

Resolving Eco-Conflicts: The Power of Environmental Mediation



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Harmony in Nature: Navigating Environmental Tensions through Mediation

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Something about the author of this e-book:

Caro Opperman is an LLB graduate from the prestigious University of Stellenbosch, with a fresh and keen perspective on environmental legal matters and mediation as such. In 2023, Caro achieved accreditation as a mediator, showcasing her commitment to alternative dispute resolution. Beyond her legal education, Caro is a dedicated environmental activist, demonstrating an unwavering passion for environmental issues. Her advocacy extends to actively participating in various workshops and presentations on legal matters, where she imparts her knowledge on diverse topics.

Caro's passion for the environment and human rights, as well as her aspirations towards sustainable social justice, culminated upon her completion of Environmental Law as a final year module. One notable presentation reflects Caro's unique perspective, as she discussed how child maintenance influences and impacts environmental rights. This intersection of family law and environmental concerns highlights Caro's innovative approach to addressing complex issues. She is a dedicated junior mediator with an enthusiastic approach to problem-solving and supporting grassroots organizations. Caro works closely with Eugene Opperman, a seasoned family legal practitioner with an impressive career in mediation and ethics.

In essence, Caro is not just a law graduate and junior mediator, but she strives for innovative ways to address social justice issues and creatively advocates for ethical sustainability in the legal field. Her dual focus on legal proficiency and environmental advocacy positions her as a dynamic and socially conscious legal professional.



Green Mediation: Strategies for Resolving Environmental Conflicts

Dignified Dispute Resolution (DDR): our commitment to mediators and the public

Who we are and what we stand for in our commitment to mediators and the public

Dignified Dispute Resolution (DDR) is a collaborative community of passionate mediators devoted to maintaining the highest ethical standards in conflict resolution. Unlike conventional companies governed by a select few, DDR comprises a nationwide panel of mediators working collectively to reshape the dynamics of dispute resolution. Every mediator in our community is bound by a stringent code of ethics, ensuring an unwavering commitment to transparency, neutrality, and fairness in every mediation endeavour. DDR stands apart not only for its dedication to ethical mediation practices but also for its emphasis on connecting clients with the most qualified mediator possessing essential skills within their geographical area, whether it is in-person or online facilitation. Operating solely with the commitment of volunteers and our nationwide panel of mediators, DDR is proudly ethical in its mediation approach, striving to deliver a dignified and unparalleled resolution experience for every individual and organization. It is important to note that all DDR mediators are well-versed in trauma-informed mediation practices, ensuring a sensitive and supportive approach to resolving conflicts.

Introduction of DDR

Dignified Dispute Resolution (DDR) is committed to revolutionising conflict resolution through ethical mediation services. Our unique selling point lies in our unwavering dedication to upholding the highest standards of ethical conduct and rules in all our mediation processes. DDR understands the diverse nature of disputes and operates across various fields, offering a tailored approach to each case. Our primary mission is to provide dignified dispute resolution, fostering an environment where conflicts are addressed with integrity and respect. With a panel of expert, qualified, and accredited mediators, DDR ensures that clients experience the utmost professionalism and competence in every mediation session.

Ethical foundation

DDR firmly believes that ethical conduct is the cornerstone of successful mediation. All our mediators adhere to a strict code of ethics, emphasising transparency, neutrality, and fairness. By maintaining the highest ethical standards, DDR not only ensures the credibility of our mediation services but also contributes to building trust and confidence among clients. Our commitment to ethical mediation extends beyond the resolution of disputes—it becomes a promise to our clients that their concerns will be handled with the utmost dignity and respect.

Expert panel and geographic flexibility

DDR boasts a panel of expert mediators, each possessing the necessary qualifications and accreditations to navigate complex disputes effectively. Whether clients prefer in-person mediation within their geographic area or opt for online mediation, DDR provides flexible solutions tailored to individual needs. Our geographic reach allows us to connect clients with local mediators, ensuring a nuanced understanding of regional dynamics and legal nuances.

Tailored and unique mediation approach

Recognising that each dispute is unique, DDR adopts a personalised approach to mediation. Our mediators carefully analyse the specifics of each case, identifying underlying issues and crafting

solutions that align with the parties' interests. By tailoring our mediation process, DDR not only ensures effectiveness but also cultivates a sense of empowerment and collaboration among the disputing parties.

Referral to suitable mediators

In the rare instance that a mediation cannot be conducted by one of DDR's panel of mediators, our commitment to client satisfaction remains unwavering. DDR takes the responsibility to refer clients to suitable and reputable mediators outside our panel. This commitment to finding the right mediator showcases DDR's dedication to prioritising client needs above all, even if it means recommending external professionals.

Alternative to litigation

DDR is passionate about presenting mediation as a viable alternative to litigation. Litigation is often time-consuming, emotionally draining, and financially burdensome. DDR aims to shift the paradigm by offering a dignified and efficient resolution method that minimises the adversarial nature of disputes. Through skilful mediation, DDR empowers parties to actively participate in crafting their own solutions, fostering a sense of ownership and satisfaction in the resolution process.

Client education and empowerment

DDR recognises the importance of educating clients about the mediation process and their role within it. We provide comprehensive information, ensuring clients understand the benefits and intricacies of mediation. By empowering clients with knowledge, DDR aims to create a collaborative atmosphere where parties are actively engaged in resolving their disputes. This educational component contributes to DDR's mission of promoting ethical and dignified dispute resolution.

Continuous improvement and innovation

DDR is committed to continuous improvement and innovation in the field of mediation. We regularly assess and enhance our mediation processes, staying abreast of industry best practices and emerging trends. This commitment to innovation ensures that DDR remains at the forefront of ethical mediation services, offering clients cutting-edge solutions and an unparalleled experience in dispute resolution.

