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LIMITS AND DANGERS OF ENVIRONMENTAL MEDIATION: A REVIEW ESSAY

DAVID SCHOENBROD*

INTRODUCTION

Allan Talbot's *Settling Things*¹ evaluates the work of a would-be new profession,² mediation of environmental disputes, and finds it good. Talbot concludes that mediation can resolve a broad array of environmental conflicts more quickly and enduringly than can litigation.³ He recommends that government and foundations promote environmental mediation through funding and by pressuring adversaries to participate in the mediation process.⁴

Talbot's view, I will argue, fails to recognize that our environmental statutes do not permit speedy or final adjudication of disputes because they involve too many steps and leave too many hard issues unresolved.⁵ Since litigators have ample opportunity to forestall decisions in the legal process, the fear of an unfavorable final judgment generally fails to motivate extralegal resolution. Usually at least one party to an environmental dispute prefers delay to compromise and has no incentive to negotiate a compromise. Talbot's recommendation would resolve few additional disputes unless his notion of pressuring parties to engage in mediation includes use of official, legal power to force parties to accept mediated results.

Environmental mediation appeals to some corporations, foundations, and environmental groups because of their understandable frustration with the delays and expense of conventional environmental

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¹ A. Talbot, *Settling Things* (1983) [hereinafter cited by page number only].

One case study that Talbot analyzes is the settlement of the Hudson River power controversy. Pp. 7-26; see text accompanying notes 49-54, 70-76 *infra*. As an organizer and moderator of a conference of parties to the controversy held at New York University School of Law on December 21, 1981, I worked on an evaluation of that settlement. See note 51 *infra*. Prior to that time, I was an attorney for the Natural Resources Defense Council, which represented one of the parties to the Hudson River dispute. Except for a single court appearance, however, I did not work on that dispute as a practitioner.

² See Fanning, *The World's Newest Profession, Environment*, Sept. 1979, at 33.

³ P. 100. See generally pp. 91-101.

⁴ See pp. 91-93 (need for pressure) *id.* at 100-01 (need for funding).

⁵ See text accompanying notes 41-44, 92-93 *infra*.

litigation.⁶ It is also a subject of scholarly inquiry,⁷ which reflects the growing interest in "alternative dispute resolution" techniques for all sorts of disputes.⁸ Environmental mediation groups have formed, received foundation grants, and been asked to mediate cases.⁹ Talbot attempts to determine how well environmental mediation has worked in practice. His positive assessment of environmental mediation is likely to be influential, both because of his accessible writing style and because of his position as a highly respected observer of environmental affairs.¹⁰

Talbot's *Settling Things* is, however, more than just one individual's opinion. It carries the weight of powerful institutions. The Ford Foundation and the Conservation Foundation sponsored and published Talbot's research.¹¹ The Ford Foundation funded many of the mediation experiments that Talbot evaluates;¹² the foreword, written by the President of the Conservation Foundation, endorses mediation even more enthusiastically than does Talbot.¹³ The foreword also notes that the Rockefeller Foundation and other institutions provide additional financial support for mediation.¹⁴

In the past, these institutions have funded environmental litigation.¹⁵ Because they are opinion leaders, they may influence other

⁶ See Shabecoff, *Mediating, Not Suing, Over the Environment*, N.Y. Times, May 29, 1983, at E16, col. 1.

⁷ See, e.g., *Environmental Mediation* (L. Lake ed. 1980); S. Mernitz, *Mediation of Environmental Disputes* (1980); Susskind & Weinstein, *Towards a Theory of Environmental Dispute Resolution*, 9 B.C. Envtl. Aff. L. Rev. 311 (1980); see also Phillips & Piazza, *The Role of Mediation in Public Interest Disputes*, 34 *Hastings L.J.* 1231 (1983).

⁸ See J. Auerbach, *Justice Without Law?* (1983); R. Fisher & W. Ury, *Getting to Yes* (1981); Bok, *The President's Report to the Harvard University Board of Overseers (1981-1982)* (on file at New York University Law Review). Chief Justice Burger has added his voice to the increasing calls for the use of such techniques. See W. Burger, *Remarks at Midyear Meeting of American Bar Association 16-17* (Feb. 12, 1984) (available from offices of the United States Supreme Court).

⁹ These organizations include the Center for Environmental Conflict Resolution (RESOLVE) (affiliated with the Conservation Foundation, Washington, D.C.), and The Office of Environmental Mediation (Seattle, Wash.), and The Environmental Mediation Service (Norfolk, Va.). For an exhaustive listing of such groups, see Susskind, *Environmental Mediation and the Accountability Problem*, 6 *Vt. L. Rev.* 1, 1 n.1 (1981).

¹⁰ Talbot wrote, among other works, a well-received account of the ongoing struggle between environmentalists and utility companies over the future of the Hudson River. A. Talbot, *Power Along the Hudson* (1972).

¹¹ See pp. viii-ix (describing Ford and Conservation Foundation support for Talbot's research).

¹² See, e.g., pp. 31, 47, 71 (mediation funded by Ford Foundation).

¹³ Pp. vii-ix (foreword by William K. Reilly).

¹⁴ Pp. vii-ix.

¹⁵ See Council for Public Interest Law, *Balancing the Scales of Justice* 227 (1976).

foundations to shift their support from environmental litigation to mediation. They may also influence government to fund mediation and may help to legitimize efforts by agencies or judges to pressure disputants to submit to mediation. The argument in *Settling Things* requires scrutiny not just as the proposal of a thoughtful author but as the rationale for actions of the powerful.

Talbot decided that the "fairest way" to carry out his commission to evaluate mediation efforts "would be by example: presenting a series of case studies."¹⁶ He examines six cases, involving matters such as the location of a municipal garbage dump;¹⁷ the operation of a small, private hydroelectric plant;¹⁸ the design of an urban expressway;¹⁹ and the impact on aquatic life of a series of large electric generating stations along the Hudson River.²⁰ These cases might seem to be a random sample of environmental disputes, but they are not. In each instance, before agreeing to take the case, the mediator, generally funded by one of Talbot's sponsors,²¹ had examined the dispute and determined that it had the potential for a successful resolution.²² Talbot's hand-picked sample is not a typical cross-section of environmental disputes. Indeed, this Essay will establish that his six cases are quite atypical.²³

The case studies do allow Talbot's journalistic talents to shine. Each study is roughly fifteen pages of easy reading, which not only narrate the basic story of the dispute and its resolution but also provide a flavor of what goes on among the individuals involved in environmental litigation and mediation. A particularly charming example involves the opposition by the people of Swansville, Maine, to a small hydroelectric plant proposed to be built by a young couple who had recently moved to Swansville from a big city. The newcomers claimed to have proof that the plant could operate economically without emptying the local reservoir each summer, but the townspeople believed that the evidence did not exist. When mediation revealed that the newcomers had been telling the truth, the citizenry reacted, altogether understandably, with the belief that someone had

¹⁶ P. 2.

¹⁷ Pp. 67-76.

¹⁸ Pp. 41-53.

¹⁹ Pp. 27-38.

²⁰ Pp. 7-24.

²¹ See notes 11-12 *supra*.

²² See, e.g., pp. 14-15 (mediator Russell Train examined circumstances of Hudson River dispute before agreeing to mediate).

