GENERAL NOTICE

NOTICE 638 OF 2013

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 (ACT N0.107 OF 1998)

NOTICE OF INTENTION TO ESTABLISH ACCREDITATION STANDARD FOR A PANEL OF ENVIRONMENTAL MEDIATORS

I, Bomo Edith Edna Molewa, Minister of Water and Environmental Affairs, hereby give notice of my intention, under section 21 of the National Environmental Management Act, 1998 (Act No.107 of 1998), to establish accreditation standards for a panel of environmental mediators set out in the Schedule hereto.

Members of the public are invited to submit to the Minister, within 30 days of publication of this notice in the Gazette, written comments to the following addresses:

By post to: The Director-General: Department of Environmental Affairs
Attention: Mr Edward Moeketsi
Private Bag X447
Pretoria, 0001

By fax to: 012 322 5890 and by email to: Emoeketsi@environment.gov.za

Hand delivered at: 315 Pretorius Street, Pretoria, Fedsure Forum Building, North Tower, 2nd Floor (Reception).

Any inquiries in connection with the notice can be directed to Mr Edward Moeketsi at 012 310 3640.

Comments received after the closing date may not be considered.

BOMO EDITH EDNA MOLEWA

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

SCHEDULE

environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

ACCREDITATION STANDARD FOR A PANEL OF ENVIRONMENTAL MEDIATORS/CONCILIATORS

DISCUSSION DOCUMENT

PREPARED BY THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS (DEA) IN CONSULTATION WITH A MEDIATION EXPERT (ADV. HENDRIK KOTZE)

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1 Introduction

The National Environmental Management Act, 1998 (Act No. 107 of 1998) ["NEMA"], Chapter 4, provides for alternative dispute resolution in respect of environmental disputes. Section 21 of NEMA authorises the establishment of a Panel of persons to render facilitation, conciliation and mediation services. NEMA refers to 'conciliation" in the dispute settlement industry in South Africa, and in the international and academic usage, it has become common practise to refer to practitioners who provide facilitation, conciliation and mediation services as "mediators". There are in any event no clearly defined differences between these practises. For purpose of this document, we will therefore refer to these practitioners as "mediators".

"Mediation" in the context of NEMA is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative, consensual and informed manner in an environment of trust. The mediator has no power to decide disputed issues for the parties and it is the mediator's objective to facilitate the parties themselves reaching their most constructive and fair agreement.

For purposes of clarity it is recommended that the term "mediation" be used in NEMA, instead of conciliation:

- The term "conciliation" does not have any universally understood definition or content. The term "mediation" on the other hand does have a widely agreed content and definition.
- The "conciliation" activities described in the current version of section 18(2) of NEMA are in any event activities which any competent mediator would undertake in the normal course of a mediation.

In terms of the requirements of Section 21 of Chapter 4 of NEMA:

> ***21. Appointment of panel and remuneration***
>
> *(2) The Minister may create a panel or panels of persons from which appointment of facilitators and arbitrators in terms of this Act may be made, or contracts entered into in terms of this Act.*

It is clear that in establishing such a panel, the Minister needs to apply a certain standard as to competency of the appointed persons.

This document examines the demands on skills and knowledge posed by environmental disputes, and on the basis of that examination, describes the minimum requirements that a mediator should have in order to qualify for accreditation/appointment as an environmental mediator.

Environmental mediation is a specialised field of mediation. In other words:

- *The first requirement for such a specialist would be that he is a qualified mediator.*

  Accordingly we will in section 2 of this document examine what the accreditation criteria should be in order to qualify as a *mediator*.

- *The second requirement would be that he has the necessary specialist skills and experience to mediate environmental disputes.*

Accordingly we will in section 3 of this document examine the additional requirements that are necessary to qualify a person as en *environmental* mediator.

This document is a collation of information from the sources cited in this document, and (save for the sections entitled "Analysis and conclusions") is not presented as original work. The following article was extremely informative on the subject, and is extensively quoted in this document; Bruce C. Glavovic, E. Franklin Dukes, Jana M. Lynott, *Training and educating environmental mediators: Lessons from experience in the United States*; MEDIATION QUARTERLY, vol. 14, no. 4, Summer 1997.

2 Mediation Accreditation Standards in South Africa

2.1 DiSAC Accreditation Standards

➢ Background to DiSAC

The mediation industry in South Africa is, like a number of other professions, self-regulating. This implies that there are no minimum standards set by way of statute or regulation.

However the Alternative Dispute Settlement ["ADR"] Industry has formulated and prescribed minimum standards for practitioners. This function is performed by the Dispute Settlement Accreditation Council of South Africa ["DiSAC"].

DiSAC is a voluntary organisation established by the ADR Industry in South Africa – specifically for purposes of determining and maintaining professional standards for the Industry.

DiSAC membership currently consists of the following organisations: The Africa Centre for Dispute Settlement (ex officio), Tokiso Dispute Settlement, Equillore, the Association of Arbitrators of Southern Africa, the Arbitration Foundation of SA, Conflict Dynamics, and Accord (pending finalisation).

In addition a number of other organisations have participated in the discussions, and given their in principle support for the initiative. These include the Department of Justice and Constitutional Development, the Law Society of SA (who hold a watching brief), the Mandela Institute (University of Witwatersrand), the National Democratic Lawyers Association and Advocates for Transformation. Other invitees and parties with an interest remain welcome to participate.

In most jurisdictions the need for a uniform national standard became pressing as soon as the use of mediation or arbitration was institutionalised through government initiative. One example of this is the Civil Mediation Council in the United Kingdom. The Civil Mediation Council is a body to which mediators and mediator providers may affiliate, and to which government agencies including Courts will refer parties to find mediators and providers. The CMC is an organisation similar to DiSAC.

The system of standards and accreditation provided by DiSAC is a voluntary, 'opt-in' system. It is not a licensing system. This implies that no practitioner can be forced to apply for accreditation, and that accreditation is not a requirement for practicing as a dispute settlement practitioner.

This approach accords with that followed in other jurisdictions. History has however shown that the voluntary standards adopted by the industry can become the de facto standard. This happens when users of these services begin adopting these standards (see for instance the example of the civil mediation Council quoted above).

➢ The DiSAC Accreditation Standards

At the start of 2012 DiSAC published its first accreditation standard for the mediation industry. A full copy of this standard is available at: (Note – the website indicates that it is a "draft standard" – this is incorrect, and is in fact the current and approved standard)

http://www.usb.ac.za/disputesettlement/dispute_settlement_accreditation_council.html

This standard carries the blessing of all the DiSAC member organisations, which make up the bulk of the ADR industry in South Africa.

In order to accredit with DiSAC as a mediator, practitioners have to meet the following standards: (This standard is the basic generic mediation qualification – or as sometimes referred to as "general commercial mediation standard" – it does not therefore include any requirements for specialisation and any field – such as family or environmental mediation)

National standard for accreditation of mediators[1]

In order to qualify for accreditation as a mediator with the Council, a candidate must:

a) Undergo training under an accredited mediator training programme and be assessed and certified as competent by accredited assessors

Or

(Where other training was successfully completed) apply for recognition of their prior learning, and then be assessed and certified as competent by an accredited assessor

Or

(in the case of experience only) apply for recognition of their prior experience, and then be assessed and certified as competent by the Council.

b) Supply testimonials of his/her good character from two persons with whom the candidate has a professional relationship.

c) Be affiliated with one or more Accredited Service Providers ('ASP').

d) Under oath, and in writing, confirm that he / she:

i) Has not been convicted of any criminal offence involving dishonesty.

ii) Was never withdrawn from or refused membership of any other panel (or if he/she was, provide details).

iii) Subjects himself / herself to the Code of Professional Conduct, and the complaints and disciplinary procedures, of the ASP with which he / she are affiliated.

e) Pay the annual Council accreditation fee.

DiSAC prescribes the following requirements for any "accredited mediator training programme":

In order to qualify for accreditation a training programme for mediators must include the following:

Programme presentation and content

a) The programme must be conducted by a training team of at least two accredited trainers for every 18 trainees.

b) The programme duration must be a minimum of 40 hours (which may be completed in more than one mediation workshop provided that no more than nine months have passed between workshops), excluding any written assessment.

c) The programme must contain the following components:

1 Additional requirements may be imposed for areas of specialization – such as labour or community mediation. Please note that different accreditation standards already exist for family mediators under the National Accreditation Board for Family Mediators, NABFAM.

i) Mediation theory (the Council will from time to time prescribe subject matters that are to be covered)

ii) Practice sessions that allow trainees to practise and develop skills:

- Each programme participant must be involved in at least nine simulated mediation sessions and act as a mediator in at least three thereof.
- The instructor must, in respect of at least one simulated mediation, provide written coaching feedback.