Corporate and community training, presentations, and workshops

Beyond individual dispute resolution services, Dignified Dispute Resolution (DDR) recognises the importance of preventive measures and proactive conflict management within corporate and community settings. DDR offers tailor-made training, presentations, and workshops designed to equip businesses and communities with the tools necessary to navigate conflicts effectively. Our team of expert mediators, well-versed in various industries, provides insightful and industry-specific guidance to address potential challenges before they escalate. Corporate training sessions focus on conflict resolution within the workplace, emphasising the creation of a harmonious and productive environment. DDR's community workshops extend this ethos to address conflicts within local communities, fostering a sense of cohesion and understanding. Through these initiatives, DDR aims to empower organisations and communities to proactively manage disputes, embracing a culture of open communication and resolution. The bespoke nature of our programs ensures that they align seamlessly with the unique dynamics and challenges of each industry, maximising their impact and relevance. DDR's commitment to promoting ethical conflict resolution extends beyond individual cases, aiming to create a ripple effect of positive and constructive approaches to disputes within both corporate and community settings.

In conclusion, Dignified Dispute Resolution (DDR) stands as a beacon of ethical mediation services, driven by a passion for resolving challenges with dignity and respect. With a commitment to ethical conduct, a panel of expert mediators, and a personalised approach, DDR positions itself as a leader in the alternative dispute resolution space. By embracing innovation, geographic flexibility, and a dedication to client education, DDR seeks to redefine conflict resolution, promoting a culture of collaboration, empowerment and support in every mediation process.



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QR code to our website and an invitation for trained and accredited mediators to join the panel of nationwide mediators:



Introduction

Environmental disputes, stemming from conflicting interests in the use and preservation of natural resources, have become increasingly prevalent in today's complex world. These types of conflict can be exacerbated by political stances and understandings of larger environmental issues such as climate change and global warming.



These disputes often involve diverse stakeholders, including governments, industries, communities, and environmental advocacy groups, each vying for their vision of sustainable development, economic security, environmental impact and natural resources. Given the intricate nature of these conflicts and the potential for far-reaching environmental impacts, there is a growing recognition of the need for effective resolution mechanisms.



Environmental mediation emerges as a valuable approach in this context, offering a constructive and collaborative process to address conflicts and find mutually acceptable solutions by following an interest-based approach to negotiation. By engaging various parties in facilitated dialogue, environmental mediation aims to navigate the complexities of competing interests, foster understanding, and forge agreements that strike a balance between development goals and ecological preservation.

Chapter 1: Understanding environmental disputes

The subject of environmental disputes and ecological conflict

Environmental disputes arise from conflicts over the use, management, and protection of natural resources and ecosystems. These disputes often stem from competing interests among different stakeholders, including governments, industries, communities, and environmental organizations. For example, a dispute may emerge when a government permits industrial activities that result in pollution, affecting the health and well-being of nearby communities.



Conflicts can also arise over land use, such as disagreements between developers seeking to build infrastructure and conservationists advocating for the preservation of ecologically sensitive areas. Additionally, issues like water rights, deforestation, and climate change policies can spark disputes as diverse parties with varying interests contend over the sustainable use of resources. The complexity of these disputes is heightened by differing perspectives on environmental impacts, economic priorities, and the overall balance between development and conservation.

A step-by-step approach to examples of environmental disputes will be discussed in a following chapter, to detail the nuance of environmental mediation in the different contexts where it may be relevant.

Environmental disputes distinguished from traditional conflict

Environmental conflicts stand apart from other private disputes due to their central focus on issues related to land, air, water, and general living resources. Various features of these disputes highlight the intricate interconnection between natural and human systems. The challenges in such environmental mediation arise from a lack of complete knowledge about the interdependence and functioning of factors within symbiotic systems, making it difficult to fully predict the consequences of utilizing different elements of dispute resolution.

Diversity of stakeholders to the environment

Furthermore, these features bring attention to the wide-ranging impact of environmental issues on diverse stakeholders, including private individuals, businesses, industries, government agencies, elected officials, and NGOs. These stakeholders exhibit differences in terms of ideology, structure, technology, organization, and capacity. Additionally, the characteristics underscore the presence of boundary issues, spanning legislative, administrative, national, state, regional, and local boundaries.



Diversity of environmental regulations and legislation

As will be discussed in the context of legal background for mediators, environmental law and disputes pertaining to environmental human rights are regulated by various types of law – legislation, case law, constitutional law, international law, etc.

The National Environmental Management Act (NEMA) and its various sub-statutes is of pertinent relevance when considering the intricacies of legislative provisions that should be considered when mediating a disputes that pertains to the land, water and atmosphere of the earth, as well as micro-organisms, plant and animal life. These environmental considerations directly relate to human habitats that influence the fulfilment of human rights as such.

Chapter 2: Definition and principles of environmental mediation

Environmental mediation, defined

Environmental dispute resolution refers to the process of addressing conflicts, disagreements, or disputes related to environmental issues through structured mechanisms that aim to find mutually acceptable solutions. These disputes often involve competing interests, such as those between government agencies, industries, communities, and environmental advocacy groups, regarding the use, management, and protection of natural resources and ecosystems.

The resolution of environmental disputes typically involves a variety of approaches, including negotiation, mediation, arbitration, and litigation. The objective is to navigate the complexities of conflicting interests, regulatory requirements, and environmental concerns to reach a resolution that considers the perspectives of all stakeholders involved. Our focus here is the transformative approach of mediation.



