation may be warranted where issues are complicated and in cross-cultural situations, and will provide valuable internship and evaluation opportunities.

At adjournment, Bill C-78 calls for the mediator to prepare a report. Workshop participants emphasized that such reports should be limited to a brief record of agreements and outstanding issues. This is a significant confidentiality issue. A report should only include an analysis of differences if the parties have reviewed and approved the report.

On the other hand, workshop participants were as concerned with "openness" as with confidentiality. Environmental protection is essentially about the public interest, and mediation cannot be credible without being in some sense an open process. Several methods of handling this dilemma were suggested.

The report concludes with ten recommendations based on workshop discussion. In general, it is recommended that the mediation process be flexible, problem-oriented and participant-centred. Other recommendations focus on the importance of communication (including "marketing" of the mediation process with other government agencies); the qualifications and competencies required of a mediator; the importance of support resources for participants; and the need to monitor the initial exercises in formal mediation.

PART I: BACKGROUND

By Barry Sadler

Introduction

Bill C-78, to establish a Federal Environmental Assessment Process, is before a Parliamentary Committee of the House of Commons. Once passed, the Act will give legal force to the Federal Government's responsibility to conduct environmental assessment (EA). For the last sixteen or so years, this responsibility has been exercised under the authority of Cabinet Decisions and the 1984 ***Guidelines*** Order-in-Council. By most standards, the draft bill and supporting policy adjustments represent a fairly sweeping package of reforms to the existing EA process.

Sections 21-29 of Bill C-78 contain provision for ***mediation*** of disputes involving proposals that have potentially significant environmental impacts and risks. This represents an important departure from current practice. Negotiatory approaches in federal EA, if employed at all, tend to be in-camera and informal. At the same time, there is growing interest in applying mediation and other alternative dispute resolution (ADR) procedures to EA and related processes in order to improve productivity. Recent studies of this relationship indicate there is an emerging body of relevant experience on which we can draw for the purposes of translating the language of Bill C-78 into action and practice.

This was the theme of a recent workshop sponsored by the Federal Environmental Assessment Review Office (FEARO), which will become the Canadian Environmental Assessment Agency (CEAA) on enactment of Bill C-78. A small group of specialists and practitioners in mediation and environmental assessment explored the options for implementing the provisions of Bill C-78. Workshop participants were asked, specifically, to provide guidance on the operational principles, protocols and procedures that would:

- foster an efficient, fair and effective process of mediation; and
- integrate this process with other phases of the environmental assessment process.

In the terminology of the ADR field, the workshop served as a policy dialogue, an initial "scoping" exercise on process design. The intent was to lay the groundwork for subsequent, more in-depth analysis of potential directions for institutionalizing mediation in the federal

process. As such, the workshop was designed to encourage a relatively freewheeling discussion. The participants, themselves, drawn from Canada and United States, represented a diverse range of affiliations and perspectives (see Appendix A). Background materials for the workshop included a discussion paper and checklist of questions (see Figure 2, page 7). These were pre-circulated and all participants were asked to provide a short commentary.

The workshop was organized on a roundtable format. Following an introduction and update on Bill C-78, each participant made a short opening statement. Subsequent rounds of discussion more or less followed the checklist of questions appended to the discussion paper. Workshop participants, however, modified the agenda both collectively at the outset and also individually and extemporaneously. (Observers of the ADR fraternity will recognize the paradox inherent in trying to direct those who are in the facilitation business, whether in mediation or consultation!) By most standards, however, the discussion was stimulating and productive. It was also leavened by the presence of observers from many federal government agencies involved in administering the new provisions. Each of the main sessions ended with a question and interaction period between participants and observers.

A synthesis of the workshop discussion is provided in Part II of this report. It is based on a content analysis of detailed transcripts of proceedings and highlights the main themes. The conclusions and recommendations outlined in Part IV reflect a more liberal interpretation of the thread of discussion. In addition, the workshop also included an impromptu session on redrafting the mediation provisions in Bill C-78, in response to the concerns of participants with respect to the language of certain clauses in sections 21-29 (see Appendix B).

It is worth noting, in closing, the nature of the opportunity represented by provisions for mediation in Bill C-78. This can be drawn by reference to the evolution of ADR methods and their application in the United States and Canada. U.S. experience with environmental mediation has diversified considerably during the past decade and this trend appears to be continuing. ADR tools and techniques are now routinely applied to deal with all kinds of resource and environmental issues at both project and policy levels. Similar trends can be detected in Canada; though here, negotiatory approaches still tend to be less professional&d and have a lower profile. That is, they proceed absent of the full range of mediated facilitation characteristic of the U.S., which, of course, may not be a bad thing. In both countries, however, environmental mediation to date is largely geared to resolving individual disputes and so is often considered to be a special, one-time approach.

Very rarely, it seems, is there an opportunity to design and integrate mediation as part of a major overhaul of an EA system or other process of decision-making. This theme of building negotiatory approaches into the day-to-day workings of communities or government was highlighted at the 18th Annual Conference of the Society of Professionals in Dispute Resolution (SPIDR, October 25-28, 1990, Dearborn, Michigan). It is seen by the Society as its major professional challenge for the next decade. With that in mind, the work begun here may be of interest to a broader audience than FEAR0 and other agencies and parties involved in, or af-

fected by, the relationship of mediation, environmental assessment and Bill C-78. But clearly that is for others to judge, and the direct concerns of the workshop are challenge enough.

Figure 1:
Workshop Purpose and Objectives

The purpose of this workshop is to provide advice to FEAR0 on the principles, protocols and procedures that should be followed in implementing the provisions for mediation set out in Sections 25 to 29 of Bill C-78.

Specific objectives are to:

- establish operational "ground rules" that will foster an efficient, fair and effective process of mediation; and
- identify a strategic approach to integrating the mediation option with other key phases of environmental assessment and review.

I-l MAKINGTHEMOSTOFMEDIATION: ADISCUSSIONNOTEONTHE PROVISIONSOFBILLC-78

This briefing paper has been prepared for the participants at the workshop on Mediation, Environmental Assessment and Bill C-78. It is intended as an opening statement to promote discussion on the role and scope of mediation proposed in the new Act. What follows, therefore, should be seen as a frame of reference for that exercise, a set of policy and institutional perspectives on the checklist of issues previously circulated to workshop participants. At the outset, it should be emphasized that this ***aide-memoir*** is not value-free or neutral. The focus involves taking a realistic look at the strengths and weaknesses of mediation practice in the context of the proposals in Bill C-78 (and ***vice-versa). So*** inevitably there are elements of selectivity and choice regarding what to include and highlight.

Workshop participants will bring their own views to bear through written commentary and roundtable discussion. The present format is a first step, open to collective redirection and reorganization. Our task is to provide the Federal Environmental Assessment Review Office with practical advice on how to **institutionalize** mediation as a constructive, problem solving tool. (See Figure 1 above.) This will be accomplished through an interactive dialogue in which we hope to work through the critical issues of process design (outlined in Figure 2 below) in a organized manner, and identify areas of agreement and disagreement.

This discussion note is organized into four sections. It begins with the starting assumptions that guide the analysis. The main body of the text (Chapters I-2 and I-3) reflect a distinction between:

- operational "ground rules" for the conduct of this process; and
- policy concerns about the strategic integration of a mediation ***approach*** with other phases of EA.

A short concluding chapter (I-4) outlines an approach to implementing the opening round of mediation exercises.

Figure 2:
A Checklist of Questions for Workshop Discussion

- ❒ To what extent does Bill C-78 circumscribe the process of mediation?
- ❒ Do the general provisions have implications for operational practice; e.g., do they limit the role and scope of mediation vis-a-vis panel review, constrain the conduct of the process or the flexibility of the mediator to conclude a successful negotiation?
- ❒ What is the appropriate balance between formal regulations and administrative guidelines in establishing the operational framework for environmental mediation?
- ❒ Which types of dispute lend themselves to mediation?
- ❒ Which types are more appropriately handled by panel review?
- ❒ What is the potential, for example, for mediation to handle complex scientific issues?
- 0 How do we judge the appropriateness of mediation and its likelihood of success with reference to particular cases?
- ❒ What criteria can be established for selecting the mediation option?
- ❒ When should a mediator be appointed in the process of dispute settlement?
- ❒ What operational distinctions can be made between "convening" and "mediating" and how can these phases be effectively integrated?
- ❒ Who should be appointed as a mediator ("in house" versus "outside" expertise)?
- 0 What qualifications should govern the appointment of independent mediators?
- ❒ What forms of training will be required to provide "in house" staff with the skills to act as mediators or conduct the pre-mediation process?
- ❒ What principles and protocols should guide the conduct of mediation?
- ❒ How much discretion should be left to the mediator to determine the steps and procedures to be followed?
- 0 What influence will the mediator exert over the selection of parties to the negotiation and ***vise -versa ?***
- ❒ To what extent can a successful mediation be a public rather than a private process?
- ❒ Are there particular phases that lend themselves to "open" versus "closed" negotiations?
- ❒ How should the results of negotiations that do not produce a satisfactory agreement be incorporated into subsequent panel reviews?
- 0 In these circumstances, does the panel, for example, start from scratch, treat the mediation report as a scoping document, or act in the specific capacity of an arbitrator?

I- 1.1 Initial Perspectives

Given the roster of participants, the record of Canadian and US experience with environmental mediation will be taken largely as read. The main themes and concerns are reasonably well known and do not require extensive description or elaboration. Because these also may be of interest to a wider audience, basic definitions and references are included to introduce the literature and facilitate further review. (See Figure 3.)

The rationale for applying mediation and other ADR procedures to improve the effectiveness of environmental assessment is also fairly straightforward and quite well documented (e.g. Canadian Environmental Assessment Research Council, 1987). It is based, firstly on the fact that conventional approaches often fail to satisfactorily deal with problems under review, and leave behind a residue of unresolved differences. Mediation and other collaborative approaches are considered by ADR practitioners and analysts to provide constructive and cost-effective means of dispute settlements-though they are not a panacea.