Assessment of trainees

a) Assessment must include:

i) A written assessment that tests understanding of the theory and law of mediation.

ii) An assessment of the trainee's competence as a mediator (in an actual mediation, or in an applicable role play). The published standard contains assessment guidelines that should be applied during assessment.

b) During the assessment phase of the training, the ratio of qualified assessors to programme participants is to be no less than 1:4

c) Each trainee must be assessed:

i) At least twice, and by different assessors.

ii) Each such assessment is to be contained in a written report.

d) When assessing a trainee, the assessor must certify a trainee as being of a competent standard, or if this is not the case recommend additional training and practice, and re-assessment at a later date, or fail the candidate.

➢ Accreditation Standards for Court Based mediation in South Africa

The Rules Board of South Africa has published for comment a rule change that will make mediation compulsory in the High Court in South Africa. No accreditation standards for the accreditation of mediators in terms of this scheme have yet been published.

The Rules Board did however request DiSAC to make submissions regarding the content of such accreditation standards. DiSAC has considered this, and has made recommendations (a copy of the recommended standard is included as Annexure A). It remains to be seen to what extent this will be adopted by the Rules Board.

2.2 General Overview of other Jurisdictions

In order to give some perspective on the DiSAC standard, we provide a short overview of the International best practise regarding minimum standards of training and experience for the accreditation of mediators.

The following table provides a summary of accreditation requirements in a number of countries:

This table is primarily based on the Comparative Mediation Table contained in the Appendix to Professor Nadja Alexander (ed.), "Global Trends in Mediations", Kluwer Law International, 2006 at pages 452-465 with modifications based on information and research by Maria Choi, Secretary of the Sub-groups.

Jurisdictions	Training and Accreditation
Australia	• National Mediator Accreditation System ("NMAS") commenced on 1 January 2008. • Under the NMAS, ADR organisations called 'Recognised Mediator Accreditation Bodies' ("RMAB") are responsible for accrediting individual mediators. • The NMAS requires 5 days of initial training and education (average of 40 hours), in addition to a formal assessment and a requirement for continuing professional development. • It is a voluntary scheme and there is no requirement for people providing services called 'mediation' to be accredited under it. However, some organisations, courts and governments have indicated that they will only use mediators accredited under the system, for example the Federal Court. • Currently RMABs include courts, government bodies, bar association and law societies. • A permanent National Mediator Standards Body established in 2010, replacing the National Mediator Accreditation Committee Inc. • The Mediator Standards Body is responsible for reviewing and developing the Standards, monitoring compliance and promoting mediation. • The legal profession may have an even more important role than the courts in informing/referring members of the public to ADR. • There has been an increasing amount of ADR training provided by legal professional bodies, including law societies and bar associations. • Some law schools in Australia offer significant education about ADR as part of their core curricula for law students. • Other professionals regularly involved with ADR include architects, engineers, planners, psychologists, social workers and accountants. • Disputes may also be referred to ADR processes by business associations and consumer organisations.

Jurisdictions	Training and Accreditation
New Zealand	• In New Zealand, many mediators are trained by and become accredited members of the Arbitrators' and Mediators' Institute of New Zealand ("AMINZ") and/or Leading Edge Alternative Dispute Resolvers ("LEADR"). • There is no formal national accreditation or regulatory standards for mediation. • AMINZ and LEADR provide mediators with high training standards and continuing professional development requirements. • LEADR's course is a 40 hour training course that also meets the requirements of the Australian National Accreditation Standards. • The AMINZ Associate syllabus sets out the topics which form the basis for the academic standard to be attained for Associate membership. These topics are taught at the Massey University Dispute Resolution Centre, the University of Waikato School of Law and the University of Auckland Faculty of Law.
United Kingdom	• Mediation in the United Kingdom developed without any form of regulation in relation to training provision. There is no 'certification' or registration system post-training that established a mediator's competence. Continuing Professional Development is not mandatory. • The Civil Mediation Council ("CMC") was set up 2003 with the support of 35 ADR providers, professional bodies, independent mediators and practitioners to focus on legal reform and education in mediation. It is now going through an internal debate as to whether or not to standardise accreditation and to act as regulator of the field. • Assessment of participants to determine their competence to mediate disputes is now an accepted part of all mediator training from the major providers in England. • No pre-requisite skills or professional background are generally required prior to attend the course, many of the skills for effective mediation being centered on practical skills. • Mostly 40-hour mediation courses with assessment.
Germany	• Mediators are not subject to national regulation - standards and mediation styles vary greatly. • Accreditation and practice standards development vary according to organisational/practice areas. • Private-sector training consisting of between 100 and 600 hours over one to two years are on offer. Generally, it comprises 200 contact hours spanning 2 years including clinical practice. • Amendments to the civil procedure laws provide statutory frameworks for both mandatory and voluntary court-related mediation schemes. • Accreditation programmes are being designed and offered on an inter-disciplinary basis at postgraduate level and allow students to specialise in different practice areas. • Limited offerings as part of university law studies. • Trend towards one to two years long programme consisting of intensive training modules.

Jurisdictions	Training and Accreditation
Canada	• The ADR Institute of Canada has drafted and implemented a national Model Code of Conduct for Mediators in June 2005 that attempts to protect the integrity of the mediation process by establishing a model ethics code for mediators who are members of the Institute. • A number of professional associations of mediators emerged nationally and provincially. • These institutes (e.g. ADR Institute of Canada) provide training and national accreditation. They may also have strict rules and procedures for accreditation and protocols for mediation. • To satisfy the requirements for accreditation, practitioners must meet education, practical experience and skills assessment requirements, pass reviews and obtain approval. • There is separate accreditation for family mediation from the Family Mediation Canada Institute.
Singapore	• No national system or law to regulate accreditation of mediators, quality, standards or practice of mediation. • Singapore Mediation Centre ("SMC") has its own internal system of mediation training and accreditation. • Numbers of mediators accredited each year are limited. • Accreditation lasts for one year, subject to renewal. • Re-accreditation only if participation in 8 hours of annual continuing education and mediator is available to conduct at least 5 mediations per year if requested to do so. • SMC has its own Code of Conduct which its mediators must follow.
Netherlands	• Court-connected mediation was introduced in the Netherlands in 1999. • All courts provide a customised service which helps parties to find the most suitable dispute resolution process for their dispute and if suitable a case is referred to a mediator. • This 'referral to mediation' system has proved a very useful and frequently applied method of resolving legal disputes. • Netherlands has one umbrella organisation *Nederlands mediation Instituu' ('NMI')* which enjoys strong links with the Ministry of Justice. • It does not train mediators itself but accredits certain institutions to do so.
Scotland	• Accreditation on an organisational/practice area basis. • Sector-specific schemes emerging. • Training is sector-specific and mainly provided by private training organisations. • Some university courses on offer.
Austria	• The regulation of the training and accreditation of mediators is governed by the Civil Law on Mediation Training which sets out the content and scope of training in this field. • Training courses tend to comprise a minimum of 200 hours. • The principal mediation providers are organised under an umbrella organisation, *Platform fur mediation* and tend to be sector based, for example one covering the legal profession, another representing notaries and another tax accountants. • An Advisory Board *ZivMediatG* was set up with specific rights and obligations to the Ministry of Justice provided for by law. • Victim-offender mediation must meet requirements of the appointed ADR organisation (Neustart).

Jurisdictions	Training and Accreditation
South Africa	• Training for mediators by private and public organisations especially in labour and family law disputes. • Professional background and experience relevant for mediator recognition.
Switzerland	• Accreditation on an organisational/practice area basis. • Training provided by private training organisations, universities and law firms. • University Law Schools offer some mediation training courses between 75-200 contact hours.
Denmark	• No national accreditation scheme, but mediators in court-related mediation must be judges or attorneys with 7 days mediation training. • Private sector training bodies with courses ranging from 1 day to several weeks. • ADR courses offered in some University Law Schools. • Two-year postgraduate degrees offered at tertiary level.
United States of America	• Mediation appears more 'professionalised' in the United States of America where State laws regarding the use of lawyers as opposed to mediators may differ widely. • No national accreditation scheme. • Some states have fairly sophisticated laws concerning mediation. They have laws with clear expectations for certification, ethical standards and protections preserving the confidential nature of mediation by ensuring that a mediator need not testify in a case that they have worked on. • Some states have laws that only relate to mediators working within the court system. Community and commercial mediators practising outside the court system may not be subject to the law and its legal protections. • Although many states recommend qualifications for mediators, no state has requirements for practice of mediation. • Rather than regulate the practice of mediation, some states have chosen to create lists of mediators meeting criteria for certain areas of practice. • When states have guidelines or requirements for mediators who receive court referrals or appointments, judges commonly have discretion in applying these guidelines. • Standard training courses comprise up to 50 hours.