Environmental dispute resolution processes often emphasize collaboration, dialogue, and sustainability. By engaging the parties in facilitated discussions, these processes seek to identify common ground, explore creative solutions, and promote practices that balance environmental conservation with societal and economic needs. The goal is to avoid protracted legal battles, minimize environmental harm, and foster long-term cooperation among the involved parties.

Principles of environmental mediation

Environmental mediation is guided by several principles aimed at fostering constructive dialogue, resolving conflicts, and promoting sustainable outcomes. Some key principles include:

- **Neutrality:** Mediators maintain impartiality and neutrality, ensuring that they do not favour any particular stakeholder. This fosters trust among the parties involved and encourages open communication.
- **Voluntariness:** Participation in environmental mediation is voluntary, and all parties involved willingly engage in the process. This ensures that the mediation is a consensual effort, leading to more sustainable and accepted solutions.
- **Confidentiality:** Mediation proceedings are typically confidential, allowing parties to speak openly without fear of information being used against them later. This confidentiality encourages a more honest and transparent exchange of ideas.
- **Collaboration:** Environmental mediation promotes a collaborative approach, encouraging all stakeholders to work together to find mutually beneficial solutions. This collaborative spirit often leads to more innovative and sustainable outcomes.
- **Inclusivity:** The mediation process aims to include all relevant stakeholders, ensuring that diverse perspectives are considered. Inclusivity helps in building a comprehensive understanding of the issues at hand and increases the likelihood of successful resolution.

- **Expertise:** Mediators often possess expertise in both environmental issues and conflict resolution techniques. This allows them to facilitate discussions effectively, ensuring that the parties are well-informed and can make informed decisions.
- **Focus on Interests:** Rather than positions, environmental mediation focuses on the underlying interests of the parties. By understanding the needs and concerns driving each stakeholder, the mediator can help identify common ground and facilitate mutually acceptable solutions.
- **Sustainability:** The goal of environmental mediation is to achieve sustainable solutions that balance economic, social, and environmental considerations. This focus helps address long-term concerns and promotes practices that benefit all parties involved.
- **Flexibility:** Environmental mediation adapts to the specific needs and complexities of each dispute. The process is flexible, allowing for the incorporation of various tools and techniques tailored to the unique aspects of environmental conflicts.
- **Compliance:** Agreements reached through mediation are voluntary but, once agreed upon, they are binding. Parties are expected to comply with the terms of the agreement, providing a foundation for ongoing collaboration and environmental stewardship.

Chapter 3: Why mediate, as opposed to adjudicate, environmental disputes?

Choosing mediation over adjudication in environmental disputes can offer several advantages, given the unique characteristics of environmental conflicts. A mental calculation must however be undergone to compare the effectiveness of mediation versus litigation however. It is of paramount importance to navigate the boundary of appropriateness when considering mediation in environmental disputes that may seem fitting in terms of restorative justice ideals. Not all environmental disputes are fit for mediation, or can be resolved through a mediator. In all types of disputes, particularly disputes that touch on aspects of human rights, the mediator must duly consider criteria that evaluate the suitability of the particular dispute for mediation. This is of utmost importance when considering the fact that environmental disputes can be characterised by a wide range of inter-relational conflict and varying interests.

The following are factors that may contribute to the appropriateness of mediation in a dispute regarding environmental interests, human rights and living resources:

Preservation of Relationships

- ✓ **Mediation:** Promotes collaboration and communication between parties. It allows stakeholders to work together to find solutions, fostering a more positive relationship that takes cognisance of the environmental interests of all participants of the mediation. This is especially crucial in environmental disputes where ongoing collaboration may be necessary for long-term sustainability.



Adjudication: Adversarial processes can strain relationships between parties, potentially leading to animosity and hindering future cooperation. This may place a burden on members of the public and corporate structures that seek to maintain a sustainable reputation of environmental support.

Flexibility and Creativity in Solutions

- ✓ **Mediation:** Provides a flexible and informal process that allows parties to explore a wide range of creative solutions that can address sensitive environmental issues and human rights. This is particularly important in natural resource disputes where unique, context-specific solutions may be required.

Adjudication: Typically involves a judge or arbitrator making a binding decision based on legal principles, which may not always address the nuanced environmental concerns or allow for innovative problem-solving where all parties are heard on an equal footing.

Time and Cost Efficiency

- ✓ **Mediation:** Generally resolves disputes more quickly and at a lower cost than formal adjudication. This is beneficial for all parties involved, as environmental issues often require urgent resolution to prevent further damage or disruption.

Adjudication: Can be a lengthy and expensive process, involving legal proceedings, expert witnesses, and formal hearings. This also hinders an effective solution to pressing issues that affect the human rights of parties involved.



Voluntary Nature and Control

- ✓ **Mediation:** Participation is voluntary, and parties have more control over the process. They can choose to participate, and any agreement reached is based on mutual consent. This allows the participants to negotiate from a more equal plane, which fosters inclusivity to communities that have not been sufficiently participated in environmental problem-solving.

Adjudication: Involves a more formal and potentially forced process. Decisions made by a third party (judge or arbitrator) may not fully align with the preferences or needs of the parties involved.

Preservation of Privacy

- ✓ **Mediation:** Often conducted in private, allowing parties to discuss sensitive information without public scrutiny. This is especially prevalent in sensitive environmental disputes that affect the inner sanctum of a community or household.

Adjudication: Generally involves a more public process, with court proceedings and decisions accessible to the public.

Preservation of Reputation

- ✓ **Mediation:** Provides an opportunity for parties to address concerns without the public airing of grievances, potentially preserving the reputation of individuals or organizations.