In both Canada and the United States, case experience with environmental mediation focuses on particular issues and customized approaches. There is correspondingly less emphasis on designing dispute resolution systems. Workshop participants, accordingly, might give some preliminary thought to examples and lessons that can inform our thinking about institutionalizing mediation within decision-making processes.

For present purposes, Bill C-78 should be treated as a general reference and not as written in stone. The Act is currently under review by an all-party Committee of the House of Commons. Observations on Sections 21 to 29 (see Appendix B) may prove helpful to FEAR0 officials and others involved with legislation. However, we should avoid becoming enmeshed in legal technicalities and concentrate on whether the language appropriately circumscribes a constructive mandate for mediation, and if not, how it might be rethought.

The practical issues of process design encompass the policy and operational frameworks for undertaking mediation. We should specify the roles, rules and responsibilities involved in implementing this approach. How should it be applied, by whom, and under what circumstances?

Figure 3:
Definition of Terms and Notation of References

Consultation is a process of two-way communication by which people are informed about proposals that may affect them, and have the opportunity to express their views and concerns prior to final decisions being taken.

Negotiation is voluntary, collaborative process of problem-solving in which parties to a dispute try to reach a mutually acceptable, workable solution to their differences through direct, face-to-face dialogue.

Mediation is a process of negotiation conducted with the assistance of an impartial third party who has no power to impose a solution on the disputants.

Arbitration is a quasi-negotiated process in which an impartial third party renders a decision that is generally binding on the disputants.

Alternative Dispute Resolution (ADR) procedures, including mediation, are distinguished from so-called conventional approaches by their emphasis on consensus-building, joint problem solving and interactive dialogue or negotiation.

The literature on the field of ADR and environmental mediation is considerable. Four key references include:

Bingham, G. 1986. *Resolving Environmental Disputes: A Decade of Experience.* The Conservation Foundation, Washington, D.C.

Fisher, R. and W. Ury. 1981. *Getting to Yes: Negotiating Agreement Without Giving In.* Boston: Houghton Miflin.

Raiffa, H. 1982. The *Art and Science of Negotiation.* Cambridge, Massachusetts: Harvard University Press.

Susskind, L., and J. Cruikshank. 1987. *Breaking the Impasse: Practical Approaches to Resolving Public Disputes. New* York: Basic Books.

These books merely provide an entry point into the longer literature. Various newsletters provide up to date information on environmental mediation practice, including Resolve, Environmental Impact Assessment Review, and Dispute Resolution Forum.

I-2 The Proposed Role and Scope of Mediation

The proposed role and scope of mediation in the new federal EA process is specified in Sections 21-24 of Bill C-78. To paraphrase, a project that is likely to cause significant environmental effects or raise public concerns may be referred either to panel review or mediation. An evident and immediate concern is whether this is unduly restrictive of the potential contribution that mediation can make to the EA process.

In this context, there are two separate issues:

1. Whether the limited function specified for mediation precludes its more informal and widespread deployment, for example, by encouraging agencies to seek resolution of issues at a referral stage. A layman's reading of Bill C-78 suggests there is room for such a discretionary application of ADR procedures, and that the Canadian Environmental Assessment Agency (CEAA), FEARO's successor, is given administrative powers to facilitate this approach [Section 54(1) (a)]. This workshop is probably not the place for a comprehensive examination of the various options for integrating ADR approaches into federal EA, but participants might care to consider the possibilities.

2. How will the relationship of mediation and panel review specified in Bill C-78 work in practice? And what changes might be entertained in this regard? These are key policy design questions for workshop participants. In addressing them, it is worth bearing in mind that panel review and mediation, as currently practiced in Canada, are quite different processes. As a result, some interesting questions are raised about their relationship to each other and to the overall approach being entertained to environmental decision-making of which they form part.

The main lines of difference between panel review and mediation are indicated in Figure 3 above. Briefly,

- Mediation is a collaborative and consensus-seeking process, based on face-to-face negotiations, in which parties to a dispute try to reach a mutually acceptable and workable solution to their differences. It is conducted with the assistance of an impartial third party, restricted to representatives of the interested parties and may be perceived as a closed and confidential dialogue.
- Panel review is an open consultative process, based on "formal" public meetings or hearings in which anyone who wishes to speak or intervene can do so. It is conducted by an independent body or tribunal of experts, who essentially serve an adjudicatory function by listening to the weight of lay and technical opinion and then prepare a report to the Minister with recommendations on project disposition and conditions.

Following from these comparisons, there are four key issues worth considering:

- the extent to which the principles of mediation support or detract from the process values that the federal EA system is designed to promote and achieve;
- the degree to which panel review and mediation complement each other as approaches to problem-solving;
- the relationship of mediation to panel review in the event that mediation fails to achieve an agreement; and
- the affiliation and responsibilities of the mediator.

These four issues are considered sequentially in the following sections.

I-2.1 On Mediation and Process Values

During the past two or three years, several discussions on the use of mediation on the federal EA system have taken place. The main reservations expressed by officials relate to the restrictions on participation and the confidentiality of the process of negotiation. Mediation is seen (whether rightly or wrongly) as jeopardizing the credibility of a process that is traditionally open to all. In the final analysis, the grounds for concern associated with the use of mediation may be seen as a policy call that has been made already by Bill C-78.

The preamble to Bill C-78, however, also identifies instrumental (as well as substantive) values of EA, notably reflected in the government's stated commitment to "public participation" and "access to information". An approximate translation of these guiding values and how they relate to mediation is given in Figure 4. The purpose here is to flag the importance of a clear articulation of the exclusionary-inclusionary aspects of mediation and participation, rather than getting bogged down in philosophical debate. It is anticipated that participants at the Ottawa workshop can help make transparent the democratic values of mediation. Other concerns which stem from this relationship revolve around whether a mediated agreement is in the public interest (bargaining away environmental quality while compensating the impactees). However, this is taken care of, in principle, by having 1) appropriately structured representation in mediated negotiations; and 2) submitting a final agreement to the Minister of the Environment for formal approval (as per Section 28 (2)(c) of Bill C-78).

In practice, of course, the instrumental concerns about mediation vis a vis participation can be further reduced by the ground rules which are adopted for this process. At issue here is first the necessity and implications of conducting an "open door" process of mediation. What might this approach look like? Will the requirement for open door mediation diminish the likelihood of reaching agreement? When considering these questions, remember too, that following the public hearing stage, the deliberations of EA panels are confidential and likely to remain so.

Figure 4:
Process Values for Environmental Assessment:
Proposed Guidelines for Public Consultation and Mediated Negotiation

Statement of Philosophy

Public participation in the federal EA system serves both instrumental and symbolic purposes. It is designed, first and foremost, to empower an effective process of environmental assessment and planning which leads to informed decision-making. It is meant, secondly, to provide an exemplary1 demonstration of federal commitment to open government and access to information.

Procedural Goal

The procedural goal of federal EA will be to provide appropriate opportunities for all affected and interested parties to be informed about and to be involved in environmental assessment and decision-making.

Principles of Application

The following principles for public consultation and dispute settlement will guide the administration of EA in the Federal Government:

1. Opportunities for public involvement in decision-making will be provided in a constructive and effective manner consistent with the nature and scope of the problem.

2. All processes of public consultation and dispute settlement, including panel review and mediated negotiation will be conducted in a fair and equitable manner without bias or discrimination toward any interest or individual.

3. Mediated negotiations among interested parties will be an "open door" process with provision for public scrutiny and comment on the conclusions and recommendations which are reached.

1. An exemplary process may he defined as one which identifies key social concerns, facilitates public input and influence, builds trust and confidence among all parties, and, wherever possible, seeks consensus and mutual accommodation of views and interests.

I-2.2 The Application of Mediation

The provision for mediation contained in Bill C-78 provides an important supplement to panel review (currently the only route for dealing with projects likely to cause significant environmental effects or generate public concern). It allows process administrators to be more discriminating in their approach to problem-solving. (There is, of course, no reason why the suite of referral options should be limited to mediation and panel review — but that is subject for another discussion.) Mediation and other ADR approaches have been applied with some success in similar settings in Canada and the United States. Recent participatory initiatives by the Ontario Environmental Assessment Board and the Alberta Energy Resources Conservation Board are instructive (e.g. Picher, 1986; Wallace and Slavik, 1986).

Section 25 of Bill C-78 appears to lean toward a prescribed role for applying mediation. It states that mediation should be applied in circumstances where the Minister of Environment is satisfied that the interests are identifiable and are willing to participate through a representative; and where the mediation is likely to produce a result that is satisfactory to all parties. Whether this also means the issues at stake are reasonably well circumscribed is another question. My own tendency is to take a conservative view of formal mediation, applying it to medium-scale NIMBY-type issues, especially in the launch phase of formal mediation, to build a credible track record. (This conservative view of formal mediation, as a complement to panel review in Bill C-78, contrasts with my liberal view of the scope of opportunity for informal applications of this process and other ADR approaches specified previously.) Other participants likely will not agree, certainly including those members of the Canadian Bar Association Task Force on Alternative Dispute Resolution who critically analyzed a recent Canadian Environmental Assessment Research Council report on environmental mediation that advocated a limited approach *to* mediation. Mediation practitioners, versed in the field, may argue with some justification that mediation is well-suited to handling more varied configurations of conflict than implied in Bill C-78, including scientifically and technically complex disputes.