²³ See text accompanying notes 45-48 *infra*.

betrayed them. They got over their anger, however, and, with the help of a mediator, found it possible to make a deal with which both sides could live.²⁴

Talbot's ability to recreate the experience of settling environmental disputes,²⁵ together with his disarming candor about the snags that occurred in the mediation cases he describes, convincingly suggests that mediation was helpful in most of the six cases and did no harm in any of them. The critical question, however, is whether the generally positive results in these six cases justify his endorsement of greater funding and promotion of environmental mediation. Talbot's attempt to generalize from the case studies is flawed. As Part I will show, he greatly overestimates the number of environmental disputes in which mediation could produce a settlement. Moreover, as Part II discusses, his recommended campaign to promote the use of mediation in environmental cases may jeopardize the public interest. Part III, therefore, presents an alternative to mediation that avoids these dangers while still promoting more rapid, lasting, and consensual solutions to environmental disputes.

I

THE LIMITED POTENTIAL OF ENVIRONMENTAL MEDIATION

In my view, Talbot's claims for environmental mediation rest on two implicit propositions: (1) until mediation became available, there were few alternatives to litigating environmental disputes,²⁶ and (2) most environmental disputes eventually become amenable to successful mediation.²⁷ Each is wrong.

²⁴ See pp. 41-54.

²⁵ Apart from newspaper articles, Talbot's account depends in large part "on what the various parties were able, or willing, to tell me." P. 4.

²⁶ This implicit proposition appears from the cases on which Talbot chooses to focus. In each case, ordinary litigation efforts had produced only protracted delay prior to mediation. See, e.g., pp. 13 (noting that Storm King project was ongoing problem for "close to 14 years, and there was no end in sight"); p. 29 (noting 12-year debate on Interstate 90 problem). The Conservation Foundation's description of Talbot's book explicitly states the proposition. Conservation Foundation, Catalog 10 (1983) (noting that "there were few alternatives to litigating environmental disputes" before mediation became available).

²⁷ This implicit proposition also appears from the cases Talbot chooses to discuss. He presents only cases of successful environmental mediation. See pp. 95-97 (asserting that three cases were clearly successful and that three others were at least arguably successful). Talbot mentions no case in which the parties never attempted environmental mediation because they considered it infeasible. Nor does he present instances where mediation stalled and ultimately failed. Talbot notes that, although one experienced environmental mediator, Harold Bellman, believes that only 10% of environmental disputes can be mediated, Bellman might mean that "the remaining

The first proposition is wrong because most environmental disputes are already resolved by either formal or informal consent. For example, if a developer plans a project, the project invariably will require government approval. To minimize delay in the approval process, the developer is likely to design the project to reduce its vulnerability to criticism from licensing agencies, at least to the extent that the developer can ascertain an agency's potential environmental objections. In essence, the developer's drafting of its application, often in consultation with licensing agencies or citizen groups, is a form of negotiation with environmental interests. If the agency or citizen groups object to the application once it is submitted, the most likely next step is informal discussion with a view toward placating the objectors by modifying the application so that the objectors decide that the development would not be worth disputing. In my experience as an attorney for an environmental organization, I found that, because of these informal processes, only a small fraction of all the license applications that might be opposed on environmental grounds are actually opposed in formal proceedings.

Informal processes also resolve potential disputes about pollution control requirements. In most cases, agencies and businesses work out disagreements over emission limits without resort to adjudicatory proceedings. When a dispute about a development or pollution control does go to litigation, it can be cut short by a negotiated settlement among the parties or by a tacit concession by one side after preliminary litigation encounters. I have no data on the frequency of such disposition of environmental cases, but my sense is that a majority of cases are resolved short of prolonged litigation. Moreover, the cases that are litigated usually are regarded as especially important. Environmental groups decide that the environmental impact, precedential value, or symbolism of the dispute justifies the expense and effort of a contest, while opposing interests have concluded that they too have enough at stake to make litigation worthwhile. What makes Talbot think that these special cases, which could not be settled by informal, voluntary negotiation, could be resolved through formal mediation?

Talbot's second implicit proposition, that mediation can successfully resolve most environmental disputes, is an attempt to respond to

90 percent aren't ready yet." P. 93. Talbot seems to think that such a view might be too hopeful, but by how much he does not say. See p. 93.

Talbot's enthusiasm for environmental mediation, however, appears more restrained when he is not writing directly under the auspices of the Conservation Foundation. See Talbot, *The Case for Environmental Mediation*, *The Mother Earth News*, July-Aug. 1983, at 183.

this question. Mediation has helped to resolve many protracted labor-management conflicts. Talbot draws an analogy between labor disputes and environmental disputes.²⁸ Talbot does mention some reasons why labor-management conflicts present simpler contexts for mediation than do environmental disputes,²⁹ but he does not make clear that many environmental disputes never involve the time pressure on all parties that is so critical in motivating resolution of labor-management conflicts.³⁰ It makes sense for both sides of a labor dispute to settle their differences short of prolonged strikes, with or without mediation. Each side depends on the other—labor needs management to earn a living, management needs labor to make a profit. Each side operates under time pressure—for each day of a strike, labor loses pay, and management loses profits.

Commentators generally view parity of power and time pressure³¹ as necessary conditions for settlement of any type of dispute, not just labor disputes.³² If one side has power over the other, the independent side can get its way without compromise. Even if there is parity of power, if a party is not subject to time pressure, it will prefer to wait and see what happens in court rather than to settle quickly.³³

²⁸ Talbot begins his description of the effectiveness of mediation with a reference to the established success of mediation in labor-management disputes. P. 1. Only at the end of the book does he introduce some reasons for caution in drawing an analogy between labor and environmental mediation. P. 91.

²⁹ Talbot's comments on the limitations of the analogy between labor and environmental mediation pertain mostly to the lack of clear structure in the latter:

[T]he setting for environmental mediation is more complex and less structured. There is no contract that is about to expire. There are usually more than two parties. The issues are measured not only in dollars and cents, but are cast also in conflicting values about how decisions affecting natural resources should be made.

P. 91.

³⁰ For a discussion of the importance of time pressure to successful mediation, see text accompanying notes 31-39 *infra*.

³¹ One party may be said to have "power" over the other when it can inflict some sort of damage on the other, either by imposing a cost or denying a benefit. "Parity of power" may be said to exist where both parties hold roughly equivalent ability to inflict damage on each other. "Time pressure" to settle exists only where one party holds some power over the other. Moreover, time pressure connotes some sense of immediacy or time-relatedness. Time pressure exists, for example, when a party must settle or face an immediate penalty, or when the amount of the penalty increases over time. Conversely, power may exist and time pressure not exist, when, for example, any penalty that may be imposed is remote in time, and the penalty will not grow with time. Since power is a necessary condition to time pressure, the remainder of this Essay will refer to time pressure alone.

³² See R. Fisher & W. Ury, *supra* note 8, at 101-10; cf. Eisenberg, *The Bargain Principle and Its Limits*, 95 *Harv. L. Rev.* 741 (1982) (outlining factors that govern conscionability of contracts).

³³ Time pressure is not measured exclusively in terms of the financial resources or political clout of the parties. Rather, it "depends primarily upon how attractive to each [party] is the

Time pressure may arise from the cost of the ongoing controversy, such as legal fees or strike expenses, from a need to end delay of a project, or from a desire to avoid the uncertainty of an unsettled outcome.

