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Resolving Conflicts Over Climate Change Solutions: Making the Case for Mediation

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This article explores the role that mediation can play in resolving the conflicts that are emerging in the climate change arena. Case studies describing mediation of disputes over air quality standards, timber harvesting, species protection, and ecosystems restoration, which resulted in consensus agreements among multiple, diverse stakeholder groups, demonstrate its applicability to the climate change arena. Mediation is not suited to every dispute or set of disputants. However, an analysis of the opportunities and constraints for addressing climate change disputes at the state, regional, and local levels suggests that mediated negotiations is well suited for resolving a number of the conflicts that are emerging over the siting of alternative energy projects, stringency of new regulations, and allocation of responsibility and costs among jurisdictions for reducing green house gas emissions.

I. INTRODUCTION

There has been significant public support for government programs to address the effects of climate change by reducing green house gas emissions.[1] Many communities are initiating "green" programs by planting trees, banning plastic bags, or providing incentives for solar or wind energy projects.[2] These communities recognize that even small efforts at the local level can make a difference. Moreover, as the cost of fossil fuel soars,

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1. *See generally* Cool California, http://www.coolcalifornia.org (last visited Mar. 31, 2010).
2. *Id.*

traditional opponents of new environmental initiatives have gotten on the bandwagon to reduce energy consumption as a means of trimming costs for power to operate homes and businesses.[3]

However, achieving even the minimum green house emission reductions that scientists indicate are critical to reverse the effects of climate change will take extraordinary measures. The regulations and measures necessary to reduce green house gases will have significant economic repercussions. Many of the solutions that are likely to be effective will change how we conduct business and our lives. As deadlines for adopting more comprehensive programs approach, the battle lines are once again being drawn.

Pepperdine University School of Law hosted a conference on September 25, 2009, that brought together government officials, representatives of public interest groups, and dispute resolution professionals to assess the challenges California faces in meeting mandates to reduce green house gas emissions, and to identify the opportunities for resolving potential conflicts through collaborative problem solving.[4] The conference sponsors sought to recognize the progress that has been made through joint problem-solving efforts among diverse interest groups that have characterized the initial attempts to confront global warming. The conference title, "Taking It Upstream," denoted that the next phase would require greater resolve and more concerted effort to overcome the obstacles that lay ahead.

The conference was designed as an "un-conference" with the intent to facilitate dialogue utilizing a range of innovative approaches for participant engagement.[5] In addition, the conference afforded opportunities for evaluating the efficacy and applicability of these and other innovative approaches to enhance public engagement in the climate change dialogue. The conversation at the conference also focused on how best to build a consensus among competing interests as new regulations and initiatives are unveiled, and whether consensus is possible.

3. *See generally* Keith Johnson, *Wal-Mart in China: Going Green Despite the Downturn*, WALL STREET J., http://blogs.wsj.com/environmentalcapital/2008/10/22/wal-mart-in-china-going-green-despite-the-downturn/ (last visited Apr. 3, 2010); Gina-Marie Cheeseman, *How Target Invests in Sustainability*, TRIPLE PUNDIT, http://www.triplepundit.com/2009/11/how-target-invests-in-sustainability/ (last visited Apr. 3, 2010).

4. Straus Institute for Dispute Resolution & the Geoffrey H. Palmer Center for Entrepreneurship & the Law, Taking It Upstream, http://law.pepperdine.edu/news-events/events/upstream/ (last visited Mar. 31, 2010). This site includes the conference program, lists of speakers, agenda, and audio records pertaining to the purpose and outcome of the conference. *See id.* The discussion below reflects the notes of the author who chaired several panels at conference.

5. *See* Straus Institute for Dispute Resolution & the Geoffrey H. Palmer Center for Entrepreneurship & the Law, "What Is an Unconference," http://law.pepperdine.edu/news-events/events/upstream/unconference.htm (last visited Mar. 31, 2010).

There was considerable dialogue among the participants of Taking It Upstream regarding whether consensus-building and mediation would be effective strategies in the climate change arena, and if so, in what context. Several panel members described the effective use of mediated negotiations in their agency to build support for critically needed public works facilities. One panel member noted that the experience changed how his agency engaged with the public. Although time-consuming and difficult, mediated negotiations that involved agency staff and potentially impacted community groups in the planning, evaluation, and design of facilities invested them in the outcome. Contrary to common perceptions, the compromises that were reached resulted in better, more creative outcomes, avoided litigation, and saved costs in the long run.

Other government officials cited the lack of experienced staff to facilitate a public consensus-building process. Still others expressed frustration over the ability to achieve unanimity in their community and concerns about the "nay sayers" who could crater what might have been a productive effort. They questioned whether consensus should be re-defined as less than 100% agreement.

In the afternoon elected officials panel, participants stressed the importance of determining what approach for public engagement best fits a particular issue or conflict. First, it is important for government officials to set appropriate expectations before they launch a collaborative effort. If the goal is to obtain meaningful public input that will help inform the decision of an agency, then these boundaries should be stated upfront. It is also critical to provide feedback to constituents on how their input informed the process. If the goal is to reach consensus on specific details of a policy, then the process should be designed to achieve this outcome. The elected officials panel members also emphasized that absent community consensus, elected officials needed to make it clear that they would make the difficult decisions. One of the clear messages of the conference was the importance of engaging the public in decision-making on climate change, and identifying what processes for public engagement were best suited to a particular issue or community.

This article will explore the role that mediation can play in resolving the conflicts that are likely to emerge in the climate change arena. Two other articles in this issue (Greenway and Zikman) provide a discussion of

innovative public engagement techniques.[6] There are conflicts that can best be addressed through mediated negotiations and others that lend themselves to different strategies and public engagement techniques. Mediation is not suitable for every dispute or set of disputants.

Before proceeding, it is important to define some of the terms that will be used in this article.[7] The terms "green house gases," "climate change," and "global warming" are used interchangeably. Green house gases (GHGs) are the by-product of carbon combustion (i.e. the burning of coal or gasoline).[8] The primary gases of concern are carbon dioxide, methane, ozone, nitrous oxide, and chlorofluorocarbons.[9] Energy consumption and transportation are the largest sources of carbon emissions.[10] The increase in carbon emissions over the past century has resulted in global warming.[11] Scientists have measured changes in the ozone layer—as evidenced in holes in the layers above the north and south poles—which has then been attributed to global warming and other climate changes.[12] The impacts of climate change will vary around the planet. For example, there may be more or less rainfall in a particular region resulting in extreme changes in cropping patterns.[13] In addition, it is anticipated that there could be additional sea-level rise from the melting of glaciers, increased flooding, and increased threats of forest fires.[14] There are also concerns about

6. *See* Greg Greenway, *Getting the Green Light for Senate Bill 375: Public Engagement for Climate-Friendly Land Use in California*, 10 PEPP. DISP. RESOL. L.J. 433 (2010); Steve Zikman, *South Pasadena: A Dialogue on Dialogue*, 10 PEPP. DISP. RESOL.. L.J. 355 (2010).

7. Many of the definitions provided can be found in AB 32 "Global Warming Solutions Act of 2006," passed by the California legislature and now found under California Health and Safety Code section 38500. *See* California Global Warming Solutions Act of 2006, 2006 Cal. Legis. Serv. 2755 (West) (codified as amended at CAL. HEALTH & SAFETY CODE § 38500 (West 2006), *available at* http://www.arb.ca.gov/cc/docs/ab32text.pdf. The Climate Change Scoping Plan also contains definitions of several key terms. CAL. AIR RES. BD., CLIMATE CHANGE SCOPING PLAN, APPENDICES, VOL. 1, at B-12 to B-14 (2008), *available at* http://www.arb.ca.gov/cc/scopingplan/document/appendices_volume1.pdf.

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS – CONTRIBUTION OF WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE IPCC (2007), *available at* http://www.ipcc-wg1.unibe.ch/publications/wg1-ar4/ar4-wg1-spm.pdf.

12. *See generally* Working Group I Fourth Assessment Report, IPCC, http://www.ipcc-wg1.unibe.ch/publications/wg1-ar4/wg1-ar4.html (last visited Apr. 3, 2010).

13. *See generally id.*

14. *See generally id.*

deforestation around the globe as cutting forests results in less removal of carbon from the atmosphere.[15]

Scientists have also indicated that cumulative reduction of GHGs is necessary to address the problem of climate change.[16] Merely moving the problem to another city, state or country will not address the global impacts. Local action is important because every reduction in energy even at the household level equates to a cumulative benefit. To make a dent in the problem, however, regional and statewide approaches must be crafted.[17]

There are many individuals who believe that the changes in climate are not attributable to green house gases, but are cyclical effects that have occurred before on this planet.[18] They contest the science behind global warming. Others dispute the urgency of responding to these effects and have expressed concerns about the cost.[19] The conflicts that will be discussed in this article pertain primarily to legislation that has been proposed or is under consideration that mandate specific targets for reducing GHG-emissions in the next decade and in the next forty years.

The article also refers to several dispute resolution techniques that are described below.

Mediation. Mediation is often defined as negotiation with the assistance of a neutral third party.[20] Unlike an arbitrator or a judge, a mediator cannot impose a solution on the parties.[21] Mediation is generally a voluntary process.[22] Mediators are jointly selected by the parties and must be acceptable to all of the interests.[23] The process is governed by rules of confidentiality.[24] The mediator employs shuttle diplomacy to assist the

15. *See generally id*.

16. *See generally id.*

17. *See* CAL. AIR RES. BD., *supra* note 7. The Climate Change Scoping Plan includes many of the measures that will be developed by the State of California Air Resource Board pursuant to AB 32. *See id.* The scoping plan also includes a history of the issue of climate change and discusses the need for collaborative action. See *id.* at C-49-54 for a discussion of the role of local government.

18. *See generally* Global Warming Hoax, *141 Scientists Sign Letter to UN Secretary-General Questioning Global Warming*, http://www.globalwarminghoax.com/comment.php?comment.news.123.1 (last visited Apr. 3, 2010).

19. *See generally* Global Warming Hoax, http://www.globalwarminghoax.com (last visited Apr. 3, 2010).

20. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 111 (4th ed. 2003).

21. *Id.*

22. *Id*. at 4.

23. *Id.*

24. *See id.* at 427-34.

parties in reaching an agreement, and any agreement reached is binding.[25] The mediator facilitates the dialogue, meets separately with the disputant to encourage the generation of options for settlement, and typically designs and orchestrates the negotiation process.[26] In the public policy context, the mediator plays a significant role in helping to convene the discussions, is likely to meet with the parties between meetings, and may also be asked to play a role in the joint implementation of the agreement.

Facilitation. Facilitation is the process of managing discussion in a group setting.[27] It can be especially effective if the facilitator has no stake in the issues under discussion. A facilitator may be a group member or staff from the agency that is hosting the meeting.[28] For public involvement processes that are intended to enhance public participation, but are not specifically intended as negotiations, there is a full range of facilitation techniques that have been successfully employed.[29] The facilitator is responsible for ensuring that the agenda is clear, that information necessary for obtaining input is provided, that creativity is encouraged, and that the parties talk to one another rather than at one another.[30] The outcome can be consensus on the issues, but typically a facilitated meeting or process will result in identification of options, evaluation and narrowing of options, and providing direction to decision-makers on preferences.[31]

Mediators are also facilitators. They use facilitation techniques to progress the dialogue and build a consensus.[32] Not all facilitators are mediators, however. The key distinction is in the formal relationship of the mediator to the parties, the rules of confidentiality, and the intended product of the process—a unanimous binding agreement.[33]

Convening. Parties who are engaged in a dispute or who are considering whether they are interested in participating in a public policy dialogue may not have a mechanism for coming together.[34] Convening involves identifying the individuals or interests that wish to participate or are

25. *See id.* at 117-18.

26. *See id.*

27. LAWRENCE SUSSKIND ET AL., THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT 7, 207 (1999).

28. *Id.* at 6.

29. *Id.*

30. *See id.*

31. *See id.*

32. *Id.* at 8.

33. *Id.* at 8-9.

34. *Id.* at 20-24, 169-97. Chris Carlson, in Chapter 4, provides two examples of a convening process, one in a community context and a second for a federal agency. *Id.* at 171-75.

necessary to participate for the discussions to be productive.[35] Convening is typically the first step in the mediation process.[36] It may also involve process design that is tailored to the unique circumstances of a particular conflict.[37] Unlike the typical litigated case in which the parties are already identified (the plaintiff and the defendant, for example), the decision on who needs to participate in resolving a public policy dispute is complicated.[38]

The mediator, as convener, may consult with the lead sponsor or sponsors of the potential process to identify the parties that need to be contacted to ascertain support and interest in the process.[39] Confidential interviews determine what issues lend themselves to negotiation—whether parties are willing to participate, and who else needs to be included for talks to proceed. This feasibility assessment will suggest whether a process is appropriate, and if it is, will determine the shape of the table, issues, and process design.[40] If a process is not feasible, then the convener may suggest variations on the process that will either help dialogue to progress, address a subset of the issues, or recommend that a process is not viable.[41]

Consensus. Consensus is defined as general agreement.[42] In the mediation context, consensus implies the unanimous consent of all of the parties to a set of actions or outcomes.[43] Parties in consensus processes have developed different variations on this definition.[44] Some have defined consensus as agreement on all of the significant issues.[45] Others have refined the term to state that consensus can be reached even if every member is not fully satisfied with every provision as long as there are not strongly

35. *Id.*

36. *Id.* at 169.

37. *Id.*

38. *Id.*

39. *Id.* at 179. *See also* SUSAN L. CARPENTER & W.J.D. KENNEDY, MANAGING PUBLIC DISPUTES 77-78 (2001).