I-2.3 The Dual Tracking of Mediation and Panel Review

The "dual tracking" of mediation and panel review outlined in Bill C-78 implies a rigid rather than a flexible approach to the timing and placement of mediation in the overall EA process. It assigns mediation, specifically, to a subordinate branch line position in relation to panel review. Under Sections 21 and 29 respectively, the Minister of the Environment can refer a proposal to either panel review or mediation with unsuccessful mediation then referred to a review panel. The value of having an adjudicatory panel as a "safety net" in such cases is obvious. Further thought, however, should be given to the nature of this relationship. Specifically, what can be gained from stalled mediations that a panel can incorporate so that the process doesn't have to start again from scratch. In such cases, mediation should be envisaged as a scoping process that preclears certain issues (on which there is agreement) and clarifies others (on which there is not agreement). What does case experience tell us on this score?

An alternative to the above arrangement may be the linkage of mediation and arbitration. In contrast to an arbitrator, the mediator has no authority to impose a solution or recommend a course of action in the event of negotiations being deadlocked. Bill C-78 implies, however, that this latter restraint may not apply in the EA system. Section 28(c) requires the mediator to submit a report setting out "the conclusions and recommendations of the participants" to the Minister and responsible authority. Does this clause open the door, in fact, to the mediator playing a more active role in the event of deadlocked negotiation?

The notion of a one-person mediator turned arbitrator raises evident difficulties in the light of current practice, though it is tempting to think of he or she as the kind of well integrated schizophrenic who will epitomize the national psyche. More to the point, would arbitration be a more cost-effective conclusion to a deadlocked mediation than reference to a conventional panel in certain circumstances? If so, how might this work?

I-2.4 Who will Mediate?

A final strategic issue that deserves separate attention is who will be appointed as a mediator. The pros and cons of the use of independent (i.e., external) mediators versus internal staff are reasonably well known. Rather than rerun these in general terms, we should consider their specific implication in the light of the approach to mediation proposed in Bill C-78. In this context, the referral of a proposal to mediation is a critical juncture. According to Section 25(a)(ii) the Minister must be satisfied that the dispute is potentially mediable.

This clause implies that a significant effort at dispute assessment and identification of the parties involved has been made already, involving someone acting in the capacity of a convener. In other words, either CEAA staff will have to perform this function or they will have to be in a position to appoint an outside mediator prior to formal reference by the Minister to ensure the conditions identified in Section 25(a)(ii) are in fact met. CEAA staff, in effect, will be required to perform the function of a mediation secretariat, much as they do now for EA panels. This will involve:

- laying the groundwork for the appointment of a mediator (either internal or external);
- supporting his or her activities; and
- monitoring the progress of negotiation and ensuring this is smoothly linked to post-mediation activities.

My own sense is that the appointment of an outside mediator is vital to the perception as much as the reality of impartiality, especially in the light of the new policy regarding panel membership. But I do not think this should be automatically assumed given a) the professional skills of the people currently working for FEARO, and b) the close association between con-

vening and mediating implied by Section **25(a)(ii)**. There are also, I believe, precedents for in-house mediation in other areas of federal activity, notably in labour negotiations. With this in mind, it is not just a question of either external or internal mediation but of the relationship between facilitation, convening and mediation in the dispute settlement process.

I-3 Drafting the Ground Rules for Mediation

Environmental mediation is usually a three-stage process. It involves:

- pre-negotiations to lay the groundwork for the conduct of the process;
- substantive negotiations to try and reach agreement; and
- post-negotiations to empower the implementation and enforcement of the agreement.

At each of these phases, there seems a sufficient body of experience with mediation to provide reasonably clear guidance on the conduct of the process. There is, of course, no standard recipe for mediated negotiation. Instead, each process must be custom-tailored to the issues, and interests involved; and the cardinal rule is for the parties themselves to establish the protocols and the agenda of negotiation. Bearing this in mind, a five-step process is proposed for building a mediation track. Workshop participants are asked to critically review and season the discussion with case-tested experience and perspectives.

Step 1: Screening the Issues. The types of circumstances under which mediation may be applied within the federal EA process lend themselves to preliminary identification. Each proposal that falls within this category, however, will require dispute assessment. Several questions need to be asked to determine the appropriateness of mediation, relating to:

- the nature and dynamic of the dispute;
- the number of interests and parties directly or indirectly involved; and
- their relationships and motivation to participate in negotiations, including those with the authority to implement agreements.

Section **25(a)(ii)** of Bill C-78 states that the Minister shall refer a project to mediation if this is likely "to produce a result that is satisfactory to all the parties". Gail Bingham **(1986),** has developed several principles or hypotheses on what affects the likelihood of success of mediation (see Figure 5). Please review them carefully as guides that will be helpful to determining the potential success of a mediation. This exercise should also prove helpful in clarifying previous perspectives on the use of mediation in the EA process.

Step 2: **Identification of Interests and Recruitment of Representatives.** This is a critical step in the mediation process. It is one of the axioms of sound practice that all relevant parties must be at the negotiating table. Otherwise, the value of the process is compromised and the chances of reaching an implementable agreement are reduced. At the same time, the nature of the process means that only a small number of people can participate. The identification of interests often creates problems with respect to complex, multi-party issues.

Figure 5:
What Affects the Likelihood of Success in Environmental Mediation?
by Gail Bingham

There are few absolutes in predicting whether parties involved in any specific dispute will be successful in reaching agreement, or whether they will be successful in implementing an agreement if they reach one. There are several principles, however, that appear to increase the likelihood of success. Some of these principles are based on qualitative observations, others are backed up by more quantitative analysis, but all remain hypotheses that will require further study.

The parties must have some incentive to negotiate an agreement with one another. The willingness of all parties to a dispute to participate is a major factor in the success of a voluntary dispute resolution process, if one expects an agreement reached to be both fair and stable. But the parties are unlikely to participate, let alone agree to a settlement, if they can achieve more of what they want in another way. However, it is difficult to assess the importance of such incentives, because mediators generally do not convene negotiations unless the parties are at least somewhat interested in attempting to resolve the dispute.

The way the negotiation or consensus-building process is conducted also appears to be an important factor in whether agreements **will** be reached. Mediators often refer to the difference between "interest-based" negotiation as opposed to "positional" bargaining in discussing what makes negotiations effective. In particular, the ability (and willingness) of the parties to identify the interests that underlie one another's positions, and to invent new alternatives that satisfy these interests, helps enormously in resolving disputes. At times, however, the parties can find no common ground regardless of their skill in negotiating with one another, even if they had the assistance of a mediator. Again, it is difficult to evaluate how well a negotiation or consensus-building process is conducted.

The'likelihood of success is less clearly affected by the number of parties involved in the dispute, the issues themselves, or the presence of a deadline. There is no evidence that a larger number of parties makes reaching agreement more difficult. In fact the average number of parties for cases in which the parties failed to reach an agreement was lower than the average number of parties in cases in which agreements were reached. Also, the evidence does not show that the issues in dispute have a significant effect. More study, done perhaps at a more detailed level, may show different results. The influence that the kind of issue has on the likelihood of success also may be linked to other factors, such as whether the particular dispute has precedent-setting implications. Finally, it appears that the presence of a deadline does not affect the likelihood of reaching an agreement.

The most significant factor in the likelihood of success in implementing agreements appears to be whether those with the authority to implement the decision participated directly in the process. When those with the authority to implement decisions were directly involved, the implementation rate was 85 percent; when they were not, only 67 percent of the agreements reached were fully implemented.

Agreements were not implemented in about 7 percent of the cases in both categories. The difference in the implementation results is that when those with the authority to implement the recommendations were not at the table, the terms of the agreement were more likely to be modified. Agreements were partially implemented in 27 percent of the cases in which those with the authority to implement the agreements were not at the table as compared with 7 percent of the cases in which those at the table had the authority to implement their agreements.

Few factors are absolute preconditions for success. In many situations, the combined positive effect of some factors can offset potentially negative factors. Also, many factors may be subject to modification by the parties and the mediator before and during the dispute resolution process. If no deadline exists, the parties may be able to create one. If one side doesn't have sufficient incentives to negotiate, another may raise the ante with assurances about implementation, mitigation, or compensation offers contingent on an agreement, or with reminders of ways the dispute could be escalated. If there are an overwhelming number of parties, coalitions may be possible. If those with power to implement the agreement are not direct participants in the process, the mediator may be able to provide an appropriate link between the parties and the eventual decision-maker.

The most important reason for a relatively high success rate in dispute resolution efforts probably is that the mediators conducted dispute assessments at the beginning of each case, as a first step in helping the parties decide whether to proceed with a voluntary dispute resolution process and, if so, what the nature or the ground rules of the process should be. Environmental disputes are so varied that different forms of assistance will be appropriate in different cases, depending on the circumstances and the wishes of the parties. Mediators spend time discussing the possibility of a voluntary dispute resolution process with each of the parties, identifying and bringing to the parties attention to those conditions that may make it **difficult** to resolve the dispute, and helping the parties decide how they wish to proceed. Logically, this initial screening, if done well, will improve the likelihood that, once an informed decision has been made to negotiate, the parties will be successful in reaching an agreement. Until comparable samples of negotiated settlements without the assistance of mediators are available, however, this will remain a hypothesis.

Given the proposed role of mediation in the Environmental Assessment Review Process, the identification of interests should not prove to be an unduly complicated exercise. It will, however, likely involve distinguishing between directly and indirectly affected interests and deciding how these parties are to be represented at the negotiating table (i.e., sorting out who needs to be at the table, and who needs to be kept informed). For organized interests the selection of a representative should be reasonably straightforward. The participation of community-based interests, which tend to be more diverse and issue-dependent, may be secured through coalition-building (or may require the designation of a public **trustee).**

Step 3: **Drafting the Rules of tbe Game.** A mediator is usually confirmed at this point. Some form of facilitation will likely have been necessary to support the completion of the first two stages. This individual may or may not continue in the capacity of mediator: the key criterion for this position is that the incumbent enjoys the confidence of all parties to the negotiation and serves at their pleasure. Accordingly, it is only when this group is in place that the mediator can be formally appointed.