Adjudication: Involves a more formal legal process, which may expose parties to public scrutiny and potentially damage their reputation. This is seen frequently in uncooperative corporate contexts with regards to green-washing and a lack of sincere social responsibility.

Chapter 4: Characteristics of environmental disputes

Relevant interests and stakeholders

The effective mediation of environmental disputes encompasses the balance between preserving the environment and pursuing development. Finding solutions to environmental problems proves challenging for domestic governments, often being implicated in the issues. The initial phase includes identifying the stakeholders, individuals or groups concerned with a particular environmental problem.



Interrelatedness

The complexity of environmental disputes arise from the interrelated nature of these disputes, as any environmental issue has a direct influence on other factors. For instance, a dispute related to air pollution not only affects environmental concerns but also has implications for human development. This is evident in the sources of air pollution, which encompass industries involved in manufacturing, the production of materials for human development, transportation services, and more. Consequently, isolating any specific environmental dispute becomes a challenging task.

Lack of cohesion

It also includes the challenge that groups advocating for environmental issues often lack cohesion. This lack of unity may stem from leadership issues within the groups and their overall fragmentation. The absence of clear leadership among these diverse groups, each championing different causes, leads to additional challenges. These challenges manifest in confusion and varying expectations among the groups, particularly regarding who should be involved in the decision-making process and related matters.

Conflicting understandings

Environmental conflicts are characterized by a challenge in making specific or even broad determinations regarding costs, parties involved, and boundaries. There is a lack of agreement on the method for assessing the value of environmental benefits or losses.

Conflicting assertions of public interests present another complication. This is due to various environmental groups claiming to represent public interest based on different grounds. The democratic structure of government imposes an obligation on the state to consider the interests of everyone. Consequently, reconciling these divergent interests becomes exceedingly difficult.

Issues in execution and enforcement

The execution of environmental agreements is frequently beyond the control of the private entities involved in the agreements. Therefore, if the government is to assume responsibility for the implementation of these agreements, government approval is necessary for resolution.

Diversity, power imbalances and lack of connection

Environmental disputes typically involve numerous parties, and the cultural diversity of these parties poses an additional concern when addressing environmental interests and the road to resolving such disputes in terms of restorative justice and common-ground mediation. Another distinctive feature of such disputes is the varying assessments of the same situations by the diverse parties involved in the dispute.

The hierarchy among the involved parties, with "level" denoting distinct power levels and forms of power, also define environmental disputes. This includes bargaining imbalances seen in corporate responsibility movements, governmental projects and the community.

The variety among the parties also suggests a lack of connection among those involved in the same dispute, and in certain instances, a history of troubled relationships exacerbates the issue.

Lack of knowledge

Disparities in knowledge and expertise in the relevant field contribute to escalating the problem further. This imbalance is evident in negotiations, where varying skill levels in support of negotiation or prolonged discussions become apparent.

Chapter 5: Unpacking the interdisciplinary nature of environmental disputes

Environmental disputes are intricate conflicts that encompass a broad spectrum of issues involving public, juristic, and private individuals. These disputes are characterized by their multifaceted nature, intertwining legal, social, economic, and environmental dimensions. They often attract significant public interest, as they can impact communities, ecosystems, and the public at large. In navigating environmental conflicts, several key aspects come into play:

At the heart of these disputes is the **complex legal landscape** that includes various regulations, statutes, and international agreements. Compliance with environmental laws, permitting processes, and liability for environmental harm are central legal issues. Moreover, the scientific and technical complexities inherent in environmental disputes necessitate expertise in fields such as ecology, geology, and environmental engineering.

Juristic persons, including corporations and legal entities, frequently find themselves entangled in environmental conflicts. Corporate responsibility, adherence to environmental impact assessments, and compliance with regulations are pivotal concerns. On the other hand, private individuals may engage in disputes related to property rights, land use, and nuisance claims, requiring a delicate balance between individual rights and broader societal and environmental interests.

Resource allocation and use represent recurring sources of conflict, involving disputes over water rights, fishing quotas, and mineral extraction. The clash of interests among private entities, juristic persons, and the public often leads to contentious debates over sustainable resource management.

Environmental disputes are **not confined by national borders**, with issues like transboundary pollution, biodiversity conservation, and climate change requiring international collaboration and coordination. As such, ethical considerations play a crucial role in navigating these conflicts, involving questions of stewardship, intergenerational rights, and moral responsibilities toward biodiversity and ecosystems.

In addressing these challenges, alternative dispute resolution methods, such as mediation and negotiation, are commonly employed to foster collaboration and find sustainable solutions. Ultimately, the resolution of environmental disputes demands a holistic approach that considers the intricate interplay of environmental, social, economic, and legal factors. Considerations to this end are discussed in the following chapters.

Chapter 6: Environmental disputes that are not appropriate for mediation

Environmental disputes may need to be referred to governmental regulatory dispute resolution rather than being privately mediated in several situations:

■ Complex Legal and Regulatory Frameworks

If the dispute involves intricate legal and regulatory issues that require interpretation and enforcement by government authorities, it may be more suitable for regulatory dispute resolution. Environmental regulations often have a significant impact on the resolution of disputes, and government agencies are typically responsible for ensuring compliance.



■ Public Interest and Stakeholder Involvement

When the dispute has broader implications for the public interest, involving the welfare of communities, ecosystems, or other public resources, it may be more appropriate for government intervention. Government agencies are tasked with safeguarding public interests and may have the authority to enforce regulations for the greater good.