40. SUSSKIND ET AL., *supra* note 27, at 75-91; CARPENTER & KENNEDY, *supra* note 39, at 71-91 (describing how a neutral analyzes a dispute to determine if negotiation or mediation is feasible).

41. *Id.*

42. Merriam-Webster Online, Consensus, http://www.merriam-webster.com/dictionary/consensus (last visited Apr. 3, 2010).

43. GERALD CORMICK ET AL., BUILDING CONSENSUS FOR A SUSTAINABLE FUTURE: PUTTING PRINCIPLES INTO PRACTICE 36, 137 n.7 (1996), *available at* http://www.geraldcormick.com/PDFs/Building%20Consensus.pdf.

44. Gerald W. Cormick, *Crafting the Language of Consensus*, 7 NEGOT. J. 363, 364-67 (1991).

45. *Id.* at 365-67.

held positions in opposition.[46] One person or party has the ability to veto the decision of the group.[47]

II. MAKING THE CASE FOR MEDIATION

Mediation has been utilized in the resolution of multi-party complex public disputes for over thirty-five years at all government levels.[48] Diverse stakeholder groups participate in a structured process facilitated by a neutral mediator to address their conflicting viewpoints on issues or on a project with the goal of reaching a consensus on an agreement. A carefully structured mediation process is able to accommodate dozens of individual groups utilizing designated representatives, spokespersons, and technical workgroups. While there may be seventy-five individual stakeholder groups represented, the number of negotiators may be limited to twenty-five.

Reaching a consensus implies that there will be compromise, while the needs of the individual parties have been substantially met.[49] Although reaching 100% agreement is a difficult and time consuming goal to attain, participants have indicated that the durability of these agreements has outweighed the cost and effort.[50] Nevertheless, mediated negotiations have successfully resolved disputes over extremely controversial and complex public policy issues including standards for pollution control, ecosystem restoration, and economic revitalization of distressed communities.

Faced with strict deadlines and onerous requirements, many leaders who are also strong advocates of public involvement are questioning the practicality of initiating consensus processes to address initiatives, especially if these efforts could be forestalled by extreme groups on either side of the negotiations table.[51] In some instances, government leaders and dispute resolution professionals who are considering mediated negotiations are suggesting that consensus be redefined as acceptance by a super majority.[52]

The discussion below focuses on how mediated negotiations can be employed to effectively resolve the disputes that are likely to arise at the state, regional, and local levels in the climate change arena. Several examples of the use of mediation at different levels of government are

46. *Id.*

47. Gerald W. Cormick, *Mediating Environmental Controversies: Perspectives and First Experience*, 2 EARTH L.J. 215, 215-24 (1976).

48. Cormick, *supra* note 44, at 365-66.

49. SUSSKIND ET AL., *supra* note 27, at 327, 333.

50. *Id*. at 327-29.

51. *Id.*

52. *Id*. *See also* Cormick, *supra* note 44, at 366-367.

provided to demonstrate the effectiveness of mediation in resolving complex disputes and to provide an institutional framework that can be applied in a variety of contexts. The discussion will address the following:

- What conflicts are emerging in each dispute arena;
- When are mediated negotiations appropriate;
- What are the existing challenges and opportunities for addressing these conflicts;
- How do these conflicts and issues compare to public policy issues that have been addressed to date through mediated negotiations;
- Recommendations for government officials and stakeholder groups.

A. Issues

As noted at the beginning of this discussion, Taking It Upstream participants examined the issues that had to be addressed to reverse the effects of climate change from three different levels: statewide, regional, and local. Each level presents its own unique opportunities and constraints.

For each level, we explore the following questions:

- Are any of these issues appropriate for collaborative negotiations;
- Is it possible to achieve a consensus (unanimity among the primary stakeholders);
- Is the mediation model for achieving consensus applicable, or are other conflict resolution models more appropriate in a particular context.

Statewide. In 2006, the California legislature enacted Assembly Bill 32 (AB 32).[53] AB 32 requires the State to reduce levels of green house gas emission back to 1990 levels by the year 2020.[54] The legislation further requires that the State's carbon footprint be reduced 30% by 2020 and 80% by 2050.[55] Jurisdictions will be required to reduce emissions from government operations, set targets for regional transportation, and adopt green building practices.[56] Development of specific additional criteria and

53. Assem. B. 32, 2005-2006 Sess. (Cal. 2006), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.pdf; *see also* CAL. HEALTH & SAFETY CODE § 38562 (West 2009).

54. *Id.*

55. *Id.*

56. *Id.*

measures including regulatory penalties was delegated to the Resources Agency and to a Climate Action Task Force.[57]

The California legislature subsequently adopted Senate Bill 375 (SB 375), which requires metropolitan planning agencies to develop GHG reduction plans and requires each local government agency to adopt a Sustainable Community Strategy (SCS) that will include baseline inventories, forecasted development plans, and a strategy for meeting reduction targets.[58] These regional and local plans are to be coordinated on the same cycle with regional transportation plans and regional housing need assessments.[59]

What remains to be decided at the state level are the rules of engagement. Specifically, interim targets, regulatory schemes for quantifying benefits from individual strategies, the integration of air pollution regulations with green house gas regulations, opportunities for emission trading (cap and trade program), and penalties for non-compliance have yet to be promulgated.

In addition, the California Environmental Quality Act (CEQA) has provisions requiring that projects be analyzed to determine the environmental impacts that could result from implementation and mitigation measures for reducing those impacts.[60] Interim guidance regarding how to address climate change was issued in June 2008, with a final document slated for adoption in early 2010.[61] However, the State Attorney General independently initiated litigation against several jurisdictions arguing that their General Plans did not adequately consider the impacts of climate change. The negotiations that ensued between the Attorney General and the local agencies resulted in significant modifications to the proposed planning

57. *Id.*

58. S.B. 375, 2008-2009 Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20080930_chaptered.pdf.

59. *Id.*

60. *See* CAL. PUB. RES. CODE §§ 21000-21006 (West 2009).

61. S.B. 97, 2007-2008 Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0051-0100/sb_97_bill_20070824_chaptered.pdf. The Technical Advisory report from the Governor's Office of Planning and Research relating to addressing climate change through CEQA was drafted pursuant to S.B. 97. *See* GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, TECHNICAL ADVISORY CEQA AND CLIMATE CHANGE: ADDRESSING CLIMATE CHANGE THROUGH (CEQA) REVIEW (2008), *available at* http://www.opr.ca.gov/ceqa/pdfs/june08-ceqa.pdf. It governs how agencies prepare project environmental analyses. *See id.* at 1. These have been amended to add a review of the potential to create greenhouse gases and affect climate change. The CEQA Guidelines may be found at CEQA – Guidelines, http://ceres.ca.gov/ceqa/guidelines/ (last visited Apr. 3, 2010).

documents.[62] Until there is sufficient experience and case law governing this area of analysis, it is likely that there will be major litigation under CEQA challenging future plans and projects in the public and private sector.[63]

To achieve the long range targets set by the legislature, California will need to identify, and implement projects of statewide importance: large scale alternative energy facilities, re-forestation guidelines, mass transportation facilities, or new technology manufacturing plants. Based on the current timelines, this will require consideration of different permitting scenarios. There are already challenges to the siting of new energy projects. For example, Senator Dianne Feinstein (D-Cal.) has opposed projects in the Mojave Desert.[64]

Several major projects of statewide significance have already been challenged under CEQA. A proposed project in San Diego County is facing challenges from homeowners, the environmental community, and regulators.[65] The laying of transmission lines has been raised as one of the issues that must be addressed in the environmental analysis.[66] A proposed high speed train, whose funding had already been approved by the voters, was successfully blocked in Superior Court by opponents challenging the adequacy of the analysis of route alternatives.[67]

This type of litigation goes beyond opposition from site neighbors. Wildlife agencies are already conferring to address how to balance the benefits of particular locations of new alternative energy facilities against

62. Press Release, Office of the Attorney General, Attorney General Brown Forges Greenhouse Gas Reduction with City of Stockton (Sept. 9, 2008), *available at* http://ag.ca.gov/newsalerts/release.php?id=1608.

63. GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, *supra* note 61. The Technical Advisory and related information on requirements for consideration of the climate change impacts that must be assessed as part of the evaluation of projects under CEQA can be accessed at Governor's Office of Planning and Research, http://www.opr.ca.gov (last visited Apr. 3, 2010).

64. Kevin Freking, *Feinstein Seeks to Block Solar Power from California Desert Land*, HUFFINGTON POST, Mar. 21, 2009, http://www.huffingtonpost.com/2009/03/21/feinstein-seeks-to-block-_n_177646.html (last visited Apr. 3, 2010).

65. Onell R. Soto, *Three County Energy Projects Debated*: *Border-Town Residents Still Smarting Over Powerlink*, SAN DIEGO UNION TRIBUNE, Jan. 30, 2010, http://www.signonsandiego.com/news/2010/JAN/30/three-county-energy-projects-debated/ (last visited Apr. 3, 2010).

66. *Id.*

67. *See* Mike Rosenberg, *Menlo Park, Atherton Will Try to Reopen High-Speed Rail Lawsuit*, SAN MATEO TIMES, Feb. 9, 2010, http://www.mercurynews.com/search/ci_14360167 (last visited Apr. 3, 2010).

the negative impacts of these locations. The U.S. Fish and Wildlife Service and the California Department of Fish and Game have each sent comment letters regarding proposed wind facilities that question the adequacy of mitigating potential impacts on condors, migratory species, and other protected species.[68] Project applicants, manufacturers, and local agencies share concerns that this level of environmental scrutiny will increase the cost and time for required for permitting. They also question whether the legislature seriously considered how it would balance competing regulatory mandates—CEQA, the Federal and California Endangered Species Act, and the Clean Air Act—in permitting projects of this size and complexity.

The legislature has begun to address these potential conflicts, but it has still left several critical issues unresolved. Assembly Bill 45 (AB 45) provides exceptions for the development of small wind turbines by limiting the issues that could be challenged in unincorporated areas.[69] The legislation, however, does not exempt small wind systems from compliance with other environmental regulations.

Decisions on the rules of engagement described above could be enacted by the legislature with great specificity or could be delegated to various agencies. Under either scenario, there is also an opportunity for the state to engage in a regulatory negotiations process. Issues that could be tackled include:

- Criteria for siting projects of statewide importance;
- Exceptions to CEQA or other regulations for projects that achieve a minimum percentage reduction in overall greenhouse gases reductions;
- Economic and regulatory incentives for innovative projects and facilities;
- Emission reduction formulas for "cap and trade" type programs;
- Inter-jurisdictional banking rules;
- Reduction targets as well as penalties for non-compliance.

The economic and environmental implications of these decisions suggest that stakeholder negotiations would be appropriate. Similarly, the litigation that has already occurred presents opportunities for mediated negotiations.

Regional. As described above, SB 375 delegates significant autonomy to local governments to develop plans that address their own unique

68. *See* Letter from California Department of Fish and Game to City of Soledad (Mar. 25, 2009) *infra* Appendix A.

69. *See* STATE OF CA OFFICE OF LEGISLATIVE COUNSEL, LEGISLATIVE COUNSEL'S DIGEST, AB 45 (2009), *available at* http://www.aroundthecapitol.com/Bills/AB_45/.

circumstances.[70] However, the process will require considerable inter-jurisdictional cooperation. Even though each jurisdiction is given total discretion regarding the content of its SCS, this will be tempered by the need to meet regional targets.[71] For SB 375 to be successfully implemented, approaches that balance the costs and benefits of achieving regional targets among the participating jurisdictions are necessary.

Regional conflicts are likely to continue over traditional matters such as competition for businesses that bring in sales tax revenue. These conflicts could be more complicated and intense because of the requirement to consider the increases in green house gases from new development. Similarly, there may be conflicts regarding the locations and mitigation for energy-related projects of regional significance.

Issues that will require future resolution include:

- Credit for jurisdictions that implemented strategies in anticipation of the regulatory mandates or as part of voluntary reductions under AB 32;
- Changes to the decision-making structure of regional governments;
- Revenue and cost sharing;
- Fair share allocation of reduction targets among jurisdictions;
- Responsibility for compliance;
- Locations of projects of regional importance, for example, wind and solar facilities, new industries, and mass transit corridors.

Each of these issues will require considerable allocation of resources for resolution. Given the economic and environmental implications of these decisions, and the potential need to modify existing institutional frameworks for decision-making, dispute resolution suggests a role for mediated negotiations.

Local level. In addition to adoption of an SCS, local jurisdictions will be required to adopt climate action plans. These plans will include actions for achieving target reductions; timelines and funding such as changes in the building energy use; energy efficient construction for all government buildings and fleet operations; and use of recyclable materials.[72] Jurisdictions will also have to identify sites for the production of energy using renewable sources, create incentives for private development of

70. *See supra* text accompanying note 58.

71. *See* CAL. HEALTH & SAFETY CODE § 38562 (West 2009).

72. There is no specific requirement in AB 32 or SB 375 to complete these local plans. The imperative has derived from litigation initiated by the California Attorney General and provisions in the settlement agreements with individual jurisdictions. *See* Press Release, *supra* note 62.

renewable energy projects, and adopt programs that reduce potential risks from wildfires, flooding, and sea level rise. There may also be measures proposed to limit development in areas that are prone to these impacts.

There are numerous decision points that are likely to engender controversy in the development and adoption of these plans and local regulations. In addition to the environmental analysis that must accompany the adoption of each plan (under CEQA) issues that must be addressed include:

- Changes in zoning and zoning regulations;
- Restrictions on new development in hazard zones (with potential compensation);
- Siting options for renewable energy facilities;
- Reduction targets for residential, commercial and industrial properties;
- Incentives for GHG reduction;
- Penalties for non-compliance;
- Sources of funding including taxes, fees, and reduction in government services.