Acknowledgements:

This table is primarily based on the Comparative Mediation Table contained in the Appendix to Professor Nadja Alexander (ed.), "Global Trends in Mediations", Kluwer Law International, 2006 at pages 452-465 with modifications based on information and research by Maria Choi, Secretary of the Sub-groups.

2.3 IMI Professional Mediator Competency Certification

One of the most recognized international mediator accreditation bodies is the International Mediation Institute ["IMI"].

IMI makes no specific provision for competency certification for mediators in a specific field of practice. IMI does however certify mediators on their professional competency – i.e. their mediation skills and experience. To gain an IMI Certification in Professional Mediation Competency, a mediator must secure at least 100 Competency Credits from four categories:

Training.

Certified Mediators must have at least five full days training as a mediator on a program provided by an IMI Registered Educational Establishment (REE) where candidates are independently assessed. Each day of training results in 1 Training Credit. Mediators having more that 5 full days formal training may count excess days above 5, up to a maximum of 10 full training days (10 Training Credits).
Training Credit – Min 5 Credits; Max 10 Training Credits
[*Note – Since many mediators pass through formal training just once, the same Training Credit will be applied annually. Subsequent training (e.g. Advanced programs, Master Classes) will qualify for either excess Training Credits or as Education Credits.*]

Education.

In each 12 month period, IMI Certified Mediators must have at least 20 hours of post-training education in amicable dispute resolution or assisted negotiation in a Continuing Professional Development (CPD) program recorded with an REE. Each CPD hour counts as 1 Education Credit. Mediators having more that 20 hours of CPD may count the excess hours above 20 to their total credit, up to a maximum of 25 hours. IMI's system for recording ongoing education will be based upon "Output CPD" in which IMI Certified Mediators must file a personal development plan with an REE; only education implementing that plan may count towards Credits. Some online CPD may be included. Education Credit – Min 20 Credits; Max 25 Credits – per annum.

Experience.

Competency as a mediator can partly be assessed by user and peer feedback. IMI Certified Mediators are encouraged to seek written feedback from the parties, their professional advisers and any shadow or peer co-mediator present during the entire process. Feedback must be sent to a REE of the mediator's choice, or to a peer Certified Mediator approved by IMI, who will prepare a periodic Feedback Digest. IMI will issue guidelines for preparing Feedback Digests, including guidelines on how to handle negative feedback (which will require the compiler of the Feedback Digest to interview the provider of negative feedback; the Feedback Digest will not capture negative feedback unless repeated more than three times from different sources). Mediators will also be required to assess their own performance. For the purposes of accumulating IMI Credits, only hours spent as a neutral in a process resulting in written feedback as described above may earn Experience Credits. Experience Credit – Min 50 Credits; Max 60 Credits – per annum.

Leadership.
All IMI Certified Mediators are expected to contribute to the advancement of the mediation profession via Leadership Initiatives. These must be recorded with REE. Each hour spent on Leadership Initiatives each year earn 1 Leadership Credit. Leadership Credit – Min 5 Credits; Maximum 25 Credits – per annum.

2.4 Analysis and Conclusions

On the basis of the above information, the following conclusions can be made:

- There appears to be universal acceptance that the standard 40 hour training and skills development programme (as required by DiSAC) is an absolute minimum standard to qualify for generic – or normal commercial mediator accreditation. A number of jurisdictions require more extensive training and or a mentorship programme, in addition to the 40 hours training, for this basic accreditation.
- In South Africa it is generally accepted that the 40 hours training in an appropriate skills mediation skills programme is regarded as an absolute minimum requirement for basic accreditation as a commercial mediator.
- Any mediator who wishes to specialise as an environmental mediator should be required to firstly qualify in accordance with the basic generic mediator training requirements. Such a training programme should also provide assessment of candidates – i.e. certification that the candidates were assessed by competent assessors and found to have the minimum required skills level.
- *It is recommended that the Department adopts a general mediation qualification standard that is similar to the DiSAC standard;*
- After qualifying as a mediator, additional specialist requirements pertinent to environmental disputes must also be imposed – based on the special requirements needed for practising in the field of environmental disputes. This will be examined in the next section.

3 Specialist Skills and Experience Required for Environmental Mediation

When we determine accreditation standards for specialist mediators (such as Family Mediators, Divorce Mediators, Environmental Mediators, Intellectual Property Mediators, etc) we always have to give regard to two sets of qualifying standards. These are:

a) The special *process skills and experience* that are required; and

b) The *substantive knowledge* and expertise that is required of the specialist field in which the mediator wishes to practice.

This section will therefore consider both these requirements with regard to environmental mediators.

3.1 Special Demands Imposed by Environmental Disputes

In order to determine what specialist skills and experience are required, we need to understand the special demands imposed by environmental mediation.

➢ What is "Environmental Conflict"?

"Environmental conflict stems from divergent views about how to allocate and utilize land, air, water, and living resources. At its deepest level, environmental conflict is the division that arises over competing demands for individual and collective rights, fulfilment of basic human needs, and biophysical constraints, under conditions of political and scientific uncertainty.

The term *environment* refers to interconnected biophysical, economic, political, and social systems; it encapsulates human interactions with the natural world. It is therefore an inclusive term encompassing both natural and human systems.

Conflict [– in this context -] refers to generic or systemic differences parties have with respect to goals, values, and interests that can lead to deployment of resources and power in an endeavour to gain a relative advantage over other parties.

*Dispute*s are one specific outcome or manifestation of conflict, in which parties are likely to adopt countervailing positions in their effort to realize their goals, values, and interests in the context of a particular issue. For example, a lawsuit filed by a nongovernmental environmental organization against the proponent of a housing development in an ecologically sensitive habitat at a particular locale is an environmental dispute that reflects, at its root, conflicting goals, values, and interests about the appropriate use of natural resources, matters of environmental quality, property rights, and economic development."[2]

➢ Characteristics of Environmental Conflict

Environmental disputes uniquely manifest high levels of the following characteristics:

1. *Environmental disputes centre on the relationship between natural and human systems; they exhibit high levels of complexity and uncertainty, and they impinge on the public good.*

2 Bruce C. et al, ditto, p 270.

Natural and human systems are intricately connected in a variety of ways (for example, via flow of energy, cycling of nutrients, and movement of materials). The manner in which land, air, water, and living resources are used can yield impacts that are spread out in time and space. Yet we have imperfect understanding of how these complex, interconnected systems function and hence what the consequences of various patterns of use might be. Furthermore, some actions pose serious threats to public health and well-being through their impact on common resources (resources that do not facilitate effective individual ownership, such as oceanic fisheries) and the spectre of irreversible consequences (for example, species or "cultural" extinction).

2. *Many parties with divergent views, experiences, and resources are involved in or affected by environmental disputes.*

Given the proclivity for environmental impacts to be spread out in time and space, there are invariably multiple parties involved in or affected by such disputes. These parties may include private citizens, business and industry, government agencies, elected and appointed officials, and a host of nongovernmental organizations concerned with a variety of issues. These parties often introduce socioeconomic, racial, and ethnic differences to environmental disputes. Disputants are likely to have divergent ideological perspectives and varying attitudes towards risk. The organizational structure, strategy, and capacity of the parties are also likely to vary.