■ High Stakes and Impact on Public Health

If the dispute involves issues with significant consequences for public health or safety, such as pollution, hazardous waste, or other environmental hazards, government regulatory bodies are often better equipped to handle the enforcement of protective measures and ensure public safety.

■ Large-Scale Environmental Impact

Disputes that have large-scale environmental impacts, such as those affecting entire ecosystems or involving transboundary issues, may require regulatory intervention at the governmental level. Governments can address the broader ecological consequences and coordinate efforts to mitigate environmental damage.

■ Enforcement of Environmental Standards

In cases where there are allegations of non-compliance with environmental standards or regulations, government agencies responsible for environmental oversight are typically tasked with investigating and taking enforcement actions.

■ Interference with Public Resources

Disputes that involve the utilization or potential harm to public resources, such as water bodies, air quality, or public lands, may fall under the jurisdiction of government authorities responsible for managing and protecting these resources.

■ Conflict Between Private Interests and Public Welfare

When there is a conflict between private interests and the broader public welfare or environmental sustainability, government regulatory bodies may need to intervene to ensure that decisions align with public policy goals and environmental protection objectives.

In these scenarios, the involvement of government regulatory bodies is essential to ensure the proper interpretation and enforcement of environmental laws and regulations. While private mediation can be effective for resolving specific issues between parties, government intervention is often necessary to address larger systemic concerns and protect public and environmental interests.

Chapter 7: Examples of environmental disputes appropriate for mediation

Mediation can be a valuable tool in resolving environmental disputes, offering a collaborative and less adversarial approach. Only once it is indeed established that an environmental dispute may be suitable for mediation, should a mediator become involved. Depending on the complexity of the dispute at issue, the mediator may be required to have a legal background, or at least supporting legal knowledge of environmental, international and constitutional law to ensure that the mediation outcome is indeed legally enforceable and equitable in terms of what is expected from environmental and international legal standards.

Below are examples of environmental disputes where mediation could be appropriate. A detailed approach to the mediation of such disputes will follow in the next chapter.

Land Use and Development Conflicts:

- Scenario: A community opposes a proposed development project in a sensitive environmental area.
- Potential Mediation: Mediation could bring together developers, community representatives, and environmental experts to explore compromise solutions that address both development needs and environmental concerns. It could allow participants to highlight the heritage and environmental stewardship of the particular area and resources within.



Water Resource Allocation:

- Scenario: Disputes between farmers, urban areas, and industrial users over water rights and allocation.
- Potential Mediation: Mediation can help parties work together to develop sustainable water management plans, considering the needs of all stakeholders and the environment.

Pollution and Contamination Issues:



- Scenario: Contamination of air, water, or soil due to industrial activities, leading to conflicts between affected communities and companies.
- Potential Mediation: Mediation can assist in negotiating cleanup plans, compensation for affected parties, and implementing preventive measures to avoid future pollution.

Protected Species and Habitat Conservation:

- Scenario: Conflicts arising from proposed projects impacting endangered species or their habitats.
- Potential Mediation: Bringing together developers, conservationists, and government agencies to find solutions that balance development goals with the need to protect endangered species and their ecosystems.

Noise and Visual Impact Disputes:

- Scenario: Community objections to the construction of wind farms, highways, or other infrastructure projects due to noise or visual impacts.
- Potential Mediation: Mediation can help identify mitigation measures or alternative project designs that address community concerns while allowing necessary development.

Waste Management and Disposal:

- Scenario: Disputes over the location and operation of waste disposal facilities.
- Potential Mediation: Mediation can assist in finding compromise solutions, addressing concerns about environmental impact and public health, while still meeting the need for waste management.

Fishing Rights and Conservation:

- Scenario: Disputes between commercial and recreational fishermen, environmentalists, and regulatory bodies regarding fishing practices and conservation measures.
- Potential Mediation: Mediation can bring together different stakeholders to develop sustainable fishing practices, allocate fishing rights fairly, and promote conservation efforts to protect marine ecosystems.

Climate Change Policy:

- Scenario: Disagreements over local or regional climate change policies, such as emissions reductions, renewable energy projects, or adaptation strategies.
- Potential Mediation: Mediation can facilitate discussions between government bodies, businesses, and environmental organizations to find common ground and implement effective policies that address climate concerns.

National Park and Wilderness Management:

- Scenario: Conflicts over the use of national parks or wilderness areas for tourism, recreation, or resource extraction.
- Potential Mediation: Mediation can help stakeholders collaborate on management plans that balance conservation goals with responsible and sustainable use of natural resources.

Disputes Over Environmental Regulations:

- Scenario: Industries challenging the enforcement of environmental regulations, claiming they are overly restrictive, while environmental groups push for stricter regulations.
- Potential Mediation: Mediation can provide a forum for negotiation and compromise, helping to develop regulations that protect the environment without unduly burdening industries.



In these examples, mediation offers a constructive approach to resolving conflicts by fostering open communication, collaboration, and finding mutually acceptable solutions that take into account environmental, social, and economic considerations.

Chapter 8: The process of mediating an environmental dispute

General principles of mediation

The general principles of mediation will apply in an environmental mediation, as follows:

- Neutrality of the mediator
- Voluntariness of participation and cooperation
- Confidentiality and “without prejudice”
- Self-Determination, party-control and active participation by parties
- Fairness and equal opportunity
- Impartiality and avoidance of favouritism
- Interest-based bargaining instead of position-based bargaining
- Collaboration and cooperative problem-solving
- Timeliness for urgent results
- Flexibility, uniqueness and tailored to the specific issue
- Mutual Respect, reserving hostility and constructive communication
- Comprehensive Understanding and informed decision-making
- Sustainability of resolutions
- Legal validity of resolutions
- Party compliance and enforcement

Initial steps before mediation

The considerations detailed below are relevant to all parties to the dispute that are participants to a potential mediation that concern an environmental issue.

