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Mediation can help clean up environmental disputes

In addition to being faster than waiting for a result at trial – and the inevitable appeal – mediation offers a host of advantages over trying environmental disputes in court.

By Brian S. Currey

Few cases are dirtier, more complicated and potentially more toxic than those involving the environment. Environmental cases are difficult to litigate and even tougher to try. They often involve multiple parties with very different interests and outlooks, can trigger emotional responses and may turn on complex scientific evidence that jurors and judges are unlikely to find interesting – or even understandable.

Even though bench trials may be a better alternative to jury trials, few judges have the time, experience and technical expertise to decide these complex, multi-faceted environmental disputes. With today's crowded dockets, any bench trial will likely be pushed off for years, as expert costs pile up. And the costs of delay may be even higher.

While litigants await trial, the window for effectuating early cleanup and remediation may be closing, and environmental damage may worsen. Any opportunities to mitigate the damage being done to people, wildlife and other natural resources may be lost. As the environmental cost goes up, pressure for criminal prosecution of violators may also increase.

A better approach

Litigating environmental disputes is costly. It requires a significant investment of time and money; the harm done to land, air, water, wildlife and public health may be irreparable. Mediation provides a far better way to resolve these cases. In addition to being faster than waiting for a result at trial – and the



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inevitable appeal – mediation offers a host of advantages over trying environmental disputes in court. For these reasons, environmental cases are frequently mediated, according to David Pettit, formerly an attorney at the Natural Resources Defense Council and now a Senior Attorney at the Center for Biological Diversity's Climate Law Institute.

I know this to be true from my own experience, having litigated environmental matters over the course of several decades. As a mediator, I now oversee their settlement, helping parties work collaboratively to resolve difficult environmental cases that would otherwise take many years to litigate.

While I was a partner at one of the country's leading law firms, I led

or contributed to teams handling many large and well-publicized environmental cases (as well as many other types of cases involving businesses and governmental entities). Among the better-known cases were the *Exxon Valdez* oil spill and the derailment of a tank car in Northern California, which released a chemical that killed virtually every organism within some 40 miles of the Upper Sacramento River. I also litigated and advised on insurance coverage issues tied to environmental issues.

After I left private practice, I served as then-Los Angeles Mayor Antonio Villaraigosa's chief counsel. In that role, I advised on all sorts of matters, including the City's environmental issues at the Port of Los

Angeles. Later, as a Los Angeles County Superior Court judge and a presiding justice of the California Court of Appeal, I resolved environmental cases. In that role, I was regularly reminded how long it can take to litigate these cases and how complex they can be. And even though I consider myself something of an expert on legal remedies (having taught a law school course on the topic), I was reminded of the limited options available to courts tasked with resolving environmental disputes.

Why mediation works

The first and most obvious advantage of mediating environmental disputes is the process itself. Most or all collaborative effort grinds to a halt during litigation. In contrast, mediation is, by nature, a collaborative process; environmental remediation generally requires collaborative effort by experts from different disciplines.

Unlike the adversarial posturing that occurs in trials, mediating parties and their experts can meet, discuss issues, organize expert work groups, interview and retain contractors, obtain cost estimates, involve insurance companies, involve other potentially responsible parties and otherwise move forward as part of the mediation process. This results in a better-informed resolution.

Mediation also offers the benefit of confidentiality. Communications between parties and their experts are protected from discovery and disclosure, which allows for a more candid and open exchange of information, ensuring a more well-reasoned settlement agreement.

Beyond this, a mediator who is knowledgeable on environmental matters can provide critical guidance to parties, counsel and experts. There is little risk that important issues will be overlooked or misunderstood, as can happen with both judges and juries; any final agreement will have been reached with mutual informed consent.

Mediation permits greater flexibility than litigation. The parties may agree on remedies unavailable to a court, such as community benefit programs to offset environmental costs, deeding of conservation easements or access agreements. Courts are limited to damages and permissible injunctive relief.

Pettit recalls a time, many years ago, when he represented the County of Santa Barbara in a lawsuit filed against it by homeowners whose water wells were being fouled by pollution from an old, closed landfill. The County had issued building permits without revealing the problematic dump. After mediation, the County resolved the litigation by agreeing to pump water to the homeowners from clean, upgradient wells. That remedy, although very practical, is unlikely to have been imposed by a court absent the County's consent.

What can be mediated

Virtually any type of environmental dispute can be mediated successfully. These include cases that call for investigation and cleanup of contaminated water, soil or air. The parties mediating environmental cases, with the support of their mediator, should have every reason to work collaboratively to determine appropriate remediation strategies as well as the best allocation of responsibility for cleanup costs. Instead of spending untold sums on legal fees and court costs, their funds can be directed in a manner that will make a difference.

Land use disputes, such as California Environmental Quality Act challenges to proposed developments and any conditions required for them, can also be mediated. Generally, land use planners and developers work together to reduce adverse environmental impacts when practicable. Sometimes, non-environmental concerns underlie the dispute, however, even if the claimed objections are environmental. For example, a union might raise environmental objections to a project because the proponents intend to employ only non-union labor. These concerns too can be addressed in mediation, even if they would be out-of-bounds in an environmental lawsuit.

Disputes between regulators and regulated businesses are also good subjects for mediation if the interested regulator is amenable. Government claims for damage to natural resources or cost recovery for environmental remediation can also be mediated successfully.

Finally, toxic tort claims, claims related to remediation of damages from fires and floods and climate change cases are excellent candidates for resolution through mediation. These types of cases can be highly complex, controversial and costly when tried in court. All of them can be – and have been – mediated productively, bringing early closure for residents who have been impacted by such disasters. The time and costs saved by forgoing trial can instead be invested in timely remediation and long-term prevention.

Conclusion

Environmental cases are being mediated. The biggest problem, according to prominent environmental litigator Kelly Winter Weil, a partner at Cotchett, Pitre & McCarthy's Santa Monica office, is there are too few mediators qualified to handle them. This overburdens the courts, delays resolution of disputes and increases costs for parties. It's time

for more environmental litigators and retired judges with environmental expertise to join me in the ranks of environmental mediators.

Hon. Brian S. Currey (Ret.) is a neutral with Signature Resolution who has more than four decades of legal and judicial experience. A former presiding justice of the California Court of Appeal and Los Angeles County Superior Court judge, he received the Los Angeles County Bar Association's Outstanding Jurist Award in 2024.