For the labor dispute analogy to work, environmental disputes must exhibit this characteristic time pressure on each of the disputants.³⁴ Talbot writes that the "basic script" for such disputes is for environmental groups to fight "unpopular projects by challenging them at every stage of what became, in the late 1960s and early 1970s, an increasingly complex environmental review process at both the state and federal level."³⁵ In addition to fighting development projects, citizen groups also try to force large enterprises to place pollution controls on already established facilities, in which case they may encounter prolonged resistance from the firms in administrative and judicial tribunals.³⁶ The prolonged nature of these processes tends to relieve one party of time pressure to settle. Where, for instance, the dispute concerns a proposal to build a new facility, opponents of the

option of not reaching agreement." R. Fisher & W. Ury, *supra* note 8, at 106. Thus, the party that feels more free to walk away from the negotiations is under less time pressure than its opponent.

³⁴ Talbot appears to recognize that lack of time pressure hinders mediation. See p. 91 ("[M]ediation becomes feasible when a conflict matures to the point where the issues are clearly defined, the various sides perceive the existence of a balance of power, and they perceive that their objectives cannot be achieved without negotiations."). He does not acknowledge, however, that lack of time pressure can block mediation altogether. See note 27 *supra*. This omission reflects an overly optimistic assessment of environmental mediation. Indeed, Talbot's call for creation of pressure by public agencies could be seen as an admission that time pressure must be artificially supplied. See p. 93. Yet Talbot phrases his call for pressure from public agencies in exclusively positive terms: "Those involved in environmental disputes need not wait passively for the timing to be right." *Id.*

In addition to the lack of time pressure in environmental disputes, the labor dispute analogy is troubling for other reasons. In a labor-management mediation, the number of parties and the limits of any given issue are fairly clear, whereas in an environmental dispute, neither is likely to be especially clear. For a critical assessment of the labor dispute analogy, see Susskind, *supra* note 9, at 6 n.14; Susskind & Weinstein, *supra* note 7, at 325-33. For a general critique of the usefulness of labor-type arbitration (as opposed to mediation) outside the labor context, see Getman, *Labor Arbitration and Dispute Resolution*, 88 *Yale L.J.* 916 (1979). Getman emphasizes that labor arbitration involves a unique blend of equality of bargaining power, mutual respect, and specific contract terms as a basis for bargaining. *Id.* at 933-34. He relies on these observations in concluding that attempts to apply the labor arbitration model to arbitration of dismissals of nonunion workers and to mediation of prisoners' grievances lack promise. See *id.* at 934-38 (workers' dismissals); p. 938-46 (prisoners' grievances).

³⁵ P. 2.

³⁶ One aspect of the Hudson River power plant dispute, for example, involved environmental groups' demands for the installation of cooling towers at electrical generating plants as a means to reduce thermal pollution of the Hudson River. Pp. 8-9. For a description of the Hudson River power plant dispute, see text accompanying notes 45-54 *infra*.

project have their way as long as the licensing process continues. Conversely, where the dispute concerns placement of pollution controls on existing facilities, delay favors the firm that seeks to avoid the controls; delay will give it a competitive advantage over firms that have already installed the controls.³⁷

Some of the sources of time pressure in labor disputes or tort litigation are not likely to influence environmental disputes so strongly. One such source of time pressure is the greater expense of confrontation rather than settlement. For a business enterprise, attorneys' fees in an environmental dispute are likely to be smaller, relative to the amount at stake, than in a typical tort suit and much smaller than the costs associated with a labor strike.³⁸ For a citizen group, the costs of litigating environmental disputes may appear prohibitive, but the group may use the dispute as a basis for fundraising and ultimately may receive an award of attorneys' fees.³⁹

Another typical source of pressure to settle is the fear that litigation may lead to a particularly adverse result, such as a large money judgment against a tort defendant. This pressure of uncertainty is undercut, however, if ordinary adjudication rarely achieves finality,⁴⁰ as is the case with environmental disputes. For instance, Talbot notes the many steps typically required to license a new facility.⁴¹ Similarly,

³⁷ Cf. R. Fisher & W. Ury, *supra* note 8, at 106-07 (noting that existence of established alternative to negotiated agreement functions to reduce disparity of power). The Clean Air Act § 304, 42 U.S.C. § 7604 (Supp. V 1981), for example, authorizes citizen suits to enforce clean air standards. These provisions are an attempt to put time pressure on polluters who have not yet installed pollution controls.

³⁸ Amendments to the Clean Air Act imposed a penalty for delayed compliance in an effort to remedy this disparity, Clean Air Act Amendments of 1977, § 119, 42 U.S.C. § 7420 (Supp. V 1981), but the Environmental Protection Agency (EPA) has been largely unable to enforce it. See Schoenbrod, *Goal Statutes or Rules Statutes: The Case of the Clean Air Act*, 30 UCLA L. Rev. 740, 795 (1983).

³⁹ See Remarks, Conference on Hudson River Power Settlement at New York University School of Law (Dec. 10, 1981) (statement of Angus Macbeth, former attorney for Hudson River Fishermen's Association) (tape recordings of conference on file at New York University Law Review) [hereinafter Remarks at Conference]. A recent Supreme Court decision that links the attorney's fee award to the plaintiff's degree of success may discourage settlement for fear of losing a substantial portion of the fee award. See *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1940 (1983).

⁴⁰ As Martin Shapiro has explained, the success of ancient Chinese dispute resolution, which consisted almost entirely of mediation, depended on the existence of an effective adjudicatory process. M. Shapiro, *Courts* 192 (1981). Because the adjudicatory process sometimes led to draconian results, the parties resorted to mediation: "The existence of an official judicial alternative to mediation, and the capacity of the district administrator to shift at will from mediation to law application, provided an essential corrective for the tendency to overclaim that is endemic to mediation." *Id.*

⁴¹ P. 101.

imposing pollution controls on existing facilities usually requires a protracted, multistage process.⁴² Because of the difficulty of achieving finality under existing statutory regimes, there is often no controlling law in environmental disputes,⁴³ which makes swift adjudication even more unlikely. Moreover, environmental statutes are often amended at intervals of several years, a shorter span than the typical duration of the litigation.⁴⁴ Frequent amendment creates the risk that important legal issues will have to be relitigated under new statutory standards before they can be resolved.

On a casual reading, the book might leave the impression that mediation will work in most environmental disputes because it worked in the six cases examined. The cases are, however, not representative of most environmental disputes. Talbot's "basic script" for protracted disputes involves a large project, such as the Storm King hydroelectric generating plant involved in the Hudson River power dispute, opposed by a citizen group whose only hope for countervailing power is through litigation.⁴⁵ Five of the six disputes, however, do not follow the script. Instead, they involve adversaries of roughly equivalent political power, such as local governments opposing local governments,⁴⁶ a small village opposing a mom-and-pop development,⁴⁷ and an Indian tribal council opposing a rural park district.⁴⁸ Only one of the six conflicts clearly follows Talbot's basic script, and the successful mediation in that case depended on exceptional circumstances that hardly demonstrate the widespread applicability of mediation. That controversy involved a dispute between electrical utilities and citizen groups over the impact of electric power generation on the Hudson River fishery.⁴⁹ The dispute was unique, in terms of mediation, because both sides had something to lose from delay.