■ Assessment of the Dispute

Conduct a thorough assessment of the environmental dispute, understanding the underlying issues, parties involved, and the history of the conflict. Identify the specific environmental concerns, legal implications, and any associated social or economic factors. This is imperative in the evaluation of the issue in regards to suitability for mediation.

■ Legal and Regulatory Research

Familiarize yourself with relevant environmental laws, regulations, and policies applicable to the dispute. Understand the legal framework that governs the environmental issue to provide informed guidance during the mediation. A breakdown of this legal framework is to be detailed in following chapters.

■ Stakeholder Analysis

Identify and analyse all stakeholders involved in or affected by the environmental dispute. This includes government entities, community representatives, industry players, and environmental advocacy groups. Understand the interests, concerns, and positions of each stakeholder.

■ **Conflict History and Context**

Investigate the history of the environmental dispute, looking into past attempts at resolution and any existing agreements. Understand the cultural, social, and economic context surrounding the dispute, as these factors may impact the mediation process.

■ **Selecting a Qualified Mediator and/or dispute resolution committee**

Choose a mediator with expertise in both mediation and environmental issues. Ensure the mediator is impartial, neutral, and capable of managing the complexities involved in environmental disputes. A serious environmental dispute may call for the appointment of a committee of impartial mediators with an inter-disciplinary approach to the dispute resolution with enhanced credibility, especially in larger communities.

When an environmental issue is determined unsuitable for mediation, **legal representation** should be sought as an alternative to address potential infringements of rights.

■ **Communication Strategy**

Develop a communication strategy to inform all stakeholders about the mediation process. Address concerns and ensure that everyone involved understands the purpose and potential benefits of mediation.

■ **Resource and Information Accessibility**

Ensure that all parties have access to relevant information and resources needed for informed decision-making during the mediation. Consider the involvement of technical experts if necessary, especially in cases with complex environmental or scientific aspects.

■ **Cultural Sensitivity**

Be aware of cultural nuances and sensitivities that may impact the mediation process. Adapt your approach to ensure inclusivity and respect for diverse perspectives. In some instances, community mediation may be an option and will require careful consideration of cultural norms and practices in contrast to western values.

■ **Prepare for Follow-Up**

Anticipate the need for ongoing communication and potential follow-up meetings post-mediation. Develop a plan for monitoring and implementing any agreements reached during the mediation. Expectation management of larger communities that participate in environmental mediation are important when a complex dispute takes longer than anticipated.

The mediator's preparation

Preparation

Familiarize yourself with the specific environmental issue at hand, including its technical, legal, and social aspects. Review relevant laws, regulations, and policies related to the environmental dispute. Identify and understand the stakeholders involved, their interests, and the context of the dispute.

Pre-Mediation Meetings with Parties

Meet separately with each party to understand their perspectives, concerns, and objectives. Establish rapport and trust to encourage open communication during the mediation process.

Define Mediation Objectives

Clearly articulate the goals and objectives of the mediation. Establish whether the primary focus is on reaching a settlement, improving communication, or fostering a collaborative approach to environmental management.

Develop a Mediation Plan

Collaborate with the parties to create a mediation plan that outlines the process, schedule, and logistics. Include provisions for confidentiality, ground rules, and any other relevant procedural details.

Gather relevant documents

Documents that is useful to prepare beforehand, may include the following: a draft agreement to mediate that the parties use to consent to participation in mediation, and agenda and ground rules for the mediation to follow, a stakeholder list, relevant background information that may assist during the mediation, legal research relevant to the mediation, pre-mediation notes, a draft communication plan for the parties to agree on, session plans and timetables, an evaluation criteria and a draft agreement template for when the mediation reaches an equitable resolution.

Legal knowledge of the mediator

A mediator is distinct from a legal advisor as their role is centered on fostering communication, understanding, and collaboration between disputing parties rather than providing legal advice or representing specific interests. The mediator maintains impartiality and neutrality throughout the process, avoiding advocacy for any party involved.

Unlike a legal advisor, the mediator does not offer specific legal guidance or conduct a detailed legal analysis. Instead, their primary function is to facilitate discussions, encourage the exploration of interests, and assist parties in reaching their own mutually agreeable solutions. The focus is on creating an atmosphere conducive to open dialogue and resolution rather than providing legal interpretations or strategies. While a mediator may have a general understanding of legal principles, their role remains distinct from that of a legal advisor, emphasizing impartial facilitation over legal advocacy. In complex environmental issues that have been evaluated as fit for mediation, the mediator should educate themselves on the legal principles that run parallel with the dispute.

Legal knowledge is important for a mediator as it equips them with a comprehensive understanding of the legal dimensions surrounding the dispute. This understanding allows the mediator to guide informed discussions, identify potential legal issues, and ensure that parties are aware of the legal implications of their decisions. While a mediator does not offer legal advice, this knowledge proves beneficial in facilitating more effective communication and aiding in the crafting of agreements that align with legal requirements.

Moreover, a mediator with legal expertise can enhance their credibility, navigate complex legal issues that may arise during mediation, and collaborate effectively with parties' legal representatives. Ultimately, the integration of legal knowledge into the mediation process contributes to a more thorough and well-rounded approach, fostering an environment conducive to reaching mutually agreeable and legally sound resolutions.