3. *The environmental setting involves incongruous "boundary" conditions.*

The boundaries of natural systems seldom conform to administrative and legislative boundaries. Invariably, there is overlapping or incomplete jurisdiction. Coordination of activities among different governmental agencies is problematic, and parties have incomplete decision-making authority, financial responsibility, and/or liability Furthermore, the significance of the issues in dispute may assume greater or lesser importance depending on the perspective from which one views the dispute. For instance, a matter might be significant on a local scale, but not at the national level, or vice versa. Environmental disputes can thus be distinguished by virtue of their primary concern with the allocation and use of land, air, water, and living resources. This focus is manifested in disputes characterized by high levels of uncertainty and complexity with consequences that affect the public good, involve multiple stakeholders, and are subject to incongruous boundary conditions.[3]

The characteristics that make environmental mediation unique can be summarised as follows:

- Disputes are *filled with complexity and uncertainty;*
- They usually involve *multiple parties* with different experiences, interests, and resources;
- There are often multiple stakeholders with *varying degrees of organization and leadership;*
- There may be *little or no continuing relationship* among some or even all of the parties;
- Overlapping or *incomplete jurisdiction* within the ambit of the affected stakeholders;
- *Few common goals* may be apparent between the stakeholders;
- The *negotiation framework may be entirely alien* to one or more of the parties;

3 Bruce C et al, ditto, p 270 - 271.

- The implications of the dispute and of any agreements may reach well beyond the disputants to the general *public good;*
- The implications of decisions having an *impact on the environment* may be far-reaching-and even irreversible. [4]

➢ Differences with mediation in other fields

The environmental mediator has many more responsibilities than the commercial or labour mediator, and many different types of responsibilities.

- Rarely is the environmental mediator presented the neat package of disputants, issues, experienced negotiators, and shared goals that the commercial or labour mediator might encounter.
- The mediator is concerned with conducting effective meetings, identifying issues, developing a common knowledge base, and monitoring the negotiation process through awareness of sources and use of power and access to information.
- Given that environmental issues frequently involve complex scientific and technical issues, as well as complicated legal and political considerations, attention must be paid to creating a shared understanding of what is known, what is unknown, and the meaning to each party of that state of knowledge.
- Each mediation involves several continuous sets of negotiations, both within the mediation group (for example, between and among the several parties to the mediation, within the makeup of each party, and within a caucus of parties with similar interests) and external to the group (within the constituency of each set of interests, with decision makers not at the table, with the media). These different sets of negotiations may require varying amounts and types of oversight, ranging from the mundane but essential logistics of dealing with multiple parties to facilitating and recording discussions.
- Implementation. Throughout, the mediator is keeping in mind how any agreements might be implemented. Not only must there be continuous linkage of the negotiations with the appropriate stakeholders and authorities, but if agreement is reached there are considerations about maintaining consensus, monitoring implementation, evaluating the process, and even reconvening when appropriate.[5]

3.2 Process Competencies

Proficiency in a number of focal process competencies is essential in environmental mediation education. Five focal competencies have been identified by the Society of Professionals in Dispute Resolution: communication, conflict analysis and assessment, process design, negotiation, and facilitation.

We wish to emphasize that unless these process competencies are embedded within a broader education program that deals extensively with both ethics and the substance of environmental disputes, such training is likely to leave trainees unprepared to deal effectively with the many complicated and difficult dimensions of real-world environmental disputes.

4 Bruce C. et al, ditto, p 274.
5 Bruce C. et al, ditto, p 275-276.

Communication skills. A prime responsibility of the mediator is to improve communication and foster understanding among disputants. The mediator therefore needs to be able to speak well, deliver logical and evocative presentations, and listen attentively to the disputants. A clear explanation of the purpose of mediation helps the parties understand the potential benefits of a collaborative dispute resolution process. Perhaps the most important skill a mediator draws on is the ability to listen well. The mediator needs to listen to the real issues behind the stated ones, cautiously interpret nonverbal messages, and model good listening techniques in order to help foster a supportive environment. This can be done by showing attention to an individual or the group through eye contact and appropriate body language, verbal responses and paraphrasing, and avoidance of premature evaluations and interruptions.

Conflict analysis and assessment. A second area of competency is the ability to examine a dispute and understand its sources, its dynamics, and the mediator's role in addressing the dispute. This requires that the mediator understands the relationships between the parties, each party's sources of power, any power imbalances that exist among parties, and the political dynamics of the dispute. In addition, both current and previous relationships among the parties are likely to affect the dynamics of the negotiation process. Pertinent information on these matters can be accessed through individual interviews with the participants. Thus, it is crucial for environmental mediators to be skillful at conducting interviews with people of diverse backgrounds in ways that elicit their understanding of the dispute.

Process design. An integral component of environmental mediation is the pre-negotiation design phase. A mediator needs to work with participants to ensure that they share the same understanding of the goals of the mediation, of how different interests are represented, and of how information is gathered. Typically, this requires developing with participants a set of agreed protocols that guide the group's interaction.

Negotiation. An environmental mediator must possess an understanding of negotiation skills so that the parties can be guided toward their most effective negotiation styles and behaviours. Indeed, much of the mediator's task is accomplished in negotiations with the various participants. The most important negotiation skills are those that build trust among participants and accountability to one's constituency and that promote clear and accurate information exchange. By assisting the parties in assessing their needs and interests, rather than remaining grounded in more threatening positions, a mediator takes the first step in creating an environment in which disputants can empower themselves.

Empowerment may also be facilitated by working with parties to invent creative alternatives, with an emphasis on how each party's options relate to the problem. It is imperative that parties be enabled to make their own informed choices based on negotiations that take place in an environment where the "guiding principles and criteria" upon which a decision is to be placed have been explicitly discussed.

The mediator's role in enhancing communication among the parties goes beyond managing the dynamics of face-to-face discussions. When negotiating public policy issues, parties need to be accountable to constituent groups. The mediator thus often plays a significant role in helping parties manage communication with those groups in such a way as to facilitate information exchange and achieve an organizational commitment to negotiated decisions. Given the characteristics of complex, multiparty disputes, a mediator can expect that negotiations will at some point break down. This may happen when controversial data are involved or where a proposed agreement is followed by a seemingly unbreakable impasse. A mediator may apply different techniques in such situations: for example, obtaining more information, establishing a task force to handle the impasse, or providing a session where the data are analysed by all parties.

Facilitation. A primary responsibility of the mediator is to facilitate meetings, both formal ones with all stakeholders and the coordination of smaller group meetings with the larger assemblies. A mediator is also involved in facilitating the information-gathering and agenda-setting processes that occur in the interim between meetings. The mediator as facilitator is chiefly responsible for managing a structured process that increases the productivity of the group, ensuring a common understanding of the goals of the meetings, and encouraging the group to work toward the highest degree of consensus when appropriate. This can be done by offering meaningful participation by all participants, recording the content of the discussions, and honouring the agenda. It is important that guidelines be drawn up early in the negotiation on issues of confidentiality, press contacts, representation, and interpersonal interaction and language that help maintain a safe environment for everyone involved to contribute to the discussions free of intimidation.[6]

It is therefore critically important that candidate mediators attend and successfully pass training courses that actually teaches these competencies.

The generic general commercial mediation training does introduce mediators to many of these skills. It does not however adequately equip the mediator to deal with the following:

- Mediating in a multi-party context.

  Effective multi-party negotiation and conflict management require the ability to enter into, build, and foster collaborative relationships among people involved in a dispute; a process that takes time to cultivate and maintain. Building relationships is essential to building trust. Trust is essential to successful group efforts and underlies effective joint implementation of agreements.[7]

- Mediating where (some of) the parties lack organisation and leadership, and/or are alien to the negotiation framework.
- Mediating disputes where the outcome has a public interest component to it.
- Situations that require extensive use of negotiation skills.
- Understanding the dynamics of team mediation (see paragraph 3.3 below).

3.3 Environmental Literacy

Environmental literacy means familiarity with the language of environmental science and public policy. In addition to the need for the consummate mediator to be a "process expert," it is important that the mediator be proficient in the language and substance of environmental science and public policy.

As a "bridge" to enhancing understanding among the disputants, the mediator needs to be well-grounded in the substantive issues so as to fulfill responsibilities that include translating and communicating, across different disciplines, often varied and contradictory viewpoints of issues characterized by technicality, complexity, and incomplete knowledge. Mediating scientifically intensive environmental disputes therefore demands an understanding of the nature of science and a reasonable degree of environmental literacy.

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6 Bruce C. et al, ditto, p 288 - 290

7 The Institute for Environmental Conflict Resolution, Course Description: Advanced Multi-Party Negotiation of Environmental Disputes, http://www.ecr.gov/AnnouncementsEvents/WorkingWithUs.aspx

Additionally, in order to promote creative and effective resolution of environmental disputes, the mediator should have a "real world understanding of how the decision-making or policy-making process functions in practice (including matters of law, politics, and administration), and how it might be improved through negotiation-based responses."[8]

There are at least two major categories of substantive knowledge essential for environmental mediators: the *scientific / technical* setting and the *political / organizational* environment.