The first facet of the dispute involved Consolidated Edison's (Con Ed) proposal to build a pumped storage hydroelectric generation facility at Storm King Mountain, New York.⁵⁰ Environmental groups

⁴² See Pedersen, *Why the Clean Air Act Works Badly*, 129 U. Pa. L. Rev. 1059, 1082-88 (1981); Schoenbrod, *supra* note 38, at 770-71.

⁴³ See Schoenbrod, *supra* note 38, at 791-93 (describing this problem with respect to Clean Air Act).

⁴⁴ The Clean Air Act, for example, was amended five times between 1970 and 1982. See generally Schoenbrod, *supra* note 38, at 808-09.

⁴⁵ P. 2.

⁴⁶ Pp. 27-38, 67-76.

⁴⁷ Pp. 41-53.

⁴⁸ Pp. 55-65.

⁴⁹ Pp. 7-24.

⁵⁰ The basic idea was to create an eight billion gallon reservoir, which would be filled during off-peak electrical usage periods and discharged to generate electricity during periods of high electrical demand. See p. 8.

opposed the Storm King project.⁵¹ Delays in licensing the project served their interest by preventing the project from operating and by increasing the cost of the project, thus making its final completion less probable. A second facet of the controversy involved the environmental impact of oil-fired and nuclear-powered generating stations already in operation along the Hudson. Environmentalists proposed that the utilities install cooling towers to reduce radically the quantity of river water used to cool the plants, thereby lessening harm to river fish.⁵² Delays in the litigation of this aspect of the dispute served the utilities' interest in gaining a reprieve from the major expense of installing cooling towers. If either aspect of the Hudson River controversy were viewed separately, only one party would feel the time pressure necessary to motivate an early settlement. The time pressure to settle was mutual because the controversy presented two disputes that mirrored each other in terms of the effects of delay.⁵³

The utilities, environmental groups, and the United States Environmental Protection Agency (EPA) signed an agreement in December 1980, under which the utilities abandoned the Storm King project, agreed to operate the existing plants in ways that would reduce harm to river fish, endowed a foundation to study the environmental impacts of the plants on the river, and agreed to pay the environmental groups' attorneys' fees in exchange for avoiding any requirement to build cooling towers for the existing plants.⁵⁴ The major participants in this dispute gathered the following year to draw lessons from their experience.⁵⁵ The parties generally agreed that the settlement depended on the time pressure felt by both sides.

The conference sought to discover why seventeen years had passed before settlement was reached. Since mutuality of time pressure existed in this controversy, and yet settlement came so late, the case may illustrate that lack of time pressure on both sides is not the only reason why negotiation fails.⁵⁶ Talbot briefly mentions other

⁵¹ In addition to aesthetic concerns, environmentalists claimed that the reservoir would destroy much of the Hudson River's striped bass population. See p. 8. This dispute provoked one of the most famous and long-lasting environmental litigations. For a chronology of the Storm King proceedings, see *The Hudson River Power Settlement* 31-48 (R. Sandler & D. Schoenbrod ed. Dec. 10, 1981) (on file at New York University Law Review).

⁵² Pp. 8-9.

⁵³ Remarks at Conference, *supra* note 39 (statement of Albert Butzel, attorney for Scenic Hudson Preservation Conference during Hudson River power plant mediation).

⁵⁴ See *Hudson River Power Settlement Agreement* (Dec. 19, 1980), reprinted in *The Hudson River Power Settlement*, *supra* note 51, at 149-203.

⁵⁵ See note 1 *supra*.

⁵⁶ Literature on negotiations and mediation also makes this point. See R. Fisher & W. Ury, *supra* note 8, at 5-18; P. Gulliver, *Disputes and Negotiations* 88-100 (1979); Gladwin, *Environ-*

obstacles near the end of his book.⁵⁷ He does not, however, place enough emphasis on these limiting factors.⁵⁸ One obstacle to settlement may be the fact that too many interests are represented in the dispute.⁵⁹ Talbot mentions the Westway dispute in New York City in which thirty groups were involved, turning efforts to mediate into "verbal brawls."⁶⁰ This seemingly extreme example, when combined with the successful mediation in the six case studies, leaves the reader with the impression that involvement by an excessive number of interests rarely impedes mediation. That impression is wrong. Environmental disputes have broad impacts; given the diversity of interests among and between business, labor, neighborhood, governmental, and environmental organizations, an environmental dispute will often become unmanageable. A large or intrusive project, such as Westway, in a metropolitan setting is particularly likely to affect a large number of conflicting interest groups. Representation of even fewer than thirty interests, however, can disable negotiations. With such a smaller number, the process still may become too ponderous to develop the give-and-take and the trust on which success depends. Twelve major interests, for example, participated in the Hudson River negotiations.⁶¹ The negotiations still took twenty months, even though the process was pushed along by a mediator, Russell Train, former administrator of the EPA, who provided rare prestige and skills.

Most of the other case studies Talbot discusses did not involve an excessive number of interests. All but one were fairly small projects situated outside major metropolitan areas. The chief players, moreover, were governmental bodies, and the citizenry seemed content, as far as Talbot reveals, to accept the decisions of their officials. The single exception among these five cases involved siting an urban highway. The chief combatants were three local governments and a num-

mental Mediation and a Contingency Theory of Preferred Third-Party Intervention (Mar. 1982) (Paper No. 81-13, New York University Graduate School of Business Administration) (on file at New York University Law Review).

⁵⁷ Pp. 93-95.

⁵⁸ Indeed, Talbot's citation of potential limiting factors appears to have had absolutely no impact on the enthusiastic endorsement of environmental mediation by William K. Reilly, President of the Conservation Foundation, in his foreword to *Settling Things*. See pp. vii-ix.

⁵⁹ The key to a mediation's manageability is the number of distinct interests represented as opposed to the number of representatives. See Susskind & Weinstein, *supra* note 7, at 337-38. The number of participants may also affect the process, but to a lesser extent. See R. Fisher & W. Ury, *supra* note 8, at 7-8. Environmental disputes often involve both many interests and many representatives.

⁶⁰ P. 94.

⁶¹ Talbot names three environmental groups, four public agencies, and five electrical utilities. P. 7.

ber of citizen organizations.⁶² The citizen groups did not participate in the negotiations,⁶³ which left them the alternatives of trying to influence the negotiations from outside or challenging the result in court, although the *fait accompli* of a successful settlement could have reduced the chances of prevailing in court.⁶⁴

Another obstacle to mediation that Talbot treats too lightly involves issues that do not permit compromise. Talbot notes in passing that negotiation is not possible if, for example, environmental groups unequivocally oppose nuclear power or off-shore oil drilling.⁶⁵ Most of the six case studies Talbot presents did not involve absolute opposition by environmentalists.⁶⁶ Since the cases presented are so different from the few situations where Talbot admits that issues of principle may block negotiation, the reader may believe that such issues are peculiar to a few special kinds of environmental disputes. Moreover, the reader may also believe that in these rare cases such issues prevent negotiation only when the opponents take a particularly hard-line stance.

There are, however, many other reasons why a case may not permit compromise. Much environmental litigation is brought by national organizations to test the meaning of environmental statutes. A settlement of the specific dispute that presents the necessary factual context would defeat that purpose.⁶⁷ Environmental statutes, moreover, can force reasonable organizations to take rigid positions. The statutes often impose inflexible commands on agencies, e.g., to protect health regardless of costs or to issue a large number of complicated regulations within a short period of time.⁶⁸ To insist that these laws be carried out without compromise may be unreasonable in many cases because the commands are unreasonable. If environmental organizations forgo the protections promised by the statute, however, they

⁶² Pp. 27-38.