A methodical guide to the day of mediation

The mediator is to approach the environmental dispute in a systematic way, so as to assure that a comprehensive and diligent mediation is conducted on the dispute in question. The following is a methodical breakdown of the steps that the mediator can apply during the mediation, after the preparations and research have been completed and early steps have been taken to initiate the mediation:

Step 1: Introductions and Opening Statements

Begin the mediation with introductions, establishing a neutral and impartial tone. Provide an overview of the mediation process, emphasizing its voluntary and confidential nature. Allow each party to make an opening statement, expressing their perspective on the environmental issue.

Step 2: Agenda Setting

Collaboratively set the agenda for the mediation session, identifying key issues and concerns to be addressed. This can be done in parallel with the mediator's own agenda to guarantee that all issues are indeed addressed. Ensure that all parties have an opportunity to contribute to the agenda-setting process, allowing them to participate in having their voice heard.

Step 3: Information Gathering

Facilitate the exchange of information between the parties, encouraging open and honest communication. Verify and clarify facts related to the environmental dispute, addressing any misconceptions or misunderstandings. This may be helpful to have the parties agree on issues that need resolving, thereby fostering a space of agreement from the outset.

Step 4: Identifying Interests and Concerns

Explore the underlying interests and concerns of each party, going beyond their stated positions. Identify common ground and shared interests that can serve as a basis for agreement. This may be done in the form of a round-table discussion with all participants present, in a private caucus with each stakeholder individually, or by way of an anonymous party-report where larger communities or high-stakes corporations are involved.

Step 5: Generating Options

Encourage the parties to brainstorm and generate potential solutions to the environmental dispute. Explore creative and mutually beneficial options that address the interests of all parties. Generating as many options as possible allow for the participants to actively work together in evaluating potential resolutions. These potential resolutions can be evaluated according to the resolution criteria as prepared prior, to measure the effectiveness of the proposed solution against the needs of all parties involved.

Step 6: Evaluating Options:

Facilitate discussions around the feasibility, benefits, and drawbacks of each proposed solution. Assist the parties in evaluating options objectively and collaboratively. Taking an interest-based approach to resolution evaluation, proposed solutions should take due cognisance of the human rights involved in the dispute and the sensitive contexts in which the respective options will have to be applied.

Step 7: Negotiation and Compromise

Guide the parties through negotiation, helping them find common ground and make concessions if necessary. This is the crux of a mediator's role in any mediation. While carefully working in terms of the principles of mediation, the mediator must encourage a spirit of compromise and cooperation to reach a mutually acceptable resolution that recognizes the needs of all parties involved. Depending on the complexity of the dispute issue at hand, the mediator must ensure that all parties are given an equal opportunity in their participation. It is imperative that all stakeholders are afforded validity in their views where it pertains to genuine and legally recognized interests.

A **facilitative approach** to negotiation allows the participants to hear the needs of the respective parties and formulate an understanding of the dispute that may pave the road to a creative, satisfying and holistic compromise and solution as such. In such an approach, empathy and compassion may allow the parties to decide on a compromise that indeed recognizes the importance of environmental human rights against other rights that may be relevant.

Taking an **evaluative approach** to negotiation may however be more directive, where the mediator reality-checks the participants' proposed resolutions and settlement recommendations. This may be more appropriate when it appears as though there is a party to the mediation that fails to see their proposed resolution as an unfair compromise in terms of the Bill of Rights and international law. The mediator may in such an instance make use of their legal research to enforce a baseline of understanding of environmental human rights for all participants involved, to ensure any proposed resolution is indeed legally sound.

The process of negotiation and cultivating understanding of the dispute may take multiple sessions of mediation in different formats. Only once all the parties are satisfied with a proposed solution, can an agreement be reached as such.

Step 8: Drafting Agreements

Once a suitable resolution is reached, the mediator is to assist the parties in drafting a formal agreement that outlines the terms of the resolution. Ensure that the agreement is clear, comprehensive, and addresses the key concerns of all parties. This may require the mediator to conduct follow-up sessions and maintain strict contact in terms of the communication plan set out.

Step 9: Closing the Mediation

Summarize the key points of the agreement and confirm the parties' understanding and commitment. Conclude the mediation session with a closing statement, expressing appreciation for the parties' efforts.

Step 10: Documentation and Reporting

Document the mediation process, including agreements reached and any unresolved issues. Prepare a final report or summary for the parties involved, ensuring clarity on the outcomes of the mediation.

Chapter 9: Research sources and legal landscape for environmental mediators

The following is a brief overview of relevant law that mediators can use to guide parties to a legally sound resolution.

It is important to note that Environmental law as a discipline is multifaceted in terms of international law and custom, domestic constitutional law and administrative law. It is therefore imperative to take cognisance of the intricacies that administrative law regulate and consider whether mediation is indeed appropriate in such complex cases where governmental agents may be a party to the dispute.

Constitution and international law

The **Bill of Rights** and internationally recognized human rights may serve as a baseline yardstick to determine if an environmental dispute's resolution is legally sound.

Relevant international law sources may be:

- United Nations Framework Convention on Climate Change, 1992
- Convention on Biological Diversity, 1992
- Convention on the International Trade of Endangered Species of Wild Fauna and Flora, 1975

Section 24 of the Constitution of the Republic of South Africa, 1996 provides that 'everyone has the right —

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that —

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

Environmental legislation

The **National Environmental Management Act 107 of 1998 (NEMA)** is the main source of legislation that governs environmental regulation and management in South Africa. It is accompanied by the various sub-Acts that govern specific environmental aspects such as marine life, water, waste disposal, animals, etc.

NEMA defines the idea of “environment” as the ‘the surroundings within which humans exist and that are made up of including—

(i) the land, water and atmosphere of the earth;

(ii) micro-organisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.’