His or her first and perhaps most important task is to work with the parties to draft the protocols that will govern the conduct of negotiations. This phase tests the ability of the parties to work together. By focusing on the process for the settlement of their differences, rather than on the issues themselves, the mediator and the negotiators have an opportunity to build confidence through reaching understanding on neutral matters before tackling divisive ones. The agreement on procedures would normally cover a range of topics: the roles and responsibilities of the parties and the mediator; rules regarding confidentiality, release of information and reporting back to constituents; and the form and nature of the recommended agreement which will be forwarded to the responsible ministers.

Other matters to be settled at this stage include the timetable for negotiation and the resources necessary to support the process. Both the timeframe and budgetary allocations may be prescribed in general terms at the initiation of negotiations. It is quite likely, however, that the parties themselves will set their own deadlines and contingencies. Similarly, the augmentation and reorganization of budgetary allotments and allocations may be requested. All of these matters form part of the grist of joint problem-solving.

Step 4: Facilitating Agreement. At this stage, the parties to a dispute get down to the real business. The emphasis in mediated negotiations is on ensuring that the disputants work through the substantive issues in an orderly, focused, and creative manner. It is the job of the mediator to ensure, through a judicious blend of consultation, chairmanship and cajolery, that the discussions do not become unproductive and that representatives maintain links with their constituencies. Much effort may have to be expended to ensure that the parties continue in the principled negotiation mode and do not lapse into confrontational bargaining. When the latter occurs, the process can quickly become derailed and degenerate into confrontation.

The approach usually followed to ensure that negotiations are purposive and productive involves these activities:

- establishing the agenda of issues to be discussed (which problems are to be tackled and in what order);
- identifying information requirements, including the terms of reference for independent consultants and opportunities for joint fact-finding;
- working toward a single negotiating text to focus the discussions;
- packaging the alternatives for mutual gain so that important interests are considered and accommodated when formulating proposals (rather than the parties becoming deadlocked over specific issues); and
- finalizing the agreement, which will usually involve a full review of the terms of a proposal with the communities and organizations involved.

Within the context of the federal EA process, the relationship of this process to the requirements for an Initial Environmental Evaluation (IEE) or similar documents will need to be carefully worked out. Mediated negotiations can both extend and are empowered by technical analysis of project impacts and mitigation/compensation options. The IEE document can serve as a basis for the joint determination of further information requirements (see the second point above). It can also be jointly reviewed to explicitly focus on areas where matters of fact and technical interpretation are in dispute. The impact statement might then be envisaged as a consolidated document, outlining areas of and grounds for agreement and disagreement. Such an approach should set the stage for focused and productive discussion. (It also contains a number of features that may lend themselves to the scoping phase of a full-scale panel review in the event that mediation does not result in an agreement).

Step 5: Implementing tbe Agreement. The mediation process does not conclude when agreement is reached. A post-negotiation phase of activity follows, encompassing monitoring the implementation of the agreement (i.e., the compliance of the parties) and, if necessary, modifying sections of it. The terms of an agreement will usually include mechanisms for this purpose and provisions for renegotiation.

Given the uncertainties typically associated with assessing environmental effects, it is inevitable that certain understandings will be contingent upon further information and circumstances. Mitigation and compensation measures, for example, can be linked to actual (monitored) as opposed to assessed (predicted) effects. It is not always easy, however, to disentangle cause and effect and further negotiation may become necessary.

Because mediated negotiations are a voluntary consensual process, it is in the interest of the parties to formally link any agreement to the institutions and individuals responsible for implementation (i.e., those with decision-making powers). Within EARP, this relationship is

specified. The mediator is required to prepare a report to the Minister of the Environment. Where an agreement has been reached by the parties, the expectation would be that this will constitute the substance of the mediator's report. In the event of an impasse, the mediator could include recommendations that might be helpful in subsequent sequences of dispute settlement.

I-4 An Adaptive Strategy for Implementing Mediation

Obviously early initiatives in this area will be crucial to the long-term success of mediated negotiation in the federal EA system. The first order of business will be to develop a short list of prequalified mediators. At present, there are only a handful of people in Canada with experience in facilitating multi-party environmental negotiations; although there is reportedly no shortage of mediators in-waiting of various persuasions and there is also a more sizable pool of applicable skills in related areas, notably labour negotiation.

A considerable effort in training will be necessary to bring all parties up to speed on environmental mediation. There are probably as many, if not more, organizations in Canada offering training than conducting practice in mediation. In order to ensure training is relevant, it may be worth developing a case book of conflict situations which walks people through the various lessons that will be necessary to effectively participate in or support mediated negotiations. There are already a number of training manuals which could provide the basis for this document. A practical training-oriented case book on dispute settlement should supplement and extend a policy guide on environmental mediation prepared by FEARO/CEAA.

Finally, I am strongly in favour of what may be termed an "experimental management" approach to implementing environmental mediation. This involves making a research and development virtue out of an operational necessity; capitalizing on the fact and experience of implementing a new approach (at least in the present institutional context) and learning by doing. EA practitioners will be familiar with this notion of an adaptive approach to process development. How widely this concept is explicitly incorporated into mediation and ADR is unclear. The experimental management approach should be conceived and designed as a strategy for legitimation of environmental mediation in federal EA. Lessons and experience should be incorporated into ongoing referrals, and at a suitable point consolidated in the policy guidelines and training manual.

References

CEARC, *The Place of Negotiation in Environmental Assessment.* Canadian Environmental Assessment Research Council (CEARC) 1987

Gusman, S. and P.J. Harter, 1986, "Mediating Solutions to Environmental Risks", *Ann. Rev. Public Health 7,* Pg. 293-312

Picher, M. 1986a, "Mediating the Siting of Waste Disposal Facilities – Two Views: The Mediator's Perspective." *Canadian Environmental Mediation Newsletter* 1 (1): *1-2*.

Sadler B., 1990, *An Evaluation of The Beaufort Sea Environmental Assessment Panel*, Federal Environmental Assessment Review Office (FEARO)

Wallace, R.R. and J. Slavik. 1986, "Environmental mediation between industry and native peoples in defined energy approval processes." *Canadian Environmental Mediation Newsletter* I(3): *7-8*.

PART II: WORKSHOP HIGHLIGHTS

By Jeff Solway

II-1 THECONCEPTOFENVIRONMENTAL MEDIATION

Workshop participants emphasized that in contrast to panel reviews (or hearings), mediation is a process where interaction and agreement are encouraged. Indeed, the goal in mediation is to build consensus among the parties. Mediation is a process of negotiation in which the parties involved try to reach agreement on their differences with the assistance of a neutral third party.

Discussion made clear that mediation and hearings operate under quite different rules of procedure. Hearings are typically adversarial and non-interactive; mediation, in principle, is collaborative. But workshop participants were under no illusions that mediation can be expected to resolve all issues all the time, particularly in large and complex projects. Where a full settlement is not possible, it was agreed that mediation should be used to clarify areas of disagreement for subsequent adjudication by a panel.

In Bill C-78, mediation is framed as a formal alternative to the panel process. However, participants emphasized that the mediation approach to conflict resolution has application throughout the environmental assessment process. To quote one participant: "We should get away from thinking of mediation as one option in a box. It should be a tool all through the EA process." That point well taken, the workshop, and this report, does focus on formal mediation as defined in Bill C-78.

In mediation, the mediator is a process facilitator, not an issue arbitrator. He or she must be able to understand and state competing world views, values and interests, and help the participants find areas of possible agreement. At times a skilled mediator may reframe problems in such a way that progress can be made. But ultimately, in the words of a participant, "the mediator should be relatively invisible, and the success should be that of the parties to mediation."

The mediation provisions in Bill C-78. These are largely pragmatic in tone and intent. Mediation is expected to help make both decision-making and implementation more effective

and efficient. It is expected that agreements that have been reached by those directly involved and affected will be implemented smoothly: "In practice, the best decision is usually a decision that the parties create, not one that is imposed." Government agencies, proponents and public interest groups all appear attracted to the pragmatic potential of environmental mediation.

Some government departments are interested in mediation because they are swamped under the present process. For example, Energy Mines and Resources (EMR) deals with some 5000 projects a year subject to environmental assessment. Many are screened out quickly, and only a few are subject to a panel review. In these cases, the department considers it has failed. There are, however, differences of opinion as to how widely that position is held across government.

For proponents, mediation seems to have appeal as a more cost-effective approach. When there are uncertainties about impacts, projects are usually subject to rigorous assessments in which, seemingly, there are requests to study everything. A collaborative process, with neutral facilitation, can be helpful in fostering a more discriminating approach based on joint fact-finding.

Community and environmental groups are interested in mediation for similar reasons. In both Canada and the U.S., these groups have had positive experiences with consultative and multi-stakeholder processes, and they have found panel reviews extremely taxing on their resources. Their support for mediation is contingent, however, upon outcomes that prove enduring. Public interest groups have been well consulted in recent years — many feel they have been over-consulted. But when the final decision is made, they often feel used and ignored. This should not, by definition, happen in a successful, well-facilitated environmental mediation.

Yet mediation must not be promoted and managed by government simply as a streamlining mechanism. To many environmental groups and local communities, the term streamlining may connote a cheaper, quicker mechanism designed not for the public good, but for government convenience. As a collaborative problem-solving tool, mediation may well shorten the process with no compromise of the public interest. Nevertheless, the goal is a better process, not merely a shorter process.

However, the fact remains that many citizens see EA panels as an important right. The root issue here is how well mediation protects the public interest. This issue was closely scrutinized during the workshop. The consensus was that if the appropriate parties are at the table, including departments familiar with the applicable environmental quality standards, then responsible decisions will result. But the issue of credibility remains. Like justice, mediation should not only be fair, but it must be *seen* as such by all parties.