⁶³ Pp. 32-33.

⁶⁴ Talbot explains that the environmental groups did in fact challenge the settlement in court. P. 95.

⁶⁵ P. 94.

⁶⁶ In the Eau Claire, Wisconsin, dump case, for example, environmentalists did not oppose the dump altogether but sought a more environmentally conscious design. P. 69. Similarly, in the Swan Lake, Maine, hydropower case, opponents were more suspicious of the developer's motives than they were absolutely opposed to the project. P. 45.

⁶⁷ Given the uncertain meaning or impact of much environmental legislation, moreover, environmental mediators who settle a test case could function as *de facto* policymakers, a possibility that raises a host of serious legal concerns. See McCrory, *Environmental Mediation—Another Piece for the Puzzle*, 6 *Vt. L. Rev.* 4, 63-64 (1981).

⁶⁸ See Schoenbrod, *supra* note 38, at 759-60.

may place their interests at the mercy of administrative agencies that the environmentalists do not trust.⁶⁹

The settlement of the Hudson River power plant dispute illustrates that disputants' nonnegotiable positions may prevent settlement and that mediators have limited power to overcome this impediment. In the early years of the Hudson River dispute, the two major aspects of the controversy were simply not subject to compromise. Environmental groups flatly opposed the Storm King project, even though Con Ed substantially redesigned it to meet some of their objections.⁷⁰ On the other hand, Con Ed believed that the project was necessary to supply power at times of peak demand.⁷¹ Con Ed's commitment, however, waned as alternative sources of peak power appeared, as its peak power needs grew less rapidly than expected, and as anticipated construction costs rose.⁷² Similarly, installation of cooling towers at first appeared to be a nonnegotiable item for both sides. If the utilities agreed to install the towers without making use of every conceivable legal defense, the public utility commissions were likely to exclude the cost of the towers from the utilities' rate bases as unnecessary expenses.⁷³ Environmental groups, on the other hand, insisted that the towers be constructed because data indicated that the towers were needed to avoid obliterating, perhaps within five years, the Hudson River as spawning ground for much of the middle Atlantic's valuable striped bass population.⁷⁴ Subsequent data, however, indicated that damage to fish might be held to acceptable levels with much less costly measures.⁷⁵ At the same time, the fish damage issue lost some force

⁶⁹ In special circumstances, for example, where environmentalists need only compromise with a single business, concern about precedential impact may be slight, and environmentalists may be less insistent about their seemingly absolute statutory rights.

⁷⁰ Remarks at Conference, *supra* note 39 (statement of Charles Luce, former chairman of the board of Con Ed).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* Ira Millstein, a senior partner at the New York law firm of Weil, Gotshal & Manges, has noted, in this connection, that typically "the utility is insecure because it's being watched by the public service commission. It's afraid to come to a conclusion because if it's wrong, it can be second-guessed. It makes settling with a utility almost impossible." Bok on Lawyers: Wise Prophet or Unjust Critic?, *Legal Times*, July 25, 1983, at 35, col. 2 [hereinafter Bok on Lawyers].

⁷⁴ Remarks at Conference, *supra* note 39 (statement of John Lawler, engineer for private consulting firm).

⁷⁵ *Id.* (statements of Peter Skinner, scientist at New York State Dep't of Environmental Conservation at time of Hudson River conference; Lawrence Barnthouse, scientist at Oak Ridge National Laboratory at time of conference).

with the discovery that Hudson River fish were already at risk from PCB contamination.⁷⁶ The two main aspects of the dispute, originally nonnegotiable, thus became negotiable over time. The mediator did not make the issues negotiable, but he did play a pivotal role in helping the parties to seize the opportunity to settle.

II

THE DANGERS OF A CAMPAIGN FOR ENVIRONMENTAL MEDIATION

Although Talbot overestimates the potential for successful mediation in environmental disputes, he does illustrate the ways in which a mediator can help to take advantage of opportunities for negotiation when they appear. In the six case studies, mediators helped the parties to see beyond their differences to the possibility of mutually beneficial outcomes, provided opportunities for the disputants to vent their anger in ways that furthered reconciliation, eased scheduling problems, and dealt with other administrative issues that might have distracted the parties from substantive negotiations.⁷⁷ These functions do parallel those served by mediators in labor disputes.

Talbot also shows that environmental mediators do something that labor mediators need not do: seek approval of the settlement from regulatory bodies. The Hudson River power plant settlement, for example, required acceptance by two federal agencies and by agencies of several states that had not participated in the negotiations.⁷⁸ Talbot demonstrates that mediators must often help to sell the deals struck by the parties to regulators, but he fails to underscore that this function raises important policy concerns.

The primary danger is that the settlement process will bypass the regulatory process in which the public interest, not necessarily represented by private parties to a negotiated settlement, can be aired. The Hudson River settlement illustrates this danger. The agreement among the utilities and the environmental groups required approval by the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, the EPA, and state public utility commissions. These agencies' statutory mandates require that they use their license authority to maximize the public interest.⁷⁹ The agencies were also

⁷⁶ *Id.* (statement of Ross Sandler, attorney at Natural Resources Defense Council at time of Hudson River settlement).

⁷⁷ For a particularly insightful description of one mediator's successful tactics, see pp. 86-89.

⁷⁸ See pp. 23-24.

⁷⁹ The New York Public Service Commission, for example, is charged with regulating utility rates. In determining whether a utility's rates are reasonable, the commission must "take into

variously responsible for determining whether the settlement protected the environment to the extent required by statute and for deciding whether to pass on to ratepayers, in the form of higher utility bills, the costs incurred by Con Ed in the abandoned Storm King project, attorneys' fees for environmental groups paid by the utilities, and the utilities' expenses in operating the existing power plants so as to reduce the impact on fish.⁸⁰ The conflict between statutory mandate and the requirements for successful settlement is apparent. If each agency had exercised its statutory mandate independently, the odds of them all approving the same package of provisions would have been miniscule. To have made each agency party to the negotiation, however, would have contravened their quasi-judicial function and, in any event, might have enlarged the number of interests represented to an unmanageable size. The Hudson River negotiators overcame this obstacle by leaving most of the agencies out of the negotiations and by then presenting them with a settlement conditioned on each of them approving it. The settlement was hard to disapprove. The only alternative to approval was continued litigation, already in its seventeenth year, with no end in sight. The proposed settlement, moreover, had been agreed on by all parties and was vigorously advocated by the mediator, Russell Train.⁸¹

In other cases, however, agency inertia and the political climate may impede settlements with governmental agencies.⁸² As Ira Millstein, a senior partner at the New York law firm of Weil, Gotshal & Manges, has remarked with respect to the EPA today:

[W]e can never settle certain kinds of cases. One kind involves a government agency that's not secure, for whatever reason—perhaps it's being attacked politically. At the Environmental Protection Agency today, you can't settle a case. You cannot, because they will not take the responsibility. So EPA cases are being fought over the most incredibly nonsensical things.⁸³

account the public health and safety consequences, and the economic consequences to ratepayers, of the utility's actions." N.Y. Pub. Serv. Law § 66-12-a (McKinney Supp. 1982).