The tasks that have been delegated to local government involve many controversial decisions that lend themselves to citizen involvement and resolution of competing interest. The "green" action efforts likewise would provide an opportunity for stakeholder involvement. Both are opportunities for mediated negotiations, albeit the format and inducement for participation might different greatly.

B. Determining when Mediated Negotiations Are Feasible

In order to consider the challenges and opportunities for engaging stakeholder groups in building a consensus on climate change policies, it is helpful to first discuss criteria for determining when mediated negotiations are appropriate. Parties who are considering whether or not to engage in a mediated negotiation process must first assess whether the dispute lends itself to this approach and whether their interests can best be met through negotiations or an alternative process. This process is referred to as Best Alternative to a Negotiation Agreement (BATNA).[73] Professional mediators who are retained to conduct an assessment of the feasibility of a negotiated process evaluate the conflict using a set of criteria that will be described below.

73. ROGER FISHER & WILLIAM URY, GETTING TO YES 104 (1981).

Interest in compromise rather than delay or precedent setting. Parties that engage in litigation of environmental and public policy issues typically decide at the outset what they hope to achieve in court.[74] In cases of product liability, an attorney may be seeking an opinion from that court that will apply solely to his client, or an attorney may be seeking to set a precedent.[75] In this case, mediation would probably not be appropriate.[76] Similarly, parties who oppose a particular statute, policy or project and are relying on a tactic of delaying to dissuade decision-makers from proceeding or are hoping that a project proponent will lose interest or funding, would not benefit from mediation.[77] In other words, they would not benefit from reaching a settlement.

Uncertainty regarding the outcome. As discussed above, the parties' BATNA is an important consideration in determining the desirability of mediated negotiations.[78] If parties are uncertain about the strength of their position, either in their ability to influence decision-makers, a court, or a jury, mediation provides them with the opportunity to have greater and more direct control over the outcome.[79]

The cost of winning may be onerous. Gerald Cormick notes that parties must be purpose-driven to participate fully.[80] One of the key decision points is whether or not the group has a strong desire for finality.[81] In addition, parties may seek to avoid continuing in what may have become a high profile, divisive debate.[82] The possibility of more years of inaction, or frustration that none of the sides has been willing to make a concession is one of the key motivators for parties who participate in a mediated process.[83]

Litigated issues are not the matters that need to be resolved. Frequently, legal challenges to resource management issues or proposed projects are made primarily on the basis of process.[84] Were the

74. *Id.* at 104-111.
75. *See generally id.*
76. *See generally id.*
77. *See generally id*.
78. *See id.*
79. CORMICK ET AL., *supra* note 43.
80. *Id.*
81. *Id*.
82. *Id.*
83. *Id.*
84. *See* Alana Knaster, *Environmental Mediation: Balancing Economic Viability with Environmental Protection*, *in* PROSPECTS FOR AUSTRALIAN FOREST PLANTATIONS 425, 427 (1988).

environmental impacts fully disclosed? Is there adequate mitigation for noise or traffic impacts to an adjacent neighborhood, or protection of a sensitive species? Winning on a procedural matter is unlikely to result to desired changes to a proposal. Litigation is also typically not the appropriate venue for providing evaluation of technical issues and joint problem-solving.[85]

Parties may need to preserve their relationship. Winning in court or in the political arena may negatively affect the relationship among parties who have to continue to conduct business together. This may be true of different public agencies, a company and a regulator, or a government and its constituents. Parties eventually reach a stage in a consensus process where they candidly explore tradeoffs.[86] This ultimately leads to better understanding and building trust that improves the outcome of the negotiations and continues beyond the negotiations.[87] Mediation that involves diverse interests and cultures in a community may also lead to a long term culture of collaboration.[88] Learning how to participate in mediated negotiations also helps build the capacity of a community. Not only is their trust for working together on the implementation of a shared vision or dispute settlement improved, but the individuals involved develop skills that can serve their interests and communities in the future.[89]

Overlapping jurisdictions and diverse interests. When agencies share responsibility for a resource, but have different mandates to enforce, they may find themselves disputing over a solution to a problem with no mechanism available to resolve their differences unless collaboration is written into the statute.[90] Diverse interests in a community may wage battle in front of the legislature or city council, but different cultures, economic resources, and organizational structure are obstacles to sitting down to negotiate about differences. Mediation provides a structure for talks, with ground rules that identify the purpose of the talks and formalize the negotiations process.

Common ground or tradeoff balance exists. Although parties may be skeptical that there is common ground or a shared interest to be achieved at the onset of a mediated process, a consensus process relies upon the parties identifying common principles against which they can evaluate whether an

85. *Id.*

86. CORMICK ET AL., *supra* note 43, at 70.

87. *Id.*

88. SUSSKIND ET AL., *supra* note 27, at 965-68 (describing a collaborative community process in Chattanooga that brought the community together for a visioning process that resulted in long term community cooperation).

89. *Id.* at 1008 (describing a mediation process in Canton, Ohio).

90. *See* Knaster, *supra* note 84, at 426.

agreement meets their respective interests.[91] The identification of common ground is the most critical step in the balancing of interests in a public policy dispute.[92] Even if the common ground is based upon very general principles such as generating new jobs, improving air quality, preserving our unique life style for our grandchildren, it forms the basis for reaching a negotiated settlement.[93] The negotiations will focus on how much, how quickly and how much it will cost to achieve the shared "vision."[94]

As noted at the onset of this discussion, the "Taking It Upstream" participants assumed that there was common ground in seeking effective solutions to reverse climate change, even though the stakeholders may be differently motivated in achieving this goal. With some key interests now questioning whether a crisis exists, negotiations based on common ground may be more difficult. However, common ground may still exist with respect to the benefits that could result from reducing green house gas emission. For example, reducing energy consumption has both environmental and economic benefits. Promoting alternative energy technology that reduces emissions also has the potential to foster new industries that provide reliable, well paying jobs, higher profits, and improve our balance of trade. Implementation of climate regulations may have upfront costs that are controversial, but the stakeholder groups may be able to negotiate strategies for compliance with a view to achieving the long term benefits of these strategies.

Determining whether there are tradeoffs among the issues is a critical factor as well. It may be difficult before negotiations begin or even in the early stages to ascertain whether compromise is possible, but parties must individually assess if there are issues upon which they are willing to compromise when deciding whether to participate. This assessment is also one of the key tasks of the mediator who, as convener, plays a role in helping the parties assess the feasibility of engaging in talks.

Authority to represent one's interest group. For negotiations to be effective, the parties must be able to commit on behalf of the individuals or groups they represent.[95] While it is especially difficult for a loosely organized coalition to deliver its approval of an agreement, it is important to

91. *Id.* at 434.
92. *Id.*
93. *Id.*
94. *Id.*
95. *See* CORMICK ET AL., *supra* note 43, at 78-86.

establish communication lines and trust among the group members to enable representatives to speak on their behalf. The group is not abdicating its responsibility or giving away its ability to veto a settlement, but authority has to be delegated for negotiations to be feasible. There are similar constraints on government officials. One member of a city council or a senior staff member in an agency may be able to represent the organization at the table, but does not have final decision-making authority. Mediation ground rules may provide the flexibility to accommodate these different levels of authority and participation. Nevertheless, determining if all of the key players have this authority is a critical step in determining the feasibility of a mediated negotiations process.[96]

Some dispute resolution practitioners discuss these criteria from the perspective of when negotiations or consensus building is not likely to succeed.[97] Mediation may not be feasible if there are unrealistic deadlines, significant power or financial imbalances among the stakeholders that disadvantages of one the parties, or when one of the key parties with a stake in the outcome is unwilling to participate.[98]

C. Challenges and Opportunities for Resolving Climate Change Disputes

The criteria for determining the feasibility of mediated negotiations outlined above, whether from a positive or negative perspective, sets the stage for a discussion of the challenges and opportunities for resolving conflicts over climate change solutions. Each of the conference panels and group discussions focused on identifying challenges and opportunities for progressing the climate change agenda. Participants responded by outlining challenges in terms of technological, economic, political, and process factors that need to be addressed. Opportunities were viewed similarly, but with a focus on capitalizing on the shared purpose or common ground that had emerged, economic incentives, and public interest in the issue.

1. Challenges

Shape of the table. Panel members noted that a critical aspect of achieving consensus on public policy issues is ensuring that all of the key interest groups are represented. It can be daunting in a state as large as California, with its numerous urban communities, to try to accommodate all of the key interests while also limiting the number of participants so that

96. *See id.*
97. SUSSKIND ET AL., *supra* note 27, at 119-20.
98. *Id.*

talks can be productive. In addition, consensus-building processes can be cumbersome and time-consuming. Most importantly, it is an arena that is less familiar to groups and hence they are reticent to participate. Many feel that unless they can directly participate, they cannot influence the outcome.

Current economic crisis. Certainly, there are opportunities for investment and costs savings that will help achieve green house gas emission reductions; however, many conference participants noted that the recession has sharply reduced the ability to make progress. Lending is stymied and entrepreneurs are having difficulty securing investors who are willing to take risks in an uncertain economy. Small businesses and families are struggling to meet their basic needs, and climate change has moved to the back burner except when they can reduce costs by re-setting their thermostat or reducing travel. The stimulus package, theoretically designed to prioritize energy projects, instead focused on maximizing job creation and "shovel ready" projects were given priority. The economic crisis has greatly impacted government agencies at all levels. With cuts in funds and cuts in hours and positions, agencies are unable to project if they will be able to allocate funds for high priority projects even if there are extraordinary benefits in reducing the carbon footprint of the jurisdiction.

Resistance to change. Even in good economic times, small changes in our daily routine can be met with resistance. In the face of potential job loss, changes in community and the uncertainties regarding the pace of recovery, individuals are clinging to what is familiar and reliable. Even the energy efficient light bulb has its critics. During the recent gas crisis, a significant number of commuters switched to public transit and carpooling increased significantly in many communities. Yet as prices were reduced, old habits returned and the public went back to the private auto. This leads one to question whether the American public will accept the major changes and expenditures necessary to achieve emission reductions if modest strategies and changes in routine are resisted.

Reaction to "green initiatives" that target a particular industry or product. A number of jurisdictions have adopted ordinances that ban plastic bags in grocery stores or Styrofoam take out containers to reduce waste at landfills that cannot be recycled.[99] There was some initial resistance from businesses that utilized these products, but as long as there was a grace

99. *See* John Roach, *Plastic-Bag Bans Gaining Momentum Around the World*, NAT'L GEOGRAPHIC NEWS, Apr. 4, 2008, http://news.nationalgeographic.com/news/2008/04/080404-plastic-bags.html (last visited Apr. 3, 2010).

period that allowed them to use up their inventory, these measures were supported. The plastic industry recently responded, however, by filing litigation to forestall adoption of such ordinances.[100] "Save the Plastic Bag Coalition" sued the City of Manhattan Beach, California, arguing that the city had to prepare an environmental impact report when they adopted an ordinance banning plastic bags.[101] The coalition argued that the city did not examine the impacts of relying on paper bags subsequent to the ban.[102] The decision was affirmed by the appellate court.[103] This turn of events suggests that there will be growing resistance to banning of traditional products, introduction of new products that compete with current products, or legislation that limits the market share of a major player in the energy field. For example, the Pacific Gas & Electric Company is supporting a statewide initiative that would require two-third voter approval before a jurisdiction can choose an alternative energy provider.[104]

Intractability of traditional warring factions. Although the olive branch appears to have been extended as key economic and political interests joined to support the state's historic climate change legislation, many conference participants questioned whether this would continue. The conference participants were especially concerned because the costs and scope of the effort needed to achieve regulatory goals continue to increase. The battle over water supply in California typifies the intransience of the interests that are the result of what many characterize as underlying incompatibilities.[105] Several local officials indicated that they did not believe there were sufficient incentives for long-time opponents to cross the line to the negotiations table.

Time and resource intensity. The experience of many conference attendees who have participated in consensus-building suggested that the time necessary for grappling with the complex technical and economic issues that underlie climate change issues and the cost of lengthy processes was a major obstacle initiating mediated talks. Given the regulatory

100. Save the Plastic Bag Coal. v. City of Manhattan Beach, 181 Cal. App. 4th 521 (Cal. Ct. App. 2010).

101. *Id.*

102. *Id.*

103. *Id.*

104. Michael Hiltzik, *PG&E Amps Up Bid for Power*, LOS ANGELES TIMES, Feb. 10, 2010, *available at* http://articles.latimes.com/2010/feb/10/business/la-fi-hiltzik10-2010feb10. *See also* Dana Hull, *PG&E Spending Millions to Block Local Utilities*, MERCURY NEWS, Jan. 31, 2010, *available at* http://www.mercurynews.com/business-headlines/ci_14296650.

105. Linda Putnam & Julia Wondolleck, *Intractability: Definitions, Dimensions, and Distinctions*, *in* MAKING SENSE OF INTRACTABLE ENVIRONMENTAL CONFLICTS 37 (Roy Lewicki, Barbara Gray & Michael Elliott, eds. 2003).

deadlines and lead-time for implementing many measures and projects, they believed that government decision-makers needed to make the hard choices and accept the risk of voter rejection.

Unanticipated impacts of "green" solutions. Conference participants discussed the recent emerging opposition to large scale alternative energy projects. In these cases, the major challenge is not balancing economic issues against environmental protection, but it is weighing the benefits of a strategy for reducing green house gases against the unanticipated impacts of that strategy. This raised questions as to whether the life cycle benefits of biofuels or wind technology are actually cleaner than traditional technology. For example, an analysis of the benefits of utilizing an alternative fuel must factor in both the emissions from production of the fuel and emissions from its use in vehicles. The net benefit as contrasted with conventional fuel may not be as considerable as assumed. The battle lines have already been drawn over the siting of solar and wind projects that would significantly reduce GHGs, but which may impact habitat or kill birds.[106] The recent court decision regarding the route for the high speed rail project suggests that setting criteria for evaluating these projects and balancing competing interests will be difficult.[107] It is appearing less likely that a project can be approved in a timely manner and without causing significant environmental impacts.