In the final analysis, mediation represents a fundamental shift in the culture of decision-making toward power-sharing. (A participant found support for his contention that, "In ack-

nowledging the various interests, mediation makes a contribution to democracy.“) The shift toward power-sharing is being made under pressure from various parties, but also, it is based on a recognition of the importance of “buy-in”: better decisions are reached and implemented more easily when made by those involved and affected. Indeed, formal mediation, under Bill C-78, is just one of a number of collaborative processes currently being entertained. At the same time, there are some evident institutional constraints in deploying mediation and related ADR approaches.

It is open to question whether this approach will actually prove to be a briefer and less costly decision-making process. Participants noted that a significant success factor is the nature of issues brought to mediation.

Tbe limits of mediation. Workshop participants tended to distinguish between two types of issues, which they referred to as “how to” issues, and “whether to” issues.

In “how to” issues, there is general agreement that a project is needed and that its adverse affects are mitigable, with appropriate redesign, compensation, monitoring, and so on. In such cases, there may be strong differences of opinion, but the potential for agreement among all parties exists. The problem here is how to implement mediation most effectively.

There are other cases, however, where the issue is whether to try mediation at all. Here, the parties’ differences may well preclude successful mediation. These differences will often be expressed in doubts about “need”: is this project really necessary? Such doubts may be based on fundamental differences in values, principles, world view, and politics, differences that may well reduce to disagreements on ideology and societal goals. When the parties are divided on this level, successful mediation is most unlikely. On the other hand, we may find that our perception of the limits to mediation expands with time and experience. As one participant put it, “After some years we will see a willingness to deal with deeper problems in mediation.”

In reality, of course, the limits of mediation cannot always be neatly framed. For example, the local community may accept a project in principle and be willing to enter mediation around contested issues, while a national environmental group disagrees in principle. A two-phase approach might be entertained in those circumstances, in which the fundamental, strategic issues are sent to a review panel, after which the parties enter into mediation to hammer out agreements on subsidiary issues.

Indeed, workshop participants warned that the limits of mediation may be pushed sooner, rather than later. Mediation may be embraced by public groups as a new venue for addressing fundamental questions. This does not mean the process should necessarily bend to that expectation. But it suggests that provision should be made in EA for addressing fundamental issues. Such provisions may emerge from current work on policy assessment.

II-2 OVERALL CONCERNS

11-2.1 Rethinking the Mediation/Panel Relationship

Bill C-78 presents mediation as an alternative and parallel track to a panel review. Should mediation fail, the project would be referred to a panel.

Workshop participants considered that the relationship between the mediation and panel processes was unduly constrained. A strong call was made for a synergistic and flexible relationship.

Several options emerged in workshop discussion:

1. *When mediation terminates with partial success.* Subject to approval by the parties, both agreed upon and outstanding issues would be reported to the panel. The panel would hear evidence on and adjudicate the outstanding issues.

2. Use *of adjudication within the mediation process. In* this case, an issue proving intractable in mediation would be referred to a panel. The decision would then be used to further the mediation process. This option would benefit from the existence of a standing panel. No provision for such a body is presently in Bill C-78. See Appendix C, Section 59(3)(c), for suggested wording.

3. *Mediation within a panel review. In* this case, a panel might refer one or more sub-issues to mediation where this is helpful.

4. *Mediation following a panel review.* It is conceivable that a panel may recommend that certain residual issues be referred to mediation. Should mediation fail, the matters in question could return to the panel, or perhaps to a standing panel.

5. *Where most but not all of the parties are willing to mediate.* In certain cases of this nature it might be decided to go ahead with mediation, with the results of mediation sent to a panel. The panel would weigh those results against the views of those who did not participate in the mediation.

6. *Mediation under the auspices of an arbitration panel.* This option assumes that mediation will not work without the threat of adjudication. This threat does exist in the Bill at present, in that matters dealt with in failed mediation end up before a panel, but some members of the workshop felt that this was not sufficient protection against bad faith. The labour expe-

rience, increasingly, is that parties do not treat mediation seriously since they see binding arbitration as the real decision-making process. Among some workshop members there was concern that, in environmental mediation, some parties could use mediation as a delaying tactic. Placing mediation within the more rigorous panel context may reduce the benefits of such bad faith. The existence of a standing panel would avoid considerable expense and delay.

However, it must be emphasized that even as the Bill stands, the threat of an onerous formal panel is a critical motivator for genuine participation in mediation. But for panels to carry this weight, their decisions must continue to be respected by the Minister, so that panel decisions are effectively final. This is consistent with Canadian tradition, but it remains an article of faith. Finality was the subject of considerable discussion. It was the view of some of those present, to quote one person, that "There has to be finality for motivation. If agreements can be overruled, people won't play."

114.2 The Importance of a Participant-Centred Approach

Although Bill C-78 identifies mediation as a collaborative problem-solving process, the language of the relevant sections of the Bill at times runs counter to that purpose. Workshop participants felt that the Bill reads in a very "top-down" fashion in crucial if subtle respects, particularly in provisions for Ministerial decision-making.

For example, Section 29 states:

> Where at any time after a project has been referred to mediation the Minister is of the opinion that mediation is not likely to produce a result that is satisfactory to all of the parties, the Minister may terminate the mediation and refer the project to a review panel.

The same issue recurs in-provisions for screening, appointment of the mediator, and terms of reference.

Screening. In this context, screening means the process by which a project is referred to mediation. Key criteria are set forth in Section 25 (a):

> Where a project is to be referred to mediation or a review panel under this Act, the Minister shall, within a prescribed period, refer the project
>
> (a) to mediation, if the Minister is satisfied that
>
> (i) the parties who are directly affected by or have a direct interest in the project have been identified and are willing to participate in the mediation through representatives, and
>
> (ii) the mediation is likely to produce a result that is satisfactory to all of the parties; or
>
> (b) to a review panel, in any other case.

Workshop participants suggested the Bill specify that the Minister's decision will be based on a fact finder's report. Fact finding is necessary to determine who the parties are, whether they will participate, whether each party can successfully delegate authority to a representative, and whether mediation is likely to yield a satisfactory result to all involved. The importance of such groundwork, both to the Minister's decision and to the success of mediation, should be acknowledged.

Also criticized was the definition of party as those "directly affected" or with "a direct interest". Given the success of multi-stakeholder processes in recent years, "direct" may be too

narrow a term. There was consensus that the words "demonstrable interest" should be substituted for "direct interest" in all references. Unless all those who consider they are affected actively participate in mediation the process may be compromised and remain open to objections and challenge. In some cases, the real question is whether a party is in the room, not whether the party is at the table. With this possibility in mind, perhaps "parties" could be defined fairly narrowly, with additional "participants" admitted as observers who periodically are invited to comment, though this, of course, raises an additional set of questions.

Appointment of the mediator; setting terms of reference. Provision here is spelled out in Section 26:

> Where a project is referred to mediation, the Minister shall, in consultation with the responsible authority,
>
> (a) appoint as mediator any person who in the opinion of the Minister, possesses the required knowledge or experience; and
>
> (b) fix the terms of reference of the mediation.

Workshop participants were unanimous in their opinion that mediation cannot succeed without participation by the parties in establishing the terms of reference. They also agreed that a mediator must serve "at the pleasure of the parties".

The Task. Section 28 (2) specifies that the mediator shall help the participants reach consensus on, among other things, the environmental effects likely to result from the project. Failure to reach consensus on this presumably implies that the mediation was not successful. However, it is quite likely that while differences remained on likely effects, agreement could be reached on mitigation and monitoring. This should not be regarded as failure.

For additional suggestions on changes to the wording of Bill C-78, please see Appendix B.

II-3 OPERATIONALIZING MEDIATION

11-3.1 Overview

The proposed EA process. Bill C-78 sets the basic framework for environmental assessment. In the absence of pursuant regulations and guidelines, much must be inferred about the process, the role of the responsible authority (the Minister, agency, department or crown corporation with decision-making power over the project in question), and the role of the Canadian Environmental Assessment Agency (CEAA, or "the Agency"). The Agency is an independent organization reporting to the Minister of Environment, responsible for supporting, managing, monitoring and evaluating the federal environmental assessment process.

On the basis of workshop discussion, a more detailed description of the mediation process is outlined below:

Step 1. Except in the case of excluded projects or those covered under class assessment, the responsible authority delivers to the Environment Minister a mandatory study report (for projects on the Mandatory Study List) or a screening report. Both would include an interpretation by the responsible authority.

Participants emphasized that all responsible authorities should be informed by the Agency of the new mediation process. Ideally, the fact finding and convening processes are begun by the responsible authority in the initial screening. If the responsible authority employs a mediative approach from first contact, it will be in a good position to advise on the feasibility of formal mediation.

Step 2. For all projects subject to mandatory screening, and for all screened projects deemed by the responsible authority to have serious effects: with input from the Agency, the Minister of Environment decides whether the project should be referred back to the responsible authority for decision, or be sent to mediation, or to a panel.

This choice would be based largely on the Agency's fact finding. Fact finding asks, what are the issues, who are the parties, and is mediation appropriate? Subsidiary questions would include:

- Are all interests identifiable and representable? (If not, note that these are problems that can be solved, for example by provision for the local community to ratify any agreements.)

- Do any of the parties feel they can achieve more of their interests through some other decision-making process? Is there incentive to participate?

Step 3. The Minister makes a decision.

Step 4. If the choice is mediation, the Agency then appoints a mediator and manages the convening process.

Convening involves confirming the parties' willingness to participate, and obtaining agreement on the terms of reference. Some of those at the workshop argued that to build rapport and ensure continuity, wherever possible convening and perhaps fact fmding should be handled by the mediator. Others disagreed, feeling that both should be handled externally. The bottom line here is credibility. If mediation will be accorded significantly greater credibility with one or both processes handled by someone external to the Agency, that should be the approach. This is discussed further in Section 3.3.