It is essential that a mediator be familiar enough with the language of environmental science to converse competently with those who work in that arena. *This competency cannot be developed in a short training program*, but its importance should be emphasized.

In addition, understanding the institutional setting of an environmental dispute is essential before one can fully grasp the limitations and opportunities for mediation. The institutional setting includes the political, legal, and administrative arenas in which a dispute is being contested.

A dispute over contamination of groundwater by leaking storage tanks, for example, may involve questions of geology and hydrology, but it is also affected by the interaction of local, federal, and state governments, by the legislative and regulatory contexts of the government agencies, and by the dynamics of advocacy and business groups. One must understand the leveraging power of each of these groups, the regulatory mandates of each agency, and the political and legal obstacles confronting all parties.

A training program tailored to the needs of the trainees should provide an introduction to legislation, administrative and judicial procedures, and the organizational context in which disputes are contested. [9]

In some cases of particular complexity it may be necessary to have a Team Mediation. Team Mediation is a model where (depending on the needs of the case) the mediation team consists of a mediator trained and experienced in the mediation theory and process, an environmental attorney with subject matter expertise in the legal area of dispute, and/or an environmental expert with expertise in the technical issues in dispute.[10] Where this is required, the environmental mediator needs to understand the process implications of team mediation.

In summary, environmental mediators must be able to demonstrate the following:

- *Familiar enough with the language of environmental science – either as a result of a tertiary academic qualification or as a result of extensive experience in the field of environmental management. It is unlikely that this background can be adequately taught through a short course.*
- *An understanding of the institutional setting of an environmental dispute – either through appropriate academic background or through extensive experience in the field. Where this is lacking, it can be amplified through a short course.*

8 Bruce C. et al, ditto, p 284
9 Bruce C. et al, ditto, p 287 - 288
10 See Michael Young, Resolving Environmental Disputes with Environmental Team Mediation: A New Model, http://www.mediate.com/articles/youngm1.cfm .

3.4 Ethics: The Purpose, Goals and Values of Environmental Mediation

We have previously indicated that dispute settlement of environmental disputes takes place within the context of "the public good". This context imposes an additional requirement on the mediator, which we will examine here.

Like other professions that impinge on the "public good," environmental mediators have a responsibility to understand and mitigate the potential adverse consequences of this impact. However, environmental mediation has an added dimension of responsibility with its consequences for other life forms. The ideals of a transformative practice of environmental mediation, and advocacy for sustainable development, provide a value foundation upon which to build an ethical framework. Ethical behaviour relies upon a sense of responsibility for one's actions, a clear set of values underlying ethical principles and imperatives, and commitment and competency to enact those values and principles.

The ethics of environmental mediation thus involve considerations ranging from the types of cases a mediator pursues to the purposes and goals of a particular intervention, and to the day-to-day interaction with the disputants. All intervention strategies and behaviours have value and ethical implications; therefore, ethics cannot be merely a discrete component of training but must imbue the entire training program.[11]

We find fundamental and important differences among mediators concerning the purposes, goals, and values of environmental mediation. These differences may be summarized as outlined below. A distinction can be made between two opposing ideological orientations toward environmental and other forms of public conflict and conflict resolution. These competing orientations are not the exclusive property of the environmental mediation field; rather, they are consistent with divisions found in other disciplines such as planning and public administration.

- The "ideology of management" approach

From the part of the continuum representing what is termed an *"ideology of management"* (Dukes, 1993, 1996), the public problem receiving the greatest attention is the inability of public officials to govern, or what is known as "gridlock" or the "crisis of governance." The main components of this problem, according to those tending toward this orientation, are the proliferation of competing single-interest groups and a resultant diffusion of power; overregulation; excessive litigation; apathetic citizenry; and an overall sense of moral, cultural, and economic decline. People engage one another primarily to further their own self-interest, which is essentially economic. It is the aggregate of these competing private interests that realizes the public good. The reform of public decision making, whether in law, planning, public administration, or environmental mediation, focuses on improved efficiency, productivity, and managerial capability of authorities. *At this end of the continuum, the only goal of the environmental mediator is to settle disputes, or get agreements*.

- The "transformative" approach

In contrast to the ideology of management is a "*transformative" orientation to public conflict*. Within a transformative approach, the main problem is less the crisis of governance than the threat to public life itself, posed by the disintegration of community and of the relationships and the inability to solve public problems and resolve public conflict

From a transformative perspective, environmental disputes are viewed not only as policy stalemates but as indicators of the fragmentation of community, civic life, and governance. *The interventions of independent environmental mediators are thus not only efforts to break*

11 Bruce C. et al, ditto, p 287.

those stalemates, but opportunities as well to provide the means for strengthening community, enhancing civic engagement, and building a responsive and effective governance.

The transformative approach recognizes the need for and potential of improved public dialogue to challenge the sense of decline and distrust that permeates civic culture. In brief, *a transformative approach views the settlement of disputes as merely one of a range of important goals of environmental mediation*, including such intangible benefits to disputants and communities as enhanced environmental awareness, strengthened citizenship, and improved relationships. *The conflict resolution process is thus a vehicle for transforming communities, citizenry, and the institutions and practices of democratic governance*.

A transformative practice of environmental mediation seeks not only to help competing interests find common ground but to create a higher ground for engagement in environmental conflict-a ground where qualities such as fairness, integrity, openness, trustworthiness, and responsibility for public good are both expected and rewarded. The overriding goal is to create forums and processes-indeed, a civic culture-where individuals and organizations can be strong advocates for their views while learning of and from the views of others, where public officials can take actions that are both effective and legitimate, where communities can unite rather than separate when faced with difficult problems and divisive conflicts, and where the search for sustainable development may be pursued and advanced.[12]

- Approach prescribed by NEMA

It is clear that the NEMA prescribes that a transformative approach be followed – in accordance with the principles set out in section 2 of the Act, also with regard to interventions in terms of Chapter 4 of the Act.

Section 2(d) of NEMA provides as follows:

> *"The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and -*
>
> *(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations;"*

The essence of the principles prescribed by section 2 is set out in sections 2(2) and 2(3):

> *"(2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.*
>
> *(3) Development must be socially, environmentally and economically sustainable."*

Any mediator practising in this field will therefor be required to be an "Advocate for Sustainable Development".

This role of the mediator is consistent with commitment to a practice that is independent or non-aligned (not obligated to a particular party) and impartial (treating all parties without prejudice), but not neutral, to the extent that the latter implies necessarily remaining detached from or ignoring marked differences in disputants' capacities to meaningfully participate in the process. We are not suggesting that the mediator adopt the role of philosopher-king in prescribing the content of an agreement to disputants. Furthermore, we acknowledge that in some environmental disputes, the aforementioned principles may not be

12 Bruce C. et al, ditto, p 277-278.

at stake. We are, however, of the opinion that the environmental mediator has an obligation [and is directed by the provisions of NEMA] to focus the attention of the disputants on the implications of the mediated outcome on the biophysical, socio-political, and economic realms that may be at stake.[13]

The generic commercial mediation training does not equip the mediator to deal with public policy dispute resolution – i.e. dispute resolution where the outcome must be value determined (in this context it must be consistent with the directives set out in NEMA). Additional training is required in order to address this.

3.5 Mediation Experience

Given the complex, multi-faceted nature of environmental disputes that was outlined in the previous paragraphs it is clear that an environmental mediator should have prior experience of mediation.

The most effective method for developing competent environmental mediators is through reflective practice under the leadership of experienced mediators. A training program is but one component of this education. In addition to the exposure to real issues and real people, practical experience introduces the trainee to the dynamics of "unanticipated events" and to the dispute resolution process as a whole. The importance of applying not only what has been learnt but one's "common sense" or intuition becomes more apparent in handling real cases. Real cases thus provide the grist for the development of a training program.[14]

Prior experience can be the result of (a combination of) the following:

- Mediation in other fields – preferably in areas where public policy also plays a role.
- Mentoring. Mentorship is a form of apprenticeship whereby a trainee has the opportunity to learn the practice of mediation by working with an experienced professional. Often the trainee gains knowledge and experience of the mediation process by, for example, keeping a visible record of the meeting discussion, writing meeting summaries, and providing feedback to the mediator based on personal observations. Though time-consuming and costly for the mentor (unless the trainee is subsequently integrated into the mentoring organization), mentoring offers the best potential for fostering quality practice grounded in real-world experience. The trainee has the opportunity to observe mediations, think through the case, strategize potential actions to be taken, and assume other responsibilities under the supervision of a professional mediator. The duration of the mentoring program would depend upon the trainee's previous experience with an ever-increasing role for the trainee.
- Co-mediation. Many models of co-mediation exist. In Florida, state-certified mediators are sometimes required to include a co-mediator on their mediation team. Such requirements, however, can result in awkward pairings, and the sensitivity and difficulty of the mediator's task is such that forced co-mediations should be approached with caution. On the other hand, co-mediation does allow for many benefits, including the potential for increased acceptance by the disputants; diversity of mediation style and experience; easing of some of the pressure that a single

13 Bruce C. et al, ditto, p 279.
Also see this source for a full and informative discussion of the meaning and implications that the requirement of being "an advocate for sustainable development" has for mediators (p 279 -282)
14 Bruce C. et al, ditto, p 282 - 283

mediator might experience; sharing the work; and, even for experienced mediators, an opportunity to learn.