⁸⁰ In this connection, Talbot describes the utilities' vehement insistence that the environmental groups support their requests for approval from the regulatory agencies as part of the settlement package. Pp. 23-24.

⁸¹ See Remarks of Russell E. Train to Task Force on Environmental Resources (Apr. 30, 1981) [hereinafter Train], reprinted in *The Hudson River Power Settlement*, supra note 51, at 17. While the regional staff of the EPA participated in the Storm King negotiations, Train convinced EPA officials in Washington, D.C., to approve the settlement.

⁸² Remarks at Conference, supra note 39 (statement of Marcia Cleveland, Assistant Attorney General for the State of New York).

⁸³ Bok on Lawyers, supra note 73, at 35, col. 2.

In these cases, disputants may have to litigate rather than negotiate. If they do negotiate, they may be tempted to invite into the negotiations officials from governmental agencies known to be willing to compromise, and to present the more adamant agencies with a fait accompli.⁸⁴

Approval of the Hudson River power plant settlement unquestionably served the "public interest" better than disapproval would have. It represented a generally fair result.⁸⁵ Apart from the substantive merits of the settlement, however, the process by which it was approved did not ensure that regulators discharged their duty to protect the public interest. In satisfying that duty, regulators could not rely solely on the agreement among the signatory parties. Important segments of the public, such as ratepayers, were not represented in the negotiations, and most of the major parties had private stakes in the outcome. The regulator must discover what result would best serve the public interest, not simply ratify a solution over which the public has no influence. Ironically, the first Storm King court decision established precisely this duty. The Second Circuit instructed the Federal Power Commission, in often-quoted words, that its "role did not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."⁸⁶

Congress codified these words in the National Environmental Policy Act (NEPA) and also sought to open the agencies' search for the optimal solution to public scrutiny.⁸⁷ The Hudson River settlement, by contrast, was negotiated in secret, with an embargo on public discussion for twenty months.⁸⁸ Con Ed Chairman Charles Luce admitted that these secret negotiations were a violation, "at least in spirit," of NEPA and other sunshine laws.⁸⁹ The EPA Regional Administrator involved with the settlement observed that the negotiators

⁸⁴ See McCrory, *supra* note 67, at 61-62; Train, *supra* note 81, at 19.

⁸⁵ For a highly theoretical argument that the settlement was not necessarily efficient, see Porter, *Environmental Negotiation* (Sept. 1982) (Paper No. 177, University of Michigan Institute of Public Policy Studies) (on file at New York University Law Review).

⁸⁶ *Scenic Hudson Preservation Conference v. Federal Power Comm'n*, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966).

⁸⁷ National Environmental Policy Act §§ 101-102, 42 U.S.C. §§ 4331-4332 (1976).

⁸⁸ See Train, *supra* note 81, at 15.

⁸⁹ In addition, Luce stated that "some of the [administrative] agencies involved . . . were subject to sunshine laws, freedom of information laws and so forth. I don't think we violated any of those laws because we didn't write very much. [Conferees laugh.] On the other hand, the spirit . . . may possibly have been violated in all this." Remarks at Conference, *supra* note 39 (statement of Charles Luce).

"rose above the law" to end an old dispute that could have been "prolonged forever" because it was litigated under a statute that "doesn't work."⁹⁰

As I noted in Part I, our inability to use statutory regimes to achieve finality in environmental disputes is a primary cause of overly long environmental litigation and a primary reason why such delay is hard to avoid through negotiation. In Part III, I will suggest means by which finality can be promoted.⁹¹ Here, however, it is important to recognize that a campaign to promote the use of mediation and to pressure disputants to accept it will create several serious dangers.

First, such a campaign invites Congress to add mediation mechanisms to badly structured and overly complicated environmental statutes rather than to correct their basic defects. Rather than make hard choices between economic and environmental goals, Congress generally prefers to leave the choices to administrators. When administrators are unable to discover adequate direction in the environmental statutes, Congress often reacts by engrafting onto the statutes new and more complicated decisionmaking procedures instead of clarifying the initial directives.⁹² The call for governmental support of environmental mediation⁹³ could give legislators a new kind of band-aid to cover flawed statutes, one that would suggest that the problem is not in what Congress has done, but in the unwillingness of environmentalists and industrialists to compromise.

Second, mediation may undermine regulatory processes designed to protect the public interest. For example, the protraction of the Hudson River dispute, the prestige of the mediator, and the momentum of the negotiations made it hard for agency officials to discharge their responsibility to exercise independent judgment.

Third, pressuring parties into mediation may seriously restrict important rights. One of the key participants in the Hudson River settlement, Albert Butzel, emphasized that successful mediation depends on "a common interest in there being a settlement."⁹⁴ Underestimating the reasons that prevent development of such common interest, Talbot would substitute, in its place, governmental pressure to settle.⁹⁵ Whether placed on environmentalists or industries, pres-

⁹⁰ Id. (statement of Charles Warren, former EPA Regional Administrator).

⁹¹ See Schoenbrod, *supra* note 38, at 803-16.

⁹² Id. at 799-801; see text accompanying note 109 *infra*.

⁹³ Other proponents of environmental mediation have also called for governmental support. See, e.g., McCrory, *supra* note 67, at 68; Susskind & Weinstein, *supra* note 7, at 349.

⁹⁴ Remarks at Conference, *supra* note 39 (statement of Albert Butzel, attorney for Scenic Hudson Preservation Conference).

⁹⁵ See p. 93.

sure may dilute legal rights under existing statutes without a legislature or agency taking responsibility for that dilution of rights.

An example will suggest the kind of administrative power that pressure to mediate would create. Suppose it is discovered that a chemical plant emits a very dangerous air pollutant. The Clean Air Act entitles people living near the plant to have the EPA Administrator issue an emission standard that would protect their health and welfare without regard to cost, and permits the agency to delay enforcement only within narrow exceptions.⁹⁶ Mediation, however, might produce different results than those prescribed by the Clean Air Act. A settlement between the chemical company and the people affected by the pollution might provide that the company abate the health risk to a lesser extent than the statute requires in exchange for a monetary payment to persons at risk. A settlement might even leave some residential areas uninhabitable, with the polluting company purchasing the homes of displaced residents. These compromises might seem more sensible than the statutory remedy, but the EPA has no power to impose such results on citizens. Indeed, the Clean Air Act authorizes citizen suits against the Administrator for failure to fulfill his statutory mandate.⁹⁷ Pressure to mediate, however, could force citizens to accept a compromise rather than their statutory remedy, without congressional amendment of the statute. For example, the EPA could implicitly threaten that, if citizens refused to accept a mediated solution, the EPA would delay or limit the pollution standards required by the statute. Relief from such a threat, moreover, would be difficult, given the EPA's essentially unreviewable discretion as to the content and timing of standards.⁹⁸

In addition to sacrificing important rights provided by environmental statutes, forced mediation subjects disputants to power that is largely unaccountable and unreviewable. One prominent advocate of mediation maintains that mediators should consider, and even promote, the interests of unrepresented parties and the public in general.⁹⁹ How to define these interests and set priorities among them is far from clear even in the context of conventional administrative decisionmaking. With forced mediation, a public official who requires parties to mediate will have essentially delegated the responsi-

⁹⁶ Clean Air Act § 112, 42 U.S.C. § 7412 (Supp. V 1981).

⁹⁷ Id. § 304, 42 U.S.C. § 7604.