Managing relationships. Workshop participants emphasized that the mediator must regard all government agencies at the table as parties like any other, and must balance the terms of reference and budget set by the government with her or his ethical and professional responsibilities. (Reportedly, a central issue in U.S. environmental mediation is the interaction between the responsible authority, other central agencies, and the mediator.) A large part of the mediator's job is to handle difficult and delicate relationships. The challenge of managing relations with the employer and other government agencies, who like the other parties have their own agendas, must not be underestimated.

As the mediator must be perceived as independent from any government agenda, so the Agency must be perceived as independent from responsible authorities. The Agency will report to the Environment Minister, but will be independent from the Department of Environment — which will be a party to mediation as responsible authority. It is vital, then, that the Agency act independently from the Department, and be *perceived* as independent.

Marketing mediation. One of the Agency's more important tasks encompasses communications, education, and marketing. Government agencies, including Justice and the Auditor General, need to understand environmental mediation. The mediation option should change the way responsible authorities approach issues and parties from first contact. Indeed, if responsible authorities take a mediative approach wherever possible, fewer problems will require either formal mediation or a review panel.

The Agency, in turn, should be asking where mediation can be used most productively, not whether or not it fits at all. While its direct responsibility does not begin until the mandatory study or screening is delivered, it does have the mandate, stated in general terms in Section 59(2)b) "to advise persons and organizations on matters relating to the assessment of environ-

mental effects". For instance, the Agency could name a mediation coordinator to provide advice, support and direction on procedures and practice.

II-3.2 The Mediation Process

The pre-mediation phase. As indicated above, the formal mediation process begins long before participants gather around a negotiating table. It is in the pre-mediation phase when the parties and issues are identified, the terms of reference are established, and the prospects for successful mediation are assessed. There will be little interest in mediation if the parties are not involved in the fundamental decisions, specifically: Who is involved, what is on the agenda, and what are the rules? Clearly, the pre-mediation phase can become quite lengthy and complex, but "dealing with messiness" upfront is cost effective.

Workshop participants concurred that determining who should take part is frequently more difficult than identifying the issues. Identifying the interests requires an understanding of the politics of the situation. Who is really in control? Who are the real players? And with the interests identified, the question of representation may remain. Each sector - citizens and environmental groups, government agencies, and industry — has its own difficulties acknowledging interest and nominating a representative.

A factor that must be acknowledged at this stage is differential resources. A collaborative process can only be fair and open if all of the parties who should be at the table have the resources to do so. Where necessary, funding must be provided, along the lines of intervenor funding in panel reviews. How this should be managed is at yet unclear. Various approaches are being tried across the country. FEAR0 should review existing intervenor funding mechanisms to elicit principles and processes. In this context, distinction should be made between study funds and process funds. Study funds can easily dominate an assessment budget, given the cost and status of "expert" studies. Funds that assure full participation in the process are at least as important.

Once interests are identified a statement of known parties should be released, with a call for others with a demonstrable interest to come forward. When mediation begins, the first order of business should be to ask the group who is not present that should be.

Workshop participants were emphatic that the responsible authority should be a party to mediation, along with any other government agencies with jurisdiction over the project. U.S. experience indicates that agreements are significantly more likely to be implemented if the responsible authority is at the table. These agencies may not be party to all issues under the mediation, but their presence will at times be essential to ensure that agreements fall within existing regulations. However, it will be important not to overload the process with government representatives. This could be avoided by developing a departmental caucus position, and selection of a caucus representative, and by including those government agencies playing only a technical role on an "as required" basis. Participating departments must extend their full support to the process, including timely delivery of information. Initially, government agencies, and especially the responsible authority, may be reluctant to participate. An alternative is for the reluctant parties to participate as observers.

Clearly, the pre-mediation phase must be undertaken by a skilled practitioner. Fact finding and convening were likened to international diplomacy. The initial approach is casual: "I'm only here to suggest we consider talking about this." The question should not be whether it is in a party's interest to negotiate, but whether it is possible that negotiation could result in a satisfactory outcome.

People unfamiliar with mediation may be concerned that they will have to give up too much. They should be asked only to come to the table prepared to consider negotiation. Others may believe that entering mediation implies weakness. The appropriate strategy here is delicate. This is a dance that the agency promoting mediation must subtly lead.

Ultimately, the fact finder/convener must arrive at a judgment of the likelihood of a successful mediation. It is important not to underestimate this task. A technically knowledgeable convener will be able to evaluate whether the reasons for differences indicate that positions are irreconcilable, whether positions are truly mutually exclusive.

At the table. When the parties arrive at the table, the mediator has identified the parties, the parties have selected representatives, and very likely, the mediator has met with the representatives.

Bill C-78 states little about the actual process of formal mediation. It says only that the mediator is not to proceed until all the necessary information is made available to all of the parties; that the mediator is empowered to help the participants reach consensus, in accordance with the regulations and terms of reference, on likely environmental effects, mitigation measures, and an appropriate follow-up program; and that the mediator is to prepare a report detailing the conclusions and recommendations of the participants.

The first task, at the table, is to attend to process and reach agreements on procedures and the agenda. Good groundwork in the pre-mediation phase will smooth these tasks, and several mediators noted the benefit derived if the mediator is the same individual who has conducted the prior fact finding and convening.

It is useful to note that in mediation the parties act in accordance with their *perception* of self-interest, and that their perception changes and evolves. Therefore, it is appropriate that the agenda move with the parties' increasing understanding of where their interest lies and how they can best move ahead. An experienced mediator will recognize when an item should be on or off the table, and will facilitate ways to help people work toward consensus when the time is right.

Beyond this, there is no pre-set formula. The only rule appears to be flexibility. Mediation is a "moving, floating kind of environment". The approach must be collaborative and the structure

loose, with the mediator free "to craft whatever is appropriate under the circumstances". Key tasks in process management include:

- Ensuring that information is generated and expertise is found as the need arises. This may involve establishing a separate technical inquiry, for example.
- Identifying a process for bringing in additional players in mid-stream, if that proves pivotal to reaching agreement. The process must be "permeable".
- Helping to define and reframe issues when the process gets stuck. An example would be seemingly irresolvable differences on impact predictions. Reframed, the task might be seen as finding agreement on an adequate monitoring program. To quote a participant, "It's human nature that people articulate their differences in polarized terms. It will look irreconcilable, but usually it's not true."
- Establishing a good communications plan. This might involve no more than timely information mailings and minutes.
- Avoiding misunderstandings; for example by developing protocols for media relations.
- Training participants. The mediator needs to be ready to move into a training mode at the appropriate moment if participants' styles are getting in the way of problem-solving.
- Formation of caucuses, or subgroups, when there are large numbers of interests. A rough rule of thumb is that caucuses should be formed to limit the parties at the table to 20-25 people. (An example would be encouraging a trade organization to pull together an industry position.) The mediation provisions in Bill C-78 were defined in the expectation that the process would only be applied to discrete issues with a limited number of parties involved.

The possibility that an unworkable number of parties might be identified received attention. Several participants suggested that an important Agency role in dealing with this will be coalition building. Agency staff, they predicted, will help citizens organize themselves. More speculatively, existing NGO's could receive funding for this purpose. (For example, the Canadian Environmental Network has been instrumental in achieving consensus on which NGO's should participate in a particular review panel, coordinating caucuses of concerned groups, and selecting representatives.)

The mediator may also find it necessary to undertake a similar role with industry, promoting sectoral coalitions. And if citizens and industry are asked to work out sectoral positions, why should not the same be asked of government? Where many federal agencies are involved, a departmental caucus may be necessary.

The presence of Caucuses slows the process, increasingly the more diffuse the constituent communities. There must be time for the caucus representative to get back to the rest of the caucus members, and time for each of them to report back to their respective constituencies. This might take four to six weeks.

It should also be recognized that the mediation process is much more than what happens around a table. It involves work outside the negotiation sessions with individual representatives, with caucuses of representatives, and with the actual parties or the constituencies that those at the table represent. At times, the process will be adjourned while additional information, expertise, or parties is sought. However, maintaining contact between meetings is essential. Otherwise, "You find the world has changed!"

The entire mediation process may also be adjourned in accordance with the mediator's sense of timing. If the process becomes stalled, the mediator must exit. But the reality of failure — with a formal panel being the alternative — often has positive impact. The mediator must maintain contact with the parties and when appropriate, reconvene the process. An acute sense of timing is a critical skill.

On the mediator role, and what it takes to be a good mediator, two comments stand out:

- "It can be a lousy job. It can be very lonely. You need a certain aptitude, and you need to like pain."
- "It's difficult to find and recruit mediators. Not everyone can be trained to do it well, though I don't really know why since the basics are being a good listener, a straight shooter, fast on your feet, and honest."

The mediator may function alone, or as the manager of a mediation team. Team or co-mediation may be warranted where the issues are complicated, and can be useful in reducing bum-out, providing internship opportunities, and providing capacity to reflect on and evaluate the entire mediation exercise. Team or co-mediation may also prove valuable in cross-cultural situations, a challenge that shares a good deal with international diplomacy, on which there is a considerable body of literature.

Closure. Under Bill C-78, the goal of mediation is to reach consensus on likely environmental effects, mitigation measures, and an appropriate follow-up program. If mediation is successful, it then becomes subject to acceptance by the Minister of the Environment and the responsible authority. If unsuccessful, the matter goes to a panel review.

But what of partial success? This may well prove to be a common outcome, and provision must be made for this eventuality. Clearly, consensus on all issues by only some of the parties is not an agreement. But agreement by all of the parties on some of the issues represents progress that should be incorporated into a subsequent panel review. If the parties in a partially successful mediation concur, a report on their agreements should be introduced as evidence in a public hearing.

The difficult issue here is confidentiality. In principle, it makes sense that partial agreements serve as a scoping exercise for a subsequent panel review, with some issues settled and areas

of disagreement identified and perhaps clarified. But any report providing details of a failed mediation may compromise a party's position in the adversarial panel context. An example might be where a local community agreed in principle to a new pulp mill, if the technology used ensures that effluent contains no detectable dioxins. If the proponent does not agree to meet this condition, there is no agreement, and the conditional willingness of the community to accept the project should not be reported at all.