- Case Analysis. Case analysis is an effective way to illustrate real-world disputes and possible solutions, enabling one to draw conclusions that have wider application. If the stated training objective is not achieved by means of an available case, then it might be instructive to have the participants redesign the exercise based on their experiences. It is crucial that the trainee relate case analysis to conflict theory in order to understand how the outcome of a dispute is influenced by the dispute resolution tools applied.
- Role Plays and Simulations. Role plays allow trainees to test out mediation styles and techniques in mock mediations. They can help trainees better understand the interests of various disputants, both in general terms and in specific disputes, and role play can help trainees learn and practice skills.

  In simulation exercises, trainees take on the responsibility of performing "micro tasks," for example, setting an agenda or writing up an agreement. Such exercises are different from role plays in that the trainee focuses on only one aspect of a mediator's role at a time. Simulations are also more likely to be designed around aspects of an actual mediation rather than the interpretation of the dispute by trainees during a role play. The key to simulation exercises is to model reality as closely as possible. In both role plays and simulation exercises, debriefing and feedback offer an opportunity to correct role misinterpretations, caricatures, etc., and compel people to be more realistic in portraying a role or conducting a task.

It is therefore proposed that a requirement should be imposed that the environmental mediator should have prior experience of mediating a minimum of 20 cases. This experience can be obtained through a combination of the following:

- *Actual mediation in private commercial mediation (minimum of 10);*
- *Experience of environmental mediation through the following (minimum of 10):*
  - *Mentoring and/or co-mediation in environmental mediations (a minimum of 3 matters must be counted towards the total);*
  - *Actual experience of mediation in public policy matters (including non-environmentally related cases) (maximum of 5 non-environmentally orientated matters may be counted towards the total);*
  - *Case studies, role plays AS MEDIATOR and simulations of environmental mediations (maximum of 5 matters may be counted towards the total)*

Compliance with the experience requirement should be based on an evaluation and assessment of candidates based on the guidelines set out above.

Candidates with insufficient experience should agree to participate in a programme of mentoring/supervising apprentice mediators when required. In principle this should be required for all new entrants who have little or no experience of environmental mediation. The purpose of supervision of candidate mediators is to provide mentoring to these candidates, and to ensure that candidates have the requisite skills to mediate cases without supervision.

Supervision means the attendance of a qualified mediator in the mediation proceedings being conducted by a candidate mediator. The supervisor should co-mediate the case, and

will therefore be able to actively participate so as to ensure the proper outcome of the mediation proceedings for the parties in attendance. Candidate mediators would not be entitled to any fees for cases performed under supervision.

The supervisor, after supervision, should:

- Provide the candidate mediator with verbal feedback and advice.
- Submit a confidential written report on the performance of the candidate mediator to the authority doing the assessment of the candidate. Such report must stipulate whether or not the candidate mediator is ready to mediate on his/her own, and may recommend additional training and mentoring, where necessary.

3.6 Analysis and Conclusions

The special requirements for environmental mediators can be summarised as follows:

- The mediator requires additional process skills and experience in order to deal with the following:
  - Mediating in a multi-party context.
  - Mediating where (some of) the parties lack organisation and leadership, and/or are alien to the negotiation framework.
  - Situations that require extensive use of negotiation skills.
- The mediator requires prior experience of mediating a minimum of 20 cases. This experience can be obtained through a combination of the following:
  - General experience as mediator in any kind of mediation (minimum of 10);
  - Experience of environmental mediation through the following (minimum of 10):
    - Mediating environmental disputes;
    - Mediating in public policy matters (including non-environmental cases) (maximum of 5 non-environmental cases may be counted towards the total);
    - Mentoring and/or co-mediation in environmental mediations (a minimum of 3 matters must be counted towards the total);
    - Case studies, role plays AS MEDIATOR and simulations of environmental mediations (maximum of 5 matters may be counted towards the total)
- Candidates with insufficient experience should agree to participate in a programme of mentoring/supervising apprentice mediators when required. In principle this should be required for all new entrants who have little or no experience of environmental mediation. The purpose of supervision of candidate mediators is to provide mentoring to these candidates, and to ensure that candidates have the requisite skills to mediate cases without supervision.
- The mediator must be "environmentally literate". In other words he/she must have substantive knowledge of the following:
  - The language of environmental science and policy – either as a result of a tertiary academic qualification or as a result of extensive experience in the field of environmental management.

It is unlikely that this background can be adequately taught through a short course – the mediator must have an academic or practise background in the field of environmental management.

This requirement can be expressed as follows: The mediator must have a tertiary qualification in environmental management, -planning or -science, or a minimum of 8 years of progressively responsible professional work in environmental policy, -planning or -science.

- The institutional setting of an environmental dispute (legislation, administrative and judicial procedures, and the organizational context in which disputes are contested) – either through appropriate academic background or through extensive experience in the field.

  Where the mediator was not introduced to this through his study or practise in environmental management/planning or science, it can be amplified through a short course.

- The mediator must have training and/or experience in public policy dispute resolution – i.e. conflict that is in the public domain and where the outcome must be value determined (in this context it must be consistent with the directives set out in NEMA).

4 Additional Requirements

4.1 Diversity & Access to Justice

By becoming entrenched in the Department of Environmental Affair's dispute settlement strategy, mediation will start to play a fundamental role in the way in which people perceive the Department. If it serves to enhance access to justice, it will serve to legitimise the legal system, and vice versa.

This is a big responsibility that needs to be understood and taken up.

Rawls's theory of justice as fairness aids in understanding both the social justice promise and critique of the field of dispute resolution. To begin with the promise, much of the enthusiasm for "alternative" dispute resolution arose out of popular dissatisfaction with the courts. The costs associated with litigation and the delay in reaching trial made public adjudication virtually inaccessible to many citizens. Some citizens also questioned the legitimacy of attorneys' and judges' dominance over the litigation process and their control over the norms to be used for decision making.[47] Viewing these concerns through the prism of Rawls's analysis, it could be argued that dispute resolution advocates perceived the courts as failing to operate in a manner that assured all citizens the opportunity to exercise their basic liberties, particularly the right to trial and the right to free expression, which are essential for the achievement of political and social justice.

The courts' embrace of mediation and arbitration may thus be seen as an attempt to find other legitimate mechanisms that would allow citizens to exercise these liberties, at least to an acceptable degree. Both mediation and arbitration offer citizens the opportunity for free expression—perhaps even freer expression than is available in the courts—and the opportunity to reason together. Isabelle R. Gunning has highlighted this connection between mediation, social justice, and procedural justice in urging that disadvantaged people "need, even more so than advantaged group members, a forum in which their authentic voices and experiences can be expressed" and that mediation, as a forum fostering the expression of such authentic voices, offers "another locus in American political, social and legal life where ideas about equality are defined and redefined."[48] Each mediation session thus represents a powerful, individualized opportunity for citizens to grapple directly with the law and engage in the mutual deliberation and decision making so prized by Rawls. Depending upon a mediator's management of the disputants' interaction, a mediation session also can offer citizens an empowering "civic education"[49] in the respect, responsibility, and dialog that "fair and equal" citizens extend to each other and that ease public deliberation and decision making.[50] 15

It is therefore essential that environmental mediators should:

- Understand diversity – specifically in the South African context;

15 Remembering the Role of Justice on Resolution: Insights from Procedural and Social Justice Theories, by Nancy A Welsh http://law.psu.edu/_file/Welsh/Remembering%20the%20Role%20of%20Justice%20in%20Resolution.pdf

- Be capable of dealing with cultural and language differences between the parties;
- Be qualified to deal with party imbalances (represented *vs.* unrepresented, sophisticated *vs.* unsophisticated, powerful *vs.* weak, the organised *vs.* the disorganised, etc).