⁹⁸ For a discussion of EPA discretion in enforcement of, for example, the Clean Air Act, see Schoenbrod, *supra* note 38, at 766-79.

⁹⁹ See Susskind, *supra* note 9, at 5-8.

bility for defining and ordering these interests to the mediator.¹⁰⁰ Although the mediator may attempt to remain impartial, such a stance is seldom attainable.¹⁰¹ Thus, the choice of mediator is critical. The public official who presses mediation on disputants will not have to conform to any standards and, most likely, will not be subject to effective judicial review. We may not object to the exercise of such power by officials we admire; its exercise by an EPA Administrator or Secretary of the Interior whom we distrust would be troubling.

III

AN ALTERNATIVE TO MEDIATION

Because the value of Talbot's proposals for environmental mediation is, at best, limited, there remains the need to solve the important problem that mediation seeks to address: the inability of existing law to decide many environmental disputes with reasonable dispatch and finality. Commentators who advocate alternative dispute resolution look to informal or unofficial decisionmaking processes such as negotiation, mediation, arbitration, or private tribunals.¹⁰² They seek alternatives to adjudication, which in most cases is the process by which private disputes are resolved. The environmental mediation movement employs this approach with respect to public environmental disputes. For environmental disputes, however, administrative or judicial adjudication is not the only, or even the primary, method of dispute resolution. While much of the law applied in the adjudication of private disputes is common law or is derived from common-law principles, environmental disputes are usually decided under legislative regimes, and legislatures intervene in ongoing disputes with some frequency. In seeking alternatives to prolonged adjudication under existing environmental statutes, therefore, we should consider changing the legislative structures governing environmental problems.

While I do not suggest that Congress or state legislatures should settle specific environmental disputes routinely, some disputes, such as the Alaskan oil pipeline controversy,¹⁰³ are of such magnitude that

¹⁰⁰ See McCrory, *supra* note 67, at 61-62.

¹⁰¹ See P. Gulliver, *supra* note 56, at 213-19; Stulberg, *The Theory and Practice of Mediation*, 6 *Vt. L. Rev.* 85, 96-106 (1981).

¹⁰² See authorities cited in note 8 *supra*.

¹⁰³ The history of this dispute is laid out in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 241-46 (1975). Congress effectively settled the dispute by enacting legislation to grant a permit for the pipeline. *Id.* at 244-45.

eventually the legislature is likely to play a decisive role. In such cases, we should urge the legislature to play its part sooner rather than later.

As a more general solution for ordinary environmental disputes, legislatures could restructure environmental statutes to provide rules of conduct. For instance, an environmental statute might prohibit industrial boilers from emitting more than a specific number of grams of certain pollutants per unit of energy produced. Such detailed law-making is not beyond the capability of a legislature. There is precedent for legislation that sets out rules of conduct,¹⁰⁴ and, more recently, Congress has provided air pollution emission limits for new cars.¹⁰⁵ Most modern environmental legislation does not state rules of conduct. Rather, most environmental statutes delegate this task to agencies; agencies, not legislatures, promulgate the rules. A few statutes candidly provide that they embody conflicting goals and that the agency must reconcile them.¹⁰⁶ Other statutes purport to make hard choices, but the agency is nonetheless left to resolve conflicts.¹⁰⁷ Although these statutes fail to balance environmental and other (chiefly economic) values by delegating responsibility, they do mandate, in great detail, procedures that the agencies must follow in striking the balance.¹⁰⁸

I have argued elsewhere that Congress could and should deal with air pollution by legislating rules of conduct rather than by delegating its responsibility to the EPA.¹⁰⁹ Rather than repeat those arguments here, I will show why such a scheme would curtail litigation and promote settlement.

¹⁰⁴ See generally U.S. Pub. Health Serv., *Digest of State Air Pollution Laws* (1966); Chass & Feldman, *Tears for John Doe*, 27 S. Cal. L. Rev. 349, 360-72 (1954).

¹⁰⁵ Clean Air Act § 202, 42 U.S.C. § 7521(b) (Supp. V 1981).

¹⁰⁶ See, e.g., Toxic Substances Control Act § 2, 15 U.S.C. § 2601 (1982); Outer Continental Shelf Lands Act § 204, 43 U.S.C. § 1334(a)(1) (Supp. V 1981).

¹⁰⁷ One example is the Clean Air Act §§ 101-327, 42 U.S.C. §§ 7401-7626 (Supp. V 1981). See Schoenbrod, *supra* note 38, at 751-54 (describing goals and operation of Clean Air Act). Another example is the National Environmental Policy Act (NEPA) §§ 101-103, 42 U.S.C. §§ 4331-4333 (1976). The NEPA policy section, 42 U.S.C. § 4331 (1976), is a ringing endorsement of environmental objectives, but a close reading of the entire statute suggests legislative equivocation as to goals. See *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980) (holding that, in taking action, agency need not elevate environmental interests over other interests).

¹⁰⁸ See, e.g., Schoenbrod, *supra* note 38, at 766-79 (describing administrative complications created by Clean Air Act).

¹⁰⁹ See *id.* at 803-18. That article distinguished between statutes that delegate responsibility for formulating rules to agencies, "goals statutes," and statutes that directly legislate rules, "rules statutes." *Id.* at 783-89. This Essay, although not employing these precise definitions, assumes that an essential distinction between the two types of statutes can be framed.

When rules are issued by an agency under a delegation from the legislature, whether the agency followed statutory directives can often be the subject of protracted litigation. For example, the section of the Federal Water Pollution Control Amendments of 1972 at issue in the Hudson River power plant cases ordered the EPA to establish controls on thermal effluents and water intakes of power plants.¹¹⁰ The statute permitted the EPA to issue a five-year permit for thermal discharges only if the discharge limits specified in the permit would "assure the protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife"¹¹¹ and would reflect "the best technology available for minimizing adverse environmental impact."¹¹² The EPA administrative hearings on whether the Hudson River power plants required cooling towers produced sharp disagreement over the meaning of this language, over how to balance economic costs against environmental benefits, and over the extent to which cooling towers would improve the river environment.¹¹³ The administrative hearing alone, with no judicial review, consumed four years and was in progress when the cases were settled, even though the permit was for only five years.¹¹⁴ Additional five-year permits would require further proceedings, in which new information about the river environment and the availability of control technology would probably be considered. This statutory procedure for regulating power plants has produced, in other locales, equivalent delays and has generated much litigation on both the procedural and substantive requirements of the statute.¹¹⁵ Had Congress itself prescribed the discharge limits on

With regard to the frequent objection that Congress lacks the expertise and institutional capability to fashion detailed rules, see *id.* at 807-15. Not all environmental disputes, of course, are appropriate for legislatively fashioned rules solutions. The administration of public property, for example, is less amenable to such rules because the government is directly involved in management so that agency administration is probably most efficient. There may remain, however, some scope for legislatively fashioned rules to govern official property managers.

¹¹⁰ Federal Water Pollution Control Act § 316, 33 U.S.C. § 1326 (1976).

¹¹¹ *Id.* § 316(a), 33 U.S.C. § 1326(a).

¹¹² *Id.* § 316(b), 33 U.S.C. § 1326(b).

¹¹³ See The Environmental Protection Agency Consolidated Adjudicatory Hearing: The Differing Contentions on the Operative Scientific and Legal Principles, reprinted in *The Hudson River Power Settlement*, *supra* note 51, at 123-45.