Partial agreements, confidentiality and the mediator's report were the subject of intense discussion. A mediator's report on agreements and outstanding issues should be reviewed and approved by all parties. Without explicit approval to go further, the report should only report which points the parties agreed on, and which points they did not agree on.

Characterizing differences is another matter again because the parties frame the issues so differently. With great sensitivity, in some cases, it may be possible for the mediator's report to provide an analysis of differences, but only if the parties agree on that analysis. Additionally, the parties might be invited to provide a synopsis of their position, without prejudicing their status in a panel review. Equally important, the mediator should not be asked to testify about matters that would compromise the ethics of professional confidentiality.

Conversely, a parallel thread running through the workshop is "openness". Environmental protection is essentially about the public interest, and mediation cannot be credible without being in some sense an open process. This matter was not settled in any clear fashion, but aspects were clarified:

- Ensuring that the full range of public interests are at the table, including government agencies familiar with applicable standards and regulations, should ensure that the public interest is protected.
- The parties may decide that their formal negotiations can be open. There are examples from the United States and Ontario of mediations conducted in this way. Minutes can also be distributed, and provision may be made for observers to the process. (One option for ensuring that mediated negotiations are a public process is the "fishbowl" technique. This might involve twenty people at the table, and another one hundred listening, with periodic opportunity for dialogue between the two groups. Such an approach is a way to involve people who are interested and concerned, and may intervene later, but are not recognized formally as parties to mediation.)

11-3.3 Who Should Mediate?

Much of the discussion on this question revolved around the issue of whether mediators should be CEAA staff members, or whether they should be external and independent. Alternatively, some combination of the two options might be appropriate. The workshop record reveals an equivocal conclusion similar in many ways to that reached on fact finding and convening: the fundamenal issue is credibility.

Some workshop participants felt that in most cases only external mediators will win confidence. Others disagreed, pointing to the importance of continuity, quality control, technical and process competence — and to the fact that, in the past, FEAR0 staff have earned an enviable reputation as capable and trusted panel chairs. In fact, FEAR0 has used internal chairs to maintain quality, but since mediation is already an established profession with its own standards, quality control in this case may not be as large an issue.

The internal/external debate may also be less of an issue in Canada than in the U.S. because of Canada's tradition of professionalism in the public service. Several Canadian examples were offered where internal staff act successfully as mediators. The Ministry of Transport, the Department of Labour, and WHMIS (Workplace Hazardous Material Information System) all use staff mediators. However, it was noted that the parties in mediations handled by Department of Labour staff are non-governmental. In cases where government agencies are involved in mediation, there is less confidence that an internal mediator could be neutral, perceived as neutral, and get results.

Several participants took the middle ground. In their view, the calibre and professionalism of the mediator is more important than whether he or she is external or internal to the Agency. In any case, it will be important for the Agency to employ highly skilled mediators for use in an emergency, and to handle fact finding/convening. As noted earlier, knowledge and credibility built up during fact finding and convening may be lost if one or both of those functions are separated from the mediation function.

The Agency was also encouraged to keep a public list of qualified mediators, and to evaluate the performance of fact finders, conveners and mediators used. (An important measure will be the opinion of the parties.) One participant suggested that the administration of mediation be kept quite separate from the administration of panels, so as to restrict the transfer of information.

II-4 SKILLS AND TRAINING

The essential prerequisites of a good mediator are not so much personality traits as capabilities. Important capabilities are:

- ability to gain and maintain trust;
- ability to listen;
- stamina and a thick skin;
- the ability to negotiate effectively;
- ability to move the process along directly through rewording of negotiated texts;
- being "a straight shooter, fast on your feet, and honest";
- substantive technical knowledge (to be able to determine if positions are truly mutually exclusive, for example);
- substantive knowledge of related politics and decision-making processes, in this case with respect to federal environmental assessment.

Mediators at the workshop reported that a number of efforts have and are being made to detail systematically the kinds of competencies necessary:

- A work group of the North American Society for Mediation has developed an analysis of the competencies important for mediators in general, and the environmental sector of the Society is currently developing a more detailed competencies list for environmental mediation.
- A work group of the Society of Professionals in Dispute Resolution (SPIDR) is currently trying to create a performance-based test for mediator aptitude.
- The U.S. Mediation Service has conducted a study exploring why certain of its mediators were requested more often than others. Data in the study included videotape of the mediators at work. The resulting article identified character traits, skills and other qualities.

Training for mediation. The best mediator training is experiential. Several participants reported good results with simulations, but this was followed by an internship in actual mediation. Multi-party mediation simulations based on Canadian cases are urgently needed. Formal, theoretical training (eg. in conflict and conflict management) was viewed as useful, but quite insufficient.

The following profession journals were identified:

- *Network Interaction for Conflict Resolution;*
- *The Negotiation Journal,* Harvard University;
- *The Alternative Dispute Resolution Journal,* Washington, D.C.;
- *Resolve,* Washington, D.C.

II-5 MONITORING AND EVALUATION

It is vital that the first few mediations under the reformed environmental assessment process go well, and that we learn as much as possible from the experience. A direct approach to evaluation would include data collection throughout the process. However, doubts were expressed about contact with the parties during the mediation — the evaluation process must be respectful of their needs — and after-the-fact interviews were viewed as useful. On the other hand, a non-intrusive observer might be acceptable to the parties, and clearly, there is no substitute for observation throughout the process.

Interviews after mediation adjourns should pose some basic questions:

- What happened, from your perspective?
- Did the mediation save time or money?
- In what ways was the mediator a help or hindrance?

Several workshop participants noted also that team mediation may prove valuable for evaluation, allowing more opportunity for monitoring and evaluation.

PART III: CONCLUSIONS AND RECOMMENDATIONS

By Barry Sadler

Roundtable discussion at the workshop provided a valuable set of ideas and insights. These are the basis for the following conclusions and recommendations.

1. The role and scope of mediation should be conceived morejlexibly than is currently implied in Bill C-78.

In particular, the mediation-panel review relationship should be rethought. As presently stated, this appears too rigid and uni-dimensional. Several options for making the mediation–panel relationship more creative and synergistic were put forward at the workshop. These deserve careful consideration.

2. ***Mediation should be applied as a problem-solving tool, with the process being framed by issues rather than vice versa.***

Workshop participants supported this principle. They emphasized that the role and scope of mediation in relation to issues should not be predetermined. A recommendation put forward in the discussion paper that mediation should be limited to less complex, well bounded issues (at least initially) received a mixed response. ***Some*** workshop participants felt that potential of mediation in dealing with larger, more complicated issues was unduly discounted. This is an area worth further discussion.

3. A participant-centred approach to mediation should be adopted, in which the emphasis is on including all parties with a demonstrable interest.

The language of Bill C-78 appears to workshop participants to be biased toward administrative convenience in the use of mediation. It reflects a "top-down" rather than a "bottom-up" or user-oriented approach. Specific concerns relate to the criteria for dispute assessment and referral in section 25(a) and for the appointment of a mediator in section 26. These can be respectively dealt with by:

- providing for a process of joint fact finding to determine the mediability of an issue; and
- recognizing that the mediator must be acceptable to all parties and serves at their pleasure as well as the Minister's.

4. ***In the pre-operational phase, it is important that line agencies understand the mediation process that is being proposed and their role and responsibilities within it.***

There was considerable discussion at the workshop about whether and how government agencies involved in the issues should participate in mediated negotiations. All participants felt strongly that agencies with direct responsibilities should be party to negotiations, though there was a caution that a multiple presence would be counter-productive. In this context, an option would be to form a government caucus in support of a lead negotiating agency. Workshop observers from federal departments, however, expressed concerns "about whether this approach would fly with senior managers". Quite obviously, this is something on which FEAR0 should be taking further soundings.

5. A three-stage mediation process is proposed, in which pre-negotiation spadework is important to the success of parties reaching agreement.

The effort put into the pre-mediation phase pays dividends later when the process is formally launched and substantive negotiations begin. Workshop participants were unanimous on that point. They also provided a fund of practical advice on laying the groundwork for a productive transition from screening the issues and convening the parties to facilitating negotiations. No purpose is served by repeating the details here, but one message requires reinforcing. It is very unlikely that the transition between the two phases will be as clear cut as implied in the referral clauses of Bill C-78 (see also #3). Similar comments apply to the transition to the post-negotiation phase (discussed next).

6. Specific provision should be made for mediated negotiations which are "partially successful ".

Under Bill C-78, it is assumed mediated negotiations will either result in agreement or end in stalemate. In practice, it seems quite likely that parties may reach partial or near-agreement (i.e. on all but one question). Where this is the case, it seems unreasonable and inefficient to have a panel review process that reverts to square one. The alternative would be for a panel to treat a mediated negotiation as a pre-review process and focus only on residual issues. Workshop participants, however, stressed that there are concerns regarding confidentiality and prejudice to the interests of parties to the negotiation associated with this course of action. These deserve further attention.

7. The prime qualification for a mediator is acknowledged credibility and demonstrated competence, rather than whether he or she is from "inside" or "outside" the agency responsible for managing the process.

This, ultimately, is the conclusion to be drawn from a lengthy discussion on whether FEARO/CEAA should rely on external or internal mediators. A mediator's standing and skill are the things that matter, not his or her affiliation per se. Lead staff from the agency clearly have a role to play in the pre-negotiation phase of fact finding and convening, and this may well yield a smooth transition to a mediator function. The key here is not only credibility with the parties and knowledge of the issue but ability to do a job which is different in kind rather than degree from panel chairmanship. One means of gaining these skills may be through participation in a "team approach" led by a pre-qualified mediator (e.g. one who meets the competencies described by the SPIDR Environmental Sector Committee).