The only special category of mediation recognised by the IMI is mediation in cultural diverse circumstances. This is the level of challenge presented here, and needs to be addressed in training. These realities are a very persistent component of environmental mediations, and therefore need to be part of the training and accreditation standards for environmental mediators.

4.2 Academic, Professional & Experience Requirements

Given the complex, multi-faceted nature of environmental disputes, the range of parties involved, and the cross-cutting character of natural and social settings, it is vital for the environmental mediator to have considerable "life experience," that is, to understand environmental disputes as they manifest themselves in the real world. Limited real-world experience is likely to result in simplistic and possibly naive conceptualization of environmental disputes and yield unworkable strategies for their resolution. Life experience is needed to enable the mediator to exercise sound judgment under circumstances in which there is little time for consultation or reflection. Furthermore, it can be important for mediators to be peers of the disputants, in terms of life experience, in order to engender their respect and confidence.[16]

In the previous section it was already stated that the environmental mediator must have either a tertiary qualification in environmental management, or extensive practice experience in that field, so as to equip him/her with the required level of substantive knowledge. In light of this it is not proposed that an academic qualification in the field of environmental management be a pre-requisite, as it is quite possible for mediators who have academic credentials in other fields may acquire the necessary levels of environmental literacy.

However, given the complex, multi-faceted nature of environmental disputes, it is proposed that a tertiary qualification is required as a minimum entry qualification for environmental mediators. As stated, this needs not be in the field of environmental management, but should be in a field that does provide some background education for the task at hand as mediator – i.e. a qualification in the field of law, commerce, business, or social sciences.

It is not proposed that an environmental mediator be required to have any professional qualification (apart from that of mediator).

In South Africa an aged based requirement will probably amount to unfair discrimination, and is in any event not required. Qualification and experience requirements can however be justified in this context.

4.3 Language Proficiency

South Africa has 11 official languages and there is thus a need for mediators in different languages. It is therefore proposed that mediators be required to stipulate which language(s) they are practising in. They then have to be able to demonstrate proficiency in the stipulated language(s).

If required, an independent, standard internationally acknowledged, language test can be adopted to test and certify language proficiency.

16 Bruce C. et al, ditto, p 283.

4.4 Moral Character

Most jurisdictions require some degree of moral character as a minimum requirement of a mediator. This could range from testimonials to a requirement that the mediator should not have any criminal conviction that relates to fraud.

It is therefore proposed that, as a minimum, a person must not have a criminal record involving dishonesty and must not be declared insolvent.

4.5 Risk and Supervision

It is normal practice to require that mediators work within a governance environment. This ensures that standards are maintained, and that there is recourse in cases where the mediator deviates form the norms of acceptable conduct. This requirement can best be expressed by requiring the mediator to:

- Comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (where such a code of conduct is part of the regulatory framework);
- Have sufficient professional insurance for purposes of civil liability claims against him/her as mediator.

4.6 Analysis and Conclusions

The following additional requirements should therefore be set for environmental mediators:

- The mediator must have training or experience in mediating in culturally diverse circumstances (as set out in paragraph 4.1 above). Where this is lacking it can be supplemented by a short course;
- The mediator must have adequate life experience – this can best be expressed as a requirement that he/she must have sufficient work experience. It is suggested that a minimum of 8 years be required;
- The mediator must have a tertiary qualification in environmental management, law, commerce, business, or social sciences;
- The mediator must be in good standing in that the applicant must not have a criminal record involving dishonesty and must not be declared insolvent;
- The mediator must comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (where such a code of conduct is part of the regulatory framework);
- The mediator must have sufficient professional insurance for purposes of civil liability claims against him/her as mediator.

5 A Draft Standard

1) The recommended Accreditation Requirements for Environmental Mediators are as follows:

- A tertiary degree or a tertiary qualification (meaning any post matric SAQA accredited qualification) in environmental management, -law, -planning or -science, law, commerce, business, law or social sciences;
- Where the mediator does not have a tertiary qualification in environmental management, -planning or -science, he/she is required to have a minimum of 8 years of progressively responsible professional work in environmental policy, -planning or -science;
- Minimum of eight years work experience;
- The mediator must have sufficient knowledge of the institutional setting of an environmental dispute (legislation, administrative and judicial procedures, and the organizational context in which disputes are contested)– either through appropriate academic background, demonstrable experience in the field, or additional training;
- The mediator must have fulfilled requirements of a 40 hour mediator training programme with the required assessment and accreditation with accredited trainers and assessors;
- The mediator must have additional training or demonstrable experience with regard to the following:
    - Mediating in a multi-party context.
    - Mediating and facilitating where (some of) the parties lack organisation and leadership, and/or are alien to the negotiation framework.
    - Situations that require extensive use of negotiation skills.
    - Public policy dispute resolution – i.e. conflict that is in the public domain and where the outcome must be value determined (in this context it must be consistent with the directives set out in NEMA).
    - Mediating in culturally diverse circumstances (as set out in paragraph 4.1 above).

  (This additional training can be incorporated into the 40 hour training programme, or provided as a separate offering).
- Sufficient mediation experience. This should be based on an evaluation of candidates based on the guidelines set out below. Candidates with insufficient experience should agree to participate in programme of mentoring/supervising apprentice mediators when required. In principle this should be required for all new entrants who have little or no experience of environmental mediation.

  As a general guide an environmental mediator requires prior experience of mediating a minimum of 15 cases. This experience can be obtained through a combination of the following:

- General experience as mediator in any kind of mediation (minimum of 10). through the following:
  - Mediating in any case
  - Mentoring and/or co-mediation in mediations
  - Case studies, role plays AS MEDIATOR and simulations of mediations (maximum of 5 matters may be counted towards the total);
- Experience of environmental and public policy mediation through the following (minimum of 5):
  - Mediating environmental disputes;
  - Mediating in public policy matters (including non-environmental cases) (maximum of 3 non-environmental cases may be counted towards the total);
  - Mentoring and/or co-mediation in environmental mediations (a minimum of 2 matters must be counted towards the total);
  - Case studies, role plays AS MEDIATOR and simulations of environmental mediations (maximum of 3 matters may be counted towards the total);

- Be in good standing in that the applicant must not have a criminal record involving dishonesty and must not be declared insolvent;
- Comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (- where such a code of conduct is part of the regulatory framework);
- Have sufficient professional insurance for purposes of civil liability claims against him/her as mediator.

For purposes of membership, mediators must specify what language they are proficient with to mediate in. Their proficiency in that language must then be of a high enough standard, and this may be evaluated if necessary.

2) Environmental Mediator Training

a) Training providers who want to accredit an Environmental Mediator Training Course must:

i) Submit a course outline that complies with the Council's requirements for general commercial mediation training courses; and

ii) Provide details to show that their course addresses the specific skills requirements of Environmental Mediation. The following must specifically be included:

(1) Mediating in a multi-party context;

(2) Mediating where (some of) the parties lack organisation and leadership, and/or are alien to the negotiation framework;

(3) Mediating disputes where the outcome has a public interest component to it;

(4) Situations that require extensive use of negotiation skills;

(5) Public policy dispute resolution – i.e. conflict that is in the public domain and where the outcome must be value determined (in this context it must be consistent with the directives set out in NEMA).

iii) Provide details of how the practical component of their general mediation course has been adapted to simulate the environmental mediation environment

b) Training Providers may also accredit an Environmental Literacy Course aimed at qualifying mediators to meet the requirements of understanding the institutional setting of an environmental dispute (legislation, administrative and judicial procedures, and the organizational context in which disputes are contested).

c) Trainers who want to be accredited to provide Environmental Mediator Training must meet the DiSAC requirements for training in general mediation courses, and provide proof of relevant environmental mediation and experience.

d) Assessors who want to be accredited to assess Environmental Mediator Training must meet the DiSAC requirements for assessors in general mediation courses, and provide proof of relevant environmental mediation experience.

6 Procedural Issues

It is suggested that the following procedural issues should be considered and addressed by the Department:

6.1 Comments on the Accreditation Standard

It is strongly recommended that prior to adopting or finalising the draft accreditation standard set out in this document, it should be published for comment – at least to a select group of stakeholders.

It is suggested that at least the following entities should be asked to comment on the draft standard:

- Other internal sections/Units within the Department and relevant stakeholders within the sector;
- The Dispute Settlement Accreditation Council (DiSAC).