Where a dispute is more specific, the mediator may find more resources and legal information in the following statutes:

- National Water Act 36 of 1998
- Conservation of Agricultural Resources Act 43 of 1983
- National Heritage Resources Act 25 of 1999
- National Environmental Management: Biodiversity Act 10 of 2004
- Alien and Invasive Species Regulations - 25 September 2020
- National Environmental Management: Protected Areas Act 57 of 2003
- National Environmental Management: Waste Act 59 of 200
- National Environmental Management: Air Quality Act 39 of 2004
- National Forests Act 84 of 1998
- National Veld and Forest Fire Act 101 of 1998
- Spatial Planning and Land Use Management Act 16 of 2013
- Fertilisers, Farm feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947
- Genetically Modified Organisms Act 15 of 1997
- Agricultural Pests Act 36 of 1983
- Nature and Environmental Conservation Ordinance Act 19 of 1974
- The Carbon Tax Act 15 of 2019
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These legislative sources serve as further reading for the mediator to research independently to ensure that a legally sound and enforceable resolution is reached during or post-mediation. Mediators without a legal background or knowledge in environmental law may however find it appropriately ethical to consult with an environmental specialist on the effectiveness of the proposed resolution as it pertains to law and regulations.

Conclusion

In conclusion, the process of mediating an environmental dispute is a complex yet invaluable approach to resolving conflicts that arise in the realm of environmental conservation and resource management. This collaborative method, rooted in communication and negotiation, seeks to reconcile conflicting interests and foster sustainable solutions for the benefit of both the environment and the involved stakeholders.

One of the key strengths of environmental mediation lies in its ability to address the multifaceted nature of disputes. Environmental issues often involve diverse parties, ranging from government agencies and corporations to local communities and environmental advocacy groups. Mediation provides a platform for these stakeholders to come together, share their perspectives, and actively participate in crafting mutually agreeable solutions. This inclusivity is crucial for fostering a sense of ownership and commitment to the outcomes, as all parties have had a voice in the decision-making process.

Furthermore, the mediation process encourages the exploration of innovative and adaptive solutions. Environmental disputes are inherently dynamic, influenced by evolving scientific knowledge, economic conditions, and societal values. Mediation allows for the incorporation of these changing factors into the resolution, ensuring that agreements remain relevant and effective over time. This adaptability is essential in addressing the complexities of environmental challenges, such as climate change, habitat preservation, and natural resource management.

Moreover, environmental mediation promotes a shift from adversarial to collaborative problem-solving. Traditional legal processes often foster an adversarial environment, pitting opposing parties against each other in a win-lose scenario. In contrast, mediation encourages a cooperative approach, where parties work together to find common ground and shared interests. This not only reduces the emotional and financial costs associated with prolonged legal battles but also fosters a sense of goodwill and cooperation that can extend beyond the specific dispute.

While environmental mediation holds great promise, it is not without its challenges. Balancing the power dynamics among participants, ensuring representation of marginalized voices, and navigating complex scientific and technical issues require skilled and impartial mediators. Additionally, the success of mediation relies on the willingness of parties to engage in good faith and commit to the process.

In conclusion, the process of mediating environmental disputes represents a constructive and inclusive avenue for addressing the intricate challenges associated with environmental conservation. Through collaboration, adaptability, and a commitment to cooperative problem-solving, mediation offers a pathway to sustainable resolutions that prioritize the well-being of the environment and the diverse interests of stakeholders involved. As we navigate an increasingly interconnected and ecologically sensitive world, the role of environmental mediation becomes ever more critical in forging a harmonious balance between human activities and the health of our planet.

Summary of this e-book

This digital handout outlines a comprehensive process for environmental mediation, emphasizing the importance of inclusive agenda-setting, information gathering, and identifying interests and concerns. The following points can be highlighted as key points in ethical environmental dispute resolution:

- Environmental disputes involve a complex interplay of legal, social, economic, and environmental dimensions, impacting communities, ecosystems, and the public at large.
- Key challenges in environmental disputes include lack of cohesion among environmental advocacy groups, conflicting understandings of public interests, issues in execution and enforcement of environmental agreements, diversity and power imbalances among involved parties, and disparities in knowledge and expertise in the relevant field.
- Environmental disputes are not confined by national borders and may involve transboundary pollution, biodiversity conservation, and climate change, necessitating international collaboration and ethical considerations.
- General principles of mediation, such as neutrality of the mediator, voluntariness of participation, confidentiality, self-determination, fairness, interest-based bargaining, collaboration, and sustainability of resolutions, apply to environmental mediation.
- Initial steps before mediation involve thorough assessment of the dispute, familiarization with relevant environmental laws, stakeholder analysis, understanding conflict history and context, selecting a qualified mediator, developing a communication strategy, ensuring resource and information accessibility, cultural sensitivity, and preparing for follow-up.

It further highlights the facilitative approach to negotiation, encouraging parties to generate options and evaluate them collaboratively. The mediator's role in guiding negotiation, drafting agreements, and closing the mediation is detailed, emphasizing the importance of documenting the process and ensuring clarity on outcomes. Additionally, the document provides an overview of relevant international and environmental law sources that mediators can use to guide parties to a legally sound resolution, emphasizing the significance of human rights and environmental legislation in resolving disputes.

Overall, the ebook provides a detailed framework for environmental mediation, emphasizing the importance of ethical conduct, inclusivity, and legal soundness in the resolution of environmental disputes. It underscores the role of mediators in guiding parties through a structured process that culminates in a formal agreement, while also highlighting the legal landscape and ethical foundation that underpins the mediation services provided by DDR.

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