8. The credibility of the mediation process is also influenced by the calibre of participation of the parties involved, and it is critical that adequate resources ate provided.

Resources include "intervenor funding" for interests who otherwise may not be able to afford to participate in a mediated negotiation. In the initial phase of this process, a certain amount of training may also be required to ensure all participants can participate effectively. Resources would encompass information for those not directly participating, but who must appreciate what is involved. (For example, it is important to keep open lines of communication between representatives and their caucuses.)

9. An explicit approach to monitoting and learning from the experience of the first batch of EA mediations should be adopted.

The learning curve will be particularly steep following the launch of mediated negotiation. The first formal mediations afford an opportunity to review how the process is working, and to make adaptions and corrections on an ongoing basis. This "trial and error" approach can pay major dividends during a critical time, when the effectiveness and credibility of the process is being shaped. Workshop participants suggested this monitoring function might be incorporated into the team approach to mediation noted in point 7.

10. The next step in the development of environmental mediation is a draft guide or manual on procedures and codes of practice.

Workshop materials and discussion indicate there is a sufficient basis of understanding and experience available in Canada to move reasonably confidently to the next step, drafting operational guidelines for mediated negotiations. A number of questions raised here require response and clarification as part of that exercise. The drafting of guidelines ideally should be undertaken by a multi-disciplinary team that balances perspectives and experience.

Appendix A: List of Participants

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APPENDIXB: SUGGESTEDCHANGESTOTHETEXTOF BILLC-78

Note 1: Additions to the current text are in italics, deletions are in square [ ] brackets.

Note 2: The language of the Bill calls for mediation to be considered if (among other considerations) "the project is likely to cause significant adverse environmental effects that may not be mitigable". This phrase is repeated in a number of contexts, and it is suggested that in each case the last portion of the phrase, "that may not be mitigable" be removed. This, it was felt, is a conclusion to be sought through a panel or mediation.

Note 3: In a number of instances, the Bill provides the panel option, but not the mediation option. This is the case for transborder disputes within Canada, disputes involving another country, and disputes where a project does not meet the usual criteria for assessment specified in Section 5. It is understood that for a variety of reasons the mediation process set up under Bill C-78 may be inappropriate in these cases, but it was agreed that **the** ***possibility*** of using that process should not be precluded. Hence it is suggested that a reference to mediation be added in each of the appropriate Sections. (See suggestions regarding Sections **43, 44** and 45.)

SUGGESTED REWORDING OF SECTION 19

19. (1) After receiving a mandatory study report in respect of a project, the Agency shall, *in the manner provided for in the regulations,* publish a notice setting out the following information:

(a) the date on which the mandatory study report will be available to the public;

(b) the place at which copies of the report may be obtained; and

(c) the deadline and address for filing comments on the conclusions and recommendations of the report

(2) Prior to the deadline set out in the notice published by the Agency, any person may file comments with the Agency relating to the conclusions and recommendations of the mandatory study report.

(3) ***The*** *Agency may request the responsible authority* ***to prepare*** *a response to any comments received pursuant to subsection* ***19(2).***

SUGGESTED REWORDING OF SECTION 20

20. After taking into consideration the mandatory study report, (and) any comments filed pursuant to subsection 19(2) ***and any reports thereon prepared by the responsible authority pursuant to subsection 19(3)***, the Minister shall

(a) refer the project to mediation or a review panel in accordance with section 25 where, in the opinion of the Minister,

(i) the project is likely to cause significant adverse environmental effects [that may not be mitigable], or

(ii) public concerns respecting environmental effects of the project warrant it; or

(b) refer the project back to the responsible authority for action to be taken under paragraph 34(1)(a) where, in the opinion of the Minister&

(i)] the project is not likely to cause significant adverse environmental effects[, or

(ii) any such effects can be mitigated.]

SUGGESTED REWORDING OF SECTION 21

21. Where at any time a responsible authority is of the opinion that

(a) a project is likely to cause significant adverse environmental effects [that may not be mitigable], or

(b) public concerns respecting environmental effects of the project warrant it,

the responsible authority may refer the project to the Minister for a referral to mediation or a review panel in accordance with section 25.

SUGGESTED REWORDING OF SECTION 24

24. Where at any time the Minister is of the opinion that

(a) a project is likely to cause significant adverse environmental effects [that may not be mitigable], or

(b) public concerns respecting environmental effects of the project warrant it,

the Minister may, after consulting the responsible authority or, where there is no responsible authority in relation to the project, the appropriate federal authority, refer the project to mediation or a review panel in accordance with section 25.

SUGGESTED REWORDING OF SECTION 43

43. (1) Where a project for which an environmental assessment is not required under section 5 is to be carried in a province and the Minister is of the opinion that the project is likely to cause serious adverse environmental effects in another province, the Minister may establish a review panel to conduct an assessment of the interprovincial environmental effects of the project **[.]** or ***he may refer the project to mediation.***

(2) The Minister shall not establish a review panel ***or refer theproject to mediation*** where the Minister and the Governments of all interested provinces have agreed on another manner of conducting an assessment of the interprovincial effects of the project.

(3) A review panel may be established ***or the Minister may refer theproject to mediation*** pursuant to subsection (1) on the Minister's own initiative or at the request of any interested province.

(4) At least ten days before establishing a review panel ***or referring the project to mediation*** pursuant to subsection **(1),** the Minister shall give notice of the intention to establish a review panel ***or refer theproject to mediation*** to the proponent of the project and to the governments of all interested provinces.

(5) Unchanged.

SUGGESTED REWORDING FOR SECTION 44

44. (1) Where a project for which an environmental assessment is not required under section 5 is to be carried out in Canada or on federal lands and the Minister is of the opinion that the project is likely to cause serious adverse environmental effects outside Canada or those federal lands, the Minister and the Secretary of State for External Affairs may establish a review panel to conduct an assessment of the international environmental effects of the **project[.]** ***or they may refer the project to mediation or such other similar dispute resolution mechanism as may available and acceptable to Canada and*** *the potentially* ***affected foreign state.***

(2) At least ten days before establishing a review panel or ***referring theproject to mediation*** pursuant to subsection **(1),** the Minister shall give notice of the intention to establish a review panel ***or refer the*** *project* ***to mediation*** to

(a) the proponent of the project;

(b) to the government of any province in which the project is to be carried out or that is adjacent to federal lands on which the project is to be carried out; and

(c) the government of any foreign state in which, in the opinion of the Minister, serious adverse environmental effects are likely to occur as a result of the project.

(3) ***A review panel may be established or the Minister and the Secretary of State for External Affairs may refer*** *the* ***project to mediation pursuant to subsection (1) on their own joint initiative or at the request of any potentially affected foreign state.***

SUGGESTED REWORDING OF SECTION 45

45. (1) Where a project for which an environmental assessment is not required under section 5 is to be carried in Canada and the Minister is of the opinion that the project is likely to cause serious adverse environmental effects on federal lands or on lands in respect of which Indians have interests, the Minister may establish a review panel to conduct an assessment of the environmental effects of the project on those lands [.] or ***he may refer the project to mediation.***

(2) Where a project for which an environmental assessment is not required under section 5 is to be carried on lands in a reserve that is set apart for the use and benefit of a band and is subject to the Indian Act, on settlement lands described in a comprehensive land claims agreement referred to in section 35 of the constitution Act, 1982 or on lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and is mentioned in a prescribed schedule, and the Minister is of the opinion that the project is likely to cause serious adverse environmental effects outside those lands, the Minister may establish a review panel to conduct an assessment of the environmental effects of the project outside those lands [.] ***or he may refer the project to mediation.***

(3) At least ten days before a review panel is established or ***theproject is referred to mediation*** pursuant to subsections (1) or (2), the Minister shall give notice of the intention to establish a ***review*** panel or ***refer the*** *project* ***to mediation*** to the proponent of the project and to the governments of all interested provinces and...

(The rest of section 45 is unchanged.)

SUGGESTED ***ALTERNATIVE*** TO SECTION 59(3)(a)

Notwithstanding any other provision of this Act, where it may be helpful in resolving any issue, on issues between or among the parties affected by the project, the proponent, or the responsible agency, with their consent and on terms acceptable to them, the Agency or any Review Panel, having taken or authorized the taking of any prior steps reasonably necessary, may appoint a Mediator to assist the parties in finding agreement.

(b) Any agreement reached shall be referred to the Review Panel who, in making its report to the Minister, shall advise fully in respect of any Agreement reached, having heard submissions from the parties, made such inquiries and taken into account such considerations as it deems necessary and appropriate in respect of the Agreement.

(c) If no Review Panel has been appointed the Agency shall refer any Agreement reached to the Minister who shall appoint a Review Panel, or refer it to a Standing Review Panel he may constitute for such circumstances, and fix the terms of reference having regard to the existence of the Agreement and such considerations as he considers necessary and appropriate, or if he is satisfied that the conditions of Section 25 and the requirement of Section **28(1)** are met, or substantially so, he may deem it to be the Report of the Mediator provided for in Section **28(1)** in its entirety.

(d) A Review Panel may delay, adjourn or otherwise conduct its proceedings in respect of and during the course of mediation as it sees fit, and take such other steps as it considers appropriate.

(e) Nothing said or done by the Mediator nor by any participant to the mediation is the proper subject of testimony, nor is the Mediator or Participant compellable to testify in respect of the mediation, or any document generated during the mediation compellable on production, before any Review Panel, Administrative Tribunal, Technical Tribunal or Court.

(f) The Agency may, **from** time to time, having regard to the evolving body of experience and rationale, issue Guidelines to Review Panels and Practice Notes to Mediators on a non-binding basis, for the purpose of furthering the development and consistency of standards, practices and procedures in giving effect to the intent of this Act which is that it is in the public interest to encourage the voluntary settlement of disputes by consensual processes and incorporate them into decision making and pursuant thereto, the Minister may make Regulations to facilitate carrying out the purposes and provisions of this Section.