6.2 Assessment, Supervision and Accreditation

It is clear that in order to establish and maintain an Environmental Mediation Panel on the principles contained in the Draft Standard, the following specific expertise and capacity is required:

- Capacity to assess the process competencies of candidate mediators;
- Capacity to assess the substantive knowledge required of mediators;
- Capacity to provide supervision and mentorship to candidate mediators.

It is recommended that Department reaches a strategic agreement with DiSAC, that DiSAC will adopt and accredit environmental mediators in accordance with the final Draft Standard, and provide capacity for the supervision and mentorship of candidate mediators. The Department can then constitute its panel from the group of mediators that are accredited by DiSAC as environmental mediators.

7 The Establishment of an Arbitration Panel

NEMA provides as follows:

"19. Arbitration

(1) A difference or disagreement regarding the protection of the environment may be referred to arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(2) Where a dispute or disagreement referred to in subsection (1) is referred to arbitration the parties thereto may appoint as arbitrator a person from the panel of arbitrators established in terms of section 21."

This raises the question of whether the Department should establish an Arbitration Panel. It is submitted that:

- The use of the word "may" in section 19(2) (rather than the word "shall") indicates that the section does not prescribe that arbitrators be appointed from such a Panel.
- It is clear that in terms of the Arbitration Act (which according to section 19(1) governs these arbitration proceedings) the parties can by agreement appoint any person as their arbitrator.
- The establishment of a Panel in terms of section 19(2) would therefore merely serve to assist the parties in readily identifying persons who are qualified to arbitrate their dispute – rather than to limit their choice to the persons on the Panel.

It is submitted that, if the need arises, the Department can in due course formulate standards for the accreditation of a Panel of Arbitrators in terms of section 19.

Annexures

Annexure A: DiSAC Recommended Standard for Court Based Mediation

1) *The recommended Accreditation Requirements are as follows:*

Level 1:	• *A tertiary degree or a relevant tertiary qualification (meaning any post matric SAQA accredited qualification in commerce, business, law or social sciences);* • *Minimum of five years work experience;* • *Be in good standing in that the applicant must not have a criminal record involving dishonesty and must not be declared insolvent, and must be independent minded;* • *Must show knowledge of court systems and litigation;* • *Comply with a professional code of conduct, and practise under the monitoring of an accredited service provider (where such a code of conduct is part of the regulatory framework);* • *Have sufficient professional insurance individually or through the dispute resolution officer (if a service provider) for purposes of civil liability claims against them as mediators;* • *Fulfilled requirements of a 40 hour commercial mediator training programme with the required assessment and accreditation with accredited trainers and assessors. Such training must be adapted to contain the special requirements identified in Annexure B, or a conversion course dealing such additional matters should be taken;* • *Adequate mediation experience. This should be based on an evaluation of candidates (with which the DiSAC accredited training and or service providers can assist);* • *Candidates with insufficient or no mediation experience should agree to participate in programme of mentoring/supervising apprentice mediators when required. In principle this should be required for all new entrants who have little or no experience of mediation and/or the litigation environment (a more detailed programme of apprenticeship will be developed by DiSAC); and* • *Conduct a minimum of 24 mediations a year.*
Level 2:	• *Meet all the requirements for level 1 mediator;* • *Conducted a minimum of 100 court aligned or other mediations, with at least 20 that are deemed complex mediations;* • *Practiced in the field of ADR for a minimum of 5 years;* • *Considered a leader in the ADR industry in terms of reputation as a mediator and/or as an academic/commentator/practitioner.*

For purposes of membership, mediators must specify what language they are proficient to mediate in. Their proficiency in that language must then be of a high enough standard, and this may be evaluated if necessary

It is recommended that membership to the panel in terms of Rule 12(2) be for a period of three years, which is renewable.

2) *Court Mediator Training*

e) *Training providers who want to accredit a Court Mediator Training Course must:*

i) *Submit a course outlines that complies with the Council's requirements for general mediation training courses; and*

ii) *Provide details to show that their course addresses the specific skills requirements of Court Mediation. The following must specifically be included:*

(1) *Preparing candidate for the context within which they will operate as Court Mediators. Course content must address:*

- *The culture change brought about by the introduction of Court Mediation*
- *The typical responses and attitudes that they may encounter as Court Mediators*
- *The role of Court Mediation in providing access to justice*
- *The challenges of providing mediation in an environment of diversity, and*
- *The challenges of addressing power imbalances between parties.*

(2) *The specific challenges posed Court Mediation, with a focus on the following:*

- *Styles of mediation (evaluative vs. facilitative)*
- *Time limited mediation*
- *The need for facilitating the litigation process (narrowing points of dispute, facilitating the early and informal exchange of information, etc)*

(3) *The administrative requirements imposed by the Court Mediation Scheme, and by administrative service providers*

(4) *The goals and objectives of the Court Mediation Pilot Scheme.*

iii) *Provide details of how the practical component of their general mediation course have been adapted to simulate the CBM environment*

f) *Training Providers may also accredit a CBM Orientation Course aimed at qualifying mediators who are accredited (or qualify for accreditation) under DiSAC's general mediator accreditation standard, to do CBM mediations. Such a course must address the issues raised in para 5(a) (ii) above.*

g) *Trainers who want to be accredited to provide Court Mediator Training must meet the Council's requirements for training in general mediation courses, and provide proof of relevant mediation experience*

h) Assessors who want to be accredited to assess Court Mediator Training must meet the Council's requirements for assessors in general mediation courses, and provide proof of relevant mediation experience

3) Additional Requirements for Accredited Service Providers

Accredited Service Providers who have Court Mediators affiliated with them should be required to:

a) Arrange supervision for candidate mediators who seek accreditation as Court Mediators. Mediators who provide such supervision shall do so at no charge, and shall qualify for CPD points for such

b) Implement on-going Mediator Monitoring Programmes that include:

i) Regular review and assessment of mediator performances by senior mediators, with remedial programmes to address deficiencies

ii) Customer feedback programmes on the performance of the mediators, that include formal complaint systems

c) Develop continued professional development programmes to support Court Mediators operating under their auspices. Such programmes shall include the monthly hosting of discussion or debriefing sessions where mediators can share experiences and discuss approaches to problem situations.

Comments and Amendments

In general, we think the draft is excellent and our comments are relatively minor.	Noted
We wondered whether the requirement that an environmental mediator must have 8 years' experience in an environmental field was maybe setting the bar too high. What was the rationale for the number? We wondered whether there might be disputes that are relatively simple, but the requirement for a highly qualified and experienced mediator would then make mediation of those disputes too costly. (Costs are almost always a big issue in environmental disputes.) In any event, we don't think it should be less than five years.	This only applies to candidates who do not have a tertiary qualification in Environmental management. It is submitted this is a reasonable requirement, as mediation requires extensive knowledge of environmental matters
It is mentioned elsewhere, but the first paragraph on page 24 should maybe refer to environmental law as one of the acceptable disciplines for the tertiary education requirement.	Amended
Section 5: pages 28 to 29 – does the initial training for mediators have to be the generic commercial mediation training – or would the specialised environmental mediation training course be substituted? Put another way: where does the Environmental Mediator Training Course mentioned on page 29 fit in – as the initial training or as the second, "specialised" training? Perhaps this could be clarified a bit?	Amended
We weren't sure if a brief discussion on the personal attributes/qualities/skills of a good mediator is appropriate in an accreditation standard?	This is not an accreditation requirement that is assessed distinctly from general competency. So though valuable, it is not included in the standard.
Reference is made at page 4 to the UK National Mediation Helpline. This entity was disbanded some time ago and the approach now is to the Civil Mediation Council. Our suggestion therefore would be to amend the particular paragraph to read as follows:- "In most jurisdictions the need for a uniform national standard became pressing as soon as the use of mediation or arbitration was institutionalised through government initiative. One example of this is the Civil Mediation Council in the United Kingdom. The Civil Mediation Council is a body to which mediators and mediator providers may affiliate, and to which government agencies including Courts will refer parties to find mediators and providers. The CMC is an organisation similar to DiSAC."	Amended
At page 22, reference is made to the requirements to be imposed on an environmental mediator. Without knowing how many environmental mediators in South Africa could fulfill these requirements, it is our view that perhaps the requirement that the mediator must have a minimum of 10 environmental mediations may be too stringent and should perhaps be relaxed but that the requirement of actual mediation, mentoring or co-	Amended

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