Reaching consensus. Given the challenges outlined above, many community leaders are questioning whether consensus, defined as unanimity, is achievable, and at what price? At the Pepperdine conference, panelists expressed concerns regarding the difficulty of gaining assent from the five percent of the groups or individuals with extreme positions on either end of the spectrum. They questioned whether it was cost effective and whether trying to gain approval from the outliers would result in a watering down of the benefits of what was being negotiated. Others questioned whether consensus was actually attainable. Certainly, the challenges of designing the negotiations table, economic downturn, eroding imperative to

106. Jeffrey Ball, *Renewable Energy, Meet the New Nimbys: Solar and Wind-Power Proposals Draw Opposition from Residents Fearing Visual Blight; A Dilemma for Some Environmentalists*, WALL STREET J., Sept. 4, 2009, *available at* http://online.wsj.com/article/SB125201834987684787.html (describing some of the recent controversy over the siting and operation of wind farms).

107. *See* Stacie Chan, *High-Speed Rail Lawsuit Settlement Leads to More Questions*, SILICON VALLEY PULSE, Mar. 1, 2010, http://siliconvalleypulse.serramedia.com/content/high-speed-rail-lawsuit-settlement-leads-more-questions (last visited Apr. 3, 2010).

address climate change, the environmental resource balancing act, and resistance to change make the goals of collaborative consensus-building more difficult.

2. Opportunities

Deadlines and legislative mandates. Public policy negotiations have benefited from clear deadlines and policy guidelines. These establish the BATNA for any negotiations process. Assuming that the reduction targets and dates do not slip, the regulatory deadlines of AB 32 and SB 375 in California and, at a later date, regulatory deadlines that may be imposed in federal legislation to implement climate change agreements provide critical motivation for stakeholder groups to collaborate.[108]

Global race to manufacture clean technology. Although China exceeds the United States in the generation of GHGs, the Chinese government has adopted policies and incentives that now make China the leader in technology development for solar and wind energy.[109] China has set ambitious goals for the use of renewable energy and will be striving to meet its own accelerating energy demand as well as dominate energy exports.[110] This green gamesmanship has the potential to spur American industrial interest in competing for a market share. President Barack Obama, in his State of the Union Address on January 27, 2010, expressed concerns that the United States was falling behind China.[111] With an ever increasing national debt and eroding market share in technology, this is an opportunity that could propel American ingenuity to successfully compete.

Energy is likely to be the biggest opportunity for research and development since the chip industry wave of innovation. It is potentially a trillion dollar market in the United States. Solar and wind energy markets

108. Assem. B. 32, 2005-2006 Sess. (Cal. 2006), *available at* http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.pdf. There are 2020 and 2050 deadlines for green house gas reductions. *See id.* Another example of the benefits of a deadline is discussed in the description of the Negotiated Rulemaking Process for Reformulated and Oxygenated Gasoline. *See supra* text accompanying note 110. The six month deadline given to the EPA by Congress provided the impetus for the parties to collaborate.

109. Keith Bradsher, *China Leading Global Race to Make Clean Energy*, N.Y. TIMES, Jan. 31, 2010, at A1, *available at* http://www.nytimes.com/2010/01/31/business/energy-environment/31renew.html. *See also* Thomas L. Friedman, *Make America a Solar Power*, SAN JOSE MERCURY NEWS, Sept. 16, 2009.

110. Bradsher, *supra* note 109.

111. Barack Obama, U.S. President, State of the Union Address (Jan. 27, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

are projected to reach $250 billion in the next ten years.[112] The potential gains from this market are a key factor in maintaining an alliance between business interests and environmental advocates. As noted in the introduction to this article, the relationships among vested stakeholders are changing. This presents both an opportunity and a challenge. The success of China in meeting the global market challenge suggests that all levels of government will need to forge a consensus on regulations and incentives addressing both the economic and the environmental side of the equation.

Federal and state incentives. Funding for clean energy innovation and projects has already been instrumental in spurring investment in energy initiatives.[113] Recovery Act dollars have been invested in communities across the country which have provided major incentives to local and state governments to jump start programs that might not have been funded for years in the future.[114] Tax credits and rebates have been attractive to investors and consumers, and if extended, will continue to spur development.

Policy incentives to utilize public engagement and alternative dispute resolution. There are provisions in several pieces of legislation and programs that promote the use of public engagement and alternative dispute resolution for obtaining input and support from the public in setting long range goals and programs or for resolving disputes that may arise in the approval and implementation process. SB 375 includes provisions that require regional governments to use dispute resolution approaches for resolving their disputes.[115] Several communities across the state have engaged in the preparation of blueprints for growth.[116] These plans pre-date SB 375 but contain some of the same programmatic elements that will be

112. *See generally* Scott Duke Harris, *Silicon Valley Tech Leaders Are Reinventing Themselves for a Cleantech Revolution*, SAN JOSE MERCURY NEWS, Jan. 31, 2010, http://www.mercurynews.com/business/ci_14225614 (last visited Apr. 3, 2010).

113. *See, e.g.*, Victoria Guay, *Energy Project First of Its Kind in the State*, CITIZEN.COM, Apr. 3, 2010, http://www.citizen.com/apps/pbcs.dll/article?AID=/20100403/GJNEWS02/704039881/-1/CITNEWS (last visited Apr. 3, 2010).

114. *See id.*

115. SB 375 has a specific provision for the Southern California Association of Government with respect to dispute resolution. *See* S.B. 375, 2008-2009 Sess. (Cal. 2008), *available at* http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_bill_20080930_chaptered.pdf.

116. Ana Campo, *With Gas Over $4 Cities Explore Whether It's Smart to Be Dense*, WALL STREET J., July 7, 2008, *available at* http://online.wsj.com/article/SB121538754733231043.html (describing the Sacramento Council of Government Blueprint process, which has become the model for Sustainable Community Strategies in SB 375).

included in the subsequent sustainable community strategies. The blueprint process is designed to evaluate alternative land use development patterns and put smart growth principles into action to achieve GHG reductions. The blueprints are prepared at the regional level. The blueprint process included extensive stakeholder involvement and the identification of preferred growth scenarios.[117]

Federal and international dispute resolution process models. There are also models in U.S. and Canadian legislation supporting the use of consensus-based processes. These processes have been successfully applied to resolve dozens of disputes that involved multiple stakeholder interests, on technically and politically complex environmental and public policy issues. For example, the Negotiated Rulemaking Act of 1990 was enacted by Congress to formalize a process for negotiating contentious new regulations.[118] The Act provides a process called "reg neg" by which representatives of interest groups that could be substantially affected by the provisions of a regulation, and agency staff negotiate the provisions.[119] The meetings are open to the public; however, the process does enable negotiators to hold private interest group caucuses. If a consensus is reached on the provisions of the rule, the Agency commits to publish the consensus rule in the Federal Register for public comment.[120] The participants in the reg neg agree that as long as the final regulation is consistent with what they have jointly recommended, they will not challenge it in court. The assumption is that parties will support a product that they negotiated.[121] Reg neg has been utilized by numerous federal agencies to negotiate rules pertaining to a diverse range of topics including safe drinking water, fugitive gasoline emissions, eligibility for educational loans, and passenger safety.[122]

In 1991, in Canada, an initiative was launched by the National Task Force on Consensus and Sustainability to develop a guidance document that would govern how federal, provincial, and municipal governments would address resource management disputes. The document that was negotiated, "Building Consensus for a Sustainable Future: Guiding Principles," was adopted by consensus in 1994.[123] The document outlined principles for building a consensus and process steps. The ten principles included

117. *Id.*

118. 5 U.S.C. §§ 561-70.

119. *Id.*

120. *Id.*

121. Alana Knaster & Philip Harter, *The Clean Fuels Regulatory Negotiation*, INTERGOVERNMENTAL PERSPECTIVE 20, 20-22 (1992).

122. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2000).

123. CORMICK ET AL., *supra* note 43.

provisions regarding inclusivity of the process (this was particularly important in Canada with respect to inclusion of Aboriginal peoples), voluntary participation, accountability to constituencies, respect for diverse interests, and commitment to any agreement adopted.[124] The consensus principles were subsequently utilized to resolve disputes over issues that included sustainable forest management, siting of solid waste facilities, impacts of pulp mill expansion, and economic diversification based on sustainable wildlife resources.[125] The reg neg and Consensus for Sustainable Future model represent codified mediated negotiation processes that have withstood the test of legal challenge and have been strongly endorsed by the groups that have participated in these processes.

Community interest. A number of communities have taken up the challenge of trying to address global warming by engaging residents in a collaborative process that is unique to each jurisdiction.[126] The climate change crisis has provided opportunities for communities to establish a new "green" identity that reflects their own community's values and can result in significant new job creation.[127] Communities around the state have engaged their citizens in developing community sustainability and climate change strategies in response to the slogan "think globally, but act locally." Many of these engagements have had an environmental focus; others have promoted economic development with the goal of harmonizing that growth with climate action. As the economic ramifications of these community strategies become more important, local governments may begin to think about employing a negotiations process.

III. COMPARISON OF THE CLIMATE CHANGE CONFLICT ISSUES TO PUBLIC POLICY ISSUES THAT HAVE BEEN MEDIATED TO DATE

Mediated consensus building has a long record of success that suggests the process can be effectively utilized to address intractable conflicts on controversial public policy issues. In this section, we provide a brief summary of several successful efforts that lay the foundation for evaluating the context in which mediation may be effectively utilized to resolve climate

124. *Id.* at 6.

125. *Id.* at 1.

126. *See* Zachary Stahl, *Sustainability Is the Farm Town's New Mantra*, MONTEREY COUNTY WEEKLY, May 28, 2009, *available at* http://www.montereycountyweekly.com/archives/2009/2009-May-28/sustainability-is-the-farm-towns-new-mantra.

127. *See id.*

change disputes. The case examples include a broad spectrum of policy issues at different government levels. Each process was initiated at a different stage in the conflict. The common threads in these disputes were multiple stakeholder interests, and involvement of resource dependent industries and communities. In each case, the terms of the settlement agreement had broad implications to those other than the immediate stakeholders represented.

A. Negotiated Rulemaking on Reformulated and Oxygenated Gasoline[128]

The Clean Air Act Amendments of 1990 required the Environmental Protection Agency (EPA) to promulgate complicated gasoline regulations within one year.[129] The provisions of the Act included mandates to certify reformulated gasoline and make it available for sale by 1995 in the nine U.S. cities that had the worst air pollution.[130] The regulations would have to address reduction in emission of toxic and ozone producing chemicals, and establish procedures for ensuring that the gasoline sold elsewhere would not worsen air quality elsewhere.[131] In addition, the amendments required changes to the oxygen formula of gasoline delivered to several cities in the country that were in nonattainment for carbon monoxide.[132]

The debate over the amendments had been contentious and the EPA anticipated that developing regulations would be equally difficult. They decided to propose engaging the stakeholders in a reg neg even though the process would be time consuming, in order to provide the EPA with the expertise, experience, and practical insight that would be required to weigh and balance all of the competing interests and complex issues of fundamentally changing how petroleum would be refined in the United States.[133] Although the negotiations would focus on micrograms of pollutants, all of the participants recognized that the economic stakes would be calculated in the billions of dollars.

128. Knaster & Harter, *supra* note 121, at 20-22.

129. *See* Clean Air Act, U.S. EPA, http://www.epa.gov/air/caa (last visited Apr. 3, 2010).

130. *See id.*

131. *See id.*

132. *See id.*

133. Intent to Form an Advisory Committee to Negotiate Guidelines and Proposed Regulations Implementing Clean Fuels Provisions and Announcement of Public Meeting, 56 Fed. Reg. 5167 (Feb. 8, 1991).

There were close to one hundred separate organizations that had an interest in these negotiations.[134] The Negotiating Rulemaking Act suggests that negotiating committees be limited to twenty-five.[135] Based on the recommendations of the co-mediators/conveners, the committee was expanded to thirty-one members.[136] Each of the key interests was organized into interest caucuses. For example, there were forty-nine cities that would be directly affected by the rule.[137] They agreed to representation by five individuals, coordinated by the executive director of the Association of State and Local Air Pollution Control Officials.[138] The petroleum interests were divided into three separate caucuses—large and medium sized companies, small refiners, and alternative energy refiners. Public interest groups, including several national and regional environmental coalitions, agreed to five seats at the table, with the designated negotiators assuming responsibility for obtaining input from the larger group.[139] The organization of the group allowed for participation in work groups around each of the key topics. The use of work groups allowed more participation by individual stakeholder groups who did not have seats at the table, but had expertise in a particular area and enabled them to participate more fully in caucus decision-making.

The negotiations centered on the issue of modeling and testing of formulas.[140] One side argued for laboratory testing of formulas to ensure compliance with the legislation. Others noted that in order to meet the deadlines, modeling of the formulas was the only feasible solution. The final settlement incorporated a simpler model than had been originally contemplated, but included a process for incorporating new data. The tradeoff for use of these models was that industry agreed to meet Phase II reformulated gasoline requirements earlier than was required by law. At the end of six months, a consensus was reached on an outline for a proposed

134. The EPA contacted the author and Philip Harter, both of whom had experience conducting complex, technical regulatory negotiations, to undertake this feasibility study. Knaster & Harter, *supra* note 121, at 20.

135. *Id.* at 21.

136. *Id.* at 22.

137. *Id.* at 21.