¹¹⁴ See Environmental Protection Agency Proceedings Concerning Water Withdrawal and Thermal Discharges from All of the Plants, reprinted in *The Hudson River Power Settlement*, *supra* note 51, at 45-48.

¹¹⁵ For an example of a more than four-year delay caused by differing interpretations of the procedural and substantive requirements of § 316 of the Federal Water Pollution Control Act, 33 U.S.C. § 1326 (1976), see *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 307-08 (1st Cir. 1979); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 874-75 (1st Cir.), cert. denied, 439 U.S. 824 (1978).

which permits would be conditioned, this step of the adjudication process could have been avoided.

Other environmental statutes multiply this potential for delay. The decision whether to install cooling towers on the Hudson River power plants was confined to a single proceeding. Other statutes divide the decision whether to place controls on particular facilities into several proceedings.¹¹⁶ In as many as six or more separate phases, for example, the EPA formally identifies possibly dangerous pollutants, gathers information about them, develops guidelines for controlling that risk, and issues regulations applicable to particular sources of the pollutant.¹¹⁷ It may take so long to produce binding controls that, before the agency announces site-specific regulations, new information may emerge suggesting the need to retrace these administrative steps. Meanwhile, the polluter may use this development to argue that any regulations initially issued should not be enforced until the agency finally determines exactly what controls to impose.¹¹⁸

Prolonged litigation is almost inevitable under environmental statutes that provide for delegated administrative regulation. The statutes permit litigation of a wide range of genuine issues concerning their substantive meaning and procedural operation. Since such litigation generally must be resolved before regulations are implemented, polluters seeking to delay new controls and development opponents seeking to delay new projects have great incentives to prosecute such litigation. Legislative promulgation of environmental rules, by contrast, could not be delayed by litigation. Although rules imposed by the legislature would be subject to interpretation, litigation over the meaning of such rules would likely be less prolonged and difficult than that over administrative rules. A statute that limits polluters to a specific number of grams of pollutant per unit of energy produced, for instance, might occasion litigation as to whether a particular source of pollution is within the category regulated or whether the agency is correctly measuring the pollutant. These issues, however, are much narrower than those that would arise under a statute that delegates authority to control air pollution with instructions to meet abstract goals and follow complex procedures.¹¹⁹ Rules imposed by the legisla-

¹¹⁶ See, e.g., Toxic Substances Control Act §§ 4-6, 15 U.S.C. §§ 2603-2605 (1982); Federal Water Pollution Control Act § 61(b), 33 U.S.C. § 1341 (1976 & Supp. V 1981).

¹¹⁷ For descriptions of the operation of the Clean Air Act, see Pederson, *supra* note 42, at 1082-88 (1981); Schoenbrod, *supra* note 38, at 756-83.

¹¹⁸ Schoenbrod, *supra* note 38, at 795.

¹¹⁹ See *id.* at 756-82 (criticizing Clean Air Act).

ture thus would ease the problem of prolonged environmental disputes both by eliminating the need for much litigation and by narrowing litigation when it arises.

In addition to directly reducing the length and frequency of environmental litigation, rules imposed by the legislature would also promote settlement. The greater likelihood of achieving finality under such rules would encourage parties to settle disputes that they might otherwise litigate. Fear of an adverse result in litigation would help to produce the parity of time pressure conducive to negotiation.¹²⁰ Rules imposed by the legislature also promote settlement by providing a clear starting point for negotiation. Since such rules directly regulate conduct, they must be framed in concrete terms and embody compromises. Disputants operating under such rules could not take diametrically opposed positions on the environmental problem they face. Rather, they would have to take the legislated compromise as a given and begin their negotiations on the question of how best to implement that rule. Environmental statutes that delegate, by contrast, establish no starting point; disputants can hope for victory on every issue. They require agencies to promulgate controls that achieve environmental quality and that are economically and technologically realistic.¹²¹ Statutes that delegate thus suggest that compromise is not necessary and that the agency can somehow satisfy everyone's desires. For environmental disputants, whose interests are inherently in conflict, this unrealistic impression is not conducive to negotiation. One of the key attorneys in the Hudson River controversy, writing several years before the settlement of those cases, noted that the abstract and conflicting goals contained in the relevant statute "are obvious causes of confusion and disagreement. . . . This, together with uncertainty as to the character and significance of environmental impact actually caused by power plant discharges and intakes, tends to cause parties to adhere to doctrinaire positions, making difficult the resolution of differences."¹²²

Moreover, to the extent that the legislature, in adopting statutes that delegate, does not take a definite position on environmental problems, disputants can always hope that an administrative decision adverse to their interests may be reversed by legislative amendment.

¹²⁰ See text accompanying notes 32-33 *supra*.

¹²¹ See, e.g., Schoenbrod, *supra* note 38, at 756-59 (describing conflict of goals in Clean Air Act).

¹²² Berger, *Thermal Discharges and Power Plant Intakes: Section 316 in Perspective*, 11 *Nat. Resources Law.*, 305, 305 (1978).

Parties thus have another strong incentive to delay implementation of rules by pursuing prolonged litigation. Legislative reversals of administrative environmental rules have not been rare, although these amendments tend not to address the rules directly but to recast the terms of the delegation. The resulting new administrative tasks,¹²³ however, create more opportunities for delay.

CONCLUSION

Talbot's call, in *Settling Things*, for increased pressure to compromise is well-intentioned. He would mistakenly pressure the disputants, rather than the legislature, to strike environmental compromises. As this Essay suggests, it is the legislature, much more than private parties, that has the power to effect appropriate compromise.

How can the legislature be forced to strike such compromises? Some recent Supreme Court opinions arising under the Occupational Safety and Health Act¹²⁴ suggest that the doctrine that prohibits standardless delegation of legislative power may put pressure on Congress to make clearer environmental choices.¹²⁵ Political pressure might also develop if there were broader awareness of the harm caused by the legislature's failure to face difficult environmental issues. Talbot's book will hopefully add to that pressure by emphasizing the harm done by prolonged environmental litigation, even though his proposal will not solve the problem.

¹²³ For example, the 1974 amendments to the Clean Air Act § 110, see Energy Supply and Environmental Coordination Act of 1974, Pub. L. No. 93-319, § 4, 88 Stat. 256 (codified as amended at 42 U.S.C. § 7410(c)(2)(B)-(D) (Supp. V 1981)), passed in response to the EPA's mandate of automobile parking regulations as a pollution control device, did not resolve the policy dilemma that gave rise to the regulations, but merely precluded the EPA from using a particular means to achieve the Act's lofty goals. Later amendments to the Clean Air Act § 172, see Clean Air Act Amendments of 1977, Pub. L. No. 95-95, tit. I, § 129(b), 91 Stat. 746, amended by Pub. L. No. 95-190, § 14(a)(55), (56), 91 Stat. 1402 (codified as amended at 42 U.S.C. § 7502 (Supp. V 1981)), similarly avoided difficult policy choices by simply extending deadlines for meeting then-unattainable air quality standards.

¹²⁴ See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 639-41 (1980) (Stevens, J., plurality opinion); *id.* at 671-88 (Rehnquist, J., concurring).

¹²⁵ I hope in a subsequent article to propose a reformulation of the delegation doctrine that will circumvent the result orientation that has plagued it in the past.

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