138. *Id.*

139. *Id. See also* Environmental Protection Agency Negotiating Committee for Reformulated and Oxygenated Gasoline, Organizational Protocols, *infra* Appendix B.

140. *Id*. *See also* Regulation of Fuels and Fuel Additives: Standards for Reformulated and Conventional Gasoline, 59 Fed. Reg. 7716 (Feb. 16, 1994).

rule. The final rule was published well in advance of the regulatory deadline.[141]

The case example demonstrates the value of the mediated negotiations process in allowing direct negotiations on complex issues in a constrained timeline. It also demonstrates the type of creative exchange of ideas and solutions that can occur in a process that is designed to accommodate and enfranchise a larger number of diverse interests and individual organizations, while keeping the number negotiators small.

B. Old Growth Timber Forests in Washington State Forest Trust Lands[142]

The timber wars in Washington State occurred on many levels. Environmentalists challenged the practices of the timber industry, arguing that clear-cutting had both short and long term impacts to the health of the ecosystem. Local communities argued that reducing harvesting would impact jobs and that loggers were the "endangered species" in the Northwest.[143] The debate was further complicated by the fact that a significant portion of the proceeds from logging were allocated by law to school construction and accordingly representatives of the school became engaged to protect this income.[144] Moreover, although the dispute centered in Washington and Washington politics and economics, groups from around the country were watching to see how the issues would be resolved.

The Director of the Department of Natural Resources, which managed the State's old growth timber, appointed a special commission to prepare recommendations on how the state's forest resources should be managed.[145] The selection of the representatives to sit on this commission was based on a careful balancing of all of the key interest groups: local and statewide environmental groups, timber industry, loggers, a representative sample of the towns and schools that would be most impacted by any of the decisions, and key legislators.[146] The year-long process was facilitated by a team of mediators.[147]

The process design included several key features: (1) joint education of all of the members on key technical issues regarding timber harvesting and ecosystem management; (2) the formation of technical subcommittees each

141. *See* Regulation of Fuels and Fuel Additives, *supra* note 140.
142. Knaster, *supra* note 84, at 432-33.
143. *See id.* at 432.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*

assigned to integrate the input from experts into different sets of recommendations that would be coordinated ultimately into a single text; and (3) each interest caucus was given responsibility to keep its constituency informed and obtain their general support as compromises emerged throughout the process so that there would be no surprises at the end.[148]

The final agreement represented a number of important compromises that addressed the short and long term needs of the parties:[149]

- Creation of a sustained yield unit in the forest that would provide a stable supply of timber that would not jeopardize local economics or school funding;
- Creation of an experimental forest to test the various techniques that had been proposed during the deliberations to determine how best to maintain diversity of the forest in balance with production;
- Postpone harvesting of the most critical stands of endangered species habitat for fifteen years pending the outcome of the joint experiments; and
- Initiation of a comprehensive economic study to develop strategies for economic development that would reduce dependence on a single industry.

The participants began as bitter enemies, but recognized at the onset that they needed to reach common ground.[150] The common ground statement in the group's consensus recommendations reads as follows: "These recommendation[s] seek to balance the goals of providing trust revenue for education, protecting the biological diversity of the forest environment and supporting the local timber-dependent economy."[151]

By learning to listen to and address one another's concerns and joint evaluation of alternatives against the balancing goal of the Commission, a consensus was forged. Each side learned how to accomplish its goals without the elimination of its opponents. Winning was equated to working out a balanced solution.

As seen in the EPA negotiated rulemaking case study, the Washington State logging dispute demonstrates how multiple interests can function in a negotiations by relying on a limited set of designated representatives. It also provides an example of how mediated negotiations can achieve

148. *Id.*
149. *Id.* at 432-33.
150. *Id.* at 433.
151. *Id.*

compromises on complex issues that strike a balance between the immediate needs of direct stakeholders as well as the long term broader ecological and economic systems. The compromise that was reached was also important to other groups confronting similar issues in the neighboring states, and although the settlement was Washington specific, many of the concepts have applicability elsewhere.

C. Pacific Offshore Cetacean Take Reduction Team[152]

The National Marine Fisheries Service (NMFS) is responsible for ensuring the protection of a number of marine mammal species.[153] The agency is also responsible for managing ocean fisheries to ensure their sustainability and economic viability.[154] The federal laws governing NMFS contain many potentially competing provisions that require ensuring economic viability of a fishery as well as protection of endangered species.[155]

The Marine Mammal Protection Act requires formation of take reduction teams that include representatives of the fishing industry, environmentalists, scientists, state and regional fishery management agencies, and NMFS.[156] The purpose of the teams is to prepare plans to reduce the interaction between commercial fishing operations and the threatened and endangered marine mammals. The plans must evaluate approaches for reducing mammal entanglement while "taking the economics of the fishery into consideration."[157] NMFS retained a mediator/facilitator (the author) in 1996 to convene a take reduction team that would address marine mammal interaction during the course of gillnet fishing for sharks and swordfish in California and Oregon.[158]

152. Information about the Pacific Offshore Cetacean Take Reduction Team (POCTRT) can be found at Pacific Offshore Cetacean Take Reduction Plan (POCTRP) – Office of Protected Resources, http://www.nmfs.noaa.gov/pr/interactions/trt/poctrp.htm (last visited Apr. 3, 2010). The website for the POCTRT includes the final report, published rules, team members, and annual recommendations.

153. *See* National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service, http://www.nmfs.noaa.gov (last visited Apr. 3, 2010).

154. *See id.*

155. *See* 50 C.F.R. § 216 (2005), *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf.

156. *See generally* Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (2006), *available at* http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa.pdf.

157. § 1387(f)(2).

158. *See* POCTRP, *supra* note 152. The author was the convener of the POCTRT and served as the facilitator for each subsequent annual meeting through 2009. *See* NOAA Pacific Offshore

Convening an appropriately representative group was the first challenge.[159] NMFS was being sued almost weekly by various environmental groups because of alleged non-compliance with various federal laws. The California gillnet fleet had already been severely impacted by a California initiative banning gillnetting within three miles of shore to protect sea otters. The fishing industry in general was reeling from regulations governing tuna and salmon fishing and opportunities for fishermen to switch to another fishery were slowly disappearing. Impacts on the fishing industry were also affecting the communities and businesses that depended on serving freshly caught California fish.[160] As in the Washington State timber harvesting case study, while resolution of these issues would mostly impact communities in California, there were national implications for how these issues would be addressed. Negotiated solutions also had international ramifications for the species and with respect to whether U.S. regulation of its citizens would reap benefits to foreign fleets that did not have to comply.

It took several months to convene a team that was acceptable to all key stakeholders. Although the composition of the team was dictated by law, each of the individual ports in California wanted representation. The environmental community grappled with competing demands for limited staff and it wanted to ensure that the different perspectives between California and national groups would be accommodated. Agency staff workloads were similarly constrained, and it was important to have staff with the technical knowledge and experience in collaborative negotiations. The mediators worked with the parties ahead of time to negotiate a "shape of the table" that would address all of these needs and constraints.

The team had five months to develop its recommendations on a comprehensive plan. The group agreed to operate by consensus, defined as unanimity, with the understanding that representatives would obtain input from their broader constituencies. The meetings began with technical presentations on the operation of the fishery, information on the distribution and behavior of the mammals, data analysis, and innovations in gear technology. As in the Washington State case, designing and participating in a joint educational process opened communication lines and established a

Fisheries Take Reduction Team Meeting, 61 Fed. Reg. 5385 (Feb. 12, 1996). *See also* POCTRT CONTACTS (2009), http://www.nmfs.noaa.gov/pr/pdfs/interactions/poctrt_contacts.pdf.

159. *See supra* note 158.

160. Personal communication to the author.

collaborative environment that would serve well during the difficult debates ahead. The mediators also divided the group into work groups, giving each group a separate assignment of drafting one of the elements of the plan. There was representation from each caucus on the four work groups. Each monthly session would start with work groups and then reports back to the joint session. There was also extensive public outreach at each of the ports, and public testimony at each session. The public input was focused on assisting the group with strategies rather than pro and con arguments for stronger regulations.[161]

The final set of consensus recommendations included a package of measures with a key provision regarding the design of an at-sea controlled experiment to test whether a specially designed sound device (called a "pinger") would warn whales of the presence of the net.[162] In addition, there were several mandatory measures that related to fishing practices, skipper education workshops, and enforcement.[163] The fishermen had feared that there would be closures of areas or new seasonal closures and that stringent regulations would give Japanese and Mexican fleets free reign to enter California to fish for swordfish without complying with the regulations. There would potentially be greater impacts on marine mammals as a result. However, because group dynamics had evolved into a positive working relationship, and because the package was designed as an adaptive management strategy, closures were not part of the consensus recommendations.[164]

The Take Reduction Team met annually until 2009 to review the status of the species and data collected from observers on the fishing vessels regarding take. Each year, with the assistance of the mediator, the team put together its consensus recommendations for NMFS.[165] With very few exceptions, the recommendations were adopted into regulations or agency programmed activities. At its May 2009 meeting, the team recommended to NMFS that they had met their goal of reducing take of marine mammals to

161. *See* RESOLVE, INC., THE NATIONAL MARINE FISHERIES SERVICE TAKE REDUCTION TEAM NEGOTIATION PROCESS EVALUATION, http://www.nmfs.noaa.gov/pr/pdfs/interactions/trt_evaluation.pdf (evaluating the success of the Take Reduction Team processes and describing some process dynamics of, among others, the Pacific Cetacean Take Reduction Team).

162. Taking of Marine Mammals Incidental to Commercial Fishing Operations: Pacific Offshore Cetacean Take Reduction Plan Regulations, 62 Fed. Reg. 51805 (Oct. 3, 1997) (to be codified at 50 C.F.R. pt. 229), *available at* http://www.nmfs.noaa.gov/pr/pdfs/fr/fr62-51805.pdf.

163. *Id.*

164. *Id.*

165. See POCTRP, *supra* note 152, for a list of Team Recommendations for the years 1998-2009.

what was required in the regulation, and that the Take Reduction Team process was no longer necessary.[166]

This case demonstrates the importance of mediated negotiations when there is an ongoing threat of litigation with a set of issues that require integration of different levels of regulatory authority, complex ecosystems management, and adaptive management strategies to address competition for scarce resources. It also demonstrates how unanimity can be forged among historic enemies when their efforts are directed toward achieving a common objective that is respectful of one another's interests and integrity.

D. Malibu Lagoon Task Force[167]

In March 2000, business interests, resource agencies, conservation groups, and property owners initiated a consensus process to identify approaches for improving the natural environment in the lagoon. The improvements were to address native plants and animal species, protection of human health, and restoration of the function of the wetlands. Attempts to obtain public input through a less structured facilitated meeting approach had been fraught with arguments over weighting of the vote, shouting matches regarding priority setting, and accusations regarding the ulterior motives of the participants. By the time several key players decided to contact a mediator, the group was close to disbanding because no progress had been made on any issue.

The mediator (author) worked with the participants to establish a formal membership list, based on balanced representation of stakeholder interests. The ground rules also established strict rules about attendance, private caucuses, courtesy to others, and most importantly, recognizing the legitimacy of the concerns and goals of others. The ground rules read: "It is understood that there will be disagreements on the issues under discussion and that discussions can be heated. There will be no personal attacks; any violators may be asked to remove themselves from the meeting by the

166. POCTRT, 2009 RECOMMENDATIONS REPORT (2009), *available at* http://www.nmfs.noaa.gov/pr/pdfs/interactions/poctrt_recommendations2009.pdf.

167. The author, then President of the Mediation Institute, was retained by the California Resource Agency to mediate the group proceedings after several years of meetings that were facilitated informally by agency staff. The Resource Agency was seeking input from community stakeholders in setting long range priorities for restoration of Malibu Lagoon. The contract included development of ground rules, facilitation of meetings, and development of consensus recommendations from the Task Force. The Mediation Institute was based in southern California.

Mediator."[168] After the first violation of the personal attack ground rule, which was swiftly enforced by the mediator, progress began.

Everyone agreed upon the importance of the wetland to the local economy and the health of Santa Monica Bay; however, they continued to battle over the scope and timing of the first steps to remedy the problems and over who should bear the cost. As a result, no decisions were made. The key division within the community had historically been over whether upstream polluters, including a waste treatment plant or downstream businesses with septic systems adjacent to the wetlands, were responsible for degrading the wetlands.

The group had been reviewing a comprehensive study that included several hundred pages of potential strategies for wetland restoration and management. The mediator recommended that the group be divided into four subcommittees, and assigned each group to review two of the eight chapters of the report. They were asked to develop criteria for selecting a strategy, to rank each strategy, and then to whittle down the list from fifteen to three. Although many of the sessions were heated, with debates over the costs and benefits of each idea and responsibility for implementation, a list emerged that could then be undertaken by the full group.

The first attempt by the full group to reach a consensus on a single preferred project devolved into a shouting match reminiscent of the old debates in the community. The mediator then suggested that rather than fighting over the list, the group should agree upon a set of recommendations that included short-term and long-term high priority recommendations for wetland restoration projects and short-term and long-term priority projects for wetland treatment projects. The list could be used by potential funders to identify projects that were consistent with the funding available. Short-term priorities were actually phase one of the larger, long-term priorities. The recommendations also included priority sites based upon the analysis in the report regarding feasibility.[169]

The final historic recommendations report to the state and federal agencies (that had set aside funds but did not want to proceed without community assent) represented a compromise on the issue that had been debated for over a decade: timing and scope of work. No landowner was subjected to eminent domain proceedings. The first sites were identified public lands. The group also agreed to construct a small treatment plant that could be incorporated into one of the restoration projects. The consensus was based upon the group agreeing that starting small and learning from the

168. Malibu Lagoon Task Force, Ground Rules and Final Agreement, Mediation Process Agreement Rule 14, *infra* Appendix C.

169. *See id.*

experiences in each step was better than fighting over who would pay for the ultimate solution.[170]

IV. RECOMMENDATIONS REGARDING THE USE OF MEDIATION TO RESOLVE CLIMATE CHANGE DISPUTES

The discussion above outlines the types of conflicts that have emerged to date that are likely to surface on issues related to climate change. There are a number of challenges confronting decision-makers and the public that will engage in these disputes that will impede progress on climate change agencies. There is also a window of opportunity for collaboration and problem-solving in which diverse interests can engage one another to reach a common ground that addresses multiple interests.

The U.S. and Canadian regulatory framework for addressing resource and sustainability issues as well as the case studies illustrate how multi-party mediation can be effectively utilized to attain consensus agreements on public policy issues. The issues tackled in each of the case studies are comparable to many of those in the climate change arena. Resolution requires analysis of complex meteorological and ecological systems. The cost/benefit analysis of potential solutions involves differentiation of short-term and long-term factors, expectations regarding return on investment, and risks. There are overlapping jurisdictions that have to be reconciled. Lastly, the stakes are high, and delay has implications that may transcend the direct problems that are in dispute.

As is true in each of the case studies, the climate change arena consists of multiple groups with diverse organizational structures and institutional experiences. Each interest may have a different stake in the outcome, and there are extreme differences in the ability of each group to sustain conflict. These differences require a structured process for productive dialogue.

It has been indicated throughout this discussion that mediation is an effective tool for resolving conflict, but it may not be appropriate for all the types of conflicts. What then does the information above suggest regarding the potential role of mediation in addressing climate change disputes? Given the enormity of the challenges and limitations on time and resources, what

170. The recommendations of the Task Force will subsequently implemented in phases as had been envisioned. *See* Letter from Jerome C. Daniel, Chairperson, Santa Monica Mountain Conservancy, to Scott Albright, Senior Planner, City of Malibu Planning Department (Feb. 24, 2003), *available at* http://smmc.ca.gov/pdf/attachment462_Attachment.pdf (supporting an environmental document regarding a land purchase in the lagoon based on recommendations).

categories of conflicts and substantive areas does the information provided in this article suggest are most conducive for a mediated negotiations process?

A. State Level

Implementing regulations and guidance documents. At the state level, mediation would be particularly effective in the negotiation of implementing regulations. A reg neg type process would address the shape of the table, facilitate dialogue on complex scientific and technical issues, and hopefully avoid costly political wrangling and litigation. A package of measures could be crafted establishing specific formulas, alternatives for compliance, incentives and enforcement parameter. A negotiations process might also consider how to balance competing environmental considerations that characterize many of the alternative energy innovations. Is there a threshold for a project that would achieve a significant reduction in GHGs and also allow an exception to potentially conflicting statutes? Development of a "cap and trade" policy would also be well suited for a negotiated rulemaking that could accommodate multiple interests and achieve a tradeoff balance.

Projects of statewide importance. A number of alternative energy projects proposed for in California have been subject to challenge by site neighbors and single-purpose interest groups.[171] Each of these challenges has great merit, and opponents have potential to prevail in litigation on procedural and substantive grounds. Rather than piecemeal the permitting process or proceed through litigation, a mediated solution would bring all of the interested parties to the table, allow dialogue on how to address competing interests, and potentially emerge with a compromise with tradeoffs that could not be crafted outside of a mediated process.

Some of the CEQA litigation that has contested the adequacy of a project Environmental Impact Report (EIR) may result in a revised EIR, but not necessarily a change in the project. The opponents and proponents need to consider whether a negotiated approach, as contrasted with a procedural battle, would better meet the interests of the litigants as well as the public. The cost of delay, and uncertainty regarding the outcome, suggest that mediated negotiations may be appropriate.

Mediation may also be appropriate at the initial stage of project development, when there is an opportunity to reach a consensus on a site, scope of the project, and mitigation measures, rather than at the tail end of the process when changing a project is difficult and costly. However, this

171. *See* Freking, *supra* note 64; Soto, *supra* note 65; Rosenberg, *supra* note 67; Ball, *supra* note 106.

assumes that the participants have common ground in developing an alternative energy project, mass transportation, or green business.

B. Regional Level

Projects of regional significance. Negotiations would be appropriate relating to the siting and permitting of projects of regional significance for the same reasons as outlined above for projects of statewide importance. Ideally, the negotiations could be initiated early in the siting and design stage, rather than at the point that the decision-makers are voting on a project. The mediation process could transpire over several phases: siting, design, environmental review, and implementation.

Process for regional decision-making. The Metropolitan Planning Organizations (MPOs) and regional governments in California have been delegated a great deal of responsibility in connection with green house gas reduction planning and compliance.[172] These responsibilities will generate considerable dialogue among jurisdictions in each region. To the extent any region believes that the current decision-making and dispute resolution processes may not be appropriate to meet this challenge, a mediated process may be appropriate for designing a new decision-making structure prior to beginning discussions and debates. This was the approach followed by the Canadian Roundtable.[173] A mediated negotiation on a climate change planning process design would also be appropriate.

There is considerable history of the use of dispute resolution and mediated negotiations in Southern California over such issues as the distribution of affordable housing, transportation planning, and environmental justice.[174] Siting of alternative energy facilities has the potential to raise issues of environmental justice, as occurred with respect to transportation planning if more affluent neighborhoods successfully resist

172. *See supra* text accompanying notes 58, 70.

173. *See supra* text accompanying note 123.

174. Southern California Association of Governments (SCAG) was threatened with litigation in connection with the regional transportation plan in the 1990s. A mediated settlement resulted in meaningful change in the planning process and set the stage for future collaboration on environmental justice issues. See the case study describing this dispute at Southern California – Environmental Justice – Case Studies, http://www.fhwa.dot.gov/environment/ejustice/case/case4.htm (last visited Apr. 3, 2010). *See also* Alana Knaster, Gregory L. Ogden & Peter Robinson, *Public Sector Dispute Resolution in Local Governments: Lessons from the SCAG Project*, 1 PEPP. DISP. RESOL. L.J. 177, 177-232 (2000) (discussing the history of public sector dispute resolution in southern California).

the placing of facilities in their communities. These earlier models can be adopted to address climate change issues or a mediated process may be utilized to negotiate new models appropriate to the long-term nature of the climate change planning process.

Fair share allocation of reduction targets; revenue and cost sharing. This set of issues represents a new arena without precedent that would lend itself to an ad hoc process, such as mediation. The convening would set the shape of the table, address representation, and allow for critical dialogue which would make tradeoffs and compromise possible. The product of these negotiations could be a formula that would be applied across the board or a specific process for addressing each new set of issues and responsibilities. Although not described in the case studies, in 2000 the Southern California Association of Governments (SCAG) region adopted a dispute resolution process that was created through a mediated negotiation process for resolving regional housing need allocations.[175] This process expedited settlement of disputes over the allocation and avoided significant litigation.

C. Local Level

Many of the issues that have been listed in this article that would engender controversy at the local level are suitable for mediation, but decision on whether to rely on that process or another vehicle for eliciting public input is dependent on timeframes and the politics of the situation. Many local site-specific disputes have been successfully mediated. Issues that are likely to be most appropriate for mediation are the permitting of energy facilities or new green businesses climate change-related ordinances.

New green businesses. Many communities are actively seeking to attract new industry and businesses that produce "green" products.[176] The belief is that these have good potential to create stable jobs, increase the tax base, and are less likely to be challenged by traditional opponents of development. It is precisely this need to balance the impacts from the benefits that would make these suitable for mediation. As described for projects of statewide or regional benefit, the mediation process provides a

175. *See* William Fulton, *Housing Allocation Process Demands Overhaul, But Ideas Are Missing*, 18(4) CAL. PLAN. & DEV. REP. (2003), *available at* http://www.cp-dr.com/node/786.

176. *See, e.g.*, Kurtis Alexander, *Green Entrepreneur Eyes Shut-Down Davenport Cement Plant*, SANTA CRUZ SENTINEL, Feb. 13, 2010, *available at* http://www.scsextra.com/story.php?sid=93014 (discussing the opportunity for converting a former cement plant into a plant that takes carbon dioxide from the air and produces an environmentally friendly form of cement; exemplifies a community collaboration on re-use that could lend itself to a mediated process; the existing cement facility was the source of public controversy over air pollution and noise for decades).

vehicle for all interests—parochial and global—to engage on equal footing. The process would also result in agreements on a project or sites for projects, rather than end in regulatory limbo or lengthy litigation.

The cost of delay in this context is an important consideration in selecting a mediated negotiations approach. Opponents of a project may be hoping that delay makes a project infeasible. On the other hand, opponents may agree that new green industry and economic development is important to the community; what they may dispute is the location or type of project that is being proposed. Mediation gives them the opportunity to shape the outcome and craft a mutually acceptable product.

Climate action plan; jurisdictional GHG reduction plans; "green ordinances." The traditional planning and ordinance development process has worked over the years and lends itself to a variety of public engagement techniques at various stages of the process. Mediation would be an effective tool if decision-makers and stakeholders envision a particularly divisive process on these subjects or if the conflict appears to be headed to court. Such issues as changes in zoning requirements, reduction targets for private industry, and penalties for non-compliance might benefit from the sharing of technical expertise and structured talks. As evidenced in the each of the mediation case studies, these issues are ripe for phasing tradeoffs that might allow for greater flexibility in the early years of permitting in exchange for more stringent requirements into the future. They might also result in an agreement that establishes a pilot program overseen by the negotiations group that would serve as the basis for a subject program or regulation.

V. CONCLUSION

The first draft of this article began with the premise that one of the key elements necessary for achieving a consensus—sharing common ground—exists regarding the need to address climate change. The tone of that draft was far more optimistic about the opportunities for collaboration on how environmental protection and economic growth could be married. Just prior to the recent Copenhagen Climate Change Conference, government leaders, representatives of industry, and nongovernmental organizations appeared in agreement on the urgency to reduce green house gas emissions. What remained to negotiate was the menu of options, timeline, and the cost. These in themselves represent a significant challenge, but the "retreat" at Copenhagen will now make each of the negotiations on strategies for reducing emissions more difficult. It is likely that each future negotiation will begin with a debate over whether a crisis truly exists. Nevertheless, as

the discussion in this article has demonstrated, the use of mediated negotiations remains a viable tool for addressing climate change conflicts despite this additional challenge.

As the criteria for determining whether a mediated negotiation is feasible have been considered, it appears that a number of conflict scenarios in the climate change arena lend themselves to a mediated approach. There are overlapping jurisdictions and diverse interests that must be accommodated. There is uncertainty regarding the outcome of future regulations. Litigants who have filed against a particular project are not interested in "fixing" an EIR, but in getting a seat at the table to revise a proposed project. The cost of winning is onerous for many of the disputants, and although delay may be an immediate goal, lengthy delay may raise the cost of the ultimate project or the cost of compliance. In many of the conflict arenas, there is a need to preserve a long term relationship among government agencies and an interested public.

In conclusion, mediation is an effective tool for addressing complex, multi-party conflicts and for forging collaboration on contentious issues that require tradeoffs and negotiations among interests. Mediation is not the only tool that can accomplish these objectives, but it is a process that has been successfully implemented in regulations and tested across the United States and in Canada at all levels of government. It is also a tool that can be complemented by other strategies and techniques for engaging public engagement.

This article is intended to give decision-makers and the many stakeholders who are seeking opportunities for improving public involvement in decision-making on climate change options for enhancing that engagement. Mediation has its advantages and challenges, as have been described in this article. It is not appropriate for every conflict and every situation. On the spectrum of maximizing public involvement, mediation has the advantage of being the most inclusive process because it places stakeholders in a shared role with elected officials and community leaders. Those who have actually participated in the process, contrasted with those who have observed on the sidelines, recognize that it involves hard work and a time commitment.

This article concludes with a quotation from the last set of recommendations of the Pacific Offshore Cetacean Take Reduction Team whose proceedings were described under case studies.[177] This statement acknowledges the value that the process had for the individual participants and the public at large that they represented:

177. *See supra* text accompanying notes 152-66.

> At the time the POCTRT was established, reducing the levels of take seemed insurmountable. Because of the willingness of TRT members to solve problems and compromise, NMFS staff, working with other government agencies, the fishing industry, NGOs, technical experts and the public have succeeded in establishing a program that has achieved remarkable progress in reducing the bycatch of marine mammals. This success demonstrates that other Take Reduction Teams can likewise address and solve difficult resource management challenges.[178]

178. POCTRT, *supra* note 166, at 1.

APPENDIX A

California Natural Resources Agency
DEPARTMENT OF FISH AND GAME
Central Region
1234 East Shaw Avenue
Fresno, California 93710
http://www.dfg.ca.gov

ARNOLD SCHWARZENEGGER, Governor
DONALD KOCH, Director

March 25, 2009

Clifton Price, Public Works Director
City of Soledad
Post Office Box 156
Soledad, California 93960

Subject: Mitigated Negative Declaration (MND) for the Soledad Wastewater Treatment Plant Wind Turbine Energy Project (SCH No. 2009021111)

Dear Mr. Price:

The Department of Fish and Game has reviewed the proposed MND for the Soledad Wastewater Treatment Plant Wind Turbine Energy Project (Project). The Project proposes to install seven (7) wind turbines at the existing wastewater treatment plant southwest of the City of Soledad, adjacent to the Salinas River, in Monterey County. Each turbine would be on a solid pole with a hub height of 121 feet. Each three-blade rotor would have a 68-foot diameter, making the total turbine height 155 feet.

Wind energy projects are new to the Salinas Valley, and as a result we do not have avian and bat impact data from local projects with which we may adequately predict potential impacts for this Project. Avian and bat impacts at wind energy sites in some parts of the State have proven to be substantial, and the proposed Project shares some of the factors which contribute to significant impacts at other sites. The proposed turbine height and rotor diameter are within the range of other turbines which are known to "take" raptor species at relatively high rates. Several raptor species are known to fly regularly over the Project site and may be exposed to mortality, including the fully protected white-tailed kite (*Elanus leucurus*), the fully protected and State endangered American peregrine falcon (*Falco peregrinus americanum*), and the Species of Special Concern Northern harrier (*Circus cyaneus*). Further, the Salinas Valley and particularly the Soledad area have the added complication of supporting regular flights of the fully protected, State and federally endangered California condor (*Gymnogyps californianus*). Finally, the Project location contains open water features on- and off-site and is in close proximity to the Salinas River riparian corridor, both of which are factors that contribute to high rates of bat use.

Given the known risks of wind turbines at other sites, and the species and habitats associated with this Project, we offer the following comments to aid in avoiding and minimizing avian and bat impacts and to strengthen the Project's California

Environmental Quality Act (CEQA) analysis and significance determinations. The Project's reconnaissance-level surveys detected several "red-flag" species and use patterns. Based on the results of these preliminary surveys, and the known condor use patterns, the Project warrants further study to develop a baseline, thresholds of significance, and feasible mitigation. We recommend that the MND identify the thresholds, rather than deferring them to agency consultation after Project approval. The Department recommends completing one year of regular bird and bat use surveys prior to Project approval to determine appropriate mitigation (such as alternative sites and designs) and to support the significance determinations. We also recommend developing a scientific carcass search method as a tool for determining whether the Project meets permit conditions during operation. The Department's opinion is that the Project as proposed may result in impacts to California condor, and recommend exploring measures to avoid the potential impacts. Please see the California Energy Commission (CEC) and Department guidelines (2007) for suggested survey methods and potential mitigation strategies. Lastly, we recommend focused surveys for Congdon's tarplant (*Centromadia parryi* ssp. *congdonii*) if they have not already been completed.

CEQA Authority: The Department is a Trustee Agency with the responsibility under CEQA for commenting on projects that could impact fish and wildlife resources. Pursuant to Fish and Game Code Section 1802, the Department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species. As a Trustee Agency for fish and wildlife resources, the Department is responsible for providing, as available, biological expertise to review and comment on environmental documents and impacts arising from project activities, as those terms are used under CEQA.

Baseline Data for Biological Resources/Deferred Essential Studies: Courts have repeatedly not supported conclusions that impacts are mitigable when essential studies, and therefore impact assessments, are incomplete (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d. 296; *Gentry v. City of Murrieta* (1995) 36 Cal. App. 4th 1359; *Endangered Habitat League, Inc. v. County of Orange* (2005) 131 Cal. App. 4th 777).

The MND documents four reconnaissance-level bird and bat surveys conducted in October 2008 and concludes that the impacts to birds and bats are mitigable. The Department recommends following the California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development (CEC and DFG 2007) to gather adequate biological impact assessment data for wind energy development. On November 16, 2008, Department staff recommended to the City's consultants, PMC, working on this Project that bird and bat use data should be collected with methods following the CEC and Department guidelines. The Department's opinion is that the

surveys completed to date do not establish an adequate baseline for assessing impacts and developing mitigation. The October surveys were reconnaissance-level, completed during a time of year that would not detect seasonal variations and movements (e.g., wintering and nesting species), and provided no information on which bat species or how many bats utilize the Project site.

The Department recommends bird and bat surveys to determine species composition, occurrence, frequency, and behavior relative to the risk zone (rotor-swept area). For this Project site, we recommend weekly acoustic monitoring for bats and weekly diurnal bird counts for one year, to provide an adequate baseline. The MND should also consider whether the Project may "take" nocturnal migrants, such as songbirds. Nocturnal migrant counts may be warranted to determine this potential risk.

Deferred Mitigation: The Court of Appeal in *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645 struck down mitigation measures which required formulating management plans developed in consultation with State and Federal wildlife agencies after project approval. CEQA Guidelines (Section 15126.4 (a)(1)(B)) also stipulate that it is not appropriate to defer feasible mitigation measures to a future date. Mitigation measure MM 4-2 defers the development of mitigation measures for bats to consultation with the Department after Project approval.

Thresholds of Significance: Mitigation measure MM 4-2 proposes consulting with the Department to determine bat mortality thresholds of significance after Project approval. We request clarification on how significance determinations were made for this Project given that thresholds of significance have not been established and baseline bat data were not collected for the Project site. Thresholds should be established to determine whether the potential impacts exceed the thresholds, whether the proposed mitigation reduces impacts to levels below the thresholds, and to use as triggers for mitigating unanticipated impacts. Without specific thresholds, the significance of the potential impacts and effectiveness of proposed mitigation is unclear. In addition, the mitigation as proposed is open-ended and would be difficult to enforce.

Bats: As the MND discusses, the Project may result in bat mortality. The Department's opinion is that the extent of bat mortalities, the species that are likely to be taken, and the potential significance of these impacts have not been adequately characterized, as discussed above. We recommend following the CEC and Department guidelines (CEC and DFG 2007) to develop adequate baseline data for bat impact analysis. Generally, where bat data are unavailable, we request that applicants employ acoustic or other monitoring techniques to characterize the bat use of wind project sites for one year prior to CEQA analysis.

The potential for bats to utilize this Project site is high given the suitable foraging habitat on-site and the Project's proximity to suitable roost and foraging areas in the Salinas River corridor. The Salinas River corridor provides suitable roosting and foraging habitat for many species, while the Project site contains open water features conducive to foraging. The treatment and evaporation ponds on-site, as well as the "ditch" with open water and riparian vegetation adjacent to the proposed turbine locations, increase the potential for bats to utilize the Project site. In addition, many bat species forage over agricultural lands such as those adjoining the Project on three sides.

Red bats forage in agricultural areas and may roost in the Salinas River riparian corridor, adjacent to the Project site. Prior to Project approval, acoustic monitoring should be completed to determine whether red bats and other bat species utilize the Project site to adequately characterize the effects and facilitate the development of mitigation.

Even what may be perceived as low mortality rates may have significant effects on bat populations. Many of the bat species that the Project has the potential to "take" are in decline and have naturally low population growth potential. They occur in low numbers, have few natural predators, reproduce at low rates, and are long-lived (20 to 30 years). These characteristics make bats relatively more susceptible to significant, adverse population effects from introduced mortality sources.

Bird Protection: The Department has jurisdiction over actions that may result in the disturbance or destruction of active nest sites or the unauthorized "take" of birds. Sections of the Fish and Game Code that protect birds, their eggs and nests include Sections 3503 (regarding unlawful "take," possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the "take," possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful "take" of any migratory nongame bird). Discussion on the potential for Project-related "take" of specific avian species follows in subsequent portions of this letter.

California Condor: Fish and Game Code Section3511 (prohibition on taking of fully protected birds) precludes any authorized "take" of California condor. The Department believes that the Project as currently proposed has the potential to "take" California condors. Further, the MND does not propose specific measures to avoid "take" of this critically endangered and fully protected species. We do not consider potential condor impacts to be speculative when condors are known to routinely fly over a proposed wind energy project site.

As the MND discusses, the Project site is within the flight path of condors which regularly move between the Santa Lucia and Gabilan Mountains. The Department

agrees that the current potential for "take" appears to be low given the existing flight data; however, the Project design and location do not preclude the potential for "take" of California condor. The MND notes that recorded flights within 10 kilometers of the Project were greater than 300 feet over the valley floor and some were less than 150 feet over foothills within 2 to 3 kilometers of the Project. The recorded flights over the valley floor to date may be higher than the turbines, but we caution that the data do not demonstrate that all flights would be higher than the proposed turbines as the MND states. Condor locations are recorded only periodically and only for 25 percent of the condors. Monitored condor locations and altitudes between data point recordings are unknown, as are the locations of 75 percent of the birds.

Considering that the rotor tips would be 155 feet high, the assumption that all flights would be over 300 feet leaves little room (145 feet) for error. In addition, those 300-foot heights were based on Global Positioning System data with a 49-foot margin of error, and measured from topographic maps with an unknown elevation error or contour interval.

Condor foraging in the Salinas Valley is expected to increase during the life of this Project. Condor spatial use, including foraging sites, is already becoming more variable and opportunistic. The Salinas River corridor is one potential foraging area. A lack of recent condor observations on valley floors is likely related to the fact that most of the animals' habitat use is significantly affected by feeding stations located away from valley floors. Historic accounts of condors prior to their removal from the wild included observations of feeding on valley floors and low hills such as the Carrizo Plain and the Cholame Hills.

Given that the Salinas Valley floor may supply enough wind for wind energy development, we disagree with the assessment that the lack of wind limits condor use of the valley floor. Any strong surface wind, not just updrafts, can facilitate condors taking off from the ground.

White-Tailed Kite: White-tailed kite is also a fully protected species pursuant to Fish and Game Code Section 3511 and the Department cannot authorize their "take." The MND documents that the reconnaissance-level bird surveys detected white-tailed kite flying regularly across the Salinas River riparian area and into the Project site, which suggests that the Project may result in "take" of this fully protected species.

Northern Harrier: Northern harrier is a California Bird Species of Special Concern which is in decline in Monterey County (Davis and Niemela 2008). The MND documents that the reconnaissance-level bird surveys detected northern harriers flying

regularly across the Salinas River riparian area and into the Project site. This suggests that the Project may result in "take" of this species.

Peregrine Falcon: In November 2008, PMC staff working on this Project informed Department staff that one or multiple peregrine falcons regularly preyed upon shorebirds at the Project site. The MND does not disclose this information; we request clarification on the status of this species at the Project site. In addition to being State endangered, peregrine falcon is a fully protected species pursuant to Fish and Game Code Section 3511; and the Department cannot authorize its "take."

Predicted Mortality Rates: The MND's predicted mortality rates for raptors is 0.70 raptors per year. We request clarification on how this number was developed considering that the four days of reconnaissance-level bird surveys are inadequate to determine bird use rates. This is important because this mortality rate, undefined significance thresholds, and mitigation measures which do not mitigate mortality for multiple species already known to utilize the site are the basis for the MND's determination that avian impacts have been mitigated to less than significant levels.

The assessment that the proposed turbine design minimizes avian mortality risk is also problematic. The proposed 155-foot tall turbines have a height and rotor-swept area similar to the older machines at Altamont Pass which resulted in high mortality rates, yet the MND concludes that the proposed turbines would result in relatively lower raptor mortality because they are "newer generation." Tubular-tower and lattice-tower designs at Altamont Pass with hub heights (e.g., 79 to 141 feet) and rotor diameters (e.g., 56 to 108 feet) similar to the proposed Project caused the high mortality rates referenced in the MND (Thelander et al. 2003). For comparison, the Project proposes tubular towers with a 121-foot hub height and 68-foot rotor diameter. We caution that the proposed design is actually very similar to the older installations at Altamont; further, contrary to what the MND states, it is not clear that the age of an installation has any relation to avian impacts (CEC and DFG 2007).

Quantified estimates of potential avian mortality are unsupported without site-specific bird use data. The Department recommends bird use counts on all wind energy projects, including this Project, prior to impact analysis (CEC and DFG 2007).

Pond Netting: The MND proposes covering all ponds on-site with netting to exclude birds. The intent is to deter raptor use of the site by reducing available prey (waterfowl and shorebirds). We support this approach but note that pond netting has proven only partially successful at most locations. This measure may deter some use by peregrine falcon, but is unlikely to deter all use and would mostly likely not reduce visitation by other raptor species, including the fully protected species white-tailed kite and the

Species of Special Concern northern harrier. This mitigation measure therefore does not minimize impacts to multiple raptor species.

In addition, pond netting itself can pose a risk to wildlife. The monofilament grid proposed as an option may interfere with bat species which forage over open water. We recommend a denser mesh design that is more detectable to bats.

Carcass Searches: Mitigation measure MM 4-2 proposes bat carcass searches during the first year of operation, with no specified frequency or methods. We recommend developing a scientifically defensible carcass search method based on the CEC and Department guidelines (2007) and identifying the methods in the CEQA document. We recommend also implementing avian carcass searches to determine what the actual effects of this Project may be. Carcass searches should not be considered mitigation in themselves or in lieu of the baseline studies needed to determine the significance of potential effects. Carcass searching is a tool to determine whether the project exceeds thresholds or permit conditions which should be specified in the MND.

Congdon's Tarplant: The MND concludes that the Project site is unsuitable for Congdon's tarplant. The Department requests clarification on whether botanical surveys were completed during the season when this species is detectable or whether the absence determination was based on predicted habitat suitability. Congdon's tarplant persists in highly disturbed, agricultural settings in the Salinas Valley, including sites that are similar to the Project site (e.g., Highway 101 shoulders, dirt parking areas in Chualar).

We recommend that botanical surveys be conducted following guidelines developed by the Department (http://www.dfg.ca.gov/biogeodata/cnddb/pdfs/guideplt.pdf) and the United States Fish and Wildlife Service (http://www.fws.gov/ventura/speciesinfo/protocols_guidelines/docs/botanicalinventories.pdf). Botanical surveys should cover the entire property and should be timed appropriately to detect all species which may occur on the property before CEQA analysis occurs. Use of reference sites is recommended for species which are known to occur in the vicinity or which otherwise have a high potential of occurring on-site.

In conclusion, the Project site's water bodies, proximity to the Salinas River corridor, and known use by special status avian species warrants further impact characterization and exploration of mitigation measures. We recommend completing baseline studies to adequately characterize the Project's potential impacts and develop enforceable mitigation prior to Project approval. Because the potential effects may be partially related to the site's proximity to the Salinas River and the evaporation ponds, alternative Project siting may minimize some of the potential impacts.

Clifton Price
March 25, 2009
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We look forward to working with you to find solutions for this challenging Project. If you have any questions regarding these comments, please contact Dave Hacker, Staff Environmental Scientist, at 3196 Higuera Street, Suite A, San Luis Obispo, California 93401, by telephone at (805) 594-6152, or by email at dhacker@dfg.ca.gov.

Sincerely,

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Literature Cited

CEC and DFG, 2007. California guidelines for reducing impacts to birds and bats from wind energy development. Commission final report. California Energy Commission, Renewables Committee, and Energy Siting Division, and California Department of Fish and Game, Resources Management and Policy Division. CEC-700-2007-008-CMF. Available at www.dfg.ca.gov/habcon/energy/wind/

Davis, Jeff N. and Chris A. Niemela. 2008. Northern harrier (*Circus cyaneus*). Pages 149-155 *in* California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate conservation concern in California. Studies of Western Birds 1. W. D. Shuford and T. Gardali (editors). Western Field Ornithologists, Camarillo, California, and California Department of Fish and Game, Sacramento. Allen Press.
Available at http://www.dfg.ca.gov/wildlife/nongame/ssc/birds.html

Thelander, C.G., K.S. Smallwood, and L. Rugge. Bird risk behaviors and fatalities at the Altamont Pass Wind Resource Area. National Renewable Energy Laboratory, Colorado, USA.

APPENDIX B

ENVIRONMENTAL PROTECTION AGENCY
NEGOTIATING COMMITTEE FOR
REFORMULATED AND OXYGENATED GASOLINE

ORGANIZATIONAL PROTOCOLS

1. PARTICIPANTS

   a. *Interests Represented.* Any interest that would be significantly affected by an EPA guideline or rule with respect to reformulated gasoline, detergent additives, and oxygenated fuels marketable credit trading or labeling may be represented in the negotiations.

   b. *Interest Caucuses.* Organizations, companies, or individuals may join with other allied interests to form a caucus. An interest caucus may authorize one or more individuals to represent the caucus.

   c. *The Negotiating Committee.* Each organization or interest caucus that is a party to the negotiations shall appoint a designated number of representatives to serve as a member of the Negotiating Committee. The Negotiating Committee shall consist of the representatives of the parties.

   d. *Alternates for Committee Members.* Each organization or interest caucus that is a party to the negotiations may designate an alternate. Alternates may substitute for Committee Members in the event that the Member cannot attend a session of the Negotiating Committee.

   e. *Additional Parties.* Additional parties may join the Committee after negotiations have begun only with the concurrence of the Committee and if within the number of parties permitted under the Committee's charter.

   f. *Attendance at Meetings.*

      (1) Each Committee Member agrees to make a good faith effort to attend each session of the Negotiating Committee. The Committee Member's alternate agrees to make a good faith effort to attend any Committee meeting that the Member is unable to attend.

      (2) The Committee Member may be accompanied by such other individuals as the Committee Member believes is appropriate to represent his/her interest.

      (3) Only the Committee Member or the alternate will have the privilege of sitting at the negotiating table and of speaking from the floor during the negotiations without Committee approval, except —

         (a) any Committee Member may call upon a technical adviser to elaborate on a relevant point, and

         (b) pursuant to the Federal Advisory Committee Act, any person attending the

Committee meetings may address the Committee if time permits or file statements with the Committee.

g. ***Constituents' Interests.*** Committee Members are expected to represent the concerns and interests of their constituents and to ensure that any agreement developed by the Committee is acceptable to the organization or caucus which the Committee Member represents.

2. DECISIONMAKING

a. ***Consensus.*** The Committee will operate by consensus which for the purpose of this regulatory negotiation means unanimity. Committee decisions will be made by the concurrence of all Committee Members.

b. ***Workgroups.***

(1) Smaller workgroups may be formed to address specific issues and to make recommendations to the Committee. The membership of each workgroup shall consist of no more than fifteen people. Each organization or interest caucus that is represented on the Negotiating Committee may designate members of each workgroup. Other individuals who the Committee believes would enhance the functioning of a workgroup or representatives of interests that would be significantly affected by the topics addressed by the workgroup but which is not otherwise represented on the Negotiating Committee may also serve on that workgroup. Not all organizations or interest caucuses represented on the Negotiating Committee need to participate in each workgroup. The decision as to whether or not to participate is the prerogative of that organization or caucus.

(2) Workgroups are not authorized to make decisions for the Committee as a whole. Decisions to forward a report of a workgroup to the Negotiating Committee shall be made with the concurrence of all workgroup members who are present at the meeting where the decision is made.

(3) Workgroup meetings will be held between the full sessions and will be scheduled in the same location and time whenever possible. All Committee Members will be notified of all workgroup meetings.

c. ***Discontinue if unproductive.*** The Committee may discontinue negotiations at any time if they do not appear productive.

3. AGREEMENT

a. ***Written Statement.*** Any agreement reached by the Committee on the guidance or proposed regulations will take the form of a written statement that will be signed by all Committee Members. EPA will use the written statement as the basis of guidelines and proposed regulation(s) to the maximum extent possible consistent with the Agency's legal obligations.

b. ***Final Rule.*** Any agreement reached by the Committee following publication of the Notice of Proposed Rulemaking will take the same form. EPA intends to use the written statement as the basis for the final rule(s) to the maximum extent possible, except that consistent with its legal obligations, EPA will take into consideration public comments and other legal requirements.[1]

Final Regulations. In the case of agreements reached prior to the proposed regulations and incorporated into the proposal, EPA expects to promulgate final regulations that are consistent with the agreements to the extent appropriate in light of the agency's legal obligations and the public comments received in response to the proposal. In the case of agreements reached after the proposed regulations have been published, EPA will consider such agreements along with the public comments received in response to the proposal and the agreement in making its decision on the final regulations.[2]

c. ***Support for Proposed and Final Rule.*** The parties other than EPA agree to support the proposed and final rule and guideline to the extent they are consistent with the written statement.

4. FACILITATORS

Neutral facilitators will work with all the parties to ensure that the process runs smoothly. The facilitators serve at the will of the Committee.

5. MEETINGS

a. ***FACA and NRA.*** The negotiations will be conducted under the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act of 1990 (NRA).

b. ***Open Meetings.*** Negotiating sessions will be announced in the *Federal Register* prior to the meeting and, consistent with FACA requirements, will be open to the public.

c. ***Minutes.*** The proceedings will not be electronically recorded, but draft minutes of Committee meetings will be kept and approved by the Committee. The minutes will be made available to the public on request.

d. ***Agendas.*** Meeting agendas will also be developed by consensus. The Committee will determine if information requests are reasonable and relevant.

e. ***Impasse.*** If a deadlock or impasse is declared by any party, the facilitators will be available to help the deadlocked parties to try to resolve the impasse.

f. ***Caucus.*** Any party may declare a caucus at any time.

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1. Language from the March 5 draft of the protocols.

2. Language proposed by EPA's Office of General Counsel at the March 14 meeting.

6. SAFEGUARDS FOR THE PARTIES

a. *Good Faith.* All parties agree to act in good faith in all aspects of these negotiations. Specific offers, positions, or statements made during the negotiations may not be used by other parties for any purpose outside the negotiations or as a basis for future litigation. It is the intent of the Committee that other attendees of the Committee's meetings also voluntarily comply with this provision in order to support the regulatory negotiation process by encouraging the free and open exchange of ideas, views, and information prior to achieving consensus. Personal attacks and prejudiced statements will not be tolerated.

b. *Right to Withdraw.* Any party may withdraw from the negotiations at any time without prejudice. The remaining Committee Members shall then decide whether to continue the negotiations.

c. *Others' Positions.* No party will make public announcements or hold discussions with the press characterizing the position of any other party even if that party withdraws from the negotiations.

d. *Information.*

(1) All parties agree not to withhold relevant and non-proprietary information, recognizing that competitive concerns may make disclosure of certain information unlawful or competitively sensitive. If a party believes it cannot or should not release such information, it will provide the substance of the information in some form (such as by aggregating data, by deleting non-relevant confidential information, by providing summaries, or by furnishing it to a neutral consultant to use or abstract) or a general description of it and the reason for not providing it directly. Emission data shall be treated as provided by 40 CFR § 2.301 and cannot be considered confidential.

(2) Parties will provide information called for by this paragraph as much in advance of the meeting at which such information is to be used as is reasonably convenient.

(3) All parties agree not to divulge information shared by others in confidence.

(4) Information and data provided to the Committee in writing is a matter of a public record.

(5) Nothing contained in these protocols shall restrict EPA's authority pursuant to §§ 114 and 208 of the Clean Air Act.

e. *Rulemaking Record.*

(1) Minutes of meetings and any other documents prepared or circulated in conjunction with the Negotiation shall be placed in a public docket of the negotiations, but shall not be placed in any EPA rulemaking docket or considered by EPA as a basis for rulemaking, except —

(a) EPA may submit a list of documents for inclusion in a rulemaking docket in

support of regulations proposed in accordance with the Committee's written statement and may include any such listed document in the docket unless more than seven Committee members object within thirty days, or

(b) factual material, data, or aggregations of data that is not confidential and that was prepared in conjunction with the negotiations and relevant to the subject of the negotiations and of the rulemaking.

(2) This provision does not prevent any party to these negotiations from submitting to any EPA rulemaking docket any document that such party prepared or otherwise generated for use in this negotiation. But no party may make such use of any document prepared or generated by any other party for use in this negotiation.

7. SCHEDULE

Negotiating sessions will be held approximately every three weeks. The first negotiating session will be held on March 14 and 15. EPA has set a target date to publish a Notice of Proposed Rulemaking for reformulated gasoline and the oxygenated labeling requirement by May 31, 1991. The Committee therefore needs to reach a consensus on an NPRM in sufficient time to meet that schedule. Moreover, EPA is required by statute to publish guidelines for marketable credit trading for oxygenated fuel by August 15, 1991, and the Committee must agree on the guidelines in sufficient time to meet this schedule. EPA must publish a final rule for reformulated gasoline by November 15, 1991.

APPENDIX C

MALIBU LAGOON TASK FORCE

MEDIATION PROCESS AGREEMENT

OBJECTIVES FOR THE MEDIATION PROCESS

1. To identify one or more near-term actions which might be taken to improve the natural environment in the Malibu Lagoon area, defined for these purposes as extending north to south from the Arizona crossing at Cross Creek Road to the surfzone, and from east to west within the Malibu Creek Watershed. The east-west boundaries are Malibu Canyon and Sweet Water Mesa, the ridgelines in each direction.

2. Environmental improvements may include one or more of the following: a) improvements to native and/or endangered fish, bird, plant or wildlife habitat, b) protection of human health and safety, and c)enhancement or restoration of self-sustaining wetland areas in the Lagoon area.

TASK FORCE DECISION-MAKING IN THE PROCESS

3. Members of the Task Force will be organizations or constituencies with an interest in improving the natural environment of the Malibu Lagoon area or which could be affected by proposed actions regarding improvement of the Lagoon area. Constituencies to be represented would include: 1) resource and regulatory government agencies, 2) environment and conservation groups, 3) water contact users and 4) property owner associations and business associations.

Membership must be confirmed by March 21, 2000. After that date, any additional organizations wishing to participate must be approved by the Task Force. However, the Task Force will not revisit its prior decisions.

4. Each member will designate a representative. Representatives are expected to reflect the concerns and interest of their organizations or constituencies and to ensure that any agreement reached by the Task Force is acceptable to their organization. Alternates are permitted, but must be kept informed of the issues under discussion. Alternates will not participate in Full Task Force discussions unless they are substituting for the member. They may serve on subgroups.

5. Representatives will strive to attend all meetings. Draft agendas will indicate if the Task Force will be making a formal decision (*action item).*

6. The goal of the Task Force is to reach unanimity on its recommendations; however, if the Task Force is unable to attain this goal, then concurrence of 85% of the representatives present shall be characterized as agreement by the Task Force. If all of the representatives from a given constituency group are opposed to matter under consideration, then the 85% approval cannot be characterized as an agreement.

7. Reaching an agreement implies that all members are engaging in good faith bargaining and are searching for solutions that accommodate the needs of all of the members.

OTHER GROUNDRULES FOR THE PROCESS

8. Agendas will be circulated two weeks prior to each Task Force meeting, along with any materials ready for review prior to the meeting.

9. Meetings will start and end on time.

10. Meetings will be facilitated by the Mediator. Representatives may speak only when recognized by the Mediator, and will yield the floor upon the Mediator's request.

11. The mediator or any representative may call a private caucus at any time.

12. Meeting will be open to the public. Time will be reserved for public comment at the end of each meeting and public comment will be facilitated by the Mediator.

13. Meeting notes will be prepared by the Mediator for each session and will be approved at the beginning of the subsequent meeting.

14. All members recognize the legitimacy of the concerns and goals of other members. It is understood that there will be disagreements on the issues under discussion and that discussions can be heated. There will be no personal attacks; any violators may be asked to remove themselves from the meeting by the Mediator.

15. The Mediator may communicate with any representatives on the Task Force at anytime, including during and in-between meeting.

16. Subcommittees may be created by the Task force to prepare materials and proposals for consideration by the full Task Force at its meetings. Subcommittee work products will not be binding on the Task Force or any member, absent approval by the Task force.

17. This mediation process is entirely voluntary and anyone can withdraw at any time by giving notice to the Mediator or one of the Chairpersons.

18. The Task Force may terminate the Mediator or this mediation process at any time.

19. Task Force members unhappy with the mediation process shall contact the Mediator directly with their concerns before airing their grievances with the larger public.

20. There shall be no video or tape recordings of meetings.

21. Brief announcements by Members may be made at the beginning of each